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 OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed.

1. Clark County School District (CCSD) is a political subdivision of the State of Nevada. *See* NRS 386.010(2).

2. Daniel F. Polsenberg, Dan R. Waite, Brian D. Blakley, and Abraham G. Smith of Lewis Roca Rothgerber Christie LLP represented CCSD in the district court and have appeared in this Court.

3. No publicly traded company has any interest in this appeal.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 1st day of June, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel Polsenberg*
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

RULES

JURISDICTIONAL STATEMENT

Clark County School District (CCSD) appeals from a final judgment and an order awarding attorney's fees. NRAP 3A(b)(1), (8). Plaintiffs served written notice of the judgment's entry on August 15, 2017; CCSD timely appealed on August 23. (8 App. 1975.) Plaintiffs served written notice of the order awarding fees on November 20; CCSD timely appealed on November 22. (9 App. 2162.)

ROUTING STATEMENT

The Supreme Court should retain this appeal. It presents the important question of a school district's liability under the Due Process clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972 for student-on-student bullying. Although the federal appellate courts have spoken clearly on the issues, the district court's contrary ruling may spur inconsistent rulings across the state. NRAP 17(a)(10). The issues were raised throughout the case, including at 6 App. 1311, and resolved at 6 App. 1459 and 8 App. 1950.

PRINCIPAL ISSUES PRESENTED

1. **42 U.S.C. § 1983.** The federal courts of appeal unanimously agree that a school district's failure to stop student-on-student bullying

is not a "state-created danger" that violates due process. Are they wrong?

2. **Title IX.** Title IX of the Education Amendments of 1972 imposes severe penalties on school districts that discriminate on the basis of sex. However, student-on-student sexual harassment does not trigger Title IX penalties unless the school district knows about pervasive sexual harassment and rejects an opportunity to correct it. Here, when school staff followed up on reports of two students being bullied and took steps to address, the students told the school that the problems had stopped. Is CCSD liable for violations of Title IX?

STATEMENT OF THE CASE

CCSD appeals from a final judgment and an order granting attorney fees following a bench trial in the Eighth Judicial District Court, the Honorable Nancy Allf, District Judge, presiding.

This case involves two sixth-graders whose band classmates taunted them and, in one instance, jabbed one of the students in the groin. After initial reports prompted disciplinary action, the plaintiff students feared retaliation, so when school staff followed up, the students insisted that the bullying had stopped. The students never complained that the bullying continued and, in fact, refrained from reporting bullying for fear of retaliation. After a few months, the students transferred to another school, where they thrived. The students' mothers sued, and trial proceeded on just their claims against CCSD under 42 U.S.C. § 1983 and Title IX.[1]

The district court found for the students on both federal claims, reasoning that the school's principal did not investigate the bullying as required under state law and that "it was CCSD's failure to take affirmative action that subjected [the students] to further bullying and

[1] This appeal does not involve the separate question of CCSD's liability under state law for student bullying.

harassment." (6 App. 1457:24–26; *accord* 8 App. 1969:22–25, 1971:21–23.) The court awarded $200,000 for each boy, plus $470,418.75 in attorney's fees and $19,236.19 in costs, for a total judgment of $889,654.94.

The district court's analysis of the federal claims departs from that used in federal courts, including Nevada's federal district court and the Ninth Circuit. *See Lamberth v. CCSD,* 698 F. App'x 387, 388 (9th Cir. 2017); *Lamberth v. CCSD*, No. 2:14-cv-02044-APG-GWF, 2015 WL 4760696 (D. Nev. Aug. 12, 2015).

CCSD appeals.

STATEMENT OF FACTS

In 2011, Nolan Hairr and Ethan Bryan started sixth grade at Greenspun Junior High School. (2 App. 469:3–471:12.) Nolan was small, with long blond hair. (8 App. 1965:27–28.) Ethan was tall for his age and overweight. (8 App. 1957:17–18.) The students were friends and decided to take beginning band to learn how to play the trombone. (2 App. 469:3–471:12.) The trombone section included two fellow sixth-graders, referred to here as C. and D. (5 App. 1012:16–1013:5.)

A. The Bullying Directed Toward Nolan

C. and D. call Nolan homophobic names

Nolan testified that C. and D. began insulting him almost immediately with names such as "fucking faggot," "gay boyfriend," and "cunt." (2 App. 471:1–15.)

Nolan reports generic bullying but no sexual or homophobic language

On September 7, Nolan reported C.'s behavior to dean Cheryl Winn. (2 App. 474:8–475:1.) He wrote only that he "had been being bullied by C." and intentionally left out the homophobic and sexual slurs. (6 App. 1265:5-9 (citing 2 App. 476:5–10).) He also concealed the homophobic nature of the name-calling in a later meeting with Dean Winn. (6 App. 1255:14–15; 2 App. 978:2–3). According to Nolan, nobody at school thought he was actually gay. (3 App. 539:24–541:9.)

Dean Winn responds, and C. retaliates

Dean Winn promptly responded to Nolan's complaint by coming to band class and reprimanding C. (3 App. 519:9–520:1.) After she left, C. called Nolan a "tattletale" and jabbed him in the groin with a pencil. (2 App. 478:18–481:9; 3 App. 519:9–4.) C. said that he was checking to see whether Nolan was a boy or a girl. (2 App. 478:18–479:9; 3 App. 519:9–

4.) The pencil did not penetrate Nolan's pants or skin or leave any bruising. (5 App. 1220:4–1221:17.) Nolan did not go to the school nurse, even though he had previously done so for other minor injuries. (3 App. 518:7–18.)

Nolan conceals the pencil incident

The pencil incident happened when the band teacher, Robert Beasley, was not looking. (3 App. 517:17–18.) Nolan did not report the incident to Mr. Beasley or any other staff member because he feared the school would punish C., which might prompt further retaliation. (2 App. 480:13–481:2, 3 App. 517:19–24.) Nolan confided only in Ethan, two days later. (3 App. 520:11–17.)

Mrs. Bryan overhears Ethan and Nolan discussing the pencil incident

Ethan's mother, Mary Bryan, overheard Ethan and Nolan talking about the pencil incident and confronted Ethan. (4 App. 835:22–836:13).

Mrs. Bryan's September 15 e-mail omits C.'s comment about "checking" Nolan's gender

On September 15, Mrs. Bryan e-mailed Mr. Beasley and school counselor John Halpin. (9 App. 2225.) She also intended to address

Principal Warren McKay, but because she typed his e-mail address incorrectly, he did not receive the e-mail. (8 App. 1956:17–19, M. Bryan, 4 App. 836:23–25).

Mrs. Bryan described generic bullying toward *Nolan* but did not mention any homophobic language or sexual harassment, or any conduct toward her own son, Ethan. (9 App. 2225; 4 App. 839:17–842:11.) She suggested solving the problem by moving C. and D. away from Nolan:

> My son told me that his friend Nolan Hairr has been bullied in class and it is unacceptable. The boys names' [sic] are [C.] and [D]. They pull his hair everyday, have been elbowing him and have gone so far as to stab him in his genitals with a pencil. . . . Please move [C.] and [D.] to a different area so that our children can learn properly and have constructive school experiences and do not have to deal with these two boys[]. . . . Nolan is afraid to notify an adult for fear of retaliation. I trust that you will take this matter as seriously as I have.

(9 App. 2225.)

Nolan meets with Counselor Halpin and conceals the harassment

The next morning, Counselor Halpin left Mrs. Bryan a voicemail that he was going to help Nolan report the situation. (4 App. 945:7–22.) He also offered to discuss the situation with Mrs. Bryan. (4 App. 945:7–

22.)

Counselor Halpin immediately summoned Nolan to discuss Mrs. Bryan's September 15 e-mail. (4 App. 940:23–943:20; 2 App. 482:14–483:23; 3 App. 527:22–530:25.) He asked whether Nolan had been bullied and what was going on. (2 App. 482:14–483:23.) Nolan misrepresented, however, that "everything was fine and that nothing was happening." (*Id.* 2 App. 482:14–483:23; 3 App. 527:22–530:25.)

Nolan admits that he lied to prevent the school from taking further action. (*Id.* at 3 App. 530:9–25.) Still, Counselor Halpin encouraged Nolan to submit an incident report to Dean Winn about the allegations in Mrs. Bryan's e-mail. (4 App. 940:23–943:20.) Nolan chose not to. (2 App. 482:14–483:23; 3 App. 527:22–530:25.)

Mr. Beasley rearranges the seats, reprimands C. and D., and refers C. to Dean Winn

Although Nolan concealed the bullying from Counselor Halpin, Mr. Beasley took three steps to address Mrs. Bryan's September 15 e-mail:

1. As Mrs. Bryan requested, Mr. Beasley rearranged the seats within the trombone section, separating Nolan and C. and moving Ethan next to C. Mr. Beasley made these particular moves because he

thought that Ethan's physical presence and friendship with Nolan would deter C. from bothering Nolan. (4 App. 987:20–988:18, 990:3–12, 5 App. 1018:15–1022:12; 1026:18–1027:5.) To protect Nolan from retaliation, he rearranged most of the other seats without announcing the reason for the change. (2 App. 485:9–14, 3 App. 512:16–22.) At the time, Mr. Beasley did not believe that Ethan was a target. (5App. 1018:15–1019:2.)

2. Mr. Beasley reprimanded C. and D. for their inappropriate behavior. (*Id.* at 4 App. 987:20–988:18, 5 App. 1018:15–1022:12.)

3. Mr. Beasley completed a discipline referral form and referred C. to Dean Winn's office. (9 App. 2226; 5 App. 1102:22–1103:5.) After this, Nolan never again reported any bullying or harassment. (3 App. 513:23–514:4.)

Nolan's parents learn about the pencil incident

Mrs. Bryan disclosed the pencil incident to Nolan's mother, Aimee Hairr, for the first time on September 21. (5 App. 1190:2–17.) That night, Nolan's father checked Nolan's genitals and found nothing wrong. (3 App. 522:3–5; 5 App. 1193:9–15, 1220:4–1221:11.)

Mrs. Hairr discusses the pencil incident with Assistant Principal DePiazza

The next day, September 22, Mrs. Hairr called Assistant Principal Leonard DePiazza and relayed C.'s comment that he had been checking to see if Nolan was a girl. (8 App. 1958:16–27.)

