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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January 26, 2022

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"

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Fayette County School District

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Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT

According to Defendants, they did not violate Title IX or the Equal Protection Clause because, in their view, A.P. was not choked, slammed against a wall, and forced to perform oral sex on campus. In other words, Defendants' position hinges on disputed facts that must be resolved by a jury. As for the arguments A.P. pursues that do not rely solely on these disputed facts—for example, A.P.'s retaliation claim—Defendants simply abdicate, offering no response.

A jury could conclude that Defendants punished A.P. even though Defendants understood from her report that they were responding to "a rape in our school." After A.P. told school officials about being assaulted, they told her that "it looked like you liked it," detained her in In-School Suspension, suspended her for ten days, and referred her to a school-district tribunal for engaging in "sexual impropriety" in violation of a disciplinary policy that does not distinguish between consensual and nonconsensual sexual conduct. Then, the District expelled her.

A.P.'s account of being assaulted never wavered, and she never told any teacher, administrator, or anyone else that what happened to her was a consensual sexual act. But with A.P. already in In-School Suspension, Defendants maintain that they concluded, based on surveillance footage solely from before and after the assault, that A.P. was not attacked and forced to perform oral sex. The video on which Defendants purport to base this

conclusion shows only an empty hallway during the assault. Indeed, Defendants admit that the video does not show any conduct—sexual or otherwise—that would warrant expulsion.

And to the extent that the footage from before and after the assault is relevant at all, it cannot, at the summary-judgment stage, be given more credence than A.P.'s testimony about what actually happened off camera: She "kept telling him no," but J.B. unbuckled his pants, twice choked her, and forced her to "give him head."

This Court should reject Defendants' request to apply an upside-down summary-judgment standard that would ignore A.P.'s consistent testimony that she told school officials she was assaulted. Taking A.P.'s testimony as true and drawing reasonable inferences in her favor, the record shows that officials discriminated against A.P. for being sexually assaulted and punished her for reporting that assault. Because a jury could conclude that Defendants' actions violated Title IX and the Equal Protection Clause, this Court should reverse the district court's grant of summary judgment.

ARGUMENT

I. A.P. is not precluded from litigating her claims.

Defendants argue that because the disciplinary tribunal found that A.P. violated Rule 28 of the District's Code of Conduct she is precluded from

arguing that Defendants' response to her report of sexual assault violated Title IX. Resp. Br. 18-21. That is wrong.[1]

A. Issue preclusion is an affirmative defense, *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008), and Defendants have failed to meet their burden of proving it. A state administrative body's findings may have preclusive effect in federal court only when the agency "acting in a judicial capacity … resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986). When these circumstances are met, "federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's court." *Id.*

1. The issue that Defendants contend A.P. is precluded from litigating—whether J.B. forced A.P. to perform oral sex—was not resolved in Defendants' favor by the disciplinary tribunal nor could it have been. App. III at 1178-79. After A.P. reported that she had been sexually assaulted, App. II at 636-37, Defendants maintained that she violated Rule 28 of the District Code of Conduct, which prohibits "commission of an act of sexual contact … or inappropriate public displays of affection" without distinguishing

[1] Defendants have argued on appeal that only A.P.'s Title IX claim is barred by issue preclusion, Resp. Br. 18, so any argument that her Section 1983 claim is barred has been forfeited. In any case, issue preclusion does not apply to that claim for the same reasons that it does not apply to A.P.'s Title IX claim.

between consensual and nonconsensual sexual contact. App. II at 481. Thus, the State Board of Education that upheld A.P.'s expulsion concluded that Rule 28 "does not require … evidence of intent"—that is, a student violates Rule 28 whether or not she intended to engage in sexual contact or was forced to do so. App. III at 1178.

As if to underscore that the only issue relevant to the tribunal's determination that A.P. violated Rule 28 was whether A.P. engaged in a sexual act, not whether the act was welcome, when the State Board of Education upheld A.P.'s expulsion it found that A.P. "did not agree to perform oral sex," that "the male student grabbed her by the throat twice," and that A.P. "told [J.B.] 'no' when he asked her to do it." App. III at 1177. It nonetheless upheld the tribunal's decision because A.P. "ultimately performed the act." *Id.* So, the Board's findings are consistent with A.P's view of the facts, not Defendants'.

