IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHTERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JANE DOE,	)	
	)	No. 1:18-CV-05278
Plaintiff,	)	
	)	Hon. Steve C. Jones
v.	)	
	)	
GWINNETT COUNTY PUBLIC SCHOOLS,	)	
	)	
Defendant.	)	

PLAINTIFF JANE DOE'S OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Plaintiff Jane Doe was forcibly orally sodomized by a fellow student at Peachtree Ridge High School ("PRHS") on school premises, shortly after the school day ended. The very next morning, she reported the sexual assault to her teacher at Defendant Gwinnett County Public Schools (the "District").[1] School officials repeatedly interviewed her for purposes of investigating *her* behavior and attacking her credibility, without advising her or her family; used those interviews to institute abusive disciplinary proceedings against her directed by school counsel, who repeatedly belittled, humiliated, and degraded her; twice punished and sanctioned her for purportedly having "engaged" in oral sex on school grounds; forced her to attend school alongside the rapist; and refused to intervene when she reported that numerous students were calling her "liar," "slut," "bitch," and that a male student intimated he too wanted to sexually assault her. Jane Doe withdrew from school, and the Doe family moved away from the county.

The District's motion to dismiss takes a similar tack, attempting to discredit Ms. Doe and her factual allegations—even though the applicable legal standard requires the District to accept those facts as true. Based on the detailed factual allegations in Ms. Doe's Complaint, her Title IX deliberate indifference, Title IX

[1] The District has noted that this is not its correct legal name. Ms. Doe will file an Amended Complaint to correct that inadvertent error, if necessary.

retaliation, and 42 U.S.C. § 1983 failure-to-train claims against the District are well pled and facially plausible. The District seeks dismissal of all three well-pled claims by disregarding the applicable legal standard and devotes three-quarters of its "fact" section disputing Ms. Doe's factual allegations based on extrinsic evidence attached to its motion, instead of accepting her allegations as true. Similarly, the District bases its arguments on factual disputes that cannot properly be determined at this procedural stage. The District suggests this Court should treat its motion as one for summary judgment, without explicitly stating so or citing the legal standard that permits conversion. This is likely because courts routinely deny such requests where, as here, discovery has not yet commenced.

The District further contends Ms. Doe is precluded from bringing her federal claims because the officers in a school disciplinary hearing concluded that she had violated a District rule by "engaging" in oral sex on school property. But the District's argument is barred by the very statute that authorized the disciplinary hearing. (*See* Doc. 22 at 9 n.3) That statute provides:

> Nothing in this subpart shall be construed to prohibit, restrict, or limit in any manner any cause of action otherwise provided by law and available to any teacher, school official, employee or student.

O.C.G.A. § 20-2-758. The District's argument would fail even in the absence of this plain statutory language. Pursuant to Eleventh Circuit and other precedent

directly on point, Ms. Doe's claims are not precluded. The hearing was confined to determining whether Ms. Doe and her named harasser, "MP," had violated a District rule; it was not a Title IX hearing to determine whether MP should be found responsible for the sexual assault Ms. Doe reported. The hearing did not determine a single factual issue underpinning Ms. Doe's federal claims and there is no indication how hearing officers defined "consensual" sex. Also, Ms. Doe contends the biased and inequitable hearing itself was part of the District's overt discrimination against her.

Finally, this Court should permit Ms. Doe to proceed with all of her claims. Dismissal under Rule 12(b)(6) may only be granted in the rare circumstance that the defendant can *conclusively* demonstrate—based on the allegations in the Complaint itself—that the plaintiff cannot state a claim for relief. The District cannot do so here. Its motion to dismiss, therefore, should be denied.

BACKGROUND

In February 2015, Ms. Doe was a 16-year-old sophomore at PRHS. (Doc. 1 ¶ 15.) On February 4, 2015, shortly after the end of the school day, MP, a fellow student, asked Ms. Doe if she would like to see the school's Ridge Vision News (RVN) room. (*Id.* ¶¶ 16–17.) Ms. Doe had not seen the room before, and she agreed. (*Id.* ¶ 17.) By school policy and rules, the RVN room should have been

locked and those in the room subject to direct supervision. (*Id*.)

In the RVN room, MP grabbed Ms. Doe's hips, pulled her to him, fondled her buttocks, and started pulling down her pants. (*Id.* ¶ 18.) Ms. Doe affirmatively demonstrated her lack of consent by pushing his hands away and saying, "No, stop!" and "What are you doing?" (*Id*.) MP then restrained Ms. Doe, pushed her into a chair, positioned himself above her, and forcibly kissed her, thrusting his tongue in her mouth. (*Id.* ¶ 19.) He threatened, "You can't leave until you suck my dick." (*Id*.) MP unzipped his pants, pulled out his penis, grabbed Ms. Doe's head and hair, and shoved his penis into her mouth, while Ms. Doe was terrified, in shock, gagging, and crying. (*Id*.) MP released Ms. Doe and began masturbating himself. (*Id.* ¶ 20.) Ms. Doe quickly grabbed her book bag, left the room, wiped her tears, and went to meet her mother, who had arrived at the school to pick her up. (*Id*.) MP text messaged a friend about the assault, stating he felt "guilty" about "doing something he shouldn't have done." (*Id.* ¶ 21.)