Assistant Principal DePiazza offers to move Nolan for his protection

The school's response was immediate. According to Mrs. Hairr, Assistant Principal DePiazza offered multiple remedies, including moving Nolan to a different class or transferring him to a different school, but she rejected these solutions. (8 App. 1958:16–27.)

Counselor Halpin again meets with Nolan, and Nolan again conceals any harassment

The same day, Counselor Halpin discussed Mrs. Bryan's September 15 e-mail with Mrs. Hairr and then met with Nolan again. (4 App. 927:8–19; 8 App. 1959:9–15; 4 App. 929:11–24; 3 App. 529:20–530:25.) Nolan again intentionally concealed the harassment from Counselor Halpin. (3 App. 530:2–25.) At trial, Nolan admitted that he was "purposely trying to mislead [Counselor Halpin] into believing that the mistreatment from C. and D. had stopped." (3 App. 530:2–25.) Counselor Halpin believed Nolan. (4 App. 944:21–945:6.)

Nolan submits a second incident report but again conceals any homophobic mistreatment

Although Counselor Halpin believed Nolan's report that the bullying ceased, there was still an issue of disciplining C. for his past behavior. Accordingly, Counselor Halpin took Nolan to Dean Winn's office and encouraged Nolan to fill out an incident report "with as many details as possible." (*Id.* 4 App. 929:11–24.) Nolan, however, left out any harassment based on gender or sexual orientation and omitted the pencil incident altogether:

> [C.] was messing with my hair, kicking the instrument and also blowing air in my face. He called me duckbill dave and another kid Phil the Fail.

(3 App. 526:20–527:10; 9 App. 2230.)[2]

Nolan truthfully reports the harassment has ended

Without citation or explanation, the district court stated that Nolan denied meeting with Dean Winn to discuss the September 22 incident report. (8 App. 1960:2.) Nolan, however, admitted that he met with Dean Winn and that during that meeting he told her that the "bullying," the "harassment," "[t]he name calling and everything [he was]

[2] These names had no sexual or homophobic meaning. (*See, e.g.*, 2 App. 998:9–13.)

experiencing" in the band class had completely stopped. (3 App. 543:5–545:13). Despite his earlier deceptions, Nolan testified this statement was true: shortly after Mrs. Bryan's September 15 e-mail, the bullying ended. (3 App. 543:5–545:13.)

Dean Winn disciplines C. and meets with C.'s mother

Shortly thereafter, Dean Winn summoned C. for a disciplinary interview. (9 App. 2226; 5 App. 1088:11–12; 1100:18–21.) Afterward, she held a mandatory parent conference with C. and his mother to discuss C.'s behavior. (9 App. 2226; 5 App. 1088:11–12; 1100:18–21; 5 App. 1125:16–1126:13.)

No one reports any further misconduct toward Nolan

From September 22 until Nolan's transfer to another school in February 2012, no one reported any misconduct toward Nolan. Nolan did not even tell his parents about any further harassment until just before the transfer. (2 App. 488:4–25, 3 App. 505:12–506:5, 524:8–11.) After that transfer, Nolan wrote another incident report confirming that his statement to Dean Winn on September 22—that the "bullying had ceased in band"—was true. (9 App. 2236.)

B. The Bullying Directed Toward Ethan

C. makes fun of Ethan's size and, later, lobs homophobic insults

Early in the school year, C. and D. began making fun of Ethan's height and weight. (3 App. 551:1–22.). Later, C. started calling Ethan homophobic names. (4 App. 797:16–19.) Like Nolan, however, Ethan admitted that no one actually perceived him as gay. (3 App. 648:9–649:16.)

Ethan tells his mother

On October 18, 2011, Mrs. Bryan asked Ethan about scratches on his leg. (4 App. 796:17–800:3.) Ethan said that C. scratched his leg with a trombone and used homophobic slurs. (4 App. 796:17–800:3.)

Mrs. Bryan's October 19 e-mail says nothing about any sex-based or homophobic conduct

The next morning, Mrs. Bryan e-mailed Mr. Beasley and Counselor Halpin letting them know, for the first time, that Ethan was being bullied "when the teacher is not looking." (9 App. 2228.) In this e-mail, Mrs. Bryan again mentioned nothing about any homophobic or sex-based language or conduct. (9 App. 2228.) Instead, she described the trombone scratching and said that C. called Ethan a "Big Fat Ass." (9 App. 2228.)

According to Mrs. Bryan, she met with Dean Winn later on October 19 and described the homophobic slurs. (8 App. 1960:23–27.)

School staff take action in response to Mrs. Bryan's October 19 e-mail

In response to Mrs. Bryan's second e-mail, Mr. Beasley again rearranged the seating, this time moving Ethan as far as possible from C. within the trombone section. (5 App. 1027:12–1028:13; 3 App. 596:22–597:7; 3 App. 539:20-23.)

Counselor Halpin also called Mrs. Bryan to discuss her e-mail but was rebuffed. (4 App. 810:17–18.) Mrs. Bryan told him not to worry about it because "Dean Winn is handling it." (4 App. 862:20–863:4.) Still, Counselor Halpin forwarded the e-mail to Dean Winn to make sure she was aware. (8 App. 1961:6–7.)

The district court finds that the school's response did not include the formal investigation required by NRS 388.1351

Later that day, Counselor Halpin reported on Mrs. Bryan's two e-mails in a weekly administrators' meeting with Principal McKay and Assistant Principal DePiazza. (8 App. 1961:9–17.) Principal McKay instructed his team to "take care of the matter." (8 App. 1961:19.) Based on differing recollections about what happened, however, the district

court decided that nobody performed the official investigation mandated by Nevada's antibullying statute, NRS 388.1351. (8 App. 1961:18–1962:8, 1962:21–27.)

Ethan submits a sanitized incident report

That same day, Ethan submitted to Dean Winn an incident report about C.'s behavior:

> I had apparently sat where C[.] wanted to place his instrument, while he wasn't there. When he returned, he started hitting me with his trombone. Then the teacher walked in and he immediately stopped.

(9 App. 2231.) Like Mrs. Bryan's e-mails and the students' other reports, this report describes no sex-based or homophobic conduct.

Ethan meets with Dean Winn and reports that everything is fine

Around this time, Dean Winn brought Ethan to her office to discuss the band class. (3 App. 556:1–557:3; 3 App. 651:10–652:12.) Like Nolan before, Ethan insisted that "everything was fine" and that "the prior problems in the band class were being resolved." (3 App. 556:1–557:3, 592:7–594:18; 3 App. 651:10–652d:12.)

C. The Students Conceal Harassment to Prevent CCSD from Taking Corrective Action

After the initial reports of bullying, Counselor Halpin and Assistant Principal DePiazza each checked on Ethan and Nolan periodically. (4 App. 949:12–951:2; 3 App. 545:6–14.) Each time, Ethan and Nolan reported that everything was fine. (4 App. 949:12–951:2; 3 App. 545:6–14.) Both students admit that they concealed the bullying for the purpose of preventing CCSD from taking corrective action. (*E.g.*, 2 App. 480:13–481:2, 483:14–18, 495:16–24; 3 App. 564:2–10; 6 App. 1259:24–28, 1263:1–2, 1266:1–2, 1269:6–7; 8 App. 1955:15–16, 22–25, 1957:24–1958:2, 1959:24–28, 1963:3–4.)

After October 19, neither the students nor their mothers complained about ongoing bullying to anyone at school. (5 App. 1240:15–19; 2 App. 488:4–25, 3 App. 505:12–506:5, 524:8–11; 3 App. 583:2–9; 3 App. 649:17–651:9, 654:6–8.)

The district court found, however, that from October 19 until the students' transfer in early February, the bullying "continued out of the sight of Mr. Beasley," and that Ethan and Nolan concealed it from school staff. (8 App. 1963:1–4; 1955:22–24; 1957:24–2.)

D. Nolan and Ethan Transfer Schools and Excel

Ethan and Nolan transfer to a state-funded, tuition-free charter school

In early February 2012, Ethan and Nolan transferred to Explorer Knowledge Academy (EKA), a state-funded, tuition-free charter school. (5 App. 1235:2–22.) Attending EKA was no more expensive than attending Greenspun. (5 App. 1235:23–1236:5.) Ethan and Nolan attended EKA for the rest of sixth grade and all of seventh grade. (3 App. 606:20–23; 3 App. 531:10–12.) Nolan stayed for eighth grade, too. (3 App. 531:10–12.) Both students enjoyed EKA and excelled there. (3 App. 531:3–533:12.) They experienced no bullying or harassment. (2 App. 494:9–17; 3 App. 570:5–18.)

The students transfer to tuition-charging religious schools

Later, both Ethan and Nolan voluntarily transferred to Lake Mead Christian Academy, a private religious school that charges tuition. (4 App 885:21–887:25; 5 App. 1215:7–1216:8.) Nolan eventually transferred to Green Valley Christian, a different tuition-charging school. (5 App. 1215:22–23.)

E. After the Transfer, CCSD Learns about the Bullying and Orders Principal McKay to Suspend C. and D.

Mrs. Bryan describes the homophobic language in a post-transfer e-mail

Six days after the students transferred to EKA, Mrs. Bryan sent an e-mail to Greenspun staff and—for the first time—to district officials, describing the homophobic language directed toward Ethan and Nolan. (9 App. 2232; 4 App. 831:2–833:19; 5 App. 1154:8–14.)

CCSD orders Principal McKay to investigate the harassment and suspend the bullies

CCSD took immediate action. Assistant Superintendent Jolene Wallace and Academic Supervisor Andre Long, Principal McKay's direct supervisor, met with Principal McKay and ordered him to investigate the alleged harassment. (8 App. 1963:21-27; 5 App. 1168:5–1169:21.) Following that investigation, Assistant Superintendent Wallace ordered Principal McKay to suspend both C. and D. (5 App. 1168:5–1169:21.) Principal McKay had reservations about suspending D. but obeyed the order to suspend both. (5 App. 1168:5–1169:21.)

F. The District Court Finds Substantive Due Process and Title IX violations

Mrs. Bryan and Mrs. Hairr initially sued CCSD and numerous others. (*See generally* 1 App. 111.) The case proceeded to trial on just two claims against CCSD: a substantive due process claim under 42 U.S.C. § 1983, and a Title IX claim for discrimination on the basis of perceived sexual orientation. (2 App. 264, at 4; 1 App. 142, ¶ 154.)

