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 L. ALLF, District Judge
District Court Case No. A-14-700018-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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

Appellant has been represented in this litigation by Daniel F. Polsenberg, Dan R. Waite, Joel D. Henriod, Brian D. Blakley, and Abraham G. Smith of Lewis Roca Rothgerber Christie LLP.

Dated this 2nd day of June, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Brian D. Blakley*

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JURISDICTIONAL STATEMENT

Clark County School District (CCSD) appeals from a final judgment under Title IX[1] and an order awarding attorney's fees. NRAP 3A(b)(1), (8). Plaintiffs served written notice of the judgment's entry on September 17, 2021, and CCSD timely appealed on October 4. (12 App. 2813, 2815.)

ROUTING STATEMENT

The Supreme Court should retain this appeal. It is familiar with the facts and legal issues in *Clark County School District v. Bryan*, 136 Nev. 689, 478 P.3d 344 (2020). Following reversal and remand, the district court entered a substantially identical judgment. As a result, this appeal raises not only the same substantive issues as in the prior appeal, but also the inconsistency of the district court's judgment with this Court's opinion and mandate.

PRINCIPAL ISSUES PRESENTED

1. In its prior opinion, this Court held that the existing record did not support Title IX liability but remanded for "additional findings." The district court instead reentered the same findings as before. Does

[1] Title IX of the Education Amendments of 1972 targets institutional discrimination "on the basis of sex." 20 U.S.C. § 1681(a).

this identical factual record now establish Title IX liability, and is the district court's reimposition of Title IX liability without additional findings consistent with this Court's mandate?

2. To evaluate deliberate indifference, is the appropriate standard whether the actions of individual school employees were "reasonable under the circumstances," as the district court held, or does Title IX require an official decision by the school district that is "more than negligent" and "*clearly* unreasonable in light of the *known* circumstances," as this Court held in the prior opinion?

3. Does the record here establish deliberate indifference, considering the affirmative acts that school administrators took to address the students' bullying and the students' subsequent reports that the bullying had stopped?

4. In its prior opinion, this Court held that the district court "failed to properly analyze" whether CCSD made plaintiffs "more vulnerable to harassment." On remand, plaintiffs presented no evidence and proposed no additional findings, and the district court again ignored this causation element. Was the district court justified in reimposing Title IX liability without a finding of causation?

5. In its prior opinion, this Court expressed several concerns with the damages award. Was it appropriate for the district court to disregard this Court's instructions and reenter the identical award based on the same prohibited considerations?

6. Did the district court properly award attorney's fees in excess of the plaintiffs' limited success and at substantially higher than prevailing hourly rates?

STATEMENT OF THE CASE

This is an appeal from a final judgment entered—on remand from this Court—in the Eighth Judicial District Court, before the Honorable Nancy Allf, District Judge.

Plaintiffs Ethan Bryan and Nolan Hairr each tried claims under Title IX and 42 U.S.C. § 1983 against a single defendant, CCSD. Both plaintiffs alleged that CCSD failed to respond adequately to reports of student-on-student bullying against plaintiffs. Following a bench trial, the district court ruled that Ethan and Nolan each proved their Title IX and § 1983 claims.

On appeal, this Court reversed the judgment on both claims. *Clark Cty. Sch. Dist. v. Bryan*, 136 Nev. 689, 701, 478 P.3d 344, 359 (2020) ("*Bryan*"). Specifically, it reversed the § 1983 claim outright, and it reversed and remanded the Title IX claim for lack of adequate findings on the "deliberate indifference" element. *Id.* at 359.

With respect to the Title IX claim, this Court first held that CCSD's actions (or inactions) in September 2011 could not meet the "exacting standard" for deliberate indifference. *Id.* at 358-59. Then, it held that the district court "bypassed" key factual issues with respect to

CCSD's actions in and after October 2011 and that its findings concerning those actions were insufficient to establish deliberate indifference or causation. *Id.* at 359. For those reasons, this Court reversed the Title IX claim "insofar as it was based upon the September complaint but remand[ed] for *additional findings* as to whether the events following the October report constituted deliberate indifference under the applicable federal standards." *Id.* (emphasis added).

On remand, however, the district court made no "additional findings" whatsoever—let alone any "additional findings" concerning "the events following the October report." *Id.* Quite the opposite, it simply re-entered the *same factual findings*—largely word-for-word—after plaintiffs proposed them again. *See infra* n.4. Those findings were insufficient to establish deliberate indifference when this Court rejected them before, and they remain insufficient now.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This Court recited the relevant facts in its prior opinion, *Bryan*, 136 Nev. at 690-92, 478 P.3d at 351-53, and CCSD summarizes only the necessary portions of that discussion here.

A. Facts

In the fall of 2011, Ethan and Nolan were sixth-graders at Greenspun Junior High, where they played the trombone in the band class. *Id.* Early in the school year, fellow trombone players C. and D. bullied Nolan by calling him homophobic names and touching his hair. *Id.* Once the bullying started, Nolan reported it to the dean. *Id.*

In mid-September, "C., who sat next to Nolan in band, called Nolan a tattletale and stabbed him in the groin with a pencil, commenting he wanted to know if Nolan was a boy or a girl." *Id.* Nolan believed that C. was retaliating for the earlier report to the dean. *Id.*

On September 15, Ethan's mother, Mary, sent an email to school staff to report the bullying directed toward Nolan, but she did not mention any homophobic slurs. *Id.* In response to Mary's email, the "band teacher spoke with C. and D. and rearranged the trombone section, and the school counselor met with Nolan, who stated he was fine." *Id.*

Nolan's mother, Aimee, learned about the bullying shortly thereafter, and on September 22, she spoke with both the dean and the vice principal. *Id.* In response, "the school counselor again met with Nolan and walked Nolan to the dean's office, encouraging him to file a report

of the stabbing and other bullying." *Id.* At that point, "Nolan filed a report stating that C. was messing with his hair, blowing air in his face, kicking his instrument, and calling him and other students names like 'duckbill Dave.'" *Id.* However, "Nolan did not report the stabbing or the homophobic slurs." *Id.* In response to Nolan's report, "[t]he dean met with C. and his mother in late September to discuss the school's hands-off policy for students and to prohibit C. from name-calling." *Id.*

Despite the efforts of the band teacher, the counselor, and the dean, C. and D. continued to bully Nolan. *Id.* Further, they began targeting Ethan and Nolan, jointly, with homophobic slurs and other misconduct. *Id.* Until then, Ethan had not been a target. *Id.*

On October 18, C. scratched Ethan's leg with a trombone. *Id.* That night, Ethan reported the bullying—including the homophobic slurs and statements—to his mother, Mary. *Id.*

On October 19, Mary emailed school staff again. In that email, she reported the trombone-scratching incident, referenced her September 15 email, and stated that C. and D. continued to bully Ethan and Nolan. *Id.* As with her prior email, however, the October 19 email "omitted mention of the homophobic conduct." *Id.* The same day, Mary also met

with the dean and informed the dean of the full extent of the harassment, including the homophobic slurs. *Id.*

At trial, there was varied testimony as to the school staff's exact response to Mary's October 19 report. *Id.* at 352, 359. No school administrator could recall "conducting an investigation complying with NRS 388.1351." *Id.*

Following Mary's October 19 email, "C. D. continued to call Ethan and Nolan names." *Id.* at 352. As time passed, Ethan and Nolan showed signs of stress and eventually stopped attending class. *Id.* Then, in early 2012, the boys withdrew from Greenspun entirely, transferring first to a tuition-free charter school and later to tuition-charging private schools. *Id.* (*See also* 5 App. 1235:2–1236:5; 4 App. 826:23–827:15, 829:3–14, 885:21–887:25; 3 App. 531:10–12; 5 App. 1235:20–21.)

Following Ethan and Nolan's withdrawal, Mary sent a third email to school staff, and—for the first time—she copied district officials. *Bryan*, 478 P.3d at 352. In response to this email, a district supervisor directed the Greenspun principal to suspend C. and D., which he did. *Id.*

B. The First Judgment

In November 2016, plaintiffs went to trial on their Title IX and § 1983 claims against CCSD. *Id.*[2] After a five-day bench trial, the district court entered judgment for plaintiffs on both claims. *Id.*

Each claim required proof that CCSD responded to the known circumstances with "deliberate indifference." *E.g.*, *id.* at 356-59, n.8. The district court found this "deliberate indifference" element satisfied because school staff failed to conduct the investigation required by NRS 388.1351. *Id.* at 352, 358-59. Specifically, it found "that the school's violation of a state statute constituted *per se* deliberate indifference." *Id.* at 359. With this finding, the district court failed—as this Court later explained—to actually address the stringent, federal standard for deliberate indifference. *Id.* In this Court's words, the district court "bypassed the key questions of whether the evidence demonstrated [1] CCSD was more than negligent, [2] that its inaction was clearly unreasonable in light of the known circumstances, and [3] that its inaction caused the

[2] Prior to trial, the district court dismissed plaintiffs' four other claims and a total of 19 other defendants.

boys to either undergo harassment or be more vulnerable to it." *Id.* (emphases added) (collecting cases).

The district court awarded $200,000 to each boy, relying on a settlement agreement in an unrelated federal case and the plaintiffs' own speculation as to the value of their out-of-pocket expenses. *Id.* at 353, 361 n.11.[3] The district court also awarded attorney's fees and costs. *Id.* at 353.

