IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Modupe Williams	:	
	:	
Plaintiff,	:	Civil Action No.:
v.	:	15-cv-04163-MSG
PENNRIDGE SCHOOL DISTRICT	:	
Dr. Tom Creeden and Nicholas Schoonover	:	
Defendants	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' RULE 12 (b) (6) MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Plaintiff, Modupe Williams, by and through her undersigned attorneys, submits the following memorandum of law in opposition to Defendants' Rule 12(b)(6) Motion to Dismiss the Second Amended Complaint. For the reasons set forth below, Plaintiff respectfully submits that Defendants' motion must be denied. Plaintiff requests oral argument with regards to Defendants' motion.

I. INTRODUCTION

When Plaintiff was a freshman at Pennridge High School, she was subject to a sustained campaign of race- and sex-based harassment by classmates. In the face of Plaintiff's reports and appeals for assistance, school administrators did nothing, allowing the harassment to continue unabated in violation of her rights under federal and Pennsylvania law. Plaintiff now brings this action against Pennridge School District, (PSD), Principal Tom Creeden, and "Ninth Grade Principal" Nicholas Schoonover ("Defendants") to redress the violations of Plaintiff's civil and constitutional rights under Title VI of the Civil Rights Act of 1964, 42 USC §2000d et seq.; Title IX of the Education Amendments of 1972, 20 USC §1681, et seq.; the Pennsylvania Human Relations Act; 42 U.S.C. §§ 1981, 1983, 1988 and the First and Fourteenth Amendments to the U.S. Constitution.

Defendants have filed a Rule 12(b)(6) motion to dismiss Plaintiff's Second Amended Complaint. Plaintiff respectfully submits that Defendants' motion lacks merit and must therefore be denied.

II. LEGAL STANDARD.

In reviewing a motion to dismiss under F.R.C.P. 12 (b) (6), "the court evaluates the merits of the claims by accepting all allegations in the complaint as true, viewing them in the light most favorable to the plaintiffs, and determining whether they state a claim as a matter of law." Gould Elecs., Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000). So too must the court "draw all reasonable inferences in favor of the non-moving party." In re Rockefeller Ctr. Properties, Inc. Sec. Litig., 311 F.3d 198, 215 (3d Cir. 2002) The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they plead sufficient facts to state a facially plausible claim for relief and thus should be afforded an opportunity to offer evidence in support of their claims. Id.; Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

III. STATEMENT OF FACTS

During the 2011-2012 academic year Plaintiff was the only black freshman at Pennridge High School (PHS), a public school located in Bucks County, Pennsylvania. Pl.'s Second Am. Compl. ¶¶ 12, 14. During her one year at PHS, Plaintiff was subject to a sustained campaign of sex- and race-based harassment by classmates, in which her school refused to intervene.

The harassment started in January 2012. When Plaintiff left history class to use the restroom, a white male student threw her backpack from her desk to the floor and took Plaintiff's seat. Id. at ¶16. Rather than remedying the situation, Plaintiff's history teacher told Plaintiff to leave the classroom and go study in the library since there were no more chairs, thus depriving

her of an educational opportunity. An omen of failures to come, both Plaintiff and her mother complained of this harassment to Defendants, but no action was taken. Id.

The harassment escalated in April 2012 when Plaintiff began receiving multiple harassing calls a day from a group of young men using a private phone number, later identified to be owned by a white male student at PHS. During and outside of school hours,[1] the callers subjected Plaintiff to an onslaught of derogatory and explicit sexual and racist abuse. The students taunted Plaintiff, who was 14 years old at the time, calling her a "bitch" and "nigger" and making lewd sexual propositions. Id. at ¶¶ 16, 21, 22, 23. If Plaintiff ignored the callers, the students left the same abusive comments on her answering machine. After Plaintiff's classmates called nineteen times in three days, her mother began screening Plaintiff's calls. Id. at ¶¶ 21, 22. Plaintiff's mother was shocked by the racist and sexually explicit comments. One caller, thinking Plaintiff's mother was the Plaintiff, said he wanted Plaintiff to 'blow him" and he would "tickle [Plaintiff] on all the right places." Id. at ¶ 22. When the student called again, he disguised his voice, adopting an "urban" affect, and said, "You know us niggers like to fuck in the ass, right?" Id. at ¶ 23.

Plaintiff's mother notified the Perkasie Police Department about these racist and sexually harassing calls. An investigation later carried out by the Perkasie Police Department revealed that three white male PHS students were responsible for the harassing calls to Plaintiff. The three students were arrested and prosecuted. Id. at ¶¶ 24, 27.

On April 10, 2012, Plaintiff's mother reported these incidents to Defendants' Ninth Grade Principal, Nicholas Schoonover, providing voice mail recordings and describing the race-

[1] The calls started during school hours on April 4, 2012, before the Spring break that started on April 5, 2012 and continued through April 9, 2012. Second Am. Compl. at ¶¶17, 18, 21, 26.

and sex-based harassment. Mr. Schoonover assured Plaintiff's mother he would investigate the matter. Id. at ¶ 25. He never did.

The harassment continued on school grounds after the spring break. In class, the callers bragged about their calls, repeating the racist and sexist epithets and insults they had directed at Plaintiff. Id. at ¶ 28. Other classmates discussed the abuse, continuing to refer to Plaintiff as a "bitch" and a "nigger." On one occasion, Plaintiff sat in English class, trying to learn, while the boy in the desk behind discussed the abuse, word for word, with other students. Id. at ¶ 30. When she soon after confronted him for copying her exam answers, he threateningly asked, "Are you going to call the cops on me too?" Id. Another white student shouted at Plaintiff "How f***ing drunk were your parents when they named you 'Modupe'?", disparaging her Nigerian origins. Id. at ¶ 32.

