IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) CHILD DOE, by his parents and next friends, JOHN and JANE DOE, Plaintiff, v. (1) INDEPENDENT SCHOOL DISTRICT NO. 5, McCLAIN COUNTY, OKLAHOMA a/k/a WASHINGTON PUBLIC SCHOOLS; (2) A.J. BREWER, Superintendent, in his individual capacity; and (3) STUART McPHERSON, Principal and Athletic Director, Washington Middle School, in his individual capacity, Defendants.	Case No: 18-cv-271-JD (Honorable Jodi Dishman)

PLAINTIFF CHILD DOE'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and LCvR 7.1 of the Local Court Rules for the Western District of Oklahoma, Plaintiff Child Doe moves for summary judgment on his Title IX claim and § 1983 Equal Protection claim against Defendant Independent School District No. 5, McClain County, Oklahoma a/k/a Washington Public Schools. In support of this motion, Child Doe is also filing Plaintiff's Brief in Support of his Motion for Partial Summary Judgment and a proposed Order.

Respectfully submitted,

s/ Nathan D. Richter
Nathan D. Richter, OBA # 22003
Renee D. Little, OBA #22630
DENTON LAW FIRM
925 West State Highway 152
Mustang, Oklahoma 73064
Telephone: (405) 376-2212
Facsimile: (405) 376-2262
nathan@dentonlawfirm.com
renee@dentonlawfirm.com

Adele P. Kimmel*
Alexandra Brodsky*
Adrienne Spiegel*
PUBLIC JUSTICE, P.C.
1620 L Street NW, Suite 630
Washington, D.C. 20036
Telephone: (202) 797-8600
Facsimile: (202) 232-7203
akimmel@publicjustice.net
abrodksy@publicjustice.net
aspiegel@publicjustice.net

*Admitted *pro hac vice*

ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) CHILD DOE, by his parents and next friends, JOHN and JANE DOE, Plaintiff, v. (1) INDEPENDENT SCHOOL DISTRICT NO. 5, McCLAIN COUNTY, OKLAHOMA a/k/a WASHINGTON PUBLIC SCHOOLS; (2) A.J. BREWER, Superintendent, in his individual capacity; and (3) STUART McPHERSON, Principal and Athletic Director, Washington Middle School, in his individual capacity, Defendants.	)	Case No: CIV-18-271-JD (Honorable Jodi W. Dishman)

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY JUDGMENT

Nathan D. Richter, OBA # 22003
Renee D. Little, OBA #22630
DENTON LAW FIRM
925 West State Highway 152
Mustang, Oklahoma 73064
Telephone: (405) 376-2212
Facsimile: (405) 376-2262
nathan@dentonlawfirm.com
renee@dentonlawfirm.com

Adele P. Kimmel*
Alexandra Brodsky*
Adrienne Spiegel*
PUBLIC JUSTICE, P.C.
1620 L Street NW, Suite 630
Washington, DC 20036
Telephone: (202) 797-8600
Facsimile: (202) 232-7203
akimmel@publicjustice.net
abrodksy@publicjustice.net
aspiegel@publicjustice.net

*Admitted *pro hac vice*

Counsel for Plaintiff

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF UNDISPUTED MATERIAL FACTS 2

District and School Background 3

The District's Policies and Procedures on Sexual Harassment and Bullying 3

Child Doe Suffered Severe and Pervasive Sexual Harassment 6

Defendants' Knowledge of, and Inadequate Response to, Reports That WMS Students Were Sexually Harassing and Threatening Child Doe 10

Sixth Grade Reports 10

Seventh Grade Reports 13

Defendants' Obligations to Address Child Doe's Reports 17

Defendants' Failure to Address Child Doe's Reports 18

The OSBI Found Evidence that Child Doe Was Sexually Assaulted and that There Was an Unchecked Practice of Students Digitally Penetrating Other Boys' Anuses.. 20

Defendants' Blatant Sex Discrimination 22

Brewer and McPherson Had Authority to Take Corrective Action 24

The District's "Phantom" Title IX Coordinator and Failure to Provide Sexual Harassment Training 27

The Unchecked Sexual Harassment Deprived Child Doe of Equal Access to Educational Opportunities 29

FACTUAL BACKGROUND 32

SUMMARY JUDGMENT STANDARD 36

ARGUMENT 37

I. Child Doe Is Entitled To Summary Judgment On His Title IX Claim. 37

II. Child Doe Is Entitled To Summary Judgment On His § 1983 Equal Protection Claim Against The District. 42

1. The District Failed To Provide Any Training On Sexual Harassment. 43

2. The District Was Deliberately Indifferent Because The Need For Sexual Harassment Training Was Patently Obvious. 44

3. The District's Failure To Train Caused Child Doe's Constitutional Injury... 46

CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 37

Barney v. Pulsipher,
143 F.3d 1299 (10th Cir. 1998) 44

Bd. of Cty. Comm'rs of Bryan Cty., Okla. v. Brown,
520 U.S. 397 (1997) 44

Cannon v. Univ. of Chicago,
441 U.S. 677 (1979) 38

City of Canton, Ohio v. Harris,
489 U.S. 378 (1989) 43, 45

Connick v. Thompson,
563 U.S. 51 (2011) 50

Davis v. Monroe Cty. Bd. of Educ.,
526 U.S. 629 (1999) 38

Doe v. Forest Hills Sch. Dist.,
No. 1:13-cv-428, 2015 WL 9906260 (W.D. Mich. March 31, 2015) 45, 46

G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.,
822 F.3d 709 (4th Cir. 2016) 38, 39

Gebser v. Lago Vista Indep. Sch. Dist.,
524 U.S. 274 (1998) 38

Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ.,
245 F.3d 1172 (10th Cir. 2001) 40

GP by & through JP v. Lee Cty. Sch. Bd.,
737 F. App'x 910 (11th Cir. 2018) (unpublished) 39

Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.,
743 F.3d 569 (7th Cir. 2014) 39

Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 38

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) 38

Jeldness v. Pearce,
30 F.3d 1220 (9th Cir. 1994) 39

Jennings v. Univ. of North Carolina,
482 F.3d 686 (4th Cir. 2007) (en banc) 41

Lawmaster v. Ward,
125 F.3d 1341 (10th Cir. 1997) 37

Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.,
813 F.2d 311 (10th Cir. 1987) 39

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 37

Murphy v. City of Tulsa,
950 F.3d 641 (10th Cir. 2019) 43

Murrell v. Sch. Dist. No. 1, Denver, Colo.,
186 F.3d 1238 (10th Cir. 1999) 42, 45, 46

