Case No: 83557

IN THE SUPREME COURT OF NEVADA

CLARK COUNTY SCHOOL DISTRICT (CCSD) Appellant/Defendant. v. ETHAN BRYAN and NOLAN HAIRR, Respondents/Plaintiffs,	District Court Case No.: A-14-700018-C

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

RESPONDENTS' BRIEF

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

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

Dated this 19th day of September 2022

/s/ Allen Lichtenstein

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I. Introduction

This case arrives at the Nevada Supreme Court for the second time. The case involves two boys, Ethan and Nolan entering Greenspun Junior High School in Henderson NV in 2011. There they were severely harassed and bullied by two other students. The bullying was sexual in nature and involved both verbal homophobic invective and physical assaults.

Initially, the District Court ruled that Defendant's Failure to investigate or take remedial action concerning the bullying of Ethan and Nolan violated both Title IX, and the boys' civil rights pursuant to 42 USC 1983.

On appeal, the Nevada Supreme Court ruled that there was no Section 1983 violation. As for the Title IX violation, The Court found no violation prior to October 19, 2011, because it was unclear if school officials had adequate notice. Concerning the time after October 19, 2011, the appellate Court found all of the prongs of a Title IX violation were present except for one. As to the question of deliberate indifference, The Nevada Supreme Court panel found that the District Court erred by ruling that the failure of school officials to adhere to statutory rules concerning investigation and remedial actions created deliberate indifference per se. It remanded the case back to the District Court for reconsideration of the deliberate indifference issue.

On remand, while the District Court eschewed looking at any form of deliberate indifference per se, it found deliberate indifference laundry on the part of Greenspun officials through an analysis of all pertinent facts and circumstances. CCSD now appeals on this very narrow issue.

II. Procedural History

Plaintiffs filed their Complaint on April 29, 2014. (ER, 1-41)[1].

A 5-day bench trial was held on November 15, 2016, November 16, 2016, November 17, 2016, November 18, 2016, and November 22, 2016. (ER, 23-27).

On July 29, 2017, District Court Judge Nancy Allf, issued her ruling in favor of Plaintiffs on both the Title IX and 42 USC 1983 claims, and awarded them each the sum of $200,000. (ER, 1448-1460) In a separate ruling on September 21, 2017, the District Court also awarded Plaintiffs attorney fees. . (ER, 2809-2812)

Defendant CCSD appealed these District Court's rulings to the Nevada Supreme Court. On Dec 24, 2020, the Nevada Supreme Court ruled that there was no 42 USC 1983 civil rights violation because there was no showing of *Monell* liability. (*See*, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-94 (1978)). 478 P.3d 344, 360.

[1] Because CCSD's Appendix contains the entire record, Plaintiffs' references to the record refer to Appellant's Appendix.

As for the Title IX claim, the panel ruled that there was no Title IX violation regarding the events that occurred in September 2011. However, according to the panel, it was unclear whether or not there was a Title IX violation regarding the bullying that took place subsequent to October 2011. The Court ruled that all of the elements for a successful Title IX action were present in that time frame except one. the panel found that the District Court had erred in finding deliberate indifference per se based on the failure to follow the pertinent state statute. the court remanded the case back to District Court for further analysis regarding the deliberate indifference question.

On remand, the District Court had the parties stipulate to the set of facts and had the parties submit competing conclusions of law. In accepting plaintiffs conclusions, the District Court did not rely on any per se ruling of deliberate indifference, but still found that Defendant exhibited deliberate indifference under all of the relevant facts and circumstances in the record. (ER, at 2371-2389).

On September 17, 2021, CCSD filed the instant second appeal. (ER, 2815-2823).

III. Standards of Appellate review

Questions of law are reviewed de novo." *SIIS v. United Exposition Services Co*., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993); *Nicholas v. State*, 116 Nev. 40, 43, 992 P.2d 262, 264 (2000). In contrast, the Nevada Supreme Court reviews a

District Court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous and not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009); *Kockos v. Bank of Nevada*, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974); *Certified Fire Prot. Inc. v. Precision Constr. Inc.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev.*, LLC, 335 P.3d 211, 214 (2014).

> This court reviews a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC,* 130 Nev. , , 335 P.3d 211, 214 (2014).

IV. Title IX standards

A Title IX claim requires a showing by a preponderance of the evidence of sex discrimination, along with Defendant's deliberate indifference. The trial testimony clearly shows this is what occurred.

In the first appeal, the panel set forth the requisite elements for a successful Title IX claim.

> The first requirement for imposing Title IX liability is that the harassment be "on the basis of sex." *Id.* For liability to attach to a school district in cases of student-on-student harassment, the plaintiff

> must also show that the school exercised substantial control over the harasser and the situation, the harassment was so severe as to deprive the plaintiff of educational opportunities, a school official with authority to correct the situation had actual knowledge of the harassment, and the school was deliberately indifferent to the known harassment.

478 P.3d at 353 (Nev. 2020), citing *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000).

Section 901(a) of Title IX provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 USC § 1681(a). Title IX's prohibition against discrimination because of sex extends to homosexual and transgender individuals. 478 P.3d at 351, *citing Bostock v. Clayton Cty.*, _ U.S.__ ,140 S. Ct. 1731 2020)

Based on the receipt of federal funds, CCSD is subject to Title IX requirements. 20 USC 1681(a). Under Title IX, student on student harassment and bullying based upon perceived sexual orientation is actionable.