The State Board of Education also concluded that "to the extent that [A.P.] has a Title IX claim," it did "not have jurisdiction to hear it." App. III at 1179. In other words, the issues relevant to this case were not "properly before" the tribunal, meaning A.P. had no "opportunity to litigate" them. *Elliott*, 478 U.S. at 799. In *Bryant v. Jones*, 575 F.3d 1281, 1302 (11th Cir. 2009), for example, the plaintiff lacked an "adequate opportunity to litigate" her federal discrimination claim at an administrative proceeding because the administrative body did not have the authority to consider the issue relevant

to her federal claim and made only narrow factual findings "tailored solely around" its "limited jurisdiction."

2. Georgia law provides another, independent reason why the disciplinary tribunal's findings lack preclusive effect. Again, federal courts must give an agency's fact finding "*the same* preclusive effect to which it would be entitled in the State's court," *Elliott*, 478 U.S. at 799 (emphasis added), and Georgia law explicitly prohibits disciplinary hearings from precluding future litigation. The Georgia Public School Disciplinary Tribunal Act states that nothing in the law "shall be construed to prohibit, restrict, or limit in any manner any cause of action otherwise provided by law and available to any … student." Ga. Ann. Code § 20-2-758. So even if the disciplinary tribunal had resolved the consent issue—and, as explained above, it did not—that finding could not "prohibit, restrict, or limit" A.P. from litigating her Title IX claims.

B. Defendants' argument that A.P.'s Title IX retaliation claim is precluded fails for an additional reason: the tribunal made no findings relevant to A.P.'s claim that Defendants responded to her protected reporting activity by punishing her. Consider, for example, the decision to place A.P. in In-School Suspension—discipline that would have dissuaded a reasonable student from reporting sexual assault. *See Bowers v. Bd. of Regents of Univ. Sys. of Ga.*, 509 F. App'x 906, 911-12 (11th Cir. 2013). When Defendants knew only that A.P. had reported being sexually assaulted, they immediately punished her, placing her in In-School Suspension *before* they reviewed the ultimately

inconclusive video footage from which they conjured a pretextual explanation for the discipline. *See* App. I at 166-67; App. II at 774-75. Thus, even if (counterfactually), the disciplinary tribunal had determined that A.P. was not choked, slammed against a wall, and forced to perform oral sex, A.P. would not be precluded from litigating her claim that Defendants punished her for protected reporting activity before they made any determination about whether she had consented or been forced to engage in sexual activity. App. I at 346.

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

A. A jury could conclude that appropriate school officials had actual knowledge of sexual harassment.

Defendants erroneously focus on whether, based on J.B.'s pre-assault conduct, Defendants had notice of a substantial risk of harassment *before* J.B. sexually assaulted A.P. Resp. Br. 22-23. But our opening brief explains (at 21) that when a student seeks recovery for a school's deliberately indifferent *response* to peer-on-peer harassment, as opposed to holding a school liable for deliberate indifference 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 regarding a future assault. *See Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 265-68 (4th Cir. 2021); Department of Justice Statement of Interest at 4, *Thomas v. Bd. of Regents of the Univ. of Neb.*, No. 4:20-cv-03081-RFR-SMB (D. Neb. June 11, 2021) ("Post-assault claims, like the claim in *Davis*, focus

on how a [federal funding] recipient responded *after* it received actual notice of a plaintiff's sexual harassment.").[2]

Defendants ignore the evidence that A.P. reported her assault to her teacher, Aminah Mitchell; school counselors, Jen Travis and Jazzmon Parham (who reported to lead Counselor Jessica Maddox); and Assistant Principals, Brandi Johnson and Curtis Armour (who notified Principal Lane). App. II at 767-770; App. I at 346. These adults understood "we might have had a rape in our school," App. I at 346, and were appropriate persons with authority to institute corrective measures to address the harms A.P. reported, *see id.* at 162, 270, 372; App. II at 476, 623; App. III at 1131.

B. A jury could conclude that A.P. suffered severe, pervasive, and objectively offensive sexual harassment.

1. Defendants concede that forced oral sex constitutes "severe, pervasive, and objectively offensive sexual harassment." Resp. Br. 23 n.7. They argue only that A.P. was not subjected to that unlawful harassment because, in their view, J.B. did not in fact assault her. In other words, Defendants do no more than identify a genuine dispute of material fact that, at this stage, must be resolved in A.P.'s favor.

a. The video footage on which Defendants heavily rely cannot entitle Defendants to summary judgment because it captures only the uneventful parts of J.B. and A.P.'s interaction. App. III at 940. Indeed, everyone agrees

[2] https://www.justice.gov/crt/case-document/file/1405241/download.

that the video shows J.B. and A.P. meeting up, embracing, kissing, and holding hands. *Id.* at 940-41; App. II at 740. What is material and disputed—that is, what must be resolved in A.P.'s favor at the summary-judgment stage—is what happened off camera.

