No. 21-12562

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

A.P.,

Plaintiff-Appellant,

v.

Fayette County School District et al.,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Northern District of Georgia
Case No. 3:19-cv-00109-TCB, Hon. Timothy C. Batten

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October 15, 2021

No. 21-12562

A.P., Plaintiff-Appellant

v.

Fayette County School District et al., Defendants-Appellees

CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 26.1-1, Plaintiff-Appellant A.P. states that the following people and entities have an interest in the outcome of this appeal:

A.P.

Armour, Curtis, Jr.

Artrip, Eric J.

Barrow, Joseph, Jr.

Batton, Timothy C., U.S. District Judge

Buechner, William H., Jr.

Chandy, Sunu

Chaudhry, Neena

Cole, Alexandra "Sachi"

Deakins, Kyle A.

Fayette County School District

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October 15, 2021

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant A.P. requests oral argument. This case involves a lengthy record and key disputes of material fact. Argument will allow the Court to investigate the relationship between the facts and the properly defined elements of A.P.'s Title IX and Equal Protection Clause claims. Argument would also aid the Court in understanding the distinctions between A.P.'s Title IX deliberate-indifference discrimination and retaliation claims.

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INTRODUCTION

When A.P.—a sixteen-year-old student with an Individualized Education Program—told school officials that she had been choked, slammed against a wall, and forced to give another student oral sex on campus, the officials responded by making things worse. Instead of launching a Title IX investigation, Assistant Principals Curtis Armour and Brandi Johnson and Principal Dan Lane told A.P. that "it looked like you liked it," detained her in In-School-Suspension, suspended her for ten days, and promised to prosecute her before a school-district tribunal for engaging in "sexual impropriety" in violation of Defendant Fayette County School District's Code of Conduct.

At the tribunal, A.P. explained that she had been attacked and forced to perform oral sex. Acting as a prosecutor, Principal Lane characterized the assault as A.P. "giv[ing] another student a gift." Without finding whether A.P. had consented or been coerced into sexual conduct, the tribunal imposed the maximum punishment available for violations of the Code of Conduct's prohibition on "sexual impropriety": expulsion. A.P. could not attend the alternative school that the District typically makes available to expelled students because the District sent her assailant to the same school. Since reporting the assault, A.P. has not been able to complete her high school education.

A.P. sued under Title IX and the Equal Protection Clause to recover for the harm Defendants inflicted on her after she reported the sexual assault.

On Defendants' motion for summary judgment, the district court was required to resolve factual disputes in A.P.'s favor and construe inferences against Defendants. But in considering whether Defendants acted with deliberate indifference, thus discriminating under Title IX, the court ignored that Defendants knew "there might have [been] a rape in our school," yet responded by expelling A.P. without determining whether she had consented to perform oral sex.

The district court's failure to view these facts in A.P.'s favor also infected its Title IX retaliation and equal-protection analysis. It is an understatement to say that suspending or expelling a student who reports an assault is conduct likely to have a chilling effect on Title IX protected activity. And genuine disputes of material fact remain over whether the District's policy of punishing students who engage in sexual conduct on campus without considering consent violates the Equal Protection Clause.

In sum, viewing the facts in A.P.'s favor as required, Defendants' punitive response to A.P.'s report was unlawful, and the district court was wrong to conclude otherwise. This Court should reverse.

STATEMENT OF JURISDICTION

A.P. sued Defendants under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and 42 U.S.C. § 1983. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1343 and 1331. The district court granted summary judgment to Defendants as to all claims and all parties on

June 28, 2021. App. III at 1285. The notice of appeal was timely filed on July 26, 2021. *Id.* at 1287. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

Title IX and the Equal Protection Clause prohibit discrimination based on sex. A.P. reported to school officials that another student, J.B., choked her and forced her to perform oral sex. Defendants did not treat A.P.'s report as a Title IX report. Instead, they suspended and expelled her without determining whether she had consented or been forced to perform oral sex.

This appeal presents three issues:

I. Whether there is a genuine dispute as to any material fact that, in violation of Title IX, Defendants were deliberately indifferent to A.P.'s report that she was choked twice, slammed against a wall, and forced to perform oral sex on another student.

II. Whether there is a genuine dispute as to any material fact that Defendants retaliated against A.P. for reporting her assault in violation of Title IX.

III. Whether there is a genuine dispute as to any material fact that (a) Defendant Lane, in his individual capacity, discriminated against A.P. based on her sex by responding to her report with deliberate indifference in violation of the Equal Protection Clause; and (b) that the District itself violated the Equal Protection Clause by not distinguishing between reports of consensual and nonconsensual sexual conduct in its disciplinary code,

failing to train employees, and imbuing Lane with final policymaking authority to punish A.P. for reporting an assault.

STATEMENT OF THE CASE

I. Factual background

As the district court should have done, this Court must construe the evidence and draw all permissible inferences in the light most favorable to A.P., the nonmoving party. *See Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos.*, 607 F.3d 742, 745 (11th Cir. 2010).

A. J.B. targets and assaults A.P.

1. A.P. had just started her second year at Fayette County High School when a classmate, J.B., approached her at school and asked why she "looked so lonely." App. III at 967. The two students vaguely knew each other from freshman year but had not spoken in the new school year. App. II at 765; App. III at 965-67. J.B. asked A.P. for her Instagram handle, and they began messaging. App. III at 967-70. The next day at school, when J.B. brought up the topic, A.P. repeatedly made clear that she wasn't interested in performing oral sex on J.B. or anyone else. App. II at 975. When J.B. pressed further, despite A.P.'s obvious disinterest, she responded, "how would you like it if something was going down your throat?" *Id.*

The following day, J.B. told A.P. to stay after school. App. III at 973. If she had known what J.B. was going to make her do later that day, she would have left. App. II. at 759. But she didn't know, so she stayed, starting her

afternoon in a classroom completing extra-credit work. *Id.* at 735. J.B. found her in the classroom and tried to convince her to leave with him. App. III at 973-74. He left the room, and messaged A.P. to "act like" her mom had arrived to pick her up so that she could exit the room with him. *Id.* at 839-40, 974. Fending J.B. off, A.P. messaged him "my mom isn't here." *Id.* at 974. But J.B. continued his pursuit. He lingered in the hallway for forty minutes, sending A.P. a flurry of messages urging her to meet him. *Id.* at 839-40.

2. A.P. eventually went to meet J.B., thinking "he just wanted to talk or hang out." App. II at 745. Surveillance footage captures the uneventful parts of their interaction. App. III at 940. When they are visible, at the start of the footage, J.B. and A.P. embrace, kiss once, and hold hands. *Id.* at 940-41, 946. A.P. walks down the hallway a few times. App. II at 739; App. III at 941. But because of the camera's position, the students are mostly not in view. *Id.*

Towards the end of their conversation, and off camera, J.B. asked A.P. "over and over and over again" to "give him head." App. II at 751. A.P. "kept telling him no," but J.B. didn't stop. *Id.* He said, "if you want to be my girl, you would do it," and A.P. answered, "why do I have to give you head to be your girl." *Id.*

As A.P. continued to resist, the harassment turned violent. J.B. unbuckled his pants and grabbed her arm to pull her towards him. App. II at 752. He choked her twice—the second time, so roughly that A.P. fell against the wall and onto the floor. *Id.* at 753. "[I]n shock," A.P. sat down. *Id.* at 758. J.B. again told A.P. to "give him head." *Id.* Even when she responded "[y]ou hurt me,"

J.B. never relented. *Id.* A.P. repeatedly told J.B. she didn't want to, but he insisted. App. III at 975. She thought to herself, "[h]e's already choked me," so she eventually performed oral sex on him for a few seconds. App. II at 758.

After the assault, A.P. felt "disgusting." App. II at 759. She was angry, hurt, and in shock. *Id.* Despite this, A.P. tried to be nice to J.B., including by hugging him before packing up her belongings, because he was popular and often started rumors about people, so she didn't want to put herself at further risk by upsetting him. *Id.* at 763.

The next day, A.P. remained upset about the assault and worried about potential fallout. App. II at 633, 767-68. So, she messaged J.B. to check that "everything was okay" and that "he wouldn't tell anybody what happened." *Id.* at 764-65. J.B. eventually responded: "Stop texting me," then, "Don't look at me or speak to me." *Id.* at 765. A.P. was already distraught that he made her do "something [she] didn't want to do the day before," and now he was "act[ing] like a fucking asshole." *Id.* at 766.

