Case No. 83557

In the Supreme Court of Nevada

CLARK COUNTY SCHOOL DISTRICT,
Appellant,

vs.

ETHAN BRYAN; and 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 APPENDIX
VOLUME 6
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2022, I submitted the foregoing "Appellant's Appendix" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR, Plaintiffs, vs. CLARK COUNTY SCHOOL DISTRICT (CCSD Defendant .	Case No. A-14-700018-C Dept. No. XXVII **PLAINTIFFS' CLOSING ARGUMENT MEMORANDUM** Department: XXVII Trial Dates: Day1, 11/15/16; Day 2, 11/16/16; Day 3, 11/17/16; Day 4, 11/18/16; Day 5, 11/22/16

Come now Plaintiffs, by and through the undersigned attorneys, and file this Plaintiffs' Trial Brief (See Trial Transcript, Day 5 at 64).

Incorporated by reference is the Court's July 25, 2016 Order, including all Findings of Fact and Conclusions of Law.

Dated this 20th day of March 2017,

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I. Introduction

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

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

As noted in this Court's July 25, 2016 Order, "this case arises under Title IX and 42 U.S.C. § 1983, based on allegations that two students (C.L. and D.M.) verbally and physically mistreated the plaintiffs based on sex, as defined by Title IX." (Order at 2). Both claims for relief require a showing that Defendant CCSD was aware of the bullying of Ethan and Nolan by Connor (CL) and Dante (DM), and that those Greenspun Junior High School officials who were mandated to respond to reports of bullying as set forth in NRS Chapter 388, instead acted in a manner that

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evidenced deliberate indifference. A Plaintiff seeking to establish deliberate indifference needs to show that the Defendant knew of and disregarded an excessive risk to the Plaintiffs' health or safety. *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 459, 168 P.3d 1055, 1062 (2007).

Here, the evidence presented at trial leaves no doubt that school officials were aware of the offensive anti-gay, homophobic and sexually explicit name-calling that Connor and Dante subjected Ethan and Nolan to, and were also aware of the physical assaults by the bullies, including Ethan being hit on the leg several times with a sharp piece of a trombone, causing scratching of his legs, and also of Nolan being stabbed in his genital area by Connor, who used the sharpened end of a pencil to do the stabbing. The school officials were also aware that the physical assaults related to the clients and slurs about Ethan and Nolan's perceived sexual orientation, as well as gender stereotyping.

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The Title IX claim requires a showing by a preponderance of the evidence of sex discrimination, along with Defendant's deliberate indifference. The trial testimony clearly shows this is what occurred. For the Substantive Due Process claim, while a showing of deliberate indifference is required, no claim or evidence of discrimination is a necessary part of that cause of action. Here, as described below, all of the elements of violations of Title IX and of Substantive Due Process are established.

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Section II below provides an account of the relevant events in this case, as set forth at trial. Section III recounts some of the most relevant testimony and evidence supporting the narrative that establishes both the Title IX and 42 USC 1983 Substantive Due Process violations.

II. Timeline of Pertinent Facts

In late August 2011, two friends, Ethan Bryan and Nolan Hairr begin sixth grade at Greenspun Jr. High School.

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Both Ethan and Nolan enrolled in Mr. Beasley's third period band class in the trombone section.

Almost from the beginning of the school year, Ethan and Nolan began to be bullied by two other trombone students, Connor and Dante.

In sixth grade, at age 11, Nolan was small for his age with long blonde hair. Connor and Dante taunted him with names like gay and faggot, and called him a girl. Connor also touched, pulled, ran his fingers through Nolan's hair and blew in Nolan's face.

Nolan, following what he believed was proper procedure, went to the Dean's office and filled out a complaint report. He was, however, too embarrassed to mention the homophobic and sexual content of the slurs that he was enduring.

Nolan was subsequently called into the Dean's office and met with Dean Winn. He did not feel that she was either sympathetic or even interested, and therefore was reluctant to discuss the homophobic sexually-oriented nature of the bullying.

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Within a day or two of Nolan's meeting with the Dean, on or about September 13, 2011, Connor, who was sitting next to Nolan in band class, reached over and stabbed Nolan in the groin with the sharpened end of the pencil. Connor said he wanted to see if Nolan was a girl, and also referred to Nolan as a tattletale.

Nolan took the tattletale reference as a sign that the stabbing was, at least in part, retaliation for Nolan complaining about the bullying.

Because of this fear of retaliation, Nolan decided not to tell any adults about any further bullying directed at him, and instead, to endure the torment in silence.

A day or two after the stabbing incident, while Nolan was at Ethan's house, Ethan's mother, Mary Bryan overheard Ethan and Nolan talking about some problem taking place at school.

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After Nolan had gone home, Mary Bryan confronted her son and questioned him concerning what Ethan and Nolan had been discussing.

Ethan described to his mother the incident where Connor stabbed Nolan in the groin with a pencil, and about the overall bullying occurring in Mr. Beasley's band class.

In response, Mary Bryan decided to contact the school officials to report the bullying in general and the stabbing in particular.

On September 15, 2011, she attempted to telephone Greenspun Principal Warren P. McKay. However, she could not reach him by telephone and was only able to talk to a junior high student volunteer. Mary did not want to leave such a sensitive message with a junior high student and was not transferred to Principal McKay's voicemail.

Mary then decided she would email the Principal and got an email address for him from the student volunteer.

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On September 15, 2011, Mary Bryan sent an email complaining about the bullying and specifically about the stabbing to three people: 1) Principal Warren McKay; 2) band teacher Robert Beasley; and 3) school counselor John Halpin.

Both Mr. Beasley and Mr. Halpin acknowledged receiving the September 15, 2011 email from Mary Bryan. Principal McKay said he did not receive it because the email address for him (which Mary Bryan obtained from his own office) was incorrect.

Both Mr. Beasley and Mr. Halpin were, in 2011, mandatory reporters who were required to report any information concerning bullying, to either the Principal or one of his designees, pursuant to NRS 3.88.1351 (1). In 2011, Principal McKay's designees at Greenspun were Vice Principal Leonard DePiazza and Dean Cheryl Winn.

Neither Mr. Beasley nor Mr. Halpin fulfilled their statutory duty to report Mary Bryan's September 15, 2011 email concerning bullying, explaining that because they saw Principal

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McKay's name in the address line, they assumed, without verifying, that Dr. McKay, and through him Vice Principal DePiazza and Dean Winn were aware of the situation.

These assumptions by Mr. Beasley and Mr. Halpin were incorrect. Moreover, by relying on their assumptions, rather than adhering to the statutory requirement to report any information concerning bullying they received, they both violated the explicit requirements of NRS 388.1351(1).

In response to the September 15, 2011 email, Mr. Beasley changed the seating arrangements in the trombone section of his class. While before, Nolan had been sitting next to Connor, after the change, Nolan set directly in front of Connor.

While Mr. Beasley attempted to keep an eye on both bullies and the bullied students, he admitted that he was unable to constantly watch them and still teach his class.

Mr. Beasley said that he made the decisions concerning the seating arrangements on his own without consultation with anyone else. This testimony conflicted with that of Dean Winn, who stated that she was involved in the decision.

The bullying continued. For Ethan Bryan, at the beginning of the school year, most of the taunts at him by Conner and Dante had to do with his size. He was large for his age and overweight.

After the incident where Connor stabbed Ethan's friend Nolan with a pencil, the bullying of Ethan began to change. It not only escalated but also shifted from being mostly about his size and weight to also involve homophobic slurs and vile and graphic innuendos concerning sexual relations between Ethan and Nolan.

Like his friend Nolan, Ethan also chose not to report the bullying that he was enduring for fear of retaliation, and lack of any real interest on the part of Greenspun school officials.

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Mary Bryan, naïvely believing that the school would contact Nolan's parents after Mary sent them the September 15, 2011 email about the stabbing of Nolan, did not directly inform Nolan's parents herself.

On or about September 21, 2011, while Mary Bryan and Nolan's mother Aimee Hairr were at a birthday party for another of Mary's children, Mary casually asked Aimee about the school's response to the September 15, 2011 email.

Aimee responded that she had received no communication from the school, and that she had no knowledge or information about the bullying of her son occurring in Mr. Beasley's band class.

After talking to Mary, Nolan's parents then confronted him about the bullying. Nolan verified the veracity of the substance of the contents of the September 15, 2011 email. He also admitted to the stabbing incident.

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On September 22, 2011, Nolan's parents made several various phone calls in an attempt to contact the school regarding the September 15, 2011 email about the stabbing of their son. They left several messages for different school officials. Finally, Aimee Hairr was able to reach Vice Principal DePiazza, and had a phone conversation with him in which she described the September 15, 2011 email, and the stabbing, including the comment by Connor that he did it to see if Nolan was a girl.

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Mr. DePiazza told Aimee Hairr that there were a few options for Nolan, all involving Nolan either transferring out of band class into another class at Greenspun, or transferring out of Greenspun to a different school entirely.

Aimee found these so-called solutions to be both inadequate and inappropriate because if anyone were to be moved, it should be the perpetrator of the bullying who assaulted her son not the victim, Nolan.

Vice Principal DePiazza denied that he ever had a phone conversation with Aimee Hairr. According to his version of events, some time in either September or October 2011 (he could not remember when) there was a meeting in his office attended by Aimee Hairr, Dean Cheryl Winn and possibly Nolan Hairr. Mr. DePiazza claimed that while there was some generalized discussion about the "situation" in the band room, nothing specific about the stabbing or the September 15, 2011 email was ever mentioned. Neither Aimee Hairr, Nolan Hairr nor Cheryl Winn corroborate Mr. DePiazza's version of events about this supposed meeting, or even that it took place.

On or about September 23, 2011, Mrs. Hairr received a return phone call from counselor John Halpin. Aimee knew Mr. Halpin because she was his dental hygienist. Mr. Halpin told her he had received this September 15, 2011 email and was aware of its contents. He said he had previously spoken to Nolan and would do so again to make sure that Nolan made a formal complaint about the stabbing to the Dean. He said he believed that Dean Winn knew about it, but wanted to make sure.

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Later that day, Nolan met with Mr. Halpin. Both agreed that the counselor wanted Nolan to go to the Dean's office to fill out an incident report. Mr. Halpin said that he accompanied Nolan to Ms. Winn's office, while Nolan said he was sent there and went by himself. Mr. Halpin also said that since the Dean was not in the office, he left a message for Dean Winn with Harriet Clark, her secretary, recounting the stabbing incident and the bullying. He gave that message to the Dean's secretary with instructions to relay that message to Dean Winn. The Dean did not report receiving Mr Halpin's message from her secretary.

Nolan, still trying to "tough it out" and not make more trouble for himself by complaining and thereby risking further retaliation, left a bland and rather innocuous version of what he was enduring in band class. He did not mention the stabbing nor the homophobic, sexually-oriented slurs.

Dean Winn said she could not remember whether she met with Nolan on or after September 22, 2011. Nolan said that no such meeting took place on or after September 22, 2011. Aimee Hairr said she never had a meeting with Dean Winn.

Dean Winn said she did not learn of the stabbing incident until the following year, February 2012.

On or about October 19, 2011, Mary Bryan noticed that Ethan had come home from school with scratches on his leg. When she confronted him about the scratches, he told her that at the end of band class, while Mr. Beasley was out of the room, one of the bullies who was behind Ethan, removed a rubber stopper out of a piece of his trombone and started hitting Ethan in the legs with the remaining sharp piece of the instrument.

Upon questioning by his parents, Ethan also disclosed that Connor and Dante continued to make lewd sexual comments including calling both Ethan and Nolan gay, faggots and other similar names, and also talked about Ethan and Nolan jerking each other off and otherwise engaging in gay sex with each other.

Ethan's parents, enraged that this was going on -- particularly after the September 15, 2011 email -- decided to confront school officials.

On October 19, 2011 Mary Bryant sent a second email addressed to Principal McKay, Mr. Beasley, and Mr. Halpin describing the continuing bullying and also the hitting scratching of Ethan's leg.

Mr. and Mrs. Bryan met with Dean Winn at the Dean's office on October 19, 2011. They described the bullying endured by both Ethan and Nolan, specifically mentioning the physical assaults as well as the vile homophobic slurs that both boys were subjected to by Connor and Dante. The Bryans made it clear that they would not tolerate a continuation of this bullying.

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Dean Winn denied the occurrence of this meeting. She also denied that she knew anything about the, emails, the physical assaults and the homophobic slurs in October 2011. She said she only learned of the October 19, 2011 e-mail the following year, in February 2012.

Mr. Halpin, who was a recipient of the October 19, 2011 email said he forwarded that email to Dean Winn to make sure she was aware of the situation. Dean Winn denied having received the October 19, 2011 email from Mr. Halpin.

Also on October 19, 2011, Mr. Halpin attended a weekly administrators meeting. Principal McKay and Vice Principal DePiazza were at that meeting. Dean Winn, who was a regular participant in those weekly meetings did not attend that day.

Mr. Halpin said that he reported on the bullying that was occurring in Mr. Beasley's band class in considerable detail. He also stated that everyone at that meeting knew about the two emails that had been sent by Mary Bryan. He also made it clear that the two assaults were perpetrated by the same two bullies against the same two bullied students. Mr. Halpin specifically recalled Principal McKay telling Vice Principal DePiazza to take care of the matter.

Dr. McKay stated his recollections from the October 19, 2011 administrators meeting differently. McKay recalled Mr. Halpin bringing up the subject of bullying in Mr. Beasley's class, but without mentioning many specifics. For reasons he did not disclose, McKay stated that he really was not interested in the details of such matters and left it to his subordinates to address the issue.

He stated that he told Mr. DePiazza and Mr. Halpin to handle the situation. McKay also stated that he subsequently did not ask the Vice Principal about how the investigation was going or what DePiazza had found out, until February 2012.

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Principal McKay only took action in February 2012 because it was then that he was ordered by his supervisor at the district level and the Assistant Superintendent to investigate the bullying of Ethan and Nolan.

Vice Principal DePiazza stated a vague memory of the October 19, 2011 administrative meeting. He recalled that there may have been some discussion about bullying but didn't really remember much. His position was that he definitely did not remember being told by Dr. McKay to conduct an investigation into the bullying reports on October 19, 2011.

Principal McKay stated that in 2011 while he never asked his Vice Principal about the bullying investigation, he did, at some point, have a casual discussion with Dean Winn about the matter. He asked her how the investigation was going. Dean Winn replied that she was having trouble getting corroborating statements from other students.

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Dean Winn's testimony contradicted the Principal's statements by claiming that she did not undertake any investigation of the bullying because she was specifically told by Dr. McKay that it was all being handled by Vice Principal DePiazza. Dr. McKay testified that Dean Winn told him she was investigating by trying to get statements from other students.

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Although the school officials all pointed fingers at each other, the one thing that they all agreed upon is that contrary to Nevada statutes, no investigation of the reports of bullying, described in the September 15, 2011, and October 19, 2011 emails from Mary Bryan and the September 22, 2011 phone conversation between Aimee Hairr and Vice Principal DePiazza, the September 23, 2011 phone conversation between Aimee Hairr and Mr. Halpin, and the October 19, 2011 meeting between Mr. and Mrs. Bryan and Dean Winn, ever occurred in 2011.

Throughout the rest of 2011, the bullying of Ethan and Nolan by Connor and Dante continued out of the sight of Mr. Beasley.

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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.

When Ethan and Nolan came back to Greenspun for the spring semester, in January 2012, their resolve began to waver. Each boy tried to avoid band class or even school altogether. Ethan feigned illness, and even tried to make himself sick by eating cardboard. Nolan would hang out in the library or in the halls. By the middle of January, both boys had essentially stopped going to school in order to avoid further bullying.

In January 2012, Ethan Bryan was prevented from attempting to commit suicide by drinking household chemicals, because of a fortuitous intervention from his mother. Ethan's parents refused to send him back to Greenspun after that.

On or around January 21, 2012 Nolan had, what his mother described as something close to a breakdown because of the bullying that he and others were enduring at Greenspun. Mrs. Hairr decided to pull Nolan out of the school at that time. She also made a report to the police.

By early February 2012, both Ethan and Nolan had been removed from Greenspun Jr. High School.

Subsequent to the removal of Ethan and Nolan from Greenspun, and also subsequent to the filing of the police report, Principal McKay, on or about February 7, 2012, was contacted by officials from the school district, specifically his direct supervisor Andre Long and the Assistant Superintendent Jolene Wallace. He was ordered by Ms. Wallace to conduct an investigation into the bullying of Ethan Bryan and Nolan Hairr.

Because he was ordered by his superiors to investigate, Principal McKay directed Vice Principal DePiazza to conduct a "second" investigation.

In fact, this was the only investigation done at Greenspun into the bullying of Ethan and Nolan. At trial, no one from either the school or the school district testified either to seeing any

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results of any earlier investigation, nor provided any evidence obtained from any earlier investigation. Contrary to the responsibilities under Nevada law, no investigation ever took place while Ethan and Nolan were attending Greenspun Junior High School.

III. Trial Testimony and Evidence Supporting Plaintiffs' Claims

Ethan Bryan and Nolan Hairr started sixth grade at Greenspun Junior High School in late August 2011. (Nolan Hairr, Day 1, at 33). Both Ethan and Nolan were in Mr. Beasley's band class, in the trombone section. (Ethan Bryan, Day 2 at 116-117)

Almost from the beginning of the semester, Ethan and Nolan began being bullied by two other sixth-grade trombone students, Conner and Dante. (Ethan Bryan, Day 1 at 119) (Nolan Hairr, Day 1 at 39) Nolan testified that at first, Nolan bore the brunt of the bullying with Conner and Dante calling him names such as "Faggot, fucking fat faggot, fucking faggot, gay, gay boyfriend, cunt." (*Id.)* This occurred almost every day. (*Id.*)

> Q (By Plaintiffs' Attorney, John Scott) And what was it that happened midway through the first week that you thought was unusual?
>
> A I had started to be called various names by certain students in that class.
>
> Q Which students? Use first names only.
>
> A Connor and Dante.
>
> Q And was this in band class?
>
> A Yes.
>
> Q And what instrument section were they in?
>
> A Also the trombone section.
>
> Q And what kind of names were they calling you?
>
> A Faggot, fucking fat faggot, fucking faggot, gay, gay boyfriend, cunt.
>
> Q Things like that?
>
> A Yes.
>
> Q And how frequently were you called these names by them?
>
> A Every day.

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(*Id.*)

Conner would also physically assault Nolan by pulling Nolan's hair running his fingers through it, while calling Nolan names like "fag, gay and homo." (*Id.* at 41)

In response, 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. (*Id.* at 43-44) A day or two later, Nolan met with Dean Winn, and told her about being bullied by Conner and Dante. He did not recount her the homophobic slurs. (*Id.* at 44-45)

A. Stabbing of Nolan by Conner -- September 15, 2011 email

A day or two after the meeting with the Dean, on September 13, 2011, Connor stabbed Nolan in the genital area with the sharpened end of a pencil while they were in band class. (*Id.* at 46-47) Connor said he stabbed Nolan to see if he was a boy or a girl. (*Id.* at 47) Nolan was a small, slight child with long blonde hair. (See photographs, Plaintiffs' Trial Exhibit No. 1) see (Cheryl Winn, Day 4 at 119)

> Q (By Mr. Scott) Was he tall, short, skinny, fat, short hair, long hair?
>
> A I know he had beautiful blonde hair. It was a little bit longer, like right here [indicating].
>
> Q Okay. Down to his shoulders?
>
> A Yeah, about.

(Cheryl Winn, Day 4 at 119) see also (Aimee Hairr, Day 5 at 6)

> Q And at that time, what was Nolan's relative size in relation to other sixth graders?
>
> A He was -- he was a small boy. He was a small boy. He had longer hair. He was skinny, was very tiny.

(Aimee Hairr, Day 5 at 6)

Before Connor stabbed Nolan, Connor called Nolan a tattletale. (Nolan Hairr, Day 1, p. 48)

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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 Connor. (*Id.* at 48-49)

A day or so later, Nolan did discuss the stabbing incident with Ethan, while at Ethan's house after school. (*Id.* at 49) After Nolan had gone home, Mary confronted her son about what she had overheard. (Mary Bryan, Day 2 at 150-151) Ethan then told her about the bullying that the two boys had endured in Mr. Beasley's band class and also about CL stabbing Nolan in the genitals with a pencil. (*Id.* at 151)

Q (By Mr. Scott) Now, at some point in -- early In that school year,

(Mary Bryan, Day 2 at 150)

> Q Did you become aware of an incident that you reported to the school?
> A I did. I was driving -- it was my turn to take the kids home that day, and I overheard Ethan and Nolan having a conversation about somebody doing something creepy. Ethan used the word "creepy." It wasn't a word that I thought was just some generic -- it was, I don't know, something that made me want to inquire. So by the time we dropped the other kids off that I was driving home, it was just Ethan and Nolan, and Nolan would usually walk home from my house, and that was our last stop. After Nolan went home, I asked Ethan what he was referring to. And he was apprehensive. He didn't want to say. He was kind of like just embarrassed, he seemed, about what was happening. And then he finally said that kids were picking on Nolan. He didn't mention himself too much. He was more concerned about Nolan. And then he mentioned that Nolan had been stabbed and that the boys that were -- had hurt Nolan, it had been an ongoing thing and this wasn't the first time they did this to Nolan, that they did -- that they were picking on him, and that that particular day Nolan got stabbed at school in his genitals with a pencil.

(Mary Bryan, Day 2 at 151)

Mary decided to call the school and talk to the Principal. (*Id.* at 152) she was unable to reach the Principal and could only talk to student volunteers. (*Id.*) She thought the matter was "too sensitive and too serious of an issue to be telling a little kid what had happened." (*Id.*) Mary was not permitted to leave a message on the Principal's voicemail. (*Id.*) The student then gave her Principal McKay's email address. However, the address she was given for him was incorrect. (*Id.*)

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Mary then, on September 15, 2011, sent the following email to school officials describing what was happening. (*Id.* at 153-154) (See Plaintiffs' Trial Exhibit No. 4)

> Dear Mr. Beasley,
>
> My name is Mary Bryan, the mother of Ethan Bryan. It has been brought to my attention that there are two boys who are in your third period band class who have been harassing and bullying fellow students. My son told me that his friend Nolan Hairr has been bullied in class and it is unacceptable. The boys names' are _____ and _____. They pull his hair everyday, have been elbowing him and have gone so far as to stab him in his genitals with a pencil This cannot be tolerated. I have given my son permission to defend himself and his best friend against these bullies, even if it means physically moving these boys away from them in order to feel safe. Please move _____ and _____ to a different area so that our children can learn properly and have constructive experiences and do not have to deal with these two boys. They are good kids who do not have to put up with this for a minute longer Nolan is afraid to notify an adult for fear of retaliation. I trust that you will take this matter as seriously as I have. '
> Thank you.

(Plaintiffs' Trial Exhibit No. 4, in part)

The September 15, 2011 email from Mary Bryan was addressed to Principal McKay, band teacher, Mr. Beasley, and Counselor Halpin. (Mary Bryan, Day 2 at 154) Both Mr. Beasley and Mr. Halpin acknowledged receiving the September 15, 2011 email. (Robert Beasley, Day 4 at 20) (John Halpin, Day 3 at 115) Principal McKay denied receiving the email because of the incorrect email address, even though that incorrect address had been provided to Mary Bryan by his own office staff. (Mary Bryan, Day 2 at 152)

As seen above, it described the incident that had occurred in Mr. Beasley's band class, where another student in the trombone section, Conner, stabbed Nolan Hairr in the genitals using the sharp end of a pencil to do the stabbing. (Nolan Hairr, Day 1 at 46-47) The bullying of Nolan in band class had begun shortly after the fall 2011 semester commenced. The verbal bullying was sexual and homophobic in nature as was the stabbing itself. Nolan testified that Conner said he did it to see if Nolan, who was small for his age, and had long blonde hair, was a girl. (Nolan Hairr, Day 1 at 33). It was also retaliatory in that Conner also referred to Nolan as a tattletale during the incident. (*Id.* at 48) Nolan had reported being bullied to Dean Winn a few days before. (*Id.)* Nolan

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testified that he was embarrassed to disclose the full sexual nature of the names he was being called, and also that he was put off by the Dean's demeanor and that she seemed not to be interested. (*Id.* at 45-46) Nolan never met with Dean Winn again. (*Id.* at 46)

Ethan Bryan was present when the stabbing occurred and caught part of it out of the corner of his eye. (Ethan Bryan, Day 1 at 121) While Ethan had been bullied by Connor and Dante, their comments had started off being directed at his size and weight, after the stabbing incident, the bullies also began directing their homophobic slurs against Ethan as well. (*Id.* at 126) Conner and Dante continuously taunted Ethan and Nolan with homophobic slurs and innuendo, and specifically made statements concerning homosexual relations and explicit sexual acts between Ethan and Nolan in vile and graphic terms. (*Id.)*

> Q (By Mr. Scott) Now, at some point after the stabbing incident of Nolan, going forward from there, did the behavior of Connor and Dante toward you, did that change over the next few weeks?
>
> A Yes.
>
> Q And how did it change?
>
> A Just it seemed like a lot meaner, I guess.
>
> Q Can you be -- well, let's talk about names that you were called, did that change?
>
> A Yes.
>
> Q And how did that change?
>
> A It went from just being like about my height and weight to like me being gay with Nolan.
>
> Q I'm sorry?
>
> A To me being gay with Nolan.
>
> Q And what types of things did they say in that regard?
>
> A Like they called us faggots and stuff like that, and they asked us if we jerked off together, things like that.

(*Id.* at 126)

> Q Well, when you say things like that, I'm not sure if anybody in this room, most importantly the judge, knows what you mean by that. So can you be a little bit more specific?

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A I don't know.

Q Okay. But they asked you about jerking off together?

A Yes.

(Id. at 127)

Because of embarrassment and fear of retaliation neither Ethan nor Nolan voluntarily told their parents about the bullying they were enduring. However, both Mr. Beasley and Mr. Halpin testified that they had, in fact, received Mary Bryan's September 15, 2011 email. (John Halpin, Day 3 at 115) (Robert Beasley, Day 4 at 20). Under Nevada law in 2011, they were mandatory reporters and had a duty to report the receipt of this information to the Principal, or his designee, see NRS 388.1351 (1).

> **NRS 388.1351 -- Staff member required to report violation principal; time period for initiation and completion of investigation; authorization for parent to appeal disciplinary decision.**
>
> 1. A teacher or other staff member who witnesses a violation of NRS 388.135 or receives information that a violation of NRS 388.135 has occurred shall verbally report the violation to the principal or his designee on the day on which the teacher or other staff member witnessed the violation or received information regarding the occurrence of the violation.

(Plaintiffs' Trial Exhibit No. 2, in part)

NRS 388.135 prohibited bullying in 2011.

> **NRS 388.135 -- Bullying, cyber-bullying, harassment and intimidation prohibited.**
>
> A member of the Board of Trustees of the school district, any employee of the board of trustees, including, without limitation, administrator, principal, teacher or other staff member, or any pupil shall not engage in bullying, cyber – bullying, harassment or intimidation on the premises of any public school, at an activity sponsored by a public school or on any school bus.

(Plaintiffs' Trial Exhibit No. 2, in part)

Both Mr. Halpin and Mr. Beasely acknowledged being mandatory reporters. (John Halpin, Day 3 at 114) (Robert Beasley, Day 3, at 23) Although the statute's language is mandatory, both Mr. Beasley and Mr. Halpin testified that they did not bother to fulfill their obligation as mandatory reporters because they both **"assumed"** that Principal McKay already knew about the

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situation. (John Halpin, Day 3 at 117) (Robert Beasley, Day 4, at 23-24). Neither did anything to verify that their assumptions were correct. Both Mr. Halpin and Mr. Beasley, by taking no affirmative action as set forth by statute, clearly violated the law.

Mr. Beasley testified that he was aware that bullied students often do not report their ordeals for a variety of reasons.

> Q (By Mr. Scott) And were you concerned that Nolan, when this happened, that Nolan didn't report it to you?
>
> A Yes.
>
> Q Why?
>
> A Because as the teacher, I would hope my students could come to me with problems like this.
>
> Q And you're aware, given your experience as a teacher, that often students who are bullied don't report it to you, correct?
>
> A Yes.
>
> Q And based on your training and experience, you know there are a number of reasons why oftentimes children who are victims of bullying do not report it to the teacher, correct?
>
> A That's my experience.

(Robert Beasley, Day 4 at 22)

> Q And based on your training and experience, you know that some students may be afraid of some kind of retaliation for being identified as a snitch or a tattletale?
>
> A Yes.
>
> Q And some students just become withdrawn and don't want to complain to anyone?
>
> A That's my understanding.
>
> Q And that's your experience too?
>
> A Yes.
>
> Q So the fact that a student who's being bullied doesn't come to you or another adult in the school, that doesn't surprise you; in fact, that's not an unusual phenomenon, correct?
>
> A Correct.

(Robert Beasley, Day 4 at 23)

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Mr. Beasley's solution after receiving the September 15, 2011 email from Mary Bryan about the stabbing and about the general bullying occurring in his class in the trombone section, was to move Nolan, who was sitting next to Connor when Connor stabbed him in the genitals with a pencil, to bring Nolan in front of Connor. (*Id.* at 26) He admitted, however, that regardless of the seating arrangements, he couldn't monitor the interactions between Connor and Nolan all of the time (*Id.* at 27-28) Mr. Beasley testified that he made the changes in the seating arrangements on his own without input from Dean Winn. (*Id.* at 24-25, 26). In fact, he did not even tell her he was changing the seating arrangement. (*Id.* at 26) He further testified that he did not discuss the bullying with her, or anyone else at the school, at all, prior to the October 19, 2011 email. (*Id.* at 28-29)

Nobody at the school ever contacted Nolan Hairr's parents about the September 15, 2011 email, or its substance, or about Nolan being bullied in general. Nolan's mother Aimee Hairr first learned of the bullying and stabbing of her son on approximately September 21, 2011 in a casual conversation with Mary Bryan at a birthday party for another child. (Aimee Hairr, Day 5 at 6-7)

> Q All right. And at some point in September of 2011, when he was in sixth grade, did you get any information regarding anything unusual happening to Nolan at Greenspun

(Aimee Hairr, Day 5 at 6)

> Junior High?
>
> A I was at a birthday party for one of my sons on the 21st of September, and during the party Mary was --
>
> Q Mary who?
>
> A Mary Bryan.
>
> Q Okay?
>
> A She was there with her children, and she approached me and asked if I had heard from the school.
>
> Q Okay. And what did you say?

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A I was a little surprised and I was wondering why, and she said that she had sent an email to the school and she had pulled it up on her phone. She let me briefly – I briefly looked at it and was reading it, and she stated that Nolan had his -- had been stabbed In his penis in school.

(Aimee Hairr, Day 5 at 7)

Mary Bryan had not immediately informed Mrs. Hairr when she first discovered the bullying, after Ethan told her about it, because Mary assumed that once she reported the stabbing incident to the school, that school personnel would both handle the situation, and also inform Nolan's parents. (Mary Bryan, Day 2 at 155) These are the actions that are required of school officials by the relevant sections of the NRS Chapter 388.

On September 22, 2011, once Aimee Hairr learned what her son was suffering through, she attempted to contact school officials; and finally Vice Principal DePiaza spoke with her. (*Id.* at 11)

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Q (By Mr. Scott) The next day, did you do anything to contact anyone at the school, at Greenspun?

A Yes. The next day me and his father made phone calls in the morning. His father started to make phone calls in the morning, and he couldn't get through. He had left some messages. And then I started calling as well. I got to a point where I spoke with -- they were student volunteers that were answering the phone, and I told them I need to speak with somebody or I'm going to come down there and wait. And so they put me on hold for about, I don't know, five minutes, and Leonard -- Vice Principal Leonard DePiazza picked up the phone.

Q Okay. Do you recall approximately what time of day that was?

A It was in the mornlng.

Q And did you talk to Mr. DePiazza?

A I did.

Q Approximately how long did that conversation last?

A Ten minutes around.

Q You identified yourself?

A I told him I was Aimee Hairr, my son was a new student in the school sixth grader. I told him that he was in band class with Mr. Beasley and that I'm aware that another mother whose student is in the school, she made a -- she sent

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(Aimee Hairr, Day 5 at 11)

out an email, about a week prior, to everybody in the administration to let them know that my son had been stabbed in his penis. And I explained he was not only stabbed, he was stabbed, but asked if he was a little girl. And he – he didn't --

Q Did Mr. DePiazza indicate to you that he was aware of the email that was sent about a week earlier?

A He did not.

Q Did he -- did you probe to try to find out what if anything he knew about that email?

A I continued -- I asked him what he -- what he could do to protect my son. At that time I was worried that my son was in band class with another child that could potentially harm him again. He -- his responses were -- I don't recall everything detail-wise what he said, but there's certain things that he told me on the phone. He said that right now there was 1800 students and they had had two deans at the school and they were down now to one dean.

A And I again reminded him I understand, but my son was stabbed, he was assaulted in your school in his band class, and he's just trying to learn. He's a little boy. He's got long hair. My son wants to be there. He's brave. You know, he's a brave little boy, he wants to be there, but my son didn't even tell me that he was stabbed. And he was -- he was a little agitated on the phone, I could tell. He said that

(Aimee Hairr, Day 5 day at 12)

Q Mr. DePiazza?

A Yes.

Q And what do you mean by that?

A Because when I told him my son was stabbed, it was as if I was saying my son was -- had his feelings hurt. And again, I had to remind him at least two or three times during that conversation I need to -- I'd like to know what type of steps I can take to protect him. I didn't want to -- I didn't want to make matters worse for my own child at that time.

Q And did Mr. DePiazza tell you what if anything he was going to do?

A He told me that this type of situation's handled with the dean. And I explained to him I already called the dean. I had also left a message with the guidance counselor. And he -- I asked --

Q Excuse me. Had you spoken with the dean?

A Not at this time, no. He was the first person I got a hold of that morning.

Q All right. Sorry to interrupt you. Anything else that you told him at that time?

A Yes. We continued to talk. I asked if I could go into the band classroom and approach the classroom and talk to them. And he said that wasn't at the time

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something that they did. And I said, "Well, then can I meet with like a round

(Aimee Hairr, Day 5 day 13)

table meet with the principal." I told him I knew the principal personally and if he could call the parents of Connor and we could all sit down to see if it was something maybe my son did, so we could try to resolve it as quietly as possible. I knew my son was humiliated a week prior and I wanted to basically keep my son safe.

Q And what did Mr. DePiazza say in response to that suggestion?

A Mr. DePiazza said that I had choices and that there were-- he told me I had choices. He could attend the school or there were choices that I could pick a different school. To be truthfully honest, I hung up the phone in disbelief at the responses that he took.

Q Well, what were the options he told you that you had at that time?

A It is something that the dean handles.

Q Okay. So he told you the dean would handle it?

A Yes.

Q He told you, you could go to put Nolan In another school?

A He said I had a choice to choose a different school.

Q Did he tell you, you had any other options?

A No. Not that I can think of.

Q And did Mr. DePiazza indicate to you that he would

(Aimee Hairr, Day 5 day 14)

follow up with you at some point, get back to you and let you know what he or the dean did to follow up on this?

A No. I just the last thing I asked him is if he could relay a message for the principal. He did mention that the principal was out that day, if I could get a call back from the principal in regards to that, to the issue.

Q So you asked that he contact the principal and so the principal would get back to you?

A Yes.

Q Mr. McKay -- Dr. McKay?

A Dr. McKay,yes.

Q Did Dr. McKay get back to you?

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A He did not.

Q Did the dean contact you In September, late September or early October?

A No

(Aimee Hairr, Day 5 day 15)

In contrast to Aimee Hairr's specific recollections of the telephone conversation she had with Vice Principal DePiazza on September 22, 2011, Mr. DePiazza denied ever having spoken to Aimee Hairr on the phone. Instead, he had some vague recollection of an in person meeting in his office, sometime in either September or October 2011, attended by Mrs. Hairr, Dean Winn and possibly Nolan Hairr.

Q (By Mr. Scott) And do you recall that on September 22, you got a call from Nolan Hairr's mother, Aimee Hairr?

A Never received a phone call.

Q Is your testimony that you did not talk to Aimee Hairr—

A I had a physical meeting with Aimee Hairr. I did not have a phone call with Aimee Hairr.

Q Did you meet with Aimee Hairr on September 22?

A I believe I met with her in September and October, yes.

Q Okay.

A I don't remember the exact date.

Q But you recall meeting with Aimee Hairr twice, once in September --

A No, just once. Either it was in September or October. I don't recall the exact date.

Q Okay. Where did that meeting occur?

(Leonard DePiazza, Day 2 at 60)

A In my office.

Q Was anyone else present?

A I believe Ms. Winn was there. And I don't recall if her son was there or not. I don't remember.

Q And do you recall at that meeting with Aimee Hairr she was concerned about her son having been stabbed in the genitals with a pencil?

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A She was concerned about the situation in the band class.

Q And did she mention to you that of those concerns it included her son being stabbed in the groin with a pencil?

A She was concerned about the behavior of the boys in that classroom.

Q I heard you the first time. My question is, did it include her son being stabbed in the groin with a pencil?

A I don't remember, but she might have brought that up. I don't recall. That's a possibility. There was a situation in the classroom and she wanted her son removed possibly, yes.

Q So if the concerns included her son being stabbed in the groin with a pencil, that wouldn't be something that would be memorable or would stand out in your mind?

A It'd be memorable that there was a situation in the classroom Ms. Winn as the dean was taking care of.

Q All right. And why do you believe Dean Winn was

(Leonard DePiazza, Day 2, at 61)

taking care of it?

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A That's her responsibility. She's the dean. It falls under her office and her responsibilities.

Q Well, other than assuming she was taking care of it, do you have any personal knowledge of what if anything Dean Winn did to take care of the complaint about the bandroom, including Aimee Hairr's son being stabbed in the groin with a pencil?

A My understanding is she went In the classroom, spoke to Mr. Beasley. Mr. Beasley made some adjustments as he could. It is a band class and the boys played a specific instrument. It's kind of hard to put a saxophone with a clarinet. So my assumption is that he made the best of his ability within his classroom to keep the boys away from each other.

Q And did you understand that Dean Winn did an investigation?

A Yes.

Q Why do you believe she did an investigation?

A For the simple reason I had a statement from Mr. Beasley. So I'm assuming that she talked to others and got statements from them also.

Q Other than your assumptions, do you have personal knowledge that she did an investigation?

A No, I do not have personal knowledge except for the statement I received from Mr. Beasley.

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(Leonard DePiazza, Day 2, at 62)

The above testimony from Leonard DePiazza, is problematic for a number of reasons. It clearly contradicts the testimony of Aimee Hairr (cited above) that she and the Vice Principal had a phone conversation on September 22, 2011 where she specifically discussed her son Nolan being stabbed in the groin with a pencil in band class. She also denied that she had a face to face meeting with DePiazza. Dean Winn testified that at some point she met with Nolan in her office, but did not corroborate the Vice Principal's account of a meeting at his office, "sometime in September or October" attended by Aimee and possibly Nolan Hairr, along with Dean Winn.

In fact, Nolan testified that he never spoke to the Vice Principal about the bullying. (Nolan Hairr, Day 1 at 52) Moreover, it defies incredulity that Aimee Hairr would contact the school after she found out about the stabbing of Nolan would have a generalized discussion about the "situation" in the band room and neglect to mention the physical assault on her son. Moreover, the written statement by Mr. Beasley that the Vice Principal said that he relied on during the alleged meeting with Aimee and Nolan Hairr, along with Dean Winn, was not written by Mr. Beasley until he was asked to do so in February 2012. (Robert Beasley, Day 4, at 34)

Aimee Hairr testified that on or about September 23, 2011, she spoke with Mr. Halpin by phone but did not meet with him in person. (Aimee Hairr, Day 5, at 16)

On either September 22, 2011 or September 23, 2011 John Halpin returned Aimee Hairr's phone call. (Aimee Hairr, Day 5 at 16)

> Q And did Mr. Halpin get back to you?
>
> A He did. He did. He called me back either later that day or the very next day, and I again, we kind of had small talk when he called. He did know Nolan was my son, and I was I related pretty much everything that Mr. DePiazza had told me.
>
> Q And did you tell Mr. Halpin what you had told Mr. DePiazza?
>
> A Almost everything, yeah, except I had -- Mr. Halpin at that time had read the email and he was aware, and I told him, I said, I'm very concerned because Nolan never in the past has never kept anything from me, so I didn't understand why he didn't tell me about this. And Mr. Halpin said, You know, we are aware, I have

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brought Nolan in and I spoke with Nolan about this issue. And I told him that, you know, he was stabbed in his penis in class to see if he was a girl, and that had I told Mr. DePiazza like three times and I didn't understand why nobody had called me back. And Mr. Halpin didn't -- he really didn't give me an answer either, just said he didn't know why.

(Aimee Hairr, Day 5, at 16)

Q Did Mr. Halpin ask you why it was another mother who complained on behalf of Nolan instead of you?

A That was never brought up.

Q Did Mr. Halpin tell you that he had received that September 15 email from Mary Bryan?

A Yes, he did.

Q Did he tell you that he reported that to the dean and the principal?

A He said that everybody was aware of the email. He said that he had -- I told him I am waiting still for a call from the dean to either meet her or speak with her, and he said, "No, Ms. Hairr. We -- Ms. Dean already met with Nolan about this issue, and I spoke with Nolan and I had him fill out a form on what happened."

(Aimee Hairr, Day 5, at 17)

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Mr. Halpin recounted his interaction with Aimee Hairr somewhat differently, stating that it was a face to face meeting in his office rather than a telephone conversation. John Halpin, Day 3 at 123)

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Q (By Mr. Scott) And you understood she was Nolan's mother?

A Yes.

Q And did she contact you?

A I believe or I remember that she came in.

Q And what do you -- where did you meet her?

A In my office.

Q And was she accompanied by anyone else?

A I don't believe so.

Q Did you know her prior to that date?

A Yes.

Q How did you know her?

A She was my dental hygienist.

Q And did you -- well, did she ask for the meeting?

A Yes, she came in.

Q And did she tell you why she was there?

A Yes.

Q What did she say?

A She said that -- and I never made the connection that she was Nolan's mom until at that point, but she had come

(John Halpin, Day3 at 123)

In regarding that situation.

Q And did you tell her you were aware of the September 15 email?

A Yes.

Q And you knew that Mrs. Hairr didn't send it, but another mother sent it?

A Yes.

Q And what do you recall about that conversation that you had in the meeting?

A I recall that she was concerned that Nolan had been jabbed with a pencil in his crotch and she was upset, and I walked her through that I had already seen Nolan and that walked him through how to look to the dean's office, but he had not at that point. And so I said that I would help out. I said, you know, I'll talk to Nolan again because I want him to be comfortable around me so that he would come to me if there's any issues. And then so I told her that I would talk with Nolan and bring him into my office and walk him over to the dean's office.

Q And why did you think it was necessary for Nolan to go to the dean's office?

A Because to report the bullying incident, so he – he needed to fill out an incident report with the dean's office.

Q And why did you believe the email of September 15 was not enough to trigger the dean to take action?

(John Halpin, Day 3 at 124)

A I wanted the dean to get involved that first time. I believed that Dr. McKay would contact her and get her going on it. I believed that Nolan from our prior conversation would go to the dean's office. And at that point I wasn't sure if he had or had not.

Q Did you believe that Dean Winn had received the email?

A I wasn't sure if Ms. Winn had received the email at that point.

Q And did you ask Nolan to go to the dean's office because you were concerned that Dean Winn either had not received it, or alternatively had received it and was ignoring it?

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A I wasn't sure, so I just wanted to make sure that he had filled out an incident report and gone to the dean's office.

Q And if Dean Winn had received the email and was already acting on it, what did you believe would be accomplished by Nolan going to the dean's office?

A I just I wasn't sure if he had filled one out, because I wanted to make sure he had. Because that's the procedure, is to fill out an incident report when you go to the dean's office for bullying or any incident.

Q And you knew that prior to September 22, Nolan had not filled out an incident report?

(John Halpin, Day3 at 125)

A I wasn't sure, so I wanted to make sure. Maybe Ms. Hairr told me. I didn't know. I wasn't sure. I don't recall if I knew that at that point or not.

Q And you believed that he was maybe afraid or was reluctant to go to the dean's office?

A He could have been reluctant. I just wasn't sure. I just wanted to make -- I wanted to coach him through it a little bit, make him feel more comfortable, and meet him another time to let him know that I'm available and I want to help him if things are happening.

Q And so you asked Nolan to go to the dean's office?

A I called Nolan into my office. We talked about it and I let him know, hey, I didn't realize that your mom was my hygienist and that, hey, I'm here for you, I want to be available for you. And then I said, "You know what. Do you feel comfortable going to the dean's office? I'll go with you." So I took him over to the dean's office, got him an incident report. It's on a clipboard. And I said, you know, fill it out with as many details as possible. And unfortunately, Ms. Winn was not in the office at that point, but Ms. Harriet Clark, she was the secretary in that office, I let her know that he was filling out an incident report and that it involved being jabbed in the crotch with a pencil.

