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 REPLY BRIEF

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INTRODUCTION

The question in this case is not simply whether student-on-student bullying occurred, but rather whether CCSD's alleged *deliberate indifference caused* student-on-student sexual harassment to occur after October 19, 2011, establishing Title IX liability. *See Clark Cnty. Sch. Dist. v. Bryan*, 136 Nev. 689, 701, 478 P.3d 344, 359 (2020) ("*Bryan*"). The answer is no.

On remand, the district court disregarded this Court's directive to answer this question. The district court made no "additional findings" concerning whether CCSD acted with deliberate indifference towards plaintiffs; instead, to impose Title IX liability, the district court rewrote the legal standards. In doing so, the district court did not analyze whether CCSD's actions were more than negligent such that CCSD's actions were "clearly unreasonable in light of the known circumstances" and caused plaintiffs to undergo further harassment. *See Bryan*, 136 Nev. at 701, 478 P.3d at 359.

This Court already ruled that the factual record previously before it did not demonstrate that CCSD acted with deliberate indifference to attach Title IX liability. *Id.* at 699, 478 P.3d at 358. And yet, the district

court re-entered the same factual findings. And while plaintiffs spend the majority of their brief also recounting the events of what occurred in 2011–2012, their re-telling of the facts simply repeats the information this Court already reviewed years ago. With nothing more before it, this Court should again conclude that the substantial evidence does not support a finding of deliberate indifference or Title IX liability. *See Bryan*, 136 Nev. at 699, 478 P.3d at 358.

The record reflects that CCSD took action to address reported bullying. Even before CCSD was aware that any bullying involved instances of sexual harassment, CCSD took action to remedy the issues and to support plaintiffs.

However, at no point after October 19, 2011—the date this Court pinpointed to define the scope of remand—was CCSD made aware of any further allegations of sexual harassment while plaintiffs attended Greenspun. Indeed, plaintiffs told their parents and Greenspun educators who checked in with them that the bullying had ceased. *See* 11 App. 2506; RAB 37–38. In light of the known circumstances at that time, CCSD believed its efforts to remediate any bullying had worked.

CCSD was not aware that there were ongoing issues after October

19, 2011, until plaintiffs unenrolled from Greenspun and filed a police report. At that point , CCSD took immediate action by conducting an investigation that resulted in discipline. 11 App. 2507; RAB 36. Put another way, when CCSD became aware that previous efforts to remediate any bullying were ineffective, it employed different methods to remedy the violations. *See Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000).

Even so, plaintiffs' allegations of incidents after October 19, 2011, were based upon "bullying" and the district court did not find that there were any instances of sexual harassment after October to establish that CCSD *caused* plaintiffs to undergo further harassment. *See Kollaritsch v. Mich. Univ. Bd. of Trs.*, 944 F.3d 613, 623–25 (6th Cir. 2019).

Therefore, once again, these facts establish that CCSD did not act with deliberate indifference. CCSD's response was not more than negligent, CCSD's response was not clearly unreasonable in light of the known circumstances, and CCSD did not cause the plaintiffs to undergo further harassment. *See Bryan*, 136 Nev. at 699, 478 P.3d at 358. Accordingly, there is no Title IX liability, and the district court erred by imposing such liability on CCSD.

The district court's awards of damages and attorney fees were therefore also improper. But even if Title IX liability could be established, the district court abused its discretion in ignoring this Court's directives on damages. *See Bryan*, 136 Nev. at 704 n.11, 478 P.3d at 361 n.11. The district court improperly awarded plaintiffs excessive damages based on speculation and a settlement agreement in an unrelated federal case. Further, the award of attorney fees was excessive and did not take into account plaintiffs' overall limited success.

ARGUMENT

I.

THE DISTRICT COURT DID NOT FULFILL THIS COURT'S MANDATES ON REMAND

A. The District Court Did Not Enter *Additional* Findings of Fact

Plaintiffs argue that the district court made additional findings of fact, as mandated by this Court. *See* RAB 20. However, as CCSD laid out in its opening brief, AOB 9 n.4, the district court did not make any new material findings of fact. The district court indeed entered findings of fact on remand, but it did not provide any *additional* findings. Further, the district court's adoption of additional conclusions of law does

not fulfill this Court's mandate remanding the case "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.