3. At school, Aminah Mitchell, a teacher A.P. trusted, noticed that A.P. "was about to cry." App. II at 633. When Mitchell spoke with her privately, A.P. lowered her guard, began crying, and told Mitchell that J.B. had "put his hand around her neck" and "made her do things that she didn't want to do." *Id.* at 633-34, 768. From this information, Mitchell understood that A.P. had been assaulted. *Id.* at 623, 636-37. But because the School District never trained Mitchell on her responsibilities for when a student reported peer-on-

peer sexual harassment, App. III at 1125, Mitchell did not contact the Title IX coordinator and instead only suggested that A.P. speak to a counselor. App. II at 636. A.P. "didn't want to go through all this or talk to anyone," including the counselors. *Id.* at 769.

B. School officials launch a disciplinary inquiry and punish A.P.

1. Counselors. To connect A.P. with a counselor, Mitchell called the counseling office hoping to speak to the Lead Counselor, Jessica Maddox. App. II at 625, 638. But Maddox was busy, so Mitchell spoke instead with Jazzmon Parham, a new hire. *Id.* at 638, 673. Mitchell relayed A.P.'s report to Parham and "mentioned specifically the comment she made about [J.B.'s] hand around her neck." *Id.* at 638-39, 681. Although the school's Code of Conduct states that students "may [] report harassment or discrimination to their school counselor," *id.* at 476, the counselors were not trained in dealing with student-on-student sexual assault or following Title IX procedures. *Id.* at 678-79, 696; App. III at 870.

Parham called Assistant Principal Curtis Armour, believing the school was responding to a case of sexual assault. App. I at 162, 345-46; App. II at 463-64, 682-83. Principal Dan Lane remembers Parham informing Armour that "there might have [been] a rape in [the] school." App. I at 345-46. Yet Armour also did not contact the school's Title IX coordinator. *Id.* at 149.

Instead, he advised Parham to get a female counselor to interview A.P. and report back. *Id.* at 162.[1]

Parham questioned J.B., who lied, denying that he had been "physically involved with a student at the school." App. II at 682. Separately, Jen Travis, another counselor, questioned A.P. *Id.* Parham joined A.P.'s questioning after speaking to J.B., and A.P. explained to both counselors that she "did something [she] didn't want to do." *Id.* at 770. The counselors described A.P. as appearing both "upset" and "giggly" at different points. *Id.* at 684; App. III at 858. If A.P. was giggling, it was because she was uncomfortable with being questioned. App. II at 770. As Travis herself acknowledged, one might expect student victims of sexual assault to appear giggly in such a situation. App. III at 933.

When Travis promised A.P. that anything she said would be kept confidential and asked A.P. if she would be more comfortable writing down what had happened to her, A.P. "opened up more." App. II at 770. A.P. then wrote "head" (meaning oral sex) on a sticky note to explain what J.B. had made her do. *Id.*; App. III at 857. However, A.P. refused to disclose J.B.'s name: she didn't want to get him in trouble because she "do[esn't] like confrontation" and was worried about how J.B. would respond. App. II at 771. A.P.'s fears about what J.B. might do next weren't unfounded: after

[1] Since leaving Fayette County, Armour has been trained to contact a Title IX coordinator "in the beginning" following a report of nonconsensual sexual contact. App. I at 149, 162, 174.

school officials questioned him, J.B. sent A.P. a variety of antagonistic messages about her "snitch[ing]" on him. App. III at 844.

According to A.P., Parham asked her whether the perpetrator was J.B. because "other students ha[d] complained about [J.B.]." App. II at 771. After confirming Parham's assumption, A.P. described J.B. as a "fuck boy," meaning he "fucks with different girls and act[s] like he's only fucked with one." *Id.* at 772.

Parham asserts that he asked A.P. whether she was made to "do something [she] didn't want to do, or" whether she did "something [she] wouldn't normally do because she liked" J.B. App. II at 684. He recalls that she "responded that she liked him, she did something she wouldn't normally do." *Id.*; App. III at 859. But, in fact, that exchange never happened. App. II at 772. A.P. testified that Parham never asked this question, and that A.P. never told Parham that she did anything because she was "down" for J.B. *Id.* Instead, A.P. consistently told the counselors that she had been forced to do "something [she] didn't want to do." *Id.* at 770-71, 776; App. III at 931, 936.

Despite A.P.'s unwavering account, the counselors concluded that the school was "dealing with a consensual sexual act." App. II at 685; App. III at 863, 867-68. As Travis later acknowledged, their opinion was "not informed by any academic research or training." App. III at 868. Parham relayed to Maddox his conclusion that A.P. had performed oral sex on J.B. without mentioning coercion. *Id.* at 862. Maddox then repeated the counselors'

determinations to Armour. App. I at 163-64. Based on Maddox's report, Armour apparently believed that the assault was consensual. *Id.* at 163.

A.P. spoke with Parham again the next morning. App. II at 690-91. Though Parham later acknowledged that what A.P. shared in that conversation led him again to believe that there had been *non*consensual sexual activity on campus, he "would not let her talk to [him] about the details of the situation since it was a discipline matter." *Id.* at 693.

Neither Parham nor Travis contacted the school's Title IX coordinator. App. II at 677; App. III at 864. They did not even know who the coordinator was. *Id.*

2. Assistant principals. By Friday morning, A.P.'s report had become "a discipline matter," App. II at 691: School officials treated A.P. as if she had been accused by a third-party witness of engaging in "sexual improprieties" on campus in violation of the school's Code of Conduct. App. I at 149-51, 330. Based on his conversation with Maddox, Armour decided the sexual act was consensual despite acknowledging that Maddox's description conflicted with Parham's initial report of events, which relayed Mitchell's account, and that A.P. had *herself* reported the assault. *Id.* at 164-65, 173. Assistant Principals Armour and Brandi Johnson then spoke directly with Mitchell, who shared with them that A.P. was made to do something that she didn't want to do. *Id.* at 173.

Johnson pulled A.P. out of her first-period class and took her to Armour's office. App. II at 774. Because she "just want[ed] everything to be done with,"

A.P. would not answer questions relating to her report. *Id.* at 775. The Assistant Principals then confiscated A.P.'s phone and placed her in In-School Suspension. App. I at 166; App. II at 775. A.P. was prohibited from returning to class and was not given her classwork. *See* App. I at 166; App. II at 775.

While A.P. was detained, Armour and Johnson questioned J.B. App. I at 167, 277. At first, J.B. said that he had met up with A.P. for "a birthday present" and that "she put her hands in his boxer shorts, but they didn't do anything." *Id.* at 277. The Assistant Principals determined he was lying. *Id.* at 278. J.B. eventually explained where the encounter had taken place. *Id.* at 283.

With A.P. still in In-School Suspension, the Assistant Principals located and reviewed the surveillance video. App. I at 167. As described above (at 5), the video shows a hallway adjoining the area where A.P. was choked and does not show any sexual contact. *Id.* at 168, 283-84.

When the Assistant Principals brought A.P. back in for continued questioning, they confronted her with the video. App. II at 775. Because she was telling the truth about what had happened to her and thus believed the video would corroborate her account, A.P. asked if they had "see[n] [J.B.] choke [her]." *Id.* Johnson responded that "it looked like you liked it or wanted it." *Id.* A.P. then confirmed again that "oral sex" had taken place, App. I at 285, but emphasized that she "didn't want to" and that she only did it because J.B. had grabbed her by the neck. App. II at 548-49. The

Assistant Principals did not consider whether other evidence might have corroborated A.P.'s specific and consistent report. For example, they never consulted J.B.'s lengthy disciplinary record, which was easily available and refers to his history of sexually harassing female students and teachers. App. I at 171; *see also* App. II at 420-39.

The Assistant Principals put A.P. back in In-School Suspension, but when she saw that J.B. was already in the room, A.P. asked to be taken elsewhere. App. II at 775. She was placed in Parham's office with nothing to do, "like [she] was in trouble." *Id.* Based on their conversations with J.B. and A.P., and specifically that the students consensually met up and that the video did not show A.P. attempting to escape J.B., Armour and Johnson concluded that the sexual act had been consensual. App. I at 174, 286-88, 296. Johnson denies that A.P. told her that she did not want to perform oral sex on J.B.—which A.P. disputes—but testified that even if A.P. had said "she was forced to have oral sex" with J.B., she "still would have been punished." *Id.* at 295. In Johnson's view, whether A.P. reported sexual assault or not was irrelevant because A.P. and J.B. "consensually met up," so Johnson would still have determined that the students "consensually participated in the act" based on video showing the students before and after, but not during, the assault. *Id.*

Johnson and Armour were unable to recall any details of their Title IX training (which, in any case, was focused solely on faculty harassment, not peer-on-peer sexual harassment, *see* App. III at 1125). App. I at 158, 269-70. And, like the counselors, neither of them knew how to respond to reports of

sexual harassment or who the school's Title IX coordinator was. *Id.* at 149, 158, 255, 269, 273, 279.