Plaintiff and her mother continued to report the abuse to school administrators, including Mr. Schoonover, PHS principal Tom Creeden, and a guidance counselor. Id. at ¶¶ 30, 31, 32, 35, 37. During multiple meetings and in a written complaint, Ex. A, Plaintiff and her mother pleaded with the school to intervene so Plaintiff could continue to learn. Yet Defendants refused to take action. Id. at ¶ 38. Defendants conducted no investigation; Defendants disciplined no students; Defendants provided no support to Plaintiff. Indeed, during one meeting on or about Friday, May 25, 2012, Schoonover told Plaintiff's mother that if Plaintiff felt like she could not attend school at PHS given the harassment, she should be hospitalized or transfer to a new school. Id. at ¶ 36.

Defendants got their wish: At the end of the 2011-2012 school year, Plaintiff, the one black student in her year, transferred from PHS as a result of the racially and sexually hostile environment that Defendants utterly failed to address and thus allowed to flourish. Yet Plaintiff's hardships at Defendants' hands were not over. Id. at ¶ 47. After transferring out of PHS,

Defendants subjected Plaintiff to retaliatory action by refusing to forward Plaintiff's transcripts to her new school. On August 15, 2012 and again on September 7, 2012, Plaintiff's mother requested Plaintiff's transcripts from Defendants to be forwarded to Plaintiff's new school, but Defendants refused to send Plaintiff's transcripts. As a result, Plaintiff was forced to change classes several times, further disrupting her education. Id. at ¶¶ 48, 49.

IV. ARGUMENT

A. PLAINTIFF STATES A CLAIM FOR DELIBERATE INDIFFERENCE TO KNOWN HOSTILE ENVIRONMENT AND HARASSMENT UNDER TITLE VI, TITLE IX, AND THE PHRA.

Under Title IX and Title VI, a federally funded school like PHS, Second Am. Compl. at ¶ 14, is liable for monetary damages if it is deliberately indifferent to known sex- or race-based student-on-student harassment "that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit," Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) (Title IX); Whitfield v. Notre Dame Middle Sch., 412 F. App'x 517, 522 (3d Cir. 2011) (Title VI). "[T]he PHRA is to be interpreted as identical to federal antidiscrimination laws except where there is something specifically different in its language requiring that it be treated differently." Fogleman v. Mercy Hospital, Inc., 283 F.3d 561, 567 (3rd Cir. 2002).

1. Plaintiff has sufficiently pled that she was subject to severe, pervasive, and objectively offensive sex- and race-based harassment.

Case law in the Third Circuit makes clear that verbal harassment, including the use of racial and sexual epithets, can constitute severe and pervasive harassment. *E.g.*, Krebs v. New Kensington-Arnold School District, 2016 WL 6820402 (W.D. Penn. 2016) (holding that "the constant and pervasive harassment with sex based terms alleged to have endured by" the plaintiff "rose to the level required under Title IX"); Price ex rel. O.P. v. Scranton School District, 2012

WL 37090 (M.D. Penn. 2012) (holding that plaintiff subject to repeated gender-based slurs had sufficiently alleged facts that satisfy the standard for a sexually hostile environment). Courts in other circuits agree. *E.g.*, Jennings v. University of North Carolina, 482 F.3d 686, 697-698 (4th Cir. 2007) (finding that the plaintiff had alleged sufficient facts regarding primarily verbal harassment for a jury to find sufficiently "severe or pervasive" conduct); Fennell v. Marion Indep. Sch. Dist., 963 F. Supp. 2d 623, 646 (W.D. Tex. 2013) ("Plaintiffs' allegation that other students repeatedly used these offensive and derogatory epithets . . . adequately alleges that Plaintiffs were subjected to severe and pervasive harassment."); Theno v. Tonganoxie Unified School Dist. No. 464, 377 F.Supp.2d 952, 968 (D. Kansas 2005) ("The court finds the school district's argument that the harassment is not actionable because it involved only name-calling and crude gestures, not physical harassment, to be without merit.").

Many courts have articulated that the harm experienced by students harassed with the particular discriminatory epithets Plaintiff was called – specifically "nigger" and "bitch" – is sufficient to state a claim for severe and pervasive harassment. The Ninth Circuit called the word "nigger" "the most noxious racial epithet in the contemporary American lexicon." Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1034 (9th Cir. 1998). "It does not take an educational psychologist to conclude that being referred to [as a nigger], being shamed and humiliated on the basis of one's race, and having the school authorities ignore or reject one's complaints would adversely affect a Black child's ability to obtain the same benefit from schooling as her white counterparts." Id. The Second Circuit has also noted the particularly severe harm of the term "nigger" in student-on-student harassment. "[I]n the school context," that court wrote, "a teacher's indifference to children's use of this particular epithet to belittle a child may well be found to have caused the sort of educational deprivation referenced in

Davis[.]" DiStiso v. Cook, 691 F.3d 226, 243 (2d Cir. 2012). *See also*, Fennell v. Marion Indep. Sch. Dist., 963 F. Supp. 2d 623, 645 (W.D. Tex. 2013) (holding that plaintiffs' claim that classmates called them the "offensive and derogatory epithets" "nigger" and "blackie" constituted, on its own, an adequate allegation that the victims "were subjected to severe and pervasive harassment"). Similarly, multiple courts have recognized "bitch" as a highly offensive sex-based epithet, the use of which may be part of a pattern of severe and pervasive harassment. E.g., Doe v. E. Haven Bd. of Educ., 200 F. App'x 46, 48 (2d Cir. 2006); Krebs v. New Kensington-Arnold Sch. Dist., No. CV 16-610, 2016 WL 6820402, at *3 (W.D. Pa. Nov. 17, 2016); Price ex rel. O.P. v. Scranton Sch. Dist., No. CIV.A. 11-0095, 2012 WL 37090, at *6 (M.D. Pa. Jan. 6, 2012).