Instead, the district court attempted to rewrite the legal standards in this matter. The district court was bound by this Court's mandate on remand and the district court's failure to follow the directives from this Court is dispositive. *See U.S. v. Thrasher*, 483 F.3d 977, 981–82 (9th Cir. 2007) (providing that the rule of mandate doctrine limits the district court's authority on remand, which is jurisdictional).

B. The District Court Did Not Address Necessary Elements for Liability

In failing to make additional findings of fact, the district court also ignored the key factual questions posed by this Court. This Court directed the district court to make "additional findings" regarding three "key" factual questions concerning 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 "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. Because the factual findings regurgitated the same "evidence" and "known circumstances" as in the prior appeal, this Court's questions remained unanswered. Plaintiffs cannot rely on that previously insufficient factual record as now sufficient to sustain their Title IX claims.

II.

THE DISTRICT COURT ORDER DOES NOT SUPPORT TITLE IX LIABILITY

In their answering brief, plaintiffs recount the facts of the underlying events, seemingly in an attempt to have *this* Court make additional findings, but that was the district court's responsibility. And the record is clear that the district court made no additional factual findings regarding deliberate indifference and causation to support Title IX liability. This Court articulated the legal standards for the district court to follow on remand, but the district court instead chose to rewrite the legal standards, reaching a liability determination based on findings of fact that this Court previously determined were insufficient.[1]

[1] Based on the same exact facts, this Court concluded that "after reviewing the record, we cannot say that substantial evidence supports the district court's finding of deliberate indifference regardless of" the

A. CCSD Did Not Act with Deliberate Indifference

"Deliberate indifference is a fact sensitive inquiry" and is a high standard that "requires conduct that is beyond mere negligence." *Garcia ex rel. Marin v. Clovis Unified Sch. Dist.*, 627 F. Supp. 2d 1187, 1196 (E.D. Cal. 2009). The response of a school may amount to "deliberate indifference" if the response was "clearly unreasonable in light of the known circumstances" and the school made "an official decision . . . not to remedy the violation." *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006) (quoting *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (199); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)). However, "a school is not deliberately indifferent simply because the response did not remedy the harassment or because the school did not utilize a particular discipline." *Garcia*, 627 F. Supp. 2d at 1196. The district court failed to apply these legal standards and to make necessary findings regarding deliberate indifference to justify Title IX liability.

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additional error of the district court relying on the state law violation. *Bryan*, 136 Nev. at 699, 478 P.3d at 358.

1. Deliberate Indifference Requires More Than Negligence

Plaintiffs agree that "Title IX deliberate indifference requires more than mere negligence." RAB 26. They therefore argue that the facts support that legal conclusion, *see* RAB 26–37, but overlook that the district court applied a negligence standard.[2]

This Court instructed that a finding of deliberate indifference in the student-on-student-harassment context requires proof that the school district's "response was clearly unreasonable in light of the known circumstances" and that the school district made an "official decision not to remedy the violation." *Bryan*, 136 Nev. at 699, 478 P.3d at 358. The district court did not apply the stringent standard required for deliberate indifference and failed to address these key factual questions. Moreover, plaintiffs' presentation of facts before this Court does not present a case for deliberate indifference imposing Title IX liability.

[2] "[T]he question for this Court is, even discounting the statutory violation, were the actions of the Greenspun administrators *reasonable* under the circumstances." 11 App. 2512 (emphasis added).

2. CCSD's Response Was Not Clearly Unreasonable in Light of the Known Circumstances

a. CCSD TOOK ACTION TO STOP FURTHER HARASSMENT

Plaintiffs' theory is a paradox: on the one hand, they say Greenspun did nothing, *see, e.g.*, RAB 29-30[3]; on the other, plaintiffs did not disclose events because they feared Greenspun try to address the bullying, *see, e.g.*, RAB 8, 10, 17, 37–38, prompting retaliation.[4] Moreover, plaintiffs themselves cite this Court's decision highlighting that CCSD indeed acted in response to the bullying allegations. *See* RAB 31 ("[I]nformation [Greenspun] gained *from the investigation*. . . . *further*

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[3] "[T]he liability is predicated on the fact that post October 19, 2011, Greenspun officials took absolutely *no action* to investigate or to remedy the situation . . . ." RAB 29-30 (emphasis added).