Early in the morning of February 5, 2015, less than 24 hours after the assault, Ms. Doe, visibly distraught and crying, reported MP's assault to her first period teacher, Kristen Powell and another teacher Ms. Doe trusted, Linda Brimmer. (*Id.* ¶ 22.) After Ms. Doe, visibly upset, told Ms. Brimmer about MP's sexual assault, Ms. Brimmer took her to meet with School Resource Officer

Lockard. (*Id*. at ¶ 23) That day, and the next, Officer Lockard and PRHS Assistant Principals Lee Augmon, LaShawnia Stinson, and Jon Weyher interviewed and questioned Ms. Doe, insisting she repeatedly recount the details of MP's sexual assault. (*Id.* ¶ 24.) Officer Lockard asked Ms. Doe: "Why didn't you bite his penis?" "Why didn't you grab his balls?" "What were you wearing?" "Did you scream?" "Are you sure you didn't want to have oral sex with him?" (*Id.* ¶ 25.) School officials even took Ms. Doe to the RVN room, the same room where Ms. Doe had just been sexually violated by MP, and insisted she reenact the attack for them. (*Id.* ¶ 26.)

Even when Ms. Doe, traumatized, stayed home from school, school officials insisted she return to school for yet more questioning, and forced Ms. Doe to recount, again, the painful details of MP's sexual assault. (*Id*. at ¶ 27.) On February 9, 2015, Ms. Doe stayed home from school, distraught and afraid of encountering MP. (*Id.* ¶ 30.) School officials asked Ms. Doe and her family come in for another meeting the following day. (*Id*.)

During the meeting on February 10, 2015, school officials suspended Ms. Doe from school for a week and charged her with violating Rule 9G of the District's code of conduct for "participating" in oral sex on school property. (*Id.* ¶ 31.) They informed Ms. Doe that the District was not pursuing her sexual assault

complaint against MP, and instead required Ms. Doe to attend a disciplinary hearing for the charge against her. (*Id.*)

On February 18, 2015, Defendant conducted a joint disciplinary hearing against MP and Ms. Doe. (*Id.* ¶ 32.) During the hearing, details of MP's sexual assault of Ms. Doe were, again, recounted—the same details Ms. Doe shared over and over again and, abusively, was forced to reenact, with school officials. (*Id.* ¶ 33.) Assistant Principal Augmon, who had a lead role in investigating Ms. Doe's report, admitted, "I don't know that I'm trained to qualify what is sexual assault" because she had never before investigated a sexual assault. (*Id.* ¶ 34.)

At the hearing, MP admitted he had unzipped and pulled down his pants without asking Ms. Doe if she wanted to engage in oral sex. (*Id.* ¶ 35.) Instead of seeking her consent, MP claimed he knew Ms. Doe "wanted" it because of an alleged "look" on her face. (*Id.*) When asked to describe that look, MP described the "look" as a "blank face that didn't really have an expression." (*Id.*) He also admitted to previous cyber sexual misconduct against Ms. Doe and that he had violated District Rule 9G. (*Id.*)

The District permitted MP's attorney to ruthlessly cross-examine Ms. Doe and attack her credibility, after which he stated in his closing argument, "I make no apologies for my conduct in cross-examining [Ms. Doe]." (*Id.* ¶ 36.) The

examination was so harsh that the hearing officer had to ask MP's attorney to "tone it down" in his closing statement. (*Id*.)

The District's attorney and agent, Creighton Lancaster, similarly demeaned Ms. Doe. In his interrogation of Ms. Doe, Lancaster asked: "Can you demonstrate for us how you had screamed when [MP] was attacking you?" (*Id.* ¶ 37.) After Ms. Doe testified that she yelled at MP "No, stop," Lancaster asked Ms. Doe if she tried to yell any louder and how many times she yelled. (*Id*.) He also asked Ms. Doe about her physical resistance to MP: "Did you try to push him with both arms, [or] just one arm? . . ."Now, when he went to put his penis in your mouth, what did you do to prevent him from doing that? In other words, did you try to keep your mouth closed or avoid that or did you do anything to stop him?" (*Id.* ¶ 38.) During his closing argument, Lancaster went so far as to state: "I would ask that you find that [MP] was more credible that the sexual encounter was consensual, and that you find [Ms. Doe] was in violation of Rule 9G." (*Id.* ¶ 40.) He also stated:

> Based on the fact that [Ms. Doe] chose not to scream louder and louder as this was going on, leads me to believe [MP]. Based on the fact that she had no physical injuries leads me to believe [MP]. Based on the fact that she didn't report this immediately after it happened despite the fact that she walked straight to her mother's car leads me to believe [MP].

(*Id*.) The hearing officers, after deliberating just 10 minutes, complied with the

District's request, finding that Ms. Doe had violated Rule 9G and punishing her with yet another suspension. (*Id.* ¶¶ 41, 43.)

When the District allowed Ms. Doe to return from the suspension, it forced her to attend classes alongside MP, and she was in continuous and constant fear of encountering him at school. (*Id.* ¶ 45.) On her first day back from suspension, Ms. Doe made it through her first period class only before she went to the school counselor and reported she felt suicidal. (*Id.* ¶ 47.)

Other PRHS students called Ms. Doe "whore," "slut," "liar," and "psycho." (*Id.* ¶ 46.) One male student indicated his desire to forcibly sodomize or sexually batter Ms. Doe by stating to her, "I wish I was [MP]." (*Id*.) Another student told Ms. Doe she had to be a liar because the school had allowed MP to return to school. (*Id*.) On multiple occasions, Ms. Doe reported to school officials that students continued to sexually harass, deride, and humiliate her, but school officials refused to take any meaningful action to curb the hostility and harassment or ensure that Ms. Doe could attend school safely. (*Id.* ¶ 48.)

Because of the intolerable environment at PRHS, and the District's refusal to take meaningful action to respond to the hostility Ms. Doe encountered at school—all resulting from her report of sexual assault—Ms. Doe's family withdrew her from PRHS. (*Id.* ¶ 49.) The only practical and affordable option the Doe family

was aware of was enrolling Ms. Doe in the District's Online Campus. (*Id.* ¶ 50.) As an Online Campus student, Ms. Doe was deprived of the benefits of an in-school educational setting, including two of the four courses she had been taking at PRHS and invaluable in-person interaction and activities with instructors and peers. (*Id.* ¶ 51.) The Does eventually moved away from Gwinnett County to escape unbearable hostility and retaliation in the community. (*Id.* ¶ 52.) Ms. Doe has suffered numerous physical and mental detriments as a result of the District's unlawful actions and inaction. (*Id.* ¶ 53.)