N. Haven Bd. of Educ. v. Bell,
456 U.S. 512 (1982) 38

Nabozny v. Podlesny,
92 F.3d 446 (7th Cir. 1996) 40

Piercy v. Maketa,
480 F.3d 1192 (10th Cir. 2007) 37, 39, 40, 41

Roberts v. Colo. State Bd. of Agric.,
998 F.2d 824 (10th Cir. 1993) 39

Shepherd v. Slater Steels Corp.,
168 F.3d 998 (7th Cir. 1999) 39

Simpson v. Univ. of Colorado, Boulder,
500 F.3d 1170 (10th Cir. 2007) 38, 46

Thomas v. Metro. Life Ins. Co.,
631 F.3d 1153 (10th Cir. 2011) 37

Waller v. City & Cty. of Denver,
932 F.3d 1277 (10th Cir. 2019) 43

Williams v. Bd. of Regents of Univ. Sys. of Georgia,
477 F.3d 1282 (11th Cir. 2007) 41

Statutes

20 U.S.C. § 1681(a) .... passim

42 U.S.C. § 1983 .... 2, 3, 42, 50

Rules

Fed. R. Civ. P. 56(a) 36

LCvR 56.1(b) 2

Constitutional Provisions

U.S. Const. amend. XIV, § 1 42

INTRODUCTION

Some cases challenging a school's response to sexual harassment are hard. This one is not. When Child Doe was a student at Washington Middle School ("WMS"), part of Independent School District No. 5, McClain County, Oklahoma a/k/a Washington Public Schools (the "District"), his classmates sexually assaulted him repeatedly. After Child Doe first reported the violence to his principal, one of his assailants threatened to kill him. Students also taunted him regularly—both for being victimized and for "snitching." The District could have used a range of tools at its disposal to stop the ongoing, known harassment and protect Child Doe's education. But they did not. The reason is no mystery. The District and its administrators did not protect Child Doe because he is a boy. This is not an allegation. It is a fact—a fact confirmed by Superintendent A.J. Brewer and Principal Stuart McPherson's taped admissions to the Oklahoma State Bureau of Investigation ("OSBI"), which later investigated Child Doe's reports of sexual abuse at WMS. Had Child Doe been a girl, Brewer and McPherson told the OSBI, they would have treated students' digital penetration of Child Doe's anus as sexual assaults. Instead, because of Child Doe's sex, they dismissed the conduct as "just boys horseplaying." It is hard to imagine a more blatant, straightforward example of sex discrimination. This is a textbook example of exactly what Title IX and the Equal Protection Clause prohibit.

Defendants' responses to Child Doe's and his heartbroken parents' repeated pleas for help varied from utter inaction to the patently absurd. What they could do wrong, they did. Once, Principal McPherson tasked a student accused of sexually assaulting Child Doe with investigating the alleged abuses. Ultimately, it was Superintendent Brewer's job to

make sure the District adequately investigated all sexual harassment reports and provided appropriate remedies. He utterly failed on both counts, so the District did as well. With no faith in District officials, Child Doe repeated a year of school to distance himself from the classmates who tormented him. Eventually, Child Doe's family saw no option but to uproot their lives and move to a new town. Perhaps there the adults charged with protecting their son would do so.

Brewer and McPherson's failures are shocking. But they are predictable given the District's failure to provide *any* necessary training to administrators on how to prevent, recognize, and respond to peer sexual harassment. McPherson did not even know he was the District's Title IX Coordinator, responsible under District policy for processing and investigating students' sexual harassment reports. No wonder the District's response was abysmal: The person tasked with addressing Child Doe's sexual harassment had no idea he was required to do so, let alone how.

None of these facts is open to dispute. The evidence could not be clearer: The District treated Child Doe's reports less seriously because of his sex, and District officials lacked the basic training needed to respond adequately. Accordingly, this Court should grant Child Doe's motion for partial summary judgment and enter judgment against the District on his Title IX claim and his equal protection claim under 42 U.S.C. § 1983.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Civil Rule 56.1(b) of the Western District of Oklahoma, Plaintiff submits this statement of undisputed material facts ("SOF").

District and School Background

1. The District is a public school district located in Washington, Oklahoma that receives federal financial assistance within the meaning of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) ("Title IX"), and is a "person" within the meaning of 42 U.S.C. § 1983. Joint Status Report (Doc. 16) at ¶ 3.

2. At all times relevant to this case, Brewer was the superintendent and an employee of the District. Joint Status Report (Doc. 16) at ¶ 3.

3. At all times relevant to this case, McPherson was an employee of the District who served as the principal and athletic director of Washington Middle School ("WMS"), a part of the District. Joint Status Report (Doc. 16) at ¶ 3.

4. At all times relevant to this case, fewer than 250 students attended WMS. Ex. 1, Expert Report of Charol Shakeshaft, Ph.D., at 44 (October 22, 2019) ("Shakeshaft Report").[1]

The District's Policies and Procedures on Sexual Harassment and Bullying

5. At all times relevant to this case, the District prohibited harassment, intimidation, and bullying, including "sexual bullying." Joint Status Report (Doc. 16) at ¶ 3; Ex. 3, Washington Board of Education Policy Prohibiting Harassment, Intimidation and Bullying (Regulation) (Nov. 10, 2014) ("Board HIB Policy").

[1] Dr. Shakeshaft evaluated the District's prevention of peer sexual harassment and abuse. Ex. 1, Shakeshaft Report at 67. She has decades of experience evaluating schools' policies and practices for preventing sexual misconduct. *Id*. at 3.

6. Under the District's HIB Policy, sexual bullying "may also constitute sexual harassment" prohibited by the District. *Id.* "Sexual harassment" includes "[u]nwelcome physical contact" and "[i]inappropriate [t]ouching." Ex. 4, Washington Board of Education Bullying Policy at 2 (Nov. 10, 2014) ("Board Bullying Policy"); Ex. 5, Washington Board of Education Harassment/Bullying Incident Report Form at 1 (Nov. 10, 2014).

7. Under the District's HIB Policy, the term "bullying" is used broadly and includes harassment and intimidation. Ex. 3, Board HIB Policy (Regulation) at 2.

8. The District adopted the HIB Policy, in part, because it recognized that bullying—including sexual bullying—"causes serious educational and personal problems . . . for the student-victim." Ex. 3, Board HIB Policy (Regulation) at 1.

9. The District also adopted the HIB Policy because it recognized that bullying—including sexual bullying—"disrupts and interferes with the student-victim's . . . ability to concentrate, retain instruction, and study or to operate free from the effects of bullying." Ex. 3, Board HIB Policy (Regulation) at 2.

10. The District's HIB Policy includes a commitment to "providing appropriate and relevant training to staff regarding identification of behavior constituting bullying of students and the prevention and management of such conduct." Ex. 3, Board HIB Policy (Regulation) at 3-4.