Toward the end of J.B. and A.P.'s conversation, and off camera, J.B. asked A.P. "over and over and over again" to "give him head." App. II at 751; *see* Opening Br. 5-6. A.P. "kept telling him no," but J.B. didn't stop. *Id.* With A.P. continuing to resist, the harassment turned violent: J.B. unbuckled his pants and grabbed her arm to pull her towards him. *Id.* 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.

Despite Defendants' contrary assertions (at 27-28), the video does not dispute this testimony. Agreeing to meet someone alone is not consent for sexual activity; nor does consent to kissing or hugging constitute consent to future or further sexual conduct. The video is thus entirely consistent with A.P.'s unwavering account of what occurred on camera, including hugging and hanging out, and what happened off camera: sexual assault.

b. To the extent that the video is relevant at all, it only underscores that genuine disputes of material fact exist over whether J.B. forced A.P. to

perform oral sex. Defendants rely on the video, for example, to imply that a jury could conclude from footage of A.P. "look[ing] down the hallway and then walk[ing] back to the alcove area nine different times" that A.P. was serving as a lookout and that she therefore intended to perform oral sex on J.B. Resp. Br. 23. But A.P.'s testimony squarely disputes this characterization. App. II at 741. In any case, even if a jury could conclude that A.P. was on the lookout, reasonable inferences must be drawn in A.P.'s favor. And it is reasonable to infer that A.P. would not want teachers or peers to see her embracing and kissing J.B. or even spending time with him afterschool in the hallways.

Defendants also emphasize that, after the assault, the video shows A.P. grabbing J.B.'s "sleeve/arm as he backed away from her toward the door to leave" and holding "her arm out, seemingly to keep J.B. from leaving." Resp. Br. 25. But, as our opening brief explains (at 26), A.P.'s post-assault behavior is consistent with how victims of sexual assault may try to protect themselves in reaction to sexual violence. And, at the very least, A.P.'s socially appeasing behavior—her capacity to try to avoid placing herself at further risk at the hands of a person who had "already choked" her, App. II at 763—does not prove Defendants' version of events. Put differently, the district court erred in granting summary judgment.

Besides failing to view the facts in A.P.'s favor as required, Defendants base their argument that the video shows that A.P. was not assaulted on impermissible sex-based stereotypes. They maintain that "if A.P. was in

distress … during the 53 minutes, she could have left or called out for help." Resp. Br. 24. That statement is based on outdated stereotypes that women or girls who cannot show that they resisted rape with all their strength—even if they *did* fight back—are presumed to be lying. *See, e.g.*, *People v. Dohring*, 59 N.Y. 374, 384 (1874) (noting court could not "conceive of a woman" who would not "resist [unwanted sex] so hard and so long as she was able"); Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. Ill. L. Rev. 953, 962-68 (1998); *see also State v. Rusk*, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting) (explaining that it is "the natural instinct of every proud female to resist"). In reality, few rape victims physically resist their attacker, which is why American rape law abolished the utmost resistance requirement decades ago. Anderson, *supra*, at 957-58, 964-68.

c. Set aside the inconclusive video, and what's left is A.P.'s unequivocal testimony that she reported sexual assault to school officials and Defendants' inconsistent testimony about whether they believed her report. In other words, genuine disputes of material fact remain, and Defendants are not entitled to summary judgment.

Consider, for example, Defendants' position that during her conversation with school counselors, Parham 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.]." Resp. Br. 23-24. Parham asserts that A.P. responded that because "she liked him, she did something she wouldn't normally do." *Id.* at 24. But, as the opening brief explains (and

Defendants ignore), A.P. testified that Parham never asked this question, and A.P. never told Parham that she did anything because she was "down" for J.B. App. II at 772; *see* Opening Br. 9. Instead, A.P. consistently told school officials that she had been forced to do "something [she] didn't want to do"—that is, that she had been forced to perform oral sex. App. II at 770-71, 776; App. III at 931, 936. And (*see supra* 7), again, Defendants do not dispute that forced oral sex constitutes "severe, pervasive, and objectively offensive sexual harassment." Resp. Br. 23 n.7.