Plaintiff, the sole African American student in her class, Sec. Amend. Compl. ¶ 11, has alleged sufficient facts to establish she was subjected to a sustained campaign of severe, pervasive, and objectively offensive race- and sex-based harassment by her classmates between January and May 2012, most of the one year she spent at Pennridge High School. She was called a "bitch" and a "nigger." Id. at ¶¶ 17, 21, 28, 30. During one three day period, she was called these vile epithets on each of nineteen harassing phone calls. Id. at ¶ 21. Cf. DiStiso, 691 F.3d at 243 (holding that student called a "nigger" by his classmates between eight and 15 times over the course of a year raised a triable issue of fact as to whether the harassment met the Davis standard for severity and pervasiveness). She was barraged with explicitly sexual comments rooted in racist stereotypes. Sec. Amend. Compl. ¶¶ 22, 23. She was mocked for her ethnic origins. Id. at ¶ 32. She was forced out of the classroom by harassment condoned by her teacher. Id. at ¶ 16. See also Davis, 526 U.S. at 650-651 ("The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical

deprivation of access to school resources" where "[d]istrict administrators deliberately ignore requests for aid from the female students wishing to use the resource."). She was ridiculed for reporting previous harassment to the police. Second Am. Compl. at ¶ 30. She sat in school listening to her peers talk about the abuse she had experienced, repeating the epithets she had been called. Id. at ¶ ¶ 28, 30. In and out of school, Plaintiff, then a high school freshman, was subject to consistent harassment so severe that the students found responsible by the police were criminally prosecuted. Id. at ¶ 27.

Due to the sustained harassment, Plaintiff was "effectively denied equal access to an institution's resources and opportunities," the key inquiry under Davis. 526 U.S. at 631. She not only missed class time because of the harassment, Second Am. Compl. at ¶ 16, but eventually was forced to transfer to another school after months of sustained abuse. See Price ex rel. O.P. v. Scranton Sch. Dist., No. CIV.A. 11-0095, 2012 WL 37090, at *6 (M.D. Pa. Jan. 6, 2012) ("The behavior of [the plaintiff's] classmates caused [her] to leave class, suffer a drop in her grades, withdraw from her position on the school yearbook, and decide to leave the School District altogether. From these facts, a reasonable person could conclude that the daily harassment created a hostile educational environment.") (internal citations omitted). Had Plaintiff remained, there is no reason to think the harassment would have stopped, and a student cannot be asked to sustain further cruelty to prove just how bad it is.

For this reason, courts have recognized that harassment severe enough to deprive the victim of educational opportunities may meet the Davis standard without extending as long as the abuse to which Plaintiff in the instant case was subject. See, e.g., Vance v. Spencer Cty. Pub. Sch. Dist., 231 F.3d 253, 259 n.4 (6th Cir. 2000) ("Within the context of Title IX, a student's claim of hostile environment can arise from a single incident.") (quoting *Doe v. School Admin.*

Dist. No. 19, 66 F.Supp.2d 57, 62 (D.Me.1999); Spencer v. Univ. of N.M. Bd. of Regents, 15-cv-00141-MCA-SCY (D.N.M. Jan. 11, 2016) (A single act of severe sexual harassment . . . can support a Title IX claim"). See also, Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (holding that civil rights protections against sexual harassment "come[] into play before the harassing conduct leads to a nervous breakdown"). Indeed, the severe and pervasive harassment at issue in Davis occurred over the course of five months, Davis, 526 U.S. at 633-34, just like the harassment in the instant case.

Defendants trivialize the nature of the harassment Plaintiff suffered, callously dismissing it as "a couple of questionable comments," Defs.' Mot. to Dismiss at 16, vile epithets and comments like "how fucking drunk were your parents when they named you Modupe?"[2] and "niggers like to fuck in the ass," Second Am. Compl. at ¶¶ 31, 23; Defs.' Mot. to Dismiss at 5. As part of their effort to understate the severity of the harassment, Defendants selectively cite to cases where courts found extreme physical abuse to constitute severe and pervasive harassment, presumably to contrast the details of those brutal assaults with the verbal harassment suffered by Plaintiff. Defs.' Mot. to Dismiss at 12-13, 16. As established above, however, courts recognize that physical assaults are not the only form of harassment that can be severe and pervasive; "words can hurt, particularly in the case of children, and . . . words of a racist nature can hurt especially severely." Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027 (9th Cir. 1998). In fact, one case upon which Defendants rely expressly notes that the verbal harassment plaintiff endured was severe and pervasive even absent the additional physical violence that Defendants emphasize. Vance, 231 F.3d at 259.

[2] Defendants shockingly contend that this comment is not race-based. Defs.' Mot. to Dismiss at 11, 18. As Plaintiff's mother explained to Defendants, Second Am. Compl. at 32, Modupe is a common name in Nigeria and a clear marker of Plaintiff's race and ethnic origins. By suggesting parents would only choose a popular Nigerian name for their child if they were "drunk," Plaintiff's classmate's comment unambiguously denigrated her race and ethnic identity.