C. The First Appeal

On appeal, this Court reversed judgment on the § 1983 claim entirely. Then, it reversed judgment on the Title IX claim "insofar as it was based upon the September complaint but remand[ed] for additional findings as to whether the events following the October report constituted deliberate indifference under the applicable federal standards." *Id.* at 359 (emphasis added).

In reaching this decision, this Court first explained the stringent, federal standard for deliberate indifference. *Id.* at 356-59 (collecting and

[3] This Court's opinion mistakenly states that the district court awarded $600,000 apiece. *Id.* at 353. Plaintiffs' proposed judgment states that amount, but the district court crossed it out and interlineated $200,000. (8 App. 1972:25.)

explaining authorities). Then, it held that "to the extent the district court found deliberate indifference based upon CCSD's action or inaction in September, that finding is not supported by the record." *Id.* at 358-59.

However, it ruled that CCSD's response to the October report presented "a closer call," as the district court had failed to make the key factual findings with respect to that response. *Id.* Accordingly, this Court sent the case back to give the district court another opportunity to make—if possible—the "additional" factual findings necessary to establish that CCSD responded with deliberate indifference. *Id.*

As guidance for remand, this Court also noted "several concerns with the damages award." This Court explained that plaintiffs had "merely speculated to their out-of-pocket expenses, and the record does not support the district court's calculation for five years of out-of-pocket expenses for each boy." This Court was "also troubled by the district court's reliance on a settlement agreement in an unrelated federal case to calculate physical and emotional distress damages." *Id.* This Court cautioned that "damages cannot be merely speculative or simply based on another case's settlement agreement" and suggested that plaintiffs

may have a "duty to mitigate damages." *Id.* (citing *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000) and 2 CIV. ACTIONS AGAINST STATE & LOCAL GOV'T § 13:15 (2d ed. 2002)).

D. The Judgment on Remand

On remand, however, the district court did not make any "additional" factual findings at all. Rather, except for minor changes,[4] the

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[4] The revised findings add paragraphing and paragraph numbers, change the bullies' initials from "CL" and "DM" to "C" and "D" (¶¶ 3, 4, 7, 12, 21, 24, 25, 31, 42, 45, 57), and make the following changes:

- Heading A: "they began" is (inadvertently) changed to "the began" [*sic*]. (8 App. 1955, 10 App. 2498.)
- ¶ 1: "began" is changed to "begin" (though the rest of the findings remain in past tense). (8 App. 1955, 10 App. 2498.)
- ¶ 16: the participial phrase "complaining about the bullying and specifically about the stabbing" is relocated to the beginning of the sentence:

  > 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[~~, complaining about the bullying and specifically about the stabbing~~].

(8 App. 1956, 10 App. 2500.)

- ¶ 31: "Nolan's mother made several phone calls to various school officials" is changed to "Nolan's mother made various phone calls," omitting to whom; in the next sentence "She" (referring to Nolan's mother) is inexplicably changed to "They." (8 App. 1958, 11 App. 2502.)

- ¶ 35: "corroborated" is changed to "corroborate" [*sic*]. (8 App. 1959, 11 App. 2503.)
- ¶ 38: Previously, Nolan "wrote" an innocuous version of events in his incident report; in the revised findings, he "left" an innocuous version. (8 App. 1959, 11 App. 2503.)
- ¶ 40: "Dean Winn said testified did not learn" [*sic*] is corrected to "Dean Winn said she did not learn . . . ." (8 App. 1960, 11 App. 2503.)
- ¶ 42: "homosexual acts" is changed to "gay sex." (8 App. 1960, 11 App. 2504.)
- ¶ 46 & Heading D: two instances of "email" or "emails" are changed to "e-mail" and "e-mails." The third "emails" is unchanged. (8 App. 1961, 11 App. 2504-05.)
- ¶¶ 47-48: two commas ending relative clauses are inexplicably deleted. (8 App. 1961, 11 App. 2505.)
- ¶ 49: the description of Mr. Halpin reporting bullying "to both Principal McKay and Vice Principal DePiazza" is deleted, leaving it unclear in the revised version to whom, if anyone, he made his report. (8 App. 1961, 11 App. 2505.)
- ¶ 51: "Dr. McKay" is changed to "He." (8 App. 1691, 11 App. 2505.)
- Heading F: "were" is (inadvertently) deleted, and a comma is (inexplicably) added: "administration ~~were~~ aware of**,** physical, and discriminatory bullying . . . ." (8 App. 1962, 11 App. 2506.)
- ¶ 57: "for in January 2012" is changed to "for the second semester, in January 2012 . . . ." (8 App. 1963, 11 App. 2507.)
- ¶ 65: "in fact" is relocated to the beginning of the first sentence; the second and third sentences are combined:

  > ***In fact,*** this was[~~, in fact,~~] 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 results of any earlier investigation[~~.~~]**,** nor [~~was~~] ***provided*** any evidence obtained from any earlier investigation. . . .

district court entered the *exact* same findings—verbatim—again. (*Compare* 8 App. 1955-64 *with* 10 App. 2498 – 11 App. 2508.) Specifically, it called for the parties to submit proposed post-remand findings. (10 App. 2373.) But plaintiffs did not identify any record support for such findings, and they proposed none, instead offering—with the minor changes detailed above—the same findings as before. (10 App. 2371; *supra* n.4.)

Plaintiffs next proposed a revised set of *legal conclusions* that effectively lowered the controlling standard for deliberate indifference down to meet the prior findings. (*See* 11 App. 2508:4-2516:10.) CCSD proposed revised conclusions and opposed the entry of plaintiffs' revised conclusions because they contradicted and diluted the legal standards set forth in this Court's opinion. (*See* 10 App. 2397.)

Over CCSD's objection, the district court accepted plaintiffs' revised conclusions and again entered judgment in their favor. (12 App. 2809.) It awarded each boy $200,000 in damages—exactly as before—and awarded $470,418.75 in attorney fees and costs. The damages award again relied on plaintiffs' own speculative "estimation of out-of-pocket costs" and the unrelated federal-court settlement. (11 App.

(8 App. 1964, 11 App. 2507-08.)

2514:8, 2515:24-25.) Disregarding this Court's instruction not to rely on the settlement, the district court insisted that using it "as a benchmark for comparison in assessing damages was entirely proper." (11 App. 2515:23-25.)

CCSD appeals.

SUMMARY OF ARGUMENT

Before the first appeal, the district court applied incorrect legal standards by suggesting that a violation of state anti-bullying statute constituted deliberate indifference as a matter of law.

Reversing, this Court held that "after reviewing the record, we cannot say that substantial evidence supports the district court's finding of deliberate indifference regardless of this error." *Bryan*, 136 Nev. at 699, 478 P.3d at 358 (emphasis added). It also held that the district court's prior findings "bypassed" the "key" factual questions concerning deliberate indifference and causation. *Id.* at 359. Accordingly, this Court repeatedly instructed the district court to make "additional findings"—if possible—on these questions. *Id.*[5]

[5] *Id.* at 351 (remanding "for further findings on the Title IX claim"), 353 (calling for "findings regarding deliberate indifference under the applicable law"), 356 ("Further findings are necessary to establish deliberate

If any evidence had supported the "additional findings" this Court called for, plaintiffs would have proposed those findings, as their case depended on it. But plaintiffs were unable to muster any factual findings beyond those this Court had already said would not meet the stringent standard for deliberate indifference under Title IX.

In again deeming those findings sufficient for Title IX liability, the district court violated the mandate rule. That is, instead of revising the deficient factual findings upward to meet the standards articulated by this Court, it revised those standards downward to meet the deficient findings—and it did so through its revised conclusions of law. But the prior opinion did not invite the district court to devise new legal standards that would fit the original findings. Rather, this Court articulated the controlling standards and identified where and how the original findings failed to meet those standards. Thus, the district court's re-

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indifference"), 359 (remanding "for additional findings as to whether the events following the October report constitute deliberate indifference under the applicable federal standards"), and 361 ("[W]e remand for additional findings as to whether the events following the October report demonstrate deliberate indifference.").

vised conclusions based on lowered standards merely attempt to overrule this Court's legal determinations with respect to the original findings.

But even if the district court were permitted to reanalyze the deliberate indifference and causation questions based solely on the original findings, these facts do not support Title IX liability.

For example, in its prior opinion, this Court repeatedly stated that "deliberate indifference" requires proof that the school district made an "official decision" not to remedy the Title IX violation. *Id.* at 357-58. Remarkably, though, the revised conclusions do not even address the "official decision" rule, because nothing in the findings or record remotely suggests that the district made an "official decision" not to remedy the violation. Instead, with plaintiffs unable to satisfy the "official decision" rule, the district court effectively revised it downward into a vicarious liability standard, which Title IX categorically rejects. In effect, it ruled that if school-level employees—as opposed to the district itself—failed to take adequate action, CCSD can be liable, regardless of whether it made an "official decision" not to remedy the violation. This revised legal conclusion contradicts this Court's prior opinion and settled Title IX

law, improperly holds CCSD vicariously liable for school-level decisions, and misstates the findings and evidence.

Similarly, the district court wrongly used a simple negligence test—"reasonable[ness] under the circumstances"—to determine that CCSD acted with deliberate indifference. This echoes the district court's previous error in finding deliberate indifference based on the standard for negligence per se..