2. In any case, Defendants do not even respond to A.P.'s contention that 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, the student need not allege that the underlying sexual harassment at issue is "severe, pervasive, and objectively offensive." Opening Br. 27-28. Because Defendants' *own* discrete discriminatory acts—punishing and ultimately expelling A.P. for being sexually assaulted—directly "denied" her "equal access" to the "institution's resources and opportunities," *cf. Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999), A.P. need not establish that the underlying sexual harassment (the *harasser's* conduct) was "so severe, pervasive, and objectively offensive," that it "undermine[d] and detract[ed] from" her "educational experience," *see id.* Remand would

thus be appropriate even if this Court concluded that a jury could not find that A.P. suffered "severe, pervasive, and objectively offensive" harassment.

C. A jury could conclude that school officials were deliberately indifferent in responding to A.P.'s report of sexual assault.

1. Defendants do not dispute that a reasonable juror could easily find a school's decision to suspend and expel a student for engaging in "sexual impropriety" when in fact she had been sexually assaulted to be clearly unreasonable. Resp. Br. 19. "Naturally," they maintain, "a student would not be punished for engaging in sex at school if that student was forced in[to] doing so," *id.*, effectively conceding that disciplining a victim under these circumstances would constitute deliberate indifference. They then ignore the evidence from which a jury could conclude that punishing a student for engaging in the very conduct she reported as sexual assault is just what occurred here. Opening Br. 29-32.

Defendants repeat the argument they made below that their response to A.P.'s assault was not deliberately indifferent because school officials spoke to her following her report and reviewed video from before and after the assault. Resp. Br. 26-29. But as our opening brief explains (at 32), Title IX does not simply require school districts to do *something* in response to sexual harassment, it 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 v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1263 (11th Cir. 2010)).

Instead of taking action to mitigate the harm A.P. had suffered, school officials responded to her report that she had been choked, slammed against a wall, and forced to perform oral sex on campus by making things worse. Start with the In-School Suspension, which, as previously discussed (at 5-6), Defendants imposed without making any determination about whether A.P. had consented to the sexual activity that she reported was assault. Likewise, for the reasons already discussed (at 4), a jury could conclude that the District expelled A.P. even though she "did not agree to perform oral sex," was "grabbed … by the throat twice," and "told [J.B.] 'no' when he asked her to do it." App. III at 1177.[3]

Given these facts, it is difficult to contemplate a less reasonable response. If schools are allowed to punish victims of sexual assault 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), "discrimination

[3] Instead of punishing A.P., Defendants could have followed its own policy and allowed her to write down what happened, interviewed other relevant potential witnesses at the school, provided her with accommodations for her learning disability during the investigation, and provided her with supportive measures during the investigation.

would go unremedied" because students would be afraid to report. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005).

2. To the extent that, when disciplining A.P., Defendants considered consent at all, a jury could determine that their conclusions on that score were clearly unreasonable. Because A.P. was telling the truth about being assaulted, she believed the video would corroborate her account that J.B. had grabbed her by the neck and forced her to perform oral sex. App. II at 548, 775. That is why she asked school officials whether they saw J.B. choking her. *Id.* Assistant Principal Johnson responded, "it looked like you liked it or wanted it." *Id.* at 775. Despite the evidence that A.P. had been assaulted—namely, A.P.'s report that she was coerced into performing oral sex—Defendants concluded, relying solely on sex-based stereotypes, that she had "wanted it" and then suspended and expelled her. They say that they based this conclusion and the discipline that followed from it on the footage from before and after the assault, but they admit that the video shows nothing that would warrant serious discipline. App. I at 171, 360.

Defendants contend that because A.P. did not contemporaneously articulate to school officials that she "could not let on that she was upset" after the assault because she was "worried that J.B. would spread rumors about what happened and ruin her reputation," she is not to be believed by a jury now. Resp. Br. 27. That argument only underscores the

unreasonableness of Defendants' response to A.P.'s report and the inappropriateness of summary judgment.