Armour told Lane an "oral sex transaction [had] tak[en] place." App. I at 170. Although he knew that Parham had once believed A.P. had been raped, Lane accepted the conclusion that the assault had been consensual without further inquiry and without speaking to A.P. *Id.* at 345-46; App. II at 781. Relying "especially" on the students' interactions in "the last ten minutes of the video," Lane told Armour "to assign the discipline for the … act." App. I at 170-71, 344. The Assistant Principals thus suspended A.P. for ten days and told her she would be referred to a tribunal hearing. App. II at 775.

No one ever informed the Title IX coordinator, Mike Sanders, that A.P. had made a Title IX report. *See* App. I at 327-28; App. III at 1125. Johnson stated that it was Lane's job to contact the Title IX coordinator at Fayette County Schools. App. I at 280, 286. But Lane said otherwise, testifying that "all assistant principals who do investigations would have [the] responsibility" of making sure that Title IX is complied with within the school. *Id.* at 327, 331. Though Lane did eventually contact Sanders after assembling a tribunal to prosecute A.P., Sanders was not contacted in "his role as a Title IX coordinator." *Id.* at 328. Lane did not disclose that A.P. had reported being grabbed by the throat. *Id.* at 327; App. III at 1126. Had Lane accurately described A.P.'s report, Sanders acknowledged that he would have felt obligated to carry out a Title IX investigation. App. III at 1126.

C. A disciplinary tribunal expels A.P.

Lane charged A.P. with allegedly violating Rule 28 of the Code of Conduct and recommended that she be expelled. App. III at 890-91. A disciplinary tribunal heard the case against A.P. In his opening argument for the school, Lane maintained that he would "prove with surveillance camera video and testimony of several FCHS staff members that [A.P.] violated … the Fayette County School's code of conduct by committing sexual impropriety in our building." *Id.* at 890. Lane never addressed whether A.P. consented or was forced to engage in sexual conduct, *see id.* at 884-1000, even though his contemporaneous notes show that A.P. told the Assistant Principals that J.B. grabbed her neck and "forced [her] to do something she didn't want to do." App. II at 544, 547.

Lane relied on the schools' video surveillance, even while admitting the serious limitation that "[t]here's a lot of time on the 90-minute video where you don't see the two students." App. III at 895. Mitchell, Travis, Parham, and Armour also testified against A.P. *Id.* at 886. In her testimony, A.P. again reiterated that she did not willingly engage in oral sex, that she repeatedly told J.B. no, and that J.B. choked her. *Id.* at 975-76. Nonetheless, in closing argument, Lane characterized the sexual assault as A.P. choosing "to give another student a gift" and recommended A.P.'s expulsion. *Id.* at 986, 994-95.

The tribunal found that A.P. violated the Code of Conduct's rule banning "sexual improprieties," which, remarkably, makes no mention of consent.

App. II at 481, 589-90. Thus, in adopting Lane's recommendation of a "substantial punishment"—expulsion for the remainder of the 2017-18 school year, App. III at 995, 998—the tribunal did not make any finding regarding consent, *see id.* at 998-99.

A.P. was formally given the option to attend an alternative school, but because J.B. would also be attending that school, A.P. would not be safe attending. *See* App. II at 589-90. It is also unclear from the record whether the alternative school could have met A.P.'s educational needs given that she had a disability and an Individualized Education Program under the Individuals with Disabilities in Education Act. *Id.* at 592.

A.P. appealed the tribunal's decision to the Fayette County School District Board. App. I at 221-22. Ted Lombard, the tribunal hearing officer, untruthfully told Sanders that A.P. testified that she had consented to oral sex. App. III at 1136-37. Sanders relayed this false information to School District Superintendent Joseph Barrow. App. I at 232-33. Rather than reviewing the hearing transcript himself, Barrow recommended that the School Board uphold A.P.'s expulsion based on Lane's retelling and "videotape segments." *Id.* at 222, 233.

A.P. then appealed to the State Board of Education, arguing, in part, that the School District violated Title IX. App. III at 1176. The Board upheld the tribunal decision. *Id.* The Board explicitly stated that "[o]n its face, Rule 28"—the code-of-conduct rule that A.P. was charged with violating—"does not require the Local Board to show evidence of intent." App. III at 1178. But

it concluded that "to the extent that [A.P.] has a Title IX claim," the Board did "not have jurisdiction to hear it." *Id.* at 1179.

II. Proceedings below

A.P. sued Defendants—Barrow, Lane (in his individual capacity), Armour, Johnson, and the School District—contending, as relevant here, that Defendants were deliberately indifferent to her report and retaliated against her in violation of Title IX and the Equal Protection Clause. App. I at 16, 33-44. The district court granted Defendants' motion for summary judgment and dismissed A.P.'s claims. App. III at 1285.

A. The district court held that A.P.'s Title IX discrimination claim failed because the harassment A.P. experienced was not "severe, pervasive, and objectively offensive," and Defendants' response to A.P.'s report was not clearly unreasonable. App. III at 1276-77. As to whether Defendants had the requisite actual knowledge to be held liable under Title IX, the court focused on Defendants' lack of notice that J.B. posed a risk to A.P. *before* the assault, without addressing that A.P.'s post-assault report put Defendants on notice of their Title IX obligations.[2] *Id.*

[2] Defendants also argued that A.P. was collaterally estopped from arguing that J.B. forced her to perform oral sex. App. III at. 1275. A.P. disagreed, explaining that her disciplinary hearing was held under O.C.G.A. §§ 20-2-752, 20-2-753(a), which does not preclude other claims, and that the tribunal did not make any finding regarding consent. *Id.* at 1011-12. The district court assumed without deciding that collateral estoppel did not apply. *Id.* at 1276.

B. As to the Title IX retaliation claim, the district court did not address the evidence that A.P.'s report was Title IX protected activity, that Defendants responded by taking actions that could have dissuaded a reasonable student from reporting sexual harassment, or that Defendants punished A.P. only because she brought the assault to their attention. App. III at 1279. Instead, the court accepted Defendants' argument that they punished A.P. for violating the Code of Conduct and concluded on that basis that they had not retaliated against A.P. *Id.*

C. The district court rejected A.P.'s equal-protection claims first by suggesting that A.P. had not shown a violation of her constitutional rights. App. III at 1281.

1. The court also held that Lane was entitled to summary judgment because A.P. had not demonstrated that he "acted with deliberate indifference to known sexual harassment," App. III at 1285, and, in any case, "would be entitled to qualified immunity," *id.* at 1284.

2. As to municipal liability, the court did not address A.P.'s claim, *see* App. III at 1029, 1032-33, that the District has a policy of treating consensual and nonconsensual conduct the same. On A.P.'s failure-to-train claim, the court held that the District neither knew nor should have known that "more, different, or better training was needed." *Id.* at 1283-84. Finally, the court wrote in a footnote that Lane categorically could never have acted as a District policymaker. *Id.* at 1284 n.7.

III. Standard of review

This Court reviews de novo a district court's grant of summary judgment, applying the same legal standards as the district court. *Newcomb v. Spring Creek Cooler, Inc.*, 926 F.3d 709, 713 (11th Cir. 2019). This Court must consider "all the evidence, and make all reasonable factual inferences, in the light most favorable to" A.P. *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1311 (11th Cir. 2001). It may not "make credibility determinations, nor weigh the parties' evidence." *Id.*

SUMMARY OF ARGUMENT

I. Under Title IX, a school district is liable when it is deliberately indifferent to known reports of severe, pervasive, and objectively offensive sexual harassment—that is, when it responds to reported harassment in a clearly unreasonable manner. Here, genuine disputes of material fact remain as to whether Defendants violated Title IX's anti-discrimination guarantee when they failed to treat A.P.'s report as one of sexual assault, then punished her. Thus, the district court erred in granting summary judgment on A.P.'s Title IX discrimination claim.

II. A reasonable jury could also conclude that Defendants violated Title IX by retaliating against A.P. because she reported sexual assault. The district court should have considered whether, viewing the facts and drawing reasonable inferences in A.P.'s favor, A.P.'s report was protected activity and whether, because of that report, Defendants took actions against A.P. that could have dissuaded a reasonable student from reporting a sexual

assault. Instead, even though the underlying truth of a Title IX report is *not* a relevant question for a retaliation claim (and, in any case, A.P. was in fact assaulted), the district court granted summary judgment on A.P.'s retaliation claim for the same reason it granted summary judgment on her discrimination claim. It concluded, despite material evidence to the contrary, "that A.P. engaged in consensual oral sex." App. I at 101; App. III at 1276. The court thus erred both in accepting Defendants' version of events as true and in failing to apply the correct retaliation standard to the facts properly construed in A.P.'s favor.