Q And you thought it was important that Dean Winn knew

(John Halpin, Day3 at 126)

that he was -- had been stabbed or poked In the crotch with a number 2 pencil?

A I think it was important. That's why I informed the secretary, to let her know that.

Q And sometime in September, within days of the – of whatever day it was you asked Nolan to go to Dean Winn's office, you checked in with Dean Winn, correct?

A Correct.

Q And you wanted to know if she was aware of the stabbing and if she was working on it or responding to it, correct?

A I asked her what the status of the situation was. I asked her, you know, what was the result, what was the outcome.

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Q And she knew that you were talking about the alleged stabbing, correct?

A I believe so, yes.

Q And that's why you were concerned?

A Yes

(John Halpin, Day3 at 127)

Mr. Halpin's testimony is marked by its internal logical inconsistency. He knew about the report of Connor stabbing Nolan in the genitals with a pencil, because he received Mary Bryan's September 15, 2011 e-mail describing the assault. He was concerned enough about the incident to want to make sure that Dean Winn was aware of it. He assumed she was but was not sure. Therefore he made sure that Nolan went to the Dean's office and filled out an incident report. Mr. Halpin knew that Nolan was reluctant to discuss the stabbing, yet the counselor did nothing to make sure that Nolan's report reflected the full extent of the assault.

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To make doubly certain that Dean Winn was aware of the stabbing, Halpin informed the Dean's secretary. Yet, a few days later, when he supposedly broached the subject with the Dean, he never specifically mentioned the stabbing of Nolan in his genitals, but rather simply asked about the "situation" in the band room. Mr. Halpin testified that he believed that Dean Winn knew that he was referring to the stabbing but he was not sure. He was unable to explain why he did not speak to the Dean specifically about Nolan being stabbed by Connor, and instead relied on assumptions and generalized questions about the "situation" in the bandroom -- the same language that Vice Principal DePiazza used in his testimony to attempt to convey the idea that he was unaware of the assault on Nolan.

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Dean Winn's testimony directly contradicted that of Mr. Halpin, as Ms. Winn testified that she never had a conversation at all with him concerning the bullying of Nolan. (Cheryl Winn, Day 4 at, 124-125) She testified that she did not learn of the stabbing incident, the homophobic slurs, or Mary Bryan's September 15, 2011 email, until February 2012, (Cheryl Winn, Day 4 at, 120),

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which was after both Ethan and Nolan had been removed from Greenspun Jr. High School by their parents, and a complaint to the school police had been filed. Dean Winn's testimony not only contradicted the testimony of Mr. Halpin but was alsowas self-contradictory as well.

> Q (By Mr. Scott) . . . And now, if you would turn to the small white binder, Tab No.4, an email dated September 15, 2011.
>
> A Okay.
>
> Q Do you recognize that email?
>
> A I do now.
>
> Q When's the first time you saw it?
>
> A Sometime in October.
>
> Q Are you sure about that?
>
> A I didn't receive it in September, no.
>
> Q Do you recall previously testifying at your deposition that you were not aware of this email until the following year?
>
> A I didn't see it until after this lawsuit or after all this, yeah.
>
> Q So the first time you saw this email, this September 15, 2011 email that's part of Exhibit No.4, was after this lawsuit was filed?
>
> A Correct.

(Cheryl Winn, Day 4 at, 120)

Thus it is unclear from her testimony whether she claims to have seen this September 15, 2011 email in October 2011, or in February 2012. This is obviously inconsistent. Dean Winn acknowledged that on September 22, 2011 she wrote in her chrono that:

> Nolan reported to the Dean that someone was calling him names, messing with his hair, kicking his band instrument and blowing in his face. Nolan's mother also contacted administration that some student, "we believe Connor continues to bother Nolan in band after Mr. Beasley talked to him about his behavior"

(Cheryl Winn, Day 4 at, 130)

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Dean Winn testified that she could not recall whether or not she did meet with Nolan on or after September 22, 2011. (*Id.* at 134) Based on a referral from Mr. Beasley, on September 27, 2011, Dean Winn met with Conner and his mother on a Required Parent Conference (RPC). (*Id.* at 139) It was not because of Nolan's or Aimee's complaint. (*Id.*) No discipline was imposed, but Conner was told to stop "joking around" in class. (*Id.* at, 143)

> Q (By John Scott) And so this RPC basically boiled down to Connor's mother telling you that he jokes around a lot, he calls other people Phil, and she would tell him not to joke around anymore, and that was the result, correct?
>
> A She did say that in our conversation. We had a conversation about kicking his band instrument, you don't need to be doing that. He was new at school just like the other sixth graders in band. I didn't know him and know him well yet. Just like all the sixth graders, they come in new to me. And, you know, we don't need to be playing around in class.

(Cheryl Winn, Day 4 at, 143)

Dean Winn testified that she had spoken to Mr. Beasley about the bullying situation in the trombone section of his band class. (*Id.* at 141) She made an entry on September 23, 2011 stating that the complaint about Connor was referred to her by Mr. Beasley. (*Id.* at 139) Yet according to the Dean, nothing was ever mentioned about the stabbing. (*Id.* at 141) However, Mr. Beasley testified that he had "no recollection of any communication in September with Dean Winn regarding Nolan." (Robert Beasley, Day 4, at 28)

Thus, even though on September 15, 2011, Mary Bryan sent an email to Principal McKay, the counselor, Mr. Halpin, and the band teacher, Mr. Beasley, stating that Nolan Hairr had been stabbed in the genitals with a pencil by Connor while they were in band class, absolutely no one at the school undertook any investigation nor initiated any disciplinary action concerning that assault.

The Principal claimed that he did not get the email and that none of his people that he trusted to do their jobs ever reported the assault to him. The mandatory reporters who received the September 15, 2011 email, Mr. Beasley and Mr. Halpin never specifically reported it or the

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assault. The Principal's designees, Vice Principal DePiazza and Dean Winn claim never to have heard about the stabbing until the following year after a police report was filed. Both Mr. Beasley and Mr. Halpin testified to speaking with either Mr. DiPiazza or Ms. Winn about the bullying or "situation" in general. Halpin assumed but did not verify that Dean Winn knew specifically about the stabbing and the September 15, 2011 email.

Both Mr. DePiazza and Ms. Winn impeached themselves with their own depositions, giving two different dates as to when they first learned about the September 15, 2011 email. Most crucial was the testimony of Nolan's mother, Aimee Hairr. She testified that she specifically told Vice Principal DePiazza about the stabbing of Nolan's genitals, and that she did so several times during the course of their telephone conversation on September 22, 2011.

The next day, she also told Mr. Halpin, who was the recipient of the email, that she had told Mr. DiPiazza about the September 15, 2011 email, and its substance. Mr. Halpin told her that everyone knew about it. For his part, Mr. DePiazza, besides contradicting his own deposition testimony and calling that testimony a mistake, had testified that he had no specific recollections concerning a meeting he claimed occurred in his office sometime in September or possibly October 2011, in which the "situation" in the band room was discussed without the stabbing incident being mentioned. His testimony about this face-to-face meeting, that he supposedly had with Aimee Hairr, Cheryl Winn and Nolan Hairr was not corroborated by any of those three, and was specifically denied by both Aimee and Nolan. Aimee's denial was very clear about her interaction with Mr. DePiazza. She testified that in a phone conversation on September 22, 2011, initiated by Aimee, she told him about Mary Bryan's September 15, 2011 email of the assault and bullying that the email described.

B. Hitting and scratching of Ethan's legs -- October 19, 2011 email

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The bullying of Nolan and Ethan by Conner and Dante continued throughout the rest of September and into October. (Nolan Hairr, Day 1 at 56-57)(Ethan Bryan, Day1 at 124-125). Neither Ethan nor Nolan wanted to complain based on the prior lack of remedial action by the school, and the retaliatory stabbing that Nolan endured after he made a complaint against Conner in September.

However, on October 19, 2011, Mary Bryan noticed a problem when Ethan came home from school. Ethan was wearing shorts, and Mary noticed a number of fresh scratches on his legs. When she confronted him about the scratches, he told her that he got them at the end of band class. Conner was behind him when they were putting away their instruments. Conner had taken a rubber stopper out of his trombone and continued to hit Ethan in the legs with the sharp exposed metal edge, causing the scratches.(Mary Bryan, Day 2, at 159-160)

> Q (By Mr. Scott) . . . when's the next time you contacted the school?
>
> A When Ethan came home with the -- he had bloody scratches on his legs, In October, and he sat down on the couch next to me. I'm assuming that wasn't my day to drive, because I remember him coming home from school and sitting down near me. And I said, What happened to your legs? And he said, Oh, something at school. And I said, What at school, Ethan?

(Mary Bryan, Day 2, at 159)

> So they were pretty -- it looked like a cat attacked him. And I said -- it wasn't just that he ran into something. And I said, What? And he said there's a -- on the trombone there's a stopper, and apparently Connor took the stopper off of it and it -- when you take the rubber stopper -- I think it's rubber, there's a sharp point inside of there, and he was flicking him back and forth [indicating] in the legs with this trombone part telling him to get up out of the chair because he wanted to sit there. And Ethan wouldn't move, so he kept on doing it.
>
> Q And after you received that information, what if anything did you do?
>
> A I asked Ethan more, like, okay, this didn't just -- like I wanted to know more about what was happening and what was happening in the past few weeks. And he said, "Yes, it happens all the time ever since Nolan got stabbed. They now say that Ethan and -- that Nolan and I are gay boyfriends and that I try to defend Nolan because he was my boyfriend and that we were faggots." And that -- apparently Ethan had a book that had some sort of wizard with a staff on the front of it. And he said, Are you reading that book -- Connor had said to Ethan, "Are you reading that book about staffs and how to shove them up people's asses so that you can jerk each other off." And it was just disgusting things that Ethan was telling me about

(Mary Bryan, Day 2, at 160)

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> crude, sexual things that Connor was saying about him and Nolan because that was his boyfriend.
>
> Q Now, were you surprised that Ethan hadn't told you about this before October 18, 19, whatever day it was when he came home with bleeding from his leg?
>
> A Oh, yeah, I was. I was not crazy surprised, because Ethan had asked me to let him handle it and he didn't want to be a big baby. He didn't want to have to have his mommy take care of everything. And I said -- this was early on, when I found out about the nature of the harassment and how extensive the insults were and what it was doing to Ethan. Then I said, "No, Ethan, this is not something that I can sit back and let you just handle it. This has gone too far too long, and I have to step in and say something."

(Mary Bryan, Day 2, at 160)

On October 19, 2011, Mary Bryan sent a second email to school officials. (Mary Bryan, Day 3, at 4) She addressed the October 19, 2011 email to the same three addresses as was done with the September 15, 2011 email.

> Hello, My name is Mary Bryan. I wrote to you all a few weeks ago asking for help to resolve an issue of bullying at school, regarding my son, Ethan Bryan, and another boy, Nolan Hairr, in Mr. Beasley's band class. As I mentioned before in my previous email, there seems to be two boys _____ and_____ who have some behavioral issues in class. The interrupt class and defy the teacher on a regular basis, often resulting in the teacher having to stop teaching class to asked them to behave. My biggest problem with these boys is that _____ who sits right next to my son now, (despite me asking the teacher that these kids not sit near my son or Nolan) is continuing with the bullying and name-calling has now turned his efforts toward Ethan.
>
> Yesterday in class, he hit Ethan repeatedly in the legs with a piece of his trombone telling him to get out of the chair. Ethan did not get up so he then began hitting him harder and calling him a "Big Fat Ass".
>
> He deliberately does this when the teacher is not looking. I'm quite sure that Mr. Beasley does not want to spend his time policing the children but I will not have my son tolerate this. Ethan is fond of Mr. Beasley and with the exception of the boys' interruptions, he is really enjoying band. He does not have to put up with being assaulted at school in any form. Ethan is an excellent student.

(Plaintiffs' Trial Exhibit No. 4, in part)

Principal McKay said he did not receive this email either because it was sent to n address that was not his email address. Mr. Beasley and Mr. Halpin acknowledged receiving the October 19, 2011 email. (John Halpin, Day 3, at 128) (Robert Beasley, Day 4 at 32-33) Mr. Beasley also

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testified that he believes he talked about the October 19, 2011 email from Mary Bryan with Dr. McKay and Dean Winn. (*Id.* at 33)

> Q (By Mr. Scott) And in addition to having this email forwarded to you, did you talk to anyone about this email?
>
> A Oh, yes.
>
> Q And who did you first talk to?
>
> A I believe I first talked to Mrs. Winn, the dean, and I believe to talk to Dr. McKay also.
>
> Q But you believe it was first with Dean Winn?
>
> A I don't know if it's first or second.
>
> Q Fair enough. You don't recall the order, but you do recall talking to both Dean Winn and Dr. McKay?
>
> A I believe I talked to them, because it's serious allegations. I don't remember specifically sitting down with either one.

(Robert Beasley, Day 4 at 33)

Also on October 19, 2011, Mary Bryan and her husband, Ethan's father, Kyle Bryan went to Greenspun Junior High School, and met with Dean Winn. (Mary Bryan, Day 3, at 3-4). The meeting lasted approximately an hour. (*Id.* at 7) The Bryans demanded that the school take action to prevent any further bullying, including the types of physical assaults that were the subject of both the September 15, 2011 in the October 19, 2011 emails. (*Id.*) The Bryans also demanded an end to the verbal bullying including the homophobic slurs and statements that both Ethan and Nolan were regularly subjected to.

> Q And can as best you can recall, can you tell the Court what you told Dean Winn at the meeting?
>
> A I started off by referencing to the two emails that I had sent, and the first one prompting the second because Ethan was now involved for having stuck up for what he believed, for having stuck up for Nolan, and it turned into that he was protective of Nolan because Nolan was a girl, and I told her all the information about how it had got to this point. She said that she -- she acknowledged that she had seen the emails. She got them from Mr. Halpin, who also left me a message that morning. We -- I started out by I was fairly uncomfortable with all that was going on and [inaudible] I was -- I couldn't believe that that was my child and ...

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My husband was furious. He -- he hadn't heard bits and pieces before this meeting about Ethan getting his chair kicked and Nolan getting blown on by the boys, and his hair flicked, and the boys blowing their instruments in Ethan and

(Mary Bryan, Day 3, at 7)

Nolan's ears and some of the words that they were saying, the implication that the two were faggots. I think Ethan was --

Q Did Dean Winn ask for more specifics?

A She did, and we let her know. My husband was prior to the meeting somewhat like in favor of Ethan saying I want to take care of this myself, I didn't want my mommy to come to my rescue. We'd never dealt I'd never dealt with anything like this and I didn't know the proper way to handle it, and at what point during this time of Ethan growing up do we let him take care of this stuff himself.
But even my husband, who was saying let Ethan be a big boy as well, knew at that point that enough was enough and he didn't -- he wasn't going to have it anymore. Ethan had sat there and didn't get up while this boy had scratched his legs over and over again and said things about Ethan, does he hold Nolan down and shove things up his ass and jerk off with his face and -- I mean, jerk off on his face, and disgusting things that 11 year olds shouldn't say and shouldn't know.

I -- my husband knew that it had got way too far and it shouldn't be in the hands of 11-year-old little boys to get themselves out of this. We were very clear –

Q Excuse me. Do you recall what Dean Winn said in response to what you and your husband were telling her?

A She indicated that she knew of this boy, and I got the feeling that she knew that this -- both the boys had –

(Mary Bryan, Day 3, at 8)

she'd had their eye on them, or I can't remember the words that she used, but something to let us know that this wasn't their first disciplinary problem and that she would handle it.

I was offering suggestions, and once I did that, saying let's have a sit-down, or I made some mention that I was actually concerned about the boy too, like no 11-year-old little boy, and even though my son was on the receiving end of this, he shouldn't know that stuff either, and that he could benefit from intervention as well.

She became defensive. She didn't want me to tell her how to do her job. I wasn't trying to. I was just offering suggestions, that I had no problem sitting down with the kids, let's talk this out because it needs to stop. And they were kids. I'm shocked by this sickness that was coming out of this little boy's mouth at that age. I'm not shocked by the cruelty of children. I'm not.

Q Were you -- during that meeting, were you or your husband more specific about the things that were coming out of Connor's mouth?

A Absolutely. And I --

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Q What did you tell --

A We made it clear to her that this was not -- Ethan's a big boy. He is very tall. He's had a weight problem – as he made him stand up in front of the court yesterday and show everybody, he has a weight problem. This is not the first

(Mary Bryan, Day 3, at 9)

time he's been teased.

He has been somebody that stands out in crowds for his whole life. He has not -- that's not the first time he's been called fat. This is the first time that it was to this degree and of this nature. That's why my husband and I went down there and made a big deal of it. This wasn't playground, ooh, you're fat, you're a giant. He had heard that. His whole life he's been overweight.

Q Okay. But were you more specific in terms of what was different about this in terms of the name calling?

A Absolutely. We let her know that this was incredibly unacceptable, this implying that the two boys were the class gay wads or whatever, faggots or gay boyfriends. My husband was very clear, so was I, that it was unacceptable and we didn't want to have to have the kids tolerate it not even a day longer.

(Mary Bryan, Day 3, at 10)

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Dean Winn denied having any recollection of meeting with Mr. and Mrs. Bryan. (Cheryl Winn, Day 4, at 147) Mr. Halpin testified that in response to receiving Mary Bryan's October 19, 2011 email, he was concerned enough that he forwarded that email to Dean Winn. (John Halpin, Day 3, at 129). Contradicting Mr. Halpin, Dean Winn denied receiving a copy of this October 19, 2011 email from him. *(Id.)* Mr. Halpin also discussed the email with Principal McKay and Vice Principal DePiazza on October 19, 2011 at an administrators meeting.

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Q (By Mr. Scott) Yes. Is one of the reasons you forwarded the October 19 email to Dean Winn because you were concerned that the administration had not acted appropriately in response to the September15 email?

A I just wanted to make sure everyone was included, and it looked like Mr. -- Dr. McKay had been included, and I wanted to make sure that Ms. Winn was aware for sure.

Q And because of your concerns when you received the October 19 email, you went and saw Dr. McKay and Mr. DePiazza 15 that day, correct?

A Correct.

Q And you wanted to make sure they were aware that there was history leading up to the October 19 email, correct?

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A Correct.

Q And when you met with them both -- well, let's start with Dr. McKay. When you met with Dr. McKay and Mr. DePiazza, that was together, the three of you, correct?

A It wasn't just the three of us. It was an admin meeting with counselors included as well. It was basically a weekly admin meeting where the counselors are also involved.

(John Halpin, Day 3, at 130)

Q Oh. But at some point during the meeting you brought this October 19 email to the attention of Dr. McKay and Mr. DePiazza at the same time and the same place?

A Yes. It was the first thing I brought up, and I think it was the first thing we talked about.

Q And you wanted to make sure that they were aware of the September 15 email, correct?

A Correct. I wanted to know where it was headed or that they were aware.

Q And Dr. McKay indicated to you that he knew about it, the September 15 email, correct?

A He might have been aware. I don't remember – I don't recall talking about the prior email, but I believe he was aware of that.

Q Well, didn't both Dr. McKay and Mr. DePiazza both indicate to you that they were aware of the September 15 email?

A I'm sure -- I'm sure they were aware of it at that point because we were talking about the new email.

Q And would it be fair to say that they indicated that they were aware of the September 15 email?

A I believe so. Because I mean, that was the point that this issue was still going on.

Q Correct. And so the October 19 email became a bigger issue within the context of the September 15 email,

(John Halpin, Day 3, at 131)

A Correct.

Q And that was your concern, why you brought it up at the very beginning of the meeting?

A Yes.

Q And both Dr. McKay and Mr. DePiazza indicated to you that they were aware of the October 19 email, and the history including the September 15 email?

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A Yes. I'm sure we did talk about that.

Q And at that meeting, did Dr. McKay tell Mr. DePiazza, the vice principal, quote, Lenny, I need you to handle this, unquote?

A Something very close to that. I need you to handle this, I need you to -- yeah, follow up on this, something to that effect.

Q And you understood that Dr. McKay, the principal, was directing or ordering Mr. DePiazza, the vice principal, to take appropriate steps to remedy this situation?

A Correct. Yes.

(John Halpin, Day 3, at 132)

Principal McKay's testimony acknowledged that the subject of the bullying in Mr. Beasley's band class was brought up by Mr. Halpin at the October 19, 2011 administrators meeting. However the McKay testimony stated that few specifics were discussed. Dr. McKay took the position that at that meeting Mr. Halpin did not specifically discuss either the September 15, 2011 or the October 19, 2011 emails from Mary Bryan, nor the substance of those emails.

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Q (By Mr. Scott) Do you recall attending weekly administrative meetings when you were the principal at -- back in 2011?

A Yes. I would hold weekly meetings, usually on Fridays.

Q And as the principal, what did you understand the purpose to be of those meetings?

A The meetings were to go over calendar items, what was coming up in the school, talking about the various activities that had to be planned for making sure all of our job responsibilities were being met, satisfied, and then to bring up any other topics that might come up.

Q And did Mr. DePiazza as the vice principal typically attend those meetings?

A Yes.

Q And did Dean Winn typically attend those meetings?

A Yes.

Q And did the counselors, including John Halpin, typically attend those meetings?

(Warren McKay, Day 4, at187)

A Yes.

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Q During any of those meetings in September or October, do you recall John Halpin bringing to your attention either the September 15th complaint in the email that you just looked at or the October 19th email?

A Mr. Halpin addressed the continuing issues with some boys in Mr. Beasley's class.

Q And when did he first raise issues in Mr. Beasley's class at these meetings; September or October or later?

A I don't recall when I became aware that there were some issues with a few boys in Mr. Beasley's class.

Q Do you recall if at some point in September or October Mr. Halpin brought to your attention the alleged stabbing of a student by another student in Mr. Beasley's class, a stabbing in the groin with a pencil?

A Mr. Halpin never addressed that with me. And when he did address me about the continuing issues that were happening, it was in the administrative meeting on or around October 19.

Q Okay.

A And he told me that the issues surrounding these two boys, which at the time I did not know who the boys were, I just knew they were a couple of boys, that they were still having issues. And knowing that these were the same boys from previously, I don't know where I got the information but I

(Warren McKay, Day 4, at188)

knew that there were some issues, that's when I voiced my insistence that this get handled.

Q And what did you understand the issues were?

A All I knew was there was general harassment of these boys. Never was there any issue of a stabbing, or a stabbing especially in the groin area.

Q And if that had been brought to your attention back in September by Mr. Halpin, what if anything would you have done?

A If I had known that there was an accused stabbing, then I would have taken a larger role in finding out exactly what was going on.

Q And what do you mean by that, a larger role?

A I would have probably asked to see the statements.

Q After you found out about this in February 2012, did you ask to see the statements?

A No. The boys weren't there anymore.

Q Well, did you ask to see the statements that should have been obtained back in September or October?

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A No.

Q Did you try to find out why this September 15 incident had not been investigated during September or October?

A It was my understanding that that incident was investigated.

(Warren McKay, Day 4, at189)

Q Who told you that?

A When I ask my dean or my assistant principal to do something, I assume that it's being handled. Since I did not hear back about the incident at any one time, I assumed that it had taken place.

Q So you assumed that Mr. DePiazza either directly or through Dean Winn had these allegations investigated?

A I had confidence that my administrative team would do exactly as I asked them to do.

Q And you assumed that that would have -- those investigations would include obtaining statements?

A I would assume that they would take the necessary steps to get a clearer picture of what happened in the classroom, and to take action, the appropriate action to get it stopped.

Q And would appropriate steps include an investigation of the allegations of stabbing in the genitals?

A Obviously whenever we are talking about that kind of accusation, we would expect that statements are taken.

(Warren McKay, Day 4, at190)

In contrast to Mr. Halpin's testimony that specifics of the seriousness of the bullying and the substance, at least, of the September 15, 2011 and October 19, 2011 emails were discussed at the October 19, 2011 administrative meeting, Principal McKay insisted that the discussion was kept at the level of generalities,

Q (By Mr. Scott) And you just spoke generically about issues without being more specific?

A. When my assumption is that it is normal, and I mean situations of students poking or that kind of thing is normal harassment were kids aren't getting along, I don't ask the details. I just say let's get it stopped. If I would've known it was a stabbing or something like that, that's a totally different situation.

. . .

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Q And you don't recall him mentioning that there was one student who was the alleged suspect or aggressor in both cases?

A I do not remember that.

(Warren McKay, Day 4 at 194 – 195)

There were other areas in which Dr. McKay's testimony was at odds with that of Mr. Halpin. As already mentioned, Mr. Halpin testified that the specifics of the bullying of Nolan and Ethan in Mr. Beasley's band class were discussed, as was the October 19, 2011 email from Mary Bryan. The McKay testimony was that the October 19, 2011 discussion at the administrative meeting never went beyond the subject of generalized bullying. Halpin testified that Mr.McKay told Mr. DePiazza to "take care of it Lenny." Dr. McKay stated that he told Mr. DePiazza and Mr.Halpin to do so.

Q (By Mr. Scott) And did you understand Mr. Halpin was participating in an investigation?

A Well, in the October meeting I asked Mr. DePiazza and Mr. Halpin to get a handle on whatever situation was going on in Mr. Beasley's class.

Q And when you say get a handle on, what were you attempting to communicate to them? What were your expectations that you wanted to communicate?

(Warren McKay, Day 4 at 199)

A That we had two boys that were being harassed in some way, shape or form. So with harassment, bullying, whatever you want to call it, they are not happy and the parents are reporting it, we need to stop it. We need to get to the bottom of it. We need to figure out how to stop it so that we don't have anymore issues.

Q And did you understand that the complaint of October 19 that was brought to your attention required an investigation to be done within ten days?

A In 2011?

Q Yes.

A No.

Q All right. That white binder you have up there, if you would turn to Tab No.2, please.

A This one here?

Yes. Tab No.2.

[Complies.]

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Q And if you'd look at the last page of that exhibit, 19 Section 388.135, if you'd look at that, please.

A The last page of the section?

Q Yeah, of Exhibit 2. I think it was four pages.

A Mrm-hmm.

Q If you'd look at the last page. At the top it says, 24 NRS 388.1351. Do you see that?

A Yes.

(Warren McKay, Day 4 at 200)

Q And do you see that it's dated 2011?

A Yes, at the front.

Q And would you take just a minute to look at it, please.

A Okay.

Q Does this refresh your recollection that in 2011, an investigation must be completed within ten days after the date on which the investigation is initiated?

A Yes, it does say ten days.

Q All right. So that refreshes your recollection?

A Yes.

(Warren McKay, Day 4 at 201)

. . .

Q And when you asked Mr. DePiazza to handle it, what did he tell you he did in that regard?

A In the administrators meeting, he acknowledged that he was going to work on it along with Mr. Halpin.

Q And did you later learn that Mr. DePiazza did nothing to work on it?

A I don't recall that.

Q Do you know as you sit here today what if anything Mr. DePiazza did to work on it?

A No.

(Warren McKay, Day 4 at 204)

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Principal McKay's lack of knowledge of his responsibility to have ensured that an investigation of a report of bullying needed to be completed within 10 days pursuant to Nevada Statute is astounding. Equally astounding is that Dr. McKay never asked Mr. DePiazza what he had discovered in the investigation. The Principal appeared totally disinterested in and indifferent to the bullying. Yet, Dr. McKay testified that he had responsibility for what Mr. DePiazza did or did not do while the Vice Principal was acting within the bounds of his job. (*Id.* at 184)

Dr. McKay, Mr. Halpin and Mr. DePiazza all agreed that all three of them attended the October 19, 2011 administrators meeting. McKay and Halpin concur that the subject of the bullying occurring in Mr. Beasley's band class was discussed at that meeting, although,unlike Dr. McKay, Mr. Halpin testified that the specifics of the nature of the bullying, as set forth in September 15, 2011 and October 19, 2011 emails from Mary Bryan were discussed.

For his part, Dr. McKay essentially testified that he had no interest in learning the details of the bullying, and simply told Mr. DePiazza and Mr. Halpin to take care of it. In his testimony, Vice Principal DePiazza claimed to have no knowledge that any of this was discussed, in any detail, at the October 19, 2011 meeting which he admitted to attending. While Dr. McKay was clearly Mr. DePiazza's immediate supervisor, the Vice Principal contradicted his boss's sworn testimony, claiming not to know anything about being tasked by Dr. McKay with dealing with the bullying in question.

> Q (By Mr. Scott) And when did you -- well, did you during the school year become aware of this October 19th email?
>
> A In February.
>
> Q Do you know a gentleman named John Halpin?
>
> A Yes, I do.
>
> Q And who is John Halpin?
>
> A He's a counselor at Greenspun Junior High School.

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Q And did you have contact with Mr. Halpin from time to time during that school year?

A Yes.

Q And do you recall on October 19 having a meeting with you, John Halpin and Principal McKay to discuss this October 19 email?

A I don't recall having a meeting. I do recall having administrative meetings weekly, it could have been brought up then, but I don't recall specifically this document being addressed at that time.

Q And do you recall a meeting, I believe, on October 19? It may have been attended by others, but

.

(Leonard DePiazza, Day 2, at 53)

certainly it was attended by you, Dr. McKay and John Halpin, where he expressed concerns to you in relation to this October 3 19 email?

A I don't recall. It could have been brought up at administrative meeting. We have those weekly.

Q Is it your testimony it didn't happen, or you just don't recall?

A I just don't recall.

Q And do you recall during a meeting, an administrative meeting on October 19, when Mr. Halpin was expressing his concern about this October 19 email, that Dr. McKay told you to take care of it?

A That I do not recall, those specific words, no, I do not.

Q Is it your testimony it didn't happen?

A I don't recall him ever saying that to me.

Q So you're not saying it didn't happen, you just don't recall?

(Leonard DePiazza, Day 2, at 54)

In his testimony Dr. McKay admitted that he never bothered to follow up with Mr. DePiazza to find out what the result of the Vice Principal's investigation was, and what remedial action was taken to ensure that the bullying did not continue.

Q (By Mr. Scott) So In the weekly administration meetings over the next two, three weeks, did you ask Mr. DePiazza what the outcome was of his investigation?

A I don't recall talking with Mr. DePiazza. I do

(Warren McKay, Day 4 at 201)

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recall informally meeting with Ms. Winn and asking her how the investigation was going and what she was finding.

Q And why did you believe Ms. Winn was conducting the investigation?

A Well, as part of the dean's office, I would assume that she was working with Mr. DePiazza.

Q And what did Ms. Winn tell you?

A She told me she was finding it difficult to find any students that corroborated the story.

Q Did she tell you she had obtained statements and interviewed students?

A That's basically what I asked her, so yes.

Q And would you be surprised to learn that she did not interview any students or obtain any statements?

A That would surprise me, yes.

(Warren McKay, Day 4 at 202)

Principal McKay's assertion that Dean Winn indicated to him that she was doing an investigation in October about the bullying, but was hard to find students who corroborated the reports of bullying directly contradicts the Dean's own testimony that she did not conduct any investigation in 2011 concerning the bullying because Principal McKay told her not to, as Mr. DePiazza was conducting that investigation.

There is no logical explanation for the inconsistency between Principal McKay's statement that Dean Winn told him she was attempting to get statements from students in her investigation about the bullying, and Dean Winn's testimony that Principal McKay told her not to do an investigation because Leonard DePiazza was taking it over. The fact of the matter is that no one commenced an investigation concerning the September 15, 2011 or October 19, 2011 emails, nor of the subject matter contained within those emails, at any time in 2011. Dr. McKay admitted he did no investigation; DePiazza also admitted he did no investigation; and Winn admitted she did no investigation either.

C. January 2012 – Ethan and Nolan Stop Attending School

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Throughout November and December, the bullying continued. Ethan became so distraught that he tried to get out of going to school by eating paper to make himself sick. Eventually, in January 2012, he decided that his only recourse was to commit suicide.

> Q (By Mr. Scott) And did you notice -- well, let me ask you this. At some point did this conduct by Connor and Dante impact your going to school?
>
> A Yes.

(Ethan Bryan, Day 1 at 134)

> Q And when was that?
>
> A In the second semester I stopped going to school almost completely, but before that I tried to fake being sick and I'd ask my mom all the time if I could stay home.
>
> Q This was before Christmas?
>
> A Yes.
>
> Q So in November/December, you try to fake being sick?
>
> A Yes.
>
> Q Why?
>
> A So I could not go to school.
>
> Q Why didn't you want to go to school?
>
> A So that I wouldn't have to deal with the harassment.
>
> Q I'm sorry?
>
> A So I wouldn't have to deal with it.
>
> Q Deal with what?
>
> A The harassment.
>
> Q And were there times you did things to try to make yourself sick?
>
> A Yes.
>
> Q What was that?

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A I tried to do things like make myself throw up. Like I'd eat paper so that it would like make me feel sick and I'd throw up.

Q And this is In November/December?

(Ethan Bryan, Day 1 at 135)

A Yes.

Q And why were you eating paper to make yourself sick to throw up?

A Because it -- I wanted to not go to school.

Q Now, after the holidays in January, did these feelings continue?

A Yes.

Q Did they get worse?

A.Yes.

Q Now, when you went back to school in early January, you still went to the band class?

A I believe so, yes.

Q And were you still being harassed by Connor and Dante?

A Yes.

Q And how did that make you feel?

A It was kind of like in the first semester, like before Christmas break I just like having it constantly kind of, I guess, made me used to it, but then not having to deal with it over the Christmas break I'm going back to dealing with it again was kind of like a lot to deal with, so I was going to try to kill myself.

Q And why were you going to do that?

A Because I didn't see any like other options.

(Ethan Bryan, Day 1 at 136)

Mary Bryan also testified that Ethan stopped going to school in January 2012, because of the bullying, and that Ethan planned to commit suicide.

Q (By Mr. Scott) Let's go to January 2012. Was there an unusual event that Ethan -- you talked to Ethan about?

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A We –

Q That's a yes or a no.

A Yes. I'm sorry. Yes.

Q Okay. What was it?

A After we came back from the Christmas break Ethan went to school for maybe two or three days and seemed to be okay on day one about going back. By day three I could tell that he was subjected to whatever it was that was making him hate school.

He, my youngest son had a basketball game, and Ethan said, Can I stay behind? I don't want to go to the game. I have schoolwork, or something. I don't remember what he said that he wanted to do. He wanted to be home alone, which was unusual for Ethan to ask. And when I left, my oldest son said, Mom, Ethan's not okay. And I said, Why? And

(Mary Bryan, Day 3, at 20)

he goes, Because I'm just scared. I'm just worried about him. And I said okay. And then he said, Maybe we should make him come with us.

So when I went back to the house, Ethan was upset that I came back and he didn't want me to be there. He wanted me to have left him alone. And he had been searching on the Internet things that he could drink, household chemicals to make himself die. And I made him come with me and he was very angry, and he still wouldn't talk to me. He sat in the car angry.

And I had my oldest son take his little brother to the basketball game. It was at one of the local high schools. And I told Ethan to come walk the track with me so that we could talk. And it was after a lot of just prompting and saying, Ethan, why would you be looking for those things, why did you and he just said that he hates life, he hates school and there's nothing that was going to make it better.

And then we left the basketball game and went home and I just -- I didn't know what to do. I didn't want to take Ethan to one of those -- although I'm a nurse, I didn't want to take him to like one of those psychiatric places, because he was just a baby. So I just stayed with him, and I had asked him again does he want to do it and he said yes. And I didn't leave him alone and I stayed up all night with him. He fell asleep.

(Mary Bryan, Day 3, at 21)

And then I called the -- like a help a suicide hotline or whatever the next morning for him. It was something through my husband's -- the power company. They had some sort of behavioral health hotline, and I just used them. And the nurse was advising me what to do, and I told her what my fears were about taking him in and that they would keep him there and they would lock him up, and I didn't want to do that because he was 11 years old.

(Mary Bryan, Day 3, at 22)

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After that incident, the Bryans decided that they were not going to send Ethan back to Greenspun Junior High School. A similar decision was made at the Hairr household in January 2012, after Aimee Hairr confronted Nolan about what was occurring at school.

Q (By John Scott) Now, at some point and after the holidays In January

(Aimee Hairr, Day 5 at 22)

of 2012, do you recall learning that Ethan had -- Ethan Bryan had stopped going to school?

A When Nolan started back at school after the Christmas holidays, periodically he would say that Ethan didn't attend school. And there went a period of time where it was probably anywhere from a week to two where Nolan just said Ethan hadn't been going to school. And—

Q And when you heard that, did you contact Ethan's mother, Mary, and inquire about it?

A I did. I called Mary and it was -- I gave her a call and asked her how things were going, and she told me that Ethan is -- he's not feeling well and that he is -- she's not going to have him go back to school.

Q And was she more specific?

A She didn't really go into detail of why. I think at that moment was a moment for me --

Q What do you mean?

A Because I had noticed Nolan was being so withdrawn that I needed to talk to my son.

Q And was there an unusual event that happened later in January in terms of your communications with Nolan?

A It was around that time period. Nolan came in the car and he was talking about the same little boy.

Q I'm sorry?

A He said the same little boy that had -- Connor, that

(Aimee Hairr, Day 5 at 23)

had stabbed him grabbed another little boy in his penis area.

. . .

Q After Nolan shared that information with you, what did you do?

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A I pulled the car over and we sat in the car and we talked for about an hour.

Q And during that hour, did you and Nolan talk about his experience at Greenspun?

A Yes.

(Aimee Hairr, Day 5 at 24)

Q And was it hard or difficult to get him to share information with you?

A It -- Nolan at that moment, he had a weird, I won't say breakdown, but he was definitely not looking at me, and he just kind of zoned out and stared. And I said, Nolan, what is -- I got to know what's going on. You've been withdrawn. You've just said the same little boy had grabbed another --

Q We won't talk about that person. Let's talk about Nolan, okay?

A Okay.

Q So when you said he had kind of a breakdown, what do you mean?

A I've never seen Nolan that way, where he just – he wouldn't look at me. I asked him to look at me several times, please look at me. And I -- can you just look at Mom and tell me what's going on, you know. Mom feels something's going on at school and you got to tell me something. And he -- I asked him, Are you being bullied, is this continuing, is something happening. And he just nodded his head and that was it for that moment.

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Q Did he open up at all during that time you were talking to him in the car?

A He just nodded his head. He confirmed that something was --

Q When you say nodded, nodded yes?

(Aimee Hairr, Day 5 at 25)

A He nodded. Mm-hmm.

Q Well, you can nod side to side or up and down.

A I'm sorry.

Q What did you understand he was communicating by his nodding?

A That yes, he was in pain.

Q And did you ask him to be more specific?

A At that moment, no. I wanted to go home, sit down with him and also with his father.

Q So what happened next?

A My husband came home and we sat down and we asked him to tell us what happened in that incident that he was talking about, and then he -- we told him, Nolan, we're going to -- we have to report this and we need to know what happened to you, you need to tell us, and you need to open up what has been happening to you. So he said that he -- he said that he had been -- said that he had been bullied almost every day.

Q Was he more specific?

A He said that kids were -- there was Connor and then there was another little boy that was in -- that was the first time I'd heard of the other little boy, Dante.

Q And was he more specific in terms of what they were doing to him?

A He said that they were pulling on his hair, saying names every day, saying things that were, in his words, "Were

(Aimee Hairr, Day 5 at 26)

really bad, Mom." And I said, "You're going to have to tell Mom what those words are, Nolan. You're going to have to tell Mommy what those words are." And my husband had him write it down, so he wrote out --

Q What did he write?

A Fucking faggot on a piece of paper. And he said that he remembers that every single day that he was at school that kids were doing that to him in the band class.

Q Did you ask him why he hadn't told you or your husband about it sooner?

A Yes, I asked him.

Q What was his answer?

A He didn't know. He said he was scared. That's the only thing he could tell me at that moment.

Q Did you -- did Nolan go back to Greenspun after that? Did he go back the next day?

A He never returned.

Q Did you talk to Nolan about his returning to Greenspun?

A I didn't at that point give him a choice anymore. Me and my husband knew we had -- we had a child that was traumatized. We didn't know how to -- I didn't now how to even move forward at that point. I didn't know how to move forward. I just know he needed to be out -- okay. I knew he needed to be out of the school, and that was it.

(Aimee Hairr, Day 5 at 27)

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Q How soon -- well, at some point did you officially withdraw Nolan from Greenspun?

A I did.

Q And about how much later? Are we talking days, weeks?

A No. It was the very next day.

Q Now, did you ask Nolan if he'd been going regularly to band class?

A At that time, like at that moment?

Q At around that time.

A Nolan -- it probably took about a couple weeks and he said towards the end of his month at Greenspun he avoided the lunchroom, and sometimes he would not even go to band class. He would skip it, he said. And I asked where he went, and he said that he would sometimes hide out in the library, and then sometimes he would just sit in the bathroom.

Q After Nolan opened up to you and your husband on the night of January 21, did you take any action in response other than withdrawing him from school?

A I made a phone call within that time frame. I made a phone call to the -- I'm not sure if it was the Clark County police or Henderson police, but I made a report.

Q To?

A The police department.

Q All right. When was that report in relation --

(Aimee Hairr, Day 5 at 28)

A Around the same --

Q I'm sorry?

A Around the same time.

Q When was it in relation to Nolan opening up to you on the 21st that you contacted the police?

A That day.

Q And that contact to the police, how was it made?

A I called.

Q And after -- how soon after that phone call did you have the next contact with the police?

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A Probably within a couple days, two or three days, we met with the police with the Bryans and the Fosters and me and Nolan.

(Aimee Hairr, Day 5 at 29)

D. February Investigation after Ethan and Nolan had Withdrawn From Greenspun

Dr. McKay testified that the school did do an investigation of the bullying of Ethan and Nolan. It was the only investigation that ever took place about the bullying, as none had occurred in 2011. The February 2012 investigation came after the police became involved and was done at the insistence of Dr. McKay's supervisor from the District, Andre Long, and Assistant Superintendant, Jolene Wallace.

Q (By John Scott) And In February 2012, did you ask Mr. DePiazza to do another investigation?

A Yes.

Q Why?

A Starting February 1, Mrs. Bryan started firing off emails to all kinds of people, including that February 7th email. So she emailed my supervisor, his supervisor and many of the trustees in the school district. So my supervisor and Jolene Wallace, who is -- was the assistant superintendent, came to my office to address the issues that were alleged in the February 7th email.

Q And if these issues raised in the February 7th email had already been investigated by Mr. DePiazza back in October when you asked him to take care of it, why did you believe it was necessary to conduct a second investigation?

A Because I was directed by Jolene Wallace to conduct another investigation.

Q And did Ms. Wallace ask to see what the results were of the initial investigation?

A She did not.

Q Did you attempt to determine what the results were of the first investigation?

A I did not.

(Warren McKay, Day 4, at 191)

In fact, Mr. DePiazza did not do "another" investigation because the February 2012 investigation was the only one that ever occurred. This is shown by the fact that there was neither any testimony nor any exhibit produced at trial that evidenced any investigation occurring prior to

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the one ordered by the District in 2012. This, of course, was undertaken after both Ethan and Nolan had withdrawn from Greenspun to escape the bullying.

III Conclusion

This case does not depend exclusively on the testimony of Plaintiffs' witnesses. The testimony from the mandatory reporters at Greenspun (Beasley and Halpin) and the Principal and his designees, all evidence deliberate indifference to the bullying of Ethan Bryan and Nolan Hairr. This is shown mostly by the fact that despite repeated emails, phone calls, and even meetings initiated by the boys' parents, no investigation of the bullying occurred until February 2012 when Dr. McKay was ordered to conduct an investigation by his own superiors. As long as nobody faced any consequences, nothing was done.

The credibility of the Greenspun witnesses was impeached not only by each other, but by individual witnesses' own testimony. Dr. McKay testified that he did not know about the September 15, 2011 and October 19, 2011 emails until February 2012. This testimony was undermined by that of Mr. Halpin who said that the substance of both of those emails, if not the actual emails themselves, was discussed at the October 19, 2011 administrative meeting. Dr. McKay, who testified that he wasn't interested in details, also testified that at that meeting, he told Mr. DePiazza and Mr. Halpin to take care of the matter. As for Mr. DePiazza, his testimony was that the subject of bullying may have come up at the October 19, 2011 meeting, but he had little recollection of it and certainly was not told that it was his job to take care of the matter by Dr. McKay.

While Dean Winn was not at the October 19, 2011 meeting, she was, according to Mr. Halpin, forwarded the October 19, 2011 email from Mary Bryan by him. She denied ever seeing the forwarded email, or receiving the message that Mr. Halpin had left for her with the Dean's secretary. Dr. McKay testified that he asked Dean Winn about her investigation. She contradicted

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him by saying that Dr. McKay told her not to conduct an investigation because Mr. DePiazza was handling it.