A.P. was a sixteen-year-old student with a learning disability who required an Individualized Education Program to access her education. App. II at 584, 592. Placing the burden of explaining typical responses to sexual assault—including shock, appeasement, communication, or other positive social behaviors with the assailant—on a traumatized teenager with documented learning disabilities is clearly unreasonable. As counselor Travis acknowledged: One might expect student victims of sexual assault to use some coping mechanisms like telling jokes or giggling when they report an assault. App. III at 933. And sexual-assault victims, particularly survivors of assaults by people they know, often express confusion about what they are supposed to think and feel about the traumatic experience. *See* Courtney E. Ahrens, et al., *Deciding whom to tell: expectations and outcomes of rape survivors' first disclosures*, 31 Women Q. 38, 39 (2007).[4] So, it would be illogical to expect any student to explain that her socially appeasing, post-assault behavior was adaptive and in no way in conflict with her account that she had been sexually assaulted.

In any event, Defendants never asked A.P. why she tried to be nice to J.B. in the aftermath of being assaulted. *See* App. II at 775-76. As the opening brief explains (at 6, 26), A.P. behaved this way for several reasons. She was in

[4] https://tinyurl.com/2wcck8ue.

shock. *Id.* at 759. She feared that J.B. might harm her further because he had "already choked her." *Id.* at 758. And J.B. was popular and often started rumors about people. *Id.* at 763.[5]

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

A. Defendants fail to explain why they are entitled to summary judgment on A.P.'s retaliation claim. Resp. Br. 31-32. They do not articulate how, in their view, A.P. has failed to establish a prima facie case of retaliation, which requires that (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). Remand of A.P.'s retaliation claim based on Defendants' forfeiture alone is therefore appropriate. *See Jones v. Sec'y, Dep't of Corr.*, 607 F.3d 1346, 1353–54 (11th Cir. 2010).

B.1. Turning to the merits, a generous reading of Defendants' cursory retaliation argument is that they contend that A.P. did not engage in statutorily protected activity because they concluded (unreasonably, *see supra* at 7-10) that she had consented to perform oral sex despite her consistent report that she was assaulted. But a jury could conclude that the

[5] Defendants nowhere dispute that a jury could conclude that the District barred A.P.'s access to an educational opportunity by suspending and expelling her. A.P. therefore relies on her opening brief (at 32-33) regarding that element of her Title IX discrimination claim.

entire chain of school officials A.P. spoke to, by Defendants' own admissions, understood A.P.'s report to allege assault. Opening Br. 36.

When the words used to report harassment do not "automatically signal" to a defendant that the plaintiff is alleging harassment, the complaint will nonetheless qualify as protected reporting activity if it includes "red flag[s]" indicating that the report is one of harassment. *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1310-14 (11th Cir. 2016). Here, although A.P. never used the word "nonconsensual" when speaking with Armour and Johnson, Resp. Br. 25, she asked them whether, when they watched the video, they had seen J.B. choke her, App. II at 775, and emphasized that she "didn't want to" perform oral sex and that she only did it because J.B. had grabbed her by the neck, *id.* at 548-49. If these statements don't "automatically signal" that A.P. was reporting sexual assault (and A.P. contends that they do), at minimum they raised red flags sufficient to alert officials that she was engaged in Title IX protected reporting activity.

2. As to whether a jury could conclude that Defendants took materially adverse actions against A.P., Defendants do not explain (nor could they) how treating A.P. "like [she] was in trouble," App. II at 775, confiscating her phone, *id.*, placing her in In-School Suspension, suspending her for ten days, referring her to the disciplinary tribunal, and finally expelling her would not dissuade a reasonable student in A.P.'s position from reporting sexual assault. Outside of a footnote in their statement of the case, Defendants make no mention of the decision to place A.P. in In-School Suspension,

underscoring their failure to address meaningfully A.P.'s retaliation claim. Resp. Br. 11 n.4. Because Defendants do not dispute that the punishments they imposed constitute materially adverse actions, A.P. relies on her opening brief (at 37) about this element of her retaliation claim.

3. A jury could also reasonably conclude that Defendants punished A.P. *because of* her report and that Defendants' proffered reason for disciplining A.P. is pretext. Defendants have no response to the admissions in the record that A.P.'s report triggered Defendants' decisions to punish her. Opening Br. 34-35. On top of that, as the opening brief details (at 37-40), A.P. has marshaled a "convincing mosaic of circumstantial evidence" supporting an inference of causation. *Herron-Williams*, 805 F. App'x at 630. Within twenty-four hours of her complaint, A.P. was placed in In-School Suspension, given a ten-day Out-of-School Suspension, and referred to a disciplinary tribunal for expulsion proceedings. App. I at 166-67, 172; App. II at 775.