Following a bench trial, the district court found for the plaintiffs on both claims, awarding each $200,000. (*See* 8 App. 1950; 6 App. 1459.)[3] According to the court, "it was CCSD's failure to take affirmative action that subjected [the students] to further bullying and harassment." (6 App. 1458:24–26; *accord* 8 App. 1969:22–25, 1971:21–23.)

SUMMARY OF ARGUMENT

No one deserves to be bullied. But a school district's simple failure to stop bullying does not, in itself, violate the U.S. Constitution. While state law prescribes a process for dealing with bullying allegations, federal law does not. Federal law instead addresses different issues: dangers that the state itself creates and to which it remains delib-

[3] The district court also awarded $470,418.75 in attorney's fees (9 App. 2160) and $19,236.19 in costs (9 App. 2107).

erately indifferent, and harassment because of a person's gender or sexual orientation. This case does not present a claim on those points of federal law. To pretend that it does trivializes both what the federal laws aim to address and what this case is really about—the all-too-common experience of generic bullying. This Court should reverse.

The § 1983 Claim

When states or their political subdivisions violate the U.S. Constitution, including the fundamental rights protected under the Due Process Clause, 42 U.S.C. § 1983 provides a remedy. Freedom from student-on-student bullying is not such a fundamental right, however.

State-Created Danger. States do not have a positive obligation to prevent their citizens from injuring one another. That doesn't mean that they can affirmatively create a danger and then remain deliberately indifferent to it. But the federal courts of appeal have unanimously held that school districts do not create such a danger merely by *failing* to prevent or stop student-on-student bullying—which is all that the district court found here. In addition, school staff did not remain deliberately indifferent; they took calculated measures to address the bullying. And the finding that Principal McKay *violated* CCSD policy de-

feats—rather than supports—§ 1983 liability against CCSD.

"Right" to an Education. The U.S. Supreme Court has rejected a federal constitutional right to a public education. Improperly using such a "right" as the pathway to the state-created danger doctrine is an independent reason to reverse the judgment under § 1983.

The Title IX Claim

Title IX of the Education Amendments of 1972 targets institutional discrimination "on the basis of sex." 20 U.S.C. § 1681(a). Student-on-student sexual harassment is attributable to a school district only under narrow circumstances: (A) The harassment is so pervasive, severe, and objectively offensive that it effectively blocks the victim from receiving educational benefits. (B) The school district knows about and has the opportunity to remedy the harassment. And (C) the district's deliberate indifference to the harassment—an official decision not to remedy it—*causes* further harassment.

Ethan was slurred with homophobic epithets not because of his perceived sexual orientation—he admits as much—but because of personal retribution. He also stymied any effort to remedy the harassment by concealing it from the school staff who asked about it.

Nolan, too, admits that no one thought he was gay; he suffered homophobic taunts not because of *sex*-based animus, but because of the bullies' *personal* hostility toward someone they viewed as a tattletale. With Ethan, he maintained the code of silence that prevented efforts to address the harassment. CCSD cured all the harassment it knew about; it cannot be liable for not curing hidden harassment.

Neither boy proved a Title IX claim on his own, despite the district court's analyzing the claims as though one boy's evidence could help the other. The judgment under Title IX should be reversed.

STANDARD OF REVIEW

While a district court's factual findings after a bench trial "will be upheld if not clearly erroneous and if supported by substantial evidence," its conclusions of law draw plenary review. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012) (quoting *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009)); *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004). That includes questions of statutory interpretation, *id.*, and the rights guaranteed by the U.S. Constitution, *In re Parental Rights as to M.F.*, 132 Nev. ___, 19, 371 P.3d 995, 997 (2016).

ARGUMENT

I.

FEDERAL CIVIL RIGHTS CLAIMS CANNOT BE ESTABLISHED THROUGH VIOLATION OF A STATE-LAW DUTY

Plaintiff went to trial only on two federal claims. Those claims have specific and exacting elements under federal law, which plaintiffs did not prove.

Instead, the district court erred in finding federal liability based on a failure to fulfill a state-law duty. Although the failure to comply with a state statute might in some circumstances constitute negligence *per se*, it cannot substitute for the requirements of a federal §1983 or Title IX claim. While the district court found that the school staff failed to conduct an adequate investigation under NRS 388.1351, this does not satisfy the "deliberate indifference" and other elements of these federal claims.

To allow a state-law duty, even a statutory one, to substitute for the elements of these federal claims would convert any negligence allegation into a federal case, complete with potentially unlimited liability beyond the caps of NRS 41.035, the imposition of attorney fees and the elimination of state-law immunities and privileges. This goes too far.

PART ONE: THE § 1983 CLAIM

II.

CCSD IS NOT LIABLE UNDER § 1983 FOR A "STATE-CREATED" DANGER

For good reason, no federal appellate court has sustained a claim that a school district's allegedly deficient handling of student bullying violates due process. The district court rejected this consensus in imposing liability here, where the students undisputedly concealed any ongoing bullying, despite the school staff's efforts to respond. This Court should reverse.

A. Under § 1983, a School District is Accountable for its *Own* Unconstitutional Policies and Customs; § 1983 Does Not Create Vicarious Liability

Congress enacted 42 U.S.C. § 1983 to hold state actors liable for violating constitutional and other federal rights. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002). To establish § 1983 liability against an entire political subdivision, such as CCSD, the plaintiff must prove (1) a constitutional violation *and* (2) "a custom or policy" of the political subdivision that caused the violation. *Baker v. D.C.*, 326 F.3d 1302, 1305 (D.C.

Cir. 2003) (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992)); *Baker v. McCollan*, 443 U.S. 137, 140 (1979). The necessity of an official custom or policy of violating constitutional rights distinguishes § 1983 from common-law torts: Unlike the common law, § 1983 does not recognize *respondeat superior* or vicarious liability; it does not attribute to a political subdivision the missteps of its employees. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997).

B. A State Actor Violates Due Process Only When it Creates a Danger by its Affirmative Conduct

1. Generally, a State's Failure to Prevent Private Violence Does Not Violate Due Process

The purpose of the Due Process Clause is "to protect the people from the State, not to ensure that the State protect[s] them from each other." *DeShaney v. Winnebago County*, 489 U.S. 189, 196 (1989). So the "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

Consider the context in which the U.S. Supreme Court rejected liability for the state's failure to prevent private violence. In *DeShaney*, a father brutally and repeatedly abused his four-year old son. 489 U.S. at

191. The county found out and initially removed him but later returned him to his father. *Id.* Although the county continued to receive reports of abuse, it did nothing. *Id.* Eventually, the beatings caused severe brain damage. *Id.* Despite this "undeniably tragic" situation, the Supreme Court rejected the boy's § 1983 claim, refusing to consider the county's inaction a violation of due process. *Id.* at 197.

2. The "State-Created Danger" Exception Applies Only to Affirmative State Conduct that Places Victims in Peril

Courts recognize an exception to *DeShaney*'s general rule, but "only where there is affirmative conduct on the part of the state in placing the plaintiff in danger." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011). And that narrow exception comes with a stringent standard: the state must act "with 'deliberate indifference' to a 'known or obvious danger'" that it created. *Id.* (quoting *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)); *Gray v. University of Colorado*, 672 F.3d 909, 921 (10th Cir. 2012).[4]

[4] A second exception for "special relationships" applies only to a victim who suffers injury while held in the state's custody "against his will." *Patel*, 648 at 973–74 (quoting *DeShaney*, 489 U.S. at 199-200). Only "incarceration, institutionalization, or other similar restraint of personal liberty" qualifies. *Id.* (quoting *DeShaney*, 489 U.S. at 200). In these

C. A Failure to Stop Student-on-Student Bullying Does Not Violate Due Process under the "State-Created Danger" Exception

1. Courts Unanimously Reject § 1983 Liability for Student-on-Student Bullying

Very few cases satisfy the requirements of the state-created danger exception. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1068 (9th Cir. 2006) (Bybee, J. dissenting) (noting that the Ninth Circuit approved its application "on fewer than five occasions"). As the federal courts of appeal have unanimously concluded, no student-bullying cases do.[5]

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settings, the state's constitutional duty arises directly "from the limitation which [the state] has imposed on his freedom." *Id.* (quoting *DeShaney*, 489 U.S. at 200).

The federal courts of appeal have unanimously rejected a special relationship based on "compulsory school attendance." *Id.* (collecting cases). These courts reason that "unlike incarceration or institutionalization, compulsory school attendance does not restrict a student's liberty such that neither the student nor the parents can attend to the student's basic needs." *Id.* Accordingly, plaintiffs did not assert—and the district court did not apply—the special-relationship exception here.

[5] *Morgan v. Town of Lexington, MA*, 823 F.3d 737, 744 (**1st Cir**. 2016) (dismissing a state-created-danger and Title IX claim and holding that a "failure of the school to be effective in stopping bullying by other students is not action by the state to create or increase the danger"); *Smith v. Guilford Bd. of Educ.*, 226 F. App'x 58, 62 (**2d Cir**. 2007) (affirming dismissal of state-created danger claim); *Morrow v. Balaski*, 719 F.3d 160, 176 (**3d Cir**. 2013) (rejecting state-created danger claim and holding that "[g]iven the limitations of *DeShaney* . . . it is now clear that the

The reasons that the federal appellate courts unanimously refuse to find state-created danger in student bullying are straightforward: The bully himself creates the harm; a school district's *inaction* in re-

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redress the [parents] seek must come from a source other than the United States Constitution"); *Stevenson ex rel. Stevenson v. Martin Cnty. Bd. of Educ.*, 3 F. App'x 25, 29 (**4th Cir**. 2001) (a school's "failure to protect by itself is not sufficient to trigger constitutional liability"); *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1002 (**5th Cir**. 2014) (rejecting state-created-danger liability in a bullycide case where "the School District attempted to alleviate tensions between [the student] and other students, by, for instance, arranging his seating in class away from a problematic student."); *Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 854–55 (**6th Cir**. 2016) (rejecting state-created-danger claim and holding that a school's inaction or insufficient action "typically does not create or increase the plaintiff's risk of harm"); *D.S. v. E. Porter Cnty. Sch. Corp.*, 799 F.3d 793, 799 (**7th Cir**. 2015) ("school officials do not have an affirmative [constitutional] duty to protect students"); *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 781 (**8th Cir.** 2001) (affirming summary judgment in molestation case and holding that "school districts are not susceptible to this state-created danger theory of § 1983 liability"); *Lamberth v. Clark Cnty. Sch. Dist.*, 698 F. App'x 387, 388 (**9th Cir.** 2017) (affirming dismissal of state-created-danger claim in student suicide case and holding that CCSD's alleged inaction was "not wrongful affirmative conduct"); *Scott v. Mid-Del Sch. Bd. of Educ.*, No. 17-6043, 2018 WL 898590, at *4 (**10th Cir**. Feb. 15, 2018) (affirming dismissal of state-created-danger claim against school board where administrators failed to prevent teacher-on-student bullying). After extensive research, it appears that neither the 11th nor D.C. Circuits have directly addressed the issue, but the 11th Circuit has refused to apply it in an analogous context. *See Mitchell v. Duval Cnty. Sch. Bd.*, 107 F.3d 837, 839 (**11th Cir**. 1997) (no § 1983 liability where a student was shot and killed on school grounds, after hours, by non-student).

sponse is not affirmative conduct. Deliberate indifference requires much more than an arguably botched response to bullying complaints.