[4] "Because of this fear of retaliation, Nolan decided not to tell *any adults* about any further bullying directed at him . . . ." RAB 8 (emphasis added). "Like his friend Nolan, Ethan also chose not to report the bullying that he was enduring for fear of retaliation . . . ." RAB 10. After October 19, 2011, "Ethan and Nolan continued to employ the strategy of trying to ignore the problem, feeling any further complaints would just lead to greater retaliation." RAB 17. "Both Ethan and Nolan testified that they were reluctant to disclose the bullying . . . *to anyone* for fear of retaliation by C. and D." RAB 37 (emphasis added). After Dean Winn took remedial action based upon Nolan's report of bullying, "[Nolan] subsequently chose not to disclose what he was being forced to endure." RAB 38. "Various school officials periodically asked Ethan and Nolan how they were doing and received *no complaints* in response." RAB 38 (emphasis added).

investigation and *more* serious *intervention* . . . ." (quoting *Bryan*, 136 Nev. at 700-01, 478 P.3d at 359) (emphases added)). This refutes the district court's conclusion that CCSD responded with deliberate indifference and was clearly unreasonable.

A school district is not required to "remedy" peer harassment. *Davis*, 526 U.S. at 648. As plaintiffs themselves recognized, occasionally efforts to address bullying can backfire—with the school's intervention inadvertently placing a target on the backs of those who seek it. Instead, a school district "must merely respond to *known* peer harassment in a manner that is not clearly unreasonable." *Id.* at 649 (emphasis added). A school district's response is clearly unreasonable only if the district "has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail[.]" *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000). However, "[t]he test for whether a school should be liable under Title IX for student-on-student harassment is not one of effectiveness by hindsight." *Porto v. Town of Tewksbury*, 488 F.3d 67, 74 (1st Cir. 2007).

CCSD agrees that a school is not automatically insulated from

Title IX liability merely because it does "something,"[5] *see* RAB 24–25, but the record here is clear that CCSD did more. CCSD responded in a timely manner, did not ignore reports of bullying from plaintiffs or their parents, and took action to address the bullying reported.[6] *See, e.g.*, 10 App. 2499; 11 App. 2501–06.

After October, CCSD had no knowledge of additional bullying and understood that its previous efforts had caused the bullying to cease, based on positive reports from the plaintiffs, *see* RAB 38; 11 App. 2506. Thereafter, when plaintiffs' parents reported issues again in February 2012, CCSD learned that the bullying had not ceased—despite what plaintiffs had led Greenspun to believe—and CCSD immediately took

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[5] Plaintiffs cite to *Doe v. Rutherford Cnty.*, No. 3:13-cv-00328, 2014 WL 4080163 (M.D. Tenn. Aug. 18, 2014), for the idea that "the mere fact that a school does 'something' . . . does not *per se* insulate it from liability under Title IX[,]" (*see* RAB 24–25), but they ignore that there, the school doing "something" prompted a verdict against Title IX liability. *See generally Doe v. Rutherford Cnty.*, 86 F. Supp. 831 (M.D. Tenn. 2015) (denying motion for new trial).

[6] Plaintiffs cite to *Zeno v. Pine Plains Central School District*, 702 F.3d 655 (2d Cir. 2012), for the proposition that a school not responding in a timely manner or escalating their responses may constitute deliberate indifference. *See* RAB 23–24. In doing so, plaintiffs fail to acknowledge that *Zeno* involved harassment and events that spanned over 3.5 years. *See* 702 F.3d at 667. The present case, spanning less than six months, is no comparison.

further remedial action. 11 App. 2507.