11. The District adopted the HIB and related policies to provide a safe school climate for its students. Ex. 4, Board Bullying Policy at 1; Ex. 3, Board HIB Policy (Regulation) at 4.

12. At all times relevant to this case, the District's policy on "Sexual Harassment of Students" described administrators' and supervisors' obligations to report, investigate, and impose sanctions for sexual harassment. Ex. 7, Washington Board of Education Policy on Sexual Harassment of Students at 1-2 (November 13, 2006) ("Board Sexual Harassment Policy"); *see also* Ex. 9, Deposition of Melinda Tague at 34:5-9, 35:8-36:6 (June 26, 2019) ("Tague Dep. Tr.").

13. Brewer, as the District's superintendent, and McPherson, as principal of WMS, were required to follow all policies enacted by the District's Board. Deposition of A.J. Brewer at 79:10-19 (June 27, 2019) ("Brewer Dep. Tr."). This included the District's HIB, Bullying, and Sexual Harassment Policies. *Id*. Tr. 52: 9-13, 79:16-19, 81:3-13, 90:13-16; 90:25-92:6; *see also* Ex. 10, Deposition of Paul Moore at 35:5-36:3, 51:18-25 (June 26, 2019) ("Moore Dep. Tr.").

14. Brewer, as superintendent, was responsible for enforcing the HIB Policy. Ex. 4, Board Bullying Policy at 2; Ex. 11, Washington Board of Education Policy Prohibiting Harassment, Intimidation and Bullying (Investigation Procedures) at 1-2 (Nov. 10, 2014) ("Board HIB Policy (Investigation Procedures)"); Ex. 8, Brewer Dep. Tr. 52: 9-13.

15. The District's HIB and Bullying Policies established investigative procedures and consequences for students who harass, intimidate, or bully other students. Ex. 11, Board HIB Policy (Investigation Procedures) at 1-2; Ex. 3, Board HIB Policy (Regulation) at 5-6; Ex. 4, Board Bullying Policy at 1; Ex. 8, Brewer Dep. Tr. 90:9-12.

16. Upon completion of an investigation, McPherson was required to notify Brewer of his findings. Ex. 11, Board HIB Policy (Investigation Procedures) at 2.

17. A school's climate is set and reaffirmed every day by teachers, administrators and, periodically, the Board. Ex. 10, Moore Dep. Tr. 18:20-24.

18. The District's Board expected Brewer and McPherson to investigate sexual harassment reports. Ex. 6, Deposition of Greg Tontz at 53:19-22 (June 28, 2019) ("Tontz Dep. Tr."); Ex. 8, Brewer Dep. Tr. at 114:3-8; 133:17-25.

19. The District's administrators were bound to use all reasonable means at their disposal to determine whether harassment had occurred. Ex. 6, Tontz Dep. Tr. 71:1-8.

20. The District and Brewer expected administrators and staff to take immediate action regarding any harassment. Ex. 8, Brewer Dep. Tr. 95:4-22.

Child Doe Suffered Severe and Pervasive Sexual Harassment

21. Plaintiff, Child Doe, is a minor male who moved with his parents, John and Jane Doe, to Washington, Oklahoma, in late 2015. Ex. 12, Deposition of Child Doe at 52:20-24 (July 2, 2019) ("Child Doe Dep. Tr.").

22. At all times relevant to this case, Child Doe resided with his parents in Washington, Oklahoma, and attended WMS. Joint Status Report (Doc. 16) at ¶ 3.

23. Child Doe matriculated in the District and began attending WMS as a sixth-grade student in the 2015-2016 academic year. Joint Status Report (Doc. 16) at ¶ 3.

24. In his first 18 months as a student at WMS, Child Doe was sexually assaulted at school three times by other male students, once in sixth grade and twice in seventh grade. Ex. 12, Child Doe Dep. Tr. 19:6-11, 47:1-12, 58:13-23, 103:14-104:2; Ex. 14, Oklahoma State Bureau of Investigation Interview Transcript, Vol. II, Phonetic Transcript of Audio Files, 609:10-25 ("OSBI Interview Tr.") (interview of Child Doe).

25. All three students forced or attempted to force their fingers into Child Doe's anus without his consent. Ex. 14, OSBI Interview Tr., Vol. II, 582:20-583:23, 585:4-586:25, 591:19-593:12, 596:4-598:3, 609:4-23, 610:20-611:14 (interview of Child Doe).

26. Two of the three sexual assaults have been substantiated by the perpetrating students' admissions, witnesses, and/or Defendants. *E.g.*, Ex. 14, OSBI Interview Tr., Vol. II, 466:6-467:1, 469:14-24, 470:18-471:1, 472:5-24, 474:9-475:5 (McPherson stated Student #2 admitted to sticking his finger in Child Doe's anus);[2] Ex. 18, Charge and Plea Records Regarding Students #2 and #4 at 1, 3, 11, 13 ("Charge and Plea Records") (Student #2 pleaded no contest to rape by instrumentation, stipulating to factual basis, and Student #4 stipulated to simple assault and battery); Ex. 31, Deposition of Thomas C. Reynolds, District Representative, at 74:25-75:4, 77:7-11, 171:1-3 (May 28, 2020) ("Reynolds Dep. Tr.") (District representative confirms Child Doe was penetrated in music class).

27. The sexual assaults Child Doe suffered at WMS were well known among the school's students. *E.g.*, Ex. 13, Oklahoma State Bureau of Investigation Interview Transcript, Vol. I, Phonetic Transcript of Audio Files at 99:7-22 ("OSBI Interview Tr., Vol. I") (Student #16 heard about incident in music classroom where Student #2 put his finger in Child Doe's anus), 113:5-16 (Student #14 heard about incident in music classroom involving Child Doe and Student #2), 154:1-17 (Student #6 heard about incident in music classroom where Student #2 put his finger in Child Doe's anus), 292:3-11, 295:6-

---

[2] McPherson sometimes euphemistically refers to digital penetration of the anus as being "poked." *See, e.g.*, Ex. 14, OSBI Interview Tr., Vol. II, 466:19-20, 472:20-21, 478:19-21. That the phrase refers to sticking a finger or thumb in someone's anus. *See, e.g.*, *id*. at 474:9-475:5.

296:6 (Student #10 aware that male students had stuck their fingers in Child Doe's anus more than once); Ex. 17, Oklahoma State Bureau of Investigation Prosecutorial Report at 115 (April 4, 2018) ("OSBI Prosecutorial Report") (Student #25 noted that news of incident spread quickly).

28. Prior to the sexual assaults, on or about December 4, 2015, a male student at WMS, "Student #1," pushed Child Doe so hard into a vent cover at school that Child Doe had to be taken to a hospital to get his right elbow stitched up. Ex. 12, Child Doe Dep. Tr. 97: 7-12; Ex. 19, Washington Public Schools Accident Report (December 4, 2015).