Mr. DePiazza, as noted above, claimed not to know anything about the bullying until 2012, even though he impeached himself on this subject with his own deposition testimony. Also, his testimony concerning the October 19, 2011 meeting cannot be squared with the testimony of Dr. McKay and Mr. Halpin.

Even if the Court were to discount the testimony of Aimee Hairr that she told Mr. DePiazza about the stabbing and the September 15, 2011 email in her telephone conversation with him on September 22, 2011, his claim that he knew nothing about the emails nor then nature of the bullying until 2012 contradicts the testimony of almost everyone else.

As for Dean Winn, her testimony was also undercut by the testimony of her colleagues. Even if the Court were to discount the testimony of Mary Bryan about her and her husband meeting with the Dean on October 19, 2011, and going into significant detail about the assaults and the vile homophobic slurs that Connor and Dante were directing at Ethan and Nolan, Ms. Winn's testimony is still at odds with that of Mr. Halpin.

The deliberate indifference was shown across the board. Mandatory reporters Mr. Beasley and Mr. Halpin received both emails but chose not to report about them as they were required to do by statute. This constitutes deliberate indifference. They both knew that bullying was occurring in Mr. Beasley's band class, and that the bullying was not just verbal abuse concerning perceived sexual orientation and sexual stereotyping. It also included physical assaults. However, they did not feel it important enough to make sure that the parties responsible for investigating and remedying the situation, namely Principal McKay, Vice Principal DePiazza, and Dean Winn, were fully informed of the situation as was Mr. Beasley and Mr. Halpin's legal responsibility.

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The most blatant examples of the deliberate indifference, however, was with Dr. McKay, Mr. DePiazza and Ms. Winn. While all three claimed to be in the dark until 2012 about the details of the bullying taking place in 2011, each of them was forced to admit that they knew there was some issue with bullying taking place in Mr. Beasley's band class. Yet, each of them testified that they did not feel it necessary to do a thorough investigation, or any investigation at all. Therefore, no investigation was ever done until one was ordered by the Assistant Superintendent in February 2012, after Ethan and Nolan had been forced out of school for the incessant and un-remedied bullying. That sort of behavior by school officials can be considered a textbook example of deliberate difference.

Dated this 20th day of March 2017,

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I hereby certify that I served the following Plaintiffs' Closing Argument via Court's electronic filing and service system and/or United States Mail and/or e-mail on the 20th day of March 2017, to:

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD); Principal Warren P. McKay, in his individual and official capacity as principal of GJHS; Leonard DePiazza, in his individual and official capacity as assistant principal at GJHS; Cheryl Winn, in her individual and official capacity as Dean at GJHS; John Halpin, in his individual and official capacity as counselor at GJHS; Robert Beasley, in his individual and official capacity as instructor at GJHS,

Defendants.

Case No. A-14-700018-C

Dept. No. XXVII

DEFENDANT CCSD'S CLOSING ARGUMENTS

TRIAL DATE: NOVEMBER 15, 2016

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I. INTRODUCTION

Two sixth grade boys (C. and D.[1]) allegedly bullied the plaintiffs Ethan Bryan and Nolan Hairr, who were also sixth grade boys at Greenspun Junior High School ("GJHS"). All four boys were in the beginning band class learning to play the trombone. The alleged harassment began in the fall of 2011 when all sixth graders transitioned from elementary to middle school. This was a discovery period for both the students, who were forming new relationships, and for the teachers/school administrators, who were busy learning the names and personalities of hundreds of new students experiencing middle school for the first time. After approximately four months in middle school, Ethan and Nolan stopped attending classes and then transferred to another school.

Despite evidence that C. and D. were the sole source of all the alleged misconduct, plaintiffs chose to sue their band teacher, counselor, dean, assistant principal, principal, and CCSD itself. That is, Ethan and Nolan's mothers sued just about everyone associated with their sons at the middle school, except the two alleged bullies.

As a result of this Court's prior rulings, each plaintiff's case has been reduced to a Title IX claim and a § 1983 substantive due process claim against a single defendant, CCSD (Order, July 22, 2016, at 4). Further, "[p]unitive damages are no longer part of this action," (*id.*), and any emotional damages are limited to the five-month period the boys attended GJHS.[2]

Only Ethan, Nolan, and CCSD are parties to this action. And because each boy is a separate and distinct plaintiff, each must independently prove the elements of his own claims. Indeed, the Court cannot find for one based on evidence of wrongdoing or damages to the other.

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[1] In order to comply with the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, and to protect privacy interests, CCSD refers to nonparty students by their first initials only.

[2] Hr'g Tr. on Mot. to Compel Rule 35 Exam, Feb. 10, 2016, at 7:14-17; Order, Mar. 21, 2016, at 1-2 (limiting plaintiffs' damages to the period before they withdrew from GJHS).

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The legal standards governing plaintiffs' two remaining claims overlap in several respects. For example, under both Title IX and § 1983, plaintiffs cannot hold CCSD liable under any theory of vicarious liability—such as *respondeat superior*—for the acts or omissions of its employees, including the GJHS staff. Instead, plaintiffs must prove that CCSD itself—through formal policy, longstanding custom, or a final-policy-maker's deliberate decision—caused their harm. *Infra* Parts II.A.1.a (Title IX) and III.A (§ 1983). At trial, neither plaintiff even tried to make such a showing. Thus, both claims fail.

Likewise, both claims require proof that CCSD acted with deliberate indifference. However, the evidence at trial proved exactly the opposite. This, too, is fatal to the Title IX and §1983 claims.

In fact, neither plaintiff proved *any* element of Title IX or §1983 liability. For example, they both failed to prove that CCSD had "actual knowledge" of any sexual harassment. Quite the opposite, they admitted to concealing the alleged sexual harassment in a deliberate effort to prevent CCSD from taking responsive action. Similarly, both failed to argue—much less prove—causation or damages.

Instead of addressing these failures, plaintiffs' 58-page brief curiously avoids the law. It includes only one case citation and consists of two parts: (1) a summary of plaintiffs' favorite testimony; and (2) a restatement of plaintiffs' favorite testimony. Tellingly, however, it does not try to apply the restated testimony to the elements of either claim.[3]

As a result, plaintiffs' closing argument is more remarkable for it does not say than what it does say. For example, it does not even argue any of the following issues:

[3] Instead, plaintiffs use the bulk of their brief to argue that a handful of school personnel have differing recollections of events that occurred five years ago. However, these perceived inconsistencies do not prove any element of any claim, and they are nothing more than red herrings. *Infra* Part V.

- That an appropriate CCSD official had actual knowledge of the alleged sexual harassment (element 1 of a Title IX claim)
- That CCSD's deliberate indifference "caused the harassment" (element 3 of a Title IX claim)
- That plaintiffs were deprived educational opportunities (element 4 of a Title IX claim)
- That plaintiffs' substantive due process rights were violated pursuant to official CCSD policy or longstanding CCSD custom (necessary for municipal §1983 liability under *Monell*)
- That the alleged due process violation resulted from "affirmative conduct," as opposed to mere inaction (element 1 of the §1983 claim)
- That plaintiffs suffered emotional distress damages
- The amount of emotional distress damages
- That plaintiffs are entitled to any compensatory damages
- The nature and amount of compensatory damages

Because plaintiffs declined to argue any of these issues in their closing brief, they cannot argue them on rebuttal.[4] And more importantly, because plaintiffs neither argued nor proved the elements of either claim, CCSD is entitled to a defense verdict.

II. PLAINTIFFS FAILED TO PROVE THAT CCSD VIOLATED TITLE IX

A. Title IX—"On the Basis of Sex"—The Law and Elements

Title IX prohibits federally-funded school districts—such as CCSD—from subjecting students to discrimination "on the basis of sex." *See* 20 U.S.C. § 1681(a). The statute provides in relevant part:

[4] Arguments saved until rebuttal are waived, because the defendant has no opportunity to address them. *See, e.g.*, *Shaw v. Terminal R. R. Ass'n of St. Louis*, 344 S.W.2d 32, 37 (Mo. 1961) ("[T]he party having the affirmative of the issues in a suit such as this may not, after full notice and warning, withhold all argument on the vital questions of injuries and damages."); Lower et al., *Nevada Civil Practice Manual* § 22.18[2] (6th ed. 2016) ("The following arguments have been found improper: . . . Saving until rebuttal material arguments on which the plaintiff's case is known to rely.").

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> No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . . (emphasis added).

Title IX applies only against fund-recipient school districts, not individual teachers, administrators, employees, or officers. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). Under the statute's enforcement mechanism, the federal government can terminate funding to a discriminating school district. *Id.* at 286. The statute also includes a narrow implied, private right of action. *Id.* at 284. Title IX claims may be based on either teacher-on-student harassment or student-on-student harassment, but different standards apply in each circumstance. *Compare id.* (teacher-on-student harassment), *with Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) (student-on-student harassment).

As one commentator observed: "[T]he Supreme Court established extraordinarily high barriers to recovery in Title IX suits" thus "creating a narrow path to victory." Note, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 Harv. C.R.-C.L. L. Rev. 95, 106 (Winter 2010) (emphases added). While it is very difficult to prove a claim under Title IX in the context of teacher-on-student harassment, it is even more difficult in the student-on-student context. *Davis,* 526 U.S. at 653; *accord Sauls v. Pierce Cnty. Sch. Dist.* 399 F.3d 1279, 1284 (11th Cir. 2005) ("The Supreme Court has applied a more rigorous standard when a Title IX plaintiff seeks damages against a school district for student-on-student harassment."). Indeed, "[t]he high burden of *Davis* ensures school districts are not financially crippled merely because immature kids occasionally engage in immature sexual behavior." *Hill v. Cundiff*, 797 F.3d 948, 970 (11th Cir. 2015).

This case involves allegations of student-on-student harassment only. (Nolan, Day 1, at 65:5-8; Ethan, Day 1, at 142:8-14).

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Plaintiffs must prove five elements to establish Title IX liability: First, that CCSD itself, not just school staff, had actual knowledge of the alleged sexual harassment and an opportunity to take corrective action. *Gebser*, 524 U.S. at 289-90. Second, that CCSD "itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to" the known sexual harassment. *Davis*, 526 U.S. at 642. Third, that CCSD's deliberate indifference caused the harassment or made plaintiffs more vulnerable to it. *Id.* at 644-45. Fourth, that the alleged sexual harassment was "severe, pervasive, and objectively offensive." *Id.* at 650. Fifth, that the harassment effectively barred Ethan and Nolan's access to educational opportunities or benefits. *Id.* Each element will now be discussed, and plaintiffs' failure to prove each element will be demonstrated.

1. Element 1 (Title IX): Plaintiffs did not prove CCSD had "actual knowledge" of the alleged sexual harassment

a. ADDITIONAL LAW RELATED TO "ACTUAL KNOWLEDGE" ELEMENT

The "actual knowledge" standard is clear. Under Title IX, plaintiffs cannot rely on theories of vicarious liability, such as "respondeat superior or constructive notice" *Gebser,* 524 U.S. at 290 (expressly rejecting the use of vicarious liability under Title IX). Instead, "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. Thus, Title IX liability attaches only if the school district—and not merely its school-level employees—is actually aware of the harassment.

To satisfy this high standard, plaintiffs must prove that an "official who at a minimum ha[d] authority to address the alleged discrimination and to institute corrective measures on [CCSD's] behalf ha[d] actual knowledge of discrimination." *Id.* The official must be "high enough up the chain-of-

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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 (11th Cir. 1999) (emphasis added). This rule makes sense. Because a Title IX judgment penalizes an entire school district and diverts public funds from the education of all students to the personal compensation of a single individual, such a harsh result is justified only when a district official, high enough to be deemed the district itself, has actual knowledge of the discrimination and responds with deliberate indifference. Thus, while a principal's knowledge of alleged sexual harassment might be imputed to the school itself, it is not imputed to the entire school district for Title IX purposes.

b. THE EVIDENCE: NOLAN ADMITTED HE REPEATEDLY CONCEALED THE ALLEGED HARASSMENT

Here, neither plaintiff offered any evidence—of any kind—that an appropriate, district-level official had any knowledge of any sexual harassment before the boys withdrew from the school in early February 2012. Instead, both plaintiffs (and their mothers) repeatedly concealed the alleged sexual harassment, despite several inquiries by GJHS staff and other opportunities to disclose it.[5] The following evidence exemplifies Nolan's admitted, deliberate effort to conceal any alleged sex- or gender-based harassment:

[5] In addition to the evidence that follows in the text, Plaintiffs' Closing Argument Memorandum ("Pls' Brief") also concedes that Ethan and Nolan (and, in some instances, their mothers) *repeatedly and consistently* concealed important information from CCSD. *See, e.g.*, Pls' Brief at 4:10-11 (Nolan was "too embarrassed to mention the homophobic and sexual content of the slurs that he was enduring"), 4:14-15 (Nolan "was reluctant to discuss the homophobic sexually-oriented nature of the bullying"), 4:23-24 ("Because of this fear of retaliation, Nolan decided not to tell any adults about any further bullying directed at him, and instead, to endure the torment in silence"), 6:25-26 ("Like his friend Nolan, Ethan also chose not to report the bullying that he was enduring for fear of retaliation . . . ."), 8:26-27 (Nolan "did not mention the stabbing nor the homophobic, sexually-oriented slurs"), 11:25-26 ("the bullying of Ethan and Nolan by C[.] and D[.] continued out of sight of Mr. Beasley"), 12:1-2 ("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"), 14:4-5 ("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"), 14:7-8 (when Nolan met with Dean Winn, "[h]e did not recount [to] her the homophobic slurs"), 15:1-2 ("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[.]"), 16:28-17:3 (the first time Nolan met with Dean Winn, "he was embarrassed to disclose the full sexual nature of the names he was being

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- Nolan's first incident report: Nolan testified that C. began insulting him with homophobic slurs "midway through the first week" of their 6th grade year. (Nolan, Day 1, at 39:1-15). He also testified that just days later, on or about September 7, he wrote an incident report concerning C.'s behavior. (*Id.* at 42:8-43:1). However, *Nolan admits that he chose not to describe any of the alleged homophobic or sexual slurs in this first report*. (Pls' Brief, at 14:5-9 (citing Nolan, Day 1, at 44:5-10)).
- Nolan's first meeting with Dean Winn: A day or two later, Dean Winn called Nolan to her office to discuss Nolan's first incident report. (Nolan, Day 1, at 44:5-45:12). However, *Nolan again admits he did not disclose the "homophobic sexually-oriented nature of the bullying.*" (Pls' Brief, at 4:14-15; Nolan, Day 1, at 46:2-3).
- C. allegedly "stabs" Nolan, but Nolan does not report it: Nolan admits that Dean Winn promptly responded to his first report. Specifically, he admits that as a result of his first report, Dean Winn came into the band classroom where Nolan "visually saw [her] speak to [C.]." (Nolan, Day 1, at 87:9-88:1). Further, Nolan testified that just moments after Dean Winn talked to C., C. called him a "tattletale," "stabbed" him in the genitals with a pencil, and stated that he was checking to see if Nolan was a girl. (Nolan, Day 1, 46:18-49:9; 87:9-4). This incident appears to be the primary basis of Nolan's sexual harassment claim. (*See, e.g., id.* at

called"), 18:5-6 ("Because of embarrassment and fear of retaliation neither Ethan nor Nolan voluntarily told their parents about the bullying they were enduring"), 34:1-5 ("The bullying of Ethan and Nolan . . . continued throughout the rest of September [after Mrs. Bryan's September 15 email] and into October [before Mrs. Bryan's October 19 email]. . . . Neither Ethan nor Nolan wanted to complain based on the prior lack of remedial action by the school").

Regardless of the reasons why plaintiffs concealed information concerning the alleged sexual harassment (even if they thought concealing the information furthered their interests better than disclosing the information), the fact remains that they did not disclose the information to the school. And, the school (and most certainly the school district) cannot be deemed to have actual knowledge of that which plaintiffs intentionally and admittedly concealed.

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91:2-6). *Nolan admits, however, that he chose not to report it to anyone at the school—or even to his own parents.* (*Id.* 48:13-49:2).

- Mrs. Bryan omits important information from her September 15 email: Mrs. Bryan testified that when she wrote her September 15 email about the pencil incident, she had been told that C. said, as he poked Nolan, that he wanted to see if Nolan was a boy or a girl. (M. Bryan, Day 3, at 35:18-36:6 ("I'm sure [Ethan] mentioned that to me, yes.")). But, Mrs. Bryan did not include this information in her September 15 email. (*Id.* at 36:7-9). She also allegedly knew that C. had been calling Nolan a girl—but she did not disclose that information either. (*Id.* at 36:10-16). Worse, Mrs. Bryan knew that Nolan was being called very specific homophobic names but she failed to disclose this information in her September 15 (and October 19) email. (*Id.* at 36:17-39:11).
- Nolan meets with Counselor Halpin and conceals the harassment: Mrs. Bryan testified that she knew specific details about the alleged homophobic language *before* she sent her September 15 email. (M. Bryan, Day 3, at 38:19-39:11). That email described the alleged pencil incident, but it said nothing about any sex- or gender-based statements or homophobic slurs. (Sep. 15 Email, Trial Ex. 4). Again, it said nothing about C.'s alleged statement that he was checking to see if Nolan was a girl. (*Id.*). Counselor Halpin read the late-night September 15 email the next morning, and he immediately called Nolan into his office to discuss it. (Nolan, Day 1, at 50:14-51:23; 95:22-98:25). Nolan admits that Counselor Halpin asked if he "had been bullied and what was occurring in the classroom." (*Id.* at 50:14-51:23). In response, Nolan—by his own admission—lied to Counselor Halpin, and told him "everything was fine and that nothing was happening." (*Id.* 50:14-51:23; 95:22-98:25).

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Q. And in that . . . first meeting that you had with Counselor Halpin, he asked you about the whole situation with the bullying and everything?

A. Yes.

Q. He asked you if everything was okay in your classes?

A. Yes.

Q. And you told Mr. Halpin that everything was okay and everything was fine?

A. I did.

Q. In other words, . . . he responded and followed up with you to make sure that you were—you were good, right?

A. Yes.

Q. Was your statement to Mr. Halpin true?

A. No.

(*Id.* 97:2-16). Nolan could have disclosed the alleged harassment, but he decided to affirmatively conceal it. Indeed, Nolan intentionally deceived Mr. Halpin for the very purpose of keeping him from taking further action. (*Id.* 51:13-18).

- Nolan meets with Counselor Halpin a second time and again conceals the harassment: Nolan also admits that Counselor Halpin called him to his office a second time to "make sure everything was going well in school and band" and that he again lied to Counselor Halpin to conceal the harassment. (*Id.* 98:6-8). Nolan's admissions with respect to this meeting clearly illustrate his intent to conceal:

Q. And in response, you again told him that everything was continuing to be okay and everything was good, right?

A. Yes.

Q. And was that response of yours truthful?

A. No.

Q. Were you purposely trying to mislead Mr. Halpin?

A. Yes.

Q. You were purposely trying to mislead him into believing that the mistreatment from C[.] and D[.] had stopped –

A. Yes.

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Q. -- when in reality it had not?
A. That is true.
Q. In other words, by telling Mr. Halpin that everything was good between you and C[.] and D[.], you were hoping that he would not follow up with those two boys, right?
A. That is correct.

(*Id.* 98:2-25). Counselor Halpin believed Nolan when he repeatedly stated that everything was fine. (Halpin, Day 3, at 141:21–142:6).

- Nolan files a second incident report and conceals both the "stabbing" and sex-based insults: On September 22, the day after Nolan's parents learned about the alleged stabbing, Nolan filed yet another incident report with Dean Winn. In this second written report, he again concealed any sex- or gender-based harassment and even omitted any reference to the "stabbing." (*Id.* 94:20-95:10). Instead, he reported seemingly innocuous conduct. Specifically, his second report states only the following: "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." (*Id.*; Incident Report, Sep. 22, 2011, Trial Ex. 9). While Nolan had the opportunity to tell the dean about any and all of the alleged sexual harassment, he again chose to conceal it.
- Ethan and Nolan continue to mislead Counselor Halpin: Following the September 15 email, Counselor Halpin periodically checked on Ethan and Nolan when he saw them in the lunchroom. Each time, Ethan and Nolan told him everything was fine. (Halpin, Day 3, at 146:12-148:2).
- Nolan's concealment was complete, even from his parents: Nolan admits he "purposely hid the frequency and intensity of the continuing bullying acts even from [his] parents" and that "each time Mr. Halpin, Mr. DePiazza or *anyone at the school* asked how things were going, asked if [he was] okay, each time [he] told them that everything was fine."

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(Nolan, Day 1, at 113:6-14) (emphasis added). Indeed, Nolan's mom testified that, after learning of the pencil incident, she asked Nolan *every day* how he was doing and *every day* Nolan said he was fine. (A. Hairr, Day 5, at 22:15-24, 41:17-42:1). Just like Mr. Halpin, Nolan's mom also believed Nolan when he repeatedly said he was fine. (*Id.* at 42:6-8).

c. THE EVIDENCE: ETHAN ADMITTED HE REPEATEDLY CONCEALED THE ALLEGED HARASSMENT

Ethan also concealed any alleged sex-based harassment until *after* he withdrew from GJHS. More specifically, while Ethan admits he never told *anyone* at the school that he was being mistreated (Ethan, Day 1, at 151:2-9; Ethan, Day 2, at 12:17-14:9, 17:6-8), the following testimony evidences his active concealment (and concealment by others):

- Mrs. Bryan intentionally fails to disclose information to CCSD: Mrs. Bryan admits she knew Ethan was being harassed long before she sent the October 19 email, but Ethan did not want her to say anything to the school. (M. Brian, Day 3, at 73:11-18). As Mrs. Bryan testified, "Ethan had asked me to let him handle it . . . . He didn't want to have . . . his mommy take care of everything." (M. Bryan, Day 2, at 161:7-9). Ethan also asked his mom not to intervene on his behalf because he felt things might get worse. (M. Bryan, Day 3, at 74:9-16). Accordingly, instead of conveying her knowledge to the school, Mrs. Bryan says she "stepped back and tried to allow Ethan to take care of it by himself . . . to be considered a big boy and be strong." (*Id.*, Day 2, at 161:21-24). Mrs. Bryan's parenting decisions certainly are not being questioned; however, her decision to intentionally withhold information from CCSD, while now trying to hold CCSD liable for not acting on the knowledge she withheld is questioned.
- Mrs. Bryan omits any sexual language from her October 19 email: Mrs. Bryan testified that she learned about numerous alleged sexual and

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homophobic insults on October 18, 2011. (M. Bryan, Day 2, at 159:17-164:16; Day 3, at 54:17-55:11). That same evening, she discussed these slurs and sexual insults with her husband (*Id.*). And because she "was disgusted" by the alleged insults she "started to write" her second email, which she sent early in the morning on October 19. (*Id.* at 162:20, 164:2-5). However, *the October 19 email says nothing about any sexual language or homophobic slurs because she was "absolutely" uncomfortable to write them out* (M. Bryan, Day 3, at 55:12-17), even if she (1) had no hesitation to describe them in detail at trial or to (2) sue CCSD for failing to take action regarding the insults she was too uncomfortable to disclose. Instead, with respect to insults, Mrs. Bryan's October 19 email states only that C. called Ethan a "big fat ass." (October 19 Email, Trial Ex. 8). Thus, immediately after learning about all of the alleged sexual language and homophobic slurs at issue in this case, Mrs. Bryan sent an email to GJHS employees that did not describe any of it. (*Id.*).

- Ethan conceals any sex-based insults in his incident report: On October 19, Ethan submitted an incident report of his own. (E. Bryan Incident Report, October 19, 2011, Trial Ex. 506). Consistent with the omissions in the October email that his mother sent just hours earlier, Ethan's report says nothing about any sexual language or homophobic slurs. Instead, Ethan concealed any such information and wrote only the following: "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." (*Id.*). Like Nolan, Ethan had a chance to describe the alleged sexual harassment, but he chose to conceal it.
- Ethan repeatedly misleads Dean Winn: Ethan admits that Dean Winn brought him to her office to discuss the band class situation. (Ethan, Day

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1, at 124:1-125:3). He further admits that when she asked "what was happening," he stated that "everything was fine." (*Id.*, Day 2, at 14:10-15:12). Moreover, he admits that when Dean Winn asked him "if the prior problems in the band class were being resolved," he told her "yes." (*Id.* at 160:7-162:18). Either these statements are true, and the alleged harassment had stopped, or they are false, and Ethan concealed it.

- Ethan misleads other GJHS administrators: Similarly, at various times, Ethan was approached in the lunchroom by either Counselor Halpin or Assistant Principal DePiazza, who asked how he was doing. Each time Ethan said "everything was fine." (Ethan, Day 2, at 15:13-16:22).
- Between October 19, and the boys' February withdrawal, both plaintiffs and their mothers were silent about the band class: Following the events of October 19, neither plaintiffs nor their mothers said anything to anyone at GJHS about any misbehavior directed at Ethan or Nolan. Thus, if any harassment continued between October 19 and plaintiffs' February withdrawal (a period of 4.5 months), plaintiffs concealed it from CCSD until after they withdrew.

d. BY REPEATEDLY CONCEALING THE ALLEGED HARASSMENT, BOTH PLAINTIFFS INTENTIONALLY PREVENTED CCSD FROM TAKING CORRECTIVE ACTION

Both boys admit that they concealed the alleged harassment for the very purpose of preventing CCSD from taking corrective action, due to a fear that C. might retaliate. (*E.g.*, Nolan, Day 1, 48:13-49:2, 51:14-18, 63:16-24; Ethan, Day 1, at 131:2-10; Pls' Brief, 8:24-28, 12:1-2, 15:1-2, 18:6-7; *see also supra* n.5). Following Nolan's first incident report, and Dean Winn's swift response, plaintiffs apparently—and correctly—recognized that the school would take corrective action in response to any known student-on-student misconduct. (*Id.*). Both boys believed that such corrective measures *could* lead to future retaliation from C. (*Id.*). So, by their own admission and in furtherance of what

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they then-believed to be in their own best interests, they repeatedly concealed the alleged harassment in a deliberate effort to prevent CCSD from taking corrective action. (*Id.*).

Remarkably, they now seek Title IX damages for CCSD's alleged failure to take the *exact* corrective and investigative measures that they deliberately prevented. They concealed the alleged sexual harassment to prevent CCSD from acting, and now they demand compensation because action was not taken. This is the opposite of "actual knowledge." Moreover, it directly contradicts *Gebser,* which states that school districts must have the opportunity to correct known harassment before a court can divert education funding—whether by limiting Title IX funding or awarding Title IX damages—from educational purposes. 524 U.S. at 289. ("[A] central purpose of requiring notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs.") Under *Gebser* and its progeny, the lack of actual knowledge is fatal to the Title IX claim.

e. NEITHER PLAINTIFF PROVED THAT CCSD HAD PRE-WITHDRAWAL NOTICE OF ANY SEXUAL HARASSMENT

On rebuttal, Nolan might try to demonstrate "actual knowledge" of sexual harassment by citing Mrs. Hairr's testimony that, in September, she verbally told Assistant Principal DePiazza that C. asked if Nolan was "a little girl" during the pencil incident. (*See* Pls' Brief at 22). Similarly, Ethan might cite Mrs. Bryan's testimony that, during an October 19 meeting, she and her husband told Dean Winn about the alleged homophobic slurs and other sexual language directed toward Ethan. (*Id.* at 36). Critically, this is the only testimony even remotely suggesting that anyone at GJHS knew about any sex- or gender-based harassment, and it fails to satisfy the "actual knowledge" element for several reasons.

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i. Neither plaintiff even attempted to prove that an appropriate CCSD official had "actual knowledge" of any sexual harassment

First, even if the mothers made such statements to Assistant Principal DePiazza and Dean Winn, plaintiffs have never argued—even at this late stage—that these school-level employees are CCSD officials "high enough up the chain-of-command that [their] acts constitute an official decision by the school district itself not to remedy the misconduct," *Floyd*, 171 F.3d at 1264 (emphasis added); *accord Gebser*, 524 U.S. at 290, and they cannot do so for the first time in their rebuttal. *Supra* n.4.

More importantly, plaintiffs offered no evidence that these two middle-school-level employees have CCSD's authority to address Title IX discrimination—and thereby jeopardize Title IX funds—on behalf of the entire school district, including its 350+ other elementary, middle and high schools. Indeed, nothing in the record even remotely supports this proposition.

Similarly, plaintiffs have never argued that anyone outside the school—let alone a CCSD official—had *any* knowledge of the alleged harassment before Ethan and Nolan withdrew. Instead, plaintiffs imply *respondeat superior* and attempt to hold the entire district responsible for what two middle-school-level employees allegedly knew about the alleged sexual harassment. The *Gebser* court expressly rejected such vicarious liability under Title IX and instead requires that an appropriate district official have "actual knowledge" of the harassment. 524 U.S. at 290. Therefore, because plaintiffs do not argue and did not prove that an appropriate CCSD official had "actual knowledge," neither of them proved the first element of a Title IX claim.

ii. Mrs. Bryan's "actual knowledge" testimony is not credible

Further, while plaintiffs and their mothers authored at least five documents complaining about the band class, *none* of those contemporaneous

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writings mentioned any sexual harassment.[6] This puts plaintiffs in an incredible position. It forces them to testify that despite memorializing five separate complaints in this sexual harassment case, they saved all information concerning the alleged sexual harassment for two oral, highly-disputed conversations. That is, they ask the Court to ignore their five written statements, which say nothing about sexual harassment, and take them at their word that they disclosed such harassment during uncorroborated conversations with Dean Winn and Assistant Principal DePiazza, despite evidence to the contrary. This testimony simply is not credible.

For example, while Mrs. Bryan testified that she told Dean Winn about some of the homophobic slurs during their October 19 meeting, her testimony is inconsistent, incredible and disputed. Mrs. Bryan testified she knew all the homophobic names the boys were being called but she admits not including any of them in her October 19 email because she was too uncomfortable to write them out. (M. Bryan, Day 3, at 55:12-17). Yet, she says she met with Dean Winn the same morning and verbally uttered the same names she was too uncomfortable to write. Dean Winn vigorously disputed that testimony. With tears in her eyes, Dean Winn explained that she is particularly sensitive to homophobic harassment because she raised a gay niece who was often subjected to it. (Winn, Day 4, at 164:14-168:5). She explained that if the Bryans had described such homophobic language, it would have evoked very strong emotions, and she would most certainly remember it. (*Id.*). Thus, she testified to a "100 percent" certainty, that Mrs. Bryan did not disclose such homophobic slurs or language. (*Id.*).

Dean Winn's testimony is "100 percent" consistent with Mrs. Bryan's October 19 email (sent the same morning), which conspicuously fails to

[6] September 15 Email, Trial Ex. 4; October 19 Email, Trial Ex. 8; Nolan September 22 Incident Report, Trial Ex. 9; Ethan October 19 Incident Report, Trial Ex. 506; *see also* Nolan, Day 1, at 42:8-43:1; Pls' Brief, at 14:5-9.

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describe any of the homophobic insults Mrs. Bryan claims to have shared with Dean Winn during the October 19 meeting. (October 19 Email, Trial Ex. 8). Likewise, Dean Winn's testimony is "100 percent" consistent with Ethan's October 19 incident report, which too fails to describe any of the homophobic-, sex-, or gender-based insults of any kind. (Ethan Report, Trial Ex. 506).

The Bryans' failure to describe any such language in the October 19 email and October 19 incident report, coupled with Dean Winn's emotional testimony about the October 19 meeting, supports only one conclusion: Mrs. Bryan did not describe any such language to Dean Winn. And had she actually done so, it would have been easy to corroborate. Indeed, *Mr.* Bryan was also at the meeting, (M. Bryan, Day 3, at 6:10-13), and plaintiffs could have easily called him to corroborate Mrs. Bryan's version of the facts. Tellingly, however, they chose not to do so.

iii. Mrs. Hairr's "actual knowledge" testimony is not credible

Mrs. Hairr's testimony that she told Assistant Principal DePiazza that C. asked if Nolan was a "girl" during the pencil-incident also lacks credibility. It too is entirely uncorroborated, and it contradicts Assistant Principal DePiazza's testimony concerning the conversation. (DePiazza, Day 2, at 143:23-144:18). Worse, the whole story about C.'s supposed "see if you're a girl" comment is entirely new. The comment is not discussed in any of the contemporaneous evidence, including the incident reports, (Trial Exs. 9, 506), or Mrs. Bryan's emails, (Trial Exs. 4, 8). In fact, plaintiffs do not even describe it in the complaint—though it is the single event on which Nolan's "gender-stereotyping" and "actual knowledge" theories now rely. Nobody mentioned this "see if you're a girl" comment until late in discovery, when plaintiffs abandoned their perceived-sexual-orientation theory and switched to their present gender-stereotyping theory. That is, plaintiffs said nothing about this single, gender-related comment—until after they admitted that no one at

GJHS perceived them as gay, (Nolan, Day 1, 1027:24-109:9;Ethan, Day 2, 11:4-12:11), and they could no longer prove a perceived-sexual-orientation claim.

Moreover, Ethan had every opportunity to corroborate Nolan's testimony concerning the alleged "see if you're a girl" comment, but he did not do so. Thus, nobody corroborated the "see if you're a girl" comment; nobody corroborated Mrs. Hairr's testimony that she shared this comment with Assistant Principal DePiazza; and nobody explained why plaintiffs failed to remember this comment until they were forced to abandon their perceived sexual orientation claim. The Court can certainly conclude the "see if you're a girl" comment is a litigation-enhancing after-thought.

f. NO CCSD EMPLOYEE HAD ANY PRE-WITHDRAWAL KNOWLEDGE OF THE ALLEGED SEXUAL HARASSMENT

Consistent with the forgoing, all of the GJHS witnesses unanimously testified that they had no knowledge of any sex-based, gender-based, or homophobic language before Mrs. Bryan sent her February 7 email. (*E.g.*, DePiazza, Day 2, 119:8-120:21; Beasley, Day 4, 67:25-68:3, Winn, Day 4, 165:4-19). Added to plaintiffs' admitted concealment, this unanimous testimony confirms that nobody—let alone an appropriate CCSD district-level official—had any "actual knowledge" of any alleged sexual harassment before Ethan and Nolan withdrew on or about February 1.[7] Thus, neither Ethan nor Nolan proved "actual knowledge" at trial, and unless the Court finds otherwise, it need not address the remaining elements of their Title IX claims.

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[7] Further, because neither the plaintiffs nor their mothers said anything about any harassment to anybody at the school between October 19 and plaintiffs' early February withdrawal, CCSD necessarily lacked any "actual knowledge" of any alleged sexual harassment that occurred during this 4.5 month span.

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2. *Element 2 (Title IX): Plaintiffs did not prove that CCSD was "deliberately indifferent" to the known sexual harassment*

a. ADDITIONAL LAW RELATED TO "DELIBERATE INDIFFERENCE" ELEMENT

CCSD "is liable for damages only where [it] intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment." *Davis*, 526 U.S. at 642. "[T]he deliberate indifference standard set forth in *Davis* sets a high bar for plaintiffs to recover under Title IX." *Stiles ex rel. D.S. v. Grangier Cnty., Tenn.*, 819 F.3d 834, 848 (6th Cir. 2016). Deliberate indifference requires "a state of mind more blameworthy than negligence." *See Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

Indeed, "[e]ven gross negligence is insufficient to establish deliberate indifference . . . ." *Thomas v. Bruce*, 2015 WL 3609693, at *3 (D. Nev. 2015); *accord Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011) ("[T]he standard we apply is even higher than gross negligence"); *Hendrichsen v. Ball State Univ.*, 2003 WL 1145474, at *3 (S.D. Ind. Mar. 12, 2003), *aff'd*, 107 F. App'x 680 (7th Cir. 2004) (holding that "even gross negligence[] does not rise to the level of deliberate indifference"); *McKay v. Dallas Indep. Sch. Dist.*, 2009 WL 615832, at *6 (N.D. Tex. Mar. 10, 2009) ("Deliberate indifference is a level of intent beyond gross negligence that is applied in any number of contexts in civil rights law."); *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 905 (D. Minn. 1999) (recognizing "that deliberate indifference describes a level of intent greater than gross negligence or recklessness"). Moreover, deliberate indifference requires a culpable mental state. *E.g.*, *Patel*, 648 F.3d at 974. As the Supreme Court declared in *Davis*, liability exists only if the school district's indifference was "intentional[]." 526 U.S. at 642.

Further, *Davis* instructs that schools are vested with broad discretion to deal with student discipline issues; therefore, just because a chosen response does not end the harassment does not mean the school was deliberately

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indifferent to the harassment. 526 U.S. at 648 ("We stress that our conclusion here . . . does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action."). Indeed, "courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Davis*, 526 U.S. at 648. To that end, a school district is "deliberately indifferent" only if its "response to the harassment or lack thereof is *clearly unreasonable* in light of the known circumstances." *Davis,* 526 U.S. at 648 (emphasis added).

The relevant questions are not whether CCSD responded perfectly,[8] not whether it responded effectively,[9] and not whether it could have done more.[10] To be clear, "Title IX does not require [schools] to take heroic measures, to perform flawless investigations, to craft perfect solutions, or adopt strategies advocated by parents." *Counts v. N. Clackamas Sch. Dist.*, 654 F. Supp. 2d 1226, 1241 (D. Or. 2009). And, a "claim that the school system could or should have done more is insufficient" to establish deliberate indifference. *Id.* "Ineffective responses" and even a "fail[ure] to follow [school] district policy does not mean that [the] actions were clearly unreasonable." *Sanches v. Carrollton-Farmers Branch Indep. School Dist.*, 647 F.3d 156, 168-69 (5th Cir. 2011); *accord Gebser*, 524 U.S. at 291-92 (a district's "failure to comply with [its] regulations, however, does not establish the requisite . . . deliberate

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[8] *See e.g., 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.).

[9] *See e.g., 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.").

[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.").

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indifference."). Indeed, "[a]ctions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference . . . ." *Moore v. Chilton Cnty. Bd. of Educ.*, 1 F. Supp.3d 1281, 1304 (M.D. Ala. 2014).

In short, deliberate indifference is a "high bar, and neither negligence nor mere unreasonableness is enough." *Sanches*, 647 F.3d at 167. This high standard is designed and intended to be met only in "limited circumstances." *Davis*, 526 U.S. at 643, 649. Therefore, "courts must be careful to strictly adhere to the *exacting standards* for deliberate indifference claims and avoid the temptation to apply a lesser standard in acquiescence to any personal sympathies or desires, no matter how justified." *Green v. Hooks*, 2017 WL 1078646, *7 (S.D. Ga. 2017) (emphasis added).[11] Indeed, as the Eleventh Circuit noted with regard to deliberate indifference (revised here to reference schools instead of prisons): "[W]e are . . . judges, not [school administrators], and the standards . . . in this area of the law are exacting for the very purpose of preventing . . . judges like us from meddling, even by our best lights, in the administration of our nation's [schools]." *Goodman v. Kimbrough*, 718 F.3d 1325, 1334 (11th Cir. 2013).

b. THE EVIDENCE: NOLAN FAILED TO PROVE CCSD WAS "DELIBERATELY INDIFFERENT" TO ANY SEXUAL HARASSMENT

Neither Nolan nor Ethan proved deliberate indifference. Instead, the evidence demonstrates that the school took calculated, admittedly-effective

[11] As the Fifth Circuit observed: "Judges make poor vice principals . . . ." *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F3d 982, 996 (5th Cir. 2014). Moreover, even school-age bullies have legal rights that must be taken into consideration. *See e.g. Doe v. Galster*, 768 F.3d 611, 621 (7th Cir. 2014) (in school disciplinary matters, there is a "tension between the legal rights of all the students involved" and that "[s]chool-age bullies also have legal rights") (citing *Goss v. Lopez*, 419 U.S. 565 (1975)); *Bd. of Educ. of City Sch. Dist. of City of New York v. Mills*, 741 N.Y.S.2d 589, 590 (N.Y. App. Div. 2002) ("school suspensions and expulsions implicate liberty and property interests of the student and, therefore, require the protections afforded by constitutional due process of law"). Accordingly, the law gives school officials wide discretion in making disciplinary decisions precisely because they have to balance the interests of all concerned—and they have to make such decisions in real-time without the benefit of months of discovery.

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steps to remedy the "known circumstances" as it learned about them. The following undisputed testimony exemplifies just some of the school's efforts to remedy the conduct directed toward Nolan:

- Dean Winn responds to Nolan's first incident report by meeting with Nolan and reprimanding C.: On or about September 7, Nolan filed his first incident report. (Nolan, Day 1, at 42:8-43:1). Nolan admits that just a day or two later, Dean Winn took responsive action by calling him into the office to discuss this first report. Nolan further admits that, after this meeting, Dean Winn took more responsive action by going to the band class and reprimanding C. (*Id.* at 87:9-88:1). Nolan admits that both *the frequency and intensity of the harassment decreased after Dean Winn took this action*. (*Id.* at 91:21-24).
- Counselor Halpin calls Mrs. Bryan to discuss her first email: The morning of September 16, Counselor Halpin read Mrs. Bryan's late-night, September 15 email and attempted to call her, but he was forced to leave a voicemail (Halpin, Day 3, at 42:7-22). In the voicemail, he explained that he was going to talk to Nolan and explain how to report the situation. He also offered to discuss the situation with Mrs. Bryan. (*Id.*).
- Counselor Halpin meets with Nolan after reading the first email: That same morning (by the end of second period), Counselor Halpin brought Nolan into his office. (*Id.* at 137:23-140:20). During this meeting he asked Nolan about the situation and encouraged Nolan to fill out an incident report regarding the allegations in the September 15 email. (*Id.*) In response, Nolan stated that everything was fine and (unknown to Counselor Halpin) did not follow the instruction to submit an incident report. (*Id.* 50:14-51:23; 95:22-98:25).
- Mr. Beasley rearranges the seats, reprimands C. and D., and refers C. to Dean Winn: The very next school day, Mr. Beasley responded to the

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September 15 email with a four-part solution. (Beasley, Day 4, at 24:20-25:18, 27:3-12, 55:15-58:8). First, he rearranged all the seats in the class but, to protect Nolan, he did not announce why the change was being made. (Nolan, Day 1, at 53:9-14, 81:16-22). At trial, Mr. Beasley explained what he did and why he did it (importantly, at this point in time, there was absolutely no indication from anyone that Ethan was being targeted):

> A. I specifically remember re-seating the boys by separating C[.] and Nolan, moving . . . Nolan to the front of the room right in front of me, and C[.] behind him, both students on the aisle where I had a good view.[12] There was nothing on their right to distract me, or to hide them. And I also put Ethan next to C[.]
>
> Ethan is a big boy, and I thought C[.] might be a little intimidated by him because of his size. He's also very quiet, and . . . I assumed that he would not become someone C[.] would talk with and get in trouble with, you know. When I separate students who are being disruptive, I want to try to put them by someone who I know will not be disruptive. . . . (*Id.* at 55:15-56:2).

Second, as just mentioned in the quotation, Mr. Beasley moved Ethan—the largest student in the class and whom Mr. Beasley knew was Nolan's friend—next to C., because he believed C. was afraid of Ethan and that Ethan's physical presence and friendship with Nolan would deter C. from bothering Nolan. (Beasley, Day 4, at 24:20-25:18, 27:3-12, 55:15-58:8). Third, Mr. Beasley talked to C. and D. about their poor behavior. (*Id.* at 24:20-25:18, 55:15-58:8). Fourth, Mr. Beasley completed a form and referred C. to Dean Winn. (C.'s Chronology of Behavior, Trial Ex. 5; Winn, Day 4, at 139:22-140:5). **After this seating change, Nolan never told anyone that any bullying continued.** (Nolan, Day 1, at 81:23-82:4).

[12] While Mr. Beasley realized this arrangement had Nolan sitting directly in front of Connor, he believed such would not be a problem because of the large space between rows needed for music stands and instrument cases, especially rows separating trombone players, who need extra room for their slides to extend. (*Id.* at 27:3-12, 50:6-16).

- Counselor Halpin meets with Nolan a second time: Two days later, on September 22, Mrs. Hairr and Counselor Halpin discussed Mrs. Bryan's September 15 email. During the conversation, Counselor Halpin assured Mrs. Hairr that he would meet with Nolan and take him to see Dean Winn. (Halpin, Day 3, at 124:8-19). As promised, Counselor Halpin initiated another meeting with Nolan and took him to Dean Winn's office, where Nolan completed an incident report that same day. (*Id.* at 126:11-24; Nolan, Day 1, at 97:20-98:1; Nolan Incident Report, Trial Ex. 9).
- Dean Winn meets with Nolan a second time: Dean Winn reviewed the referral from Mr. Beasley and Nolan's September 22 incident report, *which said nothing about any sexual harassment*. (Trial Ex. 9). She then brought Nolan into her office, where he told her the harassment in band had **completely ceased**. (Nolan, Day 1, at 111:5-112:9). Unlike other instances when Nolan admitted lying to school administrators by saying everything was fine, Nolan testified that this time he was telling the truth when he told Dean Winn the "bullying," the "harassment," "[t]he name calling and everything [he was] experiencing" in the band class had ceased. (*Id.*)

    Q. And following your one discussion with Dean Winn, the bullying ceased in band, correct?

    A. Yes.

    (*Id.* at 113:3-5). Thus, no matter how much plaintiffs criticize the school's responses, those responses effectively ended any known harassment directed at Nolan.
- Dean Winn disciplines C. by placing him on RPC: After meeting with Nolan, and learning that the harassment ceased, Dean Winn still summoned C. to her office for a disciplinary interview. Following that interview she put him on RPC for his prior behavior. (Winn, Day 4, at 125:11-12; 137:18-21).