2. CCSD Did Not Create a Danger

a. THE "STATE-CREATED DANGER" EXCEPTION REQUIRES AFFIRMATIVE CONDUCT

A state engages in "affirmative conduct" only if "state action creates or exposes an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). This requires proof that the state actors put the plaintiff in a worse position than they found him. *Johnson v. City of Seattle*, 474 F.3d 634, 641 (9th Cir. 2007).

Accordingly, state *inaction* does not violate due process. *See, e.g.*, *Johnson*, 474 F.3d at 641; *Windle v. City of Marion*, 321 F.3d 658, 662-63 (7th Cir. 2003); *see also Sanford v. Stiles*, 456 F.3d 298, 311-12 (3d Cir. 2006) (involving bullying-induced suicide). Indeed, "the absence of an affirmative act by the state in creating the danger is fatal to the claim." *Ramos-Pinero v. Puerto Rico*, 453 F.3d 48, 55 n.9 (1st Cir. 2006).

In *Lamberth*, for example, the plaintiffs alleged that CCSD caused a seventh-grader's suicide by failing to prevent known student-on-student bullying. 698 F. App'x at 388. Consistent with its sister cir-

cuits, the Ninth Circuit rejected liability because CCSD did not take "any steps to expose [the student] to a danger she did not already face." *Id.*

b. THE DISTRICT COURT FOUND ONLY A "FAILURE TO TAKE AFFIRMATIVE ACTION"— THE OPPOSITE OF AFFIRMATIVE CONDUCT

Here, the district court upended the requirement of affirmative conduct, *predicating* liability on a finding that legally *defeats* it. The court found that "it was CCSD's *failure to take affirmative action* that subjected [the students] to further bullying and harassment." (6 App. 1457:24–26 (emphasis added); *accord* 8 App. 1969:22–25, 8 App. 1971:21–23.) That finding *exonerates* CCSD: it makes clear that CCSD did not create the danger by its own affirmative conduct, a conclusion that by itself is fatal to § 1983 liability.

3. CCSD was Not Deliberately Indifferent

a. "DELIBERATE INDIFFERENCE" IS A STRINGENT STANDARD

In addition to proving that the state created the danger, a plaintiff must also prove that the state responded to that danger with deliberate indifference. *Patel*, 648 F.3d at 974.

Deliberate indifference is "an official decision" to disregard the peril that the state has created. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 275 (1998) (citing *Brown*, 520 U.S. 397 and *Canton v. Harris*, 489 U.S. 378 (1989) and adopting the same "deliberate indifference" standard in a Title IX case); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642–43 (1999). It is not simple "negligence"[6] or even "gross negligence.[7] It is a "culpable mental state": "intentionally or knowingly" subjecting someone to the "known or obvious danger." *Patel*, 648 F.3d at 974; *Davis*, 526 U.S. at 642. And it "is an exacting standard"[8] that "sets a high bar for plaintiffs."[9]

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[6] *Farmer v. Brennan*, 511 U.S. 825, 835 (1994); *see also Seamons v. Snow*, 84 F.3d 1226, 1229 (10th Cir. 1996) (dismissing state-created-danger and Title IX claims where student reported egregious student-on-student, sexual harassment and the school's chosen response inadvertently created a sexually hostile environment); *Estate of Sisk v. Manzanares*, 262 F. Supp. 2d 1162, 1179 (D. Kan. 2002) ("the relevant standard is deliberate indifference, not perfection"); *Cox v. Dakota Cnty.*, 2012 WL 5907438, *2 (D. Minn. 2012) ("The Constitution does not require perfection from the County; it requires only that the County does not act with deliberate indifference.").

[7] *Patel*, 648 F.3d at 974; *K. S. v. Nw. Indep. Sch. Dist.*, 689 F. App'x 780, 784 (5th Cir. 2017).

[8] *Doe v. Sch. Bd. of Broward Cty., Fl.*, 604 F.3d 1248, 1259 (11th Cir. 2010).

[9] *Stiles*, 819 F.3d at 848.

Courts are particularly reluctant to "second-guess[] the disciplinary decisions made by school administrators." *Davis*, 526 U.S. at 648. And rightly so. The question isn't whether the district could have done more.[10] "Ineffective responses"[11]—even "weak" and "concerning" ones[12]—may be negligent, but not deliberately indifferent.[13]

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[10] *See e.g., Porto v. Town of Tewksbury*, 488 F.3d 67, 73 (1st Cir. 2007) ("a claim that the school system could or should have done more is insufficient to establish deliberate indifference"); *Harrington v. City of Attleboro*, 172 F. Supp. 3d 337, 345 (D. Mass. 2016) (same); *Jenkins v. Univ. of Minn.*, 131 F. Supp. 3d 860, 887 (D. Minn. 2015) (even though university's responses could "have gone even further or done more," its actions were "far from exhibiting deliberate indifference").

[11] *Sanches v. Carrollton-Farmers Branch Indep. School Dist.*, 647 F.3d 156, 168-69 (5th Cir. 2011).

[12] *K. S.*, 689 F. App'x at 784.

[13] *See also P.K. ex rel. Hassinger v. Caesar Rodney High School*, 2012 WL 253439, *9 (D. Del. 2012) ("[T]he effectiveness of a [school] district's methods is not a factor considered in the Title IX analysis."); *Facchetti v. Bridgewater College*, 175 F. Supp. 3d 627, 639 n.8 (W.D. Va. 2016) ("even where the remedial action taken is ineffective in stopping the harassment, that does not show deliberate indifference."); *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 411 (5th Cir. 2015) ("Ineffective responses . . are not necessarily clearly unreasonable" and therefore do not constitute deliberate indifference); *Donovan v. Poway Unified Sch. Dist.*, 84 Cal. Rptr. 3d 285, 299 (Cal. Ct. App. 2008) ("A response by the Defendant that is merely inept, erroneous, ineffective, or negligent does not amount to deliberate indifference.").

b. THE DISTRICT COURT'S FINDINGS DEFEAT A DETERMINATION OF DELIBERATE INDIFFERENCE

The district court's findings criticize the school's response, but fall far short of a finding of deliberate indifference. As Ethan and Nolan repeatedly admitted, school staff tried to remedy the harassment they were aware of. A few examples are illustrative:

- Dean Winn met with Nolan and Ethan and reprimanded C., going so far as to require a conference with C.'s mother. (2 App. 474:8–475:1, 476:5–478:3, 3 App. 519:9–520:1; 3 App. 543:5–545:13; 5 App. 1088:11–12; 1100:18–21; 3 App. 651:10–652:12.) *See Doe ex rel. Conner v. Unified Sch. Dist. 233*, 2013 WL 3984336, at *7 (D. Kan. 2013) ("counseling or talking with students is a typical first step in addressing discipline problems").

- Counselor Halpin met with Nolan repeatedly and—despite Nolan's lies that "nothing was happening"—encouraged Nolan to submit an incident report. (2 App. 482:14–483:23; 3 App. 527:22–530:25, 4 App. 929:11–24; 3 App. 529:20–530:1; 9 App. 2230.)

- Counselor Halpin called Mrs. Bryan immediately after receiving each of her e-mails. (4 App. 845:7–22; 4 App. 810:17–18.)

- Mr. Beasley twice rearranged the seats in band class, repri-

manded C. and D., and referred C. to the Dean. (4 App. 987:20–988:18, 990:3–12, 5 App. 1018:15–1022:12; 2 App. 485:9-14, 3 App. 513:16–22; 9 App. 2226; 5 App. 1102:22–1103:5; 5 App. 1027:12–1028:13; 3 App. 596:22–597:7; 3 App. 539:20–23.) After the first move, Nolan stopped reporting harassment. (3 App. 513:23–514:4; 5 App. 1240:15–19; 2 App. 488:4–25, 3 App. 505:12–506:5, 524:8–11.) After the second move, so did Ethan. (3 App. 583:2-9; 3 App. 649:17–651:9, 654:6–8.)

- Even after Nolan and Ethan insisted that the bullying ceased, Counselor Halpin and others continued to check on the students. (4 App. 949:12–951:2; 4 App. 869:20–23, 870:18–23.)
- Counselor Halpin had Nolan fill out an incident report. (4 App. 940:23–943:20; 3 App. 526:20–527:10; 9 App. 2230.)
- Vice Principal DePiazza offered the options of changing classes or even transferring to a new school. (8 App. 1958:16-–27.)

Although it was not necessary to defeat an allegation of "deliberate indifference," Nolan and Ethan actually admitted that these responses were effective in stopping the bullying. (3 App. 543:5–545:13; 3 App. 592:7–594:18; 3 App. 651:10–652:12; 3 App. 542:23–545:5, 9 App. 2236; 3 App. 651:10-652:12.)

c. THE DISTRICT COURT APPLIED THE WRONG STANDARD

Instead of applying the Supreme Court's stringent standard for deliberate indifference, the district court improperly second-guessed the school's response and held it *strictly liable* for failing to conduct the investigation required by NRS 388.1351. (8 App. 1962:21–23, 1964:4–5, 1968:17–24, 1969:18–25; 6 App. 1457:19–28.)

In so doing, the district court wrongly assumed that CCSD could avoid constitutional liability only by providing a particular response—here, the investigative and reporting services mandated by the 2011 version of NRS 388.1351. (8 App. 1962:21–23, 1964:4–5, 1968:17–24, 1969:18–25; 6 App. 1457:19–28.) The U.S. Supreme Court has repeatedly rejected this reasoning, ruling that the Due Process Clause does not require the state to provide any "particular protective services." *DeShaney*, 489 U.S. at 197. Even a failure to comply with federal regulations or district policy does not on its own show deliberate indifference. *K. S.*, 689 F. App'x at 787 (citing *Gebser*, 524 U.S. at 291-92).