29. On or about February 18, 2016, in a music classroom at WMS, Student #1 restrained Child Doe while Student #2 shoved his fingers in Child Doe's anus. *E.g.*, Ex. 13, OSBI Interview Tr., Vol. I, 245:6–18, 246:12–247:8; Ex. 14, OSBI Interview Tr., Vol. II, 367:24-368:5; Ex. 17, OSBI Prosecutorial Report at 124; Ex. 31, Reynolds Dep. Tr. 74:25-75:4, 77:7-11, 171:1-3. Approximately thirty to forty students witnessed the sexual assault in the music classroom. Ex. 14, OSBI Interview Tr., Vol. II, 368:24-269:8.

30. News of the sexual assault, and Child Doe's report about it to McPherson, quickly spread among the sixth-grade students, many of whom—including perpetrating Student #2's friends—began to verbally harass Child Doe nearly every day, calling him "snitch" and "prison snitch." Ex. 12, Child Doe Dep. Tr. 13:2-11, 13:14-18, 80:18-24, 86:14-22; 101:10-15; Ex. 17, OSBI Prosecutorial Report at 115.

31. Throughout the rest of the academic year, students also regularly referred to him as a "prison bitch" or the kid who was "raped." Ex. 15, Deposition of John Doe at 28:3-11 (July 2, 2019) ("John Doe Dep. Tr.").

32. In May 2016, a student told Child Doe that the students involved in the sexual assault were going to "jump" him. Ex. 15, John Doe Dep. Tr. 27:6-28:2; Ex. 32, Screen Shot of Text Messages Between John Doe and McPherson (May 10, 2016).

33. On or about June 21, 2016, Student #2, who had previously forced his fingers in Child Doe's anus, sent Child Doe a threatening text message, saying "Fuck you, I am going to kill you." Ex. 12, Child Doe Dep. Tr. 43:11-44:5, 89:4-90:8, 93: 2-11; Ex. 20, Screen Shot of Text Message from Student #2 to Child Doe (June 21, 2016).

34. As Child Doe feared, the harassment escalated in seventh grade. He faced an a daily onslaught of verbal harassment by students who mocked him for being "raped" and for being a "snitch" or "prison snitch," and was again sexually assaulted. Ex. 12, Child Doe Dep. Tr. 12:21-13:4; 13:14-18, 80:21-81:5, 101:10-15; Ex. 15, John Doe Dep. Tr. 28:3-11.

35. In December 2016 or January 2017 of seventh grade, Child Doe was changing in the locker room after basketball practice when Student #5 approached Child Doe from behind and attempted to shove his finger in Child Doe's anus, and said: "Get ready because it's going to happen in high school." Ex. 12, Child Doe Dep. Tr. 49:24-50:2; Ex. 14, OSBI Interview Tr., Vol. II, 609:10-23, 610:5-611:2.

36. Right after Student #5 attempted to stick his finger in Child Doe's anus, Child Doe saw Student #5 do the same thing to another male student, Student #10. Ex. 12, Child Doe Dep Tr. 47:7-12, 56:6-57:5; Ex. 14, OSBI Interview Tr., Vol. II, 610:13-19 (interview of Child Doe).

37. In the early spring of 2017, Child Doe was sexually assaulted by another male student, Student #4. Ex. 12, Child Doe Dep. Tr. 58:13-59:17; Ex. 14, OSBI Interview

Tr., Vol. II, 582:22-583:16, 585:4-587:13 (interview of Child Doe). While Child Doe was talking to friends in a locker room, Student #4 ran up behind Child Doe and stuck his finger up Child Doe's anus. *Id*. at 582:22-583:16, 585:4-587:13.

38. On or about April 21, 2017, Student #1, who had participated in the first sexual assault, threatened to harm Child Doe for greeting Student #1's girlfriend. Ex. 14, OSBI Interview Tr., Vol. II, 606:4-20 (interview of Child Doe).

39. Student #1 told Child Doe that, if Child Doe ever spoke to Student #1's girlfriend again, he would "rip [Child Doe's] f[uck]ing head off." Ex. 14, OSBI Interview Tr., Vol. II, 606: 4-24 (interview of Child Doe).

Defendants' Knowledge of, and Inadequate Response to, Reports That WMS Students Were Sexually Harassing and Threatening Child Doe

Sixth Grade Reports

40. On February 18, 2016, the day Child Doe was sexually assaulted in his music class, he and his parents, John and Jane Doe, reported the incident to McPherson. Ex. 14, OSBI Interview Tr., Vol. II, 387:3-389:15 (interview of Robyne Cox), 466:6-467:1, 469:14-470:6 (interview of McPherson); Ex. 31, Reynolds Dep. Tr. 78:15-79:15.

41. They reported that Student #1 had restrained Child Doe while Student #2 shoved his fingers in Child Doe's anus. Ex. 14, OSBI Interview Tr., Vol. II, 593:15-594:3.

42. McPherson has acknowledged that Child Doe reported this information to him the day of the incident. Ex. 16, Deposition of Josh Dean at 56:2-17 (July 8, 2019) ("Dean Dep. Tr."); *see also* Ex. 14, OSBI Interview Tr., Vol. II, 474:9-475:5.

43. McPherson's response to Child Doe's report was that the incident was normal "horseplay" among boys. Ex. 14, OSBI Interview Tr., Vol. II, 472:14-17, 479:4-7, 479:15-22, 488:19-20, 489:12-19 (interview of McPherson); Ex. 21, Deposition of Stuart McPherson at 32:19-24 (June 27, 2019) ("McPherson Dep. Tr.").

44. According to McPherson, he did not question or discipline Student #1 for his role in the incident, but suspended Student #2 for five days. Ex. 21, McPherson Dep. Tr. 60:15-20; *see also* Ex. 22, Defendant Washington Public Schools' Answers to Plaintiff's First Interrogatories at 12 ("District's Interrogatory Answers").[3]

45. McPherson's investigation of the incident consisted only of questioning Student #2, who admitted he had done what Child Doe reported. Ex. 16, Dean Dep. Tr. 61:4-11; Ex. 22, District's Interrogatory Answers at 12-13 (Interrogatory No. 9).

46. Other than suspending Student #2 for five days, McPherson did not take any further action to ensure Child Doe's safety in response to the sexual assault Child Doe and his parents reported. Ex. 22, District's Interrogatory Answers at 12-13 (Interrogatory No. 9); Ex. 31, Reynolds Dep. Tr., 82:19-84:2, 160:5-161:4.