Further, Defendants wrongly contend, without justification or citation, that only harassment communicated directly from the original callers to Plaintiff may be considered part of the extended pattern of severe and pervasive harassment. For example, Plaintiff was subject to repeated comments from classmates regarding the harassing calls and the callers' bragging about that abuse. These comments repeated the racist and sexist epithets to which Plaintiff had been subjected over the phone. As a result, the phone harassment extended into Plaintiff's school environment, creating a hostile environment. Yet Defendant inexplicably contends that this form of harassment is irrelevant to the suit at hand because Plaintiff did not observe the callers' bragging directly but instead heard about their comments through other classmates. This position asks the court to arbitrarily limit its scope of analysis, as though it were not possible, as a matter of law, for a student to be harassed by numerous classmates.[3] Other courts have recognized "proxy harassment," in which friends of the worst perpetrators tease the victim about the abuse to which she has already been subject out of school, as contributing to a pattern of severe and pervasive harassment that constitutes a hostile environment, e.g., Doe ex rel. Doe v. Coventry Bd. of Educ., 630 F. Supp. 2d 226, 233-34 (D. Conn. 2009); Doe ex rel. Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 445 (D. Conn. 2006). By refusing to intervene, Defendants permitted such a hostile environment to flourish.

Defendants also wrongly treat Plaintiff's classmates' misconduct as a series of isolated events rather than a *pattern* of sustained harassment. Such framing is contrary to the very concept of harassment and a hostile environment, which requires courts to consider "the totality of the circumstances," Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990), and

[3] Defendants also strangely contend that this allegation constitutes "double hearsay." Defs.' Mot. to Dismiss at 11. First, such a charge is inappropriate at this stage in proceedings: a complaint cannot constitute because the plaintiff may be able to produce direct testimony of the utterance. Second, Plaintiff's claim is presented as evidence of a hostile environment wherein students gossiped about her abuse; whether the gossip accurately reporter the callers' feelings is immaterial to the effect it had on Plaintiff's mindset and access to education.

recognize patterns of abuse that compound to poison the workplace or classroom. *See*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) ("[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances."); Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 483 (3d Cir. 1997) ("The harassment did not consist of unrelated, isolated incidents, but constituted a continuous pattern of derogatory remarks, rude behavior, and discriminatory conduct."). As a federal judge in the District of Kansas noted in an opinion regarding sexual harassment in school, while "isolated incidents could be characterized as mere insults, teasing, and name-calling, collectively they reflect much more than 'simple acts' of teasing and name-calling. They reflect a pattern of harassment that was arguably severe and pervasive." Theno, 377 F. Supp. 2d at 968 (emphasis added). So, too, do the incidents Plaintiff alleges in her complaint, rendering Defendants' motion to dismiss inappropriate.

2. Plaintiff has sufficiently pled that Defendants had actual knowledge of the harassment.

A school's duty to respond to harassment is triggered by its actual knowledge of the harassment. Davis, 526 U.S. at 648 (Title IX); Whitfield, 412 F. App'x at 521 (Title VI); Fogleman, 283 F.3d at 567 (PHRA). Here, Plaintiff has sufficiently pled that Defendants were aware of the harassment thanks to her and her mother's repeated reports of the abuse between January and May 2012. Second Am. Compl. at ¶¶ 25, 26, 28, 30, 31, 32, 35, 37, 38.

Defendants misstate the law when they deny liability because they did not "kn[o]w about the phone calls before or when they were occurring," Defs.' Mot. to Dismiss at 15. First, as a matter of law, a school's receipt of notice about harassment that has already concluded constitutes "actual knowledge" that triggers the responsibility to respond. *E.g.* Warren ex rel. Good v. Reading Sch. Dist., 278 F.3d 163, 172 (3d Cir. 2002). Second, Plaintiff continued to experience harassment at the hands of her peers – and her mother continued to report that

harassment to Defendant – after the phone calls. E.g., Second Am. Compl. ¶¶ 28, 30, 32. Thus Defendant did, in fact, have actual knowledge of a continuing hostile environment, triggering the responsibility to respond both to remediate past harms and to prevent continued abuse.

3. Plaintiff has sufficiently pled that Defendants were deliberately indifferent to the hostile environment harassment.

Under Title IX, Title VI, and the PHRA, a school is liable for money damages to a plaintiff-victim if it is deliberately indifferent to severe and pervasive race- or sex-based student-on-student harassment of which it had actual knowledge. Davis, 526 U.S. at 648 (Title IX); Whitfield, 412 F. App'x at 521 (Title VI); Fogleman, 283 F.3d at 567 (PHRA). Anti-discrimination law does not dictate exactly how a school must respond to known harassment, but a school is deliberately indifferent when its "response . . . or lack thereof is clearly unreasonable in light of the known circumstances," Davis, 526 U.S. at 648. Crucially to the instant case, "[]though no particular response is required . . . the school district must respond," Vance, 231 F.3d at 260-61 (emphasis added).

When a school implements a non-trivial but lacking investigation or safety plan, courts are tasked with the sometimes difficult project of determining how much imperfect intervention is sufficient to avoid liability.[4] This is not one of the hard cases. There is no tough question of whether Defendants' intervention was insufficient because, by both Plaintiff's and Defendant's

[4] For example, in Lockhart v. Willingboro High School, a student and her family presented the question of whether a school was deliberately indifferent when it allowed a girl with special needs who had allegedly previously been assaulted by a classmate to enter a room, unsupervised, with a different student; the court said the claim was plausible enough to survive a motion to dismiss, even though the school had investigated the earlier reported assault. 170 F. Supp. 3d 722, 737 (D.N.J. 2015). A 2010 opinion from Judge Hart in the Eastern District of Pennsylvania determined that a school was not deliberately indifferent when it intervened unsuccessfully in the continued abuse of a young boy by a classmate because the schools' methods, though deficient, were not unreasonable. Brooks v. City of Philadelphia, 747 F. Supp. 2d 477, 483-84 (E.D. Pa. 2010). In 2010, Judge Cercone denied a school's motion for summary judgment because its response to a report of harassment and stalking – merely "talking to" the accused, moving his locker, and changing his homeroom – was possibly unreasonable. Jones v. Indiana Area Sch. Dist., 397 F. Supp. 2d 628, 645 (W.D. Pa. 2005).

accounts, there was no intervention. There is no dispute that PHS utterly failed to respond to the ongoing harassment.

