No. 19-2203

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JANE DOE,
Plaintiff-Appellant,
v.

FAIRFAX COUNTY SCHOOL BOARD,
Defendant-Appellee.

On appeal from the United States District Court
for the Eastern District of Virginia
(No. 1:18-cv-614 (LOG/MSN))

BRIEF OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The Fairfax County School Board is a local governmental "body corporate" established under Virginia law. It is not a stock corporation, has no parent corporation, and has no shareholders.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
INTRODUCTION 1
STATEMENT OF THE CASE 1
A. Assistant Principal Taylor learns that Jane and Jack had "hooked up." 2
B. Jane confronts Jack for having "cheated" on his girlfriend. 6
C. Taylor briefs Assistant Principal Hogan on Sunday evening. 7
D. Hogan promptly investigates and concludes that Jane was a full participant in mutual sexual touching. 8
1. Hogan's first interview with Jane. 9
2. Hogan's interview of Jack. 11
3. Hogan's second interview with Jane. 13
4. Hogan's additional investigative efforts. 16
E. Principal Banbury declines to discipline Jane or Jack. 19
F. Hogan meets with Jane's parents, agrees to their request for academic accommodations, and urges counseling that they refuse. 20
G. Jane's teachers provide generous academic accommodations. 21
H. Jane has no further interaction with Jack and Dr. V rearranges the band seating to accommodate her. 23
I. Jane's parents plan to sue but do not tell school officials until a year later, after a major renovation led to the accidental loss of certain records. 25
J. Plaintiff omits the many factual disputes below and fails to state the facts in the light most favorable to the School Board. 28
QUESTIONS PRESENTED 28
SUMMARY OF ARGUMENT 29

ARGUMENT 32

I. Plaintiff has abandoned her actual-knowledge claim against Taylor and Banbury, thereby limiting the relevant evidence to Hogan's knowledge, investigation, and response. 33

II. The district court did not err in declining to set aside the jury's no-actual-knowledge finding. 34

A. Plaintiff must show "an absolute absence of evidence" to support the jury's verdict. 34

B. *Davis* and *Baynard* require proof that Hogan had actual knowledge, subjectively measured, that Jane was sexually harassed. 35

1. Actual knowledge is subjectively measured. 35

2. Actual knowledge may be derived from allegations, but allegations alone do not automatically suffice. 39

3. Plaintiff defaulted her challenge to the court's answer to Jury Question 4. 40

4. The court did not abuse its discretion in declining to instruct that *actual knowledge* means *actual notice*. 41

C. Ample evidence supported the jury's no-actual-knowledge finding. 42

D. The district court applied the correct standard to Plaintiff's new-trial motion. 46

E. The juror-confusion allegation is procedurally defaulted, inadmissible, and baseless. 48

F. There was no miscarriage of justice in failing to provide an adverse-inference instruction. 50

III. Affirmance is warranted on independent, alternative grounds. 52

A. No reasonable jury could find deliberate indifference. 53

B. Hogan's response did not exclude Jane from Oakton's educational program. 56

CONCLUSION 57

STATEMENT REGARDING ORAL ARGUMENT 58

CERTIFICATE OF COMPLIANCE 59

CERTIFICATE OF SERVICE 59

TABLE OF AUTHORITIES

Page

Cases

Abasiekong v. City of Shelby,
744 F.2d 1055 (4th Cir. 1984) 47, 48

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
548 U.S. 291 (2006) 32, 38

Baynard v. Malone,
268 F.3d 228 (4th Cir. 2001) ..... passim

Blum v. Bacon,
457 U.S. 132 (1982) 53

Bristol Steel & Iron Works v. Bethlehem Steel Corp.,
41 F.3d 182 (4th Cir. 1994) 35

Buxton v. Murch,
249 Va. 502 (1995) 43

Cannon v. Univ. of Chicago,
441 U.S. 677 (1979) 32

Cortez-Mendez v. Whitaker,
912 F.3d 205 (4th Cir. 2019) 34, 52

Davis v. Monroe Cty. Bd. of Educ.,
526 U.S. 629 (1999) ..... passim

Doe v. Dardanelle Sch. Dist.,
928 F.3d 722 (8th Cir. 2019),
cert. denied, 2020 WL 129588 (U.S. Jan. 13, 2020) 56, 57

Ellis v. Int'l Playtex, Inc.,
745 F.2d 292 (4th Cir. 1984) 47

Farmer v. Brennan,
511 U.S. 825 (1994) 37, 38, 45

Fitzgerald v. Barnstable Sch. Comm.,
504 F.3d 165 (1st Cir. 2007),
rev'd on other grounds, 555 U.S. 246 (2009) 55

Franklin v. Gwinnett Cty. Pub. Schs.,
503 U.S. 60 (1992)..32

Gebser v. Lago Vista Indep. Sch. Dist.,
524 U.S. 274 (1998).. 33, 36, 56

Gill v. Rollins Protective Servs. Co.,
773 F.2d 592 (4th Cir. 1985),
amended on other grounds, 788 F.2d 1042 (4th Cir. 1986)..........................47

Hill v. Cundiff,
797 F.3d 948 (11th Cir. 2015) 39

Huskey v. Ethicon, Inc.,
848 F.3d 151 (4th Cir. 2017) 34

Jennings v. Univ. of N.C.,
482 F.3d 686 (4th Cir. 2007) 39

Kollaritsch v. Mich. State Univ. Bd. of Trs.,
944 F.3d 613 (6th Cir. 2019) 53, 56

Lind v. Schenley Indus., Inc.,
278 F.2d 79 (3rd Cir. 1960)...48

Minter v. Wells Fargo Bank, N.A.,
762 F.3d 339 (4th Cir. 2014) 35, 42

Morrow v. Balaski,
719 F.3d 160 (3d Cir. 2013) 38

Murrell v. Sch. Dist. No. 1,
186 F.3d 1238 (10th Cir. 1999) 39

Nivens v. Gilchrist,
444 F.3d 237 (4th Cir. 2006) 53

Porto v. Town of Tewksbury,
488 F.3d 67 (1st Cir. 2007)..55

Reynolds v. Am. Nat'l Red Cross,
701 F. 3d 143 (4th Cir. 2012) 53

Richard P. ex rel. R.P. v. Sch. Dist. of City of Erie,
No. 03-390, 2006 WL 2847412 (W.D. Pa. Sept. 30, 2006),
aff'd, 254 F. App'x 154 (3d Cir. 2007) 46

Roe v. Howard,
917 F.3d 229 (4th Cir. 2019) 2

Romero v. City of New York,
839 F. Supp. 2d 588 (E.D.N.Y. 2012) 40

Rosa H. v. San Elizario Indep. Sch. Dist.,
106 F.3d 648 (5th Cir. 1997) 37

Russell v. Absolute Collection Servs., Inc.,
763 F.3d 385, 391 (4th Cir. 2014) 53

S.B. v. Bd. of Educ. of Harford Cty.,
819 F.3d 69 (4th Cir. 2016) 55

Stevenson v. Martin Cty. Bd. of Educ.,
3 F. App'x 25 (4th Cir. 2001) 38

Turner v. United States,
736 F.3d 274 (4th Cir. 2013) 50

Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment,
558 U.S. 67 (2008) 53

United States v. Barber,
668 F.2d 778 (4th Cir. 1982) 49

United States v. Hawkins,
76 F.3d 545 (4th Cir. 1996) 49

United States v. Herrera,
23 F.3d 74 (4th Cir. 1994) 41

United States v. Hill,
927 F.3d 188 (4th Cir. 2019),
petition for cert. filed (U.S. Feb. 26, 2020) (No. 19-7778) 50, 51

United States v. Mathis,
932 F.3d 242 (4th Cir.),
cert. denied, 140 S. Ct. 639 (2019) 41

United States v. Patterson,
150 F.3d 382 (4th Cir. 1998) 50

Vance v. Spencer Cty. Pub. Sch. Dist.,
231 F.3d 253 (6th Cir. 2000), *disapproved in part on other grounds by Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613 (6th Cir. 2019) .53

Vodusek v. Bayliner Marine Corp.,
71 F.3d 148 (4th Cir. 1995) 51

West v. Richmond, F. & P. R.R. Co.,
528 F.2d 290 (4th Cir. 1975) 47

Williams v. Nichols,
266 F.2d 389 (4th Cir. 1959) 46, 47

Wyler v. Conn. State Univ. Sys.,
100 F. Supp. 3d 182 (D. Conn. 2015) 40

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 1 (Spending Clause).. 30, 32

Statutes

Title IX of the Education Amendments of 1972,
86 Stat. 373, 20 U.S.C. §§ 1681–1688 .... passim

§ 1681(a) 32

§ 1682 32

Rules

Fed. R. App. P. 28(a)(8)(A) 34, 52

Fed. R. Civ. P. 51(c)(1)...41

Fed. R. Civ. P. 59 .... passim

Fed. R. Civ. P. 59(a)..34

Fed. R. Civ. P. 72(a)..51

Fed. R. Evid. 603 49

Fed. R. Evid. 606(b).. 31, 49

Fed. R. Evid. 802 49

Fed. R. Evid. 804(b)(1) 49

Secondary Sources

11 Charles Alan Wright & Arthur R. Miller,
FEDERAL PRACTICE & PROCEDURE § 2819 (3d ed. 2019)..............................35

BLACK'S LAW DICTIONARY (11th ed. 2019) 43

INTRODUCTION

The district court properly refused a new trial because the evidence supported the jury's finding—following a two-week trial with 28 witnesses—that the Fairfax County School Board did not have "actual knowledge" of Jane Doe's alleged sexual harassment by Jack Smith. There were no eyewitnesses to their interaction, which occurred underneath Jane's blanket, at night, while Jack and Jane sat together, silently, surrounded by friends. Assistant Principal Hogan understood after interviewing them that they had engaged in mutual sexual touching, which included Jane stroking Jack's penis for 15–20 minutes until he ejaculated. Hogan did not believe that Jane was accusing Jack of assault, let alone that she had been assaulted.

Having failed to seek judgment as a matter of law (JMOL), Plaintiff now faces the most demanding appellate standard there is. She can win reversal only by proving "an absolute absence of evidence" to support the verdict. But instead of confronting the School Board's evidence, she cherry-picks the testimony to advance her own theory of the case.

That is not how appellate review works, and the Court should affirm.

STATEMENT OF THE CASE

The jury in this Title IX case found that the three relevant Oakton High School officials—Assistant Principal Michelle Taylor, Assistant Principal Jennifer

Hogan, and Principal John Banbury—lacked "actual knowledge of the alleged sexual harassment by Jack Smith that occurred" on a March 8, 2017 school-sponsored bus trip. JA-3325. Because this is "an appeal following a jury verdict," the Court must "view the trial evidence in the light most favorable to" the School Board, "the prevailing party." *Roe v. Howard*, 917 F.3d 229, 233 (4th Cir. 2019).