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- Dean Winn holds a parent conference with C. and his mother: On September 27, Dean Winn held the required parent conference with C. and his mother. During the conference, C.'s mother assured Dean Winn that she would talk to him about appropriate behavior. (Winn, Day 4, at 162:16-163:13).[13]
- **After September 22, no further reports were made of misconduct directed at Nolan until after Nolan withdrew from GJHS more than four months later.** Indeed, after September 22, Nolan failed to report any on-going harassment to even his parents until just before withdrawing from GJHS. (Nolan, Day 1, at 56:4-25, 73:12-74:5, 92:8-11). He concealed this information from his parents for the same reason he deceived the school—i.e., to avoid his parents from taking action. (*Id.* at 55:23-57:4, 60:6-61:3).

The foregoing examples demonstrate that CCSD was not deliberately indifferent to what it knew about Nolan. Indeed, the foregoing demonstrates anything but "an official decision by [CCSD] not to remedy the violation." *Gebser*, 524 U.S. at 276. To the contrary, even Ethan admits the school tried to assist Nolan by rearranging seats. (Ethan, Day 1, at 147:7-10).

In short, "deliberate indifference is a stringent standard." *Bd. of Cnty Com'rs of Bryan Cnty v. Brown*, 520 U.S. 397, 410 (1997). Nolan failed to satisfy this stringent standard.

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[13] Involving an alleged bully's parent can be a very effective disciplinary intervention. It is well recognized that "resolving student disciplinary problems by seeking cooperation from the adults in charge of the student . . . used in the search for common purposes of home and school in solving discipline problems are in the best interests of everyone." *Graham v. Knutzen*, 351 F. Supp. 642, 670 (D. Neb. 1972), *supplemented*, 362 F. Supp. 881 (D. Neb. 1973). But even if this Court believes that different discipline would be more effective, the controlling standard gives complete deference to the school's disciplinary decisions, absent proof of deliberate indifference. *Supra* Part II.A.2.a.

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c. THE EVIDENCE: ETHAN FAILED TO PROVE CCSD WAS "DELIBERATELY INDIFFERENT" TO ANY SEXUAL HARASSMENT

The school responded similarly to the "known circumstances" concerning Ethan. Indeed, the following undisputed testimony exemplifies how the school responded when it learned for the first time, on October 19, that C. had shifted his focus from Nolan to Ethan:

- **Prior to October 19, nobody reported any misconduct directed at Ethan:** Even Ethan's mom admits that her September 15 email did not mention misconduct directed toward Ethan. (M. Bryan, Day 3, at 42:2-5).
- The harassment was limited to the band room: The mistreatment of Ethan occurred only in the band classroom. (Ethan, Day 1, at 148:9-25).
- Mrs. Bryan sends her October 19 email, and Mr. Beasley moves Ethan far away from C.: Following Nolan's September 22 incident report, neither plaintiffs nor their parents informed the school of any further misconduct directed at either boy until Mrs. Bryan sent her October 19 email. (Pls' Brief at 34:1-5). In the October 19 email, Mrs. Bryan described only non-sexual conduct and advised the school, for the first time, that Ethan was now the target. (Trial Ex. 8). Upon receiving this email, Mr. Beasley again moved the boys. Specifically, Mr. Beasley moved Ethan as far away from C. as he could within the trombone section. (Beasley, Day 4, at 64:12-65:13; Ethan, Day 1, at 164:22-165:7; Nolan, Day 1, at 107:20-23).
- Counselor Halpin calls Mrs. Bryan to discuss her second email: As Mrs. Bryan admits, Counselor Halpin called her on the morning of October 19 to discuss her same-day email. (M. Bryan, Day 3, at 7:17-18). When they spoke, Mrs. Bryan told Counselor Halpin she had just met with Dean Winn and, "in so many words, don't worry about it, Ms. Winn is handling

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it." (*Id.* at 59:20-60:4). Thus, Mrs. Bryan intentionally chilled Counselor Halpin's efforts.

- Dean Winn meets with Ethan to discuss the band class situation: Around the time that Mrs. Bryan sent her October 19 email (and Ethan submitted his incident report), Dean Winn brought Ethan into her office to discuss the situation. Dean Winn tried to determine what was going on in the band class, but Ethan thwarted those efforts by stating everything was fine and that the problem was solved. (Ethan, Day 2, at 14:10-15:12). During this meeting, Ethan was either telling the truth and the problem was solved or he intentionally concealed the on-going problem and deprived Dean Winn both "actual knowledge" and the opportunity to help him.
- Counselor Halpin follows-up with Ethan and Nolan: After he received the September 15 and October 19 emails, Counselor Halpin continued to check on the boys. (Halpin, Day 3, at 146:12-148:2). Each time he did, the boys told him that everything was fine, inducing him not to take more action. (*Id.*).
- Other GJHS administrators follow-up with Ethan: More than one GJHS administrator followed-up with Ethan in the lunchroom and asked how he was doing. (M. Bryan, Day 3, at 66:20-23). Each time, Ethan misrepresented (or correctly represented) that everything was fine. (*Id.* at 67:18-23).

These are just some of the school's responsive actions, and they do not even approach gross negligence—much less deliberate indifference. Quite the opposite, they reveal efforts calculated to remedy the "known circumstances," *Davis*, 526 U.S. at 648, in the band class.

Once the school knew about the conduct directed toward Nolan, it took effective steps to remedy it. Then, almost a month after the misconduct toward

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Nolan "ceased," (Nolan, Day 1, at 111:5-112:9), the school learned that C. had shifted his focus to Ethan, and it again took calculated responsive action.

d. THE EVIDENCE: PLAINTIFFS ADMIT THAT THE SCHOOL'S RESPONSES CAUSED THE HARASSMENT TO CEASE

Further, plaintiffs repeatedly admit the school's responses were effective. For example, Nolan repeatedly testified and wrote that the bullying completely ceased in the band class within days of Mrs. Bryan's September 15 email, (Nolan, Day 1, 110:22-112:9, Nolan Incident Report, Feb. 8, 2012, Trial Ex. 547), which resulted in two meetings with Counselor Halpin, the incident report that Counselor Halpin directed Nolan to write, Nolan's subsequent meeting with Dean Winn, the seat change in band class, Mr. Beasley's discipline referral regarding C., and C.'s RPC. Indeed, by his own admission, Nolan told Dean Winn that the bullying had completely ceased in the band class when he met with her to discuss his September 22 incident report. (*Id.*). Moreover, on February 8, 2012—days after Nolan withdrew from GJHS—he wrote in an incident report that the "bullying had ceased in band" by the time he met with Dean Winn. (Nolan Incident Report, Feb. 8, 2012, Trial Ex. 547). In fact, the complaint itself includes a similar admission (FAC ¶ 40).

Likewise, Mrs. Bryan admits that when she met with Mr. Beasley on October 5 at the Open House, she believed he was sincere, thanked him for taking her concerns seriously and for rearranging the seats. (M. Bryan, Day 3, at 49:11-50:27).

Additionally, between October 19 and plaintiffs' withdrawal in early February, neither plaintiffs nor their mothers said *anything to anyone* at CCSD about the band class. (*E.g.,* A. Hairr, Day 5, at 57:15-19). This 4.5 months of radio silence confirms that the harassment ceased and that GJHS's response was effective. At a minimum, CCSD had every reason to believe its responses successfully ended the harassment and that, even if *arguendo* CCSD

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had actual knowledge of sexual harassment before October 19 (it did not), CCSD had no actual knowledge of any on-going mistreatment (sexual harassment or otherwise) between October 19 and the boys' early February withdrawal.

Now, plaintiffs claim—because they must—that the school's timely and admittedly-effective response was so culpable that that it goes beyond gross negligence and rises all the way to deliberate indifference. This is absurd. Plaintiffs do not even try to argue that CCSD's response "deliberately" exposed them to any "known" sexual harassment. Instead they admit the exact opposite—that once the GJHS faculty responded to Mrs. Bryan's emails, the known harassment ceased.

To be clear, however, even if the Court finds that the harassment did not cease, this is irrelevant to the Title IX analysis. Instead, under Title IX, the relevant questions are what CCSD actually knew and whether it responded—not whether it responded perfectly, not whether it responded effectively, not whether it could have done more, but rather whether it was aware of on-going sexual harassment and deliberately decided to allow it to continue.[14] Unless the answer to both questions is yes, Title IX does not justify diverting public education funds from the public to individual plaintiffs.

e. PLAINTIFFS' DELIBERATE INDIFFERENCE ARGUMENTS FAIL AS A MATTER OF LAW

In an attempt to save their case, plaintiffs appear to imply two deliberate indifference arguments: (1) CCSD was deliberately indifferent because Counselor Halpin and Mr. Beasley violated NRS 388.1351 when they assumed—without verifying—that principal McKay received Mrs. Bryan's emails, (Pls' Brief, at 18:25-19:3, 57:18-20); and (2) by failing to take particular investigative steps, Dean Winn, Assistant Principal DePiazza, and Principal McKay engaged in a "textbook example of deliberate indifference," which

[14] *Supra* ns. 8-10.

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renders CCSD vicariously liable, (*id.* at 58:1-10). Neither of these arguments is supported by any authority, and both fail as a matter of law.

i. Plaintiffs disguise a negligence per-se, vicarious liability argument as "proof" of deliberate indifference

Citing no authority, plaintiffs contend that if the court finds that any CCSD employee violated any "mandatory reporting" or investigative requirements listed in NRS 388.1351, it must find that CCSD itself was deliberately indifferent. (*Id.* at 18:25-19:3, 57:18-20). Here, plaintiffs appear to argue a novel theory of "deliberate indifference per se" and then attempt to use vicarious liability to impute school-level, employee conduct to CCSD. That is, they argue that if a GJHS employee violated a Nevada reporting statute, the violation itself constitutes CCSD's deliberate indifference. Plaintiffs offer *no authority* for this *never-before-adopted* proposition, and it fails for at least three reasons.

First, plaintiffs have simply disguised a negligence *per se* argument as a deliberate indifference argument. Indeed, they argue that a violation of a civil statute, NRS 388.1351, evidences conduct below the standard of care. This is a negligence per se argument,[15] not a deliberate indifference argument. At most, it could support a negligence claim.

Here, however, the Court dismissed all of the negligence claims, including Ethan and Nolan's negligence per se claims that were based on this exact statute. (Dismissal Order, Feb. 10, 2015, at 2:25-28, 3:9-11). Without any negligence claims, proof of negligence *per se* is obviously unavailing. Yet, because plaintiffs could not prove deliberate indifference at trial, they continue to proceed as if this were a negligence case. The Court should not be confused.

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[15] *See, e.g., Barnes v. Delta Lines, Inc.*, 99 Nev. 688, 690, 669 P.2d 709, 710 (1983) ("When a defendant violates a statute which was designed to protect a class of persons to which the plaintiff belongs, and thereby proximately causes injury to the plaintiff, such a violation constitutes negligence *per se*.").

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Proof of negligence, negligence per se, or even gross negligence is insufficient to establish deliberate indifference. *E.g.*, *Patel*, 648 F.3d at 974 (The standard for deliberate indifference is "higher than gross negligence."); *Supra* Part II.A.2.a.

Second, plaintiffs' attempt to bootstrap NRS 388.1351's requirements onto the federal deliberate indifference standard directly contradicts *Davis* and its progeny. Under these cases, a plaintiff cannot establish deliberate indifference by proving the school district failed to take particular investigative, reporting, or disciplinary actions. *Supra* Part II.A.2.a. Indeed, an ineffective response or even a response that violates regulatory mandates does not establish deliberate indifference. *E.g.*, *Davis*, 526 U.S. at 648; *Gebser*, 524 U.S. at 291-92 ("Lago Vista's alleged failure to comply with [Department of Education] regulations, however, does not establish the requisite actual notice and deliberate indifference."); *Sanches*, 647 F.3d at 168-69 (5th Cir. 2011).

Under the controlling, federal deliberate indifference standard, CCSD has broad discretion to deal with student-on-student harassment. *Davis*, 526 U.S. at 648. And the Court can second-guess that discretion only if it finds that CCSD responded to "known" harassment in a manner so clearly unreasonable that it surpasses gross negligence. *E.g.*, *Patel*, 648 F.3d at 974. There is no basis for such a finding here. Thus, plaintiffs' repeated reference to NRS 388.1351 is a red herring and an invitation to reversible error.

Third, plaintiffs' NRS 388.1351 argument asserts only that certain school-level employees were deliberately indifferent, but seeks to hold CCSD liable. That is, plaintiffs do not assert that CCSD itself did anything wrong, but instead that a few of its employees (at one of its more than 350 schools) violated a statutory reporting or investigation requirement. This is yet another improper *respondeat superior* theory of vicarious liability. Therefore, because

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Gebser expressly rejected vicarious liability under Title IX, 524 U.S. at 290, the NRS 388.1351 arguments fail as a matter of law.

ii. One employee's inaction, does not negate another employee's response

Similarly, plaintiffs argue that if the Court finds that Dean Winn, Assistant Principal DePiazza, or Principal McKay knew about the alleged sexual harassment and failed to perform a "thorough investigation," it must find that CCSD was deliberately indifferent—regardless of the school's other, admittedly-effective responsive actions. (Pls' Brief, at 58). Nonsense.

First, this is still nothing more than a fatally-defective *respondeat superior* argument, because it purports to hold CCSD liable on the grounds that three of its school-level employees allegedly failed to act. Thus, it fails as a matter of law. *Gebser*, 524 U.S. at 290. Second, this argument again attempts to replace the *Davis* federal deliberate indifference standard with a state-law investigation requirement. This, too, is an invitation for error. Third, plaintiffs do not and cannot cite any authority for the proposition that Dean Winn, Assistant Principal DePiazza, or Principal McKay's alleged failure to properly investigate somehow negates all of the other responsive actions undertaken by CCSD employees.

Citing no authority, plaintiffs attempt to confuse this Court into concluding that if these three GJHS employees did not perform particular investigative tasks, all other responsive actions must be ignored, and CCSD must be found deliberately indifferent. Under this reasoning, CCSD could avoid a deliberate indifference finding only when all employees with any knowledge of any harassment take specific responsive actions.[16] Plaintiffs, however, do not even try to argue that Title IX creates such a standard.

[16] Indeed, under plaintiffs' reasoning, if a school janitor learned about the band class harassment and didn't take specific action, CCSD would still be liable, regardless of what its other employees did.

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Of course, Title IX does not require specific employees to take specific actions, and it does not require the school district to implement a parent's preferred response. *E.g.*, *Davis*, 526 U.S. at 648 (Title IX does not require schools to "engage in particular disciplinary action."); *Supra* Part II.A.2.a. Instead, Title IX is satisfied as long as the district did not "deliberately" ignore "known" sexual harassment inflicted upon Ethan and Nolan. Here, it is undisputed that multiple CCSD employees responded to Mrs. Bryan's emails in a good faith, timely, and admittedly-effective manner. This is far from "gross negligence," and even further from deliberate indifference. Thus, it satisfies Title IX regardless of whether other CCSD employees failed to take particular investigative actions. Accordingly, plaintiffs did not prove CCSD's deliberate indifference, and the Court should enter judgment for CCSD on the Title IX claim.

In sum, to find that CCSD was deliberately indifferent, the Court must find that CCSD itself had actual knowledge of sex-based harassment and made "an official decision . . . not to remedy" it. *Gebser*, 524 U.S. at 276 (emphasis added). Nothing even remotely close occurred here. Ethan and Nolan failed to satisfy deliberate indifference's "stringent standard," *Bd. of Cnty Com'rs of Bryan Cnty v. Brown*, 520 U.S. 397, 410 (1997), which is especially difficult to satisfy in the context of student-on-student harassment.

3. Element 3 (Title IX): Plaintiffs did not prove that CCSD "caused" the sexual harassment

a. ADDITIONAL LAW RELATED TO "CAUSATION" ELEMENT

A Title IX funding recipient—like CCSD—can be liable "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). "Courts have construed this language as requiring Title IX plaintiffs to demonstrate that a federal funding recipient's deliberate indifference caused them to be subjected to *further* discrimination or deprivation." *Lopez v. Regents of Univ. of Cal.*, 5 F.

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Supp. 3d 1106, 1125-26 (N.D. Cal. 2013) (emphasis added); *accord Williams v. Board of Regents of Univ. System of Georgia*, 477 F.3d 1282, 1296 (11th Cir. 2007) ("Based on the *Davis* Court's language, we hold that a Title IX plaintiff . . . must allege that the Title IX recipient's deliberate indifference to the initial discrimination subjected the plaintiff to *further* discrimination." (emphasis added)); *Doe v. Blackburn College*, 2012 WL 640046, *7 (C.D. Ill. 2012) (Title IX liability exists "when the school exhibits deliberate indifference after the attack which causes the student to endure *additional* harassment" (emphasis added)).

The causation element erects a "high standard" and exists "to eliminate any 'risk that the recipient would be liable . . . not for its own official decision but instead for its employees' independent actions.'" 526 U.S. at 643 (quoting *Gebser*, 524 U.S. at 290-91).

b. THE EVIDENCE: ETHAN FAILED TO PROVE CCSD "CAUSED" HIS SEXUAL HARASSMENT

Ethan offered *no evidence* at trial that CCSD's deliberate indifference caused him to endure "further" or "additional" sexual harassment. Indeed, even though Plaintiffs' Closing Argument brief is mostly a regurgitation of 58 pages of trial testimony, none of it addresses this "causation" element.

c. THE EVIDENCE: NOLAN FAILED TO PROVE CCSD "CAUSED" HIS SEXUAL HARASSMENT

The record is equally silent regarding Nolan. Worse, instead of proving—or even arguing—that CCSD's response caused the harassment to continue, Nolan repeatedly admitted that CCSD's response caused the alleged harassment to cease. *Supra* Part II.A.2.d. This is the exact opposite of proving Title IX's causation element, and it is fatal to Nolan's Title IX claim.

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4. *Element 4 (Title IX): Neither plaintiff proved that his sexual harassment was "severe, pervasive, and objectively offensive"*

a. ADDITIONAL LAW RELATED TO "SEVERE, PERVASIVE, AND OBJECTIVELY OFFENSIVE" ELEMENT

Title IX liability does not exist unless the sexual harassment was "severe, pervasive, and objectively offensive." *Davis*, 526 U.S. at 650 (emphasis added). For the harassment to be "severe, pervasive, and objectively offensive, . . . the harassment must be more than the sort of teasing and bullying that generally takes place in schools." *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 409 (5th Cir. 2015) (emphasis added).

Civilized adults have a tendency to think (perhaps correctly so) that all sexual harassment is severe and objectively offensive. However, this predisposition does not control the Title IX analysis, for at least two reasons. First, under Title IX, sexual harassment is a prerequisite; thus, an element requiring the harassment to be "severe, pervasive, and objectively offensive" requires more than just the existence of sexual harassment—otherwise, this element has no meaning. Indeed, the "severe, pervasive, and objectively offensive" element requires the sexual harassment be especially deplorable in degree (severe), scope (pervasive) and content (objectively offensive). Second, this case does not involve sexual harassment inflicted by mature adults who "know better." Rather, all student participants (Ethan, Nolan, C., and D.) were 11-year-old sixth graders. The United States Supreme Court recognized in *Davis* the "dizzying array of immature . . . behaviors by students" and "the inevitability of student misconduct." 526 U.S. at 651-53. Indeed, the Court counseled lower court judges to be careful about measuring children's conduct with an adult yardstick:

> Courts . . . must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on, students are still learning how to

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> interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender.

Davis, 526 U.S. at 651-52.

In short, not all behavior that is clearly inappropriate and subject to condemnation rises to the level of "severe, pervasive, and objectively offensive." *See e.g., Brodsky ex rel. S.B. v. Trumbull Bd. of Educ.*, 2009 WL 230708, at *6 (D. Conn. 2009) (male student touching a female student's breasts and buttocks, and other incidents of name-calling, insults, and physical harassment "not sufficiently pervasive or severe from an objective standpoint"); *Soriano v. Bd. of Educ. of City of N.Y.*, 2004 WL 2397610, at *6 (E.D.N.Y. 2004) (conduct not sufficiently pervasive under Title IX where one boy touched female student's vagina through her skirt and other boy slapped her buttocks).

b. THE EVIDENCE: ETHAN FAILED TO PROVE ANY HARASSMENT DIRECTED AT HIM WAS "SEVERE, PERVASIVE, AND OBJECTIVELY OFFENSIVE"

Even though Ethan and Nolan were best friends and sat next to or near each other at all times in the band class, Nolan never heard Ethan called anything other than names about his height and weight. (Nolan, Day 1, at 104:18-106:4). First, comments about Ethan's height and weight have nothing to do with "on the basis of sex" and thus cannot be considered here. Second, observations about Ethan's height and weight (e.g., "jolly green giant" or "big fat ass") are not objectively offensive or severe enough to be actionable. *See Davis*, 526 U.S. at 651-52 ("Damages are not available for simple acts of teasing and name-calling among school children").

If the harassment had been "severe, pervasive and objectively offensive," one would expect some offer of medical and/or mental health records or expert

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testimony from Ethan. There was none. Moreover, because Nolan testified that C. and D.'s insults could often be heard across the room, (Nolan, Day 1, at 66:17-21), one would expect Nolan to testify that he overheard at least some of the allegedly "severe, pervasive and objectively offensive" sex-based harassment directed toward Ethan. But Nolan could offer no such testimony. Instead, he described only comments about Ethan's size.

c. THE EVIDENCE: NOLAN FAILED TO PROVE ANY HARASSMENT DIRECTED AT HIM WAS "SEVERE, PERVASIVE, AND OBJECTIVELY OFFENSIVE"

The most severe thing Nolan alleges is the pencil poke. However, he admits the pain, at its worse, was 7 out of 10. (Nolan, Day 1, at 86:3-6). He did not go to the school nurse, even though he had been to a school nurse at least four times previously for things like a scraped knee and felt the nurse helped him. (*Id.* at 86:7-18). Within a couple days of the pencil jab, Nolan's father took him into the bathroom to check his privates. (*Id.* at 90:3-5; A. Hairr, Day 5, at 10:9-15). Mr. Hairr "didn't see anything;" meaning, "everything looked fine." (*Id.* at10:15, 37:4-7). Indeed, there was no bruising, no puncture marks, no scabs, no redness, and no swelling. (*Id.* at 37:11-19). Immediately after the pencil incident, Nolan's mother recalls he did not walk or sit differently. (*Id.* at 37:20-21). In short, Nolan's mother admits there was "no external indication that Nolan was in any pain whatsoever." (*Id.* at 38:4-11). A one-time pencil poke from a 6th grade student of the kind Nolan and his mother testified about is not the "severe, pervasive and objectively offensive" conduct that subjects the entire school district to liability and damages under Title IX.

If the harassment had been "severe, pervasive and objectively offensive," one would expect some offer of medical and/or mental health records or expert testimony from Nolan. There was none.

5. *Element 5 (Title IX): Neither plaintiff proved he was "deprived educational opportunities or benefits"*

a. ADDITIONAL LAW RELATED TO THE "DEPRIVED EDUCATIONAL OPPORTUNITIES OR BENEFITS" ELEMENT

The final Title IX element requires plaintiffs to demonstrate that the sexual harassment "deprived [them] of the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650.

"Title IX's purpose is not to eradicate harassment from the educational environment." *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 717 (4th Cir. 2007) (Niemeyer, J., Dissenting), and it "does not create a federal code of manners." *Hoffman v. Saginaw Public Schools*, 2012 WL 2450805, at *7 (E.D. Mich. 2012). Instead, it is "a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner." *Gebser,* 524 U.S. at 292 (emphasis added). Accordingly, "[h]arassment standing alone, no matter how severe or pervasive, is not actionable; it must have the *effect* of discriminating so that it effectively denies students of 'equal access to an institution's resources and opportunities.'" *Jennings*, 482 F.3d at 717 (quoting Davis, 526 U.S. at 651) (emphasis in original); *see also* 20 U.S.C. § 1681(a).

b. THE EVIDENCE: ETHAN ADMITTED HE WAS NOT "DEPRIVED EDUCATIONAL OPPORTUNITIES OR BENEFITS"

Ethan admitted that, during the five months he was at GJHS, he always felt he had equal access to the school's (1) activities and functions, (2) resources, and (3) educational opportunities available to all other students. (Ethan, Day 1, at 202:11-204:2). He also admitted that his interactions with C. and D. did not keep him from participating in *any* class or activity he wanted to participate in. (Ethan, Day 2, at 9:18-10:24).

Further, Ethan testified that, since leaving GJHS, his grades stayed about the same, and his mother agreed. (Ethan, Day 1, at 200:3-5, M. Bryan,

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Day 3, at 25:13-15). He feels he has succeeded academically. (*Id.* at 199:25-200:2, Day 2, at 8:25-9:2). Indeed, despite the alleged harassment in the band class, Ethan received almost straight-A's in the GJHS band class. (Trial Ex. 555, Ethan, Day 1, at 201:24-202:10). Ethan was not at GJHS long enough to make the honor roll but, after transferring from GJHS, he made the honor roll numerous times during middle school. (Ethan, Day 2, at 4:11-5:23).

Ethan admitted *never* having any problem (1) reading at grade level, (2) expressing himself in writing, or (3) doing math at grade level. (Ethan, Day 2, at 9:7-17).

Ethan played on his school's basketball and football teams. (Ethan, Day 1, at 199:3-10, 14-19). Indeed, Ethan admitted he's been able to participate in all the extracurricular activities that he wanted to. (Ethan, Day 2, at 9:3-6). In short, Ethan was not deprived the educational opportunities and benefits needed to sustain a Title IX claim. Judgment must be entered for CCSD.

c. THE EVIDENCE: NOLAN ADMITTED HE WAS NOT "DEPRIVED EDUCATIONAL OPPORTUNITIES OR BENEFITS

Nolan testified he has (1) always read above his grade level, and (2) never had any problems expressing himself in writing or doing math at his grade level. (Nolan, Day 1, at 100:13-101:7). Nolan further admitted that his participation in school-related activities did not diminish after transferring from GJHS. (*Id.* at 101:8-11). Indeed, Nolan's mother admitted CCSD told her (and Mrs. Bryan) that Nolan (and Ethan) could both continue to participate in the GJHS Robotics Club even after transferring to a different school, if they wanted. (A. Hairr, Day 5, at 53:6-54:7).

Like Ethan, Nolan also admitted that his interactions with C. and D. never deterred him from participating in any classes he wanted to take. (Nolan, Day 1, at 101:13-102:25).[17] After leaving GJHS, Nolan received and

[17] Nolan's mother also confirmed through sworn testimony that Nolan has been able to attend and participate in every class he wanted. (A. Hairr, Day 5, at 54:21-55:1).

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continues to receive what he considers to be a better educational experience compared to GJHS. (*Id.* at 100:3-5).

In short, transferring from GJHS did not result in Nolan being deprived educational opportunities and benefits; to the contrary, he feels his educational experience improved.

B. Plaintiffs Failed To Prove Any Damages

Even if the Court determines that Ethan and Nolan were, despite their admissions, deprived educational opportunities and benefits as a result of CCSD's deliberate indifference, plaintiffs failed to offer *any evidence* of their damages, as more fully set forth below. *Infra* Part IV.

III. PLAINTIFFS FAILED TO PROVE THAT CCSD VIOLATED THEIR SUBSTANTIVE DUE PROCESS RIGHTS PURSUANT TO § 1983

Ethan and Nolan's second claim seeks to prove liability under §1983 for an alleged violation of their substantive due process rights. As demonstrated below, this requires plaintiffs to prove the *potential* for liability under § 1983 analysis and the *existence* of liability under substantive due process analysis. Both areas of the law and their elements will be discussed in order.

A. Section 1983—The Law (Monell Liability) and Elements

Section 1983 is not a standalone cause of action. *E.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) ("§ 1983 merely provides a mechanism for enforcing individual rights 'secured' elsewhere, i.e., . . . 'one cannot go into court and claim a "violation of § 1983"—for § 1983 by itself does not protect anyone against anything.'") (quoting *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979)).

Rather, § 1983 is merely a vehicle to hold state actors civilly liable for violating a citizen's federal right. *Id.* Accordingly, there can be no § 1983 liability unless a plaintiff proves a predicate violation of a federal right. *See Baker v. McCollan*, 443 U.S. 137, 140 (1979).

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As with Title IX, "*respondeat superior* or vicarious liability will not attach under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Thus, plaintiffs cannot hold CCSD liable by simply proving that some of its employees violated their federal rights. *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694 (1978).

The *Monell* decision, 436 U.S. 658 (1978), is critical to this Court's analysis. In *Monell*, the Court ruled that a political subdivision, such as CCSD,[18] cannot be held liable under § 1983 "*solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."436 U.S. at 691. Instead, "the Supreme Court has 'required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury.'" *Hunter v. County of Sacramento*, 652 F.3d 1225, 1232-33 (9th Cir. 2011) (quoting *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997)) (emphases added).

In short, to establish even the *potential* for liability against CCSD under § 1983 (before moving on to the substantive due process analysis and its elements), the Court must find: (1) a "predicate constitutional violation"; and (2) under the *Monell* step, that "a custom or policy of the municipality 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)).

Because a plaintiff must satisfy both of these steps to hold a municipality liable, a failure under either is dispositive. *See, e.g.*, *Mueller v. Cty. of Los Angeles*, 262 F. App'x 858, 859 (9th Cir. 2008); *Galal v. City of Long Beach*, 149 F. App'x 682, 684 (9th Cir. 2005) (finding "the *Monell* issue dispositive" and therefore declining to address the alleged constitutional violation.). Thus, where—as here—there is no evidence that any municipal

[18] CCSD is a political subdivision of the State of Nevada. NRS 386.010(2).

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"custom or policy" caused the violation, *Monell* liability is impossible, and a defense judgment must follow, regardless of any predicate constitutional violation. *See id.* Even so, CCSD is entitled to judgment because plaintiffs failed to prove either of the mandatory elements.

1. Element 1 (§ 1983): Neither plaintiff proved a "predicate constitutional violation"

a. ADDITIONAL LAW RELATED TO "PREDICATE CONSTITUTIONAL VIOLATION" ELEMENT

"[A] Section 1983 plaintiff must identify the particular federal right that he seeks to enforce via judicial proceedings." *Quinones-Ruiz v. Pereira-Castillo*, 607 F. Supp.2d 296, 298 (D. Puerto Rico 2009); *accord Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994) (under § 1983, "a plaintiff must identify a right secured by the United States Constitution and the deprivation of that right . . ."). Indeed, as the United States Supreme Court declared: "[I]n any action under § 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) (emphasis added).

Although plaintiffs' substantive due process claim is addressed in a subsequent section, the requirement to precisely identify a violated federal right is the same under bother § 1983 and substantive due process law—i.e., whether under § 1983 or a substantive due process analysis, the plaintiffs must "identify the exact contours of the underlying right said to have been violated." *Id.; see e.g., State v. Dist. Ct. (Logan D.)*, 129 Nev. ___, 306 P.3d 369, 377 (2013) ("A substantive due process analysis begins 'with a careful description of the asserted right.") (citing *Paul v. Davis*, 424 U.S. 693, 712 (1976) and quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)) (emphasis added). Indeed, even under a substantive due process analysis, plaintiffs must identify the specific, court-recognized "fundamental right[]" they seek to enforce. *Logan D.*, 306 P.3d at 377-78 (explaining the United States Supreme Court's

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substantive due process jurisprudence and listing the currently recognized "fundamental rights").

To the extent plaintiffs rely upon a violation of any right conferred by NRS 388.1351, or any other *non-federal* statute, rule, ordinance or policy, their reliance is misplaced. "[V]iolations of state laws . . . do not themselves state a claim under 42 U.S.C. § 1983. Section 1983 guards and vindicates federal rights alone." *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 965 (8th Cir. 2015). In short, "§ 1983 does not provide redress in federal court for violations of state law." *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060 (9th Cir. 2012). Thus, plaintiffs' focus on Nevada's investigation and reporting statutes is a distraction—a red herring.

b. THE EVIDENCE: ETHAN FAILED TO PROVE, OR EVEN IDENTIFY, A "PREDICATE CONSTITUTIONAL VIOLATION"

Ethan's closing argument brief does not even attempt to identify the predicate federal right (or fundamental substantive due process right) that was allegedly violated. While Ethan may have been mistreated, not every mistreatment rises to the level of a deprivation of a constitutional right—let alone a fundamental substantive due process right. Ethan's failure to identify any predicate constitutional violation is fatal to his burden of proof and his § 1983/ substantive due process claim.

c. THE EVIDENCE: NOLAN FAILED TO PROVE, OR EVEN IDENTIFY, A "PREDICATE CONSTITUTIONAL VIOLATION"

Nolan similarly failed to identify "the exact contours of the underlying right said to have been violated." 523 U.S. at 841, n.5. This is fatal to his § 1983/substantive due process claim.

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2. *Element 2 (§ 1983): Neither plaintiff proved municipal liability under Monell*

a. ADDITIONAL LAW: *MONELL* CREATES THREE ROUTES TO MUNICIPAL LIABILITY

Under *Monell*, "[a] section 1983 plaintiff may establish municipal liability in one of three ways." *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992). "*First*, the plaintiff may prove that a [CCSD] employee committed the alleged constitutional violation pursuant to [(a)] a formal governmental policy or [(b)] a 'longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity.'" *Id.* (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)) (emphases added). "*Second*, the plaintiff may establish that the individual who committed the constitutional tort was an official with 'final policy-making authority' and that the challenged action itself thus constituted an act of official governmental policy." *Id.* (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81 (1986)). "*Third*, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it." *Id.*

b. PLAINTIFFS ARGUED THE EXACT OPPOSITE OF *MONELL*

Fatal to plaintiffs' entire § 1983 claim, they persist in arguing the exact opposite of *Monell* liability. Rather than arguing that their rights were violated because GJHS employees followed an unconstitutional CCSD policy or custom, plaintiffs argue (and repeatedly argued throughout this case) that their rights were violated because GJHS employees failed to follow CCSD policy. (*See, e.g.*, FAC ¶¶ 24, 27, 102, 129, 145). For example, they argue that CCSD employees failed to "implement appropriate disciplinary safety strategies in protecting Ethan and Nolan, as required by school and district policy." (FAC ¶129, emphasis added).

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Thus, plaintiffs do not argue that CCSD violated their rights by adopting an unconstitutional policy or custom, as they are required to do under *Monell*. **Instead, they argue that CCSD employees failed to do what CCSD policy requires. This is the exact opposite of *Monell* liability.**[19] *Funches v. Bucks Cty.*, 586 F. App'x 864, 867 (3d Cir. 2014) (holding that, because plaintiff "asserted that the defendants violated official policy . . . their claim against the [defendants] in their official capacities cannot succeed" (emphasis added)); *Snell v. City & Cty. of Denver*, 82 F.3d 426 (10th Cir. 1996) (finding no § 1983 liability for disclosure of medical records where plaintiff "specifically alleged that the disclosure contravened official policy"); *Marzec v. Vill. of Crestwood*, 943 F.2d 54 (7th Cir. 1991) (holding that defendant was entitled to judgment on § 1983 claim because the constitutional harm resulted from a violation of official policy). Moreover, this argument is yet another attempt to hold CCSD liable under a theory of respondent superior, which *Monell* expressly prohibits. Thus, plaintiffs' § 1983 claims fail as a matter of law, CCSD is entitled to judgment, and the Court need not even decide whether plaintiffs proved a predicate due process violation.

B. Substantive Due Process—The Law and Elements

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." The Due Process Clause has both a procedural and a substantive component. "[S]ubstantive due process violations comprise those

[19] Plaintiffs' reverse-*Monell* theory is similar to the theory rejected in *Muskrat v. Deer Creek Pub. Sch.*, 715 F.3d 775, 785 (10th Cir. 2013). In *Muskrat*, the plaintiff-parents complained that school staff locked their disabled child in a small "timeout room," "popped" him on the face, slapped him on the arm, and physically restrained him. They further alleged that the school district had a policy of using timeouts only when the child posed a danger to himself or others, and that their child posed no such danger. Based on these allegations, they brought a § 1983 substantive due process claim against the school district. Applying *Monell*, the 10th Circuit found that the parents failed to identify a district policy that led to the alleged unconstitutional treatment and instead found, at most, that staff members failed to follow the school district's timeout policy. Accordingly, it concluded that the parents had argued the exact opposite of *Monell*, explaining "[i]f [the staff members] violated the policy, we obviously cannot conclude that the policy caused [the student's] alleged constitutional injury." *Id.* This Court should reach the same conclusion here.

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acts by the state that are prohibited 'regardless of the fairness of the procedures used to implement them.'" *Wood v. Ostrander*, 879 F.2d 583, 589 (9th Cir. 1989) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

1. The General Rule—DeShaney

In 1989, the United States Supreme Court decided the tragically sad, seminal case of *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189 (1989). There, four-year-old Joshua DeShaney was beaten and permanently injured by his father, with whom he lived (no mother was in the home). Indeed, the little boy was beaten so severely that he fell into a life-threatening coma. Joshua did not die, but he suffered brain damage so severe that he was expected to spend the rest of his life confined to an institution for the profoundly retarded.

Prior to the last beating, which put Joshua into a coma, several reports were made to county agencies regarding the father's abusive behavior, but those agencies disregarded the "red flags" and failed to protect Joshua. Thereafter, Joshua, through his mother, brought a § 1983 claim alleging that the county violated his substantive due process rights.

Affirming summary judgment for the county, the *DeShaney* Court held that while Due Process Clause protects citizens from the conduct of *state actors*, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by *private actors*." 489 U.S. at 195 (emphasis added). In other words, the purpose of substantive due process is "to protect the people from the State, not to ensure that the State protected them from each other." 489 U.S. at 196. "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 489 U.S. at 197 (emphasis added); *accord L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) ("As a general rule, members of the

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public have no constitutional right to sue state employees who fail to protect them against harm inflicted by third parties.").

Following *DeShaney*, two exceptions have developed. Only one of those exceptions (the state-created danger exception) is alleged by plaintiffs here.

2. The "State-Created Danger" exception

The "state-created danger" exception applies only when a state actor engages in affirmative conduct that places the plaintiff in danger. *See, e.g., L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992); *accord Patel*, 648 F.3d at 971-72. The premise of the state-created danger exception is that state actors should not escape liability when their *affirmative conduct* creates the danger which allows the victim to be harmed by the private actor. So, for example, courts have found the state-created danger exception might apply to the following affirmative state conduct:

- Police affirmatively encouraged skinheads to beat up flag-burning demonstrators. *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993), *overruled on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

- State trooper arrested an intoxicated driver and impounded his car, ousting the female passenger into a known high crime area at 2:30 a.m., wearing only a blouse and jeans in cold weather, with no way home. She subsequently accepted a ride from a man who took her to a secluded area and raped her. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989).

- Prison officials promised plaintiff, a nurse employed by the state's medium-security custodial institution, that she would not have to work alone with inmates known to be violent sex offenders. Subsequently, the officials assigned inmate with known dangerous propensities to work alone with plaintiff. The inmate then beat, robbed and raped the plaintiff. *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992).

In each of these instances, the court found the state actor engaged in affirmative conduct that created a danger the victim would not have otherwise faced without the state actor's affirmative conduct.

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From these and other cases, two requirements exist under the "state-created danger" exception. "First, the exception applies 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) (quoting *Munger v. City of Glasgow Police Dept.*, 227 F.3d 1082, 1086 (9th Cir. 2000)). This is the so-called **"affirmative conduct" prong** of the "state-created danger" exception. "Second, the exception applies only where the state acts with 'deliberate indifference' to a 'known or obvious danger.'" *Patel*, 648 F.3d at 974 (citing *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)). This is the **"deliberate indifference" prong**.

a. THE "AFFIRMATIVE CONDUCT" PRONG—ADDITIONAL LAW

The "affirmative conduct" element is satisfied only where "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) (emphasis added). This requires proof that 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). This rule "serves to distinguish cases where officials might have done more from cases where officials created or increased the risk itself." *Morrow v. Balaski*, 719 F.3d 160, 178 (3d Cir. 2013) (affirming dismissal of a bullying case) (internal quotation marks omitted) (alterations incorporated) (emphasis added). Indeed, proof of state "inaction" cannot establish substantive due process liability. *See, e.g.*, *id*; *Windle v. City of Marion*, 321 F.3d 658, 662-63 (7th Cir. 2003); *see also Sanford v. Stiles*, 456 F.3d 298 (3d Cir. 2006). In other words, "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).

For example, in *Johnson*, the Ninth Circuit held that police officers could not be held liable for injuries caused by a rioting crowd, even though they

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abandoned an operational plan "that might have more effectively" protected the plaintiffs and replaced it with a plan that was "calamitous in hindsight." 474 F.3d at 641. On these facts, the court held there was no affirmative conduct, because the decision to decrease police presence "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." *Id.*

In contrast, the same court in *Penilla v. City of Huntington Park* held that police officers could be held liable where, as first responders to a 911 call, they found a citizen outside, in plain view of passersby, in desperate need of medical care but affirmatively canceled the request for paramedics, moved the citizen inside his otherwise empty home, locked his doors, and left him alone to die (where he did die). 115 F.3d 707, 708 (9th Cir. 1997). Unlike the defendants in *Johnson*, the defendants in *Penilla* engaged in affirmative state action that exposed the plaintiff to a danger he did not already face.

b. THE EVIDENCE: BOTH ETHAN AND NOLAN FAILED TO DEMONSTRATE THAT CCSD ENGAGED IN ANY "AFFIRMATIVE CONDUCT" THAT EXPOSED THEM TO A DANGER THEY DID NOT ALREADY FACE

Here, Ethan and Nolan failed to prove that CCSD engaged in any *affirmative conduct* that exposed the boys to a new danger they would not have otherwise faced. Instead, like the plaintiffs in *Johnson*, Ethan and Nolan have only ever argued that CCSD should have done more. (*E.g.*, Nolan, Day 1, at 69:9-71:19, 72:7-2; Ethan, Day 1, 142:22-143:4; M. Bryan, Day 3, at 51:16-17). As plaintiffs have repeatedly admitted, this is a case where—at most—the school failed to act. (Id). Indeed, t*his* is a case of alleged inaction, not state action. (Id.). Unlike t*he* plaintiffs in Penilla, Ethan and Nolan have never argued, much less proven, that the school actively created their danger. Indeed, they do not even try to argue the GJHS faculty took affirmative steps to create the student-on-student harassment they encountered in the band class.

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Rather, plaintiffs' entire case is based on the school's alleged failure to protect them from preexisting harassment. For example, Nolan testified that counselor Halpin "failed to use his powers to protect [Nolan] and Ethan from C[.] and D[.]'s harassment," and that his "inactions indirectly allowed the bullying to continue." (Nolan, Day 1, at 69:16-23 (emphasis added)). Likewise, Nolan testified that Dean Winn "failed to take appropriate action in disciplining C[.] and D[.]" (*Id.* at 69:9-12 (emphasis added)). In fact, Nolan lumped all of the individual GJHS witnesses together and testified they all "failed to take action to protect [him] from C[.] and D[.]" (*Id.* 72:7-12 (emphasis added)).

Ethan offered nearly identical testimony. Indeed, he agreed that this lawsuit is "about what the Greenspun staff did not do, its failures to act as opposed what they did do." (Ethan, Day 1, 142:22-143:4 (emphasis added)). Dispositively, plaintiffs' expressly argue that Counselor Halpin and Mr. Beasley created liability by "taking no affirmative action." (Pls' Brief, at 19:2-3). Of course, a failure to act or "taking no affirmative action" is *not* "state action," and it is not "affirmative conduct." Therefore, it negates the state-created-danger exception.

Here, plaintiffs have proven—at most—that the GJHS staff failed to provide particular protective services by (1) failing to impose additional discipline on C., (2) failing to forward Mrs. Bryan's emails to principal McKay and Dean Winn, or (3) failing to conduct a more thorough investigation. However, besides constituting failures to act (i.e., the opposite of "affirmative conduct"), the "Due Process Clause does not require a State to provide its citizens with particular protective services." *DeShaney*, 489 U.S. at 197. Thus, plaintiffs' arguments about failures to act are inadequate as a matter of law.