> For liability under Title IX for student on student sexual harassment: (1) the school district "must exercise substantial control over both the harasser and the context in which the known harassment occurs", (2) the plaintiff must suffer "sexual harassment ... that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school", (3) the school district must have "actual knowledge of the harassment", and (4) the school district's "deliberate indifference subjects its students to harassment".

See, Henkle v. Gregory, 150 F.Supp.2d 1067, 1077-1078 (D. Nev. 2001). *See also, Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 U.S. Dist. LEXIS 31591, at *60-61 (D. Minn. Mar. 16, 2015).

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

V. Facts[2]

[2] [2] See, the District Court's Order Accepting Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and Judgment (ER-2488-2516)

In late August 2011 Ethan Bryan and Nolan Hairr began sixth grade at Greenspun Jr. High School. Both Ethan and Nolan enrolled in Mr. Beasley's third period band class in the trombone section. Almost from the beginning of the school year, Ethan and Nolan began to be bullied by two other trombone students, C and D.[3] (ER, 2498)

In sixth grade, at age 11, Nolan was small for his age with long blonde hair. C. and D. taunted him with names like gay and faggot and called him a girl. C. also touched, pulled, ran his fingers through Nolan's hair and blew in Nolan's face. (ER, 2499)

Nolan, following what he believed was proper procedure, went to the Dean's office and filled out a complaint report. He was, however, too embarrassed to mention the homophobic and sexual content of the slurs that he was enduring. (ER, 2499) Nolan was subsequently called into the Dean's office and met with Dean Winn. He did not feel that she was either sympathetic or even interested, and therefore was reluctant to discuss the homophobic sexually oriented aspect of the bullying. Within a day or two of Nolan's meeting with the Dean, on or about September 13, 2011, C. , who was sitting next to Nolan in band class, reached over and stabbed Nolan in the groin with the sharpened end of the pencil. C. said he want to see if Nolan was a girl, and also referred to Nolan as a tattletale. *Id.*

[3] The full names have been redacted.

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

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

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

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

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

In response, Mary Bryan decided to contact the school officials to report the bullying in general and the stabbing, in particular. (ER, 2950)

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

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

On September 15, 2011, Mary Bryan sent an email complaining about the bullying and specifically about the stabbing to three people: 1) Principal Warren McKay; 2) band teacher Robert Beasley; and 3) school counselor John Halpin. Both Mr. Beasley and Mr. Halpin acknowledged receiving the September 15, 2011, email from Mary Bryan. Principal McKay said he did not receive it because the email address for him (which Mary Bryan obtained from his own office) was incorrect. *Id*

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

Neither Mr. Beasley nor Mr. Halpin reported Mary Bryan's September 15, 2011, email concerning bullying, explaining that because they saw Principal McKay's name in the address line, they assumed, without verifying, that Dr. McKay, and through him Vice Principal DePiazza and Dean Winn were aware of the situation. These assumptions were incorrect. (ER, 2501)

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

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

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

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

On or about September 21, 2011, while Mary Bryan and Nolan's mother Aimee Hairr were at a birthday party for another child, Mary casually asked Aimee about the school's response to the September 15, 2011, email. (ER, 2502)

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

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

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

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

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

Vice Principal DePiazza denied that he ever had a phone conversation with Aimee Hairr. According to his version of events, some time in either September or October 2011 (he could not remember when) there was a meeting in his office attended by Aimee Hairr, Dean Cheryl Winn and possibly Nolan Hairr. Mr.

DePiazza claimed that while there was some generalized discussion about the "situation" in the band room, nothing specific about the stabbing or the September 15, 2011, email was ever mentioned. (ER, 2502-03) Neither Aimee Hairr, Nolan Hairr nor Cheryl Winn corroborate Mr. DePiazza's version of events about this supposed meeting, or even that it took place.

On or about September 23, 2011, Mrs. Hairr received a return phone call from counselor John Halpin. Aimee knew Mr. Halpin because she was his dental hygienist. Mr. Halpin told her he had received this September 15, 2011, email and was aware of its contents. He said he had previously spoken to Nolan and would do so again to make sure that Nolan made a formal complaint about the stabbing to the Dean. He said he believed that Dean Winn knew about it but wanted to make sure. (ER, 22503)

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

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

Dean Winn said she could not remember whether she met with Nolan on or after September 22, 2011. Nolan said that no such meeting took place on or after September 22, 2011. Aimee Hairr said she never had a meeting with Dean Winn. Dean Winn testified she did not learn of the stabbing incident until the following year, February 2012. (ER, 2403-04)

On or about October 19, 2011, Mary Bryan noticed that Ethan had come home from school with scratches on his leg. When she confronted him about the scratches, he told her that at the end of band class, while Mr. Beasley was out of the room, one of the bullies who was behind Ethan, removed a rubber stopper out of a piece of his trombone and started hitting Ethan in the legs with the remaining sharp piece of the instrument. (ER,2504)

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

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

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

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

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

Mr. Halpin, who was a recipient of the October 19, 2011, email said he forwarded that email to Dean Winn to make sure she was aware of the situation. Dean Winn denied having received the October 19, 2011, email from Mr. Halpin.(ER, 2505)

Also on October 19, 2011, Mr. Halpin attended a weekly administrators' meeting. Principal McKay and Vice Principal DePiazza were also at that meeting. *Id.*