47. Soon after he suspended Student #2, McPherson informed Brewer about the incident. Ex. 8, Brewer Dep. Tr. 111:12-24; Ex 13, OSBI Interview Tr., Vol. I, 35:14-37:23, 57:15-22 (interview of Brewer). Because they viewed the incident as mere "horseplay," neither McPherson nor Brewer contacted law enforcement or any other outside entity. Ex 13, OSBI Interview Tr., Vol. I, 44:13-45:19 (interview of Brewer).

[3] References to "Student #3" in the District's response to Interrogatory No. 9 are references to the student identified here as "Student #2."

48. A few months later, in May 2016, John Doe reported to McPherson that the students involved in sexually assaulting Child Doe in the music class were threatening to "jump" Child Doe. Ex. 15, John Doe Dep. Tr. 27:6-28:2, 28:21-29:7, 30:21-25; Ex. 32, Screenshot of Text Messages Between John Doe and McPherson (May 10, 2016).

49. McPherson did not investigate the report, provide Child Doe accommodations, or discipline any of the three students for threatening to harm Child Doe. Ex. 21, McPherson Dep. Tr. 60:15-20; Ex. 31, Reynolds Dep. Tr. 113:14-23, 115:8-14.

50. The next month, in June 2016, John Doe reported to McPherson that Student #2, who had previously forced his fingers into Child Doe's anus, sent Child Doe a threatening text message, saying "Fuck you, I am going to kill you." Ex. 15, John Doe Dep. Tr. 31:4-32:4; *see also* Ex. 20, Screen Shot of Text Message from Student #2 to Child Doe (June 21, 2016). John Doe also told McPherson that Child Doe had been experiencing constant bullying related to the sexual assault. Ex. 15, John Doe Dep. Tr. 31:13-32:4.

51. No District employee investigated Student #2's threat. Ex. 31, Reynolds Dep. Tr. 121:14-18. Other than suspending Student #2 once for penetrating Child Doe's anus, McPherson did not discipline Student #2 or any other student reported to have threatened or otherwise verbally harassed Child Doe, or take any additional action to protect Child Doe. Ex. 21, McPherson Dep. Tr. 60:7-20; Ex. 31, Reynolds Dep. Tr. 123:11-19.

52. Because of the sexual assault, verbal harassment, and school administrators' failure to take meaningful action to address these issues during his sixth-grade year, Child Doe dreaded returning to WMS for seventh grade. Ex. 12, Child Doe Dep. Tr. 70:15-20.

53. So Child Doe could avoid his tormentors, his mother, Jane Doe, asked McPherson in April, May, and August of 2016 to hold her son back and have him repeat sixth grade. Ex. 23, Deposition of Jane Doe at 23:4-24:2 (July 2, 2019) ("Jane Doe Dep. Tr."); Ex. 17, OSBI Prosecutorial Report at 53.

54. McPherson denied the request. Ex. 8, Brewer Dep. Tr. 118:23-119:12.

Seventh Grade Reports

55. Upset about the ongoing harassment and McPherson's inaction, John Doe called Superintendent Brewer on April 26, 2017. Ex. 15, John Doe Dep. Tr. 57:16-58:1, 60:1-10, 61:5-11; *see also* Ex. 8, Brewer Dep. Tr. 126:5-127:11.

56. John Doe told Brewer he was calling because he did not have confidence in McPherson. Ex. 15, John Doe Dep. Tr. 57:16-58:1, 60:1-10, 61:5-11.

57. Brewer asked John Doe to share his concerns, so that Brewer could talk with McPherson and look into the matter. Ex. 8, Brewer Dep. Tr. 127:1-11. John Doe told Brewer about the ongoing harassment his son was experiencing at school. *Id.*

58. On May 1, 2017, John Doe called Brewer to follow up on their prior phone conversation. Brewer had McPherson join them, so all three of them could talk. Brewer then asked John Doe to express his concerns. Ex. 15, John Doe Dep. Tr. 61:12-62:3.

59. John Doe discussed the harassment and said he wanted it to stop. McPherson interrupted and said, "What do you want me to do, hold his hand?" Ex. 15, John Doe Dep. Tr. 62:4-63:4; Ex. 21, McPherson Dep. Tr. 83:13-19.

60. Board policy explained the measures, including accommodations, principals could implement to protect students from further harassment. Ex. 33, Washington Board of Education Bully Policy (Regulation) (Nov. 13, 2006).

61. McPherson and Brewer said the music class incident was "horseplay" and "hazing" among boys. Ex. 21, McPherson Dep. Tr. 32:19-24; Ex. 13, OSBI Interview Tr., Vol. I, 44:13-23, 46:22-47:3 (interview of Brewer); Ex. 14, OSBI Interview Tr., Vol. II, 472:14-17, 479:4-7, 479:15-22, 488:19-20, 489:12-18 (interview of McPherson).

62. Later the same day, on May 1, 2017, John Doe and his son, Child Doe, met with Brewer and McPherson. John Doe asked his son to share everything with Brewer and McPherson, so they could fix the problem. Ex. 15, John Doe Dep. Tr. 61:12-62:22.

63. During that meeting, Child Doe and/or his father told Brewer and McPherson about Student #1's recent threat to "rip [Child Doe's] f[uck]ing head off." Ex. 12, Child Doe Dep. Tr. 68:22-69:5; Ex. 8, Brewer Dep. Tr. 117:12-19; Ex. 21, McPherson Dep. Tr. 59:3-12. Child Doe and/or his father told them that students were frequently bullying him since the sexual assault that occurred in music class in sixth grade. Ex. 12, Child Doe Dep. Tr. 86:14-87:17; *see also* Ex. 8, Brewer Dep. Tr. 117:12-19, 118:3-20, 126:5-127:11; 131:5-15. Child Doe also told Brewer and McPherson that he had been sexually assaulted twice in seventh grade. Ex. 12, Child Doe Dep. Tr. 57:19-23, 80:21-81:5; Ex. 31, Reynolds Dep. Tr. 107:6-14, 109:2-9; *see also* Ex. 8, Brewer Dep. Tr. 120:7-15, 131:5-23. At this meeting, Child Doe provided the name of the student responsible for the first seventh grade assault (Student #5) and a student witness (Student #6). Then or sometime after, McPherson and/or Brewer learned the identity of the second student who had sexually

assaulted Child Doe in seventh grade (Student #4). Ex. 12, Child Doe Dep. Tr. 72:20-73:15; *see also* Ex. 8, Brewer Dep. Tr. 131:5-23; Ex. 21, McPherson Dep. Tr. 63:5-9.

64. McPherson and Brewer have acknowledged that Child Doe told them he was again subjected to forced anal penetration in seventh grade. Ex. 13, OSBI Interview Tr., Vol. I, 39:9-40:11 (interview of Brewer); Ex. 14, OSBI Interview Tr., Vol. II, 482:11-24 (interview of McPherson); *see also* Ex. 8, Brewer Dep. Tr. 131:5-132:1.