III. The district court again misapplied the summary-judgment standard when it determined that A.P.'s Section 1983 claims failed because she had "not show[n] an underlying deprivation of her constitutional rights." App. III at 1281-85. A.P. was deprived of her right to be free from sex discrimination as secured by the Constitution.

A. Moreover, genuine disputes of material fact remain as to whether Lane, individually, acted with deliberate indifference to the inadequate inquiry into A.P.'s report despite the clearly established equal-protection right guaranteeing such an investigation.

B. Because a reasonable jury could conclude that the District (1) had an official disciplinary policy that treats reports of consensual and nonconsensual sexual conduct the same; (2) failed to train its employees to conduct constitutionally sufficient investigations despite an obvious need for training; and (3) imbued Lane with the authority to make unreviewable

disciplinary decisions against A.P., the district court erred in granting summary judgment to the District on A.P.'s equal-protection claim.

ARGUMENT

I. The district court erred in granting summary judgment on A.P.'s Title IX discrimination claim.

Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Funding recipients are liable for Title IX discrimination when they "engage[] in intentional conduct that violates the clear terms of the statute," either by making "an official decision" to deprive a student of equal access to education on the basis of sex, or when they have actual knowledge of "severe, pervasive, and objectively offensive" peer-on-peer sexual harassment yet respond with deliberate indifference, meaning they have made "an official decision … not to remedy" the harassment. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633, 642, 650 (1999). Here, the District is a federal-funds recipient, and, construing the facts in A.P.'s favor, school officials knew about her assault. App. II at 768-770, 775; App. I at 170. Not only were they deliberately indifferent to her report, they also decided to *punish* her in response. *See* App. III at 953; App. II at 649. For the reasons described below, the District may be liable for this Title IX discrimination, and the district court was wrong to grant summary judgment.

A. Appropriate school officials had actual knowledge of A.P.'s harassment.

When a student reports harassment to a school official with authority to institute corrective measures or address the matter, the school district has actual knowledge for purposes of Title IX. *See Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1255-57 (11th Cir. 2010); *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 267 (4th Cir. 2021).

The district court erroneously focused on whether, based on J.B.'s pre-assault conduct, the school had sufficient notice of a substantial risk of harassment *before* J.B. sexually assaulted A.P. *See* App. III at 1276. But when a student seeks recovery for a school's unlawful *response* to a report of peer-on-peer harassment, as opposed to holding a school liable for its inaction to an assailant's pre-assault conduct, she need not demonstrate that her assailant's prior instances of sexual harassment put the school on notice that he might assault her in the future. *See Fairfax Cnty. Sch. Bd.*, 1 F.4th at 265-68. Put simply, Title IX does not require that the assailant be a recidivist for a school to be liable for its response to harassment.

A.P. reported her assault to Mitchell, Travis, Parham, Johnson, and Armour. App. II at 767-770, 774-75. Armour also notified Principal Lane of A.P.'s report. App. I at 170. These adults were appropriate persons with authority to "institute corrective measures" to address the harms A.P. reported. *See* App. I at 162, 270, 372; App. II at 476, 623; App. III at 1131. At a bare minimum, they each could have informed A.P. of her Title IX rights or

informed the Title IX coordinator of A.P.'s report. Construing the facts in A.P.'s favor, as the district court was required to do at summary judgment, school officials had actual knowledge of A.P.'s harassment once she reported her assault during interviews with school officials.

B. Defendants made "official decisions" to deny A.P. education based on sex, including by failing to respond to severe, pervasive, and objectively offensive sexual harassment.

1. The harassment A.P. suffered was serious enough to have a "systemic effect" of denying her equal access to an educational opportunity or benefit, making it inherently severe, pervasive, and objectively offensive. *Davis*, 526 U.S. at 652. Defendants did not argue otherwise and have thus forfeited any claim to the contrary. *See* App. I at 97-98; *Jones v. Sec., Dep't of Corr.*, 607 F.3d 1346, 1353-54 (11th Cir. 2010). In the district court's words: "[t]he *only* alleged sexual harassment by J.B. is that he forced A.P. to have oral sex." App. III at 1276 (emphasis added). The implication that forcing a sixteen-year-old girl to perform oral sex does not constitute severe, pervasive, and objectively offensive harassment cannot be reconciled with Supreme Court precedent. *Davis*, 526 U.S. at 651-52. The district court also erred in focusing solely on the assault and not also on the considerable harassment that surrounded it.

a. Sexual assault and rape are "obviously" categorically severe, pervasive, and objectively offensive because a single instance of either has a systemic effect of denying a student equal access to their education. *Soper v. Hopen*, 195 F.3d 845, 854-55 (6th Cir. 1999); *accord Fairfax Cnty. Sch. Bd.*, 1 F.4th at 274;

Little v. Windermere Relocation, Inc., 301 F.3d 958, 967-68 (9th Cir. 2002). Harassment is "severe" when it is serious—that is, when it involves more than just juvenile behavior among students. *See Davis*, 526 U.S. at 651-52. "Pervasive" means systemic or widespread, *id.* at 652-53; it does not require multiple incidents of harassment because a single incident of sufficiently serious harassment (like sexual assault or rape) can create "a pervasive atmosphere of fear." *Farmer v. Kansas State Univ.*, 918 F.3d 1094, 1105 (10th Cir. 2019); *see also* Pervasive, *Merriam Webster Dictionary* (2021) (defining "pervasive" as "existing in or spreading through every part of something").[3]

Sexual assault and rape themselves are severe violations of a person's bodily autonomy. The sexual nature of the assault isolates and targets someone on the basis of sex, irrevocably altering the circumstances of a student's educational environment. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (establishing that sexual harassment such as a rape alters workplace conditions and thus is actionable under Title VII).

It's true that when a student experiences a single instance of harassment that takes the form of "insults, banter, teasing, shoving, [or] pushing"—actions that might target someone based on their sex, but are mostly rooted in juvenile immaturity—a defendant will not be liable. *Davis*, 526 U.S. at 651-52. That is why, in *Hawkins*, this Court observed that those forms of harassment must generally be more widespread than a single instance of

[3] https://www.merriam-webster.com/dictionary/pervasive

peer-to-peer misconduct to have a "systemic effect" of denying a victim equal access to an educational opportunity or benefit. *Hawkins v. Sarasota Cnty. Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003). But the Supreme Court has itself acknowledged that a single instance of sufficiently severe student-on-student harassment could have a systemic effect. *Davis,* 526 U.S. at 652-53.

In sum, sexual assault and rape are precisely the type of sexual harassment the Supreme Court envisioned as actionable in *Davis*. Sexual assault and rape constitute conduct far more severe than sex-based playground bullying. That may be why, in the proceedings below, the Defendants did not argue that sexual assault is not severe, pervasive, and objectively offensive conduct. *See* App. I at 97-98. They instead argued only that what A.P. described as an assault was, in their view, a consensual encounter, meaning it was not harassment. *Id.*

b. The district court also ignored that this Court analyzes not only the assault underlying a plaintiff's discrimination claim, but also the harassment the plaintiff suffered before and after the assault, to evaluate whether the harassment was severe, pervasive, and objectively offensive. *See Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1298 (11th Cir. 2007). This means that even when harassment occurs over the course of one night or a single day, it is "severe, pervasive, and objectively offensive" if it takes the form of a "continuous series of events," which includes, for example,

targeting the victim, assaulting the victim, and harassing the victim post-assault. *Id.* at 1297-98.

J.B.'s scheme to target, isolate, and ultimately assault A.P. demonstrates a continuous series of events to harass and violate A.P. J.B. singled out A.P. the Monday of the week of the assault because she "looked so lonely." App. III at 967. The following day, he grilled her about oral sex, which is when A.P. first told J.B. "no," that she would not consent to oral sex. *Id.* at 975. The day of the incident, he came into her classroom and tried to pressure her into lying to her teacher so she could leave the classroom with him. *Id.* at 973-74. She ultimately agreed to meet him and consented to kissing and hugging him. App. II at 740. But she was unaware of his intentions to force her to perform oral sex. *Id.* at 759. He then lured her to a secluded area out of view of surveillance cameras and began pressuring her to "give him head." *Id.* at 751. When she refused, he choked her twice, once so hard that he slammed her into a wall. *Id.* at 753. This series of events culminated in J.B. forcing A.P. to perform oral sex. And after A.P. reported her assault, J.B. sent her a series of disparaging texts and initiated a smear campaign against her on social media, furthering the abuse A.P. was subjected to. *Id.* at 765-66, 778-79.