In the Title IX context, which uses the same standard, the U.S. Supreme Court ruled that even though the school district disregarded Department of Education regulations *requiring* it to adopt and publicize

an effective policy and grievance procedure for sexual harassment claims, that regulatory violation "does not establish the requisite . . . deliberate indifference." *Gebser*, 524 U.S. at 291-92. So, too, for a § 1983 claim. Even if the school did not conduct the kind of investigation that NRS 388.1351 requires, that state-law violation does constitute "deliberate indifference," *see K. S.*, 689 F. App'x at 784–87, considering the school's other, admittedly effective actions.

d. CCSD IS NOT LIABLE FOR DELIBERATELY CONCEALED HARASSMENT

Continuing its error, the district court also ruled that the staff acted with deliberate indifference because it failed to completely stop the bullying. According to the court, liability existed because the bullying continued – albeit out of sight and despite the staff's responsive efforts. (8 App. 1963:1-4; *see also id.* 8 App. 1955:22–24; 1957:24–25.) But CCSD was not required to remedy unknown bullying. *E.g.*, *Patel*, 648 F.3d 974. The staff's response may have been imperfect, but it was not deliberately indifferent. *See Cox v. Dakota Cnty.*, 2012 WL 5907438, *2 (D. Minn. 2012) ("The Constitution does not require perfection from the County; it requires only that the County not act with deliberate indifference.").

D. There is No *Monell* Liability because No Final Policymaker for CCSD Created a Danger

Ethan's and Nolan's experience is something that CCSD takes seriously. And certainly CCSD, like school districts across the country, aims to further improve its efforts to eliminate bullying. But any failure in the school *staff's* response does not make that response *district* policy.

Monell rejects institutional liability under § 1983 solely on the basis of *respondeat superior*. *See* 436 U.S. at 691. Rather, a § 1983 violation by a school district employee can be attributed to the district if that employee "was acting as a 'final policymaker.'" *Lytle v. Carl,* 382 F.3d 978, 982 (9th Cir. 2004); *accord Monell*, 436 U.S. at 691; *Brown*, 520 U.S. at 403.[14]

Here, the district court decided that because NRS 388.1351(2) states that a "principal or his or her designee" must investigate reports of bullying, Principal McKay was acting with CCSD's policymaking au-

[14] The district court did not address or adopt the other two bases for *Monell* liability: "(1) that a district employee was acting pursuant to an expressly adopted official policy; [or] (2) that a district employee was acting pursuant to a longstanding practice or custom." *Lytle,* 382 F.3d at 982; *accord Monell*, 436 U.S. at 691.

thority when he failed to do so. (8 App. 1971:1–23.) That ruling is error.

Far from *making* policy, Principal McKay at most *violated* the duty to investigate under NRS Chapter 388 and CCSD's written policies. That state-law violation is not policymaking that subjects CCSD to § 1983 liability. *See Funches v. Bucks County*, 586 F. App'x 864, 867 (3d Cir. 2014).

1. CCSD's Board of Trustees Has Not Delegated Final Policymaking Authority to Principals

Plaintiffs' burden is to show that Principal McKay is a "final policymaker" for CCSD's disciplinary policies. *See T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 375–76 (S.D.N.Y. 2014) (requiring a showing of a "formal delegation of the Board's policymaking authority").

A "final policymaker" within a school district is someone whose authority is final "in the special sense that there is no higher authority." *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 469 (7th Cir. 2001) (Posner, J.) (school principals lack such authority); *accord, e.g.*, *Advanced Tech. Bldg. Sols., L.L.C. v. City of Jackson*, 817 F.3d 163, 167 (5th Cir. 2016) ("[I]n multiple cases, we have affirmed that officials are not final policymakers when a supervisory board has the authority

to accept or reject their decision."). "[D]ecision-making" is not policy-making if the decision "must follow the guidelines and policies established by the school district." *Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1304 (5th Cir. 1995).

In Nevada school districts, policymaking authority rests with the boards of trustees, not individual principals. *Lytle*, 382 F.3d at 983 (citing NRS 386.350); *see also* NRS 386.365. CCSD's board has not delegated policymaking authority to principals in the area of student discipline. (*See*, *e.g.*, 9 App. 2218–24.) *Cf. Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004) (disciplinary authority expressly delegated to principals via written district policy).

2. Nevada's Antibullying Statute Does Not Delegate Policymaking Authority to Principals

Contrary to the district court's ruling (at 8 App. 1971:16–23), the antibullying statute in NRS Chapter 388 does not delegate policymaking authority directly to individual school principals, either. Rather, the statute places policy-making authority in school boards and even the Department of Education, but not individual principals. NRS 388.133–.134. Consistent with that authority, CCSD's board promul-

gated a written policy. (9 App. 2218.) But it did not further delegate its authority to individual principals.

In fact, NRS 388.135 is not discretionary. *See* NRS 388.1351(2). The principal must follow the statute's process for investigation and district-level appellate review and comply with the board's policies. NRS 388.1351(2)–(8). (*See also* 9 App. 2219, at 2.) The failure to do so *violates* state law and district policy; it does not create policy.

3. Principal McKay Conceded that he Lacked Policymaking Authority

At trial, Principal McKay conceded these limits on his authority: he had no power to make CCSD policy in the realm of student discipline. (5 App. 1173:8–1175:12.)

4. Because he Lacked Authority, Principal McKay Acquiesced to District-Level Officials

What happened at the district level illustrates Principal McKay's inability to create CCSD policy. As soon as Assistant Superintendent Wallace learned about the bullying allegations, she ordered Principal McKay to investigate and, ultimately, to suspend the bullies. (8 App. 1962:1–4; 5 App. 1175:13–10.) Unlike a superintendent or school board, Principal McKay lacked authority to take another course—even though

he disagreed with suspending D. (8 App. 1962:1–4; 5 App. 1175:13–10.) And because he, like other principals, answers to CCSD's policymakers, he lacks policymaking authority for purposes of § 1983. *Gernetzke*, 274 F.3d 469. Thus, his actions cannot expose CCSD itself to § 1983 liability.

5. The District Court Found that Principal McKay Violated CCSD Policy, Not that he Created it

Here, the district court upended *Monell*'s requirement of a district-wide policy and practice. Even if an investigation under NRS Chapter 388 were essential as a matter of due process, CCSD adopted that requirement as part of its official policy. (*See* 9 App. 2218.) If Principal McKay failed to conduct the required investigation, then he *violated* CCSD policy. He did not create it. What the district court did—premising CCSD's liability on a principal's *violation* of CCSD policy—is the opposite of what *Monell* requires. *See, e.g.*, *Funches*, 586 F. App'x at 867 (a finding that "defendants violated official policy" defeated § 1983 official-capacity claim); *Snell v. City & Cty. of Denver*, 82 F.3d 426 (10th Cir. 1996) (no § 1983 liability for violation of federal law that "contravened official policy"); *Marzec v. Vill. of Crestwood*, 943 F.2d 54 (7th Cir. 1991) (same).

* * *

Principal McKay was not a final policymaker in how to respond to reports of bullying. His noncompliance with CCSD's policies is not a basis for CCSD's liability under § 1983.

III.

THE U.S. CONSTITUTION DOES NOT CREATE A FUNDAMENTAL RIGHT TO A PUBLIC EDUCATION

CCSD did not violate *any* due-process right under the state-created-danger exception. And here, the "due process right" the district court identified—the right to a public education—is one that doesn't even exist.

A. To Invoke Due Process, the District Court Must Identify a Recognized Fundamental Right

"[U]nder § 1983, the first step is to identify the exact contours of the underlying right said to have been violated." *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

"[S]ubstantive due process" sweeps up several fundamental rights, so a plaintiff suing for violation of "due process" must identify the precise right that has been recognized under that clause. *E.g., State v. Dist. Ct. (Logan D.)*, 129 Nev. ___, 306 P.3d 369, 377 (2013) (listing the

currently-recognized "fundamental rights"); *Paul v. Davis*, 424 U.S. 693, 712 (1976); *Reno v. Flores*, 507 U.S. 292, 302 (1993).

B. Substantive Due Process Does Not Include a Right to a Public Education

Here, the *sole* basis for plaintiffs' § 1983 claim was a supposed "constitutional right to a public education." (6 App. 1459:11–12; 8 App. 1969:3–8.)[15] They waived even that argument because they raised it for the first time after the close of evidence. (6 App. 1405).) But in any event, the U.S. Constitution creates no right to public education. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30, 33–35 (1973). So a claim under § 1983 cannot rest upon the deprivation of a public education. *See, e.g.*, *Charleston v. Bd. of Trs.*, 741 F.3d 769, 774–75 (7th Cir. 2013).

[15] The district court misapplied *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (cited at 8 App. 1969:3–8), a *procedural* due process case. That case holds only that if *state law* creates a property interest in public education, the state cannot suspend students from school without constitutionally adequate procedures. *Id.* It does not recognize education as a *federal* constitutional right. The district court found no procedural due process violation; so *Goss* does not apply.

C. The District Court's Reliance on a Nonexistent Right is an Alternative Ground for Reversal

The district court found § 1983 liability relying exclusively on a "right" that the U.S. Supreme Court has rejected. That error is an independent basis to reverse the judgment.

PART TWO: THE TITLE IX CLAIM

The district court also erred in imposing liability under Title IX of the Education Amendments of 1972. This kind of bullying, and the response by school staff, do not subject CCSD to Title IX penalties for discrimination on the basis of sex.

Title IX prohibits federally-funded school districts from discriminating "on the basis of sex." 20 U.S.C. § 1681(a). While courts have implied a private right of action under Title IX, that action has been construed narrowly.

The discrimination for a Title IX claim must be "on the basis of"—that is, *because of*—sex, not merely harassment for other reasons that uses sexually charged language. 20 U.S.C. § 1681(a). As with claims of a state-created danger, the plaintiff in a Title IX case must prove that

the school district acted with deliberate indifference—that it had actual knowledge of harassment and an opportunity to "take corrective action," *Gebser*, 524 U.S. at 289-90, yet remained deliberately indifferent, *Davis*, 526 U.S. at 642, causing further harassment, *id*. In a case of student-on-student harassment, the sex-based harassment must be "so severe, pervasive, and objectively offensive that it effectively bar[red] access to an educational opportunity." *Davis*, 526 U.S. at 650.