Furthermore, plaintiffs concede the alleged harassment existed *before* any of the school's alleged failures, (*E.g.*, Nolan, Day 1, at 38:20-39:8

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(testifying that the harassment began during the first week of school—i.e., before any of the GJHS staff became involved). Thus, by their own admission, the danger at issue was one they already faced—not one that they "would not have otherwise faced." *Kennedy*, 439 F.3d at 1061.[20] Therefore, the narrow, "state-created-danger" exception cannot apply.

c. THE "DELIBERATE INDIFFERENCE" PRONG

The deliberate indifference standard is the same under § 1983 and Title IX. *Davis*, 526 U.S. at 642; *Gebser*, 512 U.S. at 291. Thus, plaintiffs failed to prove the deliberate indifference element of the state-created-danger exception for all the same reasons they failed to prove deliberate indifference under Title IX. *Supra* Part II.A.2. There is simply no evidence that CCSD responded to the "known circumstances" with a level of indifference that exceeds gross negligence. *Id.* Thus, plaintiffs failed to prove substantive due process liability under the state-created-danger exception, and CCSD is entitled to judgment.

IV. PLAINTIFFS FAILED TO ARGUE OR PROVE ANY THEORY OF DAMAGES

Even if the Court somehow finds liability, plaintiffs failed to disclose, let alone prove, any damages. Indeed, their closing brief does not mention damages a single time. Instead, they want the Court to speculate how much emotional and financial harm CCSD caused them, if any, and to "calculate" the dollar value of that harm. The Court should decline the invitation to speculate regarding the extent and value of Ethan and Nolan's alleged damages.

Based on this Court's prior orders, there are only two categories of damages even at issue: (1) plaintiffs' alleged (but undiagnosed) emotional distress during the five-month period they attended GJHS;[21] and (2)

[20] As an aside, plaintiffs do not and cannot argue that the first seat change somehow exposed Ethan to a new danger. Indeed, Ethan's own testimony is dispositive on this point: "Q: And after that seating change occurred, you don't recall, you don't have any recollection regarding whether C[.]'s picking on you increased, decreased, or stayed the same, correct? A: Correct." (Ethan, Day 1, at 159:24-160:2).

[21] *See supra* n.2.

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compensatory damages for some undisclosed period of tuition expenses. The Court expressly eliminated punitive damages. (Order, July 22, 2016, at 4).

A. Neither Plaintiff Proved Emotional Distress Damages

When evaluating emotional distress damages, plaintiffs are limited by their sworn testimony. For example, Nolan did not describe any significant distress. Had he done so, plaintiffs surely would have quoted it in their brief. Further, Nolan's mother admitted that his demeanor never changed during the entire time he was at GJHS. (A. Hairr, Day 5, at 47:17-48:13, 49:9-12, 49:21-50:22). That is, even Nolan's mother concedes there is no objective evidence that he was distressed. Thus, there is no basis to award him emotional distress damages.

Similarly, while counsel argues that Ethan "attempted suicide," Ethan's testimony contradicts such—Ethan agreed that he "never attempted suicide." (Ethan, Day 1, at 168:1-4). Indeed, Ethan testified that he experienced suicide ideation but did not dwell on it. (Ethan, Day 1, at 167:19-173:4). Further, while Ethan's mother emphasized the alleged trombone scratching, Ethan himself remembers virtually nothing about the incident. (*Id.* at 181:14-186:16). He could not even recall with certainty who scratched him. (*Id.* at 129:8-10). Further, Ethan admittedly experienced a great deal of anxiety during the period he attended GJHS for reasons that had nothing to do with the harassment. (Ethan, Day 1, at 165:8-167:3). Thus, without medical records and expert testimony, it is impossible to do anything but speculate about Ethan's damages resulting from the harassment.

B. The Court Should Not Award Any Compensatory Damages

It is unclear whether plaintiffs seek compensation for the cost of tuition at their religious-based, private school. To the extent the Court is inclined to even consider such damages, it should not grant them. Indeed, such an award

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would reward plaintiffs for failing to mitigate, and it is not supported by any evidence.

1. Plaintiffs failed to mitigate damages

When Ethan and Nolan withdrew from GJHS, they both chose to attend Explore Knowledge Academy (EKA), a tax-payer funded (i.e., tuition-free) charter school. (A. Hairr, Day 5, at 52:2-22). *There were no additional expenses associated with attending EKA, as compared to GJHS.* (*Id.* at 52:23-53:5). Ethan attended EKA for the remainder of the 6th grade and all of 7th grade. (Ethan, Day 1, at 174:20-23). Nolan attended EKA for the remainder of the 6th grade and all of 7th and 8th grades. (Nolan, Day 1, at 99:10-12). Both boys enjoyed and excelled at EKA. (*See* Nolan, Day 1, at 99:3-101:12). While at EKA, the boys did not experience any problems or issues related to bullying or harassment. (Nolan, Day 1, at 61:9-17; Ethan, Day 1, at 138:5-18). Only later, both boys transferred to a private, tuition-charging, religious school (Lake Mead Christian Academy).

CCSD should not be required to pay for Ethan and Nolan's tuition costs. When the boys withdrew from GJHS, they (their parents) voluntarily chose EKA, which cost them nothing. (A. Hairr, Day 5, at 52:4-7, 52:20-53:5; M. Bryan, Day 3, at 25:4-8). And, when they withdrew from EKA, they could have selected another tuition-free school. Were the Court to award damages for plaintiffs' choice of an expensive religious-based education over a free education, it would reward them for aggravating—instead of mitigating—their damages. Had plaintiffs mitigated their damages, as the law requires,[22] tuition would not be an issue. Thus, an award of tuition damages is improper.

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[22] *E.g.*, *Smith v. Rowe*, 761 F.2d 360, 366 (7th Cir. 1985) (collecting cases establishing a duty to mitigate in civil rights cases); *Nelson v. Univ. of Maine Sys.*, 944 F. Supp. 44, 50 (D. Me. 1996) (Title IX plaintiffs have a duty to mitigate).

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2. *Plaintiffs offered only a "guess" of their tuition expenses*

Even if the Court decides that CCSD must pay for some of plaintiffs' private education, plaintiffs failed to prove their tuition expenses. At trial, neither mother could say—with any degree of certainty—how much they pay. (M. Bryan, Day 3, at 88:15-89:7; A. Hairr, Day 5, at 34:6-14).[23] Instead, when Mrs. Bryan was asked about the tuition expense, she simply responded "I could figure out and calculate it." (M. Bryan, Day 3, at 88:12). However, this was trial—this was the time for plaintiffs to put on their evidence and be cross-examined. So, on follow-up, Mrs. Bryan was asked: "Q. Do you know it right now that you can testify under penalties of perjury what it cost for you to have –", she interrupted the question to say "No. I could give you a guess." (*Id.* at 88:15-18) (emphasis added). Another follow-up ensued: "Q. Can you tell me right now what that number is? A. I could give you a guesstimate. Q. It's a guess? A. Yeah, a guess." (*Id.* at 89:2-5) (emphasis added).

Plaintiffs are not entitled to the "guesstimated" cost of their religious-based, high-school education. *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000) ("[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."). They did not plead these damages, they did not argue these damages, they did not give the Court a method for calculating these damages, and they most certainly did not prove these damages. Instead, they failed to mitigate (and, in fact, intentionally increased) these damages.

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[23] Further, at trial Mrs. Hairr revealed—for the first time—that at some point during this litigation, Nolan moved from one religious-based, private school, Las Vegas Christian Academy, (N. Hairr, Day 1, at 99:1-23), to another, "Green Valley Christian," (A. Hairr, Day 5, at 32:22-23). To the extent Nolan ever sought damages for tuition at this new school, he was required to supplement his discovery responses to disclose it. NRCP 26(e). But he didn't; instead, he sprung this information on CCSD for the first time at trial.

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To be sure, Mrs. Bryan and Mrs. Hairr had every right to purchase the religious-based education their sons presently enjoy. However, an expensive private education was not their only option and, in fact, was not their first choice. EKA, a tuition-free school, was their first choice and the school both boys attended for multiple years. There is no basis for a compensatory award for the private-school tuition the families voluntarily chose to incur, and the Court should enter judgment accordingly.

V. THE COURT SHOULD NOT BE DISTRACTED BY RED HERRINGS

Plaintiffs spend the bulk of their brief identifying and criticizing perceived inconsistencies in testimony offered by some GJHS witnesses. *None* of the alleged inconsistencies relate to any element of plaintiffs' claims. The Court should not be distracted by such red herrings.

A. The Alleged Inconsistencies in the GJHS Testimony are Irrelevant Red Herrings

Plaintiffs waited two years and three months *after* the boys left GJHS to file this lawsuit. Further, they waited another nine months to take depositions. Then, at trial, they tried to force GJHS staff members—who work with thousands of children each year—to recall details about specific events, involving two specific children, five years after those events occurred. This, by analogy, would be like asking this Court to recall the specific details of some particular hearing it held five years ago. Obviously, after the passage of five years, some degree of memory loss is expected. Thus, it would be entirely natural for some defense witnesses to recall some events differently.

However, any such inconsistencies are meaningless, unless they implicate an element of Title IX or substantive due process liability. Here, plaintiffs have not pointed to any such inconsistency. Instead, for example, they vaguely imply that if Counselor Halpin and Principal McKay have conflicting memories about what was specifically discussed at a particular meeting, this *ipso facto* shows that they failed to take some particular

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investigative action. (Pls. Brief, at 40:8-13). But even accepting this premise, the controlling deliberate indifference standard does not require particular investigative actions. *Supra* Part II.A.2.a. Moreover, if two defense witnesses failed to take some particular action, their failure does not negate all of the school's other, admittedly-effect responsive actions. *Supra* Part II.A.2.e. Thus, such putative inconsistencies say *nothing* about liability in this case. They are nothing more than red herrings calculated to confuse and distract the Court.

B. Plaintiffs' Own Testimony is Materially Inconsistent

Further, to the extent the Court is even remotely concerned about inconsistent factual testimony, it should consider two points. First, Ethan and Nolan offered significant inconsistent testimony of their own. (*Compare, e.g.*, Ethan, Day 1, 121:4, 153:12-22 (Ethan saw the pencil incident), *with* Nolan, Day 1, 88:19-89:20 (Nolan told Ethan about the pencil incident, and Ethan was "very surprised" and asked when it occurred). The boys even contradicted each other regarding where C. sat (which side of Nolan) when the pencil incident occurred—Nolan testified that C. sat to his left (Nolan, Day 1, at 47:2-3, 85:8-11) but Ethan testified to a 100% certainty that C. sat to Nolan's right (Ethan, Day 1, at 120:16-121:4, 139:17-140:2, 158:10-17). Mrs. Bryan contradicted herself numerous time. As a single example, she testified that, upon learning in January 2012 that Ethan was having suicidal thoughts, she made arrangements with the other carpool parents to fill her spot because "I wasn't taking Ethan back to school anymore." (M. Bryan, Day 3, at 20:9-23:9). However, just moments later, when asked whether she "already decided [at the time she sent her February 7 email] that Ethan would not be going back," she responded "No." (*Id.* at 28:11-14).

Second, plaintiffs take inconsistent legal positions whenever doing so suits their needs. For example, their closing brief is replete with contradictory explanations about why Ethan and Nolan concealed the sexual harassment

from CCSD. (*Compare, e.g.*, Pls' Brief, at 4:23-24 ("Because of this fear of retaliation, Nolan decided not to tell any adults about any further bullying directed at him.") *and id.* 6:25-26 ("Like his friend Nolan, Ethan also chose not to report the bullying that he was enduring for fear of retaliation . . . .") *with id.* 34:1-5 ("Neither Ethan nor Nolan wanted to complain based on the prior lack of remedial action by the school"); *see also supra* n.5). According to their brief, they concealed the sexual harassment because they feared the school would act *and* because they believed the school would not act. (*Id.*). Thus, by making inconsistency an issue, plaintiffs do themselves no favors.

C. CCSD Provided an Adequate Investigation

Finally, plaintiffs repeatedly suggest that the GJHS staff failed to investigate. This is demonstrably false. The GJHS staff took numerous steps to gather information about the "known circumstances,"[24] and each time they did, plaintiffs thwarted their investigative efforts by misrepresenting that "everything was fine"—i.e., that there was nothing to investigate—and concealing the alleged harassment.[25] Therefore, plaintiffs are flatly wrong when they argue that there was no investigation, and any suggestion to the contrary is a red herring.

While plaintiffs may have preferred a different investigation or different results—despite misleading the investigating staff— this too is a red herring, as neither Title IX nor § 1983 require any particular investigative steps. Instead, both statutes defer to school staff, absent proof of deliberate indifference. *Supra* Parts II.A.2.a., III.B.2.c. Therefore, because plaintiffs

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[24] *E.g.*, Nolan, Day 1, at 50:14-51:23, 98:2-8; Ethan, Day 1, at 124:1- 125:3; Ethan, Day 2, at 14:10-16:22; M. Bryan, Day 3, at 7:17-18, 8:3-4; Halpin, Day 3, at 42:7-22, 137:23-140:20, 146:12-148:2.

[25] *E.g.*, Nolan, Day 1, at 50:14-51:23; 94:20-98:25; Ethan, Day 1, at 160:7-162:18; Ethan, Day 2, at 14:10-16:22; Halpin, Day 3, at 146:12-148:2; Nolan Incident Report, Trial Ex. 9; E. Bryan Incident Report, October 19, 2011, Trial Ex. 506.

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failed to prove deliberate indifference, there is no basis to second guess the school's responsive actions, and CCSD is entitled to a defense verdict.

CONCLUSION

For the forgoing reasons, neither Ethan nor Nolan proved the elements of a Title IX or §1983 claim at trial. Therefore, neither plaintiff is entitled to any damages, and CCSD is entitled to a defense verdict.

DATED this 26th day of April, 2017.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b) and E.D.C.R. 8.05, I certify that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this day, I caused a true and correct copy of ***Defendant CCSD's Closing Arguments*** to be filed, via the Court's E-Filing System, DAP/Wiznet, and a courtesy copy to be emailed to the following:

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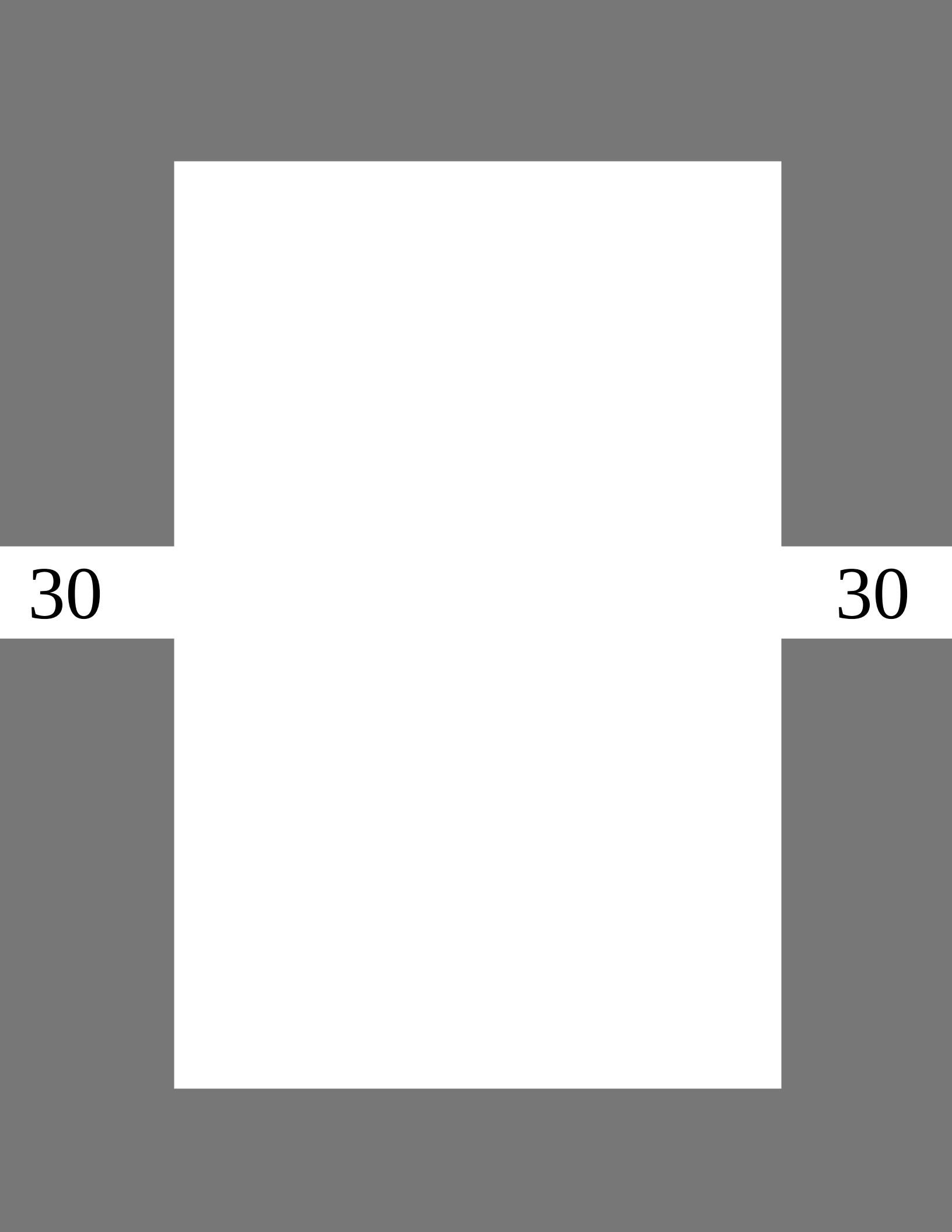
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD

Defendant .

Case No. A-14-700018-C

Dept. No. XXVII

PLAINTIFFS' CLOSING REBUTTAL BRIEF

Department: XXVII

Trial Dates: Day1, 11/15/16; Day 2, 11/16/16; Day 3, 11/17/16; Day 4, 11/18/16; Day 5, 11/22/16

Come now Plaintiffs, by and through the undersigned attorneys, and file this Plaintiffs' Closing Rebuttal Brief.

Dated this 26th day of May 2017,

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I. Introduction

In denying Defendants' Motion for Summary Judgment, the Court stated that a trial was necessary for the finder of fact, among other things, to be able to determine the credibility of the witnesses.

> I find there are issues of fact that still remain for the time of trial, most importantly to me, the demeanor of the witnesses, the strength of their memory, but I have to make a qualitative judgment as to whether or not these were more than simple acts of name-calling and teasing, whether or not the hostile environment was enough to affect education.
>
> And it's more than just grades. It's whether or not they could pay attention in class, whether or not that rises to the level, and I realize it's a high standard, but I have to make that qualitative judgment. Was there a need for more intervention? Did the parties act reasonably? Was there affirmative conduct? And then the whole issue of the deliberate indifference, whether or not conduct was clearly unreasonable is an issue of fact that has to be determined at the time of trial.

(RT, April 26, 2016 Hearing at 24

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Plaintiffs' March 20, 2017 Closing Argument Brief focused on the testimony at trial that showed that Ethan Bryan and Nolan Hairr experienced persistent bullying that was both verbal and physical, and was focused on vile homophobic discrimination. While such discrimination on the basis of sex is a necessary part of Plaintiffs' Title IX claim, it is not pertinent to the substantive due process claim. Plaintiffs also recounted the testimony of Greenspun Junior High School officials who impeached each other and even themselves. This testimony goes to the question of whether the pertinent school officials acted with deliberate indifference to actual knowledge of the extent and nature of the physical and verbal bullying endured by Ethan and Nolan at Greenspun.

Defendant's April 26, 2017 Closing Argument Brief gave scant attention to the inconsistencies and other problems with the trial testimony of these school officials. Instead, Defendant choose to focus on legal arguments, most of which had already been rejected by this Court. In this Rebuttal Brief, Plaintiffs will again go through the legal standards for both the

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Title IX and substitute due process claims and point out how the trial testimony, particularly that of school officials themselves, clearly shows violations of Plaintiffs' rights under both claims.

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

A. Title IX Standards

Section 901(a) of Title IX provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 USC § 1681(a). Based on the receipt of federal funds, CCSD is subject to Title IX requirements. 20 USC § 1681(a). Under Title IX, student on student harassment and bullying based upon perceived sexual orientation is actionable.

For liability under Title IX for student on student sexual harassment: (1) the school district "must exercise substantial control over both the harasser and the context in which the known harassment occurs", (2) the plaintiff must suffer "sexual harassment ... that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school", (3) the school district must have "actual knowledge of the harassment", and (4) the school district's "deliberate indifference subjects its students to harassment". *See, Henkle v. Gregory*, 150 F.Supp.2d 1067, 1077-1078 (D. Nev. 2001). *See also, Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 U.S. Dist. LEXIS 31591, at *60-61 (D. Minn. Mar. 16, 2015) *reversed in part on other grounds in Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2016 U.S. Dist. LEXIS 115934 (D. Minn. Aug. 29, 2016).

> In *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999), the Supreme Court discussed the standard for determining a school district's direct liability for a third party's discriminatory actions. See 526 U.S. at 633. The *Davis* Court held that "a [Title IX] private damages action may lie against the school board in cases of

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> student-on-student harassment . . . only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities . . . [and] only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *See id.* The Court also held that a school district would only be liable for a third-party's actions when the school "exercises substantial control over both the harasser and the context in which the known harassment occurs." *Id.* at 630.

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

Whether gender-oriented conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships," *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998), In the instant case, the testimony at trial showed that: 1) Greenspun Junior High School exercised substantial control over both the students involved in the bullying and the context in which the harassment occurred; 2) both Ethan and Nolan were bullied at school; 3) the harassment they endured was sexual in nature; 4) the harassment was so severe, pervasive, and objectively offensive that it deprived Ethan and Nolan of access to the educational opportunities and benefits provided by the school; 5) the appropriate school officials had actual knowledge of the bullying and sexual discrimination suffered by Ethan and Nolan; 6) the appropriate school officials demonstrated deliberate indifference to the bullying endured by Ethan and Nolan.

It is beyond question school officials exercised substantial control over both the students involved in the bullying and the context in which the harassment occurred. *See Davis, supra,* 526 U.S. at 646.

> Where, as here, the misconduct occurs during school hours and on school grounds -- the bulk of G. F.'s misconduct, in fact, took place in the classroom -- the misconduct is taking place "under" an "operation" of the funding recipient. See *Doe* v. *University of Illinois*, 138 F.3d 653, 661 (7th Cir. 1998)(finding liability where school fails to respond properly to "student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees"). In these circumstances, the recipient retains substantial control over the context in which the harassment occurs.

526 U.S. at 646.

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B. Ethan and Nolan were bullied in Mr. Beasley's band class.

The fact that Ethan and Nolan were bullied in Mr. Beasley's band class is also not at issue. See the testimony of, (Ethan Bryan, Day 1 at 119) (Nolan Hairr, Day 1 at 39).

They were not only called names, but both were physically assaulted by the bullies. On September 13, 2011, Connor stabbed Nolan in the groin with a pencil during Mr. Beasley's band class. (Nolan Hairr, Day 1 at 46-47). On October 18, 2011 Ethan was physically assaulted at the end of band class (Like they took off one of the like rubber stoppers on the instrument and was like scratching my legs with it.) (Ethan Bryan, Day 1 at 127-128)

C. The bullying was sexual in nature.

The sexual nature of the bullying aimed at Nolan was also the subject of Nolan's testimony. *Id.* He testified that from the very beginning of the school year he had to endure being called names such as " faggot, fucking fat faggot, fucking faggot, gay, gay boyfriend, cunt." *Id.* when he was 11 years old at the beginning of sixth grade, Nolan was a small child who, according to the testimony of Dean Winn, had "beautiful blonde hair down to his shoulders." (Cheryl Winn, Day 4 at 119). See also photographs in Plaintiffs' Exhibit No. 1.

While Ethan had been bullied by Connor and Dante, their comments had started off being directed at his size and weight, after the stabbing incident, the bullies also began directing their homophobic slurs against Ethan as well. (*Id.* at 126) Conner and Dante continuously taunted Ethan and Nolan with homophobic slurs and innuendo, and specifically made statements concerning homosexual relations and explicit sexual acts between Ethan and Nolan in vile and graphic terms. "[T]hey called us faggots and stuff like that, and they asked us if we jerked off together, things like that. *(Id.)* In his deposition, Connor himself testified under oath that he and Dante would call Ethan and Nolan gay, faggot, and fag boy (Deposition of CL, January 5, 2016, at 44-45)(CL's deposition transcript was admitted into evidence by the Court on November 22, 2016, Day 5, RT

at 60) thus, there is no dispute about the sexual nature of the bullying endured by Ethan and Nolan.

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

The nature of the bullying was severe, pervasive, and objectively unreasonable. It involved verbal abuse of a sexual and homophobic nature beginning from the start of the school year and only ceased when Ethan and Nolan were forced to flee Greenspun. Both boys suffered so sufficiently from the bullying that they did whatever they could to not attend school in order to avoid the bullying. (Ethan, Day 1, at 134-135) In January 2012, Ethan feigned illness in order to stay home from school. (*Id.*) He would eat paper in order to make himself sick. (*Id.)* Ethan testified that the bullying was so severe and pervasive that he saw suicide as his only way out. (*Id.*) Fortunately, he was prevented from doing so by his mother's intervention. (Mary Bryan, Day 3, at 21-22). At that point, she was forced to take him out of Greenspun. (Mary Bryan, Day 3, at 22).

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In January 2012, Nolan stopped going to band class in order to avoid the bullying by Connor. (Nolan Hairr, Day 1, at 59-60) Nolan then had a breakdown due to the constant bullying, that forced his parents also to remove him from Greenspun. (Aimee Hairr, Day 5 at 23- 29). The creation of a sufficiently hostile environment forced Ethan and Nolan's parents to remove them from Greenspun Jr. High School and deprived them of an educational opportunity.

Defendant argues, that when specifically asked the question, neither Nolan nor Ethan were able to articulate the exact nature of the educational opportunity they lost. The inability of a child to articulate the exact nature of such loss does not negate its existence, as Defendant suggests. Ethan and Nolan could not possibly know what learning they may have missed out on.

Loss of educational opportunity based on a hostile environment inquiry actually "requires careful consideration of the social context in which particular behavior occurs and is experienced

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by its target." *Oncale,* 523 U.S. at 81. "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." *Id, citing Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993). See also, *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993).

> [I]t would violate the Supreme Court's command to give Title IX a sweep as broad as its language to find that Title IX does not prohibit hostile environment sexual harassment. **Surely one is "denied the benefits of, or subjected to discrimination under" an education program on the basis of sex when, as alleged here, she is driven to quit an education program because of the severity of the sexual harassment she is forced to endure in the program.**

830 F. Supp. at 1575. (emphasis added)

The severity of the hostile environment, forced both Nolan and Ethan to quit Greenspun to escape both verbal and sometimes physical harassment from Conner and Dante that school officials were aware of, and allowed to continue. This was clearly a loss of educational opportunity.

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

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

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

524 U.S. at 290.

The Court in *Warren v. Reading Sch. Dist.*, 278 F.3d 163 (3d Cir. 2002) stated that the school principal was the appropriate person for Title IX purposes.

> The Court's analysis in *Gebser* rested upon the supposition that a principal is usually high enough up the bureaucratic ladder to justify basing Title IX liability on his or her actual knowledge and deliberate indifference. If a principal is not an

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> "appropriate person" for purposes of Title IX, a substantial portion of the Supreme Court's analysis in Gebser was nothing more than a meaningless discussion. *See also Davis Monroe County Bd of Educ.,* 526 U.S. 629, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999) (holding that principal's actual knowledge and failure to respond would support liability under Title IX); and *Murrell v. School Dist. No. 1, Denver, Colo,* 186 F.3d 1238, 1247 (10th Cir. 1999) ("We find little room to doubt that the highest-ranking administrator [at the school] exercised substantial control of Mr. Doe and the school environment during school hours, and so her knowledge may be charged to the School District.").
>
> Moreover, the practical result of holding that a principal is not an "appropriate person" would require a plaintiff to prove that members of the school's governing body, perhaps even a voting majority of those members, knew of the improper conduct. That would undermine the private cause of action under Title IX that the Court found in Cannon, and eliminate the protection Congress intended for students in schools receiving Title IX funds.

278 F.3d 163, 169-70.

In *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999) the Court considered an individual who exercises substantial control, for Title IX purposes to be anyone with the authority to take remedial action.

> Because officials' roles vary among school districts, deciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry. *Davis* makes clear, however, that a school official who has the authority to halt known abuse, perhaps by measures such as transferring the harassing student to a different class, suspending him, curtailing his privileges, or providing additional supervision, would meet this definition.

186 F.3d at 1247.

In the instant case, several Greenspun personnel testified that they had authority to take remedial disciplinary actions when appropriate. Band teacher Robert Beasley testified as follows:

> Q (By Mr. Scott) And did you understand as a teacher that you had -- part of your job was to discipline children who did not follow the rules?
>
> A. Yes.
>
> (Robert Beasely, Day 4 at 10)

Mr. Beasely also stated that the scope of his disciplinary authority ran to "any behavior including but not limited to bullying." (*Id.*)

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Dean Winn testified that campus discipline was, in fact, one of her primary responsibilities.

> Q (By Mr. Scott) Oh.
>
> A Okay. So what were my duties?
>
> Q Primary duties and responsibilities.
>
> A Primary duties. I -- besides discipline, I also supervised the -- I had about 16 or 17 teachers that I supervised, some -- and I'm not sure exactly. I think it was the social studies department, and I'm not sure exactly on that one if I was still with the English department. I also took care of discipline on campus.

(Cheryl Winn, Day 4 at 81)

Principal McKay testified that he, Vice Principal DePiazza and Dean Winn, were the school administrators. As such, they were primarily responsible for matters of discipline. Moreover, they all received regular training. (Warren P. McKay, Day 4, at 178)

Dr. McKay testified that he delegated the responsibility for discipline to Mr. DePiazza.

> A Obviously Mr. DePiazza cared, was good at supervising the teachers he was assigned. I also felt he was strong in discipline and investigations. I focused more on the curriculum and overall professional development of the school. So I took more of the curriculum role and he took more of the discipline and campus security role.

(Warren P. McKay, Day 4, at 186)

Vice Principal DePiazza testified that while Dean Winn handled most of the disciplinary issues, he was responsible for her as her supervisor.

> Q (By Mr. Scott) And did you understand that as Vice principal at Greenspun Junior High School, that you were responsible for supervising the dean?
>
> A. That is correct.
>
> Q And you understood the dean at the time, Cheryl Winn, was the primary person responsible for investigating allegations or complaints of bullying and harassment?
>
> A Or anything else that dealt with that type of stuff, yes, that was the dean's responsibility.

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Q And misconduct by children that could result in anything from forms of discipline including suspension and expulsion, it could also include referral or contacting the police if a crime was alleged?

A The dean had a discretion to make decisions based on information she collected.

Q And you understood your job as the dean's supervisor was to see that she followed the law?

A My job is to make sure she did her job on a daily basis to take care of the students on our campus.

Q Did that include following the law?

(Leonard DePiazza, Day, at 35)

A Yes.

Q Oh. And you understood back in September 2011 there was a law in Nevada that applied to school administrators, including vice principals and deans relating to investigating certain types of complaints within ten days; is that right?

A Yes.

Q And you understood that it was -- under the law it was the principal's primary responsibility to see that those investigations occurred within ten days and that the principal could delegate that authority to someone, correct?

A Yes.

Q And in September 2011, Principal Mackay or McKay, which one is it?

A McKay.

Q McKay, he had delegated the-- his responsibility to investigate complaints such as bullying or harassment to Dean Winn, correct?

A She was the dean on the campus. She took care of all the disciplinary issues.

Q And you understood that legal responsibility of the principals was delegated to the dean; is that right?

A He would direct us to take care of whatever responsibilities he felt was necessary for us to do.

Q And I'm talking about a particular legal responsibility to investigate within ten days complaints of

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(Leonard DePiazza Day 2, at 36)

bullying or harassment?

. . .

A Dr. McKay made the discretion who was supposed to do the investigation and we did our investigation.

Q And did you understand that every time a complaint of bullying or harassment was made, Dr. McKay would decide who would investigate it?

A No. He left that discretion to the dean.

Q And did you understand that discretion to the dean was who it investigated, or whether it would be investigated?

A It was the dean's responsibility to investigate.

Q Every complaint of bullying, harassment as defined by the law?

A She was responsible for doing all the investigations on our campus unless I was directed by the principal to do it.

(Leonard DePiazza, Day 2, at 37)

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

Q Do you know -- well, back in 2011, Dean Winn was under your supervision, at least not directly, but through Assistant Principal DePiazza; is that correct?

A Correct. As the principal I'm over both administrators, but under areas of responsibility, the dean is -- the dean is underneath the assistant principal. The assistant principal was given the responsibility of the dean's office.

Q And back in 2011, you understood under Nevada law that if a complaint of bullying was made, either the principal

(Warren McKay, Day 4 at 182)

or his designee was responsible for investigating that complaint?

A. Yes.

Q And who did you designate in 2011 to investigate such complaints?

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A Any administrator is designated as the principal's designee, so either Ms. Winn or Mr. DePiazza or myself.

Q And did you understand ultimately it was your responsibility?

A As a principal of the school, it is ultimately a responsibility.

(Warren McKay, Day 4 at 183)

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

Q (By Mr. Scott) And did you talk to Mr. DePiazza?

A. I did.

Q Approximately how long did that conversation last?

A Ten minutes around.

Q You identified yourself?

A I told him I was Aimee Hairr, my son was a new student in the school, sixth grader. I told him that he was in band class with Mr. Beasley and that I'm aware that another mother whose student is in the school, she made a -- she sent

(Aimee Hairr, Day 5 at 11)

out an email, about a week prior, to everybody in the administration to let them know that my son had been stabbed in his penis. And I explained he was not only stabbed, he was stabbed, but asked if he was a little girl.

(Aimee Hairr, Day 5 at 12)

As recounted on pages 37 to 38 of Plaintiffs' Closing Statement, at the October 19, 2011 meeting that Mary Bryan and her husband had with Dean Winn, Ethan's parents were quite explicit in recounting not only the physical assault that Ethan endured the day before, as stated in Mary's October 19, 2011 email, but also of the vile homophobic slurs that Ethan and Nolan were constantly being subjected to.

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Q Were you -- during that meeting, were you or your husband more specific about the things that were coming out of Connor's mouth?

A Absolutely. And I –

Q What did you tell –

A We made it clear to her that this was not -- Ethan's a big boy. He is very tall. He's had a weight problem – as he made him stand up in front of the court yesterday and show everybody, he has a weight problem. This is not the first

(Mary Bryan, Day 3, at 9)

time he's been teased.

He has been somebody that stands out in crowds for his whole life. He has not -- that's not the first time he's been called fat. This is the first time that it was to this degree and of this nature. That's why my husband and I went down there and made a big deal of it. This wasn't playground, ooh, you're fat, you're a giant. He had heard that. His whole life he's been overweight.

Q Okay. But were you more specific in terms of what was different about this in terms of the name calling?

A Absolutely. We let her know that this was incredibly unacceptable, this implying that the two boys were the class gay wads or whatever, faggots or gay boyfriends. My husband was very clear, so was I, that it was unacceptable and we didn't want to have to have the kids tolerate it not even a day longer.

(Mary Bryan, Day 3, at 10)

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

Defendan attempts to make much of the fact that neither the September 15, 2011 or the October 19, 2011 emails mentioned the sexual nature of the assaults and harassment. At the time that Mary Bryan wrote the September 15, 2011 email, she was not aware that the stabbing of Nolan Hairr in the genitals was accompanied by a statement regarding whether he was a boy or girl. Nolan's parents did not even find out about the incident until September 21, 2011. (Aimee

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Hairr, Day 5 at 6-7) As for the October 19, 2011 email by Mary Bryan, she testified that she did not include the vile homophobic language in the email because she felt more comfortable expressing it in the face to face meeting with Dean Winn on the same day. (Mary Bryan, Day 3 at 55)

Defendant appears to place great emphasis on the fact that both Ethan and Nolan were reluctant to admit to being bullied and even more reluctant to talk about the sexual nature of the harassment they were subject to. Both Ethan and Nolan testified that they were reluctant to disclose the bullying, both verbal and physical, to anyone for fear of retaliation by Connor and Dante. Nolan testified that after he lodged a complaint with the Dean about the verbal abuse, touching and hair pulling by Connor, Connor subsequently stabbed Nolan in the groin with a pencil calling him a tattletale. (Nolan Hairr, Day 1, p. 48-49). This fear of retaliation was specifically mentioned in Mary Bryan's September 15, 2011 e-mail. (Plaintiffs' Trial Exhibit No. 4)

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

Both Mr. Beasley and Mr. Halpin testified that they had, in fact, received Mary Bryan's September 15, 2011 email. (John Halpin, Day 3 at 115) (Robert Beasley, Day 4 at 20) and were therefore aware of Nolan's reluctance to report the bullying he was enduring for fear of further retaliation. In his testimony, Mr. Beasley acknowledged that based on his training and experience, bullied students are often reluctant to report such incidents to a teacher or other adult, often for fear of retaliation. (Robert Beasley, Day 4 at 22-23). Counselor John Halpin also recognized Nolan's reluctance to take his complaint about the stabbing incident to the Dean. (John Halpin, Day 3 at 126)

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

> Q Now, at some point did your mother become aware of what happened at school that day?
>
> A Yes.
>
> Q And how did that happen?
>
> A When I came home there was marks on my leg and she asked me what those were and I told her what happened.
>
> Q And when you told your mother what happened, did you understand and believe she was going to report it to the school?

(Ethan Bryan, Day 1 at 130)

> A I don't know.
>
> Q Did you at some point learn that she did report it?
>
> A Yes.
>
> Q And were you concerned or worried about the fact that she had reported it to the school?
>
> A A little bit, yes.
>
> Q And what do you mean by that, a little bit?
>
> A Well, because earlier in the year when Nolan had reported something they -- we were -- we noticed it becoming like more frequent and like they retaliated.

(Ethan Bryan, Day 1 at 130)

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

As noted above, both the band teacher, Mr. Beasley and the counselor, Mr. Halpin, acknowledged that it is not unusual for bullied children to not want to report the suffering that they are enduring. Defendant, however, seems to imply that because Ethan and Nolan "would say

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everything is fine" when casually asked how they were doing, that the bullying was somehow made up as a ruse to get them into parochial school.

This implication, obviously, is totally illogical. It is also totally irrelevant. Regardless of how the 11-year-old boys felt, the two emails plus the conversations that the boys' mothers had with appropriate school officials clearly constitute actual notice. Moreover, Defendant's' argument that the sexual nature of the name calling was somehow fabricated, is belied by the fact that, as mentioned above, Connor himself admitted to calling Nolan and Ethan homophobic names. Finally, even if the appropriate school officials did not believe the reports of the extent and nature of the bullying related to them by Ethan and Nolan's parents, they still had a statutory duty to investigate.

Principal McKay acknowledged that in 2011, NRS 388.1351(2) required that once a report of bullying is received the Principal or his or her designee shall initiate an investigation not later than one day after receiving notice of the violation, and that the investigation must be completed within 10 days after the date on which the investigation is initiated. (Warren McKay, Day 4 at 201) Dr. McKay also testified that he assigned Vice Principal DePiazza to conduct that investigation (*Id.* at 204) In reality, however, neither Principal McKay, nor his two designees Vice Principal DePiazza or Dean Winn, ever complied with the investigation requirement of NRS 388.1351(2). This constitutes deliberate indifference.

Defendant counters with the argument that they did conduct an investigation in 2011. Various school officials periodically asked Ethan and Nolan how they were doing and received no complaints in response. As noted above, the reluctance of bullied students to report the truth of what is happening to them to school officials is rather commonplace. Yet, Defendant argues that:

> The relevant questions are not whether CCSD responded perfectly, not whether it responded effectively, and not whether it could have done more. To be clear, "Title IX does not require [schools] to take heroic measures, to perform flawless investigations, to craft perfect solutions, or adopt strategies advocated by parents."

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> *Counts v. N. Clackamas Sch. Dist.*, 654 F. Supp. 2d 1226, 1241 (D. Or. 2009). And, a "claim that the school system could or should have done more is insufficient" to establish deliberate indifference. *Id.* "Ineffective responses" and even a "fail[ure] to follow [school] district policy does not mean that [the] actions were clearly unreasonable." *Sanches v. Carrollton-Farmers Branch Indep. School Dist.*, 647 F.3d 156, 168-69 (5th Cir.)
> 2011)

(Defendant's Closing Brief, at 20)

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

Deliberate indifference is "the conscious or reckless disregard of the consequences of one's acts or omissions." *Henkle v. Gregory,* 150 F.Supp.2 at 1078. Deliberate indifference occurs where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.'" *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000). It must, at a minimum, "cause students to undergo harassment or make them liable or vulnerable to it." *Id., citing Davis*, 526 U.S. at 645. "[I]f an institution either fails to act, or acts in a way which could not have reasonably been expected to remedy the violation, then the institution is liable for what amounts to an official decision not to end discrimination. *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274, 290 (1998); *See, Jane Doe A v. Green*, 298 F. Supp. 2d 1025, 1035 (D. Nev. 2004)

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

298 F.Supp.2d at 1035; *See also, S.B. v. Bd. of Educ.*, 819 F.3d 69, 77 (4th Cir. 2016).

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

819 F.3d at 77.

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

> Q (By John Scott) ... Just in your mind what would have been a good investigation?
>
> A Statements that reflect students that were close to the area of where whatever was reported was, interviews with maybe a teacher or other staff member that might have been in the area, looking at the progressive discipline of students that are involved. If wrongdoing is found or if parents need to be informed of different things, communication with parents.
>
> Q Fair enough. And when we talk about getting statements from students, would that necessarily include or not include interviewing students who are either witnesses, victims or alleged predators?
>
> MR. POLSENBERG: Your Honor, could we maybe use a different word?
>
> MR. SCOTT: Fine. What word would you like to use?
>
> THE COURT: Is it the word "predators" that you had a problem with?
>
> MR. POLSENBERG: Yes, Your Honor.

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THE COURT: Rephrase.

(Warren McKay, Day 4 at 179)

MR. SCOTT: Okay.

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

A Absolutely.

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

A Yes

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

A Yes.

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

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

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

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

(Warren McKay, Day 4 at 180)

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

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

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

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

(Warren McKay, Day 4 at 181)

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

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

231 F.3d at 261.

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

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

This Court has already twice denied Defendant's attempts to dismiss Plaintiffs' substantive due process claim, Defendant now attempts a third bite at the apple, again arguing that Plaintiffs' have not alleged any constitutional violation, and that under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the claim should be dismissed because the Due Process Clause of the United States Constitution does not require state

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actors to protect private citizens from harm inflicted by other private citizens. *DeShaney,* however, is inapplicable because Nevada recognizes a special student/school relationship.

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

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

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

678 F.3d at 998.

B. Nevada recognizes a special relationship between schools and students.

Once again, the District argues that there was no duty to protect Ethan and Nolan from student bullies because no special relationship exists. This argument was already twice rejected by this Court. Generally Nevada common law creates no duty for strangers to aid third parties in peril. *See, Sims v. General Telephone & Electronics*, 107 Nev. 516, 525,815 P.2d 151, 157. (1991). The Nevada Supreme Court has established certain exceptions to this general principle,

where a special relationship exists between the parties. *Lee v. GNLV Corp.*, 117 Nev. 291, 22 P.3d 209 (2001).

> This court, however, has stated that, where a special relationship exists between the parties, such as with an innkeeper-guest, **teacher-student** or employer-employee, an affirmative duty to aid others in peril is imposed by law. See *Sims*, at 526, 815 P.2d at 157–58 (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56, at 376 (5th ed.1984). Likewise, we have held that a party who is in " **'control of the premises'** is required to take reasonable affirmative steps to aid the party in peril." *Id.* at 526, 815 P.2d at 158 (quoting Keeton et al., § 56, at 376).

117 Nev. at 295, 22 P.3d at 212 (emphasis added); *See also Sims v. General Telephone & Electronics, supra*; *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 221 P.3d 1276 (2009), CHERRY, J., with whom SAITTA, J., agrees, dissenting. *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 255 P.3d 238 (Nev.,2011) *See also, Beckman v. Match.com*, No. 2:13–CV–97 JCM NJK. 2013 WL 2355512 at *8 (D. Nev. May 29, 2013).

Nevada is not unique in recognizing the special duty schools assume when overseeing the safety of the minors under their care. As the United States Supreme Court stated in *Davis v. Monroe County Board of Education*, 526 U.S. at 644, common law "has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties; and that, state Courts routinely uphold claims alleging that schools have been negligent in failing to protect their students from the torts of their peers." *See also, C.A. v. William S. Hart Union High School Dist.*, 270 P.3d 699, 704-705 (Cal. 2012); *Godoy v. Central Islip Union Free School Dist.*, 117 A.D.3d 901, 901-901 (N.Y. App. Div. 2014).