Finally, prior to Ms. Doe's report of sexual assault, the District failed to provide Title IX training or education to its administrators and staff—including, but not limited to, on the topics of student-against-student sexual harassment, investigating reports of sexual harassment, and the prohibition on retaliating against students who report sexual harassment—despite being well aware of the obvious need to do so. (*Id.* ¶¶ 54–68.)

STANDARD OF REVIEW

"Generally, '[t]o survive a motion to dismiss, a complaint need only present sufficient facts, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Marstellar ex rel. United States v. Lynn Tilton, Patriarch Partners, LLC,* 880 F.3d 1032, 1311 (11th Cir. 2018) (alteration in original) (quotation omitted).

"A claim is facially plausible when the plaintiff pleads sufficient facts to allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct." *Boyle v. City of Pell City*, 866 F.3d 1280, 1286 (11th Cir. 2017). In evaluating a motion to dismiss, the court is required to "accept[] the complaint's allegations as true and construe[] them in the light most favorable to the plaintiff." *Hi-Tech Pharms., Inc. v. HBS Int'l Corp.*, 910 F.3d 1186, 1193 (11th Cir. 2018) (quoting *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012)).

ARGUMENT

I. This Court Should Exclude the Extrinsic Evidence and Facts Proffered by the District.

A court may "not consider anything beyond the face of the complaint and documents attached thereto when analyzing a motion to dismiss." *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007). This is for good reason, as "[t]he court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1168 (11th Cir. 2014) (quoting *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir. 2006)).

Should a court consider extrinsic evidence on a motion to dismiss, the Federal Rules of Civil Procedure provide:

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d).

The Eleventh Circuit recognizes a narrow exception to this rule and permits a court to consider extrinsic evidence on a motion to dismiss, without converting it to a summary judgment motion, "in cases in which a plaintiff refers to a document in its complaint, the document is central to its claim, [and] its contents are not in dispute." *Stephens*, 500 F.3d at 1284. The Eleventh Circuit also cautions, "[a] document is not 'central' merely because it is directly responsive to a factual allegation." *Adamson v. DePoorter*, No. 06-15941, 2007 U.S. App. LEXIS 23577, at *7 (11th Cir. Oct. 4, 2007). A sister district court recently explained:

> A document is typically "central" to a claim only if it is a written instrument attached to or referenced in the complaint and itself gives rise, or is otherwise intrinsic, to the claim, such as an insurance policy or other contract or a promissory note; it does not encompass witness affidavits that merely recount circumstances or information relevant to a claim. If it were otherwise, almost all evidence would be "central" to a claim, and the distinction between motions to dismiss under Rule 12(b)(6) and motions for summary judgment under Rule 56 would be eviscerated.

Glass v. City of Glencoe, No. 4:17-cv-0026, 2017 U.S. Dist. LEXIS 60281, at *8 (N.D. Ala. Apr. 20, 2017) (citations omitted).

This Court has refused to consider emails attached to a motion to dismiss a breach-of-contract claim, because the plaintiff had adequately pled existence of an agreement between the parties, and the emails were intended only to dispute that fact. *Tri-State Consumer Ins. Co. v. LexisNexis Risk Solutions, Inc.*, 823 F. Supp. 2d 1306, 1316 (N.D. Ga. 2011). Another court refused to consider a bill of sale attached to a motion to dismiss when the document, although referenced in the complaint and "highly relevant" to the lawsuit, was not a "critical element" of the plaintiff's case. *United States ex rel. Testino v. Augusta Med. Sys., LLC*, CV 107-146, 2011 U.S. Dist. LEXIS 157762, at *11–18 (S.D. Ga. July 13, 2011).

Here, the District's request that this Court consider the extrinsive evidence attached to and extensively cited in its motion, all for the purpose of disputing facts set forth in the Complaint, is inappropriate and should be rejected. *See Tri-State*, 823 F. Supp. 2d at 1316. In addition, while the hearing transcript and other extrinsic evidence may be relevant to Ms. Doe's claims, they are not a "critical element" of her case as would be, for example, a written agreement in a breach of contract claim that hinges on the exact wording or provisions contained in a written instrument.[2] The merits of Ms. Doe's claims depend on evidence far beyond the record of the disciplinary hearing.

[2] As discussed *infra*, Ms. Doe has not requested, nor do her claims rely upon, judicial review of the disciplinary hearing outcome, as the District contends.

The District has not requested this Court convert its motion to one for summary judgment. Nor should the Court do so, given that discovery has not yet commenced and the record is not fully developed. Courts routinely decline conversion in these circumstances. *See Artistic Entm't, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1202 (11th Cir. 2003) (*sua sponte* summary judgment proper "only in those circumstances in which the dismissed claims have been fully developed in the evidentiary record"); *Green v. ADCO Int'l Plastics Corp.*, No. 1:17-CV-337, 2017 U.S. Dist. LEXIS 217587, at *26–27 (N.D. Ga. Dec. 27, 2017) (declining conversion "at this early stage of the proceedings because the record has not yet been developed, the factual issues raised by District's arguments are in dispute, [and] neither party has had an opportunity to conduct discovery."); *Ash v. Douglas Cty.*, No. 1:14-CV-1440, 2015 U.S. Dist. LEXIS 191571, at *10 n.7 (N.D. Ga. July 31, 2015) (declining conversion when neither party requested it).

Accordingly, this Court should exclude the extrinsic evidence the District has proffered, as well as all disputed allegations based on that evidence, and decide the motion based solely on the facts alleged in Ms. Doe's Complaint.