2. As noted earlier (at 22, 24), Defendants don't dispute that sexual assault and rape constitute severe and pervasive harassment under Title IX. Instead, Defendants suggest that because A.P. consented to meeting and kissing J.B., she implicitly consented to performing oral sex on him. App. I at 97. Equally disturbing, they allege that because in the minutes following the assault A.P.

did not look like someone "had just sexually assaulted her," her encounter with J.B. must have been consensual. *Id.* at 98. But that is a clearly unreasonable inference. *See* Michelle Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 Yale L.J. 1940, 1946-53 (2016) (comparing "traditional rape law" with reformed statutes based on modern understandings of rape). There is no legal requirement under Title IX or otherwise that a victim physically fight off an attacker, prove her "chastity," or exhibit distress to establish that harassment was unwelcome because these historical rape-law requirements are inconsistent with survivors' actual experiences. *Id.; see also* U.S. Dep't of Just., *An Updated Definition of Rape* (2012).[4]

After the assault, A.P. was in shock. App. II at 759. And, as the video reflects, she tried to be nice to J.B. in the aftermath because she didn't want to put herself at further risk. *Id.* at 763. Again, he had "already choked" her. *Id.* at 758. This reaction is consistent with how victims of assault tend to behave. In fact, many sexual-assault victims continue to maintain relationships with their attackers following the assault. *See* Patricia L. Fanflik, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?* 13 (2007).

Regardless, the district court was required to construe inferences against Defendants in considering whether a jury could conclude that the

[4] https://www.justice.gov/archives/opa/blog/updated-definition-rape.

harassment A.P. experienced was severe and pervasive. Rather than faithfully apply the summary-judgment standard, the district court erroneously assented to Defendants' false assumptions and stereotypes regarding responses to a sexual assault.

3. In any case, when a school takes discrete discriminatory acts against a student on the basis of sex so as to intentionally bar the student's access to education, violating Title IX's "clear terms," *Davis*, 526 U.S. at 642, the *harasser's* misconduct becomes less relevant. *See* 20 U.S.C. § 1681(a); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114, 115 (2002) (distinguishing between discrete discriminatory acts that violate Title VII's antidiscrimination provision and employee-on-employee harassment that, over time, results in a hostile work environment, violating Title VII). Because Defendants' conduct here—punishing and ultimately expelling A.P.—itself directly "denied" her "equal access" to the "institution's resources and opportunities," *see Davis*, 526 U.S. at 651, A.P. need not establish that the underlying sexual harassment she suffered was "so severe, pervasive, and objectively offensive," that it "undermine[d] and detract[ed] from" her "educational experience." *See id.* Instead, she must show only that Defendants relied on sex-based stereotypes to deny her educational benefits. *See Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1241 (11th Cir. 2016) (explaining in the Title VII context that a defendant may be liable when sex stereotypes factor into the defendant's decision-making process); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989).

Here, A.P. reported that she was sexually assaulted, and school officials suspended and expelled her because in their view, "it looked like [she] liked it or wanted it." App. II at 775. In other words, they punished her because she failed to fulfill traditional sex-based stereotypes about how girls should behave when sexually assaulted by boys. *See* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. Ill. L. Rev. 953, 962-68 (1998). Because A.P. did not try to fight or flee, App. I at 98, she was, in Defendants' view, responsible for being assaulted and deserving of punishment. *See id.*

C. School officials were deliberately indifferent in responding to A.P.'s report of sexual assault.

A school's response to harassment is deliberately indifferent if it "is clearly unreasonable." *Hill v. Cundiff*, 797 F.3d 948, 973 (11th Cir. 2015) (citing *Davis,* 526 U.S. at 648); *Williams*, 477 F.3d at 1295-96 (citing *Davis,* 526 U.S. at 644-45). Inaction in response to reports of sexual harassment amounts to deliberate indifference. *See Williams,* 477 F.3d. at 1296-97; *Hill*, 797 F.3d. at 974.

Here, the school first failed to act at all in response to A.P.'s report of assault. Then the school's "deliberate indifference" towards A.P.'s assault took an even more alarming turn. Instead of simply doing *nothing* to respond to A.P.'s suffering—which would have been serious institutional betrayal in its own right—school officials took affirmative steps to further harm A.P. by punishing her in response to the assault.

1. School officials' inaction was deliberately indifferent.

School officials knew A.P. reported an on-campus sexual assault, App. I at 345-46, yet failed to contact the Title IX coordinator or inform A.P. of her Title IX rights, *Id.* at 149, 327. Instead, they were deliberately indifferent to A.P.'s repeated statements that she had been forced to do something she didn't want to do. The Title IX coordinator admits that a formal Title IX investigation should have been launched. *Id.* at 327; App. III at 1126. Though the assault happened out of view of surveillance cameras, Defendants relied on footage that did not show the assault to conclude that it did not happen. App. I at 174, 296. They accepted J.B.'s ever-changing account over A.P.'s, even though she had no reason to lie and without considering whether other evidence—such as J.B.'s disciplinary record—could have corroborated A.P.'s consistent and specific account. *Id.* at 171; *see* App. II at 420-39. Their "decision to believe [J.B.'s] story over [A.P.'s]—even though [J.B.] had initially lied to them … was likely attributable to bias." *Fairfax Cnty. Sch. Bd.*, 1 F.4th at 273. Further, they ignored evidence that bolstered A.P.'s credibility, including that *she* reported the assault despite not wanting to get J.B. in trouble. App. II at 769-70.

2. School officials relied on misconceptions about how sexual-assault victims behave to justify their inaction.

Defendants based their response to A.P.'s report on myths about how survivors of sexual assault should behave. For example, counselors decided that because A.P. appeared "giggly" during their meeting, her report did not

implicate Title IX. App. II at 684; App. III at 858. Yet Travis, who had interviewed over twenty student sexual-assault victims, admitted that victims might use "giggling" as a coping mechanism after their assaults. App. III at 933. Studies support Travis's testimony: sexual-assault victims frequently respond to their assaults in counterintuitive ways. *See* Fanflik, *supra* at 26, *Victim Reponses to Sexual Assault*, at 8-9. Survivors exhibit a range of emotional reactions in response to their attacks, including rapid mood swings like "crying then laughing," *id.* at 4, which would explain why A.P. was on the verge of tears when discussing her assault with Mitchell but appeared "giggly" in her meeting with school counselors.

Ultimately, rather than investigate the assault objectively, Lane characterized A.P.'s assault as a "gift," and Johnson told her "it looked like you wanted it." App. II at 775; App. III at 986. A jury could conclude that, other than this victim blaming, Defendants took *no action* to respond to A.P.'s report before turning to punitive responses.

3. Defendants were also deliberately indifferent when they decided to suspend and ultimately expel A.P. for being assaulted.

Title IX is meant to ensure that we are "long past the day where victims of sexual assault could find themselves charged with disciplinary violations on account of having been raped." *Doe v. Bibb Cnty. Sch. Dist.*, 688 F. App'x 791, 799 (11th Cir. 2017) (Martin, J., concurring). After just one conversation with school counselors, A.P. became the subject of a disciplinary inquiry.

App. II at 691. At that point, Defendants' only basis for concluding that the assault was consensual was that A.P. appeared "giggly" in her meeting with Travis and Parham. App. III at 858. But again, that was because she was uncomfortable disclosing the details of her assault. App. II at 770.

Following her conversation with counselors, school officials removed her from class the next day and placed her in In-School Suspension. App. II at 774-75. When she was reluctant to talk to them, they confiscated her phone. *Id.* They then reviewed surveillance footage from the time of the assault. App. I at 167, 278. Because she was telling the truth about being assaulted, A.P. believed the video would corroborate her account that J.B. had grabbed her by the neck. App. II at 548, 775. That is why she asked school officials whether they saw J.B. choking her. *Id.* To this, Assistant Principal Johnson responded, "it looked like you liked it or wanted it." *Id.* at 775. Outrageous remarks like this one subjected A.P. to further discrimination by blaming her for being assaulted. They exemplify the harmful narrative that victims of sexual assault are "asking for it," making it difficult for survivors to seek justice for their assaults. School officials then suspended A.P. for ten days before subjecting her to a disciplinary hearing where she was ultimately expelled. App. I at 171; App. III at 998-99. A reasonable juror could easily find a school's decision to suspend and expel a student for engaging in "sexual misconduct" when she had been sexually assaulted to be "clearly unreasonable." *Bibb Cnty. Sch. Dist.*, 688 F. App'x at 799.