A. Assistant Principal Taylor learns that Jane and Jack had "hooked up."

While attending a national music festival in Indianapolis with the Oakton band, JA-835:9–13, 841:1–10, Taylor learned on Thursday evening, March 9, 2017 that something involving Jane Doe and Jack Smith had happened on the bus ride the day before, JA-848:17–19. The music teacher and band director, Dr. Jamie VanValkenburg (or "Dr. V"), texted Taylor at 9:56 p.m. that another student on the trip, Victoria Staub, had mentioned some "funny business": Jack had "put himself" on Jane, "Jane was not into it" and "embarrassed," and she didn't want Victoria to "tell anyone." JA-849:22–850:6; JA-2483 (PX-3). Taylor was unable to reach Dr. V by phone but would see him early the next day. Dr. V testified at trial that he did not think that Victoria had reported a sexual assault. JA-1107:6–9. Taylor didn't think so either. JA-851:15–16; JA-870:16–21.

The next morning (Friday, March 10), Taylor told Dr. V she would speak with Victoria that day. JA-854:20–855:25. Taylor spent "the entire day" with the band. JA-855:22–25. The group warmed up at 8 a.m. and performed at 9 a.m.

JA-2500 (PX-10). Taylor "ma[d]e a point" to check on Jane. JA-916:19–918:4. Jane was "smiling and engaged," JA-917:11–13, and Taylor saw no sign of distress, JA-921:6–922:5; JA-3042 (DX-56) (photo).

As the group later watched other schools perform, JA-925:6–18; JA-2500 (PX-10), Taylor received a phone call from Wally Baranyk, the Safety and Security Specialist at Oakton, JA-1211:16, 2015:21. Taylor texted, "Hey. I'm in a concert. Is it an emergency? I can call in a few, if you need me." JA-2489 (PX-6). Receiving no response, Taylor texted Darrell Estess and Kathleen Sefchick in the school security office. JA-925:22–926:6, 2485 (PX-4). Estess was a Fairfax County police officer assigned to Oakton. JA-864:15–23, 927:7–12. Sefchick was an assistant security specialist who reported to Baranyk. JA-864:8–11.

Taylor texted them, "Wally just called me. I'm in a concert…. Is it an emergency?" JA-2485 (PX-4). Sefchick and Estess each responded that Taylor should listen to her voicemail. *Id.* Taylor answered "What's up…. Can't listen right now…" Estess replied "[p]ossibly sex act on one of your buses"; Sefchick texted "[s]exual act on the bus, no names yet." *Id.*

After the band returned to the hotel for the students to change for dinner, JA-856:7–8, Taylor sought out Victoria and arranged to speak privately with her later, JA-856:9–10, 874:11–18, 876:1–7. Victoria responded, "that would be great."

JA-876:10 (Taylor). After an early dinner, the group went to a local mall from 6–9 p.m. JA-2500 (PX-10). Taylor found her opportunity to speak to Victoria alone.

Victoria said that Jane had been romantically interested in Jack, JA-938:11–16; the two had sat together under a blanket on the bus ride, JA-938:17–25; Jane had touched Jack's penis for a period of time, JA-939:3–7, 939:19–22; and Jane subsequently learned that Jack "had a girlfriend," JA-940:8–9. Victoria said that Jane was "very upset" to have "hooked up" with Jack while he had a girlfriend. JA-940:3–5. Victoria "kept coming back" to the "girlfriend," saying "can you believe that he had a girlfriend[?]" JA-940:7–9.

Victoria did not describe any sexual contact between Jack and Jane other than Jane's giving him a "hand job" under the blanket. JA-880:23–881:2, 940:10–12 (Taylor). (Although Victoria testified she told Taylor that Jack had touched Jane's breasts and digitally penetrated her, JA-385:15–386:1, Taylor firmly disputed that Victoria's account, JA-880:23–24; JA-940:10–12.) Taylor thanked Victoria for speaking with her and said she would follow up. JA-940:20–21.

Taylor understood from Victoria that Jane had engaged in a consensual sex act with Jack. JA-941:4–8. When asked at trial, "did you think you were looking at a potential sexual assault situation[?]," Taylor emphatically said "[n]o, that was not my understanding at all." JA-940:24–941:1.

Taylor knew that the consensual sex act would have to be investigated for possible disciplinary action. JA-941:9–15. The student-conduct handbook (the "Student Rights & Responsibilities" or "SR&R") prohibits sexual touching at school or on school-sponsored trips, "whether or not consensual." JA-941:11–18 (Taylor); JA-2964 (SR&R). Jane testified that she was aware that consensual sexual activity is prohibited on school trips and was concerned she could get in trouble for it. JA-1793:2–6, 1808:8–10, 17–19.

After speaking to Victoria Friday evening, Taylor called Principal Banbury to relay what Victoria had said. JA-941:19–23. Taylor reported that Jack and Jane had been sitting together on the bus, under a blanket that Jane had gotten for them, and that Jane gave Jack "a hand job." JA-1016:1–9.

Banbury and Taylor discussed whether Taylor should question Jane there and then, or wait until the students returned to school on Monday. JA-942:1–13. They worried there were no counselors on the trip to provide emotional support to Jane if needed. JA-943:22–944:5. At school, by contrast, she would have a "school psychologist, social worker, or counselor"—someone "trained in uncomfortable conversations to provide emotional support." JA-944:21–945:1.

So Banbury and Taylor agreed that Jane should be interviewed at Oakton on Monday. JA-1020:10–1021:2. In the interim, Taylor would continue to monitor Jane. JA-946:21–24, 1017:19–1018:5, 1019:6–13.

B. Jane confronts Jack for having "cheated" on his girlfriend.

The jury heard testimony about Jane's reaction upon learning Thursday morning that Jack had a girlfriend. The girlfriend, a student at another school, was also attending the festival. JA-401:15–402:11, 1349:9–10. Jane temporarily swapped seats with Jack's friend on the bus that morning to confront Jack for having "cheated" on his girlfriend. Jane insisted that Jack tell his girlfriend; Jack reluctantly agreed. JA-1349:3–8 (Jack), 1773:23–1777:7 (Jane). Jack Snapchatted Jane Thursday night that he had told his girlfriend. JA-1777:8–10 (Jane).

But the next day at the mall (Friday), Jane saw Jack kissing and "holding hands" with his girlfriend. JA-1777:11–15 (Jane), 3051 (DX-59). Jane was livid. She texted her friend back in Virginia, Aveesh Kachroo, "I HATE HIM." JA-3051 (DX-59). Jane felt sure Jack had not told his girlfriend because "[t]here's no way she would forgive him." *Id.* Aveesh encouraged Jane to "tell someone" what happened when she got back to school, but Jane worried that she "could technically get in trouble cause I didn't explicitly say no." JA-3051–52 (DX-59).

At breakfast the next morning (Saturday), Jane went up to Jack's girlfriend and told her that Jack had "cheated" on her and was "not a good person," JA-1779:8–17; Jane did not claim to have been assaulted.

Jane spoke with her parents throughout the trip but did not mention the Wednesday-evening bus incident; she said it was not the "appropriate time" to tell

them. JA-1786:12–18. She did tell more than ten of her friends, though, JA-1786:22–1787:3; JA-1788:23–1789:18, asking them not to repeat it so she could tell other friends herself, JA-1790:6–10. Jack told no classmates, JA-1357:3–10, something Jane knew, JA-1790:3–5.

While Taylor was not privy to those interactions, she continued to monitor Jane that weekend, telling Banbury that Jane seemed "happy." JA-1019:6–13 (Banbury). Saturday's schedule was packed with activities, ending with an awards banquet and concert. JA-2501–02 (PX-10). Photographs showed Jane looking very happy. *See* JA-3045–46 (DX-57) (Jane in white).

C. Taylor briefs Assistant Principal Hogan on Sunday evening.

On Sunday, the students returned by bus from Indianapolis, arriving at Oakton around 6 p.m. JA-2502–03 (PX-10). At 9:10 p.m., Dr. V texted Taylor that a parent chaperone, Kristen Jorgensen, had texted that they had an "urgent" "situation" similar to one involving a former student. Dr. V assumed it referred to the encounter between Jack and Jane. JA-888:20–889:2, 2484 (PX-3).

Kristen Jorgensen was the mother of Emily Jorgensen, a student on the trip. JA-504:15–23. Taylor didn't know "exactly what" to make of Mrs. Jorgensen's reference. JA-896:22–24, 897:18–25. But she did not view it as an allegation of sexual assault. JA-896:25–897:3, 950:15–19. Dr. V didn't either. JA-1115:17–19. But Taylor now knew there was more to the story and that it might be "more

concerning." JA-897:23–25, 951:2–6. She texted Dr. V to tell Mrs. Jorgensen that school officials "would look into it first thing the next morning." JA-898:4.

Taylor was still in Indianapolis, however. A winter storm had arrived and she didn't know when she could get back to Oakton. JA-2512 (PX-13). So at 9:44 p.m., Taylor emailed two other assistant principals for assistance. JA-2512 (PX-13). Eight minutes later, Assistant Principal Hogan replied that she would help. JA-2506 (PX-11).

D. Hogan promptly investigates and concludes that Jane was a full participant in mutual sexual touching.

Taylor briefed Hogan by phone that evening. JA-1240:13–21. Taylor reported what she learned from Victoria: Jane engaged in sexual activity with Jack on the bus; Jane had had a "crush" on Jack; and Jane was upset after finding out that Jack "had a girlfriend." JA-1187:20–1188:5. Taylor also relayed Mrs. Jorgensen's comment, which might suggest that Jane "may not have wanted to be a full participant." JA-1186:5–8. Taylor and Hogan discussed how best to approach Jane to discover what happened. JA-1240:25–1241:4.

At trial, Plaintiff's counsel pressed Hogan about whether this conversation provided any allegation that Jack had sexually assaulted Jane. Hogan explained that she did not have enough information to think that. While it was "a possibility," she lacked the facts. JA-1186:19–23. Hogan knew from many years

of working with students that things often turn out differently from vague rumors, and it's critical to learn the details. JA-1189:4–1190:4.

Hogan met with Banbury the next morning (Monday) and arranged to have Counselor Alyson Calvello accompany her when she interviewed Jane. JA-990:19–991:4. Hogan knew that Calvello could quickly build rapport with students. JA-1244:18–21. Hogan believed that Jane would feel "more comfortable" with Calvello than with her assigned counselor, Charles Grausz, a man in his fifties. JA-1244:22–1245:12.