Dean Winn, who was a regular participant in those weekly meetings did not attend that day. *Id.*

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

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

Principal McKay stated that he told Mr. DePiazza and Mr. Halpin to handle the situation. *Id.* McKay also stated that he subsequently never asked the Vice Principal about how the investigation was going or what DePiazza had found out, until February 2012. *Id.*

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

Vice Principal DePiazza stated a vague memory of the October 19, 2011, administrators meeting. He recalled that there may have been some discussion about bullying but did not really remember much. His position was that he definitely did not remember being told by Dr. McKay to conduct an investigation into the bullying reports on October 19, 2011. (ER, 2506)

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

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

Although the school officials all pointed fingers at each other, the one thing that they all agreed upon is that no investigation of the reports of bullying,

described in the October 19, 2011, emails from Mary Bryan and the October 19, 2011, meeting between Mr. and Mrs. Bryan and Dean Winn, ever occurred in 2011. *Id.*

Throughout the rest of 2011, the bullying of Ethan and Nolan by C. and D. continued unabated. *Id.*

Ethan and Nolan continued to employ the strategy of trying to ignore the problem, feeling that any further complaints would just lead to greater retaliation.

When Ethan and Nolan came back to Greenspun for the spring semester, in January 2012, their resolve began to waiver. Each boy tried to avoid band class or even school altogether. Ethan feigned illness, and even tried to make himself sick by eating cardboard. Nolan would hang out in the library or in the halls. By the middle of January, both boys had essentially stopped going to school in order to avoid further bullying. (ER, 2507)

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

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

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

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

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

In fact, this was the only investigation done at Greenspun into the bullying of Ethan and Nolan. At trial, no one from either the school or the school district testified either to seeing any results of any earlier investigation, nor provided any evidence obtained from any earlier investigation. No investigation ever took place while Ethan and Nolan were attending Greenspun Junior High School.*Id.*

VI. Prior Findings of First Supreme Court Panel

As noted above, the first panel found that for the relevant period (On or beyond October 19, 2011) other than for the question of deliberate indifference, all the elements of a Title IX violation were present.

The first prong requires that the harassment be based on sex. The panel found that the " facts support that the harassment was motivated, at least in part, by perceived sexual orientation and therefore falls within the purview of Title IX." 478 P.3d at 355.

The panel also found that the second prong was also met. ("The school exercised substantial control over the harasser and the situation.") *Id*. at 355.

The panel also found that the bullying deprived Ethan and Nolan of educational opportunities. ("We therefore conclude substantial evidence supports that the boys were denied educational opportunities as a result of the harassment." *Id.* at356.

Finally, the panel also found that "A school official with authority to correct the situation had actual knowledge of the harassment.") *Id*. at 356. The Court remanded the case "for additional findings as to whether the events following the October report constituted deliberate indifference under the applicable federal standards." *Id.* at 359.

VII. Argument

A. The District Court properly found Deliberate Indifference on the Part of Defendant.

1. The District Court fulfilled the Mandate from the Nevada Supreme Court.

CCSD proffers the curious argument that because the District Court did not state any new findings of fact, it failed to adhere to the mandate of the appellate court on remand. This is disingenuous. As the June 16, 2021, Adoption of Plaintiff's Conclusions of Law states "the parties agreed on one set of findings of Finding of Fact and each party submitted a version of Conclusions of Law."

The Findings of Fact was stipulated to by the parties. The analysis of the deliberate indifference question occurred on pages 14-18 of the Conclusions of Law section. (ER, 2508-2516) The District Court concluded that "[e]ven in the absence of consideration of the violation of NRS 3.88.1351, Greenspun officials acted with Deliberate Indifference." (ER, 2516) Defendant's District Court failed to address the mandate on remand it is without substance or foundation.

This analysis did exactly what the Nevada Supreme Court had mandated. While Defendant clearly did not like the results, The argument that the District Court made no new findings is unsupported.

2. The Failure of Greenspun Officials to adequately address the Sexual Harassment was a Causal Factor in the Continuation of Bullying of Ethan and Nolan.

CCSD argues that the District Court failed to address the issue of causation. This too is incorrect. The Nevada Supreme Court had already ruled that the sexually oriented bullying that Ethan and Nolan were forced to endure was so severe as to deprive them of educational opportunities. 478 P.3d at 355. As this is a

case of student-on-student bullying, it might be incorrect to say that Greenspun officials were the primary cause of the bullying. That distinction goes to C. and D.

However, because no action was taken by the Greenspun officials who had the authority to remedy the situation, these officials turned a blind eye and allowed the bullying to continue. Thus, their inaction was clearly an important causal factor in the continuation of the bullying of Ethan and Nolan by C. and D.

This is not a question of whether the investigatory and remedial actions were effective. They were nonexistent.

3. The Prior Nevada Supreme Court Ruling Constitutes the Law of the Case.

In Nevada, the "law of the case doctrine states that "the law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.'" *Pellegrini v. State*, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); *Walker v. State*, 85 Nev. 337, 343, 455 P.2d 34 (1969); *Graves v. State*, 84 Nev. 262, 439 P.2d 476 (1968); *State v. Loveless*, 62 Nev. 312, 150 P.2d 1015 (1944).

The law of the case doctrine "is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest." *Tien Fu Hsu v. Cty. of Clark*, 123 Nev. 625, 173 P.3d 724 (2007).