Defendants argued below that their response to A.P.'s assault was not deliberately indifferent because five school officials spoke to her following her report. App. I at 99. But none of those conversations were geared at responding to the harm A.P. suffered. For example, Armour and Johnson spoke to A.P. solely as disciplinarians. App. II at 691. Moreover, Title IX does not simply require school districts to do *something* in response to sexual harassment; it instead requires schools to respond in a manner that is not clearly *unreasonable*. *Stinson ex rel. K.R. v. Maye*, 824 F. App'x 849, 859 (11th Cir. 2020) (quoting *Doe*, 604 F.3d at 1263). A reasonable jury could easily find Defendants' choice to disregard A.P.'s account of assault based on their sex-based assumptions about appropriate victim behavior and reliance on video footage that does not show the assault to be clearly unreasonable. In holding that Defendants were not deliberately indifferent to A.P.'s report, the district court again failed to construe the facts in A.P.'s favor, and instead accepted Defendants' version of events: that A.P. consented to performing oral sex despite her unwavering report that she was coerced.

D. The District's response to A.P.'s report of sexual assault prevented her from completing her education.

A school district can be liable under Title IX when its response to a known report of harassment "effectively barred the victim's access to an educational opportunity or benefit." *See, e.g.*, *Williams*, 477 F.3d at 1298. The District first deprived A.P. of her education at Fayette County High School when they suspended and expelled her for reporting her assault. App. I at 171; App. II

at 998-99. The District then sentenced A.P. to the same alternative school as her assailant, further barring her from access to education. App. II at 589-90. Because she could not risk being around someone who violently assaulted her, and the District offered her no other options to complete her schooling, A.P. was forced to withdraw from school altogether. *Id.* A.P. also had an Individualized Education Plan for her disability, and it was not clear if the alternative school would provide her with the necessary accommodations. *Id.* at 591-90. Similarly, she did not have the necessary accommodations to complete her schooling from home. App. III at 1106. As a result, A.P. has yet to complete high school.

II. The district court erred in granting summary judgment on A.P.'s Title IX retaliation claim.

To start, this Court should remand A.P.'s retaliation claim for trial simply because Defendants failed to explain to the district court why they are entitled to summary judgment on that claim. App. I at 101. Their passing statement that the District's actions could not have been retaliation because Defendants "concluded that A.P. engaged in consensual oral sex," App. I at 101, is too unilluminating to avoid a forfeiture, *see APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d 1261, 1270 (11th Cir. 2007), entirely disputed, and flatly wrong. Because the district court simply adopted Defendants' cursory and irrelevant explanation, reversal on the retaliation claim based on forfeiture is appropriate.

Turning to the merits, A.P. may prove retaliation through direct *or* circumstantial evidence. *Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1174 (11th Cir. 2010); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189 (11th Cir. 1997). She has done both. Because the record includes direct evidence that Defendants retaliated against A.P. for reporting being sexually assaulted, the district court erred in granting summary judgment to Defendants. Though circumstantial evidence need not be considered here, the record is also sufficient on that score at summary judgment under the *McDonnell Douglas* burden-shifting framework.

A. Direct evidence shows that Defendants retaliated against A.P. because she reported being sexually assaulted.

A.P.'s retaliation claim survives summary judgment based on direct evidence: Defendants' repeated admission that they expelled her for reporting. In the face of direct evidence, summary judgment cannot be granted for Defendants. *See Mora v. Jackson Mem'l Found.*, 597 F.3d 1201, 1205 (11th Cir. 2010).

Direct evidence is "evidence, which if believed, proves the existence of fact in issue without inference or presumption." *Burrell v. Bd. of Trs. of Ga. Mil. Coll.*, 125 F.3d 1390, 1393 (11th Cir. 1997). A.P.'s case includes the "quintessential" direct evidence of retaliation, *Merritt*, 120 F.3d at 1189: School officials repeatedly admitted that they punished A.P. because of her report. *See Calhoun v. EPS Corp.*, 36 F. Supp. 3d 1344, 1359-60 (N.D. Ga. 2014), *order vacated in part on other grounds*, 2014 WL 12799080 (N.D. Ga. Sept.

15, 2014). When asked if the "only reason [the Assistant Principals] looked for this video is because [A.P.] had made an outcry about somebody doing something to her," Johnson answered "Absolutely." App. III at 953. Likewise, Mitchell testified that if A.P. "hadn't said anything to [Mitchell], she would not have been subject to discipline." App. II at 649; App. III at 953. That testimony, with no inference required, shows cause and effect between A.P.'s report and her punishment.

B. A.P. has also established a retaliation claim under the circumstantial-evidence standard sufficient to survive summary judgment.

Though reversal is required under the direct-evidence standard, which applies here, reversal is also required under the circumstantial-evidence standard. Once a plaintiff establishes a prima facie case of retaliation using circumstantial evidence, the burden shifts to Defendants to articulate a non-retaliatory reason for their actions. *Bryant v. Jones*, 575 F.3d 1281, 1307-08 (11th Cir. 2009). If the defendant does so, the plaintiff must demonstrate that the proffered reason was a pretext to mask discrimination. *Kocsis v. Fla. State Univ. Bd. of Trs.*, 788 F. App'x 680, 686 (11th Cir. 2019).

A plaintiff establishes a prima facie case of retaliation by showing (1) she engaged in statutorily protected expression; (2) she suffered an adverse action; and (3) the protected action caused the adverse action. *E.g.*, *Herron-Williams v. Ala. State Univ.*, 805 F. App'x 622, 628 (11th Cir. 2020). That burden is "not onerous." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981).

Defendants did not dispute below that A.P. engaged in a protected activity (reporting an assault) or that she suffered an adverse action (expulsion, among other discipline). And, as we now explain, the record includes sufficient support for these elements and for A.P. to prove causation using circumstantial evidence at trial.

1. A.P. engaged in statutorily protected activity when she reported that she was "made to do something she didn't want to do" to every school official who questioned her.

Reporting sexual harassment, including assault, is a protected activity. *Kocsis*, 788 F. App'x at 686-87 (citing *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1350 (11th Cir. 1999)). Defendants did not argue otherwise below. *See* App. I at 101. And all of the school officials A.P. spoke to, by Defendants' own admissions, were not only aware of her complaint, but also understood it to allege assault. *E.g.*, *id.* at 344-46. The counselors believed they were responding to a sexual assault, so they communicated to Armour that "there might have [been] a rape in [the] school." *Id.* Armour then told Lane that "a student had made [A.P.] do something that she didn't want to do." *Id.* at 345-46, 344. Lane's contemporaneous notes show Mitchell "said [A.P.] reported" and that A.P. told Armour and Johnson that J.B. grabbed her neck to force her to perform oral sex. App. II at 548.

2. Defendants took materially adverse actions when they placed A.P. in In-School Suspension, suspended her for ten days, and expelled her.

A materially adverse action is conduct that could "dissuade[] a reasonable [student] from making or supporting a charge of discrimination." *Kocsis*, 788 F. App'x at 686; *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). A.P.'s expulsion meets that bar. *See Jefferson v. Sewon America, Inc.*, 891 F.3d 911, 924 (11th Cir. 2018) ("Termination is a materially adverse action."). Indeed, even "the initiation of an internal investigation" constitutes a materially adverse action. *Entrekin v. Panama City*, 376 F. App'x 987, 995 (11th Cir. 2010). Defendants did not argue below (nor could they have) that their punishments would not dissuade a reasonable student in A.P.'s position from reporting a sexual assault. *See* App. I at 101. Defendants treated A.P. "like [she] was in trouble," confiscated her phone, placed her in In-School Suspension, suspended her for ten days, and finally expelled her. App. II at 775. Any one of those actions in a long chain of punishment could dissuade a reasonable student in A.P.'s shoes from telling a trusted teacher something horrible had happened to her.

3. A jury could reasonably conclude that Defendants punished A.P. *because of* her report.

As discussed (at 34-35), the record includes admissions that A.P.'s report triggered Defendants' decision to punish her. On top of that, A.P. has marshaled a "convincing mosaic of circumstantial evidence" supporting an inference of causation. *Herron-Williams*, 805 F. App'x at 630-31. School

officials' knowledge of a complaint at the time they took materially adverse actions supports an inference of causation, as does a close temporal connection. *Kocsis,* 788 F. App'x at 686. As already shown (at 21), A.P. reported sexual harassment to every school official she spoke to, and those officials communicated her report as such to their higher-ups. Defendants knew she was reporting assault, and within twenty-four hours of her complaint, A.P. was not only placed in In-School Suspension, but was also given a ten-day Out-of-School Suspension and referred to a disciplinary tribunal for expulsion proceedings. App. I at 166-67; App. II at 774. Even without the school's admission that punishment directly resulted from A.P.'s report, a reasonable jury could easily infer causation.