CCSD's actions and attempts to remedy any bullying based on the known circumstances at the time therefore did not amount to deliberate indifference. *See Vance*, 231 F.3d at 261 (providing that a school must have "knowledge that its remedial action is inadequate and ineffective," and "continue[] to use those same methods to no avail," to constitute deliberate indifference); *see also Oden*, 440 F.3d 1085, 1089 (concluding there was no deliberate indifference, despite a delayed process and the school's failure to follow established policies, because the school immediately acted as soon as it became aware of student's allegations, counselors met with student several times, counselors helped student file a complaint, and offender was disciplined the following year).

b. PLAINTIFFS CONCEALED ANY FURTHER HARASSMENT

Plaintiffs assert, but provide no caselaw to support, that a school district can be held liable under Title IX for student-on-student harassment even if the plaintiffs intentionally caused school officials to believe any bullying had ceased. *See* RAB 37–38. While it may be true that students who are bullied are reluctant to report issues, *see id.*, a school district cannot be held responsible when students intentionally induce

them to not take further remedial action. *Cf. Benefield ex rel. Benefield v. Bd. of Trs. of Univ. of Ala. at Birmingham*, 214 F. Supp. 2d 1212, 1223 (N.D. Ala. 2002) (concluding school was not deliberately indifferent, "given the school's attempt to ascertain the truth of the rumors and the plaintiff's multiple denials of the same").

As plaintiffs admit, "[v]arious school officials periodically asked Ethan and Nolan how they were doing and received *no complaints* in response." RAB 38 (emphasis added); *see also* RAB 17.[7] This quote reflects the reality that there is nothing in the record to demonstrate that CCSD had actual knowledge of any incidents of actionable Title IX harassment involving Ethan and Nolan *after* October 19, 2011. Plaintiffs reported no issues, no other students reported issues, and no Greenspun educator observed issues. CCSD could not respond to issues that plaintiffs led it to believe no longer existed.

[7] "Throughout the rest of 2011, the bullying of Ethan and Nolan by C and D continued out of the sight of Mr. Beasley. 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." RAB 17.

c. CCSD's Actions, in Light of the Known Circumstances, Do Not Amount to Deliberate Indifference

This case is not a situation where CCSD "continued to use the same ineffective methods to no acknowledged avail[,]" *Vance*, 231 F.3d at 262, because CCSD took actions and was led to believe that its intervention efforts were working, *see* RAB 37–38 (explaining that plaintiffs told school officials that there were no ongoing issues and that plaintiffs did not disclose to *anyone* that any further harassment was taking place). In light of these circumstances known at the time, CCSD's actions were not clearly unreasonable and therefore do not amount to deliberate indifference. *See Vance*, 231 F.3d at 261 (providing that a school district must have actual knowledge that its efforts to remediate the harassment are ineffective and continue to use the same methods to no avail, to amount to deliberate indifference); *see also Riboli v. Redmond Sch. Dist. 2J*, No. 6:19-cv-00593-MC, 2022 WL 309227, at *3 (D. Or. Feb. 2, 2022) (finding no deliberate indifference and that the school's response was not clearly unreasonable under the known circumstances where student herself did not report bullying, educators did not observe bullying, and educator kept her eye on the situation after student's parent reported bullying); *Porto*, 488 F.3d at 74–75 (finding no

deliberate indifference because it was reasonable for the school to conclude that its interventions were working, and the school was not aware of any further sexual harassment between its intervention and an additional incident that occurred three months later).

Disregarding this standard, the district court instead applied hindsight knowledge to determine that CCSD's actions constituted deliberate indifference. However, courts are precluded from "second-guessing" the disciplinary decisions made by school personnel. *Bryan*, 136 Nev. at 698, 478 P.3d at 357. And whether a school is liable cannot be based on a test of "effectiveness by hindsight." *Porto*, 488 F.3d at 74. Yet here, the district court based its ruling on "second-guessing" decisions school officials made when they relied on plaintiffs' own statements denying any further harassment was taking place. This was improper and does not fulfill the stringent standard required to find that CCSD's response amounted to deliberate indifference. *See Bryan*, 136 Nev. at 697–98, 478 P.3d at 357.