1. Hogan's first interview with Jane.

Hogan testified that she learned nothing in her first interview of Jane to suggest that Jane had been assaulted. JA-1258:3–8. Hogan took notes as they sat with Calvello at a round table in Hogan's office. JA-1257:1–13; JA-2517 (PX-18).

Jane told Hogan that she felt "stuck in a situation [that she was] not quite sure how to get out of." JA-1259:10–13; JA-2517 (PX-18). She had been friends with Jack for three years. JA-1196:24. They got on the bus after dinner; Jack asked for a blanket; Jack took her hand; pulled his pants down; put her hand on his penis; and put his hand up her shirt and down her pants. JA-1195:23–1196:10, 19–25; JA-2517 (PX-18). Jane said that she "tried to block" his hand at the outset but then, for about 20 minutes, they were "both touching." JA-1258:25–1259:9; JA-2517 (PX-18).

Hogan explored what Jane meant by being "stuck in a situation" she did not know "how to get out of." Jane said that "she participated in the sexual act but she didn't want to or she didn't know how to get out of that." JA-1259:12–16. Jane didn't indicate that she was afraid to say no, only that she "didn't know how" not to participate. JA-1259:19–21.

Jane then told Hogan that she found out "the next day" that Jack had a girlfriend. JA-1260:2–3; JA-2517 (PX-18). Jane fixated on "the girlfriend," mentioning her at least three times. JA-1198:13–16, 1258:9–17; JA-2517 (PX-18). Jane was "very offended that this happened when he had a girlfriend." JA-1198:15–16. It didn't strike Hogan as "jealousy" so much as, "how could he do this when he has a girlfriend[?]" JA-1198:19–20.

Jane did not indicate that Jack had used any force or threat. JA-1259:22–23, 1261:4–5. Nonetheless, Hogan asked questions to determine if Jane had been assaulted. JA-1260:2–8. Jane said that she and Jack did not say anything to each other during the encounter. JA-1260:8–9, 1261:6–7. When asked if she tried to stop, Jane said that she initially "tried to block him," "right in the beginning," but that was then followed by 20 minutes of mutual sexual touching. JA-1260:10–1261:3.

Hogan asked if Jane participated willingly. Jane answered that "she did participate but she just didn't know . . . what to do, so she participated." JA-

1261:8–11. After learning the next day that Jack had a girlfriend at the festival, Jane "went and told" her what happened "because she didn't feel it was right that he was having sexual activity with her when he had a girlfriend." JA-1261:18–1262:2.

Hogan described Jane's demeanor as "pretty calm, just telling a story"; Jane did not seem upset "at all." JA-1262:6–9; JA-1196:13–18. Hogan told Jane that she was going to call Jane's home and then speak to Jack. JA-1262:15–17.

Jane asked if she was going to get suspended; Hogan responded that she didn't think so. JA-1262:18–1263:5, 1264:2–9. Hogan believed Jane when she said she participated in the sexual encounter because she didn't know how not to participate. Hogan thought that Jane needed counseling, not discipline. JA-1264:6–19.

Jane agreed to write a statement while Hogan interviewed Jack. JA-1263:10–1264:1. Calvello stayed behind with Jane. JA-1265:2–6.

2. Hogan's interview of Jack.

Hogan asked Baranyk, the Safety and Security Specialist, to help with Jack's interview. JA-1265:7–19. Hogan told Baranyk that Jane had mentioned trying to "block" Jack, once, before then participating in the sexual encounter. JA-1274:5–7. Baranyk was a former police officer. JA-2016:6–14. In order "to get [Jack] to talk," JA-1271:12, Baranyk told him in a "stern" voice there were "some pretty

serious accusations here" about Jane not wanting it to "happen" and "you'd better be honest with us." JA-1265:25–1266:3, 1271:8–15, 1273:13.

Jack reacted with shock; he was "stunned" at that suggestion. JA-1273:1. "[T]hat's when [Jack] kind of just spilled his guts." JA-1273:14–15. Hogan took notes of what Jack told them. JA-2516 (PX-17).

Jack said he and Jane had engaged in sexual "touching" and that he "wasn't forcing anything on her." JA-1266:23–1267:8; JA-2516 (PX-17). He knew that Jane "had a crush on him at one time." JA-1223:4–5. He said that Jane initiated the encounter by leaning her head on his shoulder and, underneath the blanket that covered them, putting her hand on his leg. JA-1267:9–13. She then "moved closer" and, while keeping her head on his shoulder, put her hand on his penis, stroking it until he ultimately ejaculated. JA-1267:23–1268:19. Jack also said he put his hand in her pants and up her shirt. JA-1268:20–1269:4. Neither he nor Jane spoke during the encounter. JA-1272:12–15.

Jack said that Jane never pulled her hand away and never tried to stop him. JA-1267:14–22. The two had discussed sitting together on the bus after dinner; Jane had gotten the blanket to cover them; she was wearing his hat; she had "moved closer" to him; she "touched me first"; she "never said no"; and she "never gave me any indication" that she didn't want to do it. JA-1219:24–1220:1, 1269:20–1270:3, 1272:19–22. Jack named two students who sat nearby, Chris

Cortese and Karoline Davis. JA-1271:19–1272:9. Jack also said that Jane later confronted his girlfriend. JA-1270:15–17.

Hogan told Jack she would call his home and asked him to write a statement. JA-1274:11–15. She told Jack not to talk to other students and admonished: "do not talk to Jane Doe, and . . . never do this again." JA-1318:21–23.

3. Hogan's second interview with Jane.

Having heard Jack's account, Hogan and Baranyk interviewed Jane again. Jane had completed her written statement, and Hogan and Baranyk read it before speaking with her. JA-1274:19–1275:3, 1276:25–1277:3; JA-2517 (PX-18).

The statement began that Jack had "followed" her onto the bus, as if he had stalked her. JA-2515 (PX-16). But when asked, Jane admitted that she and Jack planned to sit together. JA-1276:16–1277:8. Her statement also omitted that Jane had put her head on his shoulder and that she was wearing his hat, something Hogan had learned from Jack, and which Jane now confirmed. JA-1219:21–1220:16, 1275:10–24.

Jane's statement said she "moved my hand away" from his penis but "he moved my hand back"; "I was so shocked and scared that I did not know what to say or do"; "I tried to block him but he still put his hands up my shirt and down my pants"; and "[t]his lasted for about 20 minutes." JA-2515 (PX-16). Jane wrote

that Jack then "got up to go to the bathroom and then sat back down next to me and pretended like it never happened." *Id.*

What Jane verbally told Hogan and Baranyk, however, differed from her written account. JA-1220:11–12. Jane said that she and Jack were "both wrong"—Jack for "having a girlfriend and touching" Jane, and Jane "because she didn't want to be in the situation and tried to pull away." JA-1277:24–1278:9. When pressed by Hogan, Jane admitted she had moved her hand from his penis "once," at the outset. JA-1278:10–21; JA-2518 (PX-18). She similarly said that, when he put his hand down her pants, she initially "pushed away" but "then allowed it to happen." JA-2518 (PX-18). Jane did not describe any "grabbing" of her hand by Jack or the use of "any force." JA-1278:22–1279:5. The encounter then continued, she said, with them "both touching." JA-1280:6–9.

Baranyk asked Jane if she tried to "get up" or to "stop it" in any way; she said no, "she didn't know what to do." JA-1280:10–14. So she continued stroking his penis for 10–15 minutes. JA-2518 (PX-18). She said she did not know if he ejaculated before going to the restroom. JA-1277:17–23. She also did not get up to move at any time, even though no seats were assigned and students frequently changed seats. JA-528:4–5 (Jorgensen); JA-1774:2–8, 1803:16–23 (Jane).[1]

[1] The "60 people" on the bus included Jane's longtime high-school friends. JA-1745:21–23 (Jane).

Baranyk asked Jane if she thought the encounter was consensual, to which she responded "I don't think it was consensual." JA-1280:2–4; JA-2518 (PX-18). But the jury later heard Jane testify that she believed "consent" means that she had to "explicitly say yes" before engaging in sexual touching. JA-1772:16–1773:1 (Jane). If she did not "explicitly say yes," she said, the encounter was "nonconsensual." JA-1773:2–4.

To Hogan, however, what Jane described was not an assault. For even if Jane had been thinking to herself that she did not want to participate, she fully participated. JA-1281:14–16. There was a discrepancy in their stories about whether Jane initially pulled her hand away from Jack's penis: she said she did, he said she didn't. Hogan didn't know which was true. Either way, Jane proceeded to stroke his penis for something like "20 minutes," which indicated to Hogan that Jane was a "full" and "willing participant." JA-1223:2–11.

Hogan's impression was reinforced when Baranyk asked Jane if she wanted to press criminal charges. Jane was incredulous. She put up her hands and exclaimed "No." Hogan read Jane's reaction to mean that, even if she "didn't want to participate, she still participated." JA-1280:21–1281:16. (Baranyk similarly recalled Jane saying emphatically—"No way" would she press charges. JA-2019:20–25.)

Contrary to Plaintiff's assertion, Doe Br. 2, Hogan and Baranyk did *not* try to "dissuade" Jane from pressing charges. JA-1213:17–21, JA-2020:4–6. Nor did Baranyk ask Jane "why [she] didn't scream." *Compare* Doe Br. 2 *with* JA-1214:14–17 (Hogan). (Jane did lodge such an accusation against her father, texting Aveesh that her father said Jane "was in the wrong" because she "didn't scream." JA-2898 (PX-82).)

Baranyk asked Jane for possible witnesses. She identified Karoline Davis and Brianna Murphy. JA-1281:17–24 (Hogan).

Hogan asked Jane if she had any troubling interactions with Jack after the bus ride; she said no. JA-1282:23–1283:1. Jane expressed no fear of Jack, JA-1283:2–5, and didn't think it "would happen again." JA-1318:19–20. Jane said that no one had been teasing her, and she had no reason to think that Jack had told anyone. JA-1283:6–11. Jane came across as "calm," showing no need to be consoled or comforted. JA-1281:25–1282:7.

Hogan continued to believe that Jane had described a consensual encounter. JA-1217:24–25, 1283:12–1286:14. Jane's behavior, even as she described it, showed that she was "a willing participant." JA-1286:13.

4. Hogan's additional investigative efforts.

Hogan did not fail to speak "to most of the witnesses" identified. Doe Br. 12. She sought out all three students whom Jack and Jane named. JA-1215:8–22.