Refusing to take action to curb reported abuse is clearly unreasonable. Telling a student who reports a sustained campaign of race- and sex- based harassment that she should leave school is clearly unreasonable. Plaintiff reported to Defendants that she had been repeatedly called a bitch and a nigger, subjected to speculation about her sexual preferences based on her race, and ridiculed for her ethnic origins as part of a sustained campaign of race- and sex-based harassment by her classmates. Defendants' decision to take no action to address the harassment and, instead, to urge the one African American student in her year to drop out is clearly unreasonable. Vance, 231 F.3d at 260-61. Plaintiff has alleged sufficient facts to claim that Defendants were deliberately indifferent and, as a result, violated Title IX, Title VI, and the PHRA.

4. Defendants are wrong that they cannot be held liable for harassment that occurred off school premises.

Defendants assume, without citing to any precedent or statutory authority, that a school cannot be held liable for deliberate indifference to harassment that occurred off school premises. Defs.' Mot. to Dismiss at 10-11. This position is contrary to the weight of the case law and the interpretation of Title VI and Title IX by the United States. A school's liability under Title VI or Title IX for student-on-student harassment derives not from the misconduct itself but from the institution's deliberate indifference to it. . E.g., Davis, 526 U.S. at 648-49. Courts have found that schools must address harassment that occurred in whole or in part outside of school grounds or school activities if there is a "nexus" between the misconduct and the educational setting, such as if the off-campus events create a hostile environment. E.g., Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.2d 1114, 1121 n.1 (10th Cir. 20008); Crandell v. N.Y. Coll.

Osteopathic Med., 87 F. Supp.2d 304, 315-16 (S.D.N.Y. 2000). A school's liability for failing to combat discriminatory harassment does not stop at its borders but rather extends to circumstances when and where "the harasser is under the school's disciplinary authority," Davis, 526 U.S. at 646-47.

Within the Third Circuit, multiple district court judges have denied schools' motions for summary judgment or dismissal in cases challenging their responses to harassment that occurred both within and apart from school premises and activities. *E.g.*, S.K. v. N. Allegheny Sch. Dist., 168 F. Supp. 3d 786, 803 (W.D. Pa. 2016) (finding that school had a responsibility to address verbal insults and threatening text messages that occurred both on and off school grounds); Price, No. CIV.A. 11-0095, 2012 WL 37090, at *7 (finding that plaintiff plausibly demonstrated that school was deliberately indifferent in response to sex-based harassment that occurred in part off campus during summer recess); Jones v. Indiana Area Sch. Dist., 397 F. Supp. 2d 628, 645-466 (W.D. Pa. 2005) (denying defendant's motion for summary judgment because court was unable to find that school's response to student's on- and off-campus harassment of classmate fulfilled school's Title IX responsibilities under Davis). So, too, have courts in other circuits. E.g., Fennell v. Marion Independent School Dist., 963 F.Supp.2d 623 (W.D. Tex. 2013) (finding plaintiffs stated claim under Title VI for school's deliberate indifference in response to race-based harassment that occurred in part over text messages and Facebook posts); Schroeder ex rel. Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 881 (N.D. Ohio 2003) (denying defendant's motion for summary judgment for Title IX claim challenging school's failure to respond to pattern of harassment that occurred, in part, at bowling alley without a connection to school campus or school activities).

Even in cases where the majority or the worst of the conduct occurred off campus, courts have found schools liable for their failure to intervene because of the continuing effects of the harassment on the victim's education. In a 2013 case, a court in the Middle District of Pennsylvania denied a defendant's motion to dismiss a Title IX claim because, the opinion explained, the school had a responsibility to remediate the educational impact of an off-campus rape that occurred during the summer recess, as well as prevent further harassment at the hands of the victim's assailants and their friends. C.S. v. S. Columbia Sch. Dist., No. 4:12-CV-1013, 2013 WL 2371413, at *10 (M.D. Pa. May 21, 2013). A pair of cases out of the District of Connecticut with strikingly similar facts further illustrates this point. In both cases, plaintiffs were sexually assaulted off campus and then continued to attend school in the same building as the students who had assaulted them. The assaults in both cases were followed by campaigns of mostly off-campus harassment by the assailants' friends. Under the circumstances, the courts both concluded that the off-campus "proxy-harassment" was part and parcel of plaintiffs' claims "concerning the severity and offensiveness of having to go to school in the same building as" their assailants. Doe ex rel. Doe v. Coventry Bd. of Educ., 630 F. Supp. 2d 226, 233-34 (D. Conn. 2009); Doe ex rel. Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 445 (D. Conn. 2006). Thus the courts held that there was a sufficient nexus between the off-campus conduct and the school environment that the school maintained "control" under Davis.

While some courts have stated that Title IX liability is not implicated by off-campus conduct, they have done so without examining Davis's language, a clear error. *E.g.*, Dawn L. v. Greater Johnstown Sch. Dist., 614 F. Supp. 2d 555, 568 n.3 (W.D. Pa. 2008). Other cases where courts have not held schools liable for deliberate indifference to off-premises harassment are distinguishable because they involved off-campus harassment by a former teacher after he was

fired, e.g., Doe-2 v. McLean County Unit Dist. No. 5 Bd. of Dirs., 593 F.3d 507, 512-13 (7th Cir. 2010), harassment by a non-student, e.g., Tyrrell v. Seaford Union Free Sch. Dist., 792 F. Supp. 2d 601, 629 & n.10 (E.D.N.Y. 2011), or insufficient evidence on a motion for summary judgment that the defendants exercised disciplinary authority over private residences where single assaults occurred, Roe v. St. Louis Univ., 746 F.3d 874 (8th Cir. 2014); Ostrander v. Duggan, 341 F.3d 745 (8th Cir. 2003).