II. Ms. Doe Is Not Precluded or Estopped from Asserting Her Title IX Claim for Deliberate Indifference to Her Report of Sexual Assault.

The District argues that Ms. Doe is precluded from bringing her federal claims because of findings made during the disciplinary hearing, which was held

pursuant to O.C.G.A. §§ 20-2-752, 20-2-753(a). However, the very same Georgia law expressly provides that disciplinary hearings do not preclude other legal claims. It states:

> Nothing in this subpart shall be construed to prohibit, restrict, or limit in any manner any cause of action otherwise provided by law and available to any teacher, school official, employee or student.

O.C.G.A. § 20-2-758. The District has made no argument why this plain statutory language should be ignored, nor can it. The District's frivolous and potentially sanctionable preclusion argument should be rejected outright.

Even in the absence of this statutory provision, the District's argument fails. Collateral estoppel, or issue preclusion, "precludes the re-adjudication of the same issue, where the issue was actually litigated and decided in the previous adjudication, even if it arises in the context of a different cause of action." *Cmty. St. Bank v. Strong*, 651 F.3d 1241, 1263-64 (11th Cir. 2011). The Eleventh Circuit describes the preclusive effect of a state agency or administrative determination as follows:

> When a state agency, acting in a judicial capacity, resolves disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's court.[3]

[3] Georgia law requires a party asserting collateral estoppel to establish:

Bryant, 575 F.3d at 1302 (quotation omitted).

A district court is not bound by an administrative decision where, as here, the issue at stake in litigation was not before or decided by the administrative body. *Id.* at 1302–03. In *Bryant*, the Eleventh Circuit upheld a district court's determination that an agency adjudication did not bar a plaintiff's subsequent federal discrimination claim. *Id.* at 1301–03. There, the plaintiff was an employee of DeKalb County, Georgia, and his employment position was dissolved after he refused to participate in the defendants' race-based employment discrimination. *Id.* at 1288–89. The plaintiff appealed the decision to eliminate his position to the DeKalb County Human Resources Department, which ruled adversely to him. *Id.* at 1294, 1301. He subsequently brought a retaliation claim against the defendants under 42 U.S.C. § 1981. *Id.* at 1288–89. The court held the administrative adjudication did not preclude the plaintiff's retaliation claim because the prior proceeding determined only whether a lack of funding or work justified elimination of his position, but the plaintiff was unable to challenge the underlying

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> (1) an identical issue was presented in the prior proceedings; (2) the issue was a critical and necessary part of the prior proceeding; (3) the issue was fully and fairly litigated in the previous proceeding; (4) the parties in the two proceedings were identical; and (5) a final decision was rendered by a court of competent jurisdiction.

Bryant v. Jones, 575 F.3d 1281, 1303 (11th Cir. 2009).

discriminatory nature of his termination. *Id.* at 1301–03. Moreover, the hearing officer made "very narrow and perfunctory factual findings tailored solely around his limited jurisdiction," and "the administrative adjudication did not dispose of the allegations and arguments underpinning [the] retaliation claim." *Id.* at 1302–03.

Another district court has rejected an argument nearly identical to the District's. *See Evans v. Bd. of Educ. Sw. City Sch. Dist.*, No. 2:08-CV-794, 2010 U.S. Dist. LEXIS 72926 (S.D. Ohio July 20, 2010), *aff'd*, 425 F. App'x 432 (6th Cir. 2011). In *Evans*, a female student reported to school officials that a male student had sexually assaulted her. *Id.* at *7–8. The principal concluded that the students had engaged in "consensual" sexual activities and caused a "disruption of school," and suspended both students. *Id.* The female student appealed, and a hearing officer affirmed both the finding and the suspension. *Id.* at *8–9, *17. The young woman later filed suit, asserting Title IX discrimination and retaliation claims and a § 1983 claim against the school. *Id.* at *12. The defendant argued that the hearing officer's findings barred the plaintiff's legal claims. *Id.* at *12–13. The district court rejected that argument, because the sole issue determined at the hearing was whether there was an appropriate basis for the suspension, the hearing officer did not address whether the sex was consensual and was not authorized to

adjudicate federal law claims, and plaintiff's federal claims had not been decided at the hearing. *Id.* at *18–19.

This court should similarly reject the District's preclusion argument. The sole issue determined at the disciplinary hearing was whether Ms. Doe violated Rule 9G for "participating" in oral sex on school property. (Doc. 1 ¶¶ 31–32, 39). The Rule itself contains no definition of "consensual" oral sex, and it is unclear what standard of proof or definition of "consent" was utilized at the disciplinary hearing. The hearing officers were not authorized to determine, and did not issue any findings or rulings on, Ms. Doe's Title IX or § 1983 claims, which assert the District discriminated against her after she reported sexual assault.[4] Ms. Doe was unable to challenge the inequitable and biased nature of the District's investigation of her complaint, the disciplinary hearing itself, and school officials' subsequent inaction, as those issues were not before the hearing officers. Just as

[4] Although Ms. Doe strongly contends the hearing transcript is extrinsic evidence that may not be considered in deciding the pending motion, if this Court reviews the transcript, it demonstrates the hearing officers decided no issues concerning the District's Title IX compliance. The District's attorney stated during the hearing:

> [T]he school is not on trial here. The question is whether or not [Ms. Doe] and [MP] violated the rules they are charged with, not whether the school followed all of the federal requirements that may be required to perform. That would be for a separate tribunal if there were such an allegation.

(Doc. 23-1 at 98–99.)

in *Bryant* and *Evans*, the hearing did not dispose of the allegations and arguments underpinning Ms. Doe's Title IX claim.