The facts surrounding the initial In-School Suspension alone render Defendants' proffered "legitimate" reason for punishing A.P. entirely implausible, making summary judgment inappropriate. A jury could conclude that *before* Defendants had any (albeit improper) reason to adopt the logic that A.P. had engaged in "consensual" "sexual impropriety," they pulled A.P. out of class, confiscated her phone, and detained her alone in an office with no classwork and nothing to do. Defendants imposed this discipline before they had reviewed the inconclusive video and when all they knew was that A.P. had reported assault. *See* App. I at 166-67; App. II

at 774. At the time of this punishment, every official who knew of A.P.'s report understood that they were dealing with a report of sexual assault yet responded punitively. App. II at 544-45, 547. That Defendants punished A.P. before they did anything else means a jury could conclude that their later articulated reason for punishing her—that she engaged in sexual impropriety—was pretextual.

At the very least, a reasonable jury could conclude that Defendants punished A.P. because she could not substantiate her unequivocal report of sexual assault with physical evidence or the like, which is also retaliation. *See Pye v. Nu Aire, Inc.*, 641 F.3d 1011, 1016, 1020 (8th Cir. 2011) (holding plaintiff provided "direct evidence of retaliation" where emails showed he was fired because his employer did not believe his complaints); *Young-Losee v. Graphic Packaging Int'l, Inc.*, 631 F.3d 909, 912 (8th Cir. 2011) (holding there was direct evidence of retaliation where employer called plaintiff's complaint of harassment "total bullshit" and fired her); *see also Gilooly v. Missouri Dep't of Health & Senior Servs.*, 421 F.3d 734, 740 (8th Cir. 2005) ("[A]n investigator's 'independent determination of truth or falsity of [the plaintiff's] allegation … [can]not legally be grounds for discharge.'"). Indeed, Title IX's regulations prohibit schools from disciplining students for reports of sexual assault solely on the basis that their complaints were not ultimately substantiated. *See* 34 C.F.R. § 106.71(b)(2).

As previously discussed (at 3-4), A.P. was purportedly punished for violating Rule 28. And Rule 28 "[o]n its face" does not require that the

District "show evidence of intent." App. III at 1178. In other words, a jury could conclude that A.P. would have been punished for reporting sexual assault unless *she* could affirmatively prove that she had been sexually assaulted. Defendants' admission that the video includes nothing that would warrant expulsion, App. I at 171, 360, also supports this conclusion. Johnson's testimony, too, indicates that Defendants would have punished A.P. unless she had somehow affirmatively proven that she had been sexually assaulted. App. I at 295. Johnson testified that even if A.P. had said "she was forced to have oral sex" with J.B., A.P. potentially "still would have been punished" because Johnson would still have determined that the students "consensually participated in the act." *Id.* Put differently, Johnson would have punished A.P. so long as A.P. lacked proof of the assault beyond her statement that J.B. forced her to perform oral sex.

Because disciplining a student for reporting sexual assault or for failing to affirmatively prove a report of sexual assault constitutes retaliation, the district court erred in granting summary judgment on A.P.'s Title IX retaliation claim.

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

The parties agree that when a state actor's response to known sexual harassment is inadequate under Title IX, it also violates the Equal Protection Clause. Opening Br. 40-41; Resp. Br. 35-36. Because, as detailed above in Part II, sufficient evidence exists to support A.P.'s Title IX deliberate-indifference

claim, a reasonable jury could also conclude from that evidence that A.P.'s constitutional right to an adequate response to known sexual harassment was violated.

A. A.P.'s constitutional right to an adequate response to her report of sexual assault was clearly established, and a jury could conclude that Lane violated that right.

1. Defendants ignore the record evidence demonstrating that Lane "knew of and acquiesced in" the discriminatory conduct—that is, that he acquiesced in the deliberately indifferent response to an on-campus sexual assault. *Hill v. Cundiff*, 797 F.3d 948, 978 (11th Cir. 2015). As the opening brief details (at 41-42), Lane "knew of and acquiesced in" the clearly unreasonable response to A.P.'s assault because despite writing down A.P.'s report that she was assaulted, Lane accepted the Assistant Principal's inconsistent conclusion that she consented to sexual conduct and directed them to discipline her. App. II 544-53. Lane's notes show that when A.P. learned Johnson and Armour had reviewed video footage, she asked: "Does it show him grabbing my neck?," App. II at 548, and that A.P. told Johnson and Armour that she "didn't want to" perform oral sex, *id.* at 549. But because A.P. "admitted she did it," *id.*, Lane told the Assistant Principals "to assign the discipline … for the act," App. I at 171, 344. He 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 753, 757. Lane's knowledge of and active role in the deliberately indifferent response to A.P.'s report of a possible "rape in our school" violated A.P.'s equal-protection right. App. I at 345-46.