4. The District's proffered non-retaliatory reason for punishing A.P. is pretextual.

To rebut the presumption of retaliation, Defendants must advance a nonretaliatory reason for the punishment, and, if they do, A.P. must put forward evidence that could allow a jury to conclude that the reason was pretextual. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 n.8 (11th Cir. 1993) (citing *Burdine*, 450 U.S. at 254 n.7).

The direct evidence of retaliation itself shows that Defendants have not advanced a non-retaliatory reason. As previously discussed, Defendants explicitly said that they would not have punished A.P. if she had not reported. Instead, Defendants' proffered reason admits the retaliation and simply restates their retaliatory motive, couching it in terms of A.P.'s

purported violation of school policies. *See* App. I at 101. Defendants argue that they punished A.P. because she reported what the school viewed as a consensual act in violation of the Conduct Code. App. I at 101. That is a reason, but it is not a nonretaliatory one. *Calhoun*, 36 F. Supp. 3d at 1362. Defendants' argument that their reason was nonretaliatory because they did not believe A.P.'s report to be one of sexual assault is a nonstarter: as explained below (at 40), Defendants' testimony makes clear that they understood A.P. to be describing a sexual assault. More fundamentally, even if no underlying harassment actually occurred, when a school punishes a student because they *reported* harassment, that is still retaliation. *Calhoun*, 36 F. Supp. 3d at 1356.

Moreover, even if we were to accept Defendants' post-hoc justification as a nonretaliatory basis for imposing discipline, summary judgment is inappropriate when a plaintiff has introduced evidence that a defendant's proffered non-discriminatory reason is pretextual. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997). Pretext can be shown at summary judgment by "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Herron-Williams*, 805 F. App'x at 630–31. For example, a close temporal connection between a report and punishment can constitute circumstantial evidence of pretext. *See id.* at 633. Here, each Defendant knew A.P. reported assault, and they immediately began to punish her as a result.

Moreover, the timing of A.P.'s initial punishment alone proves Defendants' proffered "legitimate" reason for punishing A.P. is entirely implausible: Defendants first disciplined A.P. well before they watched the inconclusive video and eventually adopted the logic that A.P. had engaged in "consensual" "sexual impropriety." App. I at 166-67; App. II at 774. They pulled A.P. out of class, did not allow her to return, confiscated her phone, detained her alone in an office, and placed her in In-School Suspension when *all they knew* was that A.P. had reported assault. *See* App. II. at 774; App. I at 166-67. At the time of those punishments, as discussed previously (at 36-37), every official who knew of A.P.'s report understood that they were dealing with a report of sexual harassment yet responded punitively. App. II at 544, 547. And that Defendants punished A.P. before they did anything else alone illustrates that their later reason for punishing her must be pretextual.

III. The district court erred in granting summary judgment on A.P.'s Section 1983 equal-protection claims against Lane and the District.

To establish liability under 42 U.S.C. § 1983, A.P. must first show that she was deprived of a constitutional right. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). The Equal Protection Clause creates a constitutional right to be free from sex discrimination, including sexual harassment like sexual assault. *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1300-01 (11th Cir. 2007); *Cross v. Alabama*, 49 F.3d 1490, 1507-08 (11th Cir. 1995). An "inadequate response to [] known sexual harassment" by a state actor therefore violates the Equal Protection Clause. *Hill v. Cundiff*, 797 F.3d

948, 978 (11th Cir. 2015). And when sufficient evidence exists to support a plaintiff's Title IX deliberate-indifference claim, a reasonable jury could conclude from that evidence that the plaintiff's constitutional right to an adequate response to known sexual harassment has been violated. *See Sauls v. Pierce Cnty. Sch. Dist.*, 399 F.3d 1279, 1288 (11th Cir. 2005).

As discussed above (at 28-32), school administrators were deliberately indifferent to A.P.'s report that she was sexually assaulted. Therefore, A.P.'s constitutional right to equal protection was violated.

With this threshold issue satisfied, A.P. must demonstrate that the right in question was abridged by a person acting under color of state law. *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 49-50. As we now show, Lane was engaged in a discretionary function as a District employee when he oversaw the disciplinary inquiry, and the District is liable for its own acts and those of its policymakers.

A. Lane violated A.P.'s clearly established constitutional right to an adequate response to her report of sexual assault.

1. "'[A] government official … may be liable under [S]ection 1983 upon a showing of deliberate indifference to known sexual harassment.'" *Hill*, 797 F.3d at 978. The plaintiff must show that the "individual defendant 'actually knew of and acquiesced in' the discriminatory conduct." *Id.* Here, Lane was aware of A.P.'s report within twenty-four hours and then reviewed the surveillance video. App. I at 344-46. Despite writing down the apparent inconsistencies between the reported conduct and the Assistant Principals'

conclusions, Lane embraced their opinion that A.P. had consented to J.B.'s advances. *Id.* at 344; App. II 544-553. Lane's reliance on inconclusive video footage underscores the unreasonableness of his conclusion. *See id.*; U.S. Dep't of Educ., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* 9 (Jan. 2001). Moreover, he chose to accept the Assistant Principals' secondhand account of A.P.'s testimony rather than speaking with A.P. directly, and ultimately told the Assistant Principals "to assign the discipline … for the act." App. I at 171, 344. Lane did not contact the Title IX coordinator before he disciplined A.P., and, when he finally did, he did not share A.P.'s repeated statement that she was choked. App. III at 1126. Rather, he "was very adamant" that A.P. admitted "it was consensual." *Id.* at 327; App. III at 1126. That was false. App. II at 772. Lane's knowledge of and active role in the deliberately indifferent response to A.P.'s report of a possible "rape in our school" as a disciplinary matter violated A.P.'s equal-protection right. App. I at 345-46.

2. Although a government official engaged in a discretionary function may be entitled to qualified immunity, *Hill*, 797 F.3d at 978, Lane is not entitled to qualified immunity because he (1) violated a constitutional right that (2) was clearly established at the time of the violation. *Id.* As detailed above, Lane violated A.P.'s equal-protection right to an adequate investigation of her sexual-assault report.

A constitutional right is "clearly established" when there is "(1) case law with indistinguishable facts clearly establishing the constitutional right" or

"(2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right." *Hill*, 797 F.3d at 978-79 (quoting *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291-92 (11th Cir. 2009)). Both exist here.

a. The equal-protection right to an adequate investigation is clearly established by this Court's decision in *Hill*, a case with nearly indistinguishable facts. There, a minor brought a Section 1983 equal-protection claim against the school's principal for acting with deliberate indifference to known sexual harassment. *Hill*, 797 F.3d at 978. This Court reasoned that a jury could find the principal's actions after the on-campus sexual assault amounted to deliberate indifference because he "did virtually nothing in response" when the school's "glaring [policy] inadequacies" came to light and subjected the plaintiff to further discrimination "by depriving her of the opportunity to continue attending [the school]." *Id.* at 978-79.

Lane's actions after J.B.'s assault of A.P. are factually distinct from the *Hill* principal's conduct only in that, while the *Hill* principal did "nothing," Principal Lane did "nothing" to properly respond to her report *and* then also took affirmative steps to subject A.P. to further discrimination. Lane did not correct his subordinates' improper disciplinary approach—based on the Code of Conduct—to A.P.'s report of assault. Quite the contrary: He relayed a sanitized version of events to the Title IX coordinator. Despite these glaring inadequacies in the District's response, there is no evidence that Lane

attempted to ensure proper Title IX reporting of future incidents. Worse yet, he imposed discipline on A.P. because she reported her assault. *See supra* at 36. His decision to pursue A.P.'s expulsion unquestionably "depriv[ed] her of the opportunity to continue attending" Fayette County High School. *Hill*, 797 F.3d at 978-79.