Finally, an administrative body's fact findings are binding in a later proceeding only where the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Travers*, 323 F.3d at 1296. The District admits it advocated for MP and his contention that oral sex with Ms. Doe was "consensual." (Doc. 22, 20 n.5.) Thus, even if the disciplinary hearing could somehow be viewed as deciding any issue at stake in Ms. Doe's lawsuit—which Plaintiff strongly contests—the hearing was anything but "fair," as required by the Eleventh Circuit. *See id*. If there is any question regarding the fairness of the hearing, it is a factual dispute that cannot be determined on the District's pending motion.

III. Ms. Doe Has Sufficiently Pled a Title IX Deliberate Indifference Claim.

Title IX of the Education Amendments of 1972 provides, in pertinent part:

> [N]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. §1681(a). The Eleventh Circuit requires proof of five elements for a plaintiff to succeed on a Title IX claim:

> First, the defendant must be a Title IX funding recipient. Second, an "appropriate person" must have actual knowledge of the alleged discrimination or harassment. Third, the discrimination or harassment . . . must be "severe, pervasive, and objectively offensive." Fourth, the plaintiff must prove "the funding recipient act[ed] with deliberate indifference to known acts of harassment in its programs or activities." Fifth, the plaintiff must demonstrate the discrimination or harassment "effectively barred the victim's access to an educational opportunity or benefit."

Hill v. Cundiff, 797 F.3d 948, 970 (11th Cir. 2015) (citations omitted). A school's liability can flow from "deliberate indifference after an attack that causes a plaintiff to endure additional harassment." *Doe v. Bibb Cty. Sch. Dist.*, 82 F. Supp. 3d 1300, 1306 (M.D. Ga. 2015).

Here, District moves to dismiss Ms. Doe's post-report Title IX claim only on the grounds that it did not act with deliberate indifference.[5]

[5] The District also briefly argues Ms. Doe "was not effectively denied educational opportunities or benefits" because she was able to enroll in the District's Online Campus. (Doc. 22 at 29.) This argument is factual and, in any event, lacks merit. *See Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1298 (11th Cir. 2007) ("Although UGA and UGAA neither formally forced Williams to leave nor banned her from returning, the discrimination in which they engaged or they allowed to occur on campus caused Williams to withdraw and not return. . . . Considering these circumstances, we conclude that Williams has alleged sufficient facts at this stage to show that the alleged discrimination 'effectively bar[red] [her] access to an educational opportunity or benefit,' namely pursuing an education at UGA."); *Hill*, 797 F.3d at 975–76 ("Although Doe unenrolled and moved . . . Doe's withdrawal does not bar a finding that the Board denied her an opportunity to continue attending Sparkman.").

A. Deliberate Indifference Legal Standard

A funding recipient is "deliberately indifferent 'only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.'" *Hill*, 797 F.3d at 973 (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999)). Deliberate indifference is also described as "an official decision by the [funding] recipient not to remedy the [Title IX] violation." *Id.* at 968 (first alteration in original) (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)).

The Eleventh Circuit requires a court's deliberate indifference analysis to consider the facts cumulatively and contextually. *See id.* at 975 ("Given all these events and circumstances considered cumulatively, there is a genuine issue of fact as to whether both the Board's action and inaction were deliberately indifferent. We do not say that any one action or inaction suffices. The deliberate indifference standard is rigorous and hard to meet. But the cumulative events and circumstances here . . . are enough to establish deliberate indifference under Title IX."); *see also Bibb Cty.*, 126 F. Supp. 3d at 1379 ("[T]his fact cannot be considered in isolation because, again, a funding recipient's conduct must be evaluated in light of all known circumstances.").

A school cannot escape Title IX liability by responding only minimally, or

in a clearly inadequate manner, to a report of sexual assault. The Eleventh Circuit states, "[t]he Title IX inquiry is contextual: it does not require school districts to simply do something in response to sexual harassment; rather, they must respond in a manner that is not 'clearly unreasonable in light of the known circumstances.'" *Doe v. Sch. Bd.*, 604 F.3d 1248, 1263 (11th Cir. 2010) (quoting *Davis*, 526 U.S. at 648) (emphasis in original); *see also Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1356 (M.D. Ga. 2007) ("[I]t is undeniable that [the school] engaged in some response to [plaintiff's] allegation – the key inquiry for the Court is whether the response was clearly inadequate."); *A.G. v. Autauga Cty. Bd. of Educ.*, 506 F. Supp. 2d 927 (M.D. Ala. 2007) ("it is not enough to simply say they did something."); *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260–61 (6th Cir. 2000) ("[A]ccording to Defendant, [the school district] did something in response to [the student's] allegations. . . . If this Court were to accept [the school district's] argument, a school district could satisfy its obligation where a student has been raped by merely investigating and absolutely nothing more. Such a minimalist response is not within the contemplation of a reasonable response.").

A school must respond reasonably to reports of student-on-student sexual assault, even when an investigation is inconclusive:

> [W]e have repeatedly recognized that a school district's reasonable response to sexual harassment may include corrective action such as

> monitoring and admonishing an accused teacher or student despite the inconclusive nature of the school's investigation into the misconduct. . . . [Other school districts have] seemed to recognize that inconclusive investigations are common, especially when alleged harassment occurs behind closed doors. Therefore, a reasonable response under the known circumstances may include taking informal corrective action in an abundance of caution to ensure that future misconduct does not occur.

Doe, 604 F.3d at 1262.

In addition, a post-report hostile educational environment may be actionable for Title IX purposes. *See, e.g.*, *Kinsman v. Fla. St. Univ. Bd. of Trs.*, No. 4:15cv235, 2015 U.S. Dist. LEXIS 180599, at *11 (N.D. Fla. Aug. 12, 2015) ("[t]he possibility of further encounters 'between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities'" (citations omitted)); *King v. Curtis*, No. 1:14-cv-403, 2016 U.S. Dist. LEXIS 184737, at *27-30 (W.D. Mich. Nov. 1, 2016), *adopted* 2017 U.S. Dist. LEXIS 28429, at *14-15 (W.D. Mich. Mar. 1, 2017) (hostile education environment may exist where, after plaintiffs reported sexual assault, other students called them "bitch," "slut," and "liar.")