IV.

THE SCHOOL ACTED ON REPORTS OF BULLYING; CCSD WAS NOT DELIBERATELY INDIFFERENT

Because CCSD's response was not deliberately indifferent to harassment of any kind, plaintiffs simply do not have a Title IX case. This issue, alone, resolves the claim without even needing to reach the question of whether the harassment here was "on the basis of sex" or sufficiently pervasive and offensive.

A. CCSD Had No Actual Knowledge of the Pervasiveness of any Harassment and Could Not Remedy what was Concealed

Ethan and Nolan did not experience severe, pervasive harassment on the basis of sex. Even if they had, CCSD did not have actual

knowledge of the pervasiveness of that harassment or an opportunity to remedy it.

1. One with District Authority to Remedy the Severe Harassment Must have Actual Knowledge and an Opportunity to Remedy it

As with § 1983, Title IX rejects vicarious liability. *Gebser*, 524 U.S. at 290. "[A] recipient of federal funds may be liable in damages under Title IX only for its own misconduct," not the misconduct of its students, agents, or employees. *Davis*, 526 U.S. at 640.

For the requirement of "actual knowledge," this means that an "official who at a minimum has authority" from the school district "to address the alleged discrimination and to institute corrective measures" must know about the sexual harassment and its severity and pervasiveness. *See Gebser*, 524 U.S. at 290. The official must be "high enough up the chain-of-command that his acts constitute an official decision by the school district itself not to remedy the misconduct." *Floyd v. Waiters*, 171 F.3d 1264, 1264-65 (11th Cir. 1999).

The school-district official with that actual knowledge must also have the opportunity to correct the harassment. *Gebser*, 524 U.S. at 289.

2. School Staff Found Out About Homophobic Conduct toward Nolan Only After it Stopped

By the time school staff learned of any arguably sex-based harassment toward Nolan, it had stopped. To reach a contrary conclusion, the district court relied, in part, on Mrs. Bryan's September 15 e-mail. (8 App. 1967.) But that correspondence does no more than identify where Nolan was jabbed; Mrs. Bryan does not suggest that C. targeted Nolan "on the basis of his sex." (*See* 9 App. 2225.) The disclosure that C. was supposedly checking Nolan's sex came only later, when Mrs. Hairr spoke with Assistant Principal DePiazza and Counselor Halpin. (8 App. 1958.) At that time, however, Dean Winn also met with Nolan to discuss his September 22 incident report, and Nolan not only *told* her then that the band class harassment had "ceased" (3 App. 543:5–22), but he admitted at trial that it in fact *had* ceased (*id.* at 3 App. 543:23–545:5). So by the time of Mrs. Hairr's more detailed report, the school's earlier response had already successfully curtailed any sex-based harassment. (3 App. 344:7–9.)

3. Ethan and Nolan Concealed the Pervasiveness of any Bullying, so CCSD Could Not Remedy it

In addition, far from proving CCSD's actual knowledge that Ethan and Nolan suffered severe and pervasive sexual harassment, the students admitted they concealed the scope and sexual nature of the harassment *for the very purpose of keeping* the school from taking corrective action. (*E.g.*, 3 App. 564:2–10; 6App. 1259:24–28, 1263:1–2, 266:1–1269:6–7 (Ethan)[16]; 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 (Nolan).)[17]

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[16] In closing argument, plaintiffs further detailed Ethan's concealment. *See, e.g.*, 6 App. 1255:10–11 ("Ethan also chose not to report the bullying that he was enduring for fear of retaliation . . . ."), 6 App. 1259:26–27, 6 App. 1262:25–26 ("the bullying of Ethan and Nolan by C[.] and D[.] continued out of sight of Mr. Beasley"), 6 App. 1263:1–2 ("Ethan and Nolan continued to employ the strategy of trying to ignore the problem, feeling that any further complaints would just lead to greater retaliation"), 6 App. 1269:5–6 ("Because of embarrassment and fear of retaliation neither Ethan nor Nolan voluntarily told their parents about the bullying they were enduring"), 6 App. 1285:1–5 ("The bullying of Ethan and Nolan . . . continued throughout the rest of September [after Mrs. Bryan's September 15 e-mail] and into October [before Mrs. Bryan's October 19 e-mail]. . . . Neither Ethan nor Nolan wanted to complain based on the prior lack of remedial action by the school").

[17] Plaintiffs also elaborate on Nolan's deception in closing argument. (*See, e.g.*, 6 App. 1255:10–11 (Nolan was "too embarrassed to mention the homophobic and sexual content of the slurs that he was enduring"), 6 App. 1255:14–15 (Nolan "was reluctant to discuss the homophobic sexually-oriented nature of the bullying"), 6 App. 1255:23–24 ("Because of this fear of retaliation, Nolan decided not to tell any adults about any

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. (3 App. 649:17–652:12, 15:8-16:22; 4 App. 952:7–954:18; 4 App. 949:12–951:2.) The harassment may have *become* more severe and pervasive thereafter, but if so, it was—as Ethan intended—concealed from Dean Winn or anyone else who might have taken further action. Dean Winn had no opportunity to remedy

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further bullying directed at him, and instead, to endure the torment in silence"), 6 App. 1259:26–27 (admitting that Nolan "did not mention the stabbing nor the homophobic, sexually-oriented slurs"), 6 App. 1265:4–5 ("Nolan filled out a complaint at the Dean's office. He did not mention the homophobic slurs that were directed at him but just described being bullied"), 6 App. 1265:7–8 (when Nolan met with Dean Winn, "[h]e did not recount [to] her the homophobic slurs"), 6 App. 1266:1–2 ("Nolan did not report the stabbing incident to either his parents, the Dean or any other school official, fearing that it would incite further retaliation from C[.]"), 6 App. 1267:28–1268:3 (the first time Nolan met with Dean Winn, "he was embarrassed to disclose the full sexual nature of the names he was being called").

[18] The district court also refers to communications with Counselor Halpin (8 App. 1967:25–1968:2) but does not suggest that he had "authority to take remedial disciplinary action" (8 App. 1967:15–16), so his awareness of any sexual harassment is irrelevant for Title IX.

continuing, pervasive, and severe sexual harassment of which she had "actual knowledge."

Likewise, following Nolan's first incident report, and Dean Winn's swift response, Nolan apparently—and correctly—recognized that school staff would take corrective action in response to any known student-on-student misconduct. (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.) He believed that such corrective measures *could* lead to future retaliation from C. (2 App. 480:13–481:2, 483:14–18, 5 App. 1026:16–24; 6 App. 1259:24–28, 1263:1–2, 1266:1–2, 1269:6–7.) Because of that, Nolan repeatedly concealed the harassment, depriving CCSD of what *Gebser* requires: the opportunity to take corrective action. *See* 524 U.S. at 289.

B. CCSD was Not Deliberately Indifferent to Known Harassment toward Ethan

1. Under Federal Law, "Deliberate Indifference" is an Egregious Response, Not a Failure to Follow State Law

Deliberate indifference to sexual harassment under Title IX is a high bar, just as onerous a burden as under § 1983. *Davis*, 526 U.S. at 642 (citing *Gebser*, 524 U.S. at 289-90); *Stiles*, 819 F.3d at 848. "A school district's negligent failure to prevent peer harassment" or "im-

perfect responses to harassment will not support Title IX liability." *Snethen v. Bd. of Pub. Educ.*, 2008 WL 766569, at *3 (S.D. Ga. 2008).

And in both contexts, a plaintiff cannot meet the burden of proving deliberate indifference merely by showing the school district's response failed to satisfy state or other federal law obligations, or to comply with district policy. *K. S.*, 689 F. App'x at 787 (citing *Gebser*, 524 U.S. at 291-92).

2. The Failure to Conduct a Statutory Investigation Did Not Constitute Deliberate Indifference

The district court found deliberate indifference under Title IX on the same basis it found deliberate indifference under § 1983—Principal McKay's failure to conduct an investigation under NRS 388.1351(1). (8 App. 1968:17–24, 1968:22–25.) That was error.

In contrast with state law or CCSD policy, Title IX does not require any particular response. *Gebser*, 524 U.S. at 291-92. The actions that school staff *did* take—including to solicit incident reports, reprimand C., conduct a conference with C.'s mother, rearrange the classroom seating (twice), and communicate repeatedly with the students and their mothers about appropriate solutions—show that even if the response was imperfect, it was not deliberately indifferent. *See general-*

ly supra PART One:II.C.3.b. (3 App. 651:10–652:12; 4 App. 810:17–18; 3 App. 596:22–597:7; 3 App. 583:2–9; 3 App. 649:17–651:9, 654:6–8; 4 App. 869:20–23, 870:18–23.; 2 App. 474:8-475:1, 476:5–478:3, 3 App. 519:9–520:1; 3 App. 543:5–545:13; 5 App. 1088:11–12; 1100:18–21; 2 App. 485:9–14, 3 App. 513:16–22; 9 App. 2226; 4 App. 942:22–943:5; 4 App. 1027:12–1028:13; 3 App. 539:20–23.)

This is particularly true in light of the students' efforts to *thwart* CCSD's action, by leading those who were following-up to believe that—rather than becoming severe or pervasive—the harassment had stopped altogether. (3 App. 592:7–594:18; 3 App. 651:10–652:12; 3 App. 651:10–652:12; 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.) School staff could not be branded as deliberately indifferent for concluding that their efforts had succeeded.

For the same reason that CCSD was not deliberately indifferent to a state-created danger under § 1983, CCSD was not deliberately indifferent to severe, pervasive sexual harassment under Title IX.

C. CCSD Did Not *Cause* Sexual Harassment

1. The Deliberate Indifference Must be the Cause of Further Harassment

CCSD, like any recipient of federal educational funds, can be liable under Title IX "only where [its] own deliberate indifference effectively 'cause[d]' the discrimination." *Davis*, 526 U.S. at 642-43 (quoting *Gebser*, 524 U.S. at 291). This causation element requires proof "that the Title IX recipient's deliberate indifference to the initial discrimination subjected the plaintiff to *further* discrimination." *Williams v. Bd. of Regents*, 477 F.3d 1282, 1296 (11th Cir. 2007) (emphasis added); *accord Lopez v. Regents of Univ. of Cal.*, 5 F. Supp. 3d 1106, 1125-26 (N.D. Cal. 2013); *Doe v. Blackburn College*, 2012 WL 640046, *7 (C.D. Ill. 2012). The causation element erects a "high standard." *Davis*, 526 U.S. at 643. Further, a school's failure to investigate sexual harassment "cannot be characterized as deliberate indifference that caused" that initial harassment. *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017).