3. CCSD Did Not Make an "Official Decision" Not to Remedy the Violation

Beyond a clearly unreasonable response, deliberate indifference additionally requires a finding that there was "an official

decision . . . not to remedy the violation." *Oden*, 440 F.3d at 1089 (quoting *Davis*, 526 U.S. at 648; *Gebser*, 524 U.S. at 290). That, too, is absent here.

a. VICARIOUS LIABILITY IS NOT THE STANDARD FOR DELIBERATE INDIFFERENCE

The district court's decision to hold CCSD liable for actions of individual employees and not for any identified "official decision" by CCSD amounts to vicarious liability. Plaintiffs argue this is not a case of "vicarious liability" because school administrators had "actual notice" regarding some instances of bullying, *see* RAB 25–26, but they ignore the "official decision" requirement. The U.S. Supreme Court has made clear that Title IX recipients are only held liable for Title IX violations based on recipients' own decisions and not the individual actions of their employees. *See Gebser*, 524 U.S. at 290–91. A school district may not be liable based on vicarious liability and is only liable for its own "official decision." *Id.* Whether CCSD had actual notice or not, the district court's order assigns vicarious liability, which is not allowed under law, by not identifying an "official decision" made by CCSD to not remedy alleged violations. *See Gebser*, 524 U.S. at 290.

b. CCSD's Only "Official Decisions" Were to Take Action to Remedy Violations

This Court directed the district court to determine if CCSD made an "official decision" not to remedy any harassment, *Bryan*, 478 P.3d at 357–58, but the district court made no such findings on remand. *See generally* 10 App. 2497–11 App. 2516. In their brief, plaintiffs rehash the timeline of events, but also point to no "official decision" made by CCSD—neither district personnel nor Greenspun administrators—to not remedy the situation. *See* RAB 25–37. Instead, plaintiffs direct this Court to instances where CCSD made an "official decision" *to act*. *See, e.g.*, RAB 31, 36.

Plaintiffs' examples are concrete proof that any "official decision" made by CCSD was a decision to *remedy* harassment. For example, plaintiffs detail that Principal McKay directed the vice principal and the school counselor to address any bullying issues during an administrative meeting the same exact day, October 19, 2011, that plaintiff Bryan's parents allegedly disclosed for the first time that the bullying

involved potential sexual harassment. RAB 14–15, 31.[8] Plaintiffs also illustrate that, in February 2012, after CCSD was notified that there were additional allegations of bullying—despite CCSD's knowledge to the contrary up to that point based on plaintiffs' own reports—CCSD immediately took action to remedy the violations. RAB 18, 36.[9] These actions demonstrate that CCSD's only "official decisions" after October 19, 2011 were to *remedy* harassment, not perpetuate it. The district court's contrary determination is error.

B. CCSD Did Not Act with Indifference That Caused Plaintiffs to Undergo Further Harassment

1. The District Court Did Not Address Causation

The district court additionally did not find that CCSD caused plaintiffs to undergo further harassment, a necessary element for a Title IX cause of action. Plaintiffs assert that the district court addressed the necessary causation element because this Court "already ruled that

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[8] "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."

[9] Explaining that supervisors from the school district directed Greenspun administrators to conduct an investigation in February 2012, which resulted in one of the bullies being suspended.

the sexually oriented bullying that [plaintiffs] were forced to endure was so severe as to deprive them of educational opportunities." RAB 20. However, deprivation of educational opportunities is a component of the harassment's severity; it does not speak to the necessary causation element. Instead, *Davis* requires plaintiffs to prove that CCSD's alleged deliberate indifference *caused* plaintiffs to undergo further harassment or made plaintiffs more vulnerable to it. 526 U.S. at 645.

2. CCSD Did Not Cause Plaintiffs to Undergo Further Harassment

To succeed on a Title IX claim based upon student-on-student sexual harassment, plaintiffs were required to first prove there was "an incident of actionable sexual harassment" and that the school had actual knowledge of it.[10] *Kollaritsch v. Mich. Univ. Bd. of Trs.*, 944 F.3d 613, 623 (6th Cir. 2019). Then, plaintiffs were required to also prove that "some further incident of actionable sexual harassment [occurred], that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school's

[10] This Court already determined that plaintiffs fulfilled this first prong. *Bryan*, 136 Nev. at 695, 697, 478 P.3d at 355–56.

response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment." *Id.* at 623–24.[11]