Applying the correct standard, the district court could not have found deliberate indifference. When school administrators inquire into alleged bullying to determine an appropriate course of action, the student victims cannot repeatedly lie to those administrators for the purpose of inducing inaction and then establish Title IX liability based on the very inaction the students induced, intended, and hoped for. Stated differently, a student cannot intentionally misrepresent the truth by falsely claiming that bullying ceased, in order to ensure the school takes no action and therefore retaliation does not occur, and then recover under Title IX when the lies are successful and cause the intended result—inaction. Yet, that's what happened here. The students invited inaction through false reports and then recovered when the invited error

occurred.

This Court also directed the district court to specifically address the causation element of deliberate indifference. Nothing in the record supports a finding of causation here, and the district court again ignored that element altogether.

Finally, the district court repeated its errors with respect to damages. This Court noted several serious concerns with the district court's damages award. It also provided corresponding instructions for any post-remand award. The district court defied those instructions, entered same award on the same prohibited bases.

This Court should reverse.

STANDARD OF REVIEW

"[W]hether the district court complied with [this Court's] mandate on remand" is "a question of law that this court reviews de novo." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 263–64, 71 P.3d 1258, 1260 (2003) (citing *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993)). "When a reviewing court determines the issues on appeal and reverses the judgment specifically directing the lower court with respect to particular issues, the trial court

has no discretion to interpret the reviewing court's order; rather, it is bound to specifically carry out the reviewing court's instructions." *Id.*; *see also Estate of Adams ex rel. Adams v. Fallini*, 132 Nev. 814, 818, 386 P.3d 621, 624 (2016).

This standard of review after appeal and remand stands in contrast with this Court's initial review of a bench trial, where issues of law are reviewed *de novo* and factual findings are reviewed for substantial evidence. *Bryan*, 136 Nev. at 694-95, 468 P.3d at 354-55 (citing *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012)).

ARGUMENT

I.

THE DISTRICT COURT REENTERED THE FINDINGS THAT THIS COURT HELD CANNOT SUPPORT TITLE IX LIABILITY

As discussed in Part II below, the district court erred in applying the wrong legal standard to the deliberate indifference analysis under Title IX and in skirting the requirement that any deliberate indifference by CCSD itself actually *caused* harassment. Under the proper standards, plaintiffs proved neither deliberate indifference nor causation.

But there is also a threshold problem with the district court's

judgment: its omission of any additional findings of fact. This Court repeatedly ruled that "[f]urther findings are necessary to establish deliberate indifference." *Bryan*, 136 Nev. at 698, 478 P.3d at 356; *id.* at 351 (remanding "for further findings"). (*Supra* n.5.) Specifically, because the district court had applied an incorrect standard, the original findings "bypassed" the following "key" factual questions on deliberate indifference *and* causation: (1) "whether the evidence demonstrated CCSD was *more than negligent*"; (2) whether CCSD's "inaction was *clearly unreasonable* in light of the *known circumstances*"; and (3) whether CCSD's "inaction *caused* the boys to either undergo harassment or be more vulnerable to it." *Id.* at 359 (emphasis added). In fact, this Court went so far as to rule that "after reviewing the record," it could not conclude "that substantial evidence supports the district court's finding of deliberate indifference." *Id.* at 358.

Thus, this Court made clear—repeatedly—that plaintiffs could not prevail on their Title IX claim unless the district court made "additional findings" on "key" factual questions concerning CCSD's response to the October 19 report. *Id.* at 359. But given the record in this case, plaintiffs

could not propose—and the district court did not enter—any such "additional findings" in support of their claim. Indeed, the district court entered no "additional findings" at all. The new judgment for plaintiffs cannot stand.

A. The District Court Could Not Enter Any "Additional Findings" on Deliberate Indifference or Causation, Because the Record Supports Nothing More

Had the record supported the required "additional findings" to sustain Title IX liability, plaintiffs surely would have so identified them on remand, because—as this Court made clear—their only remaining claim depended on it. *See id.* at 359. Instead, because nothing in the evidence supports the necessary "additional findings," plaintiffs retreated to the original deficient findings and proposed them again. Then, in an effort to resuscitate those deficient findings, they proposed legal conclusions that lowered the legal standards to meet the facts. (*See* 11 App. 2508:4-2516:10.)

By failing to even propose any "additional findings," plaintiffs confirmed—for a second time—that the record in this case cannot support an adequate finding of deliberate indifference or causation, just as this

Court initially observed.[6] And more to the point, because the district court did not enter any of the required "additional findings" this Court described, the post-remand judgment lacks the findings necessary for Title IX liability.

B. By Ruling that the Original Findings Establish Deliberate Indifference, the District Court Violated this Court's Clear Mandate

Relatedly, because the post-remand judgment imposes liability based entirely on findings that this Court already deemed inadequate, it contradicts this Court's mandate.

1. The District Court Lacks the Power to Enter a Judgment Inconsistent with this Court's Mandate

"The mandate rule generally requires lower courts to effectuate a higher court's ruling on remand." *Estate of Adams*, 132 Nev. at 819, 386 P.3d at 624 (citing *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007)). Under this rule, a lower court must "act on the mandate of an appellate court, without variance or examination, only execution."

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[6] *See Bryan*, 136 Nev. at 699, 478 P.3d at 358 ([A]fter reviewing the record, we cannot say that substantial evidence supports the district court's finding of deliberate indifference regardless of [the district court's] error.").

United States v. Garcia-Beltran, 443 F.3d 1126, 1130 (9th Cir. 2006) (internal citations and quotation marks omitted) (citing *In re Sanford Fork & Tool Co.,* 160 U.S. 247, 255 (1895)).[7]

The U.S. Supreme Court has long held that even when a case is remanded after appeal, "whatever was before this court, and disposed of by its decree, is considered as finally settled," such that the lower court

> is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than

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[7] *Accord Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012) ("A district court that has received the mandate of an appellate court cannot vary or examine that mandate for any purpose other than executing it.") (citing *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995)).

As indicated by the citation to *Thrasher* in *Estate of Adams*, this Court follows Ninth Circuit authority on the rule of mandate. That authority, including *Thrasher*, establishes that "if a district court errs by violating the rule of mandate, the error is a jurisdictional one." 483 F.3d at 981-82; *accord Hall*, 697 F.3d at 1067. In short, if the mandate does not remand a particular issue for the district court's further consideration, "the district court ha[s] no jurisdiction to rule on it." *United States v. Luong*, 627 F.3d 1306, 1309 (9th Cir. 2010) (citing *Thrasher* and *Katzir's Floor & Home Design, Inc. v. M–MLS.com*, 394 F.3d 1143, 1148 (9th Cir. 2004)); *see also Scottrade, Inc. v. Faller*, 687 F. App'x 537 (9th Cir. 2017) ("[u]nder the rule of mandate, the district court *lacked authority* to consider" arguments outside the scope of remand (emphasis added)).

to settle so much as has been remanded.

In re Sanford Fork & Tool Co., 160 U.S. at 255 (referring to the authority of the circuit court of appeals).

2. The District Court Violated this Court's Mandate

Here, there were multiple ways that the district court could have executed this Court's mandate. This Court did not dictate the result, just the process. The one thing the mandate foreclosed was entering the same judgment on the existing record, without additional findings.

Yet that is precisely what the district court did here. This Court plainly ruled that the original findings do not satisfy the controlling standards for deliberate indifference. *Id.* at 356, 358-59. But on remand, the district court looked at those *same* findings and reached the *opposite* conclusion. Where this Court ruled that the original findings do not establish Title IX liability, the district court disagreed and ruled that they do establish Title IX liability. By doing so, the district court violated this Court's mandate.

* * *

The district court's failure to enter additional findings that would justify plaintiffs' recovery under the correct legal standard is dispositive. But even if plaintiffs and the district court believed that additional findings were unnecessary, the following section describes why those original findings cannot establish Title IX liability.

II.

THE REVISED CONCLUSIONS ARE WRONG ON THE MERITS

This Court called for additional factual findings to conform to the applicable legal standards, not revised legal conclusions to conform to the existing facts. More importantly, it already articulated the stringent, controlling standards for deliberate indifference and clearly explained how the original findings failed to meet those standards. *See Bryan*, 136 Nev. at 697-701, 478 P.3d at 356-59. Now, the district court's revised conclusions rewrite and re-apply those standards to the original findings to reach a different result.

But under the mandate rules discussed above, as well as the broader concept of law of the case, the district court cannot reverse this Court's ruling with respect to what standards control. *Estate of Adams*, 132 Nev. at 818, 386 P.3d at 624 (citing *Recontrust Co. v. Zhang*, 130

Nev. 1, 7-8, 317 P.3d 814, 818 (2014)); *see also Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) ("The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case."); *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Nor can it reverse this Court's application of those standards to the original findings to reach a different result.

Here, the district court's revised conclusions fail for several reasons:

Among other things, the district court (1) replaced the "official decision" rule with vicarious liability, which Title IX precludes; (2) again replaced the stringent culpability standard for "deliberate indifference" with a simple negligence test; and (3) again failed to enter any conclusion (or finding) with respect to causation, a necessary element of a Title IX claim.