65. Brewer said McPherson would conduct an investigation into the allegations Child Doe had made about experiencing sexual assault in seventh grade. Ex. 15, John Doe Dep. Tr.65:4-24; *see also* Ex. 8, Brewer Dep Tr. 134:22-135:4.

66. Brewer did not document any meetings he had regarding the reported sexual assaults. Ex. 13, OSBI Interview Tr. Vol. I, 64:2-7 (interview of Brewer).

67. McPherson's investigation of Child Doe's reports included questioning Student #5 (whom Child Doe said had sexually assaulted him) and Student # 6 (whom Child Doe said had witnessed the incident and laughed when Student #5 then sexually assaulted Student #10). Ex. 14, OSBI Interview Tr., Vol. II, 477:6-478:3 (interview of McPherson); Ex. 16, Dean Dep Tr. 59:22-61:18; *see also* Ex. 12, Child Doe Dep. Tr. 47:1-48:2; Ex. 14, OSBI Interview Tr., Vol. II, 612:16-613:11 (interview of Child Doe). Both Student #5 and Student #6 denied Child Doe's allegations. Ex. 16, Dean Dep Tr. 60:8-12. McPherson considered them to be two of his best students and did not put much stock in their being involved. Ex. 14, OSBI Interview Tr., Vol. II, 477:6-478:3 (interview of McPherson); Ex. 16, Dean Dep Tr. 60:11-16; Ex. 13, OSBI Interview Tr., Vol. I, 12:17-24

(Student #5 says McPherson told him and Student #6 that, "I know y'all didn't do it, because y'all are the best two kids that we've had in the eighth grade this year.").

68. McPherson asked the accused student, Student #5, and the alleged witness, Student #6, to serve as his "eyes and ears" at the school to stop further conduct of the nature Child Doe had alleged. Ex. 13, OSBI Interview Tr., Vol. I, 12:17-13:2 (interview of Student #5), 163:21-165:4 (interview of Student #6); Ex. 14, OSBI Interview Tr., Vol. II, 478:5-12, 484:17-485:4 (interview of McPherson); Ex. 16, Dean Dep Tr. 60:11-20.

69. Neither McPherson nor anyone else in the District ever investigated whether Student #4 had sexually assaulted Child Doe. *See* Ex. 14, OSBI Interview Tr., Vol. II, 533:18-25 (interview of McPherson); Ex. 31, Reynolds Dep. Tr. 94:11-95:10, 108:6-18.

70. On or about May 9, 2017, Brewer told John Doe that McPherson could not substantiate Child Doe's allegations. Brewer said that without any witnesses to verify the allegations, there was nothing the District could do. Ex. 8, Brewer Dep. Tr. 143:15-22; Ex. 13, OSBI Interview Tr., Vol. I, 49:16-50:10 (interview of Brewer); Ex. 15, John Doe Dep. Tr. 75:14-75:22. The District did not discipline Student #4 or Student #5. Ex. 31, Reynolds Dep. Tr. 95:11-21, 108:20-22.

71. Neither Brewer nor McPherson provided Child Doe any accommodations or services to ensure his safety or continued access to education in response to the additional sexual assaults and other harassment Child Doe reported. *See* Ex. 21, McPherson Dep. Tr. 50:18-22, 83:20-85:1; Ex. 31, Reynolds Dep. Tr. 108:23-109:1, 158:15-161:54.

72. Neither McPherson nor Brewer maintained contemporaneous documentation of the "investigation" conducted into Child Doe's allegations that he experienced

additional sexual assaults in seventh grade. Ex. 16, Dean Dep. Tr. 63:17-64:21. The only documentation of McPherson's "investigation" into Child Doe's May 2017 sexual assault reports is a non-contemporaneous, typed-up timeline listing people he talked to (but not the contents of their statements) about the allegations. Ex. 21, McPherson Dep. Tr. 45:23-49:12; Ex. 25, Stuart McPherson's Redacted List of People He Interviewed. McPherson testified that he destroyed the handwritten notes on which this timeline was based. Ex. 21, McPherson Dep. Tr. 45:23-49:12.

73. Because they viewed the incidents Child Doe reported in May 2017 as "horseplay," not sexual assault, neither McPherson nor Brewer contacted law enforcement or any other outside entity. Ex 13, OSBI Interview Tr., Vol. I, 46:22-47:12, 48:20-49:12 (interview of Brewer); *see also* Ex. 21, McPherson Dep. Tr. 88:10-13, 89:11-17.

Defendants' Obligations to Address Child Doe's Reports

74. The District and Brewer expected McPherson to conduct a thorough, prompt, and documented investigation into Child Doe's allegations. Ex. 8, Brewer Dep. Tr. 128:22-129:2; Ex. 9, Tague Dep. Tr. 81:2-4.

75. As superintendent for the District, Brewer expected McPherson to document any allegation of bullying, harassment, or sexual assault, including any investigations conducted. Ex. 8, Brewer Dep. Tr. 121:6-10, 122:12-19.

76. Any failure of McPherson to document Child Doe's allegations of bullying, harassment, or sexual assault, including any investigations conducted, would be a violation of the District's policies. Ex. 8, Brewer Dep. Tr. 134:4-9.

77. The District, through Brewer and/or McPherson, was obligated to "notify local law enforcement and request that the alleged victim also contact law enforcement to report the matter for potential criminal investigation" if it appeared "that a crime may have been committed." Ex. 11, Board HIB Policy (Investigation Procedures) at 1; *see also* Ex. 1, Shakeshaft Report at 54; Ex. 2, Ex. 2, Deposition of Charol Shakeshaft, Ph.D., at 49:3-50:9 (March 25, 2020) ("Shakeshaft Dep. Tr.").

78. The District was also obligated to address the reports because student-on-student sexual harassment is prohibited by Title IX. Ex. 1, Shakeshaft Report at 67.

Defendants' Failure to Address Child Doe's Reports

79. Child Doe testified that he believed McPherson failed to protect him. Ex. 12, Child Doe Dep. Tr. 19:6-18.

80. The District's Bullying Policy required the superintendent to develop procedures for "[i]dentification and enactment of methods to prevent reoccurrence of the harassment." Ex. 4, Board Bullying Policy at 2. According to one of Child Doe's expert witnesses, Charol Shakeshaft, Ph.D., not only did Brewer fail to put methods in place to prevent harassment from reoccurring, but he and McPherson facilitated the continued harassment of Child Doe by: (1) not disciplining Student #2's two accomplices in sexually assaulting Child Doe in the music classroom; (2) failing to take action to address the evident culture of abuse Child Doe experienced for two years at WMS; (3) failing to effectively investigate and, thus, understand and take action to address the abuses; and (4) failing to report the sexual assaults to law enforcement. Ex. 1, Shakeshaft Report at 44.