Hogan interviewed Brianna Murphy and Chris Cortese. JA-1215:19–22. Cortese had been asleep and hadn't witnessed anything. JA-1812:23–1813:1 (Jane). Murphy only witnessed Jane retrieve the blanket. JA-1182:20–1184:2 (Hogan). Murphy provided a written statement, but it was subsequently lost after Oakton's renovation. JA-1183:7–10; *see infra* at 26–27. Murphy testified at trial, however, confirming that she did not see what happened under the blanket. JA-577:7–20 (Murphy).

Hogan next tried to interview Karoline Davis. But Davis was not in school that day (Monday, March 13). JA-1216:22–1217:1. (Karoline testified at trial that, even though she sat across the aisle from Jack and Jane—at most two feet away—she neither heard anything nor saw what happened under the blanket. JA-595:23–596:25.)

Hogan next met with Jack's mother, who had been a parent chaperone on the trip. Hogan informed her that Jack could be suspended for having engaged in consensual sexual activity on the bus, JA-1217:5–25, and that the decision would be "up to the principal," JA-1290:20–23.

Hogan then met with Jane's father, Michael Campfield. JA-1218:9. He arrived in person after Hogan telephoned Jane's mother, Belinda Dahlman, and left a message to call. JA-1218:12–16; JA-3408 (DX-48). Hogan told Campfield "what both students had said." JA-1218:24–1219:9. Hogan said that she did not

think Jane would be disciplined. JA-1220:22–25, 1224:4–7. Campfield took from this conversation that Jane had been in a sexual encounter but that it was *not* a "sexual assault." JA-1456:8–16 (Campfield).

Hogan then briefed Banbury. JA-1221:1–2. She relayed all the facts she had gathered, which indicated "nothing" to suggest that Jack had sexually assaulted Jane. JA-1221:8–10. *See also* JA-1222:19 ("no evidence to call that a sexual assault"); 1291:14–23 (similar). Banbury's testimony corroborated Hogan's account. *See* JA-977:19–21 (no "potential sexual assault"), 983:4–8 (same). As for possible discipline, they agreed to think more about it. JA-1221:10–13. By this point, however, Hogan believed that Jane needed counseling, not discipline. JA-1221:14–15; 1291:4–13.

A snowstorm closed school the next day (Tuesday, March 14). JA-1292:4–8. Unbeknown to Hogan, Jane's parents spent many hours with Jane at home going over what happened, asking "leading questions" because Jane was reluctant to talk. JA-1458:12–1459:5 (Campfield). That evening, Dahlman emailed Hogan seeking a meeting, and Hogan responded, inviting them to meet with her and counselor Calvello when Calvello returned to school on Thursday morning. JA-2519 (PX-21).

On Wednesday morning, Dahlman emailed to accept the Thursday-morning appointment and ask Hogan for academic accommodations for Jane, who had

missed classes before and during the band trip. Dahlman requested more time for Jane to complete assignments, citing "stress and trauma" and noting that Jane's "school work and her grades have always been very important to her." JA-2520 (PX-22). Dahlman wanted her request delivered to Jane's teachers. *Id.*

Later that morning, Karoline Davis's mother emailed Oakton. Mrs. Davis understood that the administration was seeking to speak to Karoline, but she refused permission for her to be interviewed without a parent present. JA-2522 (PX-23). Because Karoline played no part in the incident (confirmed by Karoline at trial, *supra* at 17), the school responded that Karoline did not need to be interviewed. JA-1174:21–1175:22, JA-2522 (PX-23).

E. Principal Banbury declines to discipline Jane or Jack.

After meeting with Hogan again, Banbury understood that the encounter "was consensual." JA-1030:22–1031:1. He concluded that, under the circumstances, neither student would be disciplined. JA-1031:10–19.

Hogan called Campfield to tell him. When Jane heard the news, she texted Aveesh, "I'M NOT GETTING SUSPENDED." JA-3027 (DX-54).

Later that day, Hogan received an email from Quesuan Wigfall, an Oakton counselor (JA-1309:14–15), forwarding a Monday-afternoon email from another student, Jacquelyn Nanko. JA-2523 (PX-25). Nanko had not been on the band trip. JA-1788:1–5 (Jane). But she wrote that she had "heard" that something

happened "between two of my band classmates" on the trip, and that "the girl involved was peer pressured into something not fully consensual, but she was too afraid to say no after he pulled her back when she tried to move away." JA-2523 (PX-25). Even though this was a fourth-hand report of the incident Hogan had already investigated, she followed up with Wigfall nonetheless. JA-1181:21, 1309:24–1312:14.[2]

F. Hogan meets with Jane's parents, agrees to their request for academic accommodations, and urges counseling that they refuse.

Hogan and Calvello met with Jane's parents on Thursday morning. Hogan testified that Dahlman was "very upset" that she had not gotten a phone call from school officials while the band was in Indianapolis. JA-1297:7–9. The parents discussed with Hogan their request for "academic support," and Hogan agreed that Calvello would direct teachers to excuse any "unnecessary" work and be flexible in permitting "make up assignments" when Jane was ready. JA-1298:8–22.

Dahlman became enraged that Hogan would not commit to disciplining Jack. Dahlman argued that, "since [Jane] blocked him, that is saying I don't consent to this, and it's a sexual assault." JA-1299:2–7. When Hogan responded that she had come to a different conclusion, Dahlman exploded, yelling "I want to

[2] Nanko dated Jane's friend Evan Bowden. Jane evidently told Evan about the bus incident, Evan told Nanko, and Nanko emailed Wigfall. JA-1787:4–1788:3 (Jane).

know why I did not get a phone call when another student had his fingers up my daughter's vagina." JA-1299:9–16. Hogan had already heard from both Jane and Jack that he had put his hand down Jane's pants. Although the detail about having his fingers inside her was new, Jane had already told Hogan "that they were mutually touching each other." JA-1299:17–25.

Hogan offered Oakton's support services for Jane, including counselor Calvello, Jane's assigned counselor (Grausz), and the school psychologist. JA-1300:16–1301:3. Hogan expressed empathy, explaining that Jane needed to know that if she didn't want someone to touch her, "instead of just participating, you say: I don't want this to happen." Hogan thought this was particularly important because Jane was "going off to college soon." JA-1301:4–1302:5. Jane's parents agreed that Jane would benefit from such counseling, but Dahlman told Hogan to wait before having anyone contact Jane. JA-1302:14–18. Jane's parents shook hands with Hogan and thanked her for supporting Jane. JA-1303:23–25.

G. Jane's teachers provide generous academic accommodations.

The next morning (Friday, March 17), as Hogan had arranged, Calvello emailed all seven of Jane's teachers saying that Jane "has been going through a difficult time recently" and asking that they "help her out in the classroom." Specifically, Calvello asked them to give Jane "extra time to turn in assignments," to "excuse any non-essential assignments," and to allow her to do "make-up"

assignments as needed. Calvello also asked the teachers to report back if they saw Jane "struggling," "academically or emotionally." JA-2525 (PX-27).

Calvello cc'd Jane's parents, and Dahlman used that opening to reply-all, asking the teachers to "include us [Jane's parents] in all written and verbal communication." JA-3009–10 (DX-40). Dahlman ratcheted up the reason, writing that Jane "has experienced severe trauma" and that Dahlman or Campfield might have to "contact some or all of you in the attempt to help her with the scheduling or rescheduling of her assignments/tests." *Id.*

Several teachers answered that they had not seen any sign of distress. *E.g.*, JA-3064 (DX-68) ("it hasn't shown in my class"); JX 3065 (DX-70) ("seems to be on her phone a lot"). But they all agreed to help. *E.g.*, JA-3006 (DX-36) (math teacher allowing tests to be postponed), JA-3009 (DX-40) (physics teacher promising to let Jane "make up her assignments at her own convenience").

Dahlman liberally contacted Jane's teachers the rest of the school year seeking other academic concessions, which were provided. Some were unprecedented. In honors pre-calculus, Jane's hardest class, JA-1643:1–2, 2087:6–10, the teacher excused Jane altogether from taking the final exam in June, accepting her mother's assurance that Jane was too upset. JA-1643:20–1644:19 (Dahlman); 2098:7–2099:18 (London). The teacher has never done that for anyone else. JA-2100:4–9. Similarly, after Dahlman told the physics teacher that

Jane was still suffering "trauma," JA-3014 (DX-42), he let her take six exams at home, including the final exam, something not done for other students, JA-2080:3–2083:3 (Nouristani). Her physics grades actually improved after the band trip. JA-2083:15–19.

While soliciting generous academic accommodations, Jane's parents refused Hogan's repeated offers of counseling services for Jane. On March 21, they emailed Hogan and Dr. V instructing them not to bring Jane into any meetings without their prior permission and their physical presence. JA-2528 (PX-34). Respecting those wishes, Hogan directed counselors Calvello and Grausz not to "check in" with Jane anymore. JA-3068 (DX-94).

Nonetheless, Hogan checked Jane's grades to make sure that her teachers were giving her "extended time or excusing assignments." They were, and Hogan saw nothing concerning in Jane's performance. JA-1312:15–1313:4. Jane's grades did not "drop[]." Doe Br. 13. Jane's own expert testified that her grades "didn't slip" and that she didn't suffer academically. JA-1572:9–13 (Harlow); *see also* JA-2907 (DX-8), 2909 (DX-10) (grades).

H. Jane has no further interaction with Jack and Dr. V rearranges the band seating to accommodate her.

Jane admitted that, after the band trip, Jack never tried to contact her or sit next to her. Jane "blocked him on every form of social media." JA-1773:5–12 (Jane). Jack steered clear of Jane but became socially isolated as his band friends

gossiped about what they heard. Jack lost his connections with them, stopped eating lunch in the band room, and left for home as soon as the school day ended. JA-1356:20–1358:15 (Jack). Jane, by contrast, was elected by her peers to an important leadership position on Band Council. JA-460:21–461:13. She ran with the "cooler group of kids." JA-490:5–12.

Jane and Jack were still in the same Symphonic Band class, however. It was the most prestigious and competitive class, and moving any students out meant demoting them. JA-1121:21–1122:21. On Monday evening, March 20, Dahlman emailed Hogan that Jane was "extremely uncomfortable" being in the same classroom as Jack and wanted to know "what can be done." JA-3021 (DX-47). Hogan was out sick and could not immediately respond. *Id.* The next day, Jane's parents emailed Hogan and Dr. V requesting that Jane be excused from band and allowed to do homework somewhere else. *Id.* Jane and her parents came up with that idea—not Dr. V or Hogan—but Dr. V agreed to their request, letting Jane do homework in the practice room. JA-1123:11–23 (VanValkenburg), 1836:3–25 (Jane).