A. The District Court Improperly Replaced the "Official Decision" Rule with Vicarious Liability

In the prior opinion, this Court emphasized—five separate times—that deliberate indifference requires proof that the school district made

"an official decision" not to remedy the harassment and acted with culpability beyond negligence. *Bryan*, 478 P.3d at 357-58 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 276 (1998)). Consistent with this rule, Title IX categorically rejects any vicarious liability. *Gebser*, 524 U.S. at 290. As a result, a fund-recipient school district "may be liable in damages under Title IX *only for its own misconduct*," not the misconduct of its students, agents, or employees. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (emphasis added). Otherwise, the actions of a single school teacher could jeopardize Title IX funding for an entire school district and all of its students. *See id.*

On remand, the district court pointedly declined to make the threshold finding, essential to a claim of deliberate indifference, that a CCSD official made any decision—much less an "official decision"—not to remedy the harassment. (*See generally* 10 App. 2497–11 App. 2516.) That failure of proof is no accident; it is correct. As demonstrated below, the record establishes that school staff did, in fact, take deliberate action in an attempt to remedy the harassment. *Infra* Part II.A.3. Even if those remedial actions were less than completely effective, the mere fact

that school staff undertook them confirms that CCSD made no "official decision" to allow the harassment to continue.

Unable to satisfy the "official decision" rule, plaintiffs sought to rewrite the standard on remand, and the district court obliged. *Infra* Part II.B. In effect, it ruled that if school-level employees—as opposed to the district itself—decided to take no action, the entire district could be liable, regardless of whether it made an "official decision" not to remedy the violation. (*E.g.*, 11 App. 2513:3, 16-17.) With this attempt to lower the controlling standards, the court erred twice. It not only disregarded Title IX's "official decision" rule, but it effectively replaced that controlling rule with a theory of vicarious liability, which Title IX rejects. *Gebser*, 524 U.S. at 290. Indeed, it held *the entire school district* liable for the conduct of *a handful of school-level employees/administrators*, not a district level-decision. That is not the Title IX standard for deliberate indifference, it is vicarious liability.[8]

[8] CCSD raised this argument in the prior appeal. This Court's opinion did not directly address the distinction between school-level employees and district-level administrators capable of making an "official decision" for CCSD. Instead, this Court referred to "CCSD employees," "Greenspun administrators," and the "school's response," without deciding what conduct would show that "*CCSD* was more than negligent,

1. Deliberate Indifference Requires an "Official Decision" Not to Remedy the Violation and Culpability Beyond Negligence

Title IX applies only against fund-recipient school districts, not individual teachers, administrators, employees, or officers. *Gebser*, 524 U.S. at 290. Because Title IX claims implicate district-wide funding, "the deliberate indifference standard set forth in *Davis* sets a high bar for plaintiffs to recover." *Stiles ex rel. D.S. v. Grangier Cnty., Tenn.*, 819 F.3d 834, 848 (6th Cir. 2016). This high standard is intended to be met only in "limited circumstances." *Davis*, 526 U.S. at 643, 649.

As this Court explained, deliberate indifference "requires more than mere negligence." *Bryan*, 478 P.3d at 357-58 (citing *Davis*, 526 U.S. at 643; *Karasek v. Regents of Univ. of Cal.,* 956 F.3d 1093, 1105 (9th Cir. 2020)). Under this "fairly high standard," a "negligent, lazy, or careless response will not suffice." *Bryan*, 478 P.3d at 357-58 (quoting *Karasek,*

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that its inaction was clearly unreasonable in light of the known circumstances, and that its inaction caused the boys to either undergo harassment or be more vulnerable to it." *Bryan*, 136 Nev. at 701, 478 P.3d at 359 (emphasis added).

956 F.3d at 1105) (alterations incorporated). Rather, deliberate indifference requires "a state of mind more blameworthy than negligence." *See Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

Even "gross negligence" is insufficient to establish deliberate indifference, because deliberate indifference requires a "culpable mental state." *E.g.*, *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011).[9] Similarly, "*recklessness*" isn't enough.[10] Instead, the indifference must actually be "*deliberate*"—the standard is not mere indifference, but indifference that "result[s] from careful and thorough consideration."[11]

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[9] *Hendrichsen v. Ball State Univ.*, 2003 WL 1145474, at *3 (S.D. Ind. Mar. 12, 2003) (holding that "even gross negligence[] does not rise to the level of deliberate indifference"), *aff'd*, 107 F. App'x 680 (7th Cir. 2004); *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.").

[10] *E.g.*, *Peer ex rel. Doe v. Porterfield*, 2007 WL 9655728, at *12 (W.D. Mich. Jan. 8, 2007) ("'Deliberate indifference' in this context does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference to sexual abuse.'" (quoting *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 508 (6th Cir. 1996)).

[11] *See Deliberate*, MERRIAM-WEBSTER ON-LINE DICTIONARY, https://www.merriam-webster.com/dictionary/deliberate?src=search-dict-box (last accessed on June 1, 2022).

Importantly—and as this Court explained—student-on-student harassment "is less likely to satisfy Title IX's requirements than teacher-student harassment.'" *Bryan*, 478 P.3d at 357-58 (quoting *Gebser*, 524 U.S. at 29).

"Addressing deliberate indifference in the context of student-on-student harassment, the [United States] Supreme Court has explained that Title IX liability will arise only from 'an *official decision* by the *recipient* not to remedy the violation.'" *Bryan*, 478 P.3d at 357-58 (quoting *Gebser*, 524 U.S. at 276) (emphasis added). This means that the fund-recipient school district—not just a school-level employee—must officially decide not to take action. *See id.*

In the prior opinion, this Court reiterated this "official decision" rule *five times*:

- "Title IX liability will arise only from 'an *official decision* by the recipient not to remedy the violation'";
- "[D]amages are not recoverable for a Title IX violation unless the defendant made an *official decision* not to remedy the situation";
- "[N]egligence is not enough—the response or inaction must constitute an *official decision* against remedying the situation";
- "[A]lthough a school's noncompliance with statutes, regulations, and policies can be a significant factor in analyzing delib-

erate indifference, 'particularly when it reflects 'an *official decision* . . . not to remedy the [Title IX] violation,' noncompliance is not dispositive evidence of deliberate indifference."; and

- "Title IX damages are appropriate only where the plaintiff shows an *official decision* not to remedy the violation."

Id. 357-358 (quoting *Gebser*, 524 U.S. at 276; *Karasek,* 956 F.3d at 1104-05; *Davis,* 526 U.S. at 642-43) (emphases added).

Without such an "official decision" from the recipient district, there can be no "deliberate indifference." *Id.* This is because, absent evidence of such a "decision," there is no basis to conclude that CCSD (the Title IX funding recipient) "deliberately" allowed the harassment to continue. *See id.* Put differently, for Title IX liability, plaintiffs must show that the Title IX recipient itself (i.e., the school district) "deliberated" before showing "indifference" to the violation, and this requires proof that the district itself—not its school-level employees—officially decided to take no action. *See Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 640, 643; *Bryan*, 478 P.3d at 357-58.

Explaining this standard, this Court admonished courts to "'refrain from second-guessing the disciplinary decisions made by school administrators,' who 'will continue to enjoy the flexibility they require,' so long as the school 'merely responds to known peer harassment in a

manner that is *not clearly unreasonable*.'" *Bryan*, 478 P.3d at 357-58 (quoting *Davis,* 526 U.S. at 648-49) (emphasis added). Accordingly, a "claim that the school system *could or should have done more is insufficient*" to establish deliberate indifference. *Counts v. N. Clackamas Sch. Dist.*, 654 F. Supp. 2d 1226, 1241 (D. Or. 2009). Similarly, "the violation of a regulation or policy—or here, a state statute—is not *per se* deliberate indifference." *Bryan*, 478 P.3d at 358 (citing *Karasek*, 956 F.3d at 1108). As this Court taught, a district can fail to follow a state statute "without being deliberately indifferent under federal law." *Id.*

Under these rules, even where school-level employees violate state law, "deliberate indifference is an exacting standard established by federal caselaw and requires the plaintiff to show, for instance, that [1] the district was more than negligent" *and* [2] the school district made "an official decision" not to remedy the Title IX violation. *Id.* (citing *Davis*, 526 U.S. at 642-43; *Karasek*, 956 F.3d at 1108).

2. The Revised Conclusions Do Not Even Attempt to Establish that CCSD Made an "Official Decision"

The revised conclusions do not even attempt to satisfy the stringent standards for deliberate indifference. For example, they do not con-

clude that the district made an "official decision" not to remedy the violation. (*See generally* 10 App. 2497–11 App. 2516.) In fact, they do not even suggest that any district-level official(s) made any decision—much less an "official decision"—to allow the harassment to continue. (*Id.*) This alone is fatal to any judgment for plaintiffs, because—as this Court reiterated—there can be no deliberate indifference, and no Title IX liability, unless CCSD made such an "official decision." *Bryan*, 478 P.3d at 357-58. Thus, because the revised conclusions do not even address the "official decision" requirement, they cannot support Title IX liability. *See id.*

3. Plaintiffs Were Unable to Propose an "Official Decision" Conclusion, Because the Record Establishes that CCSD Took Remedial Action

Plaintiffs' failure to propose an "official decision" conclusion is no accident. This Court went out of its way to make clear that the "official decision" rule controls here. *Id.* Thus, plaintiffs knew it controlled. *Id.* Yet, they refused to propose any "official decision" conclusion, because there is no evidence that the district made any decision to let the harassment continue. (*See generally* 10 App. 2497–11 App. 2516.) In fact, there is no finding *and* no evidence that anyone (at the school level or at

the district level) actually *decided* to let known harassment continue. (*See generally id.*)

Instead, and as demonstrated below, both the findings *and* the underlying evidence repeatedly establish that the school-level employees took prompt action—in response to the October 19 email—in an effort to remedy known harassment. *Infra* Parts II.A.3.a, b. Likewise, they establish that once district-level officials learned about the harassment, the district immediately ordered the principal to conduct a further investigation and suspend the bullies. *Bryan*, 478 P.3d at 352, 361; 10 App. 2385, at ¶ 63. Even if those remedial efforts were not immediately effective in stopping the bullying, the fact that school staff (and later, the district itself) undertook them confirms that there was no "official decision" to let the harassment continue.

a. THE FINDINGS ESTABLISH THAT SCHOOL STAFF TOOK ACTION TO REMEDY THE HARASSMENT

First, the findings themselves confirm that CCSD employees took responsive action—following the October 19 email—in an attempt to remedy the situation. (*See* 10 App. 2383, 2385, at ¶¶ 48-49, 51, 63-64.) For example, they describe the following responsive conduct:

- On October 19—the day Mrs. Bryan sent her second email—Mr. Halpin attended an administrators' meeting where he reported on the bullying "in considerable detail." (*Id.*, 10 App. 2383, at ¶¶ 48-49.)