B. Ms. Doe Has Adequately Pled the District's Deliberate Indifference.

Ms. Doe has alleged sufficient facts to support her claim that the District acted with deliberate indifference to her reports of sexual assault and subsequent

harassment. After Ms. Doe reported the assault, the District interrogated her, forced her to reenact the sexual assault in the same room where MP had attacked her the day before, and demanded she repeat details to at least six school employees. The District then punished Ms. Doe by suspending her for "participating" in oral sex on school grounds, and required she attend a disciplinary hearing, where MP admitted he had not asked Ms. Doe if she wanted to engage in oral sex, claiming he knew she "wanted" it because of the blank look on her face.

The District's deliberate indifference included its overt and concerted attempts to discredit Ms. Doe and debunk her report of sexual assault, which she had consistently recounted to many school employees, at the disciplinary hearing.[6] The District's decision to bring in its own attorney who actively advocated disbelieving Ms. Doe's report of sexual assault in favor of MP's account certainly amounts to "an official decision" by the District "not to remedy" Ms. Doe's reported Title IX violation. *See Hill*, 797 F.3d at 968. After the hearing, the District issued another suspension against Ms. Doe.

The District's deliberate indifference continued when Ms. Doe returned to

[6] The District's contention that such conduct by a school agent or representative is "commonplace in school disciplinary proceedings" (Doc. 22, 20 n.5), is highly disturbing. It suggests vulnerable minor female students are routinely belittled, humiliated, and disbelieved by school officials at these proceedings. In any event, the contention is factual and may not be considered on this motion.

school from her second suspension. She lived in constant fear of encountering MP. Given the school's treatment of her sexual assault report, Ms. Doe had every reason to anticipate MP could, again, sexually assault her without consequence, and she, again, would be blamed. The District refused to remediate the hostile environment she reported, which included other students' derogatory comments and intimations of sexual violence.

The District's motion improperly parses each individual component of its overall deliberate indifference, viewed in isolation and largely removed from the facts of this case. But this contravenes legal authority requiring examination of all facts supporting allegations of a school district's deliberate indifference, cumulatively and contextually. *See Hill*, 797 F.3d at 975; *Doe*, 604 F.3d at 1263.

The District's argument that its biased investigation and advocacy against Ms. Doe cannot constitute deliberate indifference fails, because it turns on the factual determination whether, cumulatively, the District was deliberately indifferent. The Complaint asserts the investigation was but one part of the District's overall deliberate indifference. Any factual dispute on this issue cannot be resolved on a motion to dismiss. Notably, the District does not cite a single case decided on a motion to dismiss. Every case the District cites was decided on summary judgment, after the benefit of discovery and on a full evidentiary record.

In addition, in the cases it cites, the District selectively highlights only certain aspects of schools' responses that may not rise to the level of deliberate indifference, but ignores the crucial fact that, in every case it cites, the school took concrete remedial or corrective action. (Doc. 22 at 21–25.) In stark contrast, the District did not take a single corrective or remedial action in response to Ms. Doe's report of sexual assault, which she never recanted. Instead, the District repeatedly and intentionally discredited, humiliated, and punished Ms. Doe. Any dispute as to District's deliberate indifference to Ms. Doe's reports of sexual assault and a hostile environment are factual questions properly left to a jury, not issues that can be resolved on a motion to dismiss.

This Court should also reject the District's argument that its failure to respond to Ms. Doe's reports of "post-hearing comments from other students" cannot legally constitute deliberate indifference. The District's description of the humiliation and derision Ms. Doe suffered after returning to school as "garden-variety student insults, teasing and name-calling among high school students," creates a factual question that cannot be decided here. Moreover, the District misrepresents the cases it cites to support this argument. To illustrate, the District cites *Hawkins* for the premise that "insults" or "teasing" cannot constitute actionable sexual harassment or a hostile education environment. *Hawkins v.*

Sarasota Cty. Sch. Bd., 322 F.3d 1279 (11th Cir. 2003). However, the *Hawkins* court explicitly declined to decide whether the school acted with deliberate indifference, and rested its decision on the plaintiffs' failure to prove any "concrete, negative effect on either the ability to receive an education or the enjoyment of equal access to educational programs or opportunities." *Id.* at 1287–88. Also, unlike here, the *Snethen* plaintiff did not report to the school she was the victim of post-report harassment or hostility, *Snethen v. Bd. of Pub. Educ. for the City of Savannah*, No. 406CV259, 2008 U.S. Dist. LEXIS 22788, at *16, 19 (S.D. Ga. Mar. 24, 2008), and the *A.N.* plaintiff failed to allege in his complaint whether he reported name-calling to defendant or how that harassment correlated to his disability, *A.N. v. Mart. Indep. Sch. Dist.*, No. W-13-CV-002, 2013 U.S. LEXIS 191295 (W.D. Tex. Dec. 23, 2013).

Finally, although a funding recipient's failure to comply with Department of Education guidance does not, alone, constitute deliberate indifference, many courts consider that guidance in determining whether a school's response to reported sexual harassment was appropriate and adequate. *See, e.g.*, *Doe v. Russell Cty. Sch. Bd.*, 292 F. Supp. 3d 690, 710 (W.D. Va. 2018); *Doe v. Baylor Univ.*, 240 F. Supp. 3d 646, 659–60 (W.D. Tex. 2017); *Doe v. Forest Hills Sch. Dist.*, No. 1:13-cv-428, 2015 U.S. Dist. LEXIS 175321, at *33 (W.D. Mich. Mar. 31, 2015).