81. When principals receive an allegation of student-on-student abuse, they typically enlist the help of relevant teachers in protecting the victim. Ex. 1, Shakeshaft Report at 64. Instead, McPherson enlisted the help of a student who was an alleged abuser to "watch over" other students to stop further abuse. Ex. 13, OSBI Interview Tr., Vol. I, 12:17-13:2 (interview of Student #5); Ex. 17, OSBI Prosecutorial at Report 66 (same).

82. The District did not provide increased supervision of students, including Child Doe, following the music classroom incident. Ex. 1, Shakeshaft Report at 64-65.

83. McPherson did not make sweeps or unannounced visits to classrooms or athletic facilities to curb the harassment and bullying. Ex. 1, Shakeshaft Report at 65; Ex. 31, Reynolds Dep. Tr. 161:8-23.

84. The District never offered Child Doe any post-trauma services, counseling services, or any accommodations to ensure he could access his education safely and avoid retaliation by students. Ex. 1, Shakeshaft Report 63; 159:25-160:24; Ex. 21, McPherson Dep. Tr. 50:18-22, 83:20-85:1; Ex. 31, Reynolds Dep. Tr. 158:15-161:4. The District testified that the only "accommodation" it provided was conversations its officials had with the accused students. *Id.* at 165:18-166:3, 167:11-15.

85. As the District's Title IX Coordinator and WMS's principal, McPherson was responsible for identifying, addressing, and correcting sexual harassment. Ex. 8, Brewer Dep. Tr. 108:16-21; Ex. 11, Board HIB Policy (Investigation Procedures) at 1-2; Ex. 24, Washington Board of Education Discrimination Complaints and Procedures at 1-3 (September 12, 2016) ("Board Discrimination Complaints and Procedures"). Brewer did not take action to ensure McPherson fulfilled these duties. Ex. 1, Shakeshaft Report at 66.

86. In Dr. Shakeshaft's opinion, the District's Board, Brewer, and McPherson failed to provide a safe environment for Child Doe. Ex. 1, Shakeshaft Report at 65.

87. According to Dr. Shakeshaft, a combination of the District's inadequate, absent, or unenforced policies about training, reporting, investigating, responding to allegations and red flags, and supervision led to and perpetuated the peer bullying, sexual harassment, and abuse of Child Doe. Ex. 1, Shakeshaft Report at 67. Although incomplete, the policies and training the District provided were not followed. *Id.*

The OSBI Found Evidence that Child Doe Was Sexually Assaulted and that There Was an Unchecked Practice of Students Digitally Penetrating Other Boys' Anuses

88. On November 3, 2017, at the request of the Washington Police Department's Chief, the OSBI began a criminal investigation into Child Doe's allegations of student-on-student sexual assault at WMS. Ex. 16, Dean Dep. Tr. 42:24–43:4; Ex. 17, OSBI Prosecutorial Report at cover page.

89. These allegations had originally been referred to the Washington Police Department in May 2017 by the Oklahoma Department of Human Services, which had received an anonymous call about the assaults. Ex. 17, OSBI Prosecutorial Report at 13.

90. After interviewing Student #12, the OSBI expanded its investigation to include Student #12's allegation that Student #8 had stuck a finger into Student #12's anus without consent. Ex. 17, OSBI Prosecutorial Report, cover page, 57.

91. During its investigation, the OSBI uncovered evidence that that approximately seven or eight male students had penetrated other male students' anuses. Ex. 16, Dean Dep. Tr. 55:8-19; *see also* Ex. 13, OSBI Interview Tr., Vol. I, 154:21-155:24,

156:9-15, 157:4-21(Student #7 allegedly did this to Student #6), 287:18-288:3, 288:20-289:22 (Student #5 allegedly did this to Student #10), 319:13-321:16, 322:13-18 (Students # 7, #8, and #9 allegedly did this to Student #12).

92. During the OSBI's interviews, some WMS students admitted they had inserted their fingers in the anuses of other male students. *See, e.g.*, Ex. 13, OSBI Interview Tr., Vol. I, 264:17-265:2, 267:8-24; Ex. 17, OSBI Prosecutorial Report at 79, 164. A few students treated this as a "game" and thought it was funny to catch a student by surprise and "jab" a finger in his anus without any warning or chance for the student to stop it. Ex. 14, OSBI Interview Tr., Vol. II, 483:7-16, 484:4-7 (interview of McPherson).

93. The OSBI also uncovered evidence of WMS students who had witnessed this conduct. *See, e.g.*, Ex. 13, OSBI Interview Tr., Vol. I, 165:24-166:13 (interview of Student #6), 312:21-313:11 (interview of Student #12).

94. After Child Doe's sexual assault reports in seventh grade, McPherson received reports that two other male students had been similarly assaulted. *See* Ex. 13, OSBI Interview Tr., Vol. I, 154:21-155:24, 155:22-157:22, 159:8-20 (interview of Student #6); Ex. 14, OSBI Interview Tr., Vol. II, 477:25-478:24, 484:17-485:4 (interview of McPherson).

95. When OSBI agents interviewed WMS students, some said they had been sent to McPherson's office because of sticking their fingers in other students' anuses. Ex. 16, Dean Dep. Tr. 55:20-23. Some students also said McPherson did not discipline students for this conduct. Ex. 13, OSBI Interview Tr., Vol. I, 205:19-206:13 (interview of Student #7), 302:10-14 (interview of Student #10).

96. In addition to McPherson, Brewer knew that students had admitted to inserting their thumbs in the anuses of other students and that students had admitted to witnessing this conduct. Ex. 13, OSBI Interview Tr., Vol. I, 67:2-4 (interview of Brewer).

97. Christopher Hall, Child Doe's music appreciation class teacher, told the OSBI that boys putting their thumbs in the anuses of other boys "was a thing" at WMS. Ex. 13, OSBI Interview Tr., Vol. I, 141:9-142:16 (interview of Hall).

98. In OSBI Agent Dean's opinion, what Child Doe and some other students experienced at WMS were sexual assaults, not mere "horseplay" or "boys being boys." Ex. 16, Dean Dep. Tr. 66:18-67:5. Agent Dean also testified that the fact that these incidents occurred while the students were wearing clothes did not make any difference, as there was still penetration of their anuses. *Id*. at 98:13-99:2.

99. OSBI Agent Dean believes Brewer and McPherson were mandatory reporters who were required to report the sexual assaults occurring at WMS to law enforcement. Ex. 16, Dean Dep. Tr. 71:16-72:15.