Jane sat in the practice room for only three classes, however. JA-1126:14–1127:18 (VanValkenburg), 2411:4–8 (closing). At her father's request, Dr. V rearranged the band seating to keep Jack out of Jane's "line of sight" and "as far away" from her "as possible." JA-1124:25–1125:6 (VanValkenburg), 1512:6–11

(Campfield); JA-2529 (PX-35). To avoid embarrassing anyone, Dr. V told the class he did it for "acoustic reasons." JA-1125:7–22 (VanValkenburg). Jane's family never requested another seating arrangement. JA-1128:4–8 (VanValkenburg), 1512:23–25 (Campfield).

At the band's awards banquet in June 2017, Jane became enraged when Jack received one of numerous awards given to graduating seniors. JA-1137:13–1138:12. Dr. V had ordered the awards and pre-assigned the recipients before the Indianapolis trip. JA-1138:13–1139:7. Jane "stormed out" of the banquet, JA-390:17–20, and later screamed at Dr. V for 20–30 minutes for having given Jack the award. Dr. V let her berate him; he just looked down patiently at the floor. JA-1841:23–1842:7 (Jane).

Jack graduated at the end of Jane's junior year, in June 2017, and now attends college. JA-1325:17–20. The court ruled that the relevant period for any Title IX liability ended when Jack graduated. *See* JA-2346:22–2347:3 (jury charge). Plaintiff does not contest that ruling.

I. Jane's parents plan to sue but do not tell school officials until a year later, after a major renovation led to the accidental loss of certain records.

Jane and her parents planned to sue the School Board at least as early as June 2017, as Jane was finishing her junior year. JA-1853:6–16 (Jane); JA-2562

(PX-60); *see also* JA-2435:3–16. But Jane and her family didn't tell anyone in the school system. *E.g.*, JA-1029:23–1030:4 (Banbury).

Jane returned to Oakton for her senior year and thrived, gaining early admission to William & Mary, her first-choice college. JA-1855:25–1856:8 (Jane); JA-2909 (DX-10). Jane's college-admission essay was about the bus incident. Jane wrote that "it took me a long time to admit that I had been assaulted." JA-1863:7–1864:2. She admitted that she did not use that word with Hogan; she only later applied the assault "label," sometime before meeting with the free counselor her parents arranged for her to see. JA-1864:5–8. The counselor's notes, as early as June 2017, redacted statements reflecting legal advice and attorney "work product" prepared in anticipation of litigation. *E.g.*, JA-2562 (PX-60).

Jane's parents filed this action in May 2018, JA-2, shortly before Jane graduated from Oakton. All of the school officials in this case were "stunned" and "surprised" to learn she was suing. *E.g.*, JA-1313:15–19 (Hogan), 1029:23–1030:4 (Banbury), 2021:8–13 (Baranyk), JA-1428:6–21 (Lane).

The new principal, Jamie Lane, directed all administrators to find and preserve all Oakton records relating to the matter. JA-1423:25–1424:10, 1424:20–25, 1428:22–1429:12. But the previous December, Oakton had begun a major renovation project. About 200 unlabeled banker's boxes of files were stacked in

three different storage rooms. JA-1430:11–1431:11. Lane ordered her staff to search and organize the files, looking in particular for the Jane Doe investigative file. JA-1431:12–1432:13. The search took more than three weeks, but they could not find it. JA-1424:4–10, 1431:21–1432:2.

Nonetheless, the School Board produced over 15,000 pages of records in discovery. JA-1433:18–1434:3 (Lane). Fortunately, Hogan still had her notes of her interviews with Jack and Jane. JA-1425:11–18; 2516–18 (PX-17–18). Jane's parents also had their copy of Jane's written statement. JA-1612:18–21, 2310:18–20.

The magistrate judge concluded that the School Board had spoliated several missing documents because it had a duty under "its own policy" to preserve educational and disciplinary records. JA-95. He found that the loss of evidence was negligent, not intentional. JA-97. Yet he ruled that an adverse-inference instruction should be given at trial. JA-97. On the School Board's Rule 72 appeal, JA-98, the district judge affirmed the spoliation ruling but reserved whether to grant a spoliation instruction. JA-250–51. He ultimately declined. After hearing the evidence, he found that the loss of a handful of records did not materially prejudice Plaintiff and did not warrant such a major sanction. JA-2320:11–16.

J. Plaintiff omits the many factual disputes below and fails to state the facts in the light most favorable to the School Board.

Plaintiff's brief does not mention the numerous factual disputes aired at trial. One important example stands out.

Plaintiff misportrays Banbury's email to Taylor during the band trip in which Banbury inappropriately joked about "inches under the blanket." JA-2493 (PX-9). Plaintiff accuses Banbury of "making crude jokes about [Jane's] sexual assault." Doe Br. 2.

But Banbury testified without contradiction that he consistently believed that the two students' encounter was *consensual*. JA-993:3–7. He acknowledged that his email was inappropriate and unprofessional; he "owned" his poor judgment in writing it. But he firmly denied that he was "mocking" a sexual assault survivor. JA-995:14–996:8. Banbury testified unequivocally that, if Taylor had reported any facts suggesting the encounter was nonconsensual, he would have told Taylor to hang up and call 911. JA-1023:4–12 (Banbury).

Plaintiff's brief omits such critical details. Yet the jury's no-actual-knowledge finding as to Banbury shows that the jury credited his testimony.

QUESTIONS PRESENTED

1. Did the district court properly exercise its broad discretion to deny Plaintiff's new-trial motion because the jury's no-actual-knowledge finding was supported by evidence and did not result in a miscarriage of justice?

2. Should the district court have ruled as a matter of law that Jane failed to prove deliberate indifference?

3. Should the district court have ruled as a matter of law that the School Board's response did not bar Jane's access to its educational program?

SUMMARY OF ARGUMENT

A victim of student-on-student sexual harassment may recover damages against a school board receiving federal funds under Title IX only if the victim proves that an official authorized to take corrective action was deliberately indifferent to known harassment that is so severe, pervasive, and objectively offensive that it "effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). At trial, Plaintiff assailed the conduct of three Oakton administrators: Taylor, Hogan, and Banbury.

The jury returned a no-actual-knowledge finding as to all three, but on appeal, Plaintiff contests that finding only as to Hogan. That renders irrelevant much of the testimony she cites from witnesses who did not speak with Hogan.

In any case, the district court did not abuse its discretion in finding no miscarriage of justice warranting a new trial. Because Plaintiff filed no JMOL motion on the actual-knowledge issue, the standard of review is particularly

demanding. She must show an "absolute absence of evidence" to support the jury's verdict.

After the jury requested further instruction about the meaning of "actual knowledge" in Jury Question 4, the court erred in responding that "actual knowledge" includes knowledge of mere "allegations" of sexual harassment. But the jury found against Plaintiff anyway. The instruction was wrong because *actual knowledge* means knowledge "in fact." *Baynard v. Malone*, 268 F.3d 228, 238 (4th Cir. 2001). It is a subjective standard, not an objective one. While actual knowledge may be derived from allegations, allegations do not automatically suffice. Otherwise a plaintiff could satisfy this element through mere rumor. Title IX liability attaches, however, only to intentional misconduct by school officials. Title IX is a Spending Clause statute under which school divisions must have clear notice of its requirements, and neither Congress nor the courts have informed school divisions that liability attaches to honest-but-negligent assessments that no harassment has occurred.

Despite benefitting from the wrong answer to Jury Question 4, Plaintiff claims the court erred by not going further in its answer. But she defaulted that claim by inviting the very instruction about which she now complains.

The court did not err by declining to instruct the jury that *actual knowledge* means *actual notice*. Because Plaintiff and her amici insist that those phrases are

synonymous, it could not have been error to omit *actual notice.* But in truth, *actual notice* is a mischievous phrase that invites claims of constructive notice or inquiry notice, concepts foreclosed by *Davis* and *Baynard*.

Even though the court's answer to Jury Question 4 was too lax, the jury still found for the School Board. Plaintiff's appeal fails if there was *any* evidence to support the no-actual-knowledge finding. And the evidence was ample.

Plaintiff is wrong that the court applied a JMOL standard to her Rule 59 motion. The court articulated and applied the right standard. Plaintiff would turn Rule 59 into a vehicle for the trial judge to substitute his own judgment for the jury's, something this Court has forbidden.

Plaintiff has defaulted her claim that two newspaper articles proved that a juror was confused by the instructions, given that Plaintiff did not appeal the court's denial of her reconsideration motion in which she first relied on those articles. The articles are inadmissible anyway on myriad grounds, but particularly because Federal Rule of Evidence 606(b) prohibits using such statements to impeach a verdict. And even taken at face value, the juror's statement about the court's instructions is disproved by the instructions themselves.

Nor was it a miscarriage of justice to refuse an adverse-inference spoliation instruction. On appeal, Plaintiff complains about only two documents that could not be found. But the district judge did not abuse his discretion in finding no

material prejudice. Moreover, it would have been reversible error to give an adverse-inference instruction because the loss of records was accidental, not intentional, a finding that Plaintiff does not challenge.

Finally, affirmance is warranted on two independent grounds. No reasonable jury could find that Hogan was deliberately indifferent. And her response did not effectively bar Jane's access to Oakton's educational program. To the contrary, Jane and her parents took full advantage of it.

ARGUMENT

Title IX provides that no person shall, "on the basis of sex," be "excluded from," "denied the benefits of," or "subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The statute creates an administrative remedy to cut off funds from noncompliant recipients. *Id.* § 1682. But the Supreme Court has also recognized an implied private right of action, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 709 (1979), allowing plaintiffs in appropriate circumstances to recover money damages, *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 76 (1992).

Because Title IX was enacted under the Spending Clause, however, funding recipients must be on "clear notice" of potential liabilities. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). A funding recipient is liable "only for its own misconduct." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S.

629, 640 (1999). That means "intentional conduct that violates the clear terms of the statute." *Id*. at 643. Liability cannot be based on "respondeat superior or constructive notice." *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 286 (1998).

In *Davis*, the Court held that a funding recipient may be liable for damages for failing to properly respond to student-on-student harassment "only" if school officials authorized to take corrective action "are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." 526 U.S. at 650. Only deliberate indifference to "known acts of harassment" constitutes "an intentional violation of Title IX." *Id*. at 643.

This appeal involves three of these elements: actual knowledge, deliberate indifference, and denial of educational access. Plaintiff failed to prove any of them.

I. Plaintiff has abandoned her actual-knowledge claim against Taylor and Banbury, thereby limiting the relevant evidence to Hogan's knowledge, investigation, and response.