Federal courts have adopted three specific exceptions to the law of the case doctrine, concluding that a court may revisit a prior ruling when (1)

subsequent proceedings produce substantially new or different evidence, (2) there has been an intervening change in controlling law, or (3) the prior decision was clearly erroneous and would result in manifest injustice if enforced." *Tien Fu Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007). In the absence those three extraordinary circumstances, a court should be reluctant to revisit its prior decisions.

The doctrine allows for departure where clearly warranted. But generally, "there should be adherence to the prior ruling, for it is important that the type of issue involved be not subject to perpetual litigation. *Skil Corp. v. Millers Falls Co.*, 541 F.2d 554, 558 (6th Cir. 1976). The failure of a Court to abide by the rule of the case in circumstances where none of the exceptions apply, constitutes an abuse of discretion. *United States v. Phillips*, 356 F.3d 1086, 1095 (9th Cir. 2004).

Here, none of the exceptions apply. There was no new or different evidence. There was no intervening change in controlling law. Nor was the prior decision clearly erroneous resulting in manifest injustice if enforced.

The remand was narrowly focused addressing only one component of Title IX liability, the question of whether Defendant's actions and/or inactions after October 2011 constituted deliberate indifference by being objectively unreasonable under the extent circumstances known at that time. In its appeal, however, Defendant improperly takes issue with conclusions reached by the prior panel.

4. Deliberate Indifference Standards

Deliberate indifference is "the conscious or reckless disregard of the consequences of one's acts or omissions." *Henkle,* at 1078. It occurs where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.'" *Reese,* at 739.

It must, at a minimum, "cause students to undergo harassment or make them liable or vulnerable to it." *Id., citing Davis v. Monroe County Bd. Of Educ.,,* 526 U.S. 629,645 (1999). "[I]f an institution either fails to act or acts in a way which could not have reasonably been expected to remedy the violation, then the institution is liable for what amounts to an official decision not to end discrimination. *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274, 290 (1998); *See, Jane Doe A v. Green*, 298 F. Supp. 2d 1025, 1035 (D. Nev. 2004).

Deliberate indifference is a fact sensitive inquiry. *Garcia v. Clovis Unified Sch. Dist.*, 627 F. Supp. 2d 1187, 1196 (E.D. Cal. 2009); *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006). The question of deliberate indifference on the part of school officials is a matter that is generally left to the jury. *Jane Doe A v. Green*, *supra*.

Whether a response was clearly unreasonable depends on the time it took the district to respond to complaints, the level of response, the effort expended to respond to the allegations, and the efficacy of the response. *See, Zeno v. Pine*

Plains Cent. Sch. Dist., 702 F.3d 655, 669-71 (2d Cir. 2012); *Nissen v. Cedar Falls Cmty. Sch. Dist.*, No. 20-CV-2098-CJW-MAR, 2022 U.S. Dist. LEXIS 51959, at *20-22 (N.D. Iowa Mar. 23,2022).

A reasonable factfinder may properly find deliberate indifference when a school district "ignored the many signals that greater, more directed action was needed." *Zeno*, 702 F.3d at 671.

Whether gender-oriented conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships," *Oncale* , 523 U.S. at 82, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.

“By the same token, the mere fact that a school does ‘something’ in response to a harassment claim does not *per se* insulate it from liability under Title IX.” *Doe v. Rutherford Cty.*, No. 3:13-cv-00328, 2014 U.S. Dist. LEXIS 114477, at *41 (M.D. Tenn. Aug. 18, 2014).

> "[W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." *Id.* The Supreme Court and the Sixth Circuit have also approvingly cited the Office of Civil Rights' Title IX Guidelines, which state that, in response to known sexual harassment, a district "should take immediate and appropriate steps to investigate or

> otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment, and prevent harassment from occurring again." *Vance*, 231 F.3d at 261 n. 5 (quoting 62 Fed Reg. 12034, 12042 (1997)).

Doe v. Rutherford Cty., No. 3:13-cv-00328, 2014 U.S. Dist. LEXIS 114477, at *41 (M.D. Tenn. Aug. 18, 2014); *see also*, *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 259-60 (6th Cir. 2000).

The mere fact that a school does "something" in response to a harassment claim does not *per se* insulate it from liability under Title IX. *Id.*

5. Because Greenspun Administrators who Knew about the Bullying had the Authority to Remedy the Situation, this is not a case of Vicarious Liability.

CCSD argues that because the deliberate indifference issue focuses on the Greenspun administrators who had the authority to investigate and remedy the bullying situation, rather than personnel at the district level, the claim is one for vicarious liability. This is clearly false and unsupportable.

In making the vicarious liability argument, CCSD fails to acknowledge the fact that this Court has already made the prior ruling that "because the administrators had the ability to address the bullying and institute corrective measures, we conclude CCSD had actual notice for purposes of Title IX." 478 P.3d at 356, *citing Reese at* 739. ("damages may not be recovered unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of

discrimination.") *see also*, *Gebser*, at 290. Unlike with 42 USC 1983, no final ultimate decision maker need be notified as long as notice was given to individuals who had the authority to remedy the situation.

6. Greenspun Officials Behavior Went Far Beyond Mere Negligence.

Title IX deliberate indifference requires more than mere negligence. If school officials take timely and reasonable measures to end the harassment, there is no liability under Title IX. *Takla v. Regents of the Univ. of Cal.*, No. 2:15-CV-04418-CAS (SHx), 2015 U.S. Dist. LEXIS 150587 (C.D. Cal. Nov. 2, 2015).