2. Lane is not entitled to qualified immunity, and Defendants' effort to distinguish Lane's conduct from the inadequate response taken by the principal in *Hill v. Cundiff* fails. That the rape at issue in *Hill* and the assault at issue here differ is a distraction irrelevant to whether Lane's *response* to discriminatory conduct violated A.P.'s constitutional rights. Contrary to Defendants' argument (Resp. Br. 41-42), the focus of the comparison between *Hill* and the facts here must be on the similarities or differences between the principals' response to student reports, not on comparing the gruesomeness of the assaults that the students suffered.

Defendants argue that, unlike the principal in *Hill*, "Lane did not 'do nothing' in response to Plaintiff's allegation of sexual assault." Resp. Br. 45. True. Rather than "do nothing" to properly respond to A.P.'s report, Lane took affirmative steps to subject A.P. to further discrimination. Opening Br. 43-44.

B. A jury could hold the District liable for the violation of A.P.'s equal-protection rights.

In arguing that no School District policy or custom "caused the injuries allegedly inflicted on [A.P.] by J.B.," Defendants focus on the wrong injury. Resp. Br. 36. The proper inquiry is whether the constitutional deprivation,

here the inadequate response to A.P.'s report, resulted "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). Here, the District is liable because the disciplinary code makes no distinction between consensual and nonconsensual sexual conduct; District employees were not trained to respond to peer-on-peer sexual assault; and Lane punished A.P. as a policymaker.

1. As described in the opening brief (at 45-47) and above (at 3-4), the District's official disciplinary policy treats reports of consensual and nonconsensual sexual conduct the same. Defendants' footnoted response to this point, highlights that the facts related to this official policy are disputed. Resp. Br. 34 n.9.

Although Lane testified that "[t]ypically, we would use" Rule 28 of the Code of Conduct "for things that are consensual," App. I at 359, the policy does not distinguish between reports of consensual and nonconsensual sexual conduct. The 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 disciplined 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. And, again, though Defendants claim that "[n]aturally, a student would not be punished for engaging in sex at school if that student was forced in[to] doing so," Resp. Br. 19, that is precisely what is disputed here.

2. Defendants do not respond substantively to the argument that the need for more training was so obvious and the inadequacy so likely to result in constitutional violations that the failure to train may fairly be said to represent a government policy. Instead, they argue only that this is a rare path to liability. It may be rare, but it applies here. *See* Opening Br. 47-49; *see also Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1178-85 (10th Cir. 2007) (need for greater training was obvious given likelihood of Title IX violations); *Berg v. Cnty. of Allegheny*, 219 F.3d 261, 275-77 (3d Cir. 2000) (reversing summary judgment where defendants failed to guard against a mistake in a frequently used process that led to a constitutional violation); *J.Q.T. ex rel Quinones v. Amato*, 2018 WL 4566146, at *6 (E.D. Pa. Sept. 21, 2018) ("[G]iven the incidence of sexual assault against minors it should be obvious

to the policymakers" that they must "report suspected sexual assault" to avoid allowing "constitutional violations to continue").

3. The District is responsible for Lane's disciplinary decision because he acted as a final policymaker with respect to the decision to suspend A.P. for ten days. Defendants repeat the argument that the district court erroneously adopted below that Lane cannot be a final policymaker because "Georgia law vests local boards of education with final policy making authority for school districts." Resp. Br. 39-40. As our opening brief explains (at 50), this contention misunderstands the purpose of policymaker liability. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986), 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.[6]

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.

[6] Defendants argue that Lane was not a final policymaker with respect to A.P.'s expulsion. Resp. Br. 43-44. But A.P. never argued that the District's liability for that disciplinary decision arises out of Lane's misconduct as a final policymaker. Instead, the District's liability for the expulsion is based on its official policy, treating consensual and nonconsensual sexual conduct the same, and its failure to train. The liability arising from Lane's misconduct as a final policymaker is limited to Lane's decision to impose a ten-day suspension, a decision that was final and unreviewable.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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January 26, 2021 /s/Madeline Meth

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I certify that, on January 26, 2021, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

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