2. The District Court Made No Causation Finding

The district court did not make any finding of causation. Without a finding that CCSD's response to harassment caused Ethan to suffer

further sexual harassment, CCSD cannot be liable under Title IX.

3. CCSD was Not the Cause

In any case, the record makes clear that CCSD's failure to perform the statutory investigation—the basis of the court's "deliberate indifference" finding—was not the *cause* of harassment. Such an investigation would necessarily *follow* the report of harassment; it could not cause the harassment that already happened. The causation element is especially absent here in light of the students' assurances that the harassment had stopped—a deception that itself impeded further action. (2 App. 482:14–483:23; 3 App. 527:22–530:25, 4 App. 929:11–24; 3 App. 539:20–530:1; 9 App. 2230; 3 App. 513:23–514:4; 5 App. 1240:15–19; 2 App. 488:4–25, 3 App. 505:12–506:5, 524:8–11.) CCSD is not liable under Title IX for harassment that it did not cause.

V.

THE STUDENTS FACED RETALIATORY BULLYING, NOT HARASSMENT BECAUSE OF SEX

Bullying of any kind is serious, but Title IX only addresses bullying "on the basis of sex." The students here showed only that their bullying experience included sexual and homophobic words, not that they

were bullied because of sexual animus. That is not a Title IX claim.

A. Sexually Tinged Comments are Not Sexual Harassment Unless Made Because of Sex

Whether harassment is truly "on the basis of sex" turns 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 other words, was Plaintiff being harassed *because of* . . . gender or for some other reason." *Id.* at 365 (emphasis added); *Morgan*, 823 F.3d at 745.

Depending on its impetus, conduct that is "tinged with offensive sexual connotations" does not equate to "discrimination because of sex." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (alterations incorporated).[19] For example, in *Sanches*, the bully called a female student a "ho," slapped her boyfriend's rear, and started rumors that she was pregnant and had a hickey on her breast. 647 F.3d at 163–66. While those words and actions were "tinged with offensive

[19] While *Oncale* is a Title VII case, courts "look to case law interpreting Title VII . . . for guidance in evaluating a claim brought under Title IX." *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007).

sexual connotations," their inspiration was not sex, but personal hostility—jealousy that the bully's ex-boyfriend was now dating the victim, and retribution after the victim's mother got the bully in trouble. *Id.* at 165–66. Accordingly, the sexually tinged comments were "teasing or bullying," rather than sexual harassment. *Id.*

Similarly, in *Hankey v. Town of Concord-Carlisle*, students treated the victim cruelly on several occasions, including one where they keyed the word "cunt" into her car. 136 F. Supp. 3d 52, 67 (D. Mass. 2015). But that deplorable epithet was part of a broader program of "gender-neutral bullying and threats," such that no fair-minded jury could find that she was harassed *because of* sex. *Id.* at 68. And in *Nungesser*, a male student could not assert a Title IX claim based on being labeled a "serial rapist," as that harassment stemmed from "*his conduct*" toward another student, "not because of *his status* as a male." 169 F. Supp. 3d 353, 365–66 (S.D.N.Y. 2016).

For Title IX claims based on homophobic harassment, the harassment must be motivated by a perception that the plaintiff is actually gay. *Patterson v. Hudson Area Sch.*, 724 F. Supp. 2d 682, 691 (E.D. Mich. 2010). In *Patterson*, a sixth-grader suffered daily homophobic

name-calling, including the slurs "fag," "faggot," and "gay," and later, "queer" and "man boobs." *Id.* at 684–85. Over time, his planner and locker were also defaced with homophobic messages and images, and once he was even sexually assaulted by another male student. *Id.* at 687–88. While the plaintiff had clearly been bullied and worse, he admitted that no one thought he was actually gay. The bullying stemmed instead from the plaintiff's participation in unpopular activities. *Id.* at 691–92, 694. So the harassment he suffered could not have been based on such a perception. *Id.*; *see also A.E. ex rel. Evans v. Harrisburg Sch. Dist. No. 7*, 2012 WL 4794314, at *2 (D. Or. Oct. 9, 2012) (homophobic "words expressed by this age group do not necessarily mean that plaintiff was harassed because of his perceived homosexuality").

Importantly, the question of motivation is frequently resolved as a matter of law. *See, e.g.*, *Nungesser*, 169 F. Supp. 353 (motion to dismiss); *Patterson*, 724 F. Supp. 2d 682 (judgment as a matter of law); *Hankey*, 136 F. Supp. 3d 52 (summary judgment); *Sanches*, 647 F.3d 156 (summary judgment).

B. Ethan was Not Targeted because of Perceived Sexual Orientation

Ethan complained about harassment on the basis of his "perceived sexual orientation,"[20] (1 App. 142, ¶ 154), but he did substantiate that claim. The district found only that Ethan endured "homophobic slurs and innuendo." (*See* 8 App. 1966:1–7.) Ethan admitted, however, that these insults were in retaliation for Nolan's report of generic bullying, not because of sexual orientation. (*E.g.*, 3 App. 564:8–565:15.) Likewise, Ethan admitted that no one perceived him as gay. (3 App. 648:9–649:16.) Ethan's own efforts to conceal further harassment confirm that gender-neutral motive: the bullies did not harass Ethan because they thought he was gay; rather, Ethan feared C. would bully again as retaliation for reporting C.'s earlier bullying. (3 App. 648:9–649:16.) *See Patterson*, 724 F. Supp. at 691; *Evans*, 2012 WL 4794314, at *2.

Without such a perception, the district court's finding that the "[t]he bullying was sexual in nature" (8 App. 1955:24) shows only that

[20] It is an open question whether harassment on the basis of sexual orientation even constitutes harassment "on the basis of sex" in the first place. *Compare, e.g.*, *Hively v. Ivy Tech Cmty. Coll.*, 853 F. 3d 339 (7th Cir. 2017) (*en banc*), *with Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255-57 (11th Cir. 2017). CCSD takes the position that it is not, but even if it is, plaintiffs have not proven a case.

the conduct was sexually tinged, not that it was harassment *because of* sexual orientation. *Patterson*, 724 F. Supp. 2d at 691.

C. Nolan was Not Targeted for Perceived Sexual Orientation

Like Ethan, Nolan claims harassment solely on the basis of perceived sexual orientation. But by Nolan's own admission, no one thought that Nolan was gay. (3 App. 539:24–541:9.) C. targeted him in retaliation for being a "tattletale" (*e.g.*, 2 App. 480:2–18, 3 App. 519:9–520:1; 3 App. 539:24–541:9), not because of perceived sexual orientation. Although C. jabbed Nolan and stated he wanted to see whether Nolan was "a boy or a girl," Nolan does not contend that C. actually doubted Nolan's sex or sexual orientation; the actual *reason* for the jab was retaliation for Nolan's having "tattle[d]" to Dean Winn. (2 App. 478:18–481:9, 3 App. 519:9–520:1.) That kind of personal, rather than sex-based, hostility does not trigger Title IX penalties. *Nungesser*, 169 F. Supp. 3d at 366 ("Personal animus is not gender-based harassment, and cannot form the basis for a Title IX violation."); *Seamons*, 84 F.3d at 1229 (dismissing a student-on-student Title IX claim where the harassers were retaliating for plaintiff's earlier report).

As Nolan admitted, C. was an all-around bully who targeted other

victims at "random." (*Id.* at 2 App. 499:6–9.) Nolan found himself in C.'s crosshairs because he was in the same trombone section, and then because he tattled, not because of sex.

VI.

ANY SEXUAL HARASSMENT WAS NOT SO PERVASIVE, SEVERE, AND OBJECTIVELY OFFENSIVE AS TO DEPRIVE THE STUDENTS OF EDUCATIONAL RESOURCES

A. Student-on-Student Harassment Draws a More Exacting Standard of Proof

Student-on-student sex-based harassment is always inappropriate, but it is not always so "severe, pervasive, and objectively offensive" that it blocks the victim's access to school resources. *See, e.g.*, *Hill v. Cundiff*, 797 F.3d 948, 968 (11th Cir. 2015) (citing *Davis*, 526 U.S. at 652); *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1288 (11th Cir. 2003). For example, name-calling and homophobic slurs are, alone, insufficient under Title IX.[21] The harassment must have "a 'concrete,

[21] *See, e.g.*, *Doe v. Galster*, 768 F.3d 611, 618 (7th Cir. 2014) ("Federal law does not protect students from commonplace schoolyard altercations, including name-calling, teasing, and minor physical scuffles."); *Conner*, 2013 WL 3984336, at *5 (plaintiff was called names, including "faggot," yet, "middle school boys are not held to the same societal standards as adults, and name-calling alone—even when it targets differences in gender—will not support a Title IX claim."); *Preston v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 239, 243 (W.D.N.Y. 2012)

negative effect' on the victims' education." *Fennell*, 804 F.3d at 409 (quoting *Davis*, 526 U.S. at 654).

B. The Harassment Here was Not Sufficiently Severe, Pervasive, and Objectively Offensive for Title IX

Here, the students do not meet Title IX's exacting standard.

Although Ethan ultimately transferred to another school, he rejected any suggestion that he lacked (1) "equal access to the school's activities and functions" (3 App. 634:11–16), (2) "the same access as everyone else to [the school's] resources" (3 App. 634:17–25), or (3) "access to all the same educational opportunities that were available to the other students," (3 App. 635:1–636:2). Indeed, Ethan confirmed that C. and D. did not keep him from participating in any school activities or classes. (3 App. 647:3–24.) Notwithstanding the bullying, Ethan received A's in band class. (9 App. 2240.)

Similarly, Nolan did not show how the slurs that were shared with school staff in this case were more severe or pervasive than those

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(dismissing Title IX claim where approximately half the students in plaintiff's class "constant[ly]" insulted him with homophobic slurs such as "homo," "faggot," and "bitch," and asked questions such as "whether he would perform oral sex on another male student" or let a different student sodomize him).

deemed insufficient in other cases. *See supra* n.21. Likewise, Nolan testified that (1) his interactions with C. and D. never kept him from participating in any classes he wanted to participate in (3 App. 534:21–25), (2) he always read above his grade level (3 App. 532:13–19), (3) he never had problems expressing himself in writing (3 App. 532:20–24), (4) he always did math at his grade level (3 App. 532:25–533:7), and (5) he participated in about the same number of school activities while at Greenspun as he did later (3 App,. 533:8–12). C.'s name-calling did not prevent Nolan from receiving A's in band. (9 App. 2241.)