Liability for a Title IX violation occurs when "an institution either fails to act or acts in a way which could not have reasonably been expected to remedy the violation.;" then the institution is liable for what amounts to an official decision not to end discrimination." *Doe v. Cal. Inst. of Tech.*, No. 2:18-cv-09178-SVW-JEM, 2019 U.S. Dist. LEXIS 169672 at *8 (C.D. Cal. Apr. 30, 2019) ("The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation." *Id*.

This is what happened here. The Greenspun administrators' failure to address the sexually oriented bullying of Ethan and Nolan was not an accident or a careless mistake. Principal McKay, Vice Principal DePiazza, and Dean Winn all

chose to shirk their responsibility. It was not mere negligence, but rather, deliberate indifference.

7. Greenspun Officials' Behavior Amounted to Deliberate Indifference.

Here, appropriate school officials had notice of the existence and nature of the bullying suffered by Ethan and Nolan. *See*, *Gebser*, at 290. The Court in *Warren v. Reading Sch. Dist.*, 278 F.3d 163, 169-70 (3d Cir. 2002) stated that the school Principal was the appropriate person for Title IX purposes.

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

In the instant case, several Greenspun personnel testified that they had authority to take remedial disciplinary actions when appropriate. Dean Winn testified that campus discipline was one of her primary responsibilities.

Principal McKay testified that he, Vice Principal DePiazza and Dean Winn, were the school administrators. As such, they were primarily responsible for matters of discipline. Moreover, they all received regular training.

Dr. McKay testified that he delegated the responsibility for discipline to Mr. DePiazza. (Warren P. McKay, Day 4, at 186)

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

DePiazza, Day, at 35) Mr. DePiazza also testified that Dean Winn was tasked with dealing with most disciplinary issues.

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

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

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

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

As noted above, both the District Court and the Nevada Supreme Court ruled that CCSD was on notice for Title IX purposes because Greenspun administrative officials who had authority to remedy the situation, specifically Principal John McKay, Vice Principal Leonard DePiazza, and Dean Winn, all clearly had knowledge of the bullying of Nolan and Ethan by C and D by October 19, 2011. That was the day that Mary Bryan sent an e-mail and met with Dean Winn.

In so doing, Mary laid out in considerable detail the sexual harassment and bullying that Ethan and Nolan were continually being subjected to. (ER, 2504) That same day the sexual harassment and bullying of Ethan and Nolan was discussed at an administrator's meeting attended by both Principal McKay and Vice Principal DePiazza. (ER, 2505) It was there that Principal McKay tasked Mr. DePiazza with investigating and remedying the matter. However, no investigation or any other action was undertaken by school officials until February 2012. (ER. 2507)

By then, both Ethan and Nolan had been removed from Greenspun because the bullying had caused each of these children to engage in and contemplate self-harm. After they were removed for their own safety, a complaint to police prompted the District to get involved. This is not a question of vicarious liability. Instead, the liability is predicated on the fact that post October 19, 2011, Greenspun officials took absolutely no action to investigate or to remedy the

situation, even though they were on notice of the problem. This was the ruling by both the District Court and the Nevada Supreme Court and is the law of the case.

The one question the first panel found unresolved by the District Court in the first appeal was whether under all the extent facts and circumstances the actual actions and inactions of Greenspun administrators reached the level of deliberate indifference beyond any per se violation of the applicable statute.

The Court noted that "although the violation of a statute, regulation, or policy may inform a finding of deliberate indifference, the state law violation could not constitute *per se* deliberate indifference." 478 P.3d at 358. Thus, the Court remanded the case back to the District Court "for additional findings as to whether the events following the October report constituted deliberate indifference under the applicable federal standards."

8. No Investigation was Undertaken by Greenspun Officials in 2011.

Greenspun administrators' failure to adhere their duties, as spelled out in the NRS, while not deliberate indifference bear on the issue. NRS 388.1351 requires that the administrator or designee immediately address the issue. These actions include immediately commencing an investigation that includes a written report of the findings and conclusions of the investigation, contact with parents of all pupils involved, and appropriate remedial action. None of this was done.

The panel noted that the "information gained from the investigation of the September incident, and Greenspun's administrators' failure to prevent future harassment, informs the October incident. And that "at that point (after October 19, 2011) it was clear that further investigation and more serious intervention was necessary to stop the sexual and other harassment against Nolan and Ethan, as well as to prevent further bullying and physical assaults." 478 P.3d at 359.

Principal McKay's testimony acknowledged that the subject of the bullying in Mr. Beasley's band class was brought up by Mr. Halpin at the October 19, 2011, administrators meeting. However, McKay stated that few specifics were discussed. Dr. McKay testified that at that meeting Mr. Halpin did not specifically discuss either the September 15, 2011, or the October 19, 2011, emails from Mary Bryan, nor the substance of those emails. (Warren McKay, Day 4, at 187-190).

In contrast to Mr. Halpin's testimony that specifics of the seriousness of the bullying and the substance, at least, of the September 15, 2011, and October 19, 2011, emails were discussed at the October 19, 2011, administrative meeting, Principal McKay insisted that the discussion was kept at the level of generalities. Mr. Halpin testified that Principal McKay told Vice Principal DePiazza to "take care of it Lenny." Dr. McKay stated that he told Mr. DePiazza and Mr. Halpin to do so.