- During the October 19 administrators meeting, Principal McKay instructed his subordinates to remedy the situation described in Mrs. Bryan's October 19 email. (*Id.* ¶ 51.)

- In February 2012, Assistant Superintendent Jolene Wallace—a CCSD official—expressly ordered Principal McKay to conduct a further "investigation into the bullying of Ethan Bryan and Nolan Hairr," and he directed Vice Principal DePiazza to do exactly that. (*Id.*, 10 App. 2385, at ¶¶ 63-64.)

b. PLAINTIFFS' ADMISSIONS ESTABLISH THAT THE STAFF TOOK ACTION TO REMEDY THE HARASSMENT

Second, the trial testimony—including plaintiffs' own admissions—further establishes that school staff took additional remedial action following the October 19 email. While plaintiffs did not propose (and the district court did not enter) findings on these additional actions, plaintiffs themselves admitted they occurred. For example, plaintiffs (or their mothers) admitted that CCSD employees took the following additional actions:

- After Mrs. Bryan sent her October 19 email, where she first reported harassment directed toward Ethan, Mr. Beasley immediately re-arranged the seats for a second time to move Ethan away from C. Specifically, he moved Ethan as far away from C. as he could within the trombone section. (5 App. 1027:12–1028:13; 3 App. 596:22–597:7; 3 App. 539:20–23.)

- On the morning of October 19, Counselor Halpin called Mrs. Bryan to discuss her same-day email about the harassment. (4 App. 810:17–18.) When they spoke, Mrs. Bryan told Counselor Halpin she had just met with Dean Winn and, "in so many words, [Mrs. Bryan told Counselor Halpin] don't worry about it, Ms. Winn is handling it." (*Id.* at 862:20–863:4.)

- Shortly after Mrs. Bryan's 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—as Ethan admits—he told her that everything was fine and that the problem was resolved. (3 App. 651:10–652:12.)

- After Counselor Halpin received Mrs. Bryan's September 15 and October 19 emails, he regularly met with (and checked on) Ethan and Nolan. (4 App. 949:12–951:2; 3 App. 651:10–652:12.) Each time he did, the boys told him that everything was fine, inducing Counselor Halpin not to take more action. (*Id.*)

- Following Mrs. Bryan's emails—and as plaintiffs admit—other school administrators followed-up with Ethan in the lunchroom and asked how he was doing. (*E.g.*, 4 App. 869:20–23, Ex. 3.) Each time, *Ethan represented that everything was fine.* (*E.g.*, *id.* 870:18–874:1; 3 App. 651:10–652:22.)

Like the findings, these admitted, additional examples confirm that CCSD's employees took prompt responsive actions following the October 19 email. This effort continued through October and beyond—including after the boys began telling staff members that the harassment had ceased and everything was fine. *See id.*

c. THE REMEDIAL ACTIONS CONFIRM THAT CCSD DID NOT MAKE AN "OFFICIAL DECISION" TO LET THE HARASSMENT CONTINUE

Even assuming these remedial efforts were insufficient—or even negligent—such deficiencies do not establish that the district made an "official decision" not to remedy the harassment, *see, e.g.*, *Bryan*, 478 P.3d at 358-59, and they certainly do not satisfy the high culpability requirement for "deliberate indifference." If anything, the school's remedial efforts establish the opposite of an "official decision" to let the harassment continue. Indeed, even if the staff "could have done more," its efforts to remedy the harassment establish that the district did not decide—let alone "officially" decide—against taking remedial action. Further, a "claim that the school system could or should have done more is insufficient" to establish deliberate indifference. *Counts*, 654 F. Supp. 2d at 1241 (emphasis added).

The admitted attempts to remedy the harassment confirm that CCSD did not "deliberately" or "officially" decide against remedying the harassment. That is dispositive, *Bryan*, 478 P.3d at 358-59, and it is why the district court could not include any "official decision" conclusion in its revised conclusions.

d. CCSD'S ONLY "OFFICIAL DECISION" WAS TO SUSPEND THE ALLEGED BULLIES

In fact, the evidence shows that the district made only one "official decision" in this case, and it did so on February 7, 2012, when it officially ordered Principal McKay to further investigate the alleged harassment (10 App. 2385, at ¶ 63) and then suspend the allege bullies, *Bryan*, 478 P.3d at 358. That, of course, was not an "official decision" to let the harassment continue. Rather, it was an official attempt to prevent future harassment at the school—the exact opposite of the "official decision" plaintiffs were required (but failed) to prove.

Accordingly, there is no finding and no evidence of any "official decision" not to remedy the harassment, *id.*, and the revised conclusions do not suggest otherwise. As this Court repeatedly explained, deliberate indifference requires such an "official decision," *Bryan*, 478 P.3d at 357-58, and without one, plaintiffs cannot prevail on their Title IX claims.

4. The District Court's Attempt to Rewrite the "Official Decision" Rule Violates Title IX's Bar Against Vicarious Liability, Ignores this Court's Opinion, and Misstates the Findings

Because the district court could not conclude that CCSD made an "official decision," it changed the rule. In effect, it concluded that because some school-level employees implicitly decided "to take no action," it could hold that the district itself engaged in deliberate indifference, regardless of whether the district made any "official decision" not to act. (*See, e.g.*, 11 App. 2513:3, 16–17.) Thus, it ruled that the actions of individual school-level employees were sufficient to hold the entire school district liable (and enough to justify diverting funding from all schools), even without an "official decision" from CCSD itself. (*Id.*)

As shown below, this unexplained theory of vicarious liability contradicts the United States Supreme Court's decisions in *Gebser* and *Davis,* and it contradicts the "official decision" rule this Court repeatedly emphasized. Further, it ignores the findings and the evidence establishing that the school-level employees did, in fact, take remedial action.

a. THE DISTRICT COURT REPLACED THE "OFFICIAL DECISION" RULE WITH VICARIOUS LIABILITY

First, the notion that a school-level employee's failure to act can supplant Title IX's "official decision" rule is meritless. Among other defects, it wrongly assumes that school-level employees (such as teachers) can bind a Title IX recipient (i.e., an entire school district)—through some theory of vicarious liability. Indeed, it assumes that if a teacher or dean chooses not to act, that is tantamount to the recipient district itself making an "official decision" not to act, such that the court can impose Title IX liability on the district as a whole. Thus, it imputes a school-level employee's conduct to the district itself. That is vicarious liability,[12] and it fails as a matter of law. *Gebser,* 524 U.S. at 290 (rejecting the use of any vicarious liability, because only the actions of the fund-recipient itself can create a Title IX violation).

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[12] This Court has defined "vicarious liability" as follows:

> Vicarious liability is 'liability that a supervisory party bears for the actionable conduct of a subordinate based on the relationship between the two parties.' *Black's Law Dictionary* 1055 (10th ed. 2014). The supervisory party need not be directly at fault to be liable, because the subordinate's negligence is imputed to the supervisor. *See* Restatement (Third) of Torts: Apportionment of Liability § 13 (Am. Law Inst. 2000)").

The U.S. Supreme Court has repeatedly established that there is no vicarious liability—of any kind—under Title IX. *Id.*; *Davis*, 526 U.S. at 640, 643 (the standard imposed in *Gebser* seeks to eliminate "any risk" that a school district would be liable "for its employees' independent actions"). Were vicarious liability allowed, the actions of individual school-level employees could jeopardize Title IX funding for the entire district—to the detriment of all students—which Title IX does not allow. *See Gebser,* 524 U.S. at 290; *Davis*, 526 U.S. at 640, 643. Thus, for purposes of Title IX liability, a school district can be liable only for its own "official decisions," not the decisions of its employees. *Gebser,* 524 U.S. at 290. Accordingly, where the district court concluded that an employee's decision not to act can be construed as CCSD's deliberate indifference, it ignored the "official decision" standard and applied an impermissible theory of vicarious liability. That was error.

McCrosky v. Carson Tahoe Reg'l Med. Ctr., 133 Nev. 930, 932–33, 408 P.3d 149, 152 (2017).

b. THE RECORD CONTRADICTS THE DISTRICT COURT'S EMPLOYEE-DECISION CONCLUSION

Second, the district court's vicarious-liability conclusion ignores both its own findings and the evidence. With no citation—and in an attempt to impute employee "decision" liability to CCSD—it states that school employees took no responsive action whatsoever, such that they implicitly "made a decision to take no action." (*See, e.g.*, 11 App. 2513:16–17.) That is demonstrably false. The findings and the record (including plaintiff's own admissions) repeatedly establish that the school-level employees took several forms of remedial action. *Supra* Part II.A.3. Thus, there was no evidentiary basis for the district court to conclude that the school-level employees made "a decision" to "take no action." (*See, e.g.*, 11 App. 2513:16–17.) And even if there were, such employee decisions cannot be imputed to CCSD and construed as an "official" district "decision," for purposes of Title IX liability. Therefore, the district court's effort to rewrite the "official decision" rule fails on the law and on the facts, and it cannot support Title IX liability.