Only Hogan's knowledge and response are relevant now to whether the School Board may be charged with deliberate indifference. Plaintiff concedes that only Taylor, Hogan, and Banbury were "appropriate" officials whose conduct

could subject the School Board to liability. JA-2345:3–6. But she no longer contests the jury's no-actual-knowledge finding as to Taylor and Banbury. Doe Br. 9. Any such claim is therefore waived. *Cortez-Mendez v. Whitaker*, 912 F.3d 205, 208 (4th Cir. 2019); Fed. R. App. P. 28(a)(8)(A).

Plaintiff's appellate focus on Hogan renders irrelevant much of the evidence that she emphasized at trial. Her counsel spent three trial days calling witnesses to show that what Jane told friends was ultimately relayed to *Taylor* through intermediaries: (1) Aveesh Kachroo's testimony of what he heard from Jane and related to teacher Laura Kelly, who spoke with Baranyk, who spoke with Estess and Sefchick, who texted *Taylor*; (2) testimony from Victoria Staub about what she heard from Jane and reported to *Taylor*; and (3) testimony from Emily Jorgensen about what she heard from Jane and related to her mother, Kristen Jorgensen, who texted Dr. V, who texted *Taylor*. That evidence does not establish *Hogan*'s knowledge.

II. The district court did not err in declining to set aside the jury's no-actual-knowledge finding.

A. Plaintiff must show "an absolute absence of evidence" to support the jury's verdict.

A district court may grant a new trial under Rule 59(a) only "if the verdict is contrary to the clear weight of the evidence, rests upon false evidence, or will cause a miscarriage of justice." *Huskey v. Ethicon, Inc.*, 848 F.3d 151, 158 (4th

Cir. 2017) (citing *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 346 (4th Cir. 2014)). It is "extraordinarily rare" that denying the motion constitutes an abuse of discretion. 11 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2819 (3d ed. 2019). The standard of review is normally "highly deferential" and "'exceedingly confined.'" *Minter*, 762 F.3d at 343, 348 (4th Cir. 2014) (quoting *Bristol Steel & Iron Works v. Bethlehem Steel Corp*., 41 F.3d 182, 187 (4th Cir. 1994)).

But the appellate standard is even more deferential when, as here, the plaintiff failed to seek JMOL under Rule 50: the district court's ruling cannot be reversed if "there was *any* evidence to support the jury's verdict." *Minter*, 762 F.3d at 348 (quoting *Bristol Steel*, 41 F.3d at 187). Put another way, Plaintiff must prove "there was *an absolute absence of evidence* to support the jury's verdict." *Id*. (quoting *Bristol Steel*, 41 F.3d at 187) (emphasis added).

Plaintiff does not come close to meeting her burden. Before surveying the evidence supporting the jury's no-actual-knowledge finding, we correct Plaintiff's misstatements about the actual-knowledge standard.

B. *Davis* and *Baynard* require proof that Hogan had actual knowledge, subjectively measured, that Jane was sexually harassed.

1. Actual knowledge is subjectively measured.

Plaintiff is wrong that *Davis*'s "actual knowledge" element measures a

school official's "*objective* knowledge." Doe Br. 30 (emphasis added). "Objective, actual knowledge" is an oxymoron that cannot be reconciled with *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001).

In *Baynard*, the elementary-school principal, Malone, received multiple warnings that a teacher, Lawson, was a pedophile who molested children. A former student told Malone that Lawson had sexually abused him. Another adult warned that Lawson had molested a student. And a few months later, the school librarian told Malone that she observed Lawson holding plaintiff Baynard in his lap. Malone naïvely believed Lawson's assurance that he was only having an "innocent 'father-son' chat"; in fact, Lawson was sexually abusing Baynard. 268 F.3d at 233.

Nonetheless, this Court affirmed the dismissal of the Title IX claim against the school division because Baynard had failed to prove that Malone had actual knowledge that Lawson was sexually abusing his student. *Id*. at 238. The Court rejected the test proposed by the partial dissent, under which the actual-knowledge element would be satisfied by "actual notice of a *substantial risk* of ongoing sexual abuse." *Id*. at 237–38; *see also id*. at 239–40 (Michael, J., concurring in part and dissenting in part). The majority found *Gebser* "quite clear" that "Title IX liability may be imposed only upon a showing that school district officials possessed actual knowledge of the discriminatory conduct in question." *Id*. at 238. Any doubt, the

Court said, was dispelled by *Davis*, which required proof of deliberate indifference in response to harassment "*of which [the school] had actual knowledge*." *Id*. (quoting *Davis*, 526 U.S. at 642).

To be sure, Malone's conduct was appalling. She "certainly *should have been* aware of the potential for such abuse." *Id*. at 238 (emphasis altered). But the Title IX claim against the *school division* failed because there was no evidence that Malone "was *in fact* aware that a student was being abused." *Id*.

The actual-knowledge test is thus subjective. It asks what the official is "in fact aware" of, *id.*—*i.e.*, what he "subjectively believes," *id.* at 241 (Michael, J., concurring in part and dissenting in part) (citing *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 659 (5th Cir. 1997)).

That subjective standard is analogous to the test applied to deliberate-indifference claims against prison officials, who may be held liable for failing to protect inmates from other inmates only when "*subjectively aware* of the risk" that the plaintiff would be harmed. *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (emphasis added). Title IX likewise requires that school officials "be aware of" the facts "from which the inference *could* be drawn," and they must then "*also draw* the inference." *Rosa H.*, 106 F.3d at 658 (quoting *Farmer*, 511 U.S. at 837) (emphasis added).

There is no reason to require a more demanding standard under Title IX. *Farmer* explained that prison officials have a constitutional duty to protect inmates in their custody. *Id*. at 832–33. But the federal circuits agree that public school officials have *no* constitutional duty to protect students from harassment by other students. *E.g.*, *Morrow v. Balaski*, 719 F.3d 160, 170 (3d Cir. 2013) (en banc) ("[E]very other Circuit Court of Appeals that has considered this issue in a precedential opinion has rejected the argument that a special relationship generally exists between public schools and their students."); *Stevenson v. Martin Cty. Bd. of Educ.*, 3 F. App'x 25, 30–31 (4th Cir. 2001) (same). If Congress intended the statutory standard under Title IX to be more demanding than the constitutional standard, it had to give "clear notice" beforehand. *Murphy*, 548 U.S. at 296; *Davis*, 526 U.S. at 640–42.

It is mere alarmism to claim that using a subjective standard will encourage school officials to put "their heads in the sand" in the face of harassment. Doe Br. 32. True, liability cannot rest on a "negligence standard"—*Davis* eschewed a "*should have* known" test. 526 U.S. at 642. But school officials who *must have known* about harassment expose school divisions to liability for an "intentional violation." *Id.* at 643. As Plaintiff's best case shows, a factfinder could easily reject a principal's assertion that sexual conduct was "consensual" when, for example, the female victim had the mental capacity of a "first-grader" and the

student harasser "admitted assaulting" her. *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1243–44 (10th Cir. 1999). The likelihood of litigating and losing such claims deters willful blindness. And tellingly, Plaintiff cites no real-world examples to support her parade of horribles, despite that *Davis* has been on the books since 1999.

2. Actual knowledge may be derived from allegations, but allegations alone do not automatically suffice.

Plaintiff is also mistaken that all "allegations" of sexual harassment automatically establish actual knowledge. No one disputes that a school official *could* derive actual knowledge from allegations. In *Jennings*, this Court found the actual-knowledge standard satisfied where the University's general counsel learned "vivid details" from the plaintiff about the soccer coach's lurid sexual comments and the "hostile environment" he created. *Jennings v. Univ. of N.C.*, 482 F.3d 686, 700 (4th Cir. 2007) (en banc). The question is not *how* the information comes to the responsible official, but *whether* the official becomes "*in fact* aware" that such harassment is occurring. *Baynard*, 268 F.3d at 238. And such knowledge exists only when the official has "actual knowledge that the student-on-student sexual harassment [is] severe, pervasive, and objectively offensive." *Hill v. Cundiff*, 797 F.3d 948, 969 (11th Cir. 2015). As *Baynard* demonstrates, an honest mistake, even if naïve or negligent, does not establish actual knowledge "in fact." 268 F.3d at 238.

The district court thus erred when it answered Jury Question 4 by instructing that "actual knowledge" means "actual knowledge of *an allegation or allegations* that . . . on the March 8, 2017 bus trip Jack Smith sexually harassed Jane Doe." JA-2477:23–25 (emphasis added). That instruction unfairly favored Plaintiff by lowering her burden of proof. Under that amorphous standard, the most "unsubstantiated rumor uttered among students," *Romero v. City of New York*, 839 F. Supp. 2d 588, 609 (E.D.N.Y. 2012) (emphasis omitted), might suffice to establish "actual knowledge" of severe harassment, even if the rumor is preposterous. *But see Wyler v. Conn. State Univ. Sys.*, 100 F. Supp. 3d 182, 190 (D. Conn. 2015) ("unconfirmed rumors, intimations and . . . suspicions" are "insufficient to permit a reasonable jury to find actual knowledge"). Neither Plaintiff nor her amici offer any limiting principle to cabin a school board's liability based on mere gossip or rumors.

3. Plaintiff defaulted her challenge to the court's answer to Jury Question 4.

Ironically, the erroneous response to Jury Question 4 unfairly favored Plaintiff—yet she still lost. We show in section C why ample evidence supported the jury's finding that Hogan lacked the requisite "actual knowledge."

But Plaintiff has defaulted her objection altogether by inviting the error about which she now complains. Plaintiff herself proposed the "knowledge of allegations" instruction. JA-3256. The district court accepted it, JA-2477:21–

2478:4, overruling the School Board's objection that the instruction was too lax, JA-2471:6–2474:12. Plaintiff's counsel even praised the judge, saying the instruction "helps clarify" the issue. JA-2469:17–18.

The invited-error doctrine bars Plaintiff from changing her tune. The district court cannot "be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request." *United States v. Mathis*, 932 F.3d 242, 257–58 (4th Cir.) (quoting *United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994)), *cert. denied*, 140 S. Ct. 639 (2019).

Plaintiff also waived her claim that the judge erred by failing to say *more* in response to Jury Question 4. Her counsel suggested that the court *could* go further and respond to whether "actual knowledge" is "a compilation of information about an event" or "the conclusion decided based on information provided." JA-2458:15–17, 2469:19–2470:10. But counsel said only, "I don't know . . . whether we need to be a little more explicit," JA-2469:22–24, and it wouldn't be "error" to do that, JA-2470:9. Plaintiff neither proposed a specific instruction nor objected to the court's failure to give it. So her belated objection is waived. *See* Fed. R. Civ. P. 51(c)(1).