100. The OSBI's investigation into the sexual assaults alleged by Child Doe resulted in criminal charges against Students #2 and #4 for rape by instrumentation. Ex. 18, Charge and Plea Records, 1, 9. Student #2 pleaded no contest to rape by instrumentation and stipulated to the factual basis. *Id*. at 11, 13. Student #4 stipulated to a charge of simple assault and battery. *Id*. at 3.

Defendants' Blatant Sex Discrimination

101. Both Brewer and McPherson admitted to the OSBI that if a female student had reported that a student had put his fingers in her anus, they would have responded

differently than they did to Child Doe's reports, and would have considered the incident a "sexual assault" rather than "just boys horseplaying." Ex. 14, OSBI Interview Tr., Vol. II, 517:24-518:13 (interview of McPherson); Ex. 16, Dean Dep. Tr. 62:17-63:9.

102. Both Brewer and McPherson have acknowledged that they would have taken the report more seriously if a student had put his fingers in a girl's anus rather than a boy's. Ex. 13, OSBI Interview Tr., Vol. I, 44:13-23, 46:22-47:3, 56:5-23, 57:19-58:4, 78:2-8 (interview of Brewer); Ex. 14, OSBI Interview Tr., Vol. II, 472:14-17, 479:4-7, 479:15-22, 488:19-20, 489:12-18, 491:25 (interview of McPherson); Ex. 21, McPherson Dep. Tr. 32:19-24. McPherson said that if a girl were victimized in this way, he would have called the police. Ex. 14, OSBI Interview Tr., Vol. II, 517:24-518:13 (interview of McPherson).

103. John Doe asked the school administrators what they would do if a student had stuck his fingers in a girl's anus, and both administrators said they would call the police. Ex. 15, John Doe Dep. Tr. 64:13-65:3.

104. John Doe responded that it should not make a difference if the victim is a boy or girl, because it is an unwanted touch and constitutes "rape." Ex. 15, John Doe Dep. Tr. 64:13-65:3.

105. At his OSBI interview and deposition, when asked about the music class incident, McPherson said he believed at the time, and still believes, that Student #2's insertion of his finger into Child Doe's anus was "horseplay." Ex. 14, OSBI Interview Tr., Vol. II, 472:14-17, 479:4-7, 479:15-22, 488:19-20, 489:12-18, 491:25 (interview of McPherson); Ex. 21, McPherson Dep. Tr. 32:19-24, 88:10-13, 89:11-17.

106. Defendants did not treat Child Doe's allegations of forced digital penetration of his anus as reports of sexual assault or "sexual bullying," as defined in the District's HIB Policy. Ex. 21, McPherson Dep. Tr. 31:22-32:14, 32:19-24.

107. When asked at his deposition whether any interviews stood out to him during the investigation of Child Doe's allegations, OSBI Agent Dean noted Brewer and McPherson's statements that "if the same set of circumstances occurred and it . . . happened to females, then it would have been handled differently" and said that was his "main issue with the school system." Ex. 16, Dean Dep. Tr. 69:25-70:8. OSBI Agent Dean testified that, in his opinion, Child Doe and Student #12 "were actually victims of this occurring to them against their will" and the school should have reported the incidents to law enforcement and treated this conduct as a "sexual assault," not just "horseplay or boys being boys." *Id*. at 70:10-71:2.

108. Agent Dean believes the school should have enforced the same policy regardless of the reporting student's sex. Ex. 16, Dean Dep. Tr. 71:3-9.

109. Brewer admitted in his OSBI interview that the District's investigation into Child Doe's reports should not have been handled any differently than if reported by a female student. Ex. 13, OSBI Interview Tr., Vol. I, 56:5-23.

Brewer and McPherson Had Authority to Take Corrective Action

110. The District's Board expected Brewer, as superintendent, and McPherson, as a principal, to make sure the District's schools were safe. Ex. 9, Tague Dep. Tr. 23:14-20.

111. Brewer reported to and was accountable to the District's Board. Ex. 6, Tontz Dep. Tr. 20:20-21:5; Ex. 10, Moore Dep. Tr. 10:9-12, 12:16-25, 13:7-8, 13:16- 14:3.

112. As superintendent, Brewer was responsible for developing policies, procedures, and rules to address, identify, and curb bullying in the District. Ex. 8, Brewer Dep. Tr. 52:9-13.

113. As superintendent, Brewer was responsible for presenting any proposed policies to the District's Board for adoption. Ex. 6, Tontz Dep. Tr. 12:3-23; Ex. 8, Brewer Dep. Tr. 58:10-16.

114. The District's Board relied on Superintendent Brewer to enforce its policies, and delegated this responsibility to Brewer. Ex. 6, Tontz Dep. Tr. 29:18-20; Ex. 9, Tague Dep. Tr. 75:4-10; Ex. 11, Board HIB Policy (Investigation Procedures) at 2; Ex. 31, Reynolds Dep. Tr. 63:8-12, 64:6-10.

115. Brewer was responsible for updating the District's policy manuals when there was a policy change, including its sexual harassment policy. Ex. 8, Brewer Dep. Tr. 59:16-25.

116. Brewer was responsible for disseminating the District's policies annually to all staff and students. Ex. 8, Brewer Dep. Tr. 82:17-83:21.

117. Brewer was responsible for developing procedures for the prompt investigation of harassment allegations, confidentiality of investigations, expeditious correction of the conditions causing the harassment, initiation of appropriate corrective actions, and identification and enactment of methods to prevent reoccurrence of the harassment. Ex. 8, Brewer Dep. Tr. 82:17-84:8.

118. Brewer was responsible for hearing appeals of principals' disciplinary decisions regarding sexual harassment complaints. Ex. 24, Board Discrimination Complaint and Procedures at 2.

119. Brewer was responsible for hiring, training, and evaluating the District's principals. Ex. 8, Brewer Dep. Tr. 24:16-19, 25:19-26:5, 26:13-27:5.

120. Brewer was responsible for the training of the District's teachers. Ex. 8, Brewer Dep. Tr. 26:6-15, 27:9-21.

121. Brewer was also tasked with coordinating the District's Safe School Committee. Ex. 8, Brewer Dep. Tr. 71:2-11, 75:14-22.

122. As a principal, McPherson was responsible for protecting students and keeping them safe. Ex. 21, McPherson Dep. Tr. 78:3-8, 78:16-19; Ex. 31, Reynolds Dep. Tr. 32:17-21.

123. The District's principals, including McPherson, were responsible for enforcing the Board's policies in each of their schools. Ex. 6, Tontz Dep. Tr. 29:21-24; Ex. 31, Reynolds Dep. Tr. 60:13-16, 64:1-5.

124. As part of his duty to protect and keep students safe, McPherson was required to enforce the District's HIB and sexual harassment policies. Ex. 21, McPherson Dep. Tr. 78:20-23.

125. Pursuant to the District's policies, McPherson, as principal