C. Defendant acted with deliberate difference for substantive due process violation purposes.

As noted above, Nevada recognizes a special relationship between schools and students. Because of this, it clearly is not necessary for Plaintiffs to show the existence of a state created danger, however the latter can viewed here as just an alternate method of showing of deliberate indifference. See *Willden, supra.* The "state-created danger exception" — when "the state affirmatively places the plaintiff in danger by acting with 'deliberate indifference' to a 'known and obvious danger," is manifested here. The standard for deliberate indifference does not vary

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between Title IX, Title VI, and 42 USC 1983 cases. *Doe A. v. Green*, 298 F.Supp.2d 1025, 1035 (D.Nev., 2004) Deliberate indifference consist of deliberate action or deliberate inaction. *Wereb v. Maui County*, 727 F.Supp.2d 898, 921 (D. Haw., 2010) citing, *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir., 2006); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

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

> These cases are best understood not as imposing strict liability under § 1983 for failure to perform statutory duties, but as inferring deliberate unconcern for plaintiffs' welfare from a pattern of omissions revealing deliberate inattention to specific duties imposed for the purpose of safeguarding plaintiffs from abuse. *See Duchesne v. Sugarman*, 566 F.2d 817, 832 n.31 (2d Cir. 1977).
>
> . . .
>
> The more a statute or regulation clearly mandates a specific course of conduct, the more it furnishes a plausible basis for inferring deliberate indifference from a failure to act, even without any specific knowledge of harm or risk. This is because failure to undertake a specific course of action in vindication of a general duty can reasonably be attributed to a bona fide difference of opinion as to how the duty should be performed. However, no such alternative explanation for nonfeasance can be raised where the task mandated is specific and unequivocal. The duties imposed by § 413 of the Social Services Law were of the latter character, particularly in conjunction with Commissioner Parry's memorandum stressing the importance of strict compliance.
>
> The duty imposed by § 413 was relevant to two separate theories of liability neither of which was adequately detailed in the plaintiff's request to charge. By one theory the failure to report was itself a proximate cause of Anna's continuing injury and could be the basis for liability if the agency's failure was the result of its being deliberately unconcerned about whether it complied with that duty, since reporting would have led to an investigation by the Department's confidential investigations unit which might well have discovered the abuse and put an end to it in March, 1975.
>
> Another theory of relevance views the failure to report in the face of clear statutory instructions to do so, simply as evidence of an overall posture of deliberate indifference toward Anna's welfare. Under this theory the statute does not in and of itself furnish any basis for a finding of liability, but merely constitutes incremental documentation of a pervasive pattern of indifference.

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649 F.2d at 145-46.

Thus, despite Defendant's assertion that Plaintiffs are asserting a "deliberate indifference per se" theory based on the failure to conduct the investigation mandated under NRS 388.1351(2), as in *Doe v. N.Y.C. Dep't of Soc. Servs.*, the failure to investigate the reported physical, sexual, and other verbal bullying, in the face of clear statutory instructions to do so, is significant evidence of an overall posture of deliberate indifference toward Ethan's and Nolan's welfare.

D. The Court's dismissal of Plaintiffs' negligence claims on discretionary immunity grounds has no bearing on the question of deliberate indifference.

Defendant also attempts to argue against a finding of deliberate indifference based on the fact that Plaintiffs' negligence and negligence per se claims for relief were dismissed by this Court pursuant to the Motion to Dismiss Plaintiffs' Amended Complaint. The current argument seems to be that if there was no negligence, which is a lesser standard, then there could not possibly be a finding of deliberate indifference. This argument neglects to acknowledge that the Court did not make a finding that there was no negligence. Instead, the negligence and negligence per se claims were dismissed on discretionary immunity grounds.

> **COURT FURTHER FINDS** after review discretionary immunity limits tort liability against political subdivisions and their officers, so long as the alleged torts arise within the scope of a person's public duties. NRS 41.0337. This covers both actions and inaction by individuals. NRS 41.032. To determine whether discretionary immunity applies to a particular set of facts, the court must look first to whether the decision involved an element of individual judgment or choice and then whether the decision was based on consideration of social, economic, or political policy. *Martinez v. Maruszczak*, 123 Nev. 433, 446-47, 168 P.3d 720, 729 (2007). Here, the Defendants' actions involved an element of individual judgment when they chose how to respond to information provided to them by Plaintiffs; they had discretion, within the policies and procedures of CCSD to act, or choose not to act. These actions were governed by considerations relating to the management of the school, and balancing of the needs of the entire student population. As such, the First Cause of Action, Negligence, and the Second Cause of Action, Negligence Per Se, are covered under the *Martinez* standard for discretionary immunity and must be dismissed.

February 10, 2015 Order on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint at. 2.

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Therefore, the dismissal of the negligence and negligence per se claims is totally irrelevant to the question of deliberate indifference under both Title IX, and substantive due process.

E. CCSD is subject to *Monell* liability.

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

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

(RT, April 26, 2016 Hearing at 27)

Defendant is incorrect in its argument that there can be no CCSD liability. In *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005), the Ninth Circuit stated that there are three distinct alternative theories of municipal liability, by showing: (1) a longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity; (2) that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision; or (3) that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate. *See also, Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

Liability can be established by the existence of a government a policy or custom that leads to a constitutional deprivation. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 694 (1978); *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 983 (9th Cir. 2002); *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000). The other two theories of municipal liability attach when a final policymaker for the government acts in a manner that can

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fairly be said to represent official action. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986).

Liability may attach either when the final policymaker is a final policymaking authority who made the allegedly unconstitutional action, or when that action is ratified, or delegated to a subordinate. *Menotti*, 409 F.3d at 1147; *Ulrich*, 308 F.3d at 984-85. A policy includes "a course of action tailored to a particular situation and not intended to control decisions in later situations." *Pembaur*, 475 U.S. at 481. When determining whether an individual has final policymaking authority, the pertinent query is whether he or she has authority "in a particular area, or on a particular issue." *McMillian v. Monroe County*, 520 U.S. 781 (1997). The individual must be in a position of authority to the extent that a final decision by that person may appropriately be attributed to the District. *Lytle v. Carl*, 382 F.3d 978, 983 (9th Cir. 2004); *see also, Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999). A government entity can be liable for an isolated constitutional violation. *Id.*

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

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

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

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

The question of whether a particular individual has policymaking authority is a question of state law. *Pembaur, supra,* 475 U.S. at 483; *St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988); *Lytle,* 382 F.3d at 982-83. While CCSD may argue that all disciplinary decisions made by a Principal of a school are subject to review at the District level, Plaintiffs' claims largely rest not with disciplinary decisions that were never made, but rather with the failure to even conduct an investigation regarding the bullying of Ethan and Nolan as required by NRS 388.1351(2), which in 2011, required that once a report of bullying is received, the Principal or his or her designee shall initiate an investigation not later than one day after receiving notice of the violation, and that the investigation must be completed within 10 days after the date on which the investigation is initiated.

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The legislature explicitly gave statutory mandate to investigate reports of bullying in school to the school "Principal or his or her designee." There is absolutely no legislative authority for the CCSD to designate somebody else at the District level to override the delegation of responsibility and authority. Thus, under the NRS 388.1351(2), because the final policymaker relating to the failure of Principal McKay or any of his designees to conduct the requisite investigation on the reports of the bullying of Ethan and Nolan, was the Principal himself, Defendant CCSD retains liability for the substantive due process violation under *Monell.*

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G. Greenspun School Officials' testimony impeaching themselves and each other is not a "red herring."

Plaintiffs Closing Argument Brief recounted in considerable detail the testimony of Greenspun Junior High School officials and how this testimony impeached themselves and each other. It showed the Principal, Vice Principal, and Dean, all pointing fingers at each other for the fact that no statutorily required investigation, particularly after October 19, 2011, ever took place

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while Ethan and Nolan were still enrolled in school. On pages 55-56, Defendant refers to this as a "red herring" because these school officials could not be expected to know what they did and did not do and say at the time of trial.

This argument is a curious one, as it is certainly reasonable to believe that any investigation of bullying would be accompanied by a written record including statements by potential witnesses as well as the participants themselves. No such records exist for any investigation in 2011. In fact, there was no testimony or evidence of any systematic investigation of the reports of bullying while Ethan and Nolan were still at the school. Principal McKay, as well as his designees, Vice Principal DePiazza and Dean Winn each testified that they did not do any investigation, even after October 19, 2011. Their testimony is consistent also to the extent that each said that they thought someone else was handling the matter. In fact, it never got handled while Ethan and Nolan were at Greenspun. This is no mere red herring.

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Quite the contrary, far from testifying that 2011 was so long ago that their memories were faulty, Vice Principal DePiazza testified that his memory of the events of 2011 was better at trial than it had been when he gave contradictory testimony at his deposition the year before. (Leonard DePiazza, Day 2 at 59)

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It is understandable that school officials might wish to obfuscate what they did and did not do in response to the reports of bullying of Ethan and Nolan. However, it also means that they could provide, and actually did not provide, any evidence or testimony to show that they fulfilled their statutory duty to investigate, and also their duty to protect Ethan and Nolan from the abuse that the two boys were subject to.

IV. Plaintiffs are entitled to damages.

Defendant argues that because Plaintiffs did not set forth a specific damage amount in their closing argument, they are not entitled to damages. There is no legal requirement that a Plaintiff

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request a specific amount in damages from a trial court or a jury, particularly in relation to non-economic damages. This fact was already addressed, in this case, when the Discovery Commissioner denied Defendant's Motion to Compel in her April 20, 2016 Report and Recommendations.

> Defendants filed a Motion to Compel Damages Categories and Calculations from Plaintiff Aimee Hairr on January 11, 2016. The subsequently filed a Motion to Compel Damages Categories and Calculations from Plaintiff. Mary Bryan on Order Shortening Time on February 12, 2016. On February 17, 2016, a hearing was held on these motions before Discovery Commissioner Bonnie Bulla, Discovery Commissioner. Bonnie Bulla hereby submits the following recommendations:
>
> It is recommended that Defendants' Motions to Compel Damages Categories and Calculations from Plaintiffs Aimee Hairr and Mary Bryan are Denied.

In this Court's March 21, 2016 Ruling denying Defendant's Motion to Compel a Rule 35 Examination, the limitation on Plaintiffs' damage claims was discussed. ("The Court also ruled that, at trial, Plaintiffs would not be permitted to present any argument or evidence regarding the mental or physical condition or situation of either Plaintiff Ethan Bryan or Nolan Hairr from any time after they left Greenspun Junior High School.")

At trial, Plaintiffs adhered to the limitation. In addition to setting forth a claim for tuition reimbursement, Ethan, Nolan, and their mothers, testified to the emotional and psychological distress that both boys suffered while at Greenspun, as well as the loss of educational opportunity. In their closing brief, Plaintiffs did not make an argument for a specific damage amount. Obviously any compensation for out-of-pocket expenses is far less important than the suffering of the two children from the physical, sexual, and verbal bullying that they were forced to endure while at Greenspun.

The damage in this case has primarily to do with the emotional suffering of two eleven year old boys who endured severe and pervasive harassment beginning in September 2011. It ended when they independently withdrew, on different dates, from Greenspun in January 2012.

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Based on their training and experience, Principal McKay, Vice-Principal DePiazza, Dean Winn, Counselor Halpin, and band teacher Beasely all knew the risks of harassment and bullying including isolation, depression, anxiety and suicide, especially on vulnerable sixth graders. The Court heard testimony from the victims and their mothers about the emotional impact on Nolan and Ethan. These types of non-economic injuries are decided by judges and juries on a regular basis without a formula and without a specific demand from an attorney.

Plaintiffs suffered significantly and they are entitled to be fully and fairly compensated for their loss. Debating the specific amount of tuition their parents had to pay because of the transfer only trivializes the real injuries and suffering both Nolan and Ethan endured.

Plaintiffs believe that the Court is in the best position to determine a fair and adequate damage amount based on all of the evidence and testimony presented. Clearly, however, the fact that Plaintiffs have deferred this decision to the Court without making an argument for any specific amount does not waive Plaintiffs' entitlement to any damages in an amount the Court Determines is proper.

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V. Conclusion

For all these reasons, the Court should find in favor of Plaintiffs on both the Title IX and substantive due process claims, and award both Plaintiffs appropriate and adequate damages.

Dated this 26th day of May 2017,

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that I served the following Plaintiffs' Closing Rebuttal Brief via Court's electronic filing and service system and/or United States Mail and/or e-mail on the 26th day of May 2017, to:

Dan Waite
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/s/ Allen Lichtenstein

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD); Principal Warren P. McKay, in his individual and official capacity as principal of GJHS; Leonard DePiazza, in his individual and official capacity as assistant principal at GJHS; Cheryl Winn, in her individual and official capacity as Dean at GJHS; John Halpin, in his individual and official capacity as counselor at GJHS; Robert Beasley, in his individual and official capacity as instructor at GJHS,

Defendants.

Case No. A-14-700018-C

Dept. No. XXVII

CCSD'S MOTION TO STRIKE PORTIONS OF PLAINTIFFS' CLOSING REBUTTAL BRIEF

Defendant Clark County School District ("CCSD") submits its motion to strike portions of plaintiffs' Closing Rebuttal Memorandum. This motion is supported by the following memorandum of points and authorities, the

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pleadings and papers on file in this case, and any oral argument this Court deems necessary.

DATED this 2nd day of June, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: _____

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NOTICE OF MOTION

PLEASE TAKE NOTICE that **DEFENDANTS' MOTION TO STRIKE PORTIONS OF PLAINTIFFS' CLOSING REBUTTAL BRIEF** will come on for hearing before Department XXVII at the Regional Justice Center located at 200 Lewis Avenue, Las Vegas, Nevada 89155 on the 19 day of JULY, 2017, at the hour of 9:00A o'clock __M, or as soon thereafter as counsel may be heard.

DATED this 2nd day of June, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: _____

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INTRODUCTION

Trial by ambush!

Earlier in this case, plaintiffs pivoted from their "perceived sexual orientation" theory of Title IX harassment and forced CCSD to defend a theory of "gender-stereotyping" raised for the first time after the close of discovery and only in response to CCSD's motion for summary judgment. Now—after trial and even after plaintiffs filed their initial closing argument brief—plaintiffs completely change the theory of their § 1983 (substantive due process) claim. That is, for more than three years the plaintiffs tried to avoid the general rule of no-liability announced by the United States Supreme Court in *DeShaney* by pleading and pursuing **one** of the two recognized exceptions: The "state-created danger" exception. However, recognizing they failed to prove the state-created danger exception (as conclusively demonstrated in CCSD's Closing Argument Memorandum), plaintiffs abandon such and desperately try to salvage their claim by arguing the "special relationship" exception for the first time in their Rebuttal Memorandum.

Furthermore, after filing a 58-page initial closing argument brief that cited *only <u>one</u> case* and offered no argument or application of the facts to the law (none), virtually every argument in plaintiffs' Rebuttal Memorandum is improperly raised for the first time there.

These forms of trial by ambush should not be allowed. When arguments are raised for the first time in a reply brief (compared to the opening brief) and theories of liability are adopted for the first time post-trial in a reply brief (compared to any prior time in this case), CCSD is deprived its constitutional right to due process of law. Fundamental fairness and controlling law requires all new material raised for the first time in plaintiffs' Rebuttal Memorandum to be stricken and disregarded by the Court.

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FACTUAL BACKGROUND AND PROCEDURAL PROCEDURE

This Court conducted a five-day bench trial on November 15-18 and 22, 2016. At the close of the evidence, the parties agreed and the Court ordered closing arguments to occur by briefs.

Plaintiffs filed their initial Closing Argument Memorandum ("Opening Brief") on March 20, 2017. The Opening Brief is remarkable for its citation to just a single case (found in the "Introduction") and its complete lack of any legal argument or application of facts to the controlling law. Instead, the Opening Brief contains a lengthy summary of the evidence that plaintiffs found favorable, without citation to the record, followed by an even longer statement of the facts, with citation to the record. With all due respects, the 58-page recitation of what occurred at trial was unnecessary—defense counsel and the Court were there and transcripts are available. Furthermore, it was unhelpful as it provided nothing meaningful for CCSD to respond to. *See* NEVADA CIVIL PRACTICE MANUAL § 22.18[1] (6th ed. 2016) ("[A] closing argument is not simply a summation of the evidence. . . . The argument should be limited to the issues, the evidence, and the reasonable inferences that can be drawn from the evidence. Counsel may argue how the facts of the case apply to the law . . . .").

CCSD filed its Closing Argument brief ("Answering Brief") on April 26, 2017. The Answering Brief was also 58 pages (but in a larger font size), cited more than 80 cases (almost 25% of them from the United States Supreme Court), and (1) addressed the two remaining Title IX and Section 1983 claims and the general law associated with each, (2) identified the elements of both claims, (3) set forth the specific law applicable to each element, (4) applied the evidence demonstrating Nolan's failure to satisfy the elements, (5) separately applied the evidence demonstrating Ethan's failure to satisfy the elements (after all, both boys must prove their own entitlement to any award), and (6)

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argued damages and related issues. CCSD noted very early in its Answering Brief the glaring deficiencies of plaintiffs' Opening Brief, predicted plaintiffs would try to ambush CCSD in their reply brief and noted that "[a]rguments saved until rebuttal are waived." *See e.g.,* Answering Brief at fn. 4. Nevertheless, CCSD did its best to speculate or anticipate what plaintiffs would argue for the first time in their reply brief.

Plaintiffs filed their Closing Rebuttal Brief ("Reply Brief") on May 26, 2017. Plaintiffs' Reply Brief is nothing like their unusual Opening Brief. The Reply Brief cites almost 60 cases and, as predicted, makes numerous legal arguments, none of which (except perhaps a thin reference to deliberate indifference) were made in the Opening Brief. More troubling, plaintiffs make several arguments so specious that CCSD never anticipated (and therefore never addressed) such in its Answering Brief, but which could have been easily dismantled, had plaintiffs made the arguments, as they were required to do, in their Opening Brief. Most troubling, however, is plaintiffs' complete shift from one theory of § 1983 (substantive due process) liability to another theory that plaintiffs neither pleaded in their original or amended complaint nor pursued through discovery.

CCSD asks the Court to strike the arguments plaintiffs raise for the first time in their Reply Brief (*see* Section II, *infra*).

LEGAL ARGUMENTS

I. PLAINTIFFS' FAILURE TO ADDRESS ANY LEGAL ARGUMENTS IN THEIR OPENING BRIEF CONSTITUTES A WAIVER OF ANY ARGUMENT IN REPLY

Nevada law is clear—it is "improper" to raise arguments for the first time in a reply brief and the Court should disregard such late-raised arguments. *See e.g., Haag v. Nevada,* 2016 WL 7635433, *2 n.3 (Nev. Ct. App. 2016) ("This claim was raised for the first time in the reply brief, which is improper, and we decline to consider it."); *Crampton v. Nevada,* 2016 WL

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2943955, *2 n.1 (Nev. Ct. App. 2016) ("This court will not consider arguments raised for the first time in a party's reply brief."); *Masto v. Montero*, 124 Nev. 573, 577 n.9, 188 P.3d 47, 50 n.9 (2008).

The reason is obvious: unless a party "cogently raise[s]" an issue in the opening brief, the other party is "depriv[ed] . . . a fair opportunity to respond." *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657,671 n.7, 262 P.3d 705, 715 n.7 (2011). Indeed, the case of *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208 (D.C. Cir. 1986) is instructive, albeit not binding on this Court. In *McBride*, some of the defendants (referred to as the Merrell Dow defendants) obtained summary judgment in the trial court. On appeal, the plaintiff, Mr. McBride, "failed to advance any reasons in his opening brief why that judgment should be reversed" as to the Merrell Dow defendants. 800 F.2d at 1210. Instead, McBride "made such an argument only in his reply brief, after the appellees pointed out McBride's omission and suggested [as CCSD did here in its Answering Brief (at fn. 4)] that his claim against the Merrell Dow defendants had been waived." *Id.* The D.C. Circuit affirmed summary judgment in favor of the Merrell Dow defendants, ruling as follows—even though stated in context of an appeal, the rationale is equally applicable here:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Considering an argument advanced for the first time in a reply brief, then, is not only unfair to the appellee, but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered.

800 F.2d at 1211 (internal citations and quotation marks omitted) (emphasis added); *accord, Noel v. Artson*, 297 Fed. Appx. 216, 219 (4th Cir. 2008).

Therefore, issues raised for the first time in a reply brief are deemed waived. *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52, 377 P.3d 81, 88 n.2 (2016) ("Because Khoury raises this issue for the first time in his reply brief, it is

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deemed waived and we do not consider it here."); *Jackson v. Groendendyke*, 132 Nev. Adv. Op. 25, 369 P.3d 362, 365 n.1 (2016) ("Because Jackson failed to raise this claim until his reply brief in this court, it is waived."). As such, this Court should strike all arguments raised for the first time in plaintiffs' Reply Brief.

II. THE COURT SHOULD STRIKE EVERYTHING RAISED FOR THE FIRST TIME IN THE REPLY BRIEF

Plaintiffs' Opening Brief contained **nothing** about any of the following topics that now constitute entire sections in the Reply Brief:

* The Title IX Standards (section II(A) of the Reply Brief);
* The bullying of Ethan and Nolan was severe, pervasive, and objectively unreasonable, and deprived them of significant educational opportunities (section II(D) of the Reply Brief);
* Appropriate school officials had actual notice of the existence and the discriminatory nature of the bullying (section II(E) of the Reply Brief);
* Greenspun school officials acted with deliberate indifference for Title IX violation purposes (section II(G) of the Reply Brief);
* Plaintiffs had a constitutionally protected interest in their safety and in their education (section III(A) of the Reply Brief);
* Nevada recognizes a special relationship between schools and students (section III(B) of the Reply Brief);
* Defendant acted with deliberate indifference for substantive due process violation purposes (section III(C) of the Reply Brief);
* CCSD is subject to *Monell* liability (section III(E) of the Reply Brief);
* Plaintiffs are entitled to damages (section IV of the Reply Brief).

The foregoing sections should be stricken and disregarded by the Court.

III. CCSD WAS PREJUDICED BY BEING FORCED TO GUESS WHAT PLAINTIFFS WOULD ARGUE

By simply regurgitating facts in their Opening Brief, plaintiffs forced CCSD to guess what plaintiffs would argue to the Court in reply. As such,

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CCSD was not allowed to cogently respond to any arguments actually made—instead, CCSD was forced to speculate, guess and anticipate what plaintiffs would argue. Indeed, as it turns out, the only ones responding to anything were the plaintiffs, who got a free look at CCSD's Answering Brief and then decided how to tailor their closing arguments to the Court without any further response from CCSD.

Plaintiffs may argue in response to this motion that they merely responded to what CCSD chose to argue in its Answering Brief. While partially true, it misses the point. By plaintiffs raising arguments for the first time in the Reply Brief, CCSD "had no opportunity to address [plaintiffs'] contention[s] with specificity." *Elvik v. State*, 114 Nev. 883, 888, 965 P.2d 281, 284 (1998) (emphasis added).

Indeed, taking plaintiffs' anticipated argument to its logical extension, a plaintiff could (and would prefer to) avoid taking any positions until *after and in response to* the positions the defendant(s) took during their one and only post-trial opportunity to argue. Then, the plaintiff could claim that taking positions and raising arguments for the first time in the reply was permitted because such was in response to the opposition. A plaintiff cannot sandbag the defendant by offering a superficial opening, force the defendant to guess what the plaintiff's final position and arguments will be, and then offer a voluminous and substantive reply under the guise of merely responding to what the defendant raised. "To permit . . . these circumstances would reward parties who bypass settled procedural requirements, and would encourage imprecise practice before the trial courts." *Noel v. Artson*, 297 Fed. Appx. 216, 219 (4th Cir. 2008); *see McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) ("It would . . . be patently inequitable to force Merrell Dow to defend an appeal by guessing the arguments that the appellant might make in his reply brief.").

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Accordingly, the Court should flatly reject any excuse from plaintiffs that raising issues and arguments for the first time in their Reply Brief was permitted as a mere response to the issues and arguments made by CCSD in its Answering Brief.

IV. PLAINTIFFS COMPLETELY CHANGE THEIR SECTION 1983 (SUBSTANTIVE DUE PROCESS) THEORY OF LIABILITY FOR THE FIRST TIME IN THEIR REPLY BRIEF

A. Plaintiffs Pursue The State-Created Danger Exception From The Beginning of this Case, Through Trial, Until Plaintiffs Filed Their Reply Brief

As repeatedly noted throughout this case, two exceptions exist to the general rule of no-liability announced by the United States Supreme Court in the seminal case of *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). The two exceptions are the "state-created danger" exception and the "special relationship" exception. *See e.g., Patel v. Kent School Dist.*, 648 F.3d 965, 971-72 (9th Cir. 2001). The state-created danger exception itself has two elements: affirmative conduct and deliberate indifference. *E.g., Pauluk v. Savage*, 836 F.3d 1117, 1131 (9th Cir. 2016).

From the beginning of this case, plaintiffs pleaded and pursued only the state-created danger exception. That is, in the original Complaint's § 1983 (substantive due process) claim, plaintiffs cited *Patel* and expressly mentioned the state-created danger exception and its elements:

> When a state actor engages in "affirmative conduct" that places a plaintiff in danger and acts with "deliberate indifference" to a "known and obvious danger," the state actor has violated a plaintiff's substantive due process right under the state created danger doctrine under the Fourteenth Amendment Due Process Clause of the U.S. Constitution. *Patel v. Kent School Dist.*, 648 F.3d 965, 974 (9th Cir. 2011).

Complaint (filed 4/29/14) at ¶ 163 (emphases added). No mention is made of the special relationship exception anywhere in the Complaint.

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When plaintiffs subsequently filed their First Amended Complaint ("FAC"), plaintiffs included the exact same paragraph quoted above and therefore expressly renewed their reliance upon the state-created danger path to liability. *See* FAC (filed 10/10/14 and refilled with an errata on 11/17/14) at ¶ 187.

At the close of discovery, defendants filed a motion for summary judgment ("MSJ") that included a request for judgment on plaintiffs' § 1983 (substantive due process) claim. *See* Defendants' MSJ (filed 3/1/16) at 22-30. In the MSJ, defendants noted the two exceptions but that "[o]nly one of those exceptions (the state-created danger exception) is alleged by plaintiffs here." MSJ at 24:26-27. The MSJ then set forth extensive argument, analysis and authorities regarding the state-created danger exception and its "affirmative conduct" and "deliberate indifference" elements. The MSJ contained no argument, analysis or authorities regarding the special relationship exception because it had not been pleaded or pursued.

Plaintiffs' opposition to the MSJ did not dispute defendants' assertion that only the state-created danger exception was at issue in this case (nor could they dispute what their own complaint clearly revealed).

When this Court denied summary judgment on plaintiffs' § 1983 (substantive due process) claim, the Court noted there "are issues of fact that still remain for the time of trial," including "[w]as there affirmative conduct?" *See* Tr. (4/26/16) at 24:17-18. The question of affirmative conduct is relevant only to the state-created danger exception, not the special relationship exception. The Court made no mention of the special relationship exception; thus demonstrating even this Court understood only the state-created danger exception, and not the special relationship exception, was at issue here.

Just a few days before trial, CCSD filed and served its Trial Brief. In it, CCSD again noted the two exceptions but that "plaintiffs allege only the state-

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created-danger exception." Trial Brief at 17:6-7. Plaintiffs did not prepare a trial brief. At no time during trial did plaintiffs correct CCSD or contend they were pursuing the special relationship exception. Nor did plaintiffs' Opening Brief mention anything about the special relationship exception.

Consistent with all that had occurred before in this case, CCSD's Answering Brief noted the two exceptions but that "[o]nly one of those exceptions (the state-created danger exception) is alleged by plaintiffs here." *See* Answering Brief at 47:3-4. The Answering Brief then methodically applied the trial evidence to the elements of the state-created danger exception to demonstrate plaintiffs' failure to prove their claim at trial.

Then, for the first time in the Reply Brief, plaintiffs, without explanation, abandoned the state-created danger exception (for example, there is no analysis or even mention of the required affirmative conduct element) and instead plaintiffs argue the special relationship exception. *See* Reply Brief at 20-21. This change took CCSD by complete surprise. Trial by ambush should not be allowed. *See Pierce Lathing Co. v. ISEC, Inc.*, 114 Nev. 291, 296 n.5, 956 P.2d 93, 96 n.5 (1998) ("trial by ambush will not be tolerated").

B. The "State-Created Danger" and "Special Relationship" Exceptions are Separate and Distinct Theories of Liability

Numerous courts have recognized that the "'state created danger,' and 'special relationship' are two independent theories of liability for alleged violations of th[e] constitutional right [of substantive due process]." *Alt v. Shirey*, 2012 WL 726579, *9 (W.D. Pa. 2012); *accord, e.g., Benzman v. Whitman*, 523 F.3d 119, 127 (2d Cir. 2008) ("we have recognized two separate and distinct theories of liability under the substantive component of the Due Process Clause: 'special relationship' liability and 'state-created-danger' liability.") (internal quotation marks omitted); *Hayes v. City of Detroit*, 2010 WL 597490, *5 n.2 (E.D. Mich. 2010) ("The 'state created danger' exception is

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different from the 'special relationship' exception to the general rule of *DeShaney*.").

Because the state-created danger exception and the special relationship exception are separate and distinct theories of liability and, indeed, are "subject to a different constitutional test" (*Lichtenstein v. Lower Merion School District*, 2017 WL 525889, *4 n.3 (E.D. Pa. 2017)), plaintiffs post-trial attempt to assert the special relationship theory is prejudicial and should not be allowed even if it had been raised in their Opening Brief, which it wasn't.

To make matters worse, plaintiffs reference a "special relationship" test that has nothing to do with the "special relationship" exception to *DeShaney*'s general rule of non-liability. Specifically, plaintiffs conflate the "special relationship" test applicable under *state negligence law* and the identically named, but completely different, "special relationship" exception applicable under *federal constitutional (substantive due process) law*.

This Court will recall that plaintiffs asserted state law claims for negligence and negligence per se (which were subsequently dismissed). The dicta in *Lee v. GNLV Corp.*, 117 Nev. 291, 22 P.3d 209 (2001), relied upon by plaintiffs in their Reply Brief (at 20:23-21:12), may have had some application in resolving those *state negligence claims,* but it has absolutely no application to *federal constitutional claims*. As one federal court cogently noted:

> [U]se of the phrase "special relationship" to refer to the government's *constitutional duty* to protect those whom it has physically restrained by incarceration, institutionalization, or similar methods is overly broad and possibly misleading. The governmental restraints of freedoms described in *DeShaney* might be characterized as a "special relationship," but, because a "special relationship" is also a basis for *tort liability*, the danger in transporting the term to the *narrower field of constitutional liability* is that plaintiffs may point to cases defining the . . . relationship as "special" under *tort law*.

McIntyre v. U.S., 336 F. Supp.2d 87, 111 n.20 (D. Mass. 2004) (emphasis added).

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In short, even if Nevada recognizes, as a matter of *state negligence law*, that teachers have an affirmative duty to protect students from one another, this does not create an analogous duty under the United States Constitution. Therefore, it certainly does not create a *constitutional duty* sufficient to overcome *DeShaney*'s general rule against holding state actors (such as teachers) liable for the conduct of third parties (such as other students). And, plaintiffs' reliance upon *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) to support their new-found "special relationship" argument, raised for the first time in the Reply Brief to support their §1983 (substantive due process) claim, is a significant over-reach. First, *Davis* is a Title IX case, not a § 1983 (substantive due process) case. Therefore *Davis* does not discuss the "special relationship" exception and cannot support plaintiffs' contention that a teacher-student relationship is a "special relationship" for purposes of a § 1983 (substantive due process) claim. Second, the *Davis* quote relied upon by plaintiffs in the Reply Brief (at 21:14-18) clearly reveals the Court was not talking about "special relationships" under § 1983 or any other federal law: "The common law, too, has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties. In fact, state courts routinely uphold claims alleging that schools have been negligent in failing to protect students from the torts of their peers." 526 U.S. at 644 (internal citation omitted; emphases added).

The forgoing gives just one example of the problem associated with raising issues for the first time in a reply brief, i.e., a party might direct the court to the wrong legal homonym.

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CONCLUSION

For all the foregoing reasons, CCSD's motion to strike should be granted and the Court should not consider Sections II(A), (D), (E), and (G), Sections III(A), (B), (C), (E) and Section IV of the Reply Brief.

DATED this 2nd day of June, 2017.

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CERTIFICATE OF SERVICE

Pursuant to Nev.R.Civ. Rule 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this day, I caused a true and correct copy of ***Motion to Strike Portions of Plaintiffs' Closing Rebuttal Brief*** to be filed, via the Court's E-Filing System, DAP/Wiznet, and served on all interested parties via U.S. Mail, postage pre-paid.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD

Defendant .

Case No. A-14-700018-C

Dept. No. XXVII

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' CLOSING REBUTTAL BRIEF

Department: XXVII

Trial Dates: Day1, 11/15/16; Day 2, 11/16/16; Day 3, 11/17/16; Day 4, 11/18/16; Day 5, 11/22/16

Come now Plaintiffs, by and through the undersigned attorneys, and file this Plaintiffs' Opposition to Defendant's Motion to Strike Portions of Plaintiffs' Closing Rebuttal Brief.

Dated this 15th day of June 2017,

Respectfully submitted by:

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POINTS AND AUTHORITIES

I. Introduction

Defendant's Motion to Strike Portions of Plaintiffs' May 26, 2017 Closing Rebuttal is based on the faulty premise that matters first raised in Defendant's April 26, 2017 Closing Arguments, were off-limits for Plaintiffs to address in their Rebuttal. In so doing, CCSD relies on cases involving appellate briefing rules rather than trial closing arguments. Thus, in its Motion, Defendant, for the first time, incorrectly refers to its April 26, 2017 Closing Argument as an Answering Brief. Here, Plaintiffs properly used their Closing Rebuttal to address issues argued by Defendant. That is the purpose of a Rebuttal.

Defendant also argues that it was unfairly ambushed by the "new" issues discussed in the Rebuttal. Yet, the issues CCSD complains about were all previously briefed, argued and ruled upon by the Court in connection with Defendant's Motion to Dismiss Plaintiffs' original Complaint; Defendant's Motion to Dismiss Plaintiffs' Amended Complaint; Defendant's Motion to Compel; Defendant's Motion for Summary Judgment; and Defendant's Motion for Reconsideration. Plaintiffs' Rebuttal did not address any topic that had not been subject to one or more of these previous proceedings. It was unnecessary for Plaintiffs to reargue settled matters of law in their Closing Argument; and they did not do so except in response to Defendant.

CCSD also attempts to raise the argument that Nevada's recognition of the special teacher/student relationship is applicable only to negligence claims and not to substantive due process. The applicability of the special teacher/student relationship was first fully briefed and argued with Defendant's Motion to Dismiss Plaintiffs' original Complaint. The Motion for dismissal of the Substantive Due Process claim was denied by the Court. Defendant's attempt to resurrect the issue at this juncture with a new argument about limitation to negligence, is improper as well as incorrect.

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II. Argument

A. Defendant relies on case law regarding appeals rather than written closing arguments.

The most fundamental flaw in Defendant's June 2, 2017 Motion to Strike Portions of Plaintiffs' Closing Rebuttal Brief is that it treats Plaintiffs' Rebuttal as though it were a reply to an appellate brief or a reply to an opposition to a summary judgment motion. This is clearly incorrect as the court made it quite clear that the briefs in question were in lieu of oral closing argument.

> THE COURT: So now let's talk about how you wish to conclude at this point. I am assuming, we talked Friday about closing argument via brief?
>
> MR. SCOTT: Yes.
>
> MR. POLSENBERG: Yes.

(Reporter's Trial Transcript, Day 5 at 64)

Numerous times in its Motion, CCSD refers to its April 26, 2017 Closing Argument as an "Answering Brief". See, CCSD's Motion to Strike at 2 ("CCSD filed its Closing Argument brief ("Answering Brief') on April 26, 2017."). This is incorrect and misleading. Nowhere in the Defendants' April 26, 2017 Closing Argument does the document refer to itself as an Answering Brief. That designation does not appear until the June 2, 2017 Motion to Strike.

A closing argument and an answering brief are two very different types of documents with two very different purposes. This is illustrated by the fact that all of the cases cited by CCSD for the proposition that it is improper for matters to be brought up for the first time in a reply brief, involve appellate briefs: *Haag v. State*, 2016 Nev. App. Unpub. LEXIS 545 (Nev. Ct. App. Dec. 28, 2016)(appeal of denial of habeas petition); *Crampton v. State*, 2016 Nev. App. LEXIS 237, *1 (Nev. Ct. App. 2016)(" This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus."); *State ex rel. Masto v. Montero*, 124 Nev. 573, 574, 188 P.3d 47 (2008) (In this appeal, we address the residency requirements for district

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court judicial candidates,); *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 660, 262 P.3d 705, 708 (2011)(" In this appeal, we address several issues arising from a civil litigant's invocation of his Fifth Amendment privilege against self-incrimination."); *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 496, 117 P.3d 193 (2005)("In this appeal, we consider whether NRS 484.384 violates the constitutional right to due process . . ."); *McBride v. Merrell Dow & Pharm.*, 800 F.2d 1208, 1210 (D.C. 1986)(" We begin by affirming the district court's entry of summary judgment . . ."); *Noel v. Artson*, 297 F. App'x 216, 217 (4th Cir. 2008) (Defendants "appeal the district court's denial of qualified immunity in a § 1983 action against them."); *Khoury v. Seastrand*, 377 P.3d 81, 88 n.2 (Nev. 2016) ("Khoury argues in his reply brief that the district court misinterpreted NRS 16.050 and that therefore the proper standard of review is de novo, not abuse of discretion."); *Elvik v. State*, 114 Nev. 883, 900, 965 P.2d 281, 292 (1998) ("Elvik argues that the cumulative effect of the alleged errors discussed in this appeal deprived him of his constitutional right to a fair trial."); *Jackson v. Groenendyke*, 369 P.3d 362, 364 (Nev. 2016) ("The rights implicated in this appeal pertain to water from an unnamed spring known as 'Spring A.'").

Defendant cites no cases pertaining to written closing statements. Clearly, closing arguments are distinct from either appeals or motions. In closing statements there is neither appellant nor movent. Nor, particularly in a bench trial, is there any set standard for what must be contained in a closing argument. "Each party may present a closing argument that summarizes the evidence and argues how the jury or, in a bench trial, the judge should decide the case based on that evidence." *Perry v. Cashcall Inc.*, No. C 13-02369 LB, 2013 U.S. Dist. LEXIS 166434, at *153 (N.D. Cal. Oct. 30, 2013).

Closing arguments are not the place for the parties to argue over points of law. While the Court has considerable discretion over what it will allow in the case of a bench trial, "it is

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improper for an attorney to argue legal theories to a jury when the jury has not been instructed on those theories. *Cosey v. State*, 93 Nev. 352, 566 P.2d 83 (1977), citing *Lloyd v. State*, 94 Nev. 167, 169, 576 P.2d 740, 742 (1978). In civil cases, Nevada affords a trial judge the discretion to dispense with closing arguments altogether. *Olivero v. Lowe*, 116 Nev. 395, 995 P.2d 1023 (2000).

> Olivero contends that the district court erred in refusing his request to present closing arguments. The decision whether to allow or refuse closing argument during a bench trial is entirely within the discretion of the district court. *See Gunn v. Superior Court*, 76 Cal. App. 2d 203, 173 P.2d 328 (Cal. 1946). Thus, we conclude that the district court did not err in refusing Olivero's request in this regard.

995 P.2d at 1027.

In the instant case, the Court agreed to allow the parties to make their closing arguments by way of briefs. It did not transform those closing arguments into motions. The distinction between the two is significant. For example, in a motion or an appeal, the decision to not file a brief can subject a party to sanctions up to and including dismissal. See, FRAP 31(c); Ninth Circuit Rules 31-23 and 42-1. In contrast, an attorney may decide to waive presenting closing argument for tactical purposes. *State v. Kelsey*, 2017 Nev. App. Unpub. LEXIS 106 (Nev. Ct. App. Feb. 27, 2017)

> While the choice to forgo closing argument may not have been the best option, it was a tactical decision and did not place counsel's representation outside the wide range of professionally competent assistance.

2017 Nev. App. Unpub. LEXIS 106, at *3. *See also, Alfaro v. California*, No. CIV S-03-1288 GEB KJM P, 2006 U.S. Dist. LEXIS 65036, at *22 (E.D. Cal. Aug. 29, 2006)("A decision to waive closing argument may be a reasonable tactical decision.") *citing Bell v. Cone*, 535 U.S. 685, 701-02 (2002).

In *Misch v. C.B. Contracting Co.*, Mo. App., 394 S.W.2d 98, 102 (1965), the Court stated that: "[t]he general rule governing the argument of a case to a jury is a simple one:"

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> Counsel having the affirmative (usually the plaintiff) should develop in his opening statement the points and matters which he wishes to present. The defendant may answer such argument and develop all the points he considers of importance. Then the plaintiff in closing may reply to and counter any argument the defendant has made.

Id.

B. All of the issues that CCSD wants to strike were first brought up in Defendant's Closing Argument. They were discussed by Plaintiffs purely as Rebuttal.

"Generally, the purpose of closing argument by counsel for the party having 'the burden of the issues' is to answer the argument of counsel for the other party, the one 'holding the negative.'" *Shaw v. Terminal R.R. Ass'n*, 344 S.W.2d 32, 36-37 (Mo. 1961). CCSD's Motion to Strike is predicated on an argument that Plaintiffs' Rebuttal discussed topics that were not in Plaintiffs' initial Closing Memorandum. CCSD does not, however, make an argument that these topics were not brought up in Defendant's Closing (not Answering) Brief. Each and every part of the Rebuttal that Defendant objects to was a response to a topic discussed in Defendant's Closing. There was no surprise to CCSD.

An example of this involves the question of damages. Defendant's Closing correctly points out the Plaintiffs' did not argue damages in their initial Closing. Starting on page 51 of Defendant's Closing, CCSD argues that Plaintiffs are not entitled to damages. Defendant also argues that since Plaintiffs' Closing did not argue damages, Plaintiffs are precluded from responding to Defendant's argument on damages in their Rebuttal. Starting on page 27 of Plaintiffs' Rebuttal, Plaintiffs point out the fact that their position of not arguing for specific amounts of damages, but instead, leaving the damages issue to the discretion of the Court was not only proper, but that this fact was already addressed, in this case, when the Discovery Commissioner denied Defendant's Motion to Compel in her April 20, 2016 Report and Recommendations. On page 27 of the Rebuttal, Plaintiffs reiterated their consistent position, stating, "[i]n their closing brief, Plaintiffs did not make an argument for a specific damage

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amount." Yet, CCSD's Motion to Strike argues that this somehow amounts to an ambush. That argument is fallacious. Such rebuttal argument is entirely permissible. *See, Weinbauer v. Berberich*, 610 S.W.2d 674 (Mo. Ct. App. 1980).

> In *Midwest Library Service, Inc. v. Structural Systems, Inc.*, 566 S.W.2d 249, 251-252 (Mo. App. 1978), plaintiff's counsel discussed only liability in the first part of closing argument. Defendant's closing argument referred to amounts claimed by plaintiff as damages. The second part of plaintiff's closing argument mentioned the specific amount of damages. After noting the general rule expounded earlier here, the court found that defendant had waived any error arising from plaintiff's discussion of damages because defendant itself had raised the issue in its closing argument. See also *Sullivan v. Hanley*, 347 S.W.2d 710, 714-716 (Mo. App. 1961).

610 S.W.2d at 678-79.

Again, it should be reiterated that Defendant treats the fact that the Court allowed closing argument by brief as somehow turning those memoranda into some sort of motion practice. On page 6 of the Motion to Strike, Defendant states the following.

> Plaintiffs may argue in response to this motion that they merely responded to what CCSD chose to argue in its Answering Brief. While partially true, it misses the point. By plaintiffs raising arguments for the first time in the Reply brief, CCSD "had no opportunity to address[plaintiffs'] contention[s] with specificity ." *Citing Elvik v. State*,114 Nev. 883, 888, 965 P.2d 281, 284 (1998)(emphasis added).

As noted above, *Elvik* was an appeal not a closing argument. In fact it was a criminal appeal of a conviction for first-degree murder. 114 Nev. at 886. The "new argument" raised for the first time in Appellant's Reply Brief involved Elvik's being shackled during the penalty phase after his murder conviction. *Id.* at 888.

> Elvik discusses the rules for penalty phase shackling in his opening brief, and does not discuss the evidence that he was shackled during the guilt phase until his reply brief. Accordingly, the State had no opportunity to address Elvik's contention with specificity.