However, Dr. McKay never bothered to follow up with Mr. DePiazza. If he had taken the time to do so, he would have discovered that his Vice Principal had done absolutely nothing.

It is astounding that Dr. McKay never asked Mr. DePiazza what he had discovered in the investigation. The Principal appeared totally disinterested in and indifferent to the bullying. Yet, Dr. McKay testified that he had responsibility for what Mr. DePiazza did or did not do while the Vice Principal was acting within the bounds of his job. (*Id.* at 184)

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

Dr. McKay testified that he did speak to Dean Winn about her investigation. According to the Principal, Dean Winn told him she was working on it. (Warren McKay, Day 4 at 202)

Dr. McKay essentially testified that he had no interest in learning the details of the bullying, and simply told Mr. DePiazza and Mr. Halpin to take care of it. In his testimony, Vice Principal DePiazza claimed to have no knowledge that any of this was discussed, in any detail, at the October 19, 2011, meeting which he

admitted to attending. While Dr. McKay was clearly Mr. DePiazza's immediate supervisor, the Vice Principal contradicted his boss's sworn testimony, claiming not to know anything about being tasked by Dr. McKay with dealing with the bullying in question. (Leonard DePiazza, Day 2, at 53-54)

On October 19, 2011, Mary Bryan and her husband, Ethan's father, Heath Bryan went to Greenspun Junior High School, and met with Dean Winn. (Mary Bryan, Day 3, at 3-4). The meeting lasted approximately an hour. (*Id.* at 7) The Bryans demanded that the school take action to prevent any further bullying, including the types of physical assaults that were the subject of the September 15, 2011, in the October 19, 2011, emails. (*Id.*) The Bryans also demanded an end to the verbal bullying including the homophobic slurs and statements that both Ethan and Nolan were regularly subjected to. (Mary Bryan, Day 3, at 7-10)

Principal McKay's assertion that Dean Winn indicated to him that she was doing an investigation in October about the bullying but was hard to find students who corroborated the reports of bullying directly contradicts the Dean's own testimony that she did not conduct any investigation in 2011 concerning the bullying because Principal McKay told her not to, as Mr. DePiazza was conducting that investigation. It also contradicts her own testimony that she did not learn of the incidents in question until February 2012.

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

9. Greenspun Officials acted with deliberate indifference

CCSD's argument that school officials conducted an adequate investigation into the claims that Ethan and Nolan were bullied both physically and verbally is belied by the fact that none of the administrators: Principal McKay, Vice Principal DePiazza, or Dean Winn conducted any investigation, much less an adequate one.

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

10. The District Acted Only after the Police Were Called in February 2012, After Ethan and Nolan Had Already Been Driven Out of Greenspun Jr. High School.

Throughout November and December, the bullying continued. Ethan became so distraught that he tried to get out of going to school by eating paper to make himself sick. Eventually, in January 2012, he decided that his only recourse was to commit suicide. (Ethan Bryan, Day 1 at 135-136).

Mary Bryan also testified that Ethan stopped going to school in January 2012, because of the bullying, and that Ethan planned to commit suicide. (Mary Bryan, Day 3, at 22)

After that incident, the Bryans decided that they were not going to send Ethan back to Greenspun. A similar decision was made at the Hairr household in January 2012, after Aimee Hairr confronted Nolan about what was occurring at school. (Aimee Hairr, Day 5 at 22). Nolan told her that the sexually oriented bullying by C. and D. continued unabated. Nolan also relayed that he had been eating paper to try to make himself sick so that he could avoid going to class. (Aimee Hairr, Day 5 at -29). This prompted Nolan's parents to remove him from Greenspun in January 2021 for his own safety. (Aimee Hairr, Day 5 at 28). It also caused Aimee Hairr to file a report with the police. (Aimee Hairr, Day 5 at 29)

Dr. McKay testified that the school did do an investigation of the bullying of Ethan and Nolan in February 2012 after Ethan and Nolan had already left

Greenspun. That was the only investigation that ever took place about the bullying, which occurred in 2011. The February 2012 investigation came after the police became involved and was done at the insistence of Dr. McKay's supervisors from the District, Andre Long, and Assistant Superintendent, Jolene Wallace. (Warren McKay, Day 4, at 191)

In fact, Mr. DePiazza did not do "another" investigation because the February 2012 investigation was the only one that ever occurred. It was undertaken after both Ethan and Nolan had withdrawn from Greenspun to escape the bullying, in February 2012, after their parents had contacted the police. A true investigation conducted on the District level had no difficulty gathering information and acting to rectify the situation. One of the bullies was then suspended. The other had already left school.

Greenspun administrators' failure to adhere to their duties, as spelled out in NRS 388.1351, bears on the issue of deliberate indifference. It requires that the administrator or designee immediately address the issue. These actions include immediately commencing an investigation that includes a written report of the findings and conclusions of the investigation, contact with parents of all pupils involved, and appropriate remedial action. None of this was done.

The panel noted that the "information gained from the investigation of the September incident, and Greenspun's administrators' failure to prevent future

harassment, informs the October incident. And that "at that point (after October 19, 2011) it was clear that further investigation and more serious intervention was necessary to stop the sexual and other harassment against Nolan and Ethan, as well as to prevent further bullying and physical assaults." 478 P.3d at 359.