B. Instead of Applying the Deliberate Indifference Test, the District Court Again Used a Negligence Test

The district court also applied the wrong standard for culpability. Specifically, because plaintiffs could not satisfy the controlling deliberate indifference standard for culpability, the district court lowered that standard by replacing it with a simple negligence test. (11 App. 2512:27–28.) To do so, it used the following improper question to determine whether CCSD was deliberately indifferent: "were the actions of the Greenspun administrators *reasonable* under the circumstances." (*Id.* (emphasis added).) Note the standard: not *clearly* unreasonable, but *merely* unreasonable.

To be clear, this is *not* the test for deliberate indifference at all. *Bryan*, 478 P.3d at 357-58. Rather, it is the much lower "reasonableness" standard for simple negligence. *E.g.*, *Driscoll v. Erreguible*, 87 Nev. 97, 101, 482 P.2d 291, 294 (1971) ("Negligence is failure to exercise that degree of care in a given situation which a reasonable man under similar circumstances would exercise."). Indeed, the test for negligence is whether the defendant's actions were "reasonable" under the "circumstances," *id.*, which is the very question that plaintiffs' proposed (and

the district court adopted) in the revised conclusions here. (11 App. 2512:27–28.)

But deliberate indifference requires *much more* than mere negligence. *E.g.*, *Bryan*, 478 P.3d at 357-58; *Patel*, 648 F.3d at 974; *Farmer*, 511 U.S. at 835. It requires more than "gross negligence." *Patel*, 648 F.3d at 974. As the name "deliberate" indifference makes clear, it requires "deliberate choice, rather than negligence or bureaucratic inaction." *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 276 (2d Cir. 2009) (emphasis added). Unintentional or negligent indifference/inaction is not enough. To hold otherwise, as the district court did, would mean that the word "clearly" in the "*clearly* unreasonable" standard for deliberate indifference does no work; it simply collapses into unreasonableness—that is to say, ordinary negligence.

Because the findings do not satisfy this stringent culpability standard, the district court lowered that standard by again applying a negligence test. (*See* 11 App. 2512:27-28.)[13] In the prior opinion, this

[13] The district court's reliance on a negligence standard is not new. In the original conclusions, the district court used a negligence per se standards as the test for deliberate indifference, and this Court expressly rejected the use of such negligence standards. *E.g.*, *Bryan*, 478

Court rejected the use of such negligence tests as a proxy for deliberate indifference. *E.g.*, *Bryan*, 478 P.3d at 359. Instead of following that ruling and guidance, the district court repeated its error and used a negligence test again. This is yet another reason to reject the revised conclusions and reverse.

Further, after adopting the erroneous negligence test, the district court applied it to a demonstrably false factual recitation. Specifically, plaintiffs proposed (and the district court concluded) that CCSD's response was not "reasonable" because "no remedial action was taken." (*See, e.g.*, 11 App. 2513:3, 16–17. (emphasis added).) That is, the district court somehow concluded—despite its own findings and plaintiff's own admissions—that no school staff members took *any* action in an attempt to remedy the situation. (*See id.*). That conclusion is demonstrably false. *See supra* Part II.A.3. It contradicts the findings themselves *and* plaintiffs' admissions at trial, all of which repeatedly establish that multiple staff members took action in an attempt to remedy the harassment. *See id.*

P.3d at 359 ("[T]he district court bypassed the key questions of whether the evidence demonstrated CCSD was more than negligent.").

Thus, even after proposing this lower negligence standard—instead of the controlling deliberate indifference standard—plaintiffs were still forced to resort to demonstrably false facts when proposing the revised conclusions. It was not enough to reduce the standard for culpability; they also had to rewrite the record to meet that lower standard. By doing so, they further confirmed that they failed to prove deliberate indifference—under the controlling standard—at trial.

C. Plaintiffs Repeatedly Told School Staff that the Harassment Ceased, and the District Court Second-Guessed the Staff's Decision to Believe Them

Plaintiffs own admissions are also fatal to deliberate indifference in another respect. Specifically, plaintiffs admitted that, when asked by school staff, including after October 19, 2011, they repeatedly stated that the harassment had ceased.[14] As demonstrated below, the district court second-guessed the staff's decision to believe plaintiffs. The standard for deliberate indifference precludes such second-guessing.

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[14] *E.g.*, 5 App. 1240:15–19; 2 App. 488:4–25, 3 App. 505:12–506:5, 524:8–11; 3 App. 583:2–9; 3 App. 649:17–651:9; 3 App. 651:10–655:3; 4 App. 869:20–23, 870:18–874:1; 4 App. 949:12–951:2; 10 App. 2377, 2379, 2381, 2384, at ¶¶ 9, 26, 38, 58.

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

If students insist that harassment has stopped, the school does not violate Title IX in believing the students.[15]

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

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

Similarly, in *P.H. v. School District of Kansas City*, the school district could not be liable under § 1983 or Title IX where the plaintiff hid the misconduct. 265 F.3d 653, 660 (8th Cir. 2001). When asked, "the boy denied the incident" of a teacher's sexual misconduct. *Id.* at 662. The student's denial was a key fact in the Eighth Circuit's concluding that the school district lacked the "actual knowledge and an official decision not to remedy the discrimination" necessary to constitute deliberate indifference. *Id.* at 662.[16] *See also Doe v. Galster*, 768 F.3d 611, 61-18 (7th Cir. 2014) ("The standard set out in *Davis* is not satisfied by knowledge that something might be happening and could be uncovered by further investigation.").

3. CCSD Was Not Deliberately Indifferent for Believing Nolan and Ethan

Plaintiffs contend that CCSD was deliberately indifferent because it failed to do enough to stop harassment that occurred *after* Mrs. Bryan's October 19 email and *before* their withdrawal in early February. *Bryan*, 478 P.3d at 359 (remanding for a determination concerning

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

CCSD's response after the October 19 email). Yet, plaintiffs admit that during this October-to-February period, school staff members repeatedly checked on them to determine whether the harassment had stopped (and whether additional remedial measures were necessary). *Supra* n.14. Further, they admit that during each of these conversations, they refused to tell staff members about the ongoing harassment and instead told them that everything was fine, that the harassment had ceased, or something similar. *Supra* n.14. These statements affirmatively misled CCSD to induce the district's inaction. (3 App. 564:2-10; 6 App. 1259:24-28, 1263:1-2, 266:1-1269:6-7; 2 App. 480:13-481:2, 483:14-18, 495:16-24; 6 App. 1259:24-28, 1263:1-2, 1266:1-2, 1269:6-7.)

These admitted statements to school staff were either true or false. If they were true, the school's remedial efforts actually caused the harassment to cease, and there can be no liability. Alternatively, if they were false, they concealed ongoing harassment and thus denied school staff the opportunity to take additional remedial actions. Indeed, if plaintiffs' admitted statements to school staff were false, they deprived staff members of the opportunity to do exactly what plaintiffs claim

they failed to do here—namely, stop the harassment that continued during and after October 2011.

With their re-submitted findings, revised conclusions, and testimony, plaintiffs suggest that their statements were false. (*See, e.g.*, 10 App. 2377, 2379, 2381, 2384, ¶¶ 9, 26, 38, 58; 11 App. 2511:24–2514:2; *supra* n.14.) Specifically, they appear to concede that they repeatedly lied to school staff when asked if the harassment had ceased and that, in reality, the harassment was ongoing. (*Id.*) Worse, they admit that they lied to school staff for the very purpose of inducing school staff to take no further responsive action, because they believed such actions could lead to retaliation. (*Id.*) That is, plaintiffs admit that they intentionally concealed the harassment that occurred after the school's initial response to Mrs. Bryan's October 19 email in order to induce school staff to take no further action. (*Id.*)

Yet, in the revised conclusions, the district court effectively ruled that the staff was deliberately indifferent for taking plaintiffs at their word and failing to discover (and remedy) that which plaintiffs intentionally concealed. (11 App. 2511:24–2514:2.) That is wrong as a matter of law.

Nothing in the deliberate indifference standard requires school staff to distrust a student when the student represents that previous harassment has ceased. *See*, *e.g.*, *Bryan*, 478 P.3d at 357-59. Similarly, nothing requires staff to continue taking responsive actions after the victim states that the harassment ceased. *See id.* Quite the opposite, the deliberate indifference standard gives schools considerable discretion and flexibility in determining how to respond to the *known* circumstances, and courts are precluded from "second-guessing" those decisions. *E.g.*, *id.* at 357-58 (citing *Davis*, 526 U.S. at 648-49).

This kind of "second-guessing" is exactly what the district court did here. Specifically, it effectively criticized—with the benefit of hindsight—the staff's decision to believe plaintiffs, and it concluded that staff should have instead acted to remedy circumstances that the students said did not exist. Such second-guessing is, of course, error—especially when coupled with plaintiffs' admittedly false statements and admitted intent to induce school staff to do nothing. *Supra* n.14. This is yet another reason to reject the revised conclusions.