Consistent with the case law and federal anti-discrimination laws' purpose, the United States Department of Education has issued guidance making clear that, under Title IX, schools must respond to reports of off-campus harassment. Office for Civil Rights ("OCR"), 2011 Dear Colleague Letter on Sexual Violence at 4 (hereinafter "2011 DCL"), http://www.ed.gov/ocr/letters/colleague- 201104.pdf ; 2014 Questions and Answer on Title IX and Sexual Violence at 29 (hereinafter "2014 Q&A"), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. The Education Department has applied a similar standard to claims of discrimination under Title VI. E.g., Compliance Review, University of California San Diego, OCR Docket #09-11-6901, available at http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09116901-a.html (evaluating the university's response to an off-campus party that promoted "exaggerated African American stereotypes"). *See also*, Cannon v. University of Chicago, 441 U.S. 677, 694-98 (1979) (noting that Congress intended that Title IX and Title VI be interpreted and applied in the same ways). As clear from the courts' resounding agreement, the Department of Education's position is consistent with Title IX. Therefore, the Department of Education's guidance interpreting its own regulations should be afforded deference. Auer v. Robbins, 519 U.S. 452, 461 (1997); Roberts v. Colo. State Bd. Of Agric., 998 F.2d 834, 829 (10th Cir. 1993).

The Department of Justice, in a Statement of Interest filed in Weckhorst v. Kansas State University, endorsed the shared opinion of courts and the Department of Education that schools must address students' reports of hostile environments that derive originally from events that occurred off premises. Ex. A, Department of Education Statement of Interest, Weckhorst v. Kansas State University, Case No. 2:16-cv-02255-JAR-GEB, 11-14 (hereinafter "DOJ Statement of Interest"). As the Department of Justice wrote, "the hostile effects of [harassment] can permeate the academic environment and deprive the student of educational benefits." Id. at 12.

In light of the case law and federal agency interpretation, Defendants are clearly liable for their failure to respond to Plaintiff's reports of on- and off-campus harassment. Surely the substantial effect of her classmates' behavior on Plaintiff's education establishes a nexus. By Pennridge High School's own code of conduct, the school can and will punish students for bullying that occurs off campus. Second Am. Compl. at ¶¶ 42, 43. Thus Plaintiffs' harassers were clearly under Defendants' disciplinary authority throughout their months of harassment.

B. PLAINTIFF STATES A CLAIM FOR RETALIATION UNDER TITLE VI, TITLE IX, AND THE PHRA.

Robust protections against retaliation are essential to promote the purpose of federal anti-discrimination law because they allow people who believe their rights have been violated to seek relief and combat inequity without fear of reprisal. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 180 (2005); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969). For this reason, Title IX and Title VI, and thus the PHRA, prohibit publicly funded schools from retaliating against students for complaining about discrimination. Yan Yan v. Penn State Univ., 529 F. App'x 167, 171 (3d Cir. 2013) (Title IX); Whitfield, 412 F. App'x at 522 (Title VI). See also Fogleman, 283 F.3d at 567 (PHRA). To establish a prima facie case of retaliation, a plaintiff must show that "(1) she was engaging in a protected activity; (2) the funded entity subjected her

to an adverse action after or contemporaneously with the protected activity; and (3) a causal link between the adverse action and the protected activity," Whitfield, 412 F. App'x at 522. If a plaintiff establishes a prima facie case for retaliation, the burden shifts to the defendant to offer a legitimate, non-retaliatory reason for the adverse action. Moore v. City of Philadelphia, 461 F.3d 331, 342 (3d Cir. 2006). A plaintiff may then demonstrate that the proffered explanation is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence," Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Plaintiff has alleged facts sufficient to establish a *prima facie* case of retaliation. First, defendants concede that the Plaintiff engaged in a protected activity. Defs.' Mot. to Dismiss at 19. Second, Plaintiff alleges the Defendant subjected her to adverse actions. Courts in this Circuit have borrowed from Title VII case law to define an adverse action. Toth v. California Univ. of Pennsylvania, 844 F. Supp. 2d 611, 643 (W.D. Pa. 2012); Dawn L. v. Greater Johnstown Sch. Dist., 586 F. Supp. 2d 332, 374 (W.D. Pa. 2008). At least one other Circuit has done the same, Emeldi v. Univ. of Oregon, 698 F.3d 715, 726 (9th Cir. 2012). These courts have drawn from the Supreme Court's explanation, in the employment context, than an adverse action is one that "a reasonable [person] would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination," Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (internal quotation marks and citations omitted).

In the immediate aftermath of her complaints, Plaintiff was subject to a continued campaign of harassment that Defendants refused to address, even after criminal charges were filed against her classmates. Ultimately, Plaintiff left Pennridge High School as Defendants had

cruelly encouraged her to do both explicitly and by failing to address the harassment. Second Am. Compl. at ¶¶ 32, 36, 38, 47. Defendants then refused even to provide Plaintiff's new school with her transcript, further disrupting her education. Id. at 48. Such retaliatory actions are not, as Defendants' claim, mere "petty slights or minor annoyances," Defs.' Mot. to Dismiss at 19 (quoting Burlington, 548 U.S. at 68 (2006)). A reasonable student might decide that reporting harassment to the Defendant was simply not worth the school's open hostility or the trouble of transferring without a transcript. In light of the school's retaliation, one might reasonably decide to try to tolerate harassment and, when it became unbearable, leave quietly rather than report in order to ensure a smooth school transfer.