CCSD's argument that school officials conducted an adequate investigation into the claims that Ethan and Nolan were bullied both physically and verbally is belied by the fact that none of the administrators (Principal McKay, Vice Principal DePiazza, or Dean Winn) conducted any investigation, much less an adequate one. Here school officials' failure to take further action once it was apparent that the nominal efforts it had taken did not end the problem supports a finding of deliberate indifference. *See, Flores, supra,* at 1136, *See also, Vance, supra.*

11. Ethan and Nolan Were Afraid to Fully Disclose the Nature, Extent and Severity, of the Sexual Harassment to which they were Subject.

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

tattletale. (Nolan Hairr, Day 1, p. 48-49). He subsequently chose not to disclose what he was being forced to endure. Greenspun administrators knew this through Mary Bryan's October 19, 2011, e-mail, and her meeting with Dean Winn.

Defendant argues that they did conduct an investigation in 2011. Various school officials periodically asked Ethan and Nolan how they were doing and received no complaints in response. The reluctance of bullied students to report the truth of what is happening to them to school officials is common, and clearly does not absolve CCSD of the responsibility to fully investigate and address the problem.

B. Damages were Properly Awarded

The damages awarded Ethan and Nolan of $200,000 each, were not an abuse of discretion. "The district court has "wide discretion in calculating an award of damages, and this award will not be disturbed on appeal absent an abuse of discretion." *Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997).

The first panel cited *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000) for the proposition that damages must have an evidentiary basis. 478 P.3d at 361 n. 11. It should be noted that *Frantz v. Johnson* involved the misappropriation of trade secrets. The damages were economic, which is far easier to calculate than the damages in the instant case. In *Townsend v. Bayer Corp.*, 774

F.3d 446 (8th Cir. 2014) the Court noted that "[i]n general, awards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms." 774 F.3d at 466. *See also, Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655 (2d Cir. 2012).

> A review of cases in the educational context indicate that verdicts range from the low six figures, to the mid-six figures, to as much as $1 million. Given the severity, duration, and egregiousness of Anthony's unchecked harassment, his reduced compensatory damages award was not outside the "range of permissible decisions." *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation omitted); *Ismail v.Cohen*, 899 F.2d 183 187(2nd Cir. 1990) (appellate review focuses on whether the verdict lies "within [the] reasonable range"). Because of the limited nature of our review and the fact-intensive nature of this case, *see Gasperini v. Ctr. for Humanities, Inc*., 149 F.3d 137, 141 (2d Cir. 1998) ("Deference is justified because the district judge is closer to the evidence, and is therefore in a better position to determine whether a particular award is excessive given the facts of the case."), we decline to upset the district court's decision.

702 F.3d at 673.

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

CCSD argues that it was improper for the District Court to refer to *Henkel v. Gregory*, 26 150 F.Supp.2d 1067 (D. Nev. 2001) as a guideline for damages in

similar school bullying cases. CCSD argues that this is inappropriate because of the factual differences between the two cases, so therefore the District Court abused its discretion in referencing *Henkel*. However, the District Court made it clear that it was not following *Henkle* but merely noting it. CCSD also neglects to mention that any differences between the instant case and *Henkel* were taken into account by the District Court. The damage awards were not the same.

Each boy was awarded a total sum of $200,000 by the District Court after hearing all of the trial testimony. CCSD has not shown any abuse of discretion. Defendant also argues that Plaintiffs received a damage award that was only one third of what they sought. This is untrue. Throughout the course of this lawsuit, Plaintiffs only requested damage relief in whatever amount the Court would deem fair and reasonable. In fact, CCSD vehemently objected to Plaintiffs not seeking a specified damage amount but leaving the question instead to the finder of fact.

The damage award was proper and should remain intact.

C. The Fee Award was Proper

The District Court granted Plaintiffs' requested fee award pursuant to 42 USC 1988, in the amount of $470,418.75 (ER, 2809) The Court reduced the requested hourly rate for Plaintiffs' attorney John H. Scott from $650 per hour to $450 per hour, and the rate for Allen Lichtenstein from $600 per hour to $450 per hour. The total fee award to Plaintiffs was $470,418.75. Congress passed this Act

"as a means of securing enforcement of civil rights laws by ensuring that lawyers would be willing to take civil rights cases. *Evans v. Jeff D.*, 475 U.S. 717, 748-49 (1986).

Their purpose is to ensure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights. *Id*. Plaintiffs set forth a lodestar amount comprised of the number of hours spent on this case multiplied by the reasonable hourly fee. *See, Hensley v. Eckerhart*, 461 US. 424, 433 (1983). "A 'strong presumption' exists that the lodestar figure represents a 'reasonable fee,' and therefore, it should only be enhanced or reduced in 'rare and exceptional cases.'" *Fischer v. SJB-P.D. Inc*., 214 F.3d 1115, 1119 n.4 (9th Cir. 2000) CCSD argues that this Court should reduce Plaintiffs' fee award because it claims Plaintiffs' achieved only partial success. CCSD also argues that attorneys John H. Scott and Allen Lichtenstein (in his capacity as a private attorney after July 31, 2014) should receive a billing rate of $250 an hour.