Here, plaintiffs alleged, and the district court found, that "bullying" happened after October 19, 2011. *See* 11 App. 2506 ("Throughout the rest of 2011, the bullying of Ethan and Nolan by C and D continued . . . ."). [12] This statement of fact does not provide any findings of actionable harassment after October 19, 2011. Further, the district court's order provides no rulings regarding, or evidence of, instances of sexual harassment after October 19, 2011. *See* 10 App. 2488–11 App. 2516. A vague statement that "bullying" continued through the end of the year is insufficient to prove further sexual harassment occurred. *See Kollaritsch*, 944 F.3d at 624–25 (providing that "conclusory statements

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[11] A concurring judge explained the circuit split concerning this issue of whether Title IX and *Davis* require some further incident of actionable harassment after the school had actual notice. *See id.* at 627–28 (Thapar, J., concurring). The Ninth Circuit falls in line with the Sixth, Eighth, and Tenth Circuits, requiring that a student prove "that the school's deliberate indifference actually led to harassment, not that it only made such harassment more likely." *Id.* at 628 (citing *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000)).

[12] These are the same exact facts, with only an adjustment to the initials, that were contained in the previous record before this Court. *See* 8 App. 1963.

[describing behavior such as 'stalking'], without supporting facts, are meaningless" and do not prove actionable further sexual harassment). Nor, critically, does a bare finding of continued "bullying" amount to a determination—supported by evidence—that sexual harassment after that date was attributable to CCSD's deliberate indifference.

Accordingly, the district court's rulings and the record do not reflect that CCSD *caused* plaintiffs to undergo further harassment, and CCSD cannot be held liable for a Title IX violation on this basis alone, along with the reasons detailed above. *See Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000) (explaining that a plaintiff must provide evidence of further harassment after the school received actual notice in order for the school to have "subjected" the plaintiff to harassment); *Escue v. N. OK Coll.*, 450 F.3d 1146, 1155-56 (10th Cir. 2006) (explaining that a plaintiff must show further sexual harassment after the school had notice to succeed on a Title IX claim).

Without the appropriate findings to substantiate Title IX liability, this Court should reverse.

III.

THE DISTRICT COURT ABUSED ITS DISCRETION AWARDING THE SAME DAMAGES AS BEFORE

The district court abused its discretion by again awarding excessive damages based upon speculatory out-of-pocket damages and a settlement agreement in an unrelated matter. *See* 11 App. 2514–2515. Plaintiffs take issue with this Court's reliance on *Frantz v. Johnson*,[13] *see* RAB 38–40, but this Court's guidance to the district court regarding how to calculate damages was clear, *see Bryan*, 136 Nev. at 704 n.11, 478 P.3d at 361 n.11 ("We note . . . several concerns with the damages award . . . . We caution that damages cannot be merely speculative or simply based on another case's settlement agreement.").

A. Tuition Expenses Were Not Warranted

The district court on remand again awarded damages for tuition expenses, 11 App. 2514, that do not flow from the underlying events in this litigation. Additionally, this award of tuition expenses—once again—was based upon speculation. *See id.* ("[B]ased on an estimation of out-of-pocket costs."). Plaintiffs do not address the tuition necessity or

[13] 116 Nev. 455, 469, 999 P.2d 351, 360 (2000).

tuition calculation issues in their answering brief. *See* RAB 38–40.

CCSD cannot be held responsible for plaintiffs' tuition expenses unrelated to any Title IX misconduct. *Bryan*, 136 Nev. at 704 n.11, 478 P.3d at 361 n.11 (citing to authority explaining that plaintiffs suing under civil rights statutes have a responsibility to mitigate damages and cautioning "courts in civil rights cases to consider whether the plaintiffs have a duty to mitigate damages"). After leaving Greenspun, plaintiffs attended and thrived at schools where they were not charged tuition and were not bullied. 2 App. 493; 3 App. 531–34, 631–32, 645–47; 4 App. 828; 5 App. 1234–36. Thereafter, plaintiffs decided to attend tuition-charging private schools, each for their own personal reasons unrelated to any events at Greenspun. 3 App. 531; 4 App. 829–30, 885–87. This does not amount to damages directly resulting from Title IX violations.