Defendant's adverse treatment of Plaintiff is as severe as other forms of retaliation recognized by the Third Circuit, if not more so. Defendant's withholding of Plaintiff's transcript is reminiscent of L.B. Foster's refusal to provide a reference for a former employee who had complained of sex discrimination, which the Third Circuit determined was an adverse action, E.E.O.C. v. L.B. Foster Co., 123 F.3d 746, 754 (3d Cir. 1997). In both cases, defendants interfered with complainants' ability to pursue new opportunities after the individuals left due to the discrimination they reported; in both cases, the retaliation might encourage a reasonable person not to report in order to transition to a new school or workplace without interference.

Third, the second amended complaint more than plausibly alleges a causal link between the adverse action and her and her mother's complaints of discrimination. A plaintiff may offer direct evidence of "ongoing antagonism" directed against a plaintiff by the defendant to establish causation. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000). Proof of causal connection can also be established indirectly through circumstantial evidence. Id. at 280-81. A common form of circumstantial evidence is temporal proximity between the protected activity

and discriminatory treatment, e.g., Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989). Causation also may be inferred "from the record as a whole" and Third Circuit "caselaw has set forth no limits on what [judges] have been willing to consider," Farrell, 206 F.3d at 281. In the instant case, Plaintiff has presented both direct and indirect evidence of causation. The second amended complaint alleges a clear pattern of ongoing antagonism directed by Defendants at the Plaintiff in the wake of her mother's complaints. Most startlingly, Defendants encouraged Plaintiff, then a high school freshman and the only African American student in her year, to leave Pennridge High School or seek institutionalization when she complained of harassment. In doing so, Defendant demonstrated its lack of concern for Plaintiff's education and hostility to her presence in the aftermath of her reports, a more than plausible explanation for its adverse actions. Additionally, Defendants' failure to discipline or even investigate Plaintiff's harassers, (Second Am. Compl. at ¶¶ 25, 26), constitutes circumstantial evidence of animus from which the court can reasonably infer a causal connection – and, on a motion to dismiss, should. Santiago v. Warminster Twp., 629 F.3d 121, 128 (3d Cir. 2010).

Although Plaintiff has established the three components of a prima facie case of retaliation, Defendants do not proffer a legitimate, non-retaliatory reason for their adverse actions. As a result, dismissing Plaintiff's retaliation claims under Title IX, Title VI, and the PHRA at this stage would be inappropriate.

C. PLAINTIFF STATES A CLAIM FOR DISCRIMINATION UNDER § 1983.

PHS and Individual Defendants are liable under 42 U.S.C. § 1983 for depriving Plaintiff of her equal protection rights under the Fourteenth Amendment as well as 42 U.S.C. § 1981.[5]

[5] "[Section] 1981 is not confined to contractual matters when a governmental entity is involved. Racially motivated misuse of governmental power falls within the ambit of its "equal benefit" and "like punishment" clauses which provide that 'all persons . . . shall have the same right . . . to the full and equal benefit of all laws . . . for the security of persons and property . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties .

Sex- and race-based harassment may violate a student's rights under the Equal Protection Clause. E.g., Hill v. Cundiff, 797 F.3d 948, 978 (11th Cir. 2015); T.E. v. Grindle, 599 F.3d 583, 587 (7th Cir. 2010); Jennings v. Univ. of N. Carolina, 482 F.3d 686, 701 (4th Cir. 2007); Hayut v. State Univ. of N.Y., 352 F.3d 733, 744 (2d Cir. 2003); Gant ex rel. Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 140 (2d Cir. 1999); S.K.,168 F. Supp. 3d at 812; Lee ex rel. E.L. v. Lenape Valley Reg'l Bd. of Educ., No. CIV.A.06-CV-4634(DMC, 2009 WL 900174, at *7 (D.N.J. Mar. 31, 2009). An institution or supervisor employee engaged in deliberate indifference to known sex- or race-based harassment is thus liable under § 1983. *E.g.*, Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989); Shively v. Green Local Sch. Dist. Bd. of Educ., No. 13-3423, 2014 WL 4211100, at *7 (6th Cir. Aug. 27, 2014); DiStiso v. Cook, 691 F.3d 226, 240-41 (2d Cir. 2012); Jennings, 482 F.3d at 701-02; Murrell v. Sch. Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1249 (10th Cir. 1999); Lee., No. CIV.A.06-CV-4634(DMC, 2009 WL 900174, at *7. A student may assert a § 1983 cause of action for discrimination in school in violation of the Equal Protection Clause separate and apart from any Title IX or Title VI cause of action. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 256-58 (2008).

1. PSD is liable under § 1983 for violating Plaintiff's right to equal protection.

Liability under § 1983 for constitutional deprivation may attach to a municipal office if it caused the violation. Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978). A school is liable for an officer's deliberate indifference when the individual has policymaking authority, rendering his or her behavior an act of official government policy. Id. "[A]n official with policymaking authority can create official policy,

---

. . and exactions of every kind, and to no other.'" Hall v. Pennsylvania State Police, 570 F.2d 86, 91 (3d Cir. 1978). "[T]he exclusive federal remedy against state actors for violation of rights guaranteed in § 1981 is 42 U.S.C. § 1983." McGovern v. City of Philadelphia, 554 F.3d 114, 116 (3d Cir. 2009).

even by rendering a single decision." McGreevy v. Stroup, 413 F.3d 359, 367-68 (3d Cir. 2005) (emphasis added) (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81) ("[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."). "[E]ven one decision by a [state official], if [he or she] were a final policymaker, would render his or her decision [agency] policy." Id. at 368.