PART THREE: DAMAGES AND FEES

VII.

THE DAMAGES AWARD IS UNSUPPORTED[22]

The district court lacked a basis for its award of damages. It assumed, contrary to the record, that the students needed to be compen-

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[22] **Standard of Review:** The district court's award of damages is reviewed for abuse of discretion, *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000), but an improper extrapolation of damages gets no deference, *Cent. Bit Supply, Inc. v. Waldrop Drilling & Pump, Inc.*, 102 Nev. 139, 142, 717, P.2d 35, 37 (1986).

sated for their election to attend tuition-charging private schools when the bullying had already been remedied at a tuition-free school. The district court also improperly relied on an extra-record settlement agreement whose relevance CCSD did not have an opportunity to test before the district court.

A. Ethan and Nolan Did Not Prove Damages based on Private-School Tuition

1. The District Court Rewarded Plaintiffs for Aggravating, Instead of Mitigating, their Damages

Plaintiffs seeking damages under § 1983, Title IX, and other federal civil-rights laws have a duty to mitigate their damages. *Smith v. Rowe*, 761 F.2d 360, 366 (7th Cir. 1985) (collecting cases); *Nelson v. Univ. of Me. Sys.*, 944 F. Supp. 44, 50 (D. Me. 1996) (applying the duty in Title IX).

Here, plaintiffs needlessly incurred tuition expenses, and the district court improperly rewarded them. On September 22, 2011, Assistant Principal DePiazza offered to transfer Nolan to another CCSD school, but Nolan's mother refused. (*See* 5 App. 1222:11–14.) The students' initial transfer to EKA, a state-funded, tuition-free charter school, cost them nothing. (5 App. 1235:2–1236:5.) That transfer une-

quivocally ended the bullying, and the students excelled there, both academically and in extra-curricular activities. (2 App. 493:9–17, 3 App. 532:3–534:25; 3 App. 570:5–18, 3 App. 631:3–632:20, 3 App. 645:25–647:24.) As plaintiffs admit, their later decision to switch to a private, tuition-charging, religious school (Lake Mead Christian Academy) was a convenience unrelated to harassment at Greenspun. (4 App. 826:23–827:15, 829:3–14, 885:21–887:25 (wanting to follow a counselor and put all the students in one school); 3 App. 531:10–12; 5 App. 1235:20–21 (following Ethan).)

Because the students demonstrated that they could thrive in a tuition-free institution, awarding each boy $50,000 for their "out of pocket expenses for schooling . . . outside of CCSD"—$10,000 a year starting in eighth grade (8 App. 1972:3–7)—was an abuse of discretion.

2. Nolan Did Not Pay Tuition in Eighth Grade

The district court also committed clear error in awarding Nolan $10,000 for tuition in eighth grade, when he was still attending the tuition-free EKA. (*See* 3 App. 531:10–12; 5 App. 1235:20–21.)

3. Plaintiffs Offered Only a "Guess" of their Tuition Expenses

"[A] party seeking damages has the burden of providing the court

with an evidentiary basis upon which it may properly determine the amount of damages." *Frantz*, 116 Nev. at 469, 999 P.2d at 360.

Here, even if the tuition for private religious schools were compensable in theory, plaintiffs did not establish it procedurally. Mrs. Hairr revealed for the first time during trial that Nolan moved from Lake Mead (3 App. 531:1–23) to another tuition-charging religious school (5 App. 1215:22–23); Nolan never supplemented his discovery responses to disclose this expense. *Contra* NRCP 26(e). And even at trial, the mothers could only "guess"—that is, speculate—what tuition cost. (4 App. 891:15–892:7; A5 App. 1217:6–14).

They did not plead, argue, or give the district court a method for calculating these damages. That is not an evidentiary basis for the district court to award $10,000 a year.

B. The District Court Inappropriately Based its Award on Information Outside the Record—a Settlement in a Different Case

1. CCSD Had No Opportunity to Test Henkle

"Any deliberations which are based upon a private investigation or upon private knowledge of the trial judge, untested by cross-examination or the rules of evidence, constitute a denial of due process

of law." *People v. Nelson*, 317 N.E.2d 31, 34 (Ill. 1974); *see Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1138 (7th Cir. 1988) ("[I]t is unfair and irrational for the trier of fact to rely on evidence outside the record.").

Here, the district court improperly based its damages award on a $451,000 settlement allegedly reached in *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001), although the settlement was not disclosed in the published decision or in discovery or discussed at trial. (8 App. 1972:8–19.) Instead, that extra-record settlement drove the district court's deliberation without any notice to CCSD or testing through cross-examination.

2. The Settlement in Henkle *Reflects its More Egregious Facts*

Had CCSD been given the opportunity, it would have shown that several distinguishing factors likely drove up *Henkle*'s settlement value. Derek Henkle suffered harassment for years (not a single semester), at three different schools within the district (not one), by many different students (not one or two). Most important, Derek's classmates went far beyond name-calling—or even pencil-jabbing. They lassoed Derek around the neck and threatened to drag him behind a truck, and the as-

sistant vice principal just laughed. 150 F. Supp. 2d at 1069. Police looked on as Derek endured gay epithets and a punch to the face; they refused to arrest the attacker. *Id.* at 1070. That case, unlike this one, involved a claim for punitive damages.

Settlements are rarely a reliable guide for computing damages. *See Liberte Capital Grp., LLC v. Capwill*, 248 Fed. Appx. 650, 674 (6th Cir. 2007); *Vardon Golf Co. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 651 (N.D. Ill. 1994). Here, the comparison to *Henkle* merely demonstrates the excessiveness of the award.

C. The Award was Arbitrary and Capricious

Different injuries call for different damages. In *Central Bit Supply, Inc.*, this Court reversed a district court that used payment on one drilling job to determine what was owed for a second, different job. 102 Nev. at 142, 717 P.2d at 37.

Here, Ethan and Nolan's experiences with bullying were different—not only in how severe and long they were mistreated, but in how school staff responded. The district court disregarded those differences and awarded both students $200,000. Using an arbitrary amount rather than tailoring the damages to the individual was an abuse of dis-

cretion.

VIII.

THE FEE AWARD IS EXCESSIVE

The $470,418.75 fee award, $70,000 more than the compensatory damages, is excessive and constitutes an abuse of discretion.

A. Plaintiffs' Limited Success Called for a Much Smaller Award

"The proper approach to calculating attorney fees under § 1988 is . . . [to] first calculat[e] the lodestar amount, then adjust[] for other considerations, such as extent of a plaintiff's partial success." *Gregory v. Cnty. of Sacramento*, 168 F. App'x 189, 191 (9th Cir. 2006) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)). A "fully compensatory fee" is appropriate only where "a plaintiff obtained excellent results." *Hensley*, 461 U.S. at 435.

Here, the district court reduced plaintiffs' fee request of $709,131.25 to an award of $470,418.75, thus recognizing plaintiffs did not obtain an "excellent" result. (9 App. 216.) However, the reduction fails to adequately consider just how limited plaintiffs' success was. Indeed, "the [United States] Supreme Court has recognized that the extent of a plaintiff's success is 'the most critical factor' in determining a

reasonable attorney's fee under 42 U.S.C. § 1988." *McAfee v. Boczar*, 738 F.3d 81, 92 (quoting *Hensley*, 461 U.S. at 436). The fee award fails to adequately consider that plaintiffs prevailed on just 2 of their 6 original claims and against only 1 of the 20 original defendants (i.e., they did not prevail in any manner against 95% of the original defendants). Further, plaintiffs did not win *any* of the declaratory, injunctive, or punitive relief they sought, nor did they prevail on their claims asserted against the Nevada Equal Rights Commission. This reflects very "limited success" and the award of $470,418.75 constitutes an abuse of discretion.

B. Counsel's Hourly Rate was Excessive

Additionally, the district court abused its discretion in awarding an hourly rate of $450 per hour. Then-contemporaneous federal cases surveying Nevada rates demonstrate that the "prevailing rate" for partners with 20-40 years of experience, like plaintiffs' counsel, range from $250-$375 per hour. *E.g., Home Gambling Network, Inc. v. Piche*, 2015 WL 1734928, at *10-11 (D. Nev. Apr. 16, 2015) (surveying Nevada cases and awarding, for example, $268 for a litigation attorney who was licensed the same year as plaintiffs' counsel Lichtenstein; and $361.71

for a specialist in complex patent and IP litigation with "30+ years" of experience); *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 2017 WL 44942, at *1 (D. Nev. Jan. 4, 2017) (surveying Nevada cases and awarding $325 for partners); *Dentino v. Moiharwin Diversified Corp.*, 2017 WL 187146, at *2 (D. Nev. Jan. 17, 2017) (surveying Nevada cases and awarding $350 for partners); *Chemeon Surface Tech., LLC v. Metalast Int'l, Inc.*, 2017 WL 2434296, at *1 (D. Nev. June 5, 2017) (surveying Nevada cases and awarding $375 for a partner). There was nothing complex or extraordinary about this case—indeed, no party sought to have the case deemed "complex" under NRCP 16.1(f). To the contrary, the case consisted of applying well-settled civil rights law to a set of disputed facts. No party retained any consulting or testifying experts. In short, plaintiffs conceded their case was "garden variety." (9 App. 2244–46.) Awarding $450 per hour for such a non-complex case was an abuse of discretion, especially in light of evidence that defense counsel charged $250 per hour.

CONCLUSION

Ethan and Nolan were bullied by their fellow sixth-graders C. and D., and it should not have happened. But that bullying was not a dan-

ger that CCSD created, nor were the taunts based on Ethan's or Nolan's perceived sexual orientation. Perhaps school staff could have devised a better response, but Ethan and Nolan actively concealed the bullying. They figured the bullies would retaliate because their hostility, after all, was personal, not sexual. That they fooled everyone, including their own parents, does not expose CCSD to the drastic penalties of federal civil-rights laws, however.

While Ethan and Nolan were subjected to some of C.'s "dizzying array of immature . . . behaviors," *Davis*, 526 U.S. at 651, neither boy was deprived a *constitutional* right, nor did the school district's response constitute an official decision not to remedy the situation. This Court should reverse the judgment.

DATED this 1st day of June, 2018.

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3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 1st day of June, 2018.

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