D. The Revised Conclusions Do Not Address Title IX's Causation Element, and Plaintiffs Failed to Prove It

1. The District Court Entered No Conclusion on the Causation Element, and that Alone Is Fatal

In addition to deliberate indifference, the remand order also required the district court to make new findings and conclusions on Title IX's causation element. *See Bryan*, 478 P.3d at 358-59. On this point, this Court stated as follows: "[T]he district court bypassed the key questions of whether the evidence demonstrated CCSD . . . *caused* the boys to either undergo harassment or be more vulnerable to it." *Id.* at 359 (emphasis added).

On remand, however, plaintiffs did not propose—and the district court did not enter—any conclusions (or, for that matter, any new findings) on causation. (*See generally* 10 App. 2497–11 App. 2516.) Thus, even ignoring the other errors in the original findings and revised conclusions, they still cannot support a judgment for plaintiffs, because they leave Title IX's causation element unaddressed and, consequently, unsatisfied. The district court's failure to even address the causation element on remand is yet another basis to reverse.

2. The Record Foreclosed Any Findings or Conclusions on Causation

Plaintiffs failed to propose findings or conclusions for causation, because they failed to prove causation at trial. In fact, the findings themselves preclude a causation conclusion.

Title IX's causation and deliberate indifference elements are intertwined. *Davis*, 526 U.S. at 642-43. Under the causation element, a funding recipient—such as CCSD—can be liable "only where [its] *own* deliberate indifference effectively *caused* the discrimination." *Id.* (emphasis added). This requires proof that CCSD's "inaction caused the boys to either undergo harassment or be more vulnerable to it." *Bryan*, 478 P.3d at 358 (collecting cases). "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."[17] Like deliberate indifference, the causation element imposes a "high standard" and exists "to eliminate any

[17] *Lopez v. Regents of Univ. of Cal.*, 5 F. 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

'risk that the recipient would be liable . . . not for its own official decision but instead for its employees' independent actions.'" *Davis*, 526 U.S. at 643.

At trial, plaintiffs failed to prove that CCSD was deliberately indifferent. *Supra* Part II.A-C. For that reason alone, they cannot establish that any deliberate indifference "caused" them to "undergo the harassment" or to be "more vulnerable to it." *Bryan*, 478 P.3d at 358. That itself is fatal to the causation element.

Further, even assuming plaintiffs proved deliberate indifference, nothing in the findings (or record) suggests that CCSD's conduct "caused" the student-on-student harassment or made plaintiffs more vulnerable. (*See generally* 10 App. 2497–11 App. 2516.) Instead, at most the findings establish that CCSD's remedial actions failed to *stop* the student-on-student harassment. (*Id.*) But, a failure to completely stop

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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").

student-on-student harassment is not the same as causing the harassment to occur in the first place.[18] Nor does it necessarily make a victim more vulnerable to the harassment—as would be the case if, for example, an administrator assigned a sexual-harassment victim to a locker next to her known harasser's locker. Thus, the findings establish, at most, that CCSD failed to stop the harassment, not that CCSD "caused" the harassment or made plaintiffs more vulnerable. As a result, plaintiffs did not (and could not) even propose a causation conclusion.

Additionally, to the extent any harassment continued after October 19, plaintiffs admittedly failed to report it or actively concealed it. *Supra* Part II.C. While this is unfortunate, CCSD's failure to stop harassment that plaintiffs themselves concealed cannot be deemed the "cause" of any such harassment. *See, e.g.*, *Benefield*, 214 F. Supp. 2d 1212, 1222-23, 1226 (N.D. Ala. 2002); *P.H. v. Sch. Dist. of Kansas City*, 265 F.3d 653, 660 (8th Cir. 2001). Therefore, CCSD's proven conduct

[18] *See, e.g.*, *Davis*, 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.").

does not satisfy the causation element's "high standard." *Davis*, 526 U.S. at 643.

III.

THE DAMAGES AWARD DISREGARDS THIS COURT'S INSTRUCTIONS AND REPEATS THE PRIOR ERRORS[19]

Beyond liability, the district court disobeyed this Court's instructions in awarding the same unsupported damages as before: $200,000 per plaintiff. And just as before, the district court lacked a basis for that award. Among other things, it charged CCSD for the students' tuition at private school, where the students voluntarily transferred *after* thriving at their tuition-free, bully-free public charter schools. As demonstrated below, this choice to attend tuition-charging schools was a matter of personal preference that had nothing to do with this litigation.

The district court also improperly relied on an extra-record settlement agreement—the relevance of which CCSD did not have an oppor-

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

tunity to test at trial. CCSD raised all of these issues in the prior appeal. (*See, e.g.*, CCSD AOB, Jun. 4, 2018, at 60-65). And while this Court ultimately reversed on liability, it went out of its way to identify defects in the $200,000-per-plaintiff award. *Bryan*, 478 P.3d at 361, n.11. These defects tracked each of CCSD's damages arguments. *See id.*

A. This Court's Concerns with the Prior Award Provided Clear Guideposts for Remand

This Court identified specific defects in the damages award and provided the following instructions for correction:

> We note, however, several concerns with the damages award. First, Mary and Aimee merely speculated to their out-of-pocket expenses, and the record does not support the district court's calculation for five years of out-of-pocket expenses for each boy. We are also troubled by the district court's reliance on a settlement agreement in an unrelated federal case to calculate physical and emotional distress damages. We caution that damages cannot be merely speculative or simply based on another case's settlement agreement. See *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000) (explaining there must be an evidentiary basis for an award). We also caution courts in civil rights cases to consider whether the plaintiffs have a duty to mitigate damages. *See* 2 Civ. Actions Against State & Local Gov't § 13:15 (2d ed. 2002) (addressing the plaintiff's responsibility to mitigate damages when suing under civil rights statutes due to the application of common-law tort principles to determine the remedies for such claims).

Id.

B. The District Court Disobeyed this Court's Instructions

Echoing its cavalier treatment of this Court's mandate on liability, the district court on remand wholly disregarded—and even disagreed with—these instructions on damages. (11 App. 2514:3–2516:10.) The district court re-entered the same award, in the same amount, relying on the same extra-record settlement agreement as before. (*Id.*) That award was defective before, and it remains just as defective now.

Below, CCSD largely repeats the damages arguments from the prior appeal, along with the corresponding instructions from the prior opinion, to demonstrate—again—that even if this Court affirms on liability, the damages award must be reversed.

C. Ethan and Nolan Did Not Prove Damages Based on Private-School Tuition

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

First, plaintiffs seeking damages under Title IX, and other federal civil-rights laws, have a duty to mitigate their damages. *Smith v. Rowe*, 761 F.2d 360, 366 (7th Cir. 1985) (collecting cases); *Nelson v. Univ. of*

Me. Sys., 944 F. Supp. 44, 50 (D. Me. 1996) (applying the duty in Title IX); *Bryan*, 478 P.3d at 361, n.11.

Here, plaintiffs needlessly incurred tuition expenses, and the district court improperly rewarded them—again. Specifically, in the revised conclusions, that district court ruled that "part" of the $200,000-per-plaintiff award "was based on an estimation of out-of-pocket costs"—i.e., plaintiffs' tuition expenses. (11 App. 2514:7–8.)[20] But none of plaintiffs' tuition expenses were necessitated by CCSD's alleged wrongdoing, and all of them could have been mitigated. For example, on September 22, 2011, Assistant Principal DePiazza offered to transfer Nolan to another tuition-free CCSD school, but Nolan's mother refused. (*See* 5 App. 1222:11–14.)

Further, plaintiff's initial transfer to EKA, a state-funded, tuition-free charter school, cost them nothing. (5 App. 1235:2–1236:5.) That transfer undisputedly ended the bullying, and plaintiffs excelled there, both academically and in extra-curricular activities. (2 App. 493:9–17, 3 App. 532:3–534:25; 3 App. 570:5–18, 3 App. 631:3–632:20, 3 App.

[20] Plaintiffs did not seek, and the district court has never awarded, any other forms of out-of-pocket costs—such as medical expenses—as none were incurred or proven. (*See generally* 11 App. 2514–16.)

645:25–647:24.) As plaintiffs admit, their later decision to switch to a private, tuition-charging, religious school (Lake Mead Christian Academy) was a convenience unrelated to the bullying at Greenspun. (4 App. 826:23–827:15, 829:3–14, 885:21–887:25 (Ethan's parents wanting to follow a counselor and put all their children in one school); 3 App. 531:10–12; 5 App. 1235:20–21 (Nolan following Ethan).)

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

CCSD made this argument during the prior appeal,[21] and in addressing it, this Court stated that "the record does not support the district court's calculation for five years of out-of-pocket expenses for each boy." *Bryan*, 478 P.3d at 361, n.11. Likewise, it instructed that plaintiffs in civil rights cases may have a "duty to mitigate damages." *Id.*

On remand, the district court disregarded these instructions and again entered the exact same award—a total of $200,000 per boy. And

[21] *See, e.g.*, AOB, Jun. 4, 2018, at 60-63.

while the revised conclusions no longer specify what "part" of the $200,000 award represents out-of-pocket expenses, that amount is presumably still $50,000. Otherwise, the total award, which consists of compensation for (1) out-of-pocket costs and (2) emotional harm, would be less than what was awarded before—as there were no additional findings or conclusions concerning any additional amounts for any additional emotional harm. (*See* 11 App. 2514–16.) Put differently, the district court previously awarded $200,000, with $50,000 representing tuition expenses, and the remainder representing emotional harm. And now, it has awarded $200,000 again, without making any findings concerning any additional compensation for emotional harm, meaning the out-of-pocket portion presumably remains at $50,000. Crediting plaintiff's $50,000 in unnecessary tuition expenses was error before, and it is error now.