Plaintiff's complaints by her mother of racial and sexual harassments were reported to the two Individual Defendants, principals at PHS, neither of whom took remedial action by investigating the harassment, disciplining Plaintiff's harassers, or otherwise attempting to stem the abuse. PSD's policy grants unreviewable discretion to its principals in resolving harassment complaints, Second Am. Compl. at ¶40, thereby rendering the Individual Defendants Creeden and Schoonover final policymakers in those matters. See Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1292-93 (11th Cir. 2004) (holding that school principal was final policymaker when there was no opportunity for meaningful review of his disciplinary decisions by School Board); Smith ex rel. Lanham v. Greene County Sch. Dist., 100 F. Supp. 2d 1354, 1361 (M.D. Ga. 2000) (holding that school principal was final policymaker when district authorized her to impose disciplinary action without any formal system of review). As a result, the Individual Defendants' deliberate indifference, demonstrated supra, constituted an official policy of deliberate indifference in violation of Plaintiff's constitutional rights.

2. Individual Defendants are liable under § 1983 for violating Plaintiff's right to equal protection.

When a plaintiff brings a § 1983 claim against a defendant in his or her individual capacity, the plaintiff must establish that the defendant had "personal involvement in the alleged wrongs." Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). Personal involvement can be demonstrated through "allegations of personal direction or of actual knowledge and

acquiescence." Id. Multiple circuits have held that § 1983 liability of public officials for deliberate indifference to sexual harassment by their subordinates extends to principals or teachers who knew of sexual harassment by a student and acquiesce in that conduct by refusing to reasonably respond. *See, e.g.*, Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1135-36 (9th Cir. 2003) (finding sufficient evidence of deliberate indifference by defendants who failed to investigate sexual orientation harassment complaints, discipline those accused of harassment, and/or take further action in light of knowledge that previous remedial steps were inadequate); Murrell, 186 F.3d at 1250 (holding that defendants who failed to supervise student with known history of inappropriate sexual behavior and to take adequate action in response to his sexual assaults of plaintiff could be liable). See also Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation, 49 F.3d 1490, 1495-96, 1508 (11th Cir. 1995) (holding that the record was sufficient to support § 1983 liability against a defendant who was aware of multiple complaints of sexual harassment against the same subordinate and dropped an investigation to await further misconduct by the harasser). Plaintiff has convincingly alleged, supra, that the Individual Defendants were repeatedly informed of the harassment and were deliberately indifferent to these reports.

Defendants erroneously claim that the Individual Defendants cannot be held liable because "[t]here are no allegations that Defendants made any racial or sexual comments about Plaintiff that would impute liability. There are no allegations that Defendants took any actions that were racially or sexually motivated." Defs.' Mem. in Supp. of Motion to Dismiss at 23. However, **that is not the standard for liability**. Instead, allegations of actual knowledge and acquiescence is sufficient for liability for a § 1983 claim, Rode, 845 F.2d at 1207, and that standard is met here.

D. PLAINTIFF STATES A CLAIM FOR RETALITION UNDER § 1983.

PSD and Individual Defendants are liable under 42 U.S.C. § 1983 for depriving Plaintiff of her free speech rights under the First Amendment by retaliating against her for her constitutionally protected speech – that is, her reports of harassment. "In order to plead a retaliation claim under the First Amendment, a plaintiff must allege: (1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." Thomas v. Indep. Twp., 463 F.3d 285, 296 (3d Cir. 2006). Plaintiff has sufficiently alleged each prong. The second and third requirements, respectively, mirror the requirements for an adverse action and causation for a retaliation claim under Title IX and Title VI, discussed supra. Defendants' open hostility to Plaintiff after her reports and refusal to provide a transcript could easily deter a student or parent from speaking out about harassment. Their naked contempt for Plaintiff and her continued presence at PHS – most explicit when administrators urged the 14-year-old to transfer to a new school – makes clear the causative link.

Therefore the only remaining question is whether Plaintiff's reports to PHS administrators constitute constitutionally protected speech. Surely they do. See S.K., 168 F. at 808 (W.D. Pa. 2016) ("Plaintiff's complaints to defendant concerning the failure to eradicate or otherwise control the discrimination being perpetrated within the school environment seemingly are entitled to protection under the First Amendment."). "[E]xcept for certain narrow categories deemed unworthy of full First Amendment protection–such as obscenity, 'fighting words' and libel–all speech is protected by the First Amendment." Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 282–83 (3d Cir. 2004).

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendants' motion to dismiss the Second Amended Complaint must be denied.

Respectfully submitted,

/s/ Olugbenga O. Abiona

Olugbenga O. Abiona, Esquire
1433 South 4th Street
Philadelphia, PA 19147
(215) 625-0330
Attorney ID. #57026

/s/ Neena Chaudhry

Neena Chaudhry
National Women's Law Center
11 Dupont Circle NW
Washington, DC 200036
(202) 588-5180
Admitted Pro Hac Vice

/s Adaku Onyeka-Crawford

Adaku Onyeka-Crawford
National Women's Law Center
11 Dupont Circle NW
Washington, DC 200036
(202) 588-5180
Admitted Pro Hac Vice

Attorneys for Plaintiff

Dated: January 19, 2017

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Plaintiff's Memorandum of Law in Opposition to Defendants' Rule 12 (b)(6) Motion to Dismiss the Second Amended Complaint was filed electronically with the Court today and is available for viewing and downloading by the Defendants from the ECF system.

/s/ Olugbenga O. Abiona

Olugbenga O. Abiona, Esquire

Dated: January 19, 2017