Thus, Ms. Doe's Title IX claim for deliberate indifference to her report of sexual assault is well-pled, and the Court should deny the District's motion.

IV. Ms. Doe Has Sufficiently Pled a Claim for Retaliation under Title IX.

"Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). The U.S. Supreme Court has explained the vital importance of ensuring that schools do not retaliate against those who report sexual harassment:

> Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel . . . .

Id. at 180–81.

Retaliation claims brought under Title IX are analyzed under Title VII's retaliation framework. *See, e.g.*, *Terry v. Young Harris Coll.*, 106 F. Supp. 3d 1280, 1297 (N.D. Ga. 2015); *Ross*, 506 F. Supp. 2d at 1359. To establish a prima facie case of retaliation under Title IX, a plaintiff must allege: (1) she engaged in a protected activity; (2) she suffered an adverse action; and (3) "there is a causal connection between the two." *Saphir v. Broward Cty. Pub. Sch.*, 744 F. App'x 634, 639 (11th Cir. 2018); *see also Bowers v. Bd. of Regents of the Univ. Sys. of Ga.*, 509 F. App'x 906, 911 (11th Cir. 2013); *Terry*, 106 F. Supp. 3d at 1297. "A

retaliation claim does not depend on the success of the underlying harassment claim." *Terry*, 106 F. Supp. 3d at 1297. Title IX's anti-retaliation provision protects a student "so long as she can show a good faith, reasonable belief" that the practices violated Title IX. *Id.* (citation omitted).

Here, Ms. Doe has sufficiently alleged facts stating a claim of Title IX retaliation. As set forth in her Complaint, Ms. Doe repeatedly reported sexual assault to the District, an activity protected by Title IX. (Doc. 1, ¶¶ 18, 22–24, 28); *see Saphir*, 744 F. App'x at 639; *Reza v. Univ. of S. Ala.*, No. 18-00009, 2018 U.S. Dist. LEXIS 207029, at *40 (S.D. Ala. Dec. 4, 2018). Ms. Doe also alleges she suffered adverse actions, including being suspended twice; receiving failing grades; and being denied reasonable accommodations. (Doc. 1, ¶¶ 5-6, 31, 43, 45, 48, 49, 86). An adverse action is one that "would 'dissuade[] a reasonable [person] from making or supporting a charge of discrimination.'" *Bowers*, 509 F. App'x at 911–12 (alterations in original) (quoting *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006)). Ms. Doe herself, at the school hearing, described the chilling effect of District's actions:

> What about other girls that go to Peachtree Ridge? This is a bad example. I don't want any girls to have to go through this, ever. When people find out about this and girls do get sexually assaulted, they're not going to want to come forward and tell someone, because they're going to be scared they're going to get suspended and they have to go through all of this.

(Doc. 1 ¶ 42.)

Finally, Ms. Doe has adequately pled causation. "To demonstrate causation, 'a plaintiff must show that the decision-makers were aware of the protected conduct, and that the protected activity and the adverse actions were not wholly unrelated.'" *Bowers*, 509 F. App'x at 911 (quoting *Shannon v. BellSouth Telecomm., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002)). Most compelling here is the fact that the District suspended Ms. Doe after she first reported sexual assault, and specifically because of the conduct she had reported. (Doc. 1, ¶ 31). The District then suspended Ms. Doe a second time at the disciplinary hearing, again because of the sexual misconduct she had reported. (*Id.* at ¶¶ 41, 43.) Plainly stated, the District would not have suspended Ms. Doe if she had not reported sexual assault.

A sister district court denied a defendant's motion to dismiss in a strikingly similar case, where the plaintiff reported that she had been sexually assaulted by another student, and the school retaliated by charging her with a code-of-conduct violation. *Garrett v. Univ. of S. Fla. Bd. of Trs.*, No. 8:17-cv-2874, 2018 U.S. Dist. LEXIS 64907, at *15 (M.D. Fla. Apr. 18, 2018).

The District's argument—that because it concluded Ms. Doe had engaged in consensual oral sex, she could not have a good faith, reasonable belief she was opposing a practice that violated Title IX—is unavailing. It defies logic to argue

that, because the District disbelieved Ms. Doe's report of sexual assault, she could not in good faith reasonably believe her report was protected by Title IX. *See Terry*, 106 F. Supp. 3d at 1297.

The District also appears to argue that, even if Ms. Doe establishes a prima facie case of retaliation, her claim should be dismissed because the District suspended her based on an honest belief that the conduct she reported was consensual. (Doc. 22 at 31). But this factual contention is disupted and may not be considered on a motion to dismiss. Notably, the sole case the District cites in support of its "honest belief" argument was decided on summary judgment, with a fully developed factual record. *See Howard v. Hyundai Motor Mfg. Ala.*, No. 17-14089, 2018 U.S. App. LEXIS 30189 (11th Cir. Oct. 26, 2018).

Accordingly, Ms. Doe has sufficiently pled a claim for retaliation under Title IX, and the Court should deny the District's motion to dismiss.

V. Ms. Doe Has Adequately Pled Her § 1983 Failure-to-Train Claim.

To state a § 1983 claim, a plaintiff must allege: (1) her constitutional or federal rights were violated; (2) "the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004) (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

Municipal liability attaches when the entity's "failure to train its employees in a relevant respect evidences a 'deliberate indifference'" to the risk of constitutional violations. *Vineyard v. Cty. of Murray, Ga.*, 990 F.2d 1207, 1212 (11th Cir. 1993) (citation omitted)). To succeed on a failure-to-train theory absent a pattern of violations, a plaintiff need only demonstrate "the need for a particular type of training" is "so obvious" because employees "face clear constitutional duties in recurrent situations." *Thomas v. Clayton Cty. Bd. of Educ.*, 94 F. Supp. 2d 1290, 1321 (N.D. Ga. 1999) (quoting *Young v. City of August, Ga.*, 59 F.3d 1160, 1172 (11th Cir. 1995)). The Equal Protection Clause guarantees a federal constitutional right to be free from sex discrimination. *Hill*, 797 F.3d at 976.