Though the district court reasoned (ostensibly with regard to the "clearly established" test) that "[t]his case is a far cry from *Hill*," App. III at 1285, that conclusion could only possibly hold if the record evidence is construed in Defendants' favor. But A.P. is the non-moving party. Applying the summary-judgment standard, and with the facts of *Hill* in mind, "the unlawfulness" of Lane's antagonistic response is "apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

b. *Hill* not only involved nearly indistinguishable facts, but also held on the qualified-immunity question that "every objectively reasonable government official facing the circumstances" faced by the principal in *Hill* "would know" based on "a broad statement of principle within the" Equal Protection Clause "that the official's conduct" in failing to adequately respond to sexual harassment would "violate federal law." *Hill*, 797 F.3d at 979; *see Green v. Jacksonville State Univ.*, 2017 WL 2443491, *17-18 (N.D. Ala. June 6, 2017). Lane is thus not sheltered by qualified immunity because a principal in his "position would not have believed that doing nothing was lawful in light of the clearly established principle that deliberate indifference

to sexual harassment is an equal protection violation." *Hill*, 797 F.3d at 979 (citing *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1261 (11th Cir. 2010)).[5]

B. The District is liable for the violation of A.P.'s equal-protection rights.

A school board may be held liable when its constitutional deprivations "result from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law." *Denno v. Sch. Bd. of Volusia Cnty.*, 218 F.3d 1267, 1276 (11th Cir. 2000) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)). Here, the District is liable for three reasons: (1) The written Code of Conduct makes no distinction between consensual and nonconsensual sexual conduct; (2) District employees were not trained to respond to peer-on-peer sexual assault; and (3) Lane punished A.P. in his capacity as a policymaker.

1. The District's official disciplinary policy treats reports of consensual and nonconsensual sexual conduct the same.

"Local governing bodies … can be sued directly under § 1983 for … relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially

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[5] *See also Feminist Majority Found. v. Hurley*, 911 F.3d 674, 701-02 (4th Cir. 2018); *Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 851-52 (6th Cir. 2016); *Locke v. Haessig*, 788 F.3d 662, 667-68 (7th Cir. 2015); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135-38 (9th Cir. 2003); *Murrell v. Sch. Dist. No. 1, Denver*, 186 F.3d 1238, 1251 (10th Cir. 1999).

adopted by that body's officers." *Monell*, 436 U.S. at 690. A.P. was prosecuted for violating Rule 28 of the District's Code of Conduct "by committing sexual impropriety." App. III at 890-91, 1178. That policy prohibits "commission of an act of sexual contact or of indecent exposure, or inappropriate public displays of affection [and] [i]ncludes the more serious offenses of sexual battery and sexual offenses." App. II at 481. Rule 28's definition does not mention consent. *Id.* Although the school's Progressive Discipline Guidelines do contain a provision (920) called "Sexual Offenses," which addresses "consensual sexual activities," *Id.* at 520, A.P. was prosecuted under the Code of Conduct, not the Progressive Discipline Guidelines. App. III at 890-91, 1178. And notably, Lane did not use the word "consent" before the tribunal. *Id.* at 884-1000. As if to underscore Defendants' efforts to punish A.P. regardless of consent, the State Board of Education upheld her expulsion reasoning that, although A.P. "did not agree to perform oral sex" and "told [J.B.] 'no' when he asked her to do it," *id.* at 1177, "[o]n its face, Rule 28 does not require the Local Board to show evidence of intent…." *Id.* at 1178.

Implementing this policy, school administrators responded to A.P.'s report of nonconsensual sexual contact as a disciplinary matter for which she could have been punished *even if they had believed A.P.'s report*. App. I at 295. The school simply set out to determine whether A.P. had "performed oral sex." *Id.* at 346. After A.P. admitted "just that the sexual act had taken place," and even though she always maintained that J.B. had assaulted her, *see* App.

II at 544, 547, the administrators suspended A.P. for ten days and referred her to a tribunal. App. I at 170-72. The tribunal then expelled A.P. for violating Rule 28, and the School Board affirmed that expulsion. App. III at 998-99, 1178. Had the District "not utilized a … policy" of treating consensual and nonconsensual sexual contact as the same for disciplinary purposes, A.P. would not have been punished. *See Anderson v. City of Atlanta*, 778 F.2d 678, 687 (11th Cir. 1985).

2. The District failed to train its employees to conduct constitutionally sufficient investigations despite an obvious need for training.

Inadequate training is a "'policy or custom' that is actionable under § 1983" "where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference'" to individuals' constitutional rights. *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989). A municipality's deliberate indifference can be established by showing that the need for more training was "so obvious, and the inadequacy so likely to result in the violation of constitutional rights" that "failure to provide proper training may fairly be said to represent a policy for which the city is responsible." *Id.* at 390.

When a plaintiff points to evidence that a defendant has failed to follow relevant guidance despite an obvious need for better training, a reasonable jury could conclude that the defendant acted with deliberate indifference by failing to train employees. In *Glisson v. Indiana Department of Corrections*, 849

F.3d 372, 380 (7th Cir. 2017) (en banc), for example, the Seventh Circuit reasoned that the existence of Indiana Department of Corrections Guidelines explaining what policies prison health-care providers were required to implement was "evidence that could persuade a trier of fact that" that the defendant consciously chose to violate the Eighth Amendment by failing to train employees on comprehensive treatment of chronically ill inmates. The defendant there was "admittedly familiar" with the Guidelines but nonetheless failed to adopt them. *Id*.

Here, like in *Glisson*, the District's disregard of Title IX Guidance is evidence that could persuade a reasonable jury that Defendants faced an obvious need to train employees to respond properly to student-on-student sexual-harassment reports. According to Department of Education guidance, "schools need to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials." DOE Guidance at 13, *supra* at 42. And "one does not need to be an expert to know," *Glisson*, 849 F.3d at 382, that "harassment unfortunately is an all too common aspect of the educational experience." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

Yet the record reflects that not a single administrator who responded to A.P.'s report understood how to respond to student-on-student sexual harassment or their Title IX obligations. The District's Title IX coordinator,

Sanders, admitted that the school provided *no* training on the staff's responsibilities when a student reports sexual harassment by another student. App. III at 1125. Mitchell, Parham, Travis, Johnson, and Armour all failed to contact Sanders and believed they had fulfilled their obligations by passing warped versions of A.P.'s account to their superiors. App. I at 149, 155, 157-59, 269, 273, 279; App. II at 677-79, 696; App. III at 864. Shockingly, no one but Lane even knew who the Title IX coordinator was, and Lane, when asked who was responsible for reporting to the coordinator, pointed to the Assistant Principals (who all thought it was Lane's duty). App. I at 280, 286, 331. An identical blame game resulted in a failure to contact the school resource officer. *Id.* at 176, 326.

In the face of the obvious need for training on how to respond to peer-on-peer sexual assault, the record reflects that the administrators were completely unprepared to handle one. A reasonable jury could find that the District failed to sufficiently train its staff and that this failure resulted in A.P.'s suspension and eventual expulsion.

3. The District is responsible for Lane's disciplinary decision because he acted as a final policymaker.

A municipality can be held liable for the actions of a government official "imbued with final policymaking authority." *Denno*, 218 F.3d at 1276. A municipal officer has final policymaking authority when the officer's decisions in the relevant area "are not subject to review." *Martinez v. City of Opa-Locka*, 971 F.2d 708, 714 (11th Cir. 1992). Lane made the final,

unreviewable decision to suspend A.P. for ten days and the District is therefore liable for that decision.

A school principal is acting as a final policymaker when his decision to impose discipline is not subject to "meaningful review by the School Board." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1293 (11th Cir. 2004). Here "the principal," that is, Lane, "ultimately" had the final authority as to disciplinary decisions like A.P.'s ten-day Out-of-School Suspension, and "the board would not have the authority to override the discipline." App. III at 1124, 1146. Because Lane's decision was final and could not be reviewed, he was the District's policymaker with regard to A.P.'s suspension.

Defendants argued below, and the district court agreed, that "Lane cannot be a final policymaker by virtue of his position, nor can those duties be delegated to him" because "Georgia law vests local boards of education with final policy making authority for school districts." App. III at 1192 (citing *Floyd v. Waiters*, 133 F.3d 786, 794 (11th Cir. 1998)). This contention misunderstands the express purpose of policymaker liability. In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986), the Supreme Court established the policymaker doctrine to avoid limiting municipal liability only to decisions made by a governmental body like a school district. The Court reasoned that "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level." *Id.* Thus, the Court held that "other officials 'whose acts or edicts may fairly be said to represent official policy'" can create liability for the municipality. *Id.*

Lane's decision to impose a ten-day suspension was final and unreviewable. App. I at 344. This punishment was the direct result of Lane's unconstitutional response to A.P.'s report. *See id.* Because Lane was acting as a final policymaker, and a reasonable jury could conclude that Lane's punitive approach to A.P.'s report violated her constitutional right to an adequate response to known sexual harassment, the district court erred in granting summary judgment to the District.

CONCLUSION

The district court's judgment should be reversed and the case remanded for further proceedings as to Defendants' liability on A.P.'s Title IX discrimination and retaliation claims and her equal-protection claims.

Respectfully submitted,

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