Additionally, contrary to plaintiffs' assertion that damages would be difficult to calculate, *see* RAB 38, there was no reason for the district court to rely on "an estimation of out-of-pocket costs" for tuition expenses. 11 App. 2514. Tuition expenses are exact costs; plaintiffs simply presented no documentation. *See Frantz*, 116 Nev. 455, 469, 999 P.2d

351, 360 (2000) ("[A] party seeking damages has the burden of providing the court with an evidentiary basis upon which it may properly determine the amount of damages."). Therefore, the district court abused its discretion by awarding plaintiffs tuition expenses. *See Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73, 75 (1997) (concluding the district court abused its discretion because the record did not support the damages award); *see also Bryan*, 136 Nev. at 704 n.11, 478 P.3d at 361 n.11 ("[T]he record does not support the district court's calculation for five years of out-of-pocket expenses for each boy.").

B. Reliance on *Henkle* to Award Emotional Distress Damages Was Improper

The district court also improperly awarded plaintiffs excessive damages for emotional distress based upon a settlement amount in an unrelated case. 11 App. 2514–15. In their answering brief, plaintiffs, like the district court, double down on asserting that reliance on *Henkle*[14] to calculate emotional distress damages was appropriate, *see* RAB 39–40; 11 App. 2515, despite this Court's guidance to the contrary. *See Bryan*, 136 Nev. at 704 n.11, 478 P.3d at 361 n.11 ("We are also

[14] *Henkle v. Gregory*, 150 F.Supp.2d 1067 (D. Nev. 2001).

troubled by the district court's reliance on a settlement agreement in an unrelated federal case to calculate physical and emotional distress damages.").

The district court did not "merely not[e]" *Henkle*, as plaintiffs now contend. RAB 40. Instead, the district court relied on *Henkle* "as a benchmark for comparison in assessing damages," 11 App. 2515, precisely as it had done before. This was improper, and CCSD should have been provided the opportunity to test *Henkle* at trial before the district court could use it as a benchmark to assess damages in this case. *See People v. Nelson*, 317 N.E.2d 31, 34 (Ill. 1974). Further, the emotional distress damages the district court awarded based on the comparison with *Henkle* were excessive. *See generally Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. __, 142 S. Ct. 1562 (2022).[15]

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[15] Indeed, the U.S. Supreme Court recently held that emotional distress damages are not recoverable under the Spending Clause antidiscrimination statutes it considered in *Cummings*. *See id.* at __, 142 S. Ct. at 1576; *see also Doe v. City of Pawtucket*, C.A. No. 17-365-JJM-LDA, 2022 WL 4551953, at *2 (D.R.I. Sept. 29, 2022) ("While the Supreme Court's holding in *Cummings* was limited to the ACA and RA, the opinion's underlying reasoning forces the same conclusion for Title IX."); *Unknown Party v. Ariz. Bd. of Regents*, No. CV-18-01623-PHX-DWL, 2022 WL 17459745, at *4 (D. Ariz. Dec. 6, 2022) (explaining emotional distress damages are unavailable for a Title IX violation and citing to other courts that have concluded the same since *Cummings*).

C. Damages Were Not Tailored to Each Plaintiff

Plaintiffs additionally did not address the fact that the district court failed to consider that Ethan and Nolan are separate individuals who experienced different situations. The district court failed to consider the different circumstances each plaintiff faced and instead awarded blanket amounts of $200,000 to each. The district court abused its discretion by not tailoring the damages to each individual plaintiff. For this reason, and the reasons above, the district court's damages award should be reversed.

IV.

THE ATTORNEY FEE AWARD IS EXCESSIVE

The district court abused its discretion by entering the same excessive attorney fee award that this Court previously reversed, *Bryan*, 136 Nev. at 704 n.11, 478 P.3d at 361 n.11, without providing any explanation or findings to support the fee award, 12 App. 2809. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (stating that it is important "for the district court to provide a concise but clear explanation of its reasons for the fee award"). The district court was required to "consider the relationship between the extent of success and the amount of the fee

award," *id.* at 438, before awarding fees, but the record here reflects no such analysis for this Court's review. *See McGrath v. Cnty. of Nevada*, 67 F.3d 248, 253 (9th Cir. 1995) ("If the district court fails to provide a clear indication of how it exercised its discretion, we will remand the fee award for the court to provide an explanation.").