Id. Clearly *Elvik* has no applicability here.

A rebuttal impermissibly raises new arguments beyond the proper scope of rebuttal summation when the door has not been opened by defense counsel's summation or when the new arguments are not based on reasonable inferences from the record. *See United States v. Gray*, 876

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F.2d 1411, 1417-18 (9th Cir. 1989). A statement in rebuttal that is in response to something that is first brought up in Defendant's argument is considered an "invited reply" to Defendant's closing. *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997), *citing United States v. Lopez-Alvarez*, 970 F.2d 583, 598 (9th Cir. 1992). The "invited reply" rule has also been recognized by the Nevada Supreme Court in *Glover v. Eighth Judicial Dist. Court of Nev.*, 125 Nev. 691, 715, 220 P.3d 684, 700 (2009), *citing United States v. Young*, 470 U.S. 1, 11 (1985). *See also Lawn v. United States*, 355 U.S. 339, 350 n. 15 (1958).

C. CCSD has shown no prejudice that was or could not be "neutralized by the trial judge."

Moreover, even if the Court were to find improper argument in Plaintiffs' Rebuttal, it would still have to evaluate if CCSD was prejudiced. *United States v. Birges*, 723 F.2d 666, 672 (9th Cir. 1984).

> Improprieties in counsel's arguments to the jury do not constitute reversible error **"unless they are so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge."** *United States v. Parker,* 549 F.2d 1217, 1222 (9th Cir.), *cert. denied,* 430 U.S. 971, 52 L. Ed. 2d 365, 97 S. Ct. 1659 (1977). *See also United States v. Foster,* 711 F.2d 871, 883 (9th Cir. 1983).

723 F.2d at 672(emphasis added).

CCSD's claim that it was prejudiced by Plaintiffs' Rebuttal is belied by the record which shows that every matter it wishes to strike was already in the record and subject to extensive briefing. Page 5 of Defendant's Motion lists nine topics that it says should be totally stricken from Plaintiffs' Rebuttal. As noted above, all of these were brought up in Defendant's Closing Argument. More than that, the legal arguments that CCSD mentions, are matters that this Court has already ruled upon -- sometimes more than once.

D. Each topic CCSD complains of on page 5 of its Motion to Strike was properly addressed in Plaintiffs' Rebuttal.

Defendant's first complaint is the mention in Rebuttal of theTitle IX standards.

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* The Title IX Standards.

The elements of an action under Title IX set forth in Plaintiffs' Amended Complaint; Plaintiffs' Opposition to Defendant's Motion to Dismiss the Amended Complaint; and Plaintiffs' Pre-Trial Memo.

What is most curious about Defendant's argument here is that it is clearly the job of the Judge to instruct a jury on the law. See, Nev. J.I. 1.0.

> It is my duty as Judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.
>
> You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the court.

Here, quite obviously, the Court is quite capable of instructing itself as to the Title IX standards. Any disagreement as to what those standards are has already been fully briefed by the parties and decided by the Court in both the denial of the Motion to Dismiss the Amended Complaint, as well as in Defendant's Motion for Summary Judgment. In fact, in the latter, Defendant took issue with the Court's ruling that discrimination based on perceived sexual orientation and discrimination based on gender stereotyping were both encompassed by Title IX's prohibition on discrimination based on sex. Defendant filed an unsuccessful Motion for Reconsideration suggesting, among other things, that the Court inadvertently signed the wrong proposed Findings of Fact and Conclusions of Law. CCSD cannot show prejudice from the fact that Plaintiffs did not raise this same issue again in their initial Closing Argument and only mentioned it in their Rebuttal because it was raised in Defendant's Closing.

Defendant's second, third, fourth, and fifth complaint on page 5 of its Motion were:

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

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On page 25 of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, Plaintiffs pointed out that this issue was already briefed and argued in Defendant's Motion to Dismiss Plaintiffs' original Complaint, and Defendant's Motion to Dismiss Plaintiffs Amended Complaint, and for a third time in the Motion for Summary Judgment. Again, as the Court is well aware, all three of these motions to dismiss Plaintiffs' Substantive Due Process claim were denied. This is clearly not a new issue nor a surprise to Defendant.

Defendant's eighth Complaint on page 5 of their Motion to Strike is that they were ambushed by the Rebuttal's mention of Monell *(Monell v. Department of Social Services of New York,* 436 U.S. 658 (1978)) liability.

* CCSD is subject to *Monell* liability.

Again, this issue was extensively briefed and argued in both of Defendant's Motion to Dismiss.

Finally, as discussed above, Defendant argues that the Court should strike any mention of damages in the Rebuttal.

* Plaintiffs are entitled to damages.

To reiterate, Plaintiffs position throughout all of the proceedings in this case is that while Plaintiffs were damaged, they would leave it to the Court, in its discretion, to determine the amount of any such damages. Defendant filed a Motion with the Discovery Commissioner to Compel Plaintiffs to provide an actual number. This Court accepted the Discovery Commissioner's recommendation to deny the Motion.

In short, because Defendant in its Motion to Strike does not point to anything in Plaintiffs' Rebuttal that wasn't both raised in Defendant's Closing Argument, and more importantly, wasn't already in the record, CCSD's argument that it was highly prejudiced and unable to respond to

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arguments (most of which had already been decided by the Court) it had itself brought up, is both illogical and meritless.

E. Plaintiffs never abandoned its "special relationship" claim.

On pages 7- 12 of its Motion to Strike, CCSD argues that throughout this case, Plaintiffs only pursued the state created danger exception to *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), and not the special relationship exception as well. This allegation is directly contradicted by the record. On page 38-39 of Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs original Complaint, Plaintiffs cite *Henry A. v. Willden,* 678 F.3d 991, 998 (9th Cir. 2012), among other cases, arguing that both exceptions to *DeShaney* exist in this case regarding Plaintiffs' Substantive Due Process Claim.

> Here, both exceptions exist. As noted, the State of Nevada has continually recognized the teacher– student relationship as a special relationship. Also, Defendants' behavior is indicative of the type of deliberate indifference consisting of the type of recklessness involving actual knowledge or willful blindness to easily preventable impending harm.

Plaintiffs' July 18, 2014 Opposition to Defendants' Motion to Dismiss, at 39.

As noted several times above, the Motion to Dismiss the Substantive Due Process claim was twice denied by the Court. Why CCSD, in its Motion for Summary Judgment, chose to argue only the state-created danger exception, or why it assumed that Plaintiffs had abandoned the special relationship exception, is a question that only CCSD can answer. Nowhere in the record did Plaintiffs ever abandon the special relationship exception argument. There was no reason to do so since Plaintiffs had already twice briefed the issue and prevailed. Here, CCSD seems to be attempting yet a third bite at the apple.

F. Defendant's substantive argument about the applicability of the "special relationship" substantive due process claim was already decided in the motions to dismiss, and is improper for a Motion to Strike Plaintiffs' Closing Rebuttal.

On pages 9-11 of the Motion to Strike, CCSD argues that the special relationship exception is not applicable to a constitutional Substantive Due Process claim, but only relates to state

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negligence law. As noted above, the applicability of both exceptions to *DeShaney* was already set forth in the Plaintiffs' July 18 2014 Opposition to Defendants' Motion to Dismiss, at page 39. The Court has already made its ruling on this issue. Thus, not only is CCSD incorrect on the law, the fact that it makes the substantive legal argument in a Motion to Strike Plaintiffs' Closing Rebuttal Argument is procedurally inappropriate. It is, in effect, using the Motion to Strike as a Motion for Reconsideration of a ruling that was made almost 3 years ago.

The responsibility for the failure of Defendant to either understand or remember the briefs, oral arguments, and Court rulings made at the Motion to Dismiss stage of the proceedings has to fall on CCSD itself. Again, Defendant's Motion to Strike shows no impropriety on the part of Plaintiffs regarding their Rebuttal, and therefore Defendant's Motion should be denied in its entirety.

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III. Conclusion

For all these reasons, Plaintiffs request that this Honorable Court deny Defendant's Motion to Strike in its entirety.

Dated this 15th day of June 2017,

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that I served the following Opposition to Defendant's Motion to Strike Portions of Plaintiffs' Closing Rebuttal Brief via Court's electronic filing and service system and/or United States Mail and/or e-mail on the 15th day of June 2017, to:

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/s/ Allen Lichtenstein

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DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * * *

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

Plaintiffs,

v.

CLARK COUNTY SCHOOL DISTRICT (CCSD); Pat Skorkowsky, in his official capacity as CCSD superintendent; CCSD BOARD OF SCHOOL TRUSTEES; Erin A. Cranor, Linda E. Young, Patrice Tew, Stavan Corbett, Carolyn Edwards, Chris Garvey, Deanna Wright, in their official capacities as CCSD BOARD OF SCHOOL TRUSTEES; GREENSPUN JUNIOR HIGH SCHOOL (GJHS); Principal Warren P. McKay, in his individual and official capacity as principal of GJHS; Leonard DePiazza, in his individual and official capacity as assistant principal at GJHS; Cheryl Winn, in her individual and official capacity as Dean at GJHS; John Halpin, in his individual and official capacity as counselor at GJHS; Robert Beasley, in his individual and official capacity as instructor at GJHS;

Defendants.

CASE NO: A-14-700018

DEPARTMENT 27

DECISION AND ORDER

This case arises under Title IX and 42 U.S.C. § 1983, based on allegations that two students (C.L. and D.M.) verbally and physically mistreated Ethan Bryan and Nolan Hairr, sons of the Plaintiffs, based on sex, as defined by Title IX. On November 15, 2016, a five-day bench trial commenced in Department 27 before the Honorable Judge Nancy L. Allf. Allen Lichtenstein, Esq. and John Houston Scott, Esq. appeared for and on behalf of Plaintiffs Mary Bryan ("Mrs. Bryan") and Aimee Hairr ("Mrs. Hairr"),

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(collectively "Plaintiffs"). Daniel Polsenberg, Esq., Dan Waite, Esq., and Brian D. Blakley, Esq. appeared for and on behalf of Defendant Clark County School District (CCSD), ("Defendant").

At trial, Plaintiffs' case was narrowed to two separate claims for relief—(1) a violation of Title IX of the Civil Rights Act, and (2) a violation of Plaintiffs' substantive due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983. To prevail, the claims require a showing that the Defendant was aware of the bullying and that CCSD officials, who were required to respond to reports of bullying pursuant to NRS Chapter 388, failed to act in manner that equates to deliberate indifference.

The Court having heard arguments of counsel, testimony, and being fully briefed on the matter finds as follows:

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BACKGROUND

Ethan Bryan and Nolan Hairr entered the sixth grade at Greenspun Jr. High School in August of 2011. Both students were enrolled in Mr. Beasley's third period band class in the trombone section. Nolan, eleven years old, reported being small for his age and wore long blonde hair. From almost the outset of their enrollment, both boys began to be bullied by C.L. and D.M. On numerous occasions, C.L. and D.M. taunted Nolan with homophobic slurs and sexual expletives, touching, pulling, and running their fingers through Nolan's hair and blowing in his face. Nolan reported the behavior by filling out a complaint report at the Dean's office. However, at this time, Nolan did not mention the homophobic and sexual content of the slurs that he was enduring and a subsequent meeting with Dean Winn did not proffer resolution.

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

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

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

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

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

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

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

On or about October 19, 2011, Mrs. Bryan sent a second email ("October 19th Email") addressed to the same three individuals as the September 15th Email. Mr. Beasley and Counselor Halpin both acknowledged receipt of this email, but because it was addressed to the same email addresses, Principal McKay did not receive it. Later that day, on October 19, 2011, Mrs. Bryan and her husband went to the school where they

met with Dean Winn for approximately one hour to discuss the bullying, specifically the physical assaults and homophobic slurs.

On or about October 19, 2011, Counselor Halpin attended a weekly administrators meeting with Principal McKay and Vice Principal DePiazza. Counselor Halpin testified that he reported the bullying that was occurring in Mr. Beasley's band class in considerable detail and disclosed the September 15th Email and the October 19th Email. Counselor Halpin specifically recalled Principal McKay directing Vice Principal DePiazza to take care of the matter. Principal McKay testified that he was not interested in the details of such matters and left it to his subordinates to address the issue. Principal McKay further testified that he did not follow up with Vice Principal DePiazza about how the investigation was going or what the investigation uncovered until February 2012. All of the school officials had conflicting testimony about who was tasked with the investigation into the bullying, but all testified that no investigation into the bullying was conducted until February 2012.

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

Mrs. Bryan pulled Ethan out of Greenspun Jr. High in January 2012 after Ethan contemplated suicide. On or about January 21, 2012, Mrs. Hair pulled Nolan out of Greenspun Jr. High after Nolan had an emotional breakdown because of the bullying. Mrs. Hair filed a police report, reporting the bullying and harassment.

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

DISCUSSION

A. Legal Standard - Title IX of the Civil Rights Act

Title IX of the Civil Rights Act of 1964 provides, in part, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C § 1681(a). A school district in receipt of federal funds is liable for monetary damages for violations of Title IX. *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 642, 119 S. Ct. 1661, 1671, 143 L. Ed. 2d 839 (1999) ("we concluded that *Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute.").

In *Reese v. Jefferson School District No. 14J*, the Ninth Circuit adopted the framework set out in *Davis* and set forth four requirements for imposition of school district liability under Title IX for student-student sexual harassment: (1) the school district "must exercise substantial control over both the harasser and the context in which the known harassment occurs," (2) the plaintiff must suffer "sexual harassment ... that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school," (3) the school district must have "actual knowledge of the harassment," and (4) the school district's

"deliberate indifference subjects its students to harassment." 208 F.3d 736, 739 (9th Cir. 2000) (quoting *Davis*, 119 S. Ct. 1661, 1675 (1999)).

The Ninth Circuit defines deliberate indifference as "the conscious or reckless disregard of the consequences of ones acts or omissions." *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1077–78 (D. Nev. 2001); *See also* 9th Cir. Civ. Jury Instr. 11.3.5 (1997) (citing *Redman v. County of San Diego*, 942 F.2d 1435, 1442 (9th Cir.1991), cert. denied, 502 U.S. 1074, 112 S.Ct. 972, 117 L.Ed.2d 137 (1992)). A plaintiff bringing a claim under Title IX must prove her claim by a preponderance of the evidence.

B. Legal Standard - 42 U.S.C. § 1983

A student's right to a public education is a property interest protected by the Due Process Clause. *Goss v. Lopez*, 419 U.S. 565, 573, 95 S. Ct. 729, 735, 42 L. Ed. 2d 725 (1975) ("Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education . . ."). As a general matter, the Fourteenth Amendment to the United States Constitution does not "require[ ] the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In fact, "the Fourteenth Amendment's Due Process Clause . . . does not confer any affirmative right to governmental aid and typically does not impose a duty on the state to protect individuals from third parties." *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir.2012) (quotations and citation omitted).

This rule, however, is subject to two specific exceptions; (1) the special relationship exception, and (2) the state-created danger exception. *Id.* at 998. Under the special relationship exception, the government may be liable for its failure to protect if a "special relationship" exists between it and the plaintiff such that the government has

assumed "some responsibility for the plaintiff's safety and well-being." *Id.* Under the state-created danger exception, the government may be liable for its failure to protect where "the state affirmatively places the plaintiff in danger by acting with 'deliberate indifference' to a 'known and obvious danger[.]' " *Id.* In determining whether the state-created exception applies, the Court assesses: "(1) whether any affirmative actions of the official placed the individual in danger he otherwise would not have faced; (2) whether the danger was known or obvious; and (3) whether the officer acted with deliberate indifference to that danger." *Id.* at 1002. Under either exception, the government's failure to protect renders it liable under a § 1983 claim. *Id.*

C. Nevada law mandates public school officials to report bullying and harassment

Nevada Revised Statute § 388.135 provide that:

> "[a] member of the board of trustees of a school district, any employee of the board of trustees, including, without limitation, an administrator, *principal, teacher or other staff member . . . or any pupil shall not* engage in bullying or cyber-bullying on the premises of any public school, at an activity sponsored by a public school or on any school bus."

(Emphasis added).

Furthermore, Nevada Revised Statute § 388.1351(1) provides that:

> "[a] teacher . . . principal . . . or other staff member who witnesses a violation of NRS 388.135 or receives information that a violation of NRS 388.135 has occurred *shall* report the violation to the principal . . . as soon as

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> practicable, but not later than a time during the same day on which [they] witnessed the violation or received information regarding the occurrence of a violation."

(Emphasis added).

Nevada statutes make it clear that any public school employee who either witnesses bullying or is informed that bullying has occurred or is occurring, is obligated by statute to report the bullying to the principal of the public school. Upon information that bullying has occurred or is occurring, Nevada Revised Statute § 388.1351(2) mandate that "the principal or designee *shall* immediately take any necessary action to stop the bullying . . . and ensure the safety and well-being of the reported victim or victims . . . and shall begin an investigation into the report." N.R.S. § 388.1351(1)(2). (emphasis added).

D. CCSD Officials' conduct was deliberately indifferent.

Through the testimony presented at trial, Plaintiffs have satisfied the four requirements of the Davis framework for imposition of school district liability under Title IX for student-student sexual harassment. First, CCSD, as a public high school, exercised substantial control over both the harassers and the context in which the known harassments occurs. In this case, C.L. and D.M. engaged in excessive and continuous homophobic slurs and sexual expletives directed at Nolan and Ethan in the band class classroom. C.L. and D.M.'s daily references to Nolan and Ethan as "faggot, fucking fat faggot, fucking faggot, gay, gay boyfriend, and cunt" were so severe, pervasive, and objectively offensive that it deprived the boys of access to school's educational opportunities and benefits available to students. Testimony revealed that the bullying was so severe that the boys had to avoid going to band class altogether just to avoid the

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victimization. Moreover, Ethan contemplated suicide as a result of months of bullying and harassment, and Nolan had an emotional breakdown—both of these events triggered the parents to withdraw their children from Greenspun Jr. High. Nolan and Ethan were unable to take advantage of the educational opportunities provided by the school and being accessed by students not subjected to bullying and harassment.

The third requirement of the Davis framework requires the school to have actual knowledge of the harassment. There were three separate parental complaints, all of which should have prompted a mandatory investigation under N.R.S. § 388.1351(1)(2). The September 15th Email, October 19th Email, and the October 19th meeting with Dean Winn, each put the school officials responsible for reporting the information to the Principal McKay on notice that bullying had occurred and was continuing to occur on campus. Counselor Halpin, Mr. Beasley, and Dean Winn all failed to immediately report the complaints to Principal McKay. Notwithstanding, Counselor Halpin did inform Principal McKay of the complaints and the bullying at the October 19th administrative meeting and yet CCSD offered zero evidence to indicate that an investigation was ever conducted in 2011.

The fourth requirement of the Davis framework requires the school to have acted with "deliberate indifference" that subjects its students to the harassment. As federal funding recipients, CCSD officials had a duty under Title IX, and under Nevada law, to follow up and investigate any reports of bullying and harassment occurring on school property. CCSD's failure to conduct any type of investigation after three separate complaints of bullying and an administrative meeting discussing the bullying, constitutes at the very least, reckless disregard of the consequences of it acts or omissions. Accordingly, CCSD's failure to timely investigate and take any type of remedial action

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constitutes deliberate indifference. This deliberate indifference was the causation that led to the escalation of the bullying and harassment endured by the Plaintiffs' children. Therefore, Plaintiffs have proven their Title IX claim by a preponderance of the evidence submitted at trial.

E. CCSD created the dangerous environment

CCSD's deliberate indifference to the numerous complaints of bullying forced Nolan and Ethan to remain in a known and obviously dangerous environment, which further subjected them to severe and pervasive bullying and harassment that was objectively offensive. For CCSD to be liable under the state-created exception, this Court asked: (1) whether any affirmative actions of the official placed the individual in danger he otherwise would not have faced; (2) whether the danger was known or obvious; and (3) whether the officer acted with deliberate indifference to that danger." *Henry A.* at 1002. This Court finds in the affirmative to all three inquires.

Here, the first inquiry does not require CCSD to do more than "expose the plaintiff to a danger that already existed." *Id.* To the contrary, a test such as this would render the state-created doctrine futile. In *Henry A.*, the Ninth Circuit explained that "by its very nature, the doctrine only applies in situations where the plaintiff was directly harmed *by a third party*—a danger that, in every case, could be said to have 'already existed.' " *Id.* (internal citations omitted). It follows that to be liable under the state-created exception, CCSD was not required to take an affirmative action that made the bullying and harassment worse. Instead it was CCSD's failure to take affirmative action that subjected Nolan and Ethan to further bullying and harassment. Thus, this Court finds the first inquiry is satisfied.

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The second and third inquiries are more easily ascertainable in this case. CCSD knew of the danger because of the three separate parental complaints from the Plaintiffs. Complaints CCSD officials admitted to receiving and testified that they did not inform Principal McKay. Each of the complaints gave CCSD officials sufficient details necessary to put them on notice of the dangers Nolan and Ethan were exposed to. Finally, as stated above, CCSD's failure to conduct any type of investigation after three separate complaints of bullying and an administrative meeting discussing the bullying, constitutes deliberate indifference.

Accordingly, the Plaintiffs have proven their 42 U.S.C. § 1983 claim by a preponderance of the evidence submitted at trial. Nolan and Ethan had a constitutional right to a public education, and CCSD is liable under 42 U.S.C. § 1983 for its failure to protect Nolan and Ethan by acting with deliberate indifference to the known dangers that existed in Mr. Beasley's band class. CCSD's deliberate indifference deprived Nolan and Ethan of these educational rights secured by Fourteenth Amendment Due Process Clause of the United States Constitution.

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CONCLUSION

COURT ORDERS for good cause appearing and after review, Defendant CCSD violated Title IX of the Civil Rights Act.

COURT FURTHER ORDERS for good cause appearing and after review, violated Plaintiffs' substantive due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983.

COURT FURTHER ORDERS for good cause appearing and after review Judgment shall be entered in favor of Plaintiffs Mary Bryan, on behalf of Ethan Bryan,

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and Aimee Hairr, on behalf of Nolan Hairr. Plaintiffs are entitled to a judgment for all damages sought under these two claims asserted in the Complaint, and proven at trial.

COURT FURTHER ORDERS for good cause appearing and after review that Plaintiffs shall prepare Findings of Fact, Conclusions of Law and a Judgment consistent with this Decision, and submit it the Court for review. They may include all factual findings contained in Plaintiffs' post trial briefs. At the time of submission to the Court, copies shall be transmitted to Defendant's counsel.

Dated: June 27, 2017

Nancy L Allf

NANCY ALLF
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed I caused the foregoing document to be electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail and/or by email to:

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD); Principal Warren P. McKay, in his individual and official capacity as principal of GJHS; Leonard DePiazza, in his individual and official capacity as assistant principal at GJHS; Cheryl Winn, in her individual and official capacity as Dean at GJHS; John Halpin, in his individual and official capacity as counselor at GJHS; Robert Beasley, in his individual and official capacity as instructor at GJHS,

Defendants.

Case No. A-14-700018-C

Dept. No. XXVII

CCSD'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF PLAINTIFFS' CLOSING REBUTTAL BRIEF

Date of Hearing: July 19, 2017

Time of Hearing: 9:00 a.m.

PRELIMINARY NOTE: ***On June 29, 2017, the Court issued its "Decision and Order," which arguably moots CCSD's pending Motion To Strike Portions Of Plaintiffs' Closing Rebuttal Brief ("Motion"). The Court issued its Decision and Order before the Motion's hearing date and even before the attached reply brief was due. Because CCSD had nearly completed its draft of the reply brief and so the record is complete (and because it is not clear whether the Decision and Order did moot the pending Motion), CCSD submits this incomplete reply brief,–i.e., CCSD is reluctant to expend additional effort and expense on a reply brief regarding a Motion that appears to be mooted—and instead submits this reply in substantially the state it existed when the Court issued its Decision and Order on June 29, 2017.***

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I. INTRODUCTION

"Plaintiffs' Opposition to Defendant's Motion to Strike Plaintiffs' Closing Rebuttal Brief" (the "Opposition") completely misses the point. With the exception of the "special relationship" exception, the issue is not the scope of what is at issue for decision in this case. Instead, the issue is the scope of what plaintiffs were permitted to argue in their rebuttal closing argument. Clearly, claims and issues can be ripe for decision in a case but not allowed to be addressed in a plaintiff's rebuttal closing argument. This is one of those cases.

Plaintiffs offered a perfunctory initial closing argument—perfunctory in its content, not length—and then offered their real closing argument under the guise of rebuttal. That is, plaintiffs saved until rebuttal every material argument upon which their case relies. This procrastination effectively, but impermissibly, rendered plaintiffs arguments immune from defense reply.

II. LEGAL ARGUMENT[1]

A. Plaintiffs' Opposition Suggests The Trial Was An Unnecessary Waste Of Everyone's Time

Ipse dixit: an assertion made but not proved, i.e., "it is true because I say it is true."

Plaintiffs' Opposition states numerous things this Court supposedly ruled upon at the motion to dismiss, motion for summary judgment or other pre-trial stage of this case. Thus, plaintiffs contend, "[i]t was unnecessary for Plaintiffs to reargue settled matters of law in their Closing Argument . . . ." Opp. at 1:18-19. However, there are three significant problems with plaintiffs' assertions.

[1] Plaintiffs apparently do not like the shortened nomenclature selected by CCSD in referring to (a) plaintiffs' initial closing argument brief as their "Opening Brief," (b) CCSD's closing argument brief as its "Answering Brief," and (c) plaintiffs' rebuttal closing argument brief as their "Reply Brief." Regardless, for conciseness and consistency purposes, CCSD continues these defined terms here.

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First, the assertions are made without citation to a single order or transcript. If the Court actually made the plaintiff-favorable rulings that plaintiffs now suggest, they could have easily (and should have) cited the Court to its own order or transcript where such rulings were made. Instead of precision and proof, plaintiffs rely on *ipse dixit*.

Second, plaintiffs assume that just because the Court did not grant CCSD's motion to dismiss or motion for summary judgment on a particular issue, that such is tantamount to a ruling in favor of plaintiff on that issue. Of course, it is not. Denial of a motion to dismiss is simply a ruling that plaintiffs said what they needed to say, while denial of a motion for summary most commonly means that disputed issues of fact exist and must be resolved at trial—not that those disputed issues are resolved in the non-movants favor. Thus, that the court granted parts of CCSD's prior motions and denied other parts does not mean the Court made any substantive rulings as it relates to those denied portions. Indeed, the Court's Order on the first motion to dismiss expressly states: "Any issues and arguments raised in the briefs and not addressed in this order are denied *without prejudice*." (Order (9/10/14) at 3:10-11, emphasis added).

Third, and related to the second, if the Court actually made all the plaintiff-favorable rulings contended in the Opposition, the five-day trial in this case was completely unnecessary—plaintiffs would have been declared the winners long ago.

B. Plaintiffs Misunderstand The Motion—Which Is Not About What The Court Can Decide, But Rather Is About What The Court Should Not Consider When Deciding

Plaintiffs' initial closing argument did not contain a single legal argument, did not apply the facts to the applicable law and cited only one case in 58 pages. Instead, plaintiffs' initial closing argument was a lengthy regurgitation of facts. The issue here is not whether plaintiffs' choice in how

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to structure their initial closing argument deprived the Court of jurisdiction to rule on plaintiffs' two remaining claims; rather, the issue is simply whether plaintiffs' choice deprived themselves the opportunity to tender legal arguments for the first time in their rebuttal argument.

CCSD's motion accurately predicted plaintiffs would attempt to justify their ambush by arguing they were merely responding to CCSD's closing argument. First, as detailed below, this excuse completely overlooks that CCSD's closing argument did not argue the "special relationship" exception to *DeShaney*'s general rule of no-liability and, thus, plaintiffs' rebuttal arguments regarding (indeed, their entire section devoted to) the "special relationship" exception cannot be explained as anything other than an argument (nay, a theory of liability) raised for the first time in rebuttal.

Second, while rebuttal is intended as a response to the defendant's closing argument, it is entirely improper for a plaintiff to deliver a superficial or perfunctory initial closing argument, saving the "real" argument for rebuttal and then justifying such as responsive to defendant's closing argument. Indeed, "[s]aving until rebuttal material arguments on which the plaintiff's case is known to rely" is "improper." NEVADA CIVIL PRACTICE MANUAL § 22.18[2] (6th ed. 2016); *see also*, *Rodriguez v. State*, 648 A.2d 426 (Table), 1994 WL 276988, *5 (Del. 1994) ("Sandbagging occurs when a prosecutor omits from his opening summation a salient argument of the State's case only to bring forth the argument in closing after the defense has arguably been induced to avoid the subject in closing.") (internal quotation marks and emphasis omitted).

In *People v. Robinson*, 31 Cal. App.4th 494 (Cal. Ct. App. 1995), the prosecutor gave an initial closing argument that covered only 3.5 pages of transcript and then gave a rebuttal argument that covered 35 transcript pages. The court found the prosecutor's initial closing argument was

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"perfunctory" and "designed to preclude effective defense reply." 31 Cal. App.4th at 189. Here, although plaintiffs' initial closing argument was lengthy (at 58 pages), it was completely devoid of any legal argument, legal citation or application of the facts to the law. Thus, the proper comparison here is zero pages of substantive content in plaintiffs' initial closing argument compared to 29 pages of substantive rebuttal argument. Virtually every "material argument[] on which [plaintiffs'] case is known to rely" was saved for rebuttal. NEVADA CIVIL PRACTICE MANUAL § 22.18[2] (6th ed. 2016).

As CCSD argued in its Motion, taking plaintiffs' argument to its logical extension, a plaintiff, who bears the burden of proof, could (and would prefer to) avoid taking any positions until *after and in response to* whatever positions the defendant took during their one and only post-trial opportunity to argue and thereby force the defendant to shallowly cover numerous issues trying to anticipate every argument the plaintiff should have made, but didn't make in his/her initial closing argument, but which might yet be made in rebuttal. A plaintiff should not be allowed to sandbag the defendant by offering a superficial opening, force the defendant to guess what the plaintiff's final position and arguments will be, and then offer a voluminous and substantive reply under the guise of a mere response to what the defendant raised. Such would establish a dangerous precedent that rewards plaintiffs who bypass settled procedure and would encourage imprecise practice before the trial courts. *See Noel v. Artson*, 297 Fed. Appx. 216, 219 (4th Cir. 2008).

C. Plaintiffs Surprised CCSD By Arguing The "Special Relationship" Exception For The First Time In Its Reply Brief

As noted in CCSD's Motion, the most troubling and surprising aspect of plaintiffs' Reply Brief is their attempt to unilaterally amend their complaint at this late stage to assert a substantive due process theory that has never

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been alleged. Tellingly, plaintiffs do not dispute that the "state created danger" and "special relationship" exceptions to *DeShaney*'s general rule are separate and distinct theories of liability. *See* Motion at 9:18-10:8.

Plaintiffs' Opposition points to a few lines on page 39 of a 41 page opposition to a motion to dismiss where they stated that both the "state created danger" and the "special relationship" exceptions exist in this case. This scant reference is woefully insufficient for several reasons.

First, a few lines in a brief filed three years ago in response to a motion does not constitute a de facto amendment to the complaint. *See e.g., Grayson v. O'Neill*, 308 F.3d 808, 817 (7th Cir. 2002) ("a plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment") (quoted with approval in *Ramani v. Chabad of Southern Nevada, Inc.*, 2011 WL 3298395, at *2, 127 Nev. 1168, 373 P.3d 953 (2011) (unpublished). In *Schwartz v. Schwartz*, 95 Nev. 202, 591 P.2d 1137 (1979), the Nevada Supreme Court reversed a dismissal order, issued during trial, that was predicated on *res judicata*, which the Court ruled was not properly before the trial court. More specifically, the Court ruled:

> [T]here was no reference to res judicata as a defense, or to the factual issues involved, during pre-trial discovery, opening remarks of counsel, or at any time prior to the cross-examination of appellant. When the issue did arise, counsel for appellant was surprised, and understandably unprepared . . . [and objected] on the ground that the issue had not been raised in the pleadings.

95 Nev. at 205-06, 591 P.2d at 1140); *accord, Anastassatos v. Anastassatos*, 112 Nev. 317, 913 P.2d 652 (1996) ("Although Nevada is a notice pleading jurisdiction, a party must be given reasonable advance notice of an issue to be raised and an opportunity to respond.").

Second, the original Complaint and Amended Complaint in this action identified only the state-created danger exception (and did so by name and by

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express reference to its elements of affirmative conduct and deliberate indifference, neither of which are applicable under the special relationship exception) but made no mention whatsoever of the special relationship exception. Indeed, the entire substantive due process claim as alleged in the Complaint and Amended Complaint is as follows:

CLAIM FOR RELIEF V
VIOLATIONS OF UNITED STATES CONSTITUTION: SUBSTANTIVE DUE PROCESS
42 USC § 1983

186. All allegations set forth in this Complaint are hereby incorporated by reference.

187. When a state actor engages in "affirmative conduct" that places a plaintiff in danger and acts with "deliberate indifference" to a "known and obvious danger," the state actor has violated a plaintiff's substantive due process right under the state created danger doctrine under the Fourteenth Amendment Due Process Clause of the U.S. Constitution. Patel v. Kent School Dist., 648 F.3d 965, 974 (9th Cir. 2011).

188. Deliberate indifference is established when a state actor "disregarded a known or obvious consequence of his action." Patel, 648 F.3d at 974, quoting Bryan Cnty. v. Brown, 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

189. On numerous and documented occasions, Defendants were notified as to the harassment and injuries endured by the Plaintiffs.

190. By forcing Nolan and Ethan to sit next to their harasser, and otherwise not developing a safety plan to ensure the safety of Plaintiffs, Defendants CCSD, Trustees, and Greenspun JHS were deliberately indifferent to the risk and knew the result would be further harassment and physical harm.

191. Further, by prohibiting Mrs. Bryan from volunteering, Defendants at Greenspun JHS were aware of the immediate danger and were indifferent to parental efforts to mitigate it.

192. Pursuant to 42 U.S.C. § 1983, a student may raise constitutional claims against a school district, its governing board and superintendent, for an inadequate response to peer on peer sexual harassment. Fitzgerald v. Barnstable School Committee, 555 U.S. 246 (2009).

Express reference to the "state created danger doctrine" and its two elements: (1) affirmative conduct, and (2) deliberate indifference.

No reference to the "special relationship" exception or an allegation that the school and its students stand in a special relationship.

It is "elementary" and long-standing Nevada law that "a judgment which adjudges matters outside the issues raised by the pleadings is . . . void."

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Carpenter v. Sixth Judicial District Ct., 59 Nev. 42, 73 P.2d 1310, 1311 (1937) (citing *Schultz v. Mexican Dam & Ditch Co.*, 47 Nev. 453, 224 P. 804 (1923) and *Douglas M. & P. Co. v. Rickey*, 47 Nev. 148, 217 P. 590 (1923)). Indeed, the complaint is more than a mere formality—as the Nevada Supreme Court declared more than 90 years ago:

> Clear-cut, well-defined issues should be presented by the pleadings. They are essential in every system of pleading, and there can be no orderly administration of justice without them, and, if a party can allege one cause of action, and then recover upon another, or if his complaint can be so drawn that it will be difficult to determine which of two apparent theories he proceeds upon, it can serve the purpose only to ensnare and mislead the adversary.

Nevada Mining & Exploration Co. v. Rae, 47 Nev. 173, 218 P. 89, 93 (1923) (emphasis added). It is "fundamental" that a party's recovery is bound by the allegations contained in the complaint. *Christensen v. Duborg*, 38 Nev. 404, 180 P. 306 (1915):

> It is a fundamental rule that judgment shall be *secundum allegata et probata* [i.e., according to what is alleged and proved], and any departure from that rule is certain to produce surprise, confusion, and injustice. Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them . . . The court will not ignore the whole office of a pleading and compel the parties to try their cases in the dark.

38 Nev. 404, 180 P. at 307-08 (quoting 9 Cyc. 748, 750).

In short, plaintiffs here are bound by the allegations of their complaint. Their substantive due process claim gave notice only of the state created danger exception, not the special relationship exception.

Third, this Court's Order Setting Firm Civil Bench Trial, Pre-Trial/Calendar Call (3/25/16) expressly required that "All parties . . . MUST comply with ALL REQUIREMENTS OF E.D.C.R. 2.67 . . . ." (Emphasis in original). E.D.C.R. 2.67(b)(2) provides that the pretrial memorandum "must . . . include . . . the following items: . . . (2) A list of all claims for relief designated

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by reference to each claim or paragraph of a pleading *and a description of the claimant's theory of recovery* with each category of damage requested." (Emphasis added). Plaintiffs' Pre-Trial Memorandum, filed one week before trial, completely fails to mention anything about the "special relationship" theory of recovery. E.D.C.R. 2.67(c) provides that a party who "fail[s] to comply" with the rule's requirements is subject to "a judgment of dismissal . . . or other appropriate judgment . . . or other sanctions imposed." The only "sanction" CCSD seeks here is that plaintiffs be bound by and limited to their state-created danger theory as plead in the complaint.

Fourth, on the first day of trial (November15, 2016), Judge Allf asked for openings, indicating "your opening will help me focus on the issues for determination by the Court." (Trial Tr. (11/15/16) at 4:3-4). Plaintiffs' counsel then proceeded with their opening statement, which covers 18 pages of transcript . . . without ever making reference to the "special relationship" exception. Further, although a trial brief is not mandatory, it is worth noting that (1) plaintiffs did not file a trial brief and therefore missed an opportunity to contend the "special relationship" exception was in play, (2) CCSD did file a trial brief noting that, "[h]ere, plaintiffs allege only the state-created-danger exception," (Defendant's Trial Brief (11/10/16) at 17:6-7), (3) plaintiffs never once disputed CCSD's contention at trial that only the state-created danger exception was alleged, and indeed, (4) as mentioned above, plaintiffs devoted 18 pages to an opening statement that failed to reference the "special relationship" exception even once.

Fifth, plaintiffs' post-trial Opening Brief failed to mention the "special relationship" exception and CCSD, secure in the knowledge that only the "state created danger" exception was at issue, also did not mention the "special relationship" exception. Thus, plaintiffs' contention that "[a]ll of the issues that CCSD wants to strike were first brought up in Defendant's Closing

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Argument" (Opp. at 5:5-6) is false. CCSD's closing argument can be searched in vain for any reference to the "special relationship" exception—it was raised for the first time in plaintiffs' closing rebuttal argument.

Finally, plaintiffs incorrectly rely upon the "invited reply" doctrine to justify raising issues for the first time in their rebuttal argument. (Opp. at 6:26-7:8). However, the "invited reply" doctrine—also known as the "invited response" doctrine—applies only in *criminal* cases (indeed, all the "invited reply" cases cited by plaintiffs are criminal cases). Even then, the basis for this unique doctrine is to permit the prosecutor to give rebuttal argument that is otherwise improper, but justified for reasons unique to criminal procedure.[2] In short, plaintiffs' reliance in this civil case upon the criminal law's "invited response" doctrine is completely misplaced.

D. Plaintiffs' Argument That CCSD Has Not Shown Any Prejudice That "Could Not Be 'Neutralized By The Trial Judge'" Is Nonsensical In This Bench-Trial Context

Plaintiffs curiously rely upon *United States v. Birges*, 723 F.2d 666 (9th Cir. 1984) for the proposition that "CCSD has shown no prejudice that was or could not be 'neutralized by the trial judge.'" (Opp. at 7:9-25). However, *Birges* has no application here because (1) it is a criminal case, (2) involved a

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[2] In criminal trials, if the prosecutor makes improper comments during closing argument and the jury returns a guilty verdict, the defense can have the prosecution's improper closing arguments reviewed on appeal. Conversely, however, if defense counsel makes improper comments during closing argument and the jury returns an acquittal, the case ends, i.e., there is no mechanism to review defense counsel's improper closing argument since the government cannot appeal an acquittal. Thus, "[t]o help resolve this problem courts have invoked what is sometimes called the 'invited response' or 'invited reply' rule . . . in order to 'right the scale' . . . ." *U.S. v. Young*, 470 U.S. 1, 11-13 (1985). More specifically, this rule, which "has received grudging acceptance," permits a prosecutor to remedy improper closing arguments by defense counsel by "respond[ing] in kind." *Glover v. District Court*, 125 Nev. 691, 715, 220 P.3d 684, 700-01 (2009). Stated differently, improper closing argument by defense counsel "invites" the prosecutor to "right the scale" by responding, during rebuttal, with what would otherwise be improper closing argument. *See e.g.,* Note, *Restraining Adversarial Excess In Closing Argument*, 96 COLUM. L. REV. 1299, 1333-34 (1996) ("the invited response doctrine . . . is justified solely as a means of permitting the prosecutor to counteract defense impropriety," i.e., it is a "rationale for permitting the prosecutor to argue improperly").

Here, there is no allegation that CCSD's closing argument was improper in any way. Thus, even if this were a criminal case, the "invited reply" doctrine would not apply because plaintiffs were not "invited" to respond in kind with their own improper rebuttal closing argument.

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jury trial, and (3) the issue was whether reversible error existed (not, as here, whether prejudice and error can be avoided).

Here, the judge is the fact finder. Thus, it makes no sense for plaintiffs to argue that any improper rebuttal arguments made to the fact finder can be "neutralized" by the fact finder. Indeed, plaintiffs offer no suggestion or insight regarding how this "neutralization" would occur in this case/context. In a jury case, the judge would attempt to neutralize the improper argument by instructing the jury they were required to disregard the improper argument—exactly what CCSD asks the Court to do here.

E. CCSD Agrees That "Plaintiffs Never Abandoned Its 'Special Relationship' Claim" Because One Cannot "Abandon" A Theory It Never Claimed

Plaintiff devotes an entire section of its Opposition to a straw argument under the heading "Plaintiffs never abandoned its 'special relationship' claim." (Opp. at 11:3-23). The entire argument is specious because it falsely assumes plaintiffs ever alleged the "special relationship" exception. As detailed above, plaintiffs alleged only the state-created danger exception in the complaint. Plaintiffs note they penned a few lines in a brief filed three years ago in opposition to CCSD's motion to dismiss that mentions the "special relationship" exception. However, as identified above, making an argument in a brief does not effectuate an amendment to the complaint.

In short, without repeating the procedural history regarding plaintiffs' failure to allege the "special relationship" exception and to instead rely only upon the state-created danger exception, CCSD technically agrees that plaintiffs never "abandoned" the "special relationship" exception because it is impossible to "abandon" something that was never alleged.

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F. This Court Did NOT Previously Rule The School-Student Relationship Is A "Special Relationship" for Substantive Due Process Purposes

Plaintiffs continue to perpetuate the myth that this Court previously ruled that the school-student relationship constitutes a "special relationship" *in the constitutional (substantive due process) setting*. Such is simply wrong as a matter of historical fact and law.

It must first be remembered that the term "special relationship" is relevant to determine the existence of an affirmative duty to act under two completely different areas of the law—tort law and constitutional law. As the United State Supreme Court famously declared in *DeShaney*: "It may well be that . . . the State acquired a duty under state tort law [to affirmatively act to protect little Joshua DeShaney from the harm inflicted upon him by his father.] . . .But the claim here is based on [substantive due process], which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation." 489 U.S. at 202 (emphasis added).

Whether the school-student relationship constitutes a "special relationship" for purposes of creating a *tort (negligence) duty* to act is not relevant here because plaintiffs' negligence claims were dismissed. The relevant issue is whether the school-student relationship constitutes a "special relationship" for purposes of creating a *constitutional (substantive due process) duty* to act. It does not and this Court has not ruled otherwise.

Plaintiffs point to the resolution of CCSD's first motion to dismiss and contend "[t]he Court has already made its ruling on this issue." (Opp. at 12:2-3). For sure, the Court denied CCSD's motion to dismiss the plaintiffs' substantive due process claim. However, such does not mean the Court did so on the basis that plaintiffs had (1) alleged the "special relationship" exception to *DeShaney*'s general rule of no-liability (they didn't), or (2) that

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the school-student relationship constitutes one such constitutionally recognized "special relationship" (it doesn't).

Indeed, the Court's Order denying dismissal of plaintiffs' substantive due process claim simply explains: "Plaintiffs have sufficiently pled deliberate inaction" and that "[a]ny issues and arguments raised in the briefs and not addressed in this order are denied without prejudice." (Order (9/10/14) at 3:7-11). In short, the focus of the Court's denial was solely on the deliberate indifference element of the state-created danger exception—the Order said nothing about the special relationship exception or its elements.

Most certainly, the Court did not rule that the school-student relationship constitutes a "special relationship" for purposes of substantive due process analysis. Indeed, had the Court made such a ruling, it would be contrary to the unanimous decisions of the United States Supreme Court, every Circuit Court of Appeals (that has considered the issue), and the federal District of Nevada, each of which expressly ruled that the school-student relationship, while perhaps a "special relationship" for purposes of creating a *tort duty*, is NOT a "special relationship" for purposes of creating a *constitutional duty*.[3] More locally, even the federal District of Nevada has

[3] See e.g., *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) ("we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect'") (citing *DeShaney*, 489 U.S. at 200); *Hasenfus v. LaJeunesse*, 175 F.3d 68, 71-72 (1st Cir. 1999); *Pollard v. Georgetown School Dist.*, 132 F. Supp.3d 208, 227 (D. Mass. 2015) ("Although the First Circuit has not held outright that a 'special relationship' can never arise between a school and a child, it has expressed skepticism, because 'circuits that have confronted this issue have uniformly rejected' the argument and the U.S. Supreme Court has come 'pretty close to rejecting it in [dictum in *Vernonia*].") (quoting *Hasenfus, supra*, and citing *Vernonia, supra*); *Gagnon ex rel. MacFarlane v. East Haven Bd. of Educ.*, 29 F. Supp.3d 79, 83 (D. Conn. 2014) ("While the Second Circuit has not directly addressed whether this [special relationship] exception applies to schools, there is wide consensus among federal courts of appeals that it does not."); *L.R. v. School Dist. of Philadelphia*, 836 F.3d 235, 247 n. 57 (3d Cir. 2016); *Morrow v. Balaski*, 719 F.3d 160, 170 (3d Cir. 2013) ("public schools, as a general matter, do not have a constitutional duty to protect students from private actors.") (emphasis in original); *Stevenson v. Martin Cnty Bd. of Educ.*, 3 Fed. Appx. 25, 30-31 (4th Cir. 2001) ("Following the lead of our sister circuits, we hold that the [school district] did not have a 'special relationship' with [the student] that triggered the protections of the Due Process Clause . . . ."); *Doe v. Columbia-Brazoria Independent School Dist.*, 855 F.3d 681, 688 (5th Cir. 2017) ("a public school does not have a special relationship with a student that would require . . . a constitutional duty to protect [one student] from the abuse by [another private citizen]."); *Estate of Lance v. Lewisville Independent School Dist.*, 743 F.3d 982, 1001 (5th Cir. 2014) ("a

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ruled, generally, that "mandatory school attendance does not give rise to the special relationship required to exempt a case from the *DeShaney* rule (*Arrington v. Clark Cnty Dept. of Family Services* 2014 WL 4699698, *4 (D. Nev. 2014)), and, more specifically with respect to CCSD, that there is no "special relationship between a public school and its students for substantive due process purposes" (*Lamberth v. CCSD*, 2015 WL 4760696, *4 (D. Nev. 2015)).

In short, no court offered by plaintiffs or found by the undersigned has ruled that the school-student relationship is a "special relationship" for constitutional (substantive due process) purposes as an exception to *DeShaney*'s rule of no-liability.

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public school does not have a *DeShaney* [i.e., constitutional] special relationship with its students requiring the school to ensure the students' safety from private actors"); *Stiles ex rel. D.S. v. Grainger Cnty, Tennessee*, 819 F.3d 834, 854-55 (6th Cir. 2016) ("the Sixth Circuit has consistently rejected the existence of a special relationship between school officials and students . . . ."); *McQueen v. Beecher Comm. Schools*, 433 F.3d 460, 464 n.4 (6th Cir. 2006) ("there is no 'special relationship' between a school and its students that gives rise to a constitutional duty"); *J.O. v. Alton Comm. Unity School Dist.*, 909 F.2d 267, 272 (7th Cir. 1990) ("the government, acting through local school administrations, [does not have] an affirmative constitutional duty to protect [students]"); *Lee v. Pine Bluff School Dist.*, 472 F.3d 1026, 1030-31 (8th Cir. 2007) ("even mandatory school attendance generally does not give rise to a constitutional duty of care that could trigger liability based on substantive due process"); *Patel v. Kent School Dist.*, 648 F.3d 965, 972-73 (9th Cir. 2011) (joining "every one of our sister circuits to consider the issue" in holding that the school-student relationship is not a "special relationship" for purposes of substantive due process analysis); *Maldonado v. Josey*, 975 F.2d 727, 731-33 (10th Cir. 1992) ("After reviewing DeShaney, . . . we agree with the Third and Seventh Circuits and conclude that compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school."); *Worthington v. Elmore Cnty Bd. of Educ.*, 160 Fed. Appx. 877, 881 (11th Cir. 2005) ("public schools generally do not have the requisite level of control over children to give rise to a constitutional duty to protect them from third-party actors").

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III. CONCLUSION

For all the foregoing reasons, the Court should GRANT the Motion to Strike and disregard all arguments made for the first time in plaintiffs' rebuttal closing argument, as identified in Section II of the Motion.

DATED this 6th day of July, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: _____

DANIEL F. POLSENBERG (SBN 2376)
DAN R. WAITE (SBN 4078)
BRIAN D. BLAKLEY (SBN 13074)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Attorneys for Defendants

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CERTIFICATE OF SERVICE

Pursuant to Nev.R.Civ. Rule 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this day, I caused a true and correct copy of ***CCSD's Reply In Support of Its Motion to Strike Portions of Plaintiffs' Closing Rebuttal Brief*** to be filed, via the Court's E-Filing System, DAP/Wiznet, and served on all interested parties via U.S. Mail, postage pre-paid.

Allen Lichtenstein, Esq.
Staci Pratt, Esq.
ALLEN LICHTENSTEIN ATTORNEY AT LAW, LTD.
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allaw@lvcoxmail.com
Attorneys for Plaintiffs

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San Francisco, CA 94109
john@scottlawfirm.net
Attorneys for Plaintiffs
(Admitted Pro Hac Vice)

DATED this 6th day of July, 2017.

An Employee of Lewis Roca Rothgerber Christie LLP

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Electronically Filed
1/2/2018 10:32 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, Plaintiff(s), vs. CLARK COUNTY SCHOOL DISTRICT, et al., Defendant(s).	CASE NO. A-14-700018-C DEPT. NO. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, JULY 19, 2017

TRANSCRIPT OF PROCEEDINGS RE:
CLARK COUNTY SCHOOL DISTRICT'S MOTION TO STRIKE PORTIONS OF PLAINTIFFS' CLOSING REBUTTAL BRIEF

****

APPEARANCES:

For the Plaintiff(s): ALLEN K. LICHTENSTEIN, ESQ.

RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER
TRANSCRIBED BY: SHAWNA ORTEGA, CET-562

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LAS VEGAS, NEVADA, WEDNESDAY, JULY 19, 2017

[Proceedings commenced at 10:30 a.m.]

MR. LICHTENSTEIN: Good morning, Your Honor.

THE COURT: Hang on. Do we have both sides here? Are your oppose -- do you -- are you expecting opposing counsel?

MR. LICHTENSTEIN: I've not seen opposing counsel. I had contact with opposing counsel.

THE COURT: Is -- is anyone here for Clark County School District on the *Bryan vs. Clark County School District* matter? You know, the matter was set at 9:00. Did we lose -- did anybody check in?

THE CLERK: Just Mr. Lichtenstein.

THE COURT: Sorry?

THE CLERK: No, just Plaintiff's counsel.

THE COURT: Just Plaintiff's counsel?

No, I -- this matter is fully briefed. I -- I can either rule on it and allow you to go forward or to notify them and set it for argument.

MR. LICHTENSTEIN: I -- I don't know if the court has seen it. We did submit findings of fact and conclusions of law.

THE COURT: I did. But I didn't review them --

MR. LICHTENSTEIN: I understand.

THE COURT: -- pending this motion. I did not review them yet.

MR. LICHTENSTEIN: Okay. So…

THE COURT: But this is a Motion to Strike your -- one of your opposing briefs.

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MR. LICHTENSTEIN: That's correct.

THE COURT: Yeah.

MR. LICHTENSTEIN: And I -- I don't know if that's --

THE COURT: Do you think we should go forward today or do you want the matter continued for both sides to be present?

MR. LICHTENSTEIN: Go forward today. They had filed a tentative partial response or something, wondering if it was moot or not.

THE COURT: So Mr. Lichtenstein, why don't you argue your opposition.

MR. LICHTENSTEIN: I'd be happy to argue the opposition.

It's without any undue delay, everything that they are arguing in their Motion to Strike are things that have been dealt with before. Their argument is based on a premise for an appeal or summary judgment. It is not necessary for us to raise every legal issue that has already been dealt with and already been decided in a written closing brief. Everything that was in the rebuttal that did address these things or in response to their closing brief, which is proper, that's what a rebuttal is, we rebutted. They said we didn't deal with this issue, so we rebutted them and showed them where it was.

Their reply seems to focus on the question of whether there is a special relationship between teacher and student in Nevada, and that somehow or other they were shocked and surprised when they mentioned that and we said yes, we dealt with that in the Motion to Dismiss, the Motion to Dismiss the amended complaint. They never brought it up in summary judgment, they pointed out in -- in their partial, I guess, reply brief that you said in denying or partially denying the Motion for Amended Complaint that everything that was not addressed was denied

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without prejudice. Doesn't mean it's waived. It means that they could bring it up again. They never did until their -- until their rebuttal -- not rebuttal, their closing brief.

The order that -- and decision that you made on June 29th specifically addresses that particular issue of the special relationship prong or theory of substantive due process. So if this matter isn't already moot, then almost for bookkeeping purposes, it would seem that their Motion to Strike should be denied, because it's essentially baseless.

THE COURT: Thank you.

This is the defendant's Motion to Strike the portions of the plaintiff's rebuttal -- closing rebuttal brief. It was fully briefed. We only have one counsel present. It was filed on June 2nd, the opposition was June 15th, reply on July 6th. There was an intervening decision order that I entered on or about June 29th, which I suspect the defendants believe mooted this argument.

But regardless of that and after review of the merits of the matter, the Motion to Strike portions of the reply brief will be denied for the reason that these posttrial briefs took the place of closing argument, that there was allowable argument. And had there been objections at the time of trial to the arguments raised in the rebuttal brief, I -- I would have overruled those objections at that time.

So you may present an order to that effect making sure that you first notify the other side, that the matter's been heard.

MR. LICHTENSTEIN: Thank you, Your Honor.

THE COURT: Thank you.

MR. LICHTENSTEIN: Can I raise one other issue? Because I just want to make sure that in the findings of fact and conclusions of law, I spoke with

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your law clerk, who wasn't clear whether or not that you want us to propose numbers for the -- for the damages?

THE COURT: You know, I -- I really don't want to -- that --

MR. LICHTENSTEIN: I just --

THE COURT: -- I really don't want to get into that.

MR. LICHTENSTEIN: -- wanted to make sure that I did not do anything --

THE COURT: -- issue without --

MR. LICHTENSTEIN: -- incorrect.

THE COURT: -- the other side present.

MR. LICHTENSTEIN: Okay.

THE COURT: I will review your proposed --

MR. LICHTENSTEIN: Okay.

THE COURT: -- findings and -- and we'll deal with it in due course.

MR. LICHTENSTEIN: Okay. Thank you.

THE COURT: Thank you.

[Proceedings concluded at 10:36 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Shawna Ortega, CET*562

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD

Defendant .

Case No. A-14-700018-C

Dept. No. XXVII

VERIFIED MEMORANDUM OF COSTS AND DISBURSEMENTS

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Plaintiffs, by and through the undersigned attorneys, submit this Verified Memorandum of Costs and Disbursements, in the amount of twenty-four thousand, eight hundred, thirty-two dollars and eighty cent ($24,832.90) , as itemized herein and supported by the attached documents.

Dated this 27th day of July 2017

Respectfully submitted by:

/s/ Allen Lichtenstein
Allen Lichtenstein
Nevada Bar No. 3992
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Las Vegas, NV 89120Tel: 702.433-2666
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John Houston Scott (CA Bar No. 72578)
Admitted Pro Hac Vice
SCOTT LAW FIRM

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Tel: 415.561.9601
john@scottlawfirm.net
Attorneys for Plaintiffs, Mary Bryan, Ethan Bryan, Aimee Hairr and Nolan Hairr

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STATE OF NEVADA)
) ss
COUNTY OF CLARK)

Allen Lichtenstein, hereby declares on penalty of perjury that he is one of the attorneys for Plaintiffs in the case of *Bryan v. Clark County School District* (Case No. A-14-700018-C), and has personal knowledge of the costs and disbursements expended, and that the items contained in Plaintiffs Verified Memorandum of Costs and Disbursements, which are supported by the attached documentation, are true and correct to the best of declarent's knowledge and belief; and that said costs and disbursements have been necessarily incurred and paid in this action.

Pursuant to NRS 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 27th day of July 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I served the following Plaintiffs' Verified Memorandum of Costs and Disbursements via Court's electronic filing and service system and/or United States Mail and/or e-mail on the 27th day of July 2017, to:

Dan Polsenberg, Esq.
Dan Waite. Esq.
Lewis Rocha Rothgerber Christie
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, NV 89169-5996

DPolsenberg@lrrc.com
DWaite@lrrc.com

/s/ Allen Lichtenstein

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Plaintiffs' Costs and Disbursements

In Reference To: Mary Bryan and Amy Hairr v Clark County School District (CCSD) et. al, (Case No. A-14-700018-C)

COSTS	Amount
5/19/2014 Messenger service to Attorney General (ACLU)	116.88
8/22/2014 Hearing transcript (Lichtenstein).	60.00
5/12/2015 Association of Counsel application fee (State Bar of Nevada CK #1643).	550.00
5/13/2015 Federal Express shipment to Allen Lichtenstein, Las Vegas, NV (FedEx #773596657239).	41.74
6/18/2015 Mailing disclosures (Lichtenstein).	5.75
6/19/2015 Printing disclosures (Lichtenstein).	63.77
6/22/2015 Mailing disclosures (Lichtenstein).	5.95
6/30/2015 Copies and Faxes made in office 06/01/2015-06/30/2015.	27.20
8/31/2015 Copies and Faxes made in office 08/01/2015-08/31/2015.	4.00
10/23/2015 Discovery CD (Lichtenstein).	10.80
11/2/2015 Deposition of Warren McKay (Depo International Inv #23223).	1,534.68
Deposition transcript of Warren McKay (Depo International Inv #23293).	877.98
Roundtrip travel to from SNA to LAS to SFO for Bryan/Hairr depositions (Southwest).	209.20
Meals during travel to Las Vegas for Bryan/Hairr depositions (The Sicilian Ristorante).	126.48
11/3/2015 Deposition of Cheryl Winn (Depo International Inv #23263).	1,590.00
Deposition transcript of Cheryl Winn (Depo International Inv #23417).	928.73
Taxi service in Las Vegas for Bryan/Hairr depositions (Thanh Ngoc).	52.00
Meals during travel to Las Vegas for Bryan/Hairr depositions (Arawan Thai Bistro).	25.51
Meals during travel to Las Vegas for Bryan/Hairr depositions (Gandhi India Cuisine).	25.84
11/16/2015 Deposition of Deanna Wright (Depo International Inv #23637).	603.42
Deposition transcript of Deanna Wright (Depo International Inv #23662).	416.15
Wright deposition transcript (Lichtenstein).	19.46
11/30/2015 Copies and Faxes made in office 10/01/2015-11/30/2015.	210.40
12/22/2015 Deposition of Nolan Michael Hairr (Litigation Services, Inv #1044327).	1,183.05
1/5/2016 Deposition of C L (Western Reporting Services, Inv #49962).	372.80
1/6/2016 Deposition of Aimee Olivia Hairr (Litigation Services, Inv #1046125).	960.58
1/13/2016 Deposition of D M (Western Reporting Services, Inv #49981).	379.30
1/21/2016 Deposition of Ethan Bryan (Litigation Services, Inv #1048764).	1,138.50
1/24/2016 Travel to from New Orleans to LAS for Bryan/Hairr depositions (Southwest).	221.23

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1/25/2016 Deposition of Leonard Depiazza (Depo International Inv #24752).	815.00
1/26/2016 Deposition of Robert Beaseley (Depo International Inv #24805).	533.00
1/27/2016 Deposition transcript of John Edwin Halpin (Depo International Inv #24899).	325.76
Deposition of John Edwin Halpin (Depo International Inv #24897).	589.50
1/28/2016 Deposition transcript of Andre Joseph Long (Depo International Inv #24902).	556.83
Deposition of Andre Joseph Long (Depo International Inv #24901).	947.50
Travel from LAS to SFO - Bryan/Hairr depositions (Southwest).	114.60
1/31/2016 Copies and Faxes made in office 01/01/2016-01/31/2016.	190.60
2/5/2016 Deposition of Mary Bryan (Litigation Services, Inv #1051615).	1,031.40
2/16/2016 Deposition of Heath Hairr (Litigation Services, Inv #1051615).	160.00
Deposition of Gina Abbaduto (Litigation Services, Inv #1053295).	607.25
2/19/2016 Deposition of Asheesh Dewan, MD (Litigation Services, Inv #1053578).	135.95
Deposition of Edmond Faro, MD (Litigation Services, Inv #1053610).	182.10
2/24/2016 Deposition of Dennis Moore, MD (Litigation Services, Inv #1052063).	236.35
2/29/2016 Copies and Faxes made in office 02/01/2016-02/29/2016.	67.40
3/17/2016 Federal Express shipment to Allen Lichtenstein, Las Vegas, NV (FedEx #775904967664).	32.49
3/28/2016 Documents scanned to PDF (Lichtenstein)	37.83
4/1/2016 Documents scanned to PDF (Lichtenstein).	42.39
4/21/2016 Efile transactions for Mary Bryan - 04/30/2014-04/21/2016 (Lichtenstein).	270.00
4/29/2016 Lewis Roca transcript fee (Lichtenstein).	90.14
8/31/2016 Copies and Faxes made in office 08/01/2016-08/31/2016.	6.40
10/31/2016 Copies and Faxes made in office 10/01/2016-10/31/2016.	51.80
11/9/2016 Federal Express shipment to Allen Lichtenstein, Las Vegas, NV (FedEx #7777679212411).	115.11
Depo transcript of Robert Beasley, taken 1/26/2016 (Depo International Inv #30045).	46.00
Depo transcript of Cheryl Winn, taken 11/16/2015 (Depo International Inv #30044).	151.00
Depo transcript of Warren McKay, taken 11/2/2015 (Depo International Inv #30046).	137.00
11/9/2016 Depo transcript of Deanna Wright, taken 11/16/2015 (Depo International Inv #30047).	51.00
Binders and tabs for trial (Lichtenstein).	47.48
11/15/2016 District Court Transcript of Trial 11/15/16-11/18/16, 11/22/16	440.00
11/28/2016 Court reporter deposit and service (Kimberly Lawson Karr Reporting Inv #11/28/2016.	4000.00

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12/31/2016 Copies and Faxes made in office 12/01/2016-12/31/2016.	182.80
3/15/2017 Copies and binding. (Lichtenstein).	92.95
3/16/2017 Copies and binding. (Lichtenstein).	34.22
3/31/2017 Copies and Faxes made in office 03/01/2017-03/31/2017.	23.60
4/20/2017 Efile transactions for Clark County School District - 06/30/2014-04/20/2017 (Lichtenstein).	182.00
5/31/2017 Copies and Faxes made in office during 05/01/2017-05/31/2017.	44.40
Assoc. of Counsel Renewal - Case A-14-700018 C (State of Nevada)	500.00
Total Costs	**$24,832.80**

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Reno/Carson Messenger Service, Inc.
185 Martin Street
Reno, NV 89509
tel 775.322.2424 fax 775.322.3408
process@renocarson.com
Federal Tax ID: 88-0306306
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Invoice #: 48398
Date: 05/19/2014

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Amount Due: $90.44

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LAS VEGAS, NV 89106

Phone number: 702 366-9109
Fax number: 702 366-1331
Email Address:

Requestor: TAMIKA SHAUNTEE
Your File# BRYAN V. CCSD

Service #49261: KARA JENKINS IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS COMMISSION ADMINISTRATOR OF NERC
Manner of Service: CORP/BUSINESS

Completion Information/Recieved by:AMANDA WHITE
Service Date/Time:05/16/2014 10:55 AM
Service address:100 N. CARSON ST NEVADA ATTORNEY GENERAL'S OFFICE CARSON CITYNV 89705
Served by:WADE MORLAN R-006823

Sex	Color of skin/race	Color of hair	Age	Height	Weight
Female	Caucasian	Blonde	20-30	5ft 6in	141-150lbs
Other Features:					

001490

EIGHTH JUDICIAL DISTRICT COURT-STATE OF NEVADA, CLARK COUNTY

MARY BRYAN, ET AL v. CLARK COUNTY SCHOOL DISTRICT (CCSD); ET AL

Service Documents: SUMMONS; COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND DAMAGES; CIVIL COVER SHEET

CASE#: A-14-700018-C

Service Comments:

Copy/Print/Fax Service	$6.44
Standard Service	$40.00
RUSH CHARGE	$20.00
SPECIAL MILEAGE	$24.00
TOTAL CHARGES:	**$90.44**
BALANCE:	**$90.44**

CREDIT TERMS ARE NET 30. INVOICES NOT PAID WITHIN TERMS WILL BE ASSESSED A 1.5% PER MONTH FINANCE CHARGE

001490

Reno/Carson Messenger Service, Inc.
185 Martin Street
Reno, NV 89509
tel 775.322.2424 fax 775.322.3408
process@renocarson.com
Federal Tax ID: 88-0306306
NV STATE LIC#322

Process Server - Messenger Service
RENO / CARSON / LAS VEGAS
★★★ WE MAKE DEADLINES ★★★

Invoice #: 48396
Date: 05/19/2014

INVOICE FOR SERVICE:

Amount Due: $26.44

AMERICAN CIVIL LIBERTIES UNION OF NEVADA
601 S RANCHO DR, SUITE B11,
LAS VEGAS, NV 89106

Phone number: 702 366-9109
Fax number: 702 366-1331
Email Address:

Requestor: TAMIKA SHAUNTEE
Your File# BRYAN V. CCSD

Service #49263: NEVADA EQUAL RIGHTS COMMISSION (NERC)
Manner of Service: CORP/BUSINESS

Completion Information/Recieved by:AMANDA WHITE
Service Date/Time:05/16/2014 10:55 AM
Service address:100 N. CARSON ST NEVADA ATTORNEY GENERAL'S OFFICE CARSON CITYNV 89705
Served by:WADE MORLAN R-006823

Sex	Color of skin/race	Color of hair	Age	Height	Weight
Female	Caucasian	Blonde	20-30	5ft 6in	141-150lbs
Other Features:					

001491

EIGHTH JUDICIAL DISTRICT COURT-STATE OF NEVADA, CLARK COUNTY

MARY BRYAN, ET AL v. CLARK COUNTY SCHOOL DISTRICT (CCSD); ET AL

Service Documents: SUMMONS; COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND DAMAGES; CIVIL COVER SHEET

CASE#: A-14-700018-C

Service Comments:

Copy/Print/Fax Service	$6.44
2nd Def	$20.00
TOTAL CHARGES:	**$26.44**
BALANCE:	**$26.44**

CREDIT TERMS ARE NET 30. INVOICES NOT PAID WITHIN TERMS WILL BE ASSESSED A 1.5% PER MONTH FINANCE CHARGE

001491

Financial

Bryan, Mary

Total Financial Assessment	$280.50
Total Payments and Credits	$280.50

4/30/2014	Transaction Assessment			$270.00
4/30/2014	Efile Payment	Receipt # 2014-50310-CCCLK	Bryan, Mary	($270.00)
7/27/2015	Transaction Assessment			$3.50
7/27/2015	Efile Payment	Receipt # 2015-78718-CCCLK	Bryan, Mary	($3.50)
3/21/2016	Transaction Assessment			$3.50
3/21/2016	Efile Payment	Receipt # 2016-28459-CCCLK	Bryan, Mary	($3.50)
4/21/2016	Transaction Assessment			$3.50
4/21/2016	Efile Payment	Receipt # 2016-38796-CCCLK	Bryan, Mary	($3.50)

Clark County School District, et al

Total Financial Assessment	$182.00
Total Payments and Credits	$182.00

6/30/2014	Transaction Assessment			$3.50
6/30/2014	Efile Payment	Receipt # 2014-75526-CCCLK	Clark County School District,	($3.50)
7/1/2014	Transaction Assessment			$3.50
7/1/2014	Efile Payment	Receipt # 2014-75811-CCCLK	Clark County School District,	($3.50)
8/1/2014	Transaction Assessment			$3.50
8/1/2014	Efile Payment	Receipt # 2014-88628-CCCLK	Clark County School District,	($3.50)
8/1/2014	Transaction Assessment			$3.50
8/1/2014	Efile Payment	Receipt # 2014-88733-CCCLK	Clark County School District,	($3.50)
8/7/2014	Transaction Assessment			$3.50
8/7/2014	Efile Payment	Receipt # 2014-90709-CCCLK	Clark County School District,	($3.50)
9/10/2014	Transaction Assessment			$3.50
9/10/2014	Efile Payment	Receipt # 2014-103862-CCCLK	Clark County School District,	($3.50)
9/10/2014	Transaction Assessment			$3.50
9/10/2014	Efile Payment	Receipt # 2014-104055-CCCLK	Clark County School District,	($3.50)
11/18/2014	Transaction Assessment			$3.50
11/18/2014	Efile Payment	Receipt # 2014-129961-CCCLK	Clark County School District,	($3.50)
11/20/2014	Transaction Assessment			$3.50
11/20/2014	Efile Payment	Receipt # 2014-130847-CCCLK	Clark County School District,	($3.50)
12/9/2014	Transaction Assessment			$3.50
12/9/2014	Efile Payment	Receipt # 2014-137192-CCCLK	Clark County School District,	($3.50)
12/10/2014	Transaction Assessment			$3.50
12/10/2014	Efile Payment	Receipt # 2014-137325-CCCLK	Clark County School District,	($3.50)
1/16/2015	Transaction Assessment			$3.50

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1/16/2015	Efile Payment	Receipt # 2015-05163-CCCLK	Clark County School District,	($3.50)
1/27/2015	Transaction Assessment			$3.50
1/27/2015	Efile Payment	Receipt # 2015-08735-CCCLK	Clark County School District,	($3.50)
1/27/2015	Transaction Assessment			$3.50
1/27/2015	Efile Payment	Receipt # 2015-08914-CCCLK	Clark County School District,	($3.50)
2/25/2015	Transaction Assessment			$3.50
2/25/2015	Efile Payment	Receipt # 2015-19983-CCCLK	Clark County School District,	($3.50)
10/8/2015	Transaction Assessment			$3.50
10/8/2015	Efile Payment	Receipt # 2015-106564-CCCLK	Clark County School District, et al	($3.50)
12/2/2015	Transaction Assessment			$3.50
12/2/2015	Efile Payment	Receipt # 2015-124835-CCCLK	Clark County School District, et al	($3.50)
12/2/2015	Transaction Assessment			$3.50
12/2/2015	Efile Payment	Receipt # 2015-125157-CCCLK	Clark County School District, et al	($3.50)
12/17/2015	Transaction Assessment			$3.50
12/17/2015	Efile Payment	Receipt # 2015-130465-CCCLK	Clark County School District, et al	($3.50)
1/5/2016	Transaction Assessment			$3.50
1/5/2016	Efile Payment	Receipt # 2016-00767-CCCLK	Clark County School District, et al	($3.50)
1/5/2016	Transaction Assessment			$3.50
1/5/2016	Efile Payment	Receipt # 2016-00877-CCCLK	Clark County School District, et al	($3.50)
1/5/2016	Transaction Assessment			$3.50
1/5/2016	Efile Payment	Receipt # 2016-00906-CCCLK	Clark County School District, et al	($3.50)
1/11/2016	Transaction Assessment			$3.50
1/11/2016	Efile Payment	Receipt # 2016-02616-CCCLK	Clark County School District, et al	($3.50)
1/13/2016	Transaction Assessment			$3.50
1/13/2016	Efile Payment	Receipt # 2016-03788-CCCLK	Clark County School District, et al	($3.50)
1/21/2016	Transaction Assessment			$3.50
1/21/2016	Efile Payment	Receipt # 2016-06717-CCCLK	Clark County School District, et al	($3.50)
1/27/2016	Transaction Assessment			$3.50
1/27/2016	Efile Payment	Receipt # 2016-08613-CCCLK	Clark County School District, et al	($3.50)
2/9/2016	Transaction Assessment			$3.50
2/9/2016	Efile Payment	Receipt # 2016-13414-CCCLK	Clark County School District, et al	($3.50)
2/12/2016	Transaction Assessment			$3.50
2/12/2016	Efile Payment	Receipt # 2016-15079-CCCLK	Clark County School District, et al	($3.50)
2/16/2016	Transaction Assessment			$3.50
2/16/2016	Efile Payment	Receipt # 2016-15142-CCCLK	Clark County School District, et al	($3.50)
3/1/2016	Transaction Assessment			$3.50
3/1/2016	Efile Payment	Receipt # 2016-21162-CCCLK	Clark County School District, et al	($3.50)
3/1/2016	Transaction Assessment			$3.50

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3/1/2016	Efile Payment	Receipt # 2016-21168-CCCLK	Clark County School District, et al	($3.50)
3/2/2016	Transaction Assessment			$3.50
3/2/2016	Efile Payment	Receipt # 2016-21394-CCCLK	Clark County School District, et al	($3.50)
3/23/2016	Transaction Assessment			$3.50
3/23/2016	Efile Payment	Receipt # 2016-29482-CCCLK	Clark County School District, et al	($3.50)
3/24/2016	Transaction Assessment			$3.50
3/24/2016	Efile Payment	Receipt # 2016-29855-CCCLK	Clark County School District, et al	($3.50)
3/24/2016	Transaction Assessment			$3.50
3/24/2016	Efile Payment	Receipt # 2016-29902-CCCLK	Clark County School District, et al	($3.50)
4/6/2016	Transaction Assessment			$3.50
4/6/2016	Efile Payment	Receipt # 2016-33970-CCCLK	Clark County School District, et al	($3.50)
4/7/2016	Transaction Assessment			$3.50
4/7/2016	Efile Payment	Receipt # 2016-34549-CCCLK	Clark County School District, et al	($3.50)
4/14/2016	Transaction Assessment			$3.50
4/14/2016	Efile Payment	Receipt # 2016-36878-CCCLK	Clark County School District, et al	($3.50)
4/18/2016	Transaction Assessment			$3.50
4/18/2016	Efile Payment	Receipt # 2016-37752-CCCLK	Clark County School District, et al	($3.50)
5/16/2016	Transaction Assessment			$3.50
5/16/2016	Efile Payment	Receipt # 2016-47125-CCCLK	Clark County School District, et al	($3.50)
5/17/2016	Transaction Assessment			$3.50
5/17/2016	Efile Payment	Receipt # 2016-47876-CCCLK	Clark County School District, et al	($3.50)
7/25/2016	Transaction Assessment			$3.50
7/25/2016	Efile Payment	Receipt # 2016-71205-CCCLK	Clark County School District, et al	($3.50)
7/26/2016	Transaction Assessment			$3.50
7/26/2016	Efile Payment	Receipt # 2016-71557-CCCLK	Clark County School District, et al	($3.50)
8/5/2016	Transaction Assessment			$3.50
8/5/2016	Efile Payment	Receipt # 2016-75561-CCCLK	Clark County School District, et al	($3.50)
8/11/2016	Transaction Assessment			$3.50
8/11/2016	Efile Payment	Receipt # 2016-77728-CCCLK	Clark County School District, et al	($3.50)
8/31/2016	Transaction Assessment			$3.50
8/31/2016	Efile Payment	Receipt # 2016-84035-CCCLK	Clark County School District, et al	($3.50)
11/8/2016	Transaction Assessment			$3.50
11/8/2016	Efile Payment	Receipt # 2016-108915-CCCLK	Clark County School District, et al	($3.50)
11/10/2016	Transaction Assessment			$3.50
11/10/2016	Efile Payment	Receipt # 2016-110202-CCCLK	Clark County School District, et al	($3.50)
11/15/2016	Transaction Assessment			$3.50
11/15/2016	Efile Payment	Receipt # 2016-111279-CCCLK	Clark County School District, et al	($3.50)
4/20/2017	Transaction Assessment			$3.50

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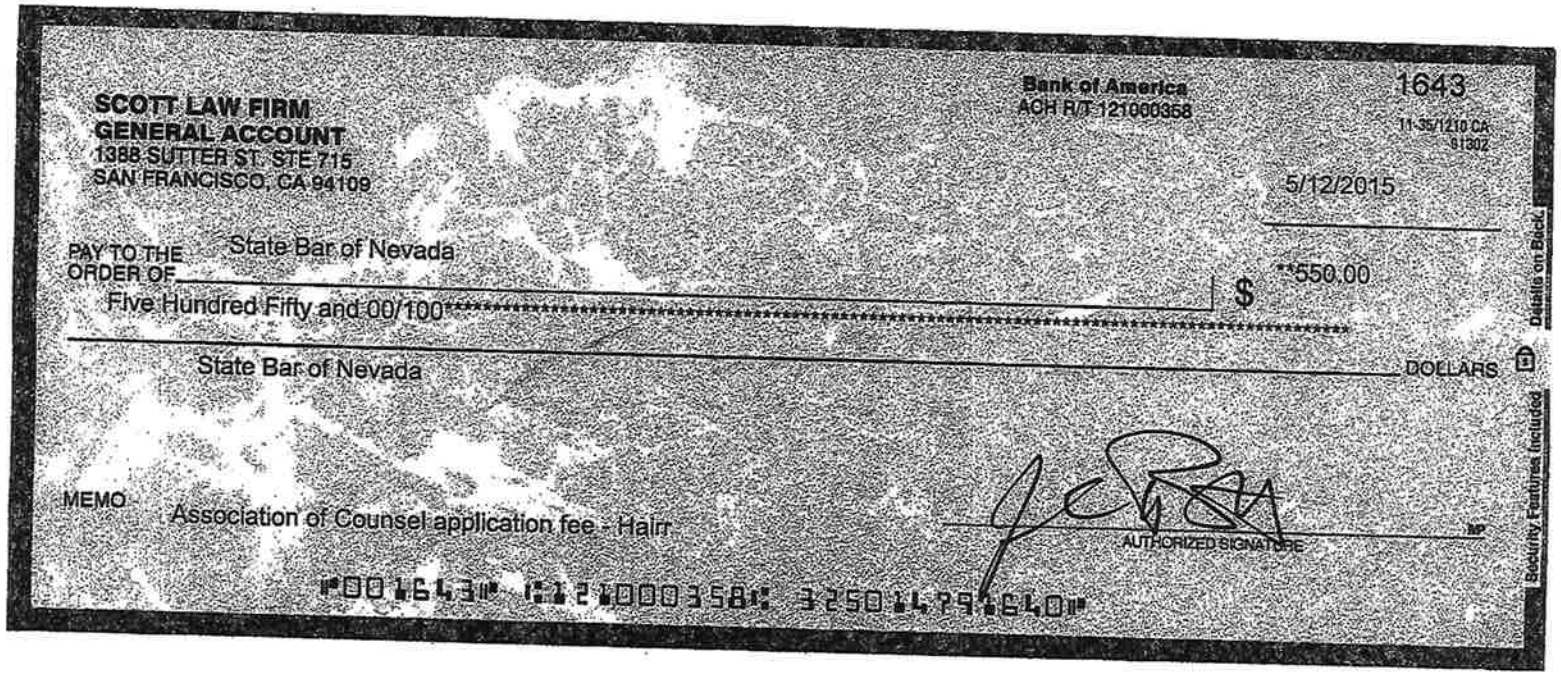

SCOTT LAW FIRM
GENERAL ACCOUNT
1388 SUTTER ST. STE 715
SAN FRANCISCO, CA 94109

Bank of America
ACH R/T 121000358

1643
11-35/1210 CA
91302

5/12/2015

PAY TO THE ORDER OF State Bar of Nevada

$ **550.00

Five Hundred Fifty and 00/100**********

State Bar of Nevada

DOLLARS

Details on Back. Security Features Included

MEMO Association of Counsel application fee - Hairr

AUTHORIZED SIGNATURE

⑈001643⑈ ⑆121000358⑆ 3250147946⑆0⑈

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THANH NGOC PHAN TA
1398 PLYMOUTH AVE
SAN FRANCISCO, CA 941
11/03/2015
Merchant ID: 000000
Terminal ID:
372238562881

CREDIT CARD
VISA SALE

CARD # XXXXXXXXX
INVOICE 51
Batch #: 0
Approval Code: 00
Entry Method: Sw
Mode: On

MDSE/SERVICES $52.
TIP $0.0

TOTAL AMOUNT $52.00

CUSTOMER COPY

THE SICILIAN RISTORANT
3520 E TROPICANA AVE #A
LAS VEGAS, NV 89121
11/02/2015 20:41:52

CREDIT CARD
VISA SALE

CARD # XXXXXXXXXXX2430
INVOICE 0026
SEQ #: 0023
Batch #: 001282
SERVER 0009
Approval Code: 04567D
Entry Method: Swiped
Mode: Online

PRE-TIP AMT $106.48
TIP 20.-

TOTAL AMOUNT 126.48

WE APPRECIATE YOUR BUSINESS!

CUSTOMER COPY

Bryan / Hair

ithwestAirlines@luv.southwest.com>
15 5:45 PM

on (HZ2PYY) | 30OCT15 | SFO-SNA-LAS | Scott/John

Log In | View my itinerary

Special Offers | Hotel Offers | Car Offers

everything you need to

Air Itinerary

AIR Confirmation: HZ2PYY

Confirmation Date: 10/13/2015

Passenger(s)	Rapid Rewards #	Ticket #	Expiration	Est. Points Earned
SCOTT/JOHN	217859913	5262150860085	Oct 8, 2016	0

Rapid Rewards points from your original booking have been redeposited in account 00000217859913
18802 Rapid Rewards points have been redeemed for new ticket: 5262150860085

Date	Flight	Departure/Arrival

[redacted]

PM

PM

$

Date	Flight	Departure/Arrival

Let us take care of check-in for you. only $12.50 one-way

Get it now >

Add a hotel

- Earn Rapid Rewards® points
- Best rate guarantee
- Free cancellation

Book a hotel >

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4 77

Sun Nov 1 4049 Depart **ORANGE COUNTY/SANTA ANA, CA** (SNA) on Southwest Airlines at **12:35 PM**
Arrive in **LAS VEGAS, NV** (LAS) at **1:40 PM**
Travel Time 1 hrs 5 mins
Wanna Get Away

Check in for your flight(s): 24 hours before your trip on Southwest.com or your mobile device to secure your boarding position. You'll be assigned a boarding position based on your check-in time. The earlier you check in within 24 hours of your flight, the earlier you get to board.

Bags fly free®: First and second checked bags. Weight and size limits apply. One small bag and one personal item are permitted as carryon items, free of charge.

30 minutes before departure: We encourage you to arrive in the gate area no later than 30 minutes prior to your flight's scheduled departure as we may begin boarding as early as 30 minutes before your flight.

10 minutes before departure: You must obtain your boarding pass(es) and be in the gate area for boarding at least 10 minutes prior to your flight's scheduled departure time. If not, Southwest may cancel your reserved space and you will not be eligible for denied boarding compensation.

If you do not plan to travel on your flight: In accordance with Southwest's No Show Policy, you must notify Southwest at least 10 minutes prior to your flight's scheduled departure if you do not plan to travel on the flight. If not, Southwest will cancel your reservation and all funds will be forfeited.

Air Cost: 11.20

Fare Rule(s): Valid only on Southwest Airlines. All travel involving funds from this Confirmation Number must be completed by the expiration date. Unused travel funds may only be applied toward the purchase of future travel for the individual named on the ticket. Any changes to this itinerary may result in a fare increase. Failure to cancel reservations for a Wanna Get Away fare segment at least 10 minutes prior to travel will result in the forfeiture of all remaining unused funds.

SFO WN SNA0.00M/MFF WN LAS0.00R/RFF 0.00 END AY11.20$SFO5.60 SNA5.60

Learn about our boarding process

Learn about inflight WiFi & entertainment

Cost and Payment Summary

AIR - **HZ2PYY**

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001497

John H. Scott

From: Southwest Airlines <SouthwestAirlines@luv.southwest.com>
Sent: Tuesday, October 13, 2015 5:52 PM
To: John H. Scott
Subject: Flight reservation (H35ED7) | 03NOV15 | LAS-SFO | Scott/John

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Southwest®

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Check In Online | Check Flight Status | Change Flight | Special Offers | Hotel Offers | Car Offers

Ready for takeoff!

Thanks for choosing Southwest® for your trip. You'll find everything you need to know about your reservation below. Happy travels!

Upcoming Trip: 11/03/15 - San Francisco

Air itinerary

AIR Confirmation: H35ED7

Confirmation Date: 10/13/2015

Passenger(s)	Rapid Rewards #	Ticket #	Expiration	Est. Points Earned
SCOTT/JOHN	217859913	5262150862870	Oct 12, 2016	0

Date	Flight	Departure/Arrival
Tue Nov 3	2054	Depart **LAS VEGAS, NV** (LAS) on Southwest Airlines at **7:40 PM** Arrive in **SAN FRANCISCO, CA** (SFO) at **9:15 PM** Travel Time 1 hrs 35 mins Wanna Get Away

Check in for your flight(s): 24 hours before your trip on Southwest.com or your mobile device to secure your boarding position. You'll be assigned a boarding position based on your check-in time. The earlier you check in within 24 hours of your flight, the earlier you get to board.

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Bags fly free®: First and second checked bags. Weight and size limits apply. One small bag and one personal item are permitted as carryon items, free of charge.

30 minutes before departure: We encourage you to arrive in the gate area no later than 30 minutes prior to your flight's scheduled departure as we may begin boarding as early as 30 minutes before your flight.

10 minutes before departure: You must obtain your boarding pass(es) and be in the gate area for boarding at least 10 minutes prior to your flight's scheduled departure time. If not, Southwest may cancel your reserved space and you will not be eligible for denied boarding compensation.

If you do not plan to travel on your flight: In accordance with Southwest's No Show Policy, you must notify Southwest at least 10 minutes prior to your flight's scheduled departure if you do not plan to travel on the flight. If not, Southwest will cancel your reservation and all funds will be forfeited.

Air Cost: 5.60

Fare Rule(s): 5262150862870: 1234.
Valid only on Southwest Airlines. All travel involving funds from this Confirmation Number must be completed by the expiration date. Unused travel funds may only be applied toward the purchase of future travel for the individual named on the ticket. Any changes to this itinerary may result in a fare increase. Failure to cancel reservations for a Wanna Get-Away fare segment at least 10 minutes prior to travel will result in the forfeiture of all remaining unused funds.

LAS WN SFO0.00T/TFF 0.00 END AY5.60$LAS5.60

Learn about our boarding process

Learn about inflight WiFi & entertainment

Cost and Payment Summary

AIR - **H35ED7**

Base Fare	$	0.00
Excise Taxes	$	0.00
Segment Fee	$	0.00
Passenger Facility Charge	$	0.00
September 11th Security Fee	$	5.60
Total Air Cost	**$**	**5.60**

Payment Information
Payment Type: 1947 Rapid Rewards Points
00000217859913
Date: Oct 13, 2015

99.00 FLIGHT
104.60
Payment Type: Visa XXXXXXXXXXXX2430
Date: Oct 13, 2015
Payment Amount: $5.60

RT $209.20

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001499

Base Fare	$	0.00
Excise Taxes	$	0.00
Segment Fee	$	0.00
Passenger Facility Charge	$	0.00
September 11th Securily Fee	$	11.20
Total Air Cost	**$**	**11.20**

Payment Information
Payment Type: 18802 Rapid Rewards Points
00000217859913
Date: Oct 13, 2015

Payment Type: Ticket Exchange
Date: Oct 13, 2015
Payment Amount: $11.20

Exchange Detail
Oct 9, 2015 From ticket # 5262149771424 to ticket # 5262150860085

Useful Tools

Check In Online
Early Bird Check-In
View/Share Itinerary
Change Air Reservation
Cancel Air Reservation
Check Flight Status
Flight Status Notification
Book a Car
Book a Hotel

Know Before You Go

In the Airport
Baggage Policies
Suggested Airport Arrival Times
Security Procedures
Customers of Size
In the Air
Purchasing and Refunds

Special Travel Needs

Traveling with Children
Traveling with Pets
Unaccompanied Minors
Baby on Board
Customers with Disabilities

Legal Policies & Helpful Information

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Notice of Incorporated Terms
Customer Service Commitment
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Contact Us

Book Air | Book Hotel | Book Car | Book Vacation Packages | See Special Offers | Manage My Account

This is a post-only mailing from Southwest Airlines. Please do not attempt to respond to this message. Your privacy is important to us, Please read our Privacy Policy.

[1] All travel involving funds from this Confirmation Number must be completed by the expiration date.
[2] Security Fee is the government-imposed September 11th Security Fee.

See Southwest Airlines Co. Notice of Incorporation
See Southwest Airlines Limit of Liability

Southwest Airlines
P.O. Box 36647-1CR

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