4. The court did not abuse its discretion in declining to instruct that *actual knowledge* means *actual notice*.

Plaintiff and her amici are also mistaken that it was reversible error to not instruct the jury that *actual knowledge* means *actual notice*. They are caught on

the horns of a dilemma, but they lose either way.

On the one hand, Plaintiff has insisted all along that *actual knowledge* and *actual notice* are "equivalent," "interchangeable," and "synonymous." ECF No. 337 at 2, 17. Her amici agree. NWLC Br. 6, 10–19 ("synonymous," "interchangeable"). But if so, then Plaintiff suffered no prejudice from the district court's decision to omit *actual notice* from the *actual knowledge* instruction.

On the other hand, if the phrases mean different things, then the district court wisely avoided the confusion. The School Board maintains that *actual notice* is a "mischievous phrase." JA-3348:9. It invites plaintiffs to urge should-have-known concepts of constructive notice or inquiry notice—an approach *Davis* and *Baynard* explicitly reject. An unopened letter in a person's mailbox does not confer *actual knowledge* of its contents, but Plaintiff would likely have urged that it provides *actual notice*. JA-1907:17–1908:3. And if *that*'s what Plaintiff had in mind, her strategy was foreclosed by *Davis* and *Baynard*. The district court did not abuse its discretion by declining to enable such arguments.

C. Ample evidence supported the jury's no-actual-knowledge finding.

So was there "an absolute absence of evidence," *Minter*, 762 F.3d at 348, to support the jury's no-actual-knowledge finding? No. In fact, the supporting evidence was abundant. For example:

- Hogan testified that she did not understand Jane to be claiming that she had been sexually assaulted; to Hogan, what Jane described was mutual sexual touching, including manually stimulating Jack to ejaculation, activity in which Jane was a full and willing participant. JA-1258:3–8, 1261:8–11, 1281:14–16.
- Jane testified at trial that, in her mind, "consent" demanded that she "explicitly say yes" before engaging in sexual touching. JA-1772:2–3, 1772:16–1773:1. But "consent may be implied from the acts and acquiescence of the parties." *Buxton v. Murch*, 249 Va. 502, 508 (1995) (citation and quotation omitted); BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "implied consent" as form of consent "inferred from one's conduct rather than from one's direct expression"). And the jury could have properly concluded that Hogan understood Jane's consent to have been implied.[3]
- Hogan's no-assault conclusion was significantly buttressed by Jane's fixation on Jack's "girlfriend" and her rage that Jack was intimate with Jane when he already had "a girlfriend." JA-1198:15–20, 1277:24–1278:9.

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[3] Indeed, the jury may well have credited Jane's trial testimony—that she did not "consent" because she did not "explicitly say yes"—when it found that Jane, at least in her own mind, "was subjected to sexual harassment" on the bus ride. JA-3324. But that fails to show that *Hogan* had actual knowledge that Jane was *accusing* Jack of sexual assault, let alone knowledge that Jane had been assaulted.

- Indeed, the School Board's forensic psychiatrist, Dr. Gold, testified that Jane's fixation on "the girlfriend" was unusual because, in her professional experience, sexual assault survivors do not complain that their assailants had "cheated" on a wife or girlfriend. JA-2163:23–2164:11.
- Jane and her parents had a motive to minimize Jane's role given their understanding that a consensual sexual encounter violated the SR&R and exposed Jane to discipline. JA-1793:2–6, 1808:8–19; JA-3052 (DX-59). Her father said Jane was "hyperventilating" about such discipline ruining "her life." JA-1455:23–1456:4. And Dr. Gold testified that Jane's fear of being disciplined best explained her emotional distress. JA-2166:8–2167:2.
- Banbury's testimony supported the jury's no-actual-knowledge finding as to Hogan, who was Banbury's source of information. Banbury never heard that Jane was the victim of assault. JA-977:19–21, 983:4–8.
- Hogan conveyed to Jane's father, after interviewing both Jane and Jack, that what happened was *not* "a potential sexual assault." JA-1456:14–16.
- Hogan disagreed with the conclusory assertion by Jane's mother that Jane's initial blocking of Jack converted what happened into a "sexual assault," JA-1298:23–1299:10, given that she proceeded to stroke Jack's penis for something like "20 minutes," indicating she was a "full" and "willing participant." JA-1223:6–11; *see also supra* at 15.

- And Jane conceded at trial—as she wrote in her college-admission essay—that it was only "a long time later" that she began to think of what happened as an "assault," JA-1863:7–1864:2, supporting the jury's reasonable inference that what *Hogan* heard Jane describe was *not* an assault.

Any one of those items alone supports the jury's no-actual-knowledge finding and defeats the appeal.

Plaintiff ignores that evidence. Instead, she misstates the record to claim that the School Board "admitted" knowing of "an *alleged* sexual assault." Doe Br. 36. But she quotes out-of-context our argument that her jury instruction misleadingly claimed that the School Board denied knowing of an "*alleged* sexual assault," when the School Board denied knowledge of *any* sexual assault—"alleged" or not. *See* JA-2287:22–2288:8 (objecting to Plaintiff's Instruction 2 at JA-3205).

Plaintiff also cites snippets from the record to argue that Hogan had actual knowledge of an assault allegation. Doe Br. 41–42. But Plaintiff misconceives the appellate court's role. Such snippets may suffice to defeat summary judgment or JMOL for the School Board on the actual-knowledge issue. But they are not enough to overturn a jury verdict based on conflicting evidence. "That a trier of fact *may* infer knowledge from [even] the obvious . . . does not mean that it *must* do so." *Farmer*, 511 U.S. at 844 (emphasis added).

A remarkably similar case is *Richard P. ex rel. R.P. v. School District of City of Erie*, No. 03-390, 2006 WL 2847412 (W.D. Pa. Sept. 30, 2006), *aff'd*, 254 F. App'x 154 (3d Cir. 2007). The jury there returned a special verdict that school officials lacked "actual knowledge" that plaintiffs were being harassed, despite the plaintiffs' extensive evidence of having been sexually assaulted and testimony that an assistant principal knew about the assaults through various interactions with plaintiffs and their parents. *Id.* at *2, *4–6. But the assistant principal's testimony differed on those claims. *Id.* at *4–6. The court refused plaintiffs' new-trial motion, explaining that "[i]t was the province of the jury to evaluate [the assistant principal's] testimony and determine whether she was worthy of belief." *Id.* at *6. The same is true here.

D. The district court applied the correct standard to Plaintiff's new-trial motion.

The district court did not apply a JMOL standard instead of the Rule 59 standard. Doe Br. 27. The court acknowledged that Plaintiff's new-trial motion "is governed by a different standard from a directed verdict motion" and "allows a trial judge to weigh the evidence and consider the credibility of witnesses." JA-3370–71 (citation omitted). It recognized its obligation to "undertake[] 'a comparison of opposing proofs.'" JA-3371 (quoting *Williams v. Nichols*, 266 F.2d 389, 393 (4th Cir. 1959)). It then noted that the testimony from Taylor, Hogan, and Banbury showed that "they did not believe that the information" presented to

them "included allegations of a sexual assault." JA-3372. While the district court recognized that there was sufficient evidence from which a jury "could have found" that "one or more of these three had actual knowledge of the allegation of sexual harassment," the evidence was "conflicting." JA-3371–72. The court saw this as a classic jury question on which a trial judge should not be "substituting his own judgment of the facts and witness credibility." JA-3372 (quoting *Abasiekong v. City of Shelby*, 744 F.2d 1055, 1059 (4th Cir. 1984)).

This Court does not lightly infer that a district judge has misapplied Rule 59 when, as here, he "expressly cite[d]" the right cases and "the proper standard." *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 298 (4th Cir. 1984). This is not a case where the district court *expressly* applied the wrong legal standard. The judge did not say, for instance, that he *had* to "consider the evidence" in the "light most favorable" to the defendant. *Williams*, 266 F.2d at 392. Or that he believed the jury's verdict was "binding" on him. *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985), *amended on other grounds*, 788 F.2d 1042 (4th Cir. 1986). The district judge said he was applying the "different standard" required by Rule 59. JA-3370. He "considered the evidence and reasonable inferences therefrom" and reasonably "concluded that the jury could properly have returned the verdict that it did." *West v. Richmond, F. & P. R.R. Co.*, 528 F.2d 290, 292 (4th Cir. 1975).

This Court has correctly refused to let Rule 59 serve as a vehicle to substitute the trial court's judgment for the jury's. *Abasiekong*, 744 F.2d at 1059. A trial judge may not "'denigrate' the jury system by granting a new trial on grounds of insufficient evidence and substituting his own judgment of the facts and witness credibility, particularly when the subject matter of the trial is simple and easily comprehended by a lay jury." *Id.* (citing *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 88–91 (3rd Cir. 1960)).

The district court quoted those very words in denying Plaintiff's new trial motion. JA-3372–73. Doing so was not error.

E. The juror-confusion allegation is procedurally defaulted, inadmissible, and baseless.

Plaintiff may not rely on the inadmissible *Washington Post* and *Fairfax Times* articles to prove juror confusion. First, her claim is procedurally defaulted. Plaintiff had the newspaper articles in hand on August 9, 2019, JA-3328 n.1, eleven days before moving for a new trial, JA-3331, yet she failed to mention them in that motion. Plaintiff did not rely on those articles until her later motion to reconsider the denial of her new-trial motion. JA-3376 (motion), 3381 n.2 (brief). Because Plaintiff has not claimed that the district court erred in denying reconsideration, her argument is now defaulted.

Second, the newspaper articles are inadmissible on myriad grounds. Media reporting of what the juror said (and what the judge and other jurors said) are rank

hearsay. *See* Fed. R. Evid. 802. The juror was not sworn, making his statements inadmissible for that reason alone. Fed. R. Evid. 603; *United States v. Hawkins*, 76 F.3d 545, 551 (4th Cir. 1996). His statements were inadmissible because the School Board could not cross-examine him. Fed. R. Evid. 804(b)(1). And the article attributed statements to the judge that are independently inadmissible. Fed. R. Evid. 605.

But most importantly, the juror's statements are inadmissible under Rule 606(b). For in any "inquiry into the validity of a verdict," a juror is disqualified from testifying about "the effect of anything on that juror's or another juror's vote" or about "any juror's mental processes concerning the verdict." Fed. R. Evid. 606(b)(1). *See, e.g.*, *United States v. Barber*, 668 F.2d 778, 786 (4th Cir. 1982).

The School Board raised those evidentiary impediments below, JA-3403; ECF No. 363 at 7–11, but Plaintiff ignores them. The district court struck from the record a "transcript" of the juror's unsworn interview "for many of the reasons stated in Defendant's brief, but specifically under [Rule] 606(b)." JA-3405. Although the district court neglected to strike the newspaper articles, they stand on no higher ground and must likewise be disregarded.