A. Counsel's Hourly Rate Was Excessive

The district court abused its discretion by finding that plaintiffs' counsel's excessive hourly rate of $450 was "reasonable." While plaintiffs are correct that a reasonable rate cannot be based upon a preset formulation by a court, RAB 45, plaintiffs disregard that the district court was required to calculate a reasonable hourly rate "by considering certain factors, including the novelty and difficulty of the issues, the skill required to try the case, . . . and fee awards in similar cases." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1114 (9th Cir. 2008). Assessing these factors, the district court should have reduced plaintiffs' counsel's hourly rate based upon the evidence before it.

B. Limited Success Warrants a Reduced Fee Award

After calculating the lodestar amount, the district court was required to consider factors such as the results obtained and, in this case,

should have then reduced the fee award based on plaintiffs' limited success. *Hensley*, 461 U.S. at 440 (holding "that the extent of a plaintiff's success is a *crucial factor* in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988" (emphasis added)). Plaintiffs rely on this Court's decision in *Herbst v. Humana Health Insurance*, 105 Nev. 586, 781 P.2d 762 (1989), to support their position that attorney fees should not be reduced based on their limited success in this case. RAB 42. However, since this Court decided *Herbst* in 1989, federal courts have continued to clarify when and how attorney fees based on federal statutes can be reduced. *See*, *e.g.*, *McCown v. City of Fontana*, 565 F.3d 1097, 1104–05 (9th Cir. 2009) (providing guidance that the district court should take into account limited success on related claims and damages when determining a reasonable attorney fee award).

C. Plaintiffs Did Not Achieve "Complete Success"

Plaintiffs assert the curious position that they achieved "complete success." *See* RAB 41–42. Beyond plaintiffs only prevailing on one remaining claim against one remaining defendant, plaintiffs ignore that this Court concluded they could not succeed on their claim for Section

1983 liability, *Bryan*, 136 Nev. at 703, 478 P.3d at 361. Based on this Court's reversal alone, the district court should have reviewed and revised its previous award of attorney fees. *See Hensley*, 461 U.S. at 436 (explaining that the lodestar amount may be excessive, if "a plaintiff has achieved only partial or limited success," "even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith"); *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 213–14 (1st Cir. 1997) (affirming reduction of attorney fees after remand for a failed claim and citing *Hensley* to explain that it was appropriate "to discount for failed or non-compensable claims where they cannot be neatly segregated from a successful compensable one").

1. Limited Success Against Initial Defendants

Plaintiffs achieved only partial success against the defendants it sought to bring into the litigation. Failing to prevail against all defendants, even if the claims were related, establishes limited success, notwithstanding plaintiffs' explanation that all initial defendants were connected to the one remaining claim against CCSD. *See, e.g.*, *Corder v. Gates*, 947 P.2d 374, 379 (9th Cir. 1991) ("[S]ince the plaintiffs succeeded against only a few defendants, a reduction for *limited success*

was permissible," even though all of the claims were related and plaintiffs succeeded against three defendants (emphasis added)).

2. Limited Success on Initial Claims

Plaintiffs also achieved limited success on their initial claims, both in the number of claims and the relief sought. Plaintiffs contend that because they never sought a specific damages award amount, there is no basis to find that they achieved partial success. RAB 44. Put another way, plaintiffs ask this Court to hold that there is no basis for any court to analyze whether a plaintiff achieved limited monetary success for the purposes of determining an appropriate attorney fee award, if the plaintiff did not request a specific damages amount.

Coupled with the reality that the damages calculation here was erroneously based upon speculation and a settlement agreement in an unrelated case, 11 App. 2514–15, this Court should reverse the attorney fee award that did not take into account plaintiffs' overall limited success on their initial claims. *See Gregory v. Cnty. of Sacramento*, 168 F.App'x. 189, 190 (9th Cir. 2006) (affirming reduction of attorney fees that "reflected 'the limited amount of monetary success achieved in the case'"). To conclude otherwise would suggest a plaintiff could escape

Hensley analysis of attorney fees if they simply "request[ ] damage relief in whatever amount the Court would deem fair and reasonable." RAB 44.

Accordingly, the district court abused its discretion by not considering plaintiffs' limited success on remand and by re-entering the fee award without any explanation.

CONCLUSION

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

Dated this 19th day of December, 2022.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

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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 19th day of December, 2022.

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