Here Plaintiffs achieved complete success. Plaintiffs' attorneys' hourly rates are reasonable, even though the District Court significantly reduced them. When determining a reasonable fee award under a federal fee-shifting statute, a district court must first calculate the lodestar by multiplying the number of hours reasonably expended, by the reasonable hourly rate. *Carter v. Caleb Brett LLC*, 741 F.3d 1071, 1073 (9th Cir. 2014). Despite CCSD's protestations to the contrary,

Plaintiffs received excellent results on the Title IX claim based on the finding of deliberate indifference on the part of school officials.

The Court awarded each Plaintiff the sum of $200,000 as fair compensation. CCSD argues that because Plaintiffs did not prevail on all of its legal theories, they did not achieve excellent results. This argument is contrary to well established law. All of the hours set forth in Plaintiffs' Motion involved the same set of facts. In order for hours to be exempt from inclusion in the fee calculation, those hours must involve both different theories of law and different facts. *Herbst v. Humana Health Ins.*, 105 Nev. 586, 591, 781 P.2d 762, 765 (1989)

CCSD did not and could not argue that the claims against the school district and its agents involved claims based on different facts. Normally this will encompass all hours reasonably expended on the litigation. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. *Id*. Nonetheless, CCSD asserts that because Plaintiffs failed to prevail on every contention raised in the lawsuit, the lodestar amount should be reduced. Defendant's position is incorrect as a matter of law.

The Nevada Supreme Court, in *Herbst v. Humana Health Ins*., 105 Nev. at 591, stated that if the claims in question revolved around a common core of facts, none of the hours expended are exempt. CCSD argues that all but one of the

Defendants, with the exception being CCSD itself, ended up being dismissed from the case, therefore showing only partial success. This argument, however, shows nothing of the sort. All of the Defendants listed in Plaintiffs' October 10, 2014, Amended Complaint were either agents of CCSD or the School District itself. All of the claims for relief are based on the exact same facts. Although Plaintiffs proffered several different legal theories, that alone is not a proper basis for reducing the lodestar in light of the claims being made on the same facts. Unrelated claims are only those that are both factually and legally distinct. *Ibrahim v. United States Dep't of Homeland Sec*., 835 F.3d 1048, 1062 (9th Cir. 2016), *citing Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003).

In *Cabrales v. Cty. of L.A.*, 935 F.2d 1050 (9th Cir. 1991), the Court noted that the measure of success is the end result of the litigation. Here, despite the winnowing of claims and Defendants during the course of proceedings, Plaintiffs obtained the relief they were seeking, thus providing excellent results. CCSD does not even argue that any of the claims made against the CCSD Defendants are both legally and factually distinct.

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

argued that the Court did not provide declaratory relief to Plaintiffs in its June 29, 2017, Order. This declaration is undoubtedly clear and unambiguous. Defendant also argues that Plaintiffs received a damage award that was only one third of what they sought.

This is untrue. Throughout the course of this lawsuit, Plaintiffs only requested damage relief in whatever amount the Court would deem fair and reasonable. In fact, CCSD vehemently objected to Plaintiffs not seeking a specified damage amount but leaving the question instead to the discretion of the Court. This does not show partial success. The damages awarded to Plaintiffs do not show only partial success.

Plaintiffs' counsels' rates were reasonable. CCSD argues that the proper rates for Plaintiffs' attorneys in this case, John H. Scott, and Allen Lichtenstein (as a private attorney) is $250 per hour. While not dispositive in and of itself, Plaintiffs' Retainer Agreement indicates that counsel disclosed a $600-$750 per hour usual hourly rate for similar civil rights cases. The Court in *Quesada v. Thomason*, 850 F.2d 537, 541 (9th Cir. 1988) *citing Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 718 (5th Cir. 1974), stated that "the fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case."). In *Costa v. Comm'r of SSA*, 690 F.3d 1132 (9th Cir. 2012) the Court rejected a policy of setting a flat rate

of $250 per hour on civil rights cases. *See also, Moreno v. City of Sacramento,* 534 F.3d 1106 (9th Cir. 2008).

Comparable rates show Plaintiffs' counsels' rates were reasonable. Citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 808 (2002), the Court in *Ellick v. Barnhart*, 445 F. Supp. 2d. 1166, 1172 n. 18 (C.D. Cal. 2006) noted that, "[t]he hours spent by counsel representing the claimant and counsel's "normal hourly billing charge for non-contingent-fee cases" may aid "the court's assessment of the reasonableness of the fee yielded by the fee agreement." Courts may look to comparable hourly rates in the area for guidance on granting fee awards. *Pierce v. Underwood*, 487 U.S. 552 (1988). A "reasonable" hourly rate cannot be determined with exactitude according to some preset formulation accounting for the nature and complexity of every type of case. Therefore, courts often assume that an attorney's normal hourly rate is reasonable, or, in the case of public interest counsel, a reasonable rate is generally the rate charged by an attorney of like "skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895, n. 11 (1984).

In this case, the fees awarded were fair and should be upheld,

VIII. Conclusion

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

Dated this 19th day of September 2022

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Plaintiffs-Respondents' Brief complies with NRAP 32. This document is proportionately spaced, has a Times New Roman typeface of 14 point and contains 10,771 words.

Dated this 19th day of September 2022.

/s/ Allen Lichtenstein

CERTIFICATE OF SERVICE

I hereby certify that I served upon all counsel, the foregoing Plaintiff's/Appellant's Opening Brief via the Court's electronic filing and service process and/or email, and/or United States Mail, on September 19, 2022.

/s/ Allen Lichtenstein