Numerous federal courts have recognized failure-to-train claims much like the one alleged here. *See, e.g.*, *Doe v. Hamilton Cty. Bd. of Educ.*, 329 F. Supp. 3d 543, 579-81 (E.D. Tenn. 2018) ("if a school district employee has served a school in a capacity that often puts them in close proximity to students, and they serve in that role for any significant length of time, at least some acquaintance with Title IX and student-on-student harassment training seems to be at least minimally necessary"); *Doe v. Russell Cty. Sch. Bd.*, 292 F. Supp. 3d 690, 711 (W.D. Va. 2018); *C.R. v. Novi Cmty. Sch. Dist.*, No. 14-14531, 2017 U.S. Dist. LEXIS 18394, at *46–47 (E.D. Mich. Feb. 9, 2017); *King*, 2016 U.S. Dist. LEXIS 184737, at

*42–43; *Doe v. Forest Hills Sch. Dist.*, No. 1:13-cv-428, 2015 U.S. Dist. LEXIS 175321, at *55-58 (W.D. Mich. Mar. 31, 2015) (granting plaintiff summary judgment on failure-to-train claim and comparing the need to provide training on Title IX to the need to train police officers on how to use a weapon); *Belcher v. Robertson Cty.*, No. 3-13-0161, 2014 U.S. Dist. LEXIS 165238, at *32-33 (M.D. Tenn. Nov. 26, 2014).

Here, as Ms. Doe has alleged, the District violated her equal protection rights by failing to appropriately address her reports of sexual assault, subjecting her to further harassment and retaliating against her for reporting sexual assault. (Doc. 1, ¶¶ 25–28, 31, 33, 36–41, 43, 45–49, 64–68).

Ms. Doe also has sufficiently alleged the District maintained a custom or policy of inadequate training on Title IX, sexual harassment, and assault. As set forth in the Complaint, decades of U.S. Supreme Court precedent and guidance from the U.S. Department of Education has placed District on notice that, *inter alia*, failing to properly respond to a student's report of sexual harassment may constitute sex discrimination and retaliating against a student because she reports sexual assault is sex discrimination.[7] (Doc. 1, ¶¶ 54–63, 99–101). These

[7] This precedent includes *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), in which a student who suffered sexual harassment sued Defendant for monetary damages under Title IX.

authorities make clear that "harassment unfortunately is an all too common aspect of the educational experience," *Davis*, 526 U.S. at 629, that "[p]reventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn," and that "schools need to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately," U.S. Dep't of Educ., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at ii, 13 (2001). Despite the obvious need for Title IX training, the District failed to provide adequate training or education to its staff, administrators, students, or parents. (Doc. 1, ¶¶ 64–68). The District ignored the well-known risk of student-on-student sexual assault, and that its administrators and staff would be ill-equipped to handle those highly predictable situations when they arose, given their lack of training on, *inter alia*, how to respond to or investigate reports of student-against-student sexual harassment, or, at the very least, that retaliation against a student who reports sexual assault constitutes illegal sex discrimination. (*Id.*). These failures created a serious risk of sex discrimination, in violation of students' federal, civil, and constitutional rights. (*Id.*).

Ms. Doe has sufficiently alleged that the District's failure to train caused her constitutional injury. To establish causation, a plaintiff must show "the identified

deficiency in a [] training program [and supervision] must be closely related to the ultimate injury." *Daniel v. Hancock Cty. Sch. Dist.*, 626 F. App'x 825, 835 (11th Cir. 2015) (alterations in original) (quoting *City of Canton*, 489 U.S. at 391)). This requires a plaintiff to demonstrate a connection between the failure to train and the risk, as well as the risk and the plaintiff's harm. *Id.* (citing *Hale v. Tallapoosa Cty.*, 50 F.3d 1579, 1584 (11th Cir. 1995)). Ms. Doe has alleged that the District's failure to train its administrators and staff created a serious risk of unlawful sex discrimination, and that risk directly caused Ms. Doe's harm. (Doc. 1, ¶¶ 64–68, 96–104). The District's failure to provide adequate training to school officials subjected Ms. Doe to victim-blaming questions intended to discredit her report of sexual assault and highly inappropriate interrogation and cross-examination, including by the District's attorney. (*Id.* at ¶ 66). The District's inadequate training caused those officials to ignore relevant standards applicable to addressing student reports of sexual assault. As a result, they did not understand how sexual assault victims may react to trauma, forced Ms. Doe to reenact the sexual assault, demanded she repeatedly recount horrific details of the assault, refused to remediate the hostile environment she suffered, and retaliated against Ms. Doe by punishing her, twice, for reporting sexual assault. (*Id.*).

The District's argument that Ms. Doe must show that a government official

"'actually knew or acquiesced in' the discriminatory conduct," is inapt because that requirement applies to individual defendants' liability under § 1983, not municipal liability. *Hill*, 797 F.3d at 978.

Accordingly, Ms. Doe has sufficiently pleaded her § 1983 failure-to-train claim, and the Court should deny the District's motion to dismiss.

CONCLUSION

For all of the reasons stated above, Ms. Doe respectfully requests this Court DENY Defendant's Motion to Dismiss in its entirety.

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LOCAL RULE 7.1(D) CERTIFICATION

The undersigned counsel certifies that the forgoing document was prepared using Times New Roman 14 point font as approved by Local Rule 5.1(B).

Dated: March 4, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Service of this filing will be made on all ECF-registered counsel by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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