Finally, the statement attributed to the juror is demonstrably untrue. He supposedly claimed that the district judge "convinced [the jurors] they needed

'direct evidence' school officials knew for a fact that [Jane] was harassed." JA-3390; *accord* JA-3399. But *that* statement appears nowhere in the trial transcript.

F. There was no miscarriage of justice in failing to provide an adverse-inference instruction.

Nor did the district court abuse its "broad discretion" by declining to grant an adverse-inference spoliation instruction. *Turner v. United States*, 736 F.3d 274, 281–82 (4th Cir. 2013). A decision *not* to give an instruction is error only "'if the instruction (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the [party]'s ability to conduct his [case].'" *United States v. Hill*, 927 F.3d 188, 209 (4th Cir. 2019) (quoting *United States v. Patterson*, 150 F.3d 382, 388 (4th Cir. 1998)), *petition for cert. filed* (U.S. Feb. 26, 2020) (No. 19-7778).

Plaintiff fails to satisfy the first and third elements. Not only was an adverse-inference instruction incorrect, but giving it would have been reversible error. An adverse-inference instruction is proper only if the loss or destruction of records is "intentional." *Turner*, 736 F.3d at 282. This Court squarely held in *Vodusek v. Bayliner Marine Corp.* that an "adverse inference about a party's consciousness of the weakness of his case . . . cannot be drawn merely from his *negligent* loss or destruction of evidence; the inference requires a showing [1] that the party *knew* the evidence was relevant to some issue at trial and [2] *that his*

willful conduct resulted in its loss or destruction." 71 F.3d 148, 156 (4th Cir. 1995) (emphasis added).

Plaintiff could not make either showing. The magistrate judge found that the loss of evidence was "negligent," not intentional. JA-97. Plaintiff did not seek review of that finding and is therefore bound by it. Fed. R. Civ. P. 72(a).

Plaintiff's strategic behavior also discredits her position. Plaintiff began planning her lawsuit a year before her May 2018 filing, and Oakton personnel were blindsided when she finally sued. *See supra* at 25–26. The School Board produced more than 15,000 pages of responsive documents. JA-1433:18–1434:3. But unfortunately, a massive renovation of Oakton that started in December 2017 disrupted the storage of hundreds of boxes of student records. JA-1430:4–1431:2. Although a handful of relevant documents could not be found, there was no evidence that any records were intentionally destroyed.[4]

Plaintiff also failed the third element of *Hill* because she could not prove that withholding a spoliation instruction "seriously impaired" her case. *Hill*, 927 F.3d

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[4] Plaintiff's instruction, JA-243, was also incorrect because it was one-sided. It ignored *Jane*'s intentional destruction of her own texts with boyfriends after she filed suit, evidence essential to assessing her insistence that the School Board's actions supposedly damaged her romantic relationships with men. *See* JA-1857:12–1858:5, 2312:23–2313:23.

at 209. For one thing, the instruction she wanted was permissive; it did not require the jury to infer that any missing documents would have helped her. JA-243.

For another, the district judge did not abuse his discretion in concluding that the absence of the missing documents did not materially prejudice her case. JA-2320:11–16. On appeal, Plaintiff quarrels about only two items: Murphy's witness statement and Baranyk's notes from meeting with teacher Kelly. Doe Br. 44.[5] But Murphy admitted that she had not witnessed the sexual encounter. JA-577:7–20. She also testified at trial about what she wrote in her statement. JA-574:18–575:5. As for Baranyk's notes about his conversation with Kelly, neither he nor Kelly was an "appropriate" person whose knowledge imputes to the School Board. And Kelly, like Murphy, provided live testimony at trial about what she said to Baranyk. JA-550:21–551:2. So the judge had ample support for his lack-of-prejudice finding.

III. Affirmance is warranted on independent, alternative grounds.

Because the School Board does not seek to modify the judgment, it may, without filing a cross-appeal, rely on "any matter appearing in the record in

[5] Her complaints about other lost items are therefore waived. *Cortez-Mendez*, 912 F.3d at 208; Fed. R. App. P. 28(a)(8)(A). Plaintiff mentions in passing a reformatted desktop computer. Doe Br. 44. But no local copy of any student statement was saved to that hard-drive, JA-1434:14–1438:1 (Lane), so no evidence was lost when it was "wiped," *see* JA-3356:20–3357:14.

support of the judgment." *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 80 (2008) (quoting *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982)); *Reynolds v. Am. Nat'l Red Cross*, 701 F. 3d 143, 155–56 (4th Cir. 2012) (same). Affirmance is permissible on any independent ground, even one "specifically rejected" below. *Nivens v. Gilchrist*, 444 F.3d 237, 249 (4th Cir. 2006) (citation and quotation omitted).

Affirmance is warranted here on two grounds in the School Board's JMOL motion. *See* JA-1873–93, 2263–64, 3184–87. The JMOL ruling is reviewed *de novo*, taking the facts in the light most favorable to Plaintiff. *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 391 (4th Cir. 2014).

A. No reasonable jury could find deliberate indifference.

"Deliberate indifference" under *Davis* is "a very high standard." *Baynard*, 268 F.3d at 236. The official's response or non-response must be "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. "Actions that in hindsight are 'unfortunate' or even 'imprudent' will not suffice." *Baynard*, 268 F.3d at 236. A "showing of mere negligence will not meet it." *Id*. Indeed, deliberate indifference requires "more than mere 'recklessness' on the part of the appropriate person." *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 263 (6th Cir. 2000), *disapproved in part on other grounds by Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 621 n.3 (6th Cir. 2019). The official must

"have been aware that adverse consequences from his or her action were certain or substantially certain to cause the harm." *Id*.

Plaintiff's evidence did not come close to meeting that standard. When Taylor alerted Hogan on Sunday night, Hogan immediately responded. The next day, Hogan twice interviewed Jane, interviewed Jack, and interviewed two of the three witnesses they had identified. *Supra* at 9–17.

Even though Hogan did not view what happened as an assault, she offered counseling to help Jane. But Jane's parents refused that help. Her parents wanted only academic support, to which Hogan agreed, directing Calvello to ask Jane's teachers to extend liberal academic accommodations. The teachers responded enthusiastically. They provided extraordinary concessions that included letting Jane skip her final exam in pre-calculus and do six exam retakes in A.P. Physics at home. Even though Jane's parents would not let Hogan or Oakton's counselors contact Jane without their permission, Hogan still checked Jane's grades to make sure that her teachers had provided academic accommodations. JA-1312:15–1313:4.

To be sure, Jane's mother testified that Hogan declined her demand that Jack be removed from band class. JA-1665:21–25. But *Davis* rejected the notion that "victims of peer harassment now have a Title IX right to make particular remedial demands." *Davis*, 526 U.S. at 648. "[S]chool administrators are entitled to

substantial deference when they calibrate a disciplinary response," and "a school's actions do not become 'clearly unreasonable' simply because a victim or his parents advocated for stronger remedial measures." *S.B. v. Bd. of Educ. of Harford Cty.*, 819 F.3d 69, 77 (4th Cir. 2016) (applying Title IX standard in § 504 case). "After all, in situations involving charges of peer-on-peer harassment, a public school has obligations not only to the accuser but also to the accused." *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 174 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009).

Having concluded that Jane willingly participated in sexual touching, Hogan had no basis to remove Jack from band class, the only one of its kind at Oakton. And given that reality, Jane and her parents reached an appropriate accommodation with Dr. V. It was *Jane's* family that proposed that she be excused to a practice room, which happened on only three occasions before Dr. V agreed to the family's follow-up request to rearrange the band seating to keep Jane as far apart from Jack as possible, a rearrangement her family did not complain about thereafter. *Supra* at 24–25.

The Supreme Court in *Davis* foresaw "no reason why courts" would not grant JMOL motions in cases where a school's response was "not 'clearly unreasonable' as a matter of law." 526 U.S. at 649; *see, e.g.*, *Porto v. Town of Tewksbury*, 488 F.3d 67, 76 (1st Cir. 2007) (granting JMOL for lack of evidence of

deliberate indifference in student-on-student harassment case, noting that the school administrator "acted reasonably in responding to RC's inappropriate touching by separating RC and SC and sending them to the guidance counselor"). Because Hogan was demonstrably caring and compassionate towards Jane, not willfully indifferent, the district court should have granted the JMOL motion.

B. Hogan's response did not exclude Jane from Oakton's educational program.

The district court should also have ruled as a matter of law that the School Board's response to the band-trip incident did not exclude Jane from Oakton's educational program.[6] *See Gebser*, 524 U.S. at 290 ("the response must amount to deliberate indifference to discrimination"); *Kollaritsch*, 944 F.3d at 622 (a Title IX "injury" requires "deprivation of 'access to the educational opportunities or benefits provided by the school'" (quoting *Davis*, 526 U.S. at 650)); *Doe v. Dardanelle Sch. Dist.*, 928 F.3d 722, 727 (8th Cir. 2019) (affirming summary judgment where school's response, even if deliberately indifferent, did not deny plaintiff access to its educational program), *cert. denied*, 2020 WL 129588 (U.S. Jan. 13, 2020).

Far from excluding Jane from Oakton's educational opportunities, Hogan went to great lengths to help her, enabling Jane to earn excellent grades her junior

[6] *See* JA-1883:9–18, 2263:22–25; JA-3187.

year, JA-2909 (DX-10), and early admission to her first-choice college, JA-1855:25–1856:8. Jane did not suffer excess "absences" or "withdr[a]w from classroom discussion." Doe Br. 13 (misstating JA-617:20–25 (Brady)). Jane's own expert conceded that Jane's grades "didn't slip" and she did not suffer academically. JA-1572:9–13 (Harlow).

Other circuits have granted judgment as a matter of law under similar facts. *E.g.*, *Dardanelle*, 928 F.3d at 727 (finding no exclusion from educational program where plaintiff's GPA "increased in both her junior and senior years, and she graduated on time"). JMOL was appropriate here too. For nothing that the School Board did "effectively [barred]" Jane's "access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633.

CONCLUSION

The Court should affirm.

Respectfully submitted,

FAIRFAX COUNTY SCHOOL BOARD

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STATEMENT REGARDING ORAL ARGUMENT

Because the Court may summarily affirm for the reasons stated by the district court in denying Plaintiff's new-trial motion, JA-3370–74, oral argument is unnecessary. Counsel for the School Board will gladly participate in oral argument, however, if the Court believes that oral argument would aid the decisional process.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Rule 32(a)(7)(B), because it contains 12,993 words [fewer than 13,000], excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/
Stuart A. Raphael

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2020, I electronically filed this brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/
Stuart A. Raphael