2. Nolan Did Not Pay Tuition in Eighth Grade

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

Nolan did not incur any tuition expenses for eighth grade, but the district court awarded him $10,000 for eighth grade tuition expenses anyway. As with the others, this error was raised in the prior appeal (AOB 62), but the district court committed it again.

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

"[A] party seeking damages has the burden of providing the court with an evidentiary basis upon which it may properly determine the amount of damages." *Frantz*, 116 Nev. at 469, 999 P.2d at 360.

Here, even if the tuition for private religious schools were compensable in theory, plaintiffs did not establish it procedurally. Mrs. Hairr revealed for the first time during trial that Nolan moved from Lake Mead (3 App. 531:1–23) to another tuition-charging religious school (5 App. 1215:22–23); Nolan never supplemented his discovery responses to disclose this expense. *Contra* NRCP 26(e). And even at trial, the mothers could only "guess"—that is, speculate—what tuition cost. (4 App. 891:15–892:7; A5 App. 1217:6–14.) They did not plead, argue, or give the district court a method for calculating these damages. That is not an evidentiary basis to award $10,000 a year.

In the prior opinion, this Court identified this defect and explained that a damages award based on such speculation is improper. *Bryan*, 478 P.3d at 361, n.11. Specifically, it ruled that plaintiffs' "merely speculated to their out-of-pocket expenses" and "that damages cannot be merely speculative." *Id.*

On remand, plaintiffs did not propose—and the district court did not enter—any new findings to cure the speculation. Yet, based on that same speculation, the district court again awarded out-of-pocket expenses without any evidentiary basis. (11 App. 2514:7–8.) That is still error.

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

1. CCSD Had No Opportunity to Test Henkle

Just as before, the district court based the remainder of its award on the extra-record settlement in *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001), an unrelated federal case. (11 App. 2515:24–25.)

As argued in the prior appeal, "[a]ny deliberations which are based upon a private investigation or upon private knowledge of the

trial judge, untested by cross-examination or the rules of evidence, constitute a denial of due process of law." *People v. Nelson*, 317 N.E.2d 31, 34 (Ill. 1974); *see Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1138 (7th Cir. 1988) ("[I]t is unfair and irrational for the trier of fact to rely on evidence outside the record.").

In the original conclusions, the district court based its damages award on the $451,000 settlement allegedly reached in *Henkle,* although that settlement was not disclosed in the published decision or in discovery or discussed at trial. (8 App. 1972:8–19; 11 App. 2515:24–25.) Instead, that extra-record settlement drove the district court's deliberation without any notice to CCSD or testing through cross-examination at trial.

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

Had CCSD been given the opportunity to test *Henkle* at trial, it would have shown that several distinguishing factors likely drove *Henkle*'s settlement value up. Derek Henkle suffered harassment for years (not a single semester), at three different schools within the district (not one), by many different students (not one or two). Most important,

Derek's classmates went far beyond name-calling—or even pencil-jabbing. They lassoed Derek around the neck and threatened to drag him behind a truck, and the assistant vice principal just laughed. 150 F. Supp. 2d at 1069. Police looked on as Derek endured gay epithets and a punch to the face; they refused to arrest the attacker. *Id.* at 1070. That case, unlike this one, involved a claim for punitive damages.

Settlements are rarely a reliable guide for computing damages. *See Liberte Capital Grp., LLC v. Capwill*, 248 Fed. Appx. 650, 674 (6th Cir. 2007); *Vardon Golf Co. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 651 (N.D. Ill. 1994); *Bryan*, 478 P.3d at 361, n.11. And here, if the *Henkle* comparison demonstrates anything, it demonstrates the excessiveness of the award.

3. The District Court Rejected this Court's Instruction and Relied on the **Henkle** *Settlement Again*

In the prior opinion, this Court was "troubled by the district court's reliance on a settlement agreement in an unrelated federal case to calculate physical and emotional distress damages" and that such "damages cannot be . . . simply based on another case's settlement agreement." *Bryan*, 478 P.3d at 361, n.11.

On remand, however, the district court not only disregarded this instruction, but affirmatively rejected it. (*See* 11 App. 2515:24–25.) Specifically, while this Court ruled that reliance on the *Henkle* settlement was *improper*, the district court expressly disagreed, stating the following (in the third-person) in the revised conclusions: "the District Court's use of *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001) as a benchmark for comparison in assessing damages *was entirely proper*." (*Id.* (emphases added)). In effect, it attempted to overrule this Court on *Henkle*. Of course, the district court cannot overrule this Court's legal conclusions, *supra* Part I, and its stubborn reliance on *Henkle* remains legally flawed.

E. The Award was Arbitrary and Capricious

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

Here, Ethan and Nolan's experiences with bullying were different—not only in how severe and long they were mistreated, but in how school staff responded. Just as before, the district court disregarded

those differences and awarded both students the exact same amount, $200,000. Using an arbitrary amount rather than tailoring the damages to the individual was an abuse of discretion.

IV.

THE FEE AWARD IS EXCESSIVE

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

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

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

Here, the district court originally reduced plaintiffs' fee request of nearly $700,000, to an award of $470,418.75, thus recognizing plaintiffs did not obtain an "excellent" result. (7 App. 1576; 9 App. 2159–60; 12

App. 2809.) Then, that $470,418.75 award was reversed by this Court's prior opinion, leaving the district court to again determine liability and, if necessary, an appropriate fee award. *Bryan*, 478 P.3d at 361 ("In light of our decision, we necessarily reverse the damages and attorney fees awards.").

On remand, the district court again entered the $470,418.75 fee award. (12 App. 2809.) However, it did not enter any additional findings, conclusions, or any other explanation as to how, and on what evidentiary basis, it calculated that post-remand award. Thus, this new fee award (unlike the prior, reversed fee award) is unsupported by any findings, and it should be reversed.

Further, the reduction from $709,131.25 to $470,418.75 fails to adequately consider just how limited plaintiffs' success was. Indeed, "the [United States] Supreme Court has recognized that the extent of a plaintiff's success is 'the most critical factor' in determining a reasonable attorney's fee under 42 U.S.C. § 1988." *McAfee v. Boczar*, 738 F.3d 81, 92 (4th Cir. 2013) (quoting *Hensley*, 461 U.S. at 436).

Here, the fee award fails to adequately consider that plaintiffs prevailed on just two of their six original claims at trial and against

only one of the 20 original defendants (i.e., they lost entirely against 95% of the original defendants). Likewise, it fails to account for the fact that this Court reversed the judgment on one of the two tried claims—the § 1983 claim—leaving plaintiffs with the chance to prove just one claim (of six) against just one defendant (of 20) on remand.

Moreover, plaintiffs did not win *any* of the declaratory, injunctive, or punitive relief they sought, nor did they prevail on their claims asserted against the Nevada Equal Rights Commission. This reflects very "limited success." Thus, even if it were supported by findings, the post-remand award of $470,418.75 constitutes an abuse of discretion.

B. Counsel's Hourly Rate was Excessive

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

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

V.

IF AGAIN REMANDED, THE CASE SHOULD BE REASSIGNED

Given two opportunities to prove CCSD's deliberate indifference

for Title IX liability, plaintiffs proved only that they cannot. This Court should reverse with instructions to enter judgment for CCSD.

If this Court is inclined to give plaintiffs a *third* bite at the apple, however—i.e., yet another "remand for additional findings as to whether the events following the October report constituted deliberate indifference under the applicable federal standards," *Bryan*, 136 Nev. at 701, 478 P.3d at 359—this Court should reassign the matter to a different district judge.

Unlike attorney disqualification, judicial recusal "may be required on the basis of a mere appearance of impropriety." *Liapis v. Second Judicial Dist. Court*, 128 Nev. 414, 419, 282 P.3d 733, 737 (2012). This Court recently clarified that, even when a judge is acting in her official capacity, disqualification is necessary when "the judge has formed an opinion displaying deep-seated favoritism or antagonism toward the party that would prevent fair judgment." *Canarelli v. Eighth Judicial Dist. Court*, 138 Nev., Adv. Op. 12, 506 P.3d 334, 339 (2022) (citing *Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996)).

Such favoritism arises when the judge has "expressed herself in the premises" by reaching a predetermined result without regard to the

evidence or applicable legal standards. *Leven v. Wheatherstone Condo. Corp., Inc.*, 106 Nev. 307, 310, 791 P.2d 450, 451 (1990). In that circumstance, this Court requires reassignment. *Id.* Indeed, this Court has reassigned cases on the *first* remand if the judge sitting as the trier of fact has "formed and expressed an opinion on the ultimate merits." *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014) (citing *Leven*).

Here, the impropriety goes even further. The district judge has *twice* reached its predetermined outcome, the second time after being admonished by this Court that those findings were insufficient to reach that result. The district judge even reentered the same capricious damages award based on the very considerations this Court had deemed improper. While CCSD stands willing to give judges the benefit of the doubt in close cases, this case is not close: whether due to intransigence or favoritism, this district judge has made it clear that CCSD cannot receive a fair hearing.

CONCLUSION

For these reasons, this Court should reverse the district court's post-remand judgment.

Dated this 2nd day of June, 2022.

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

Dated this 2nd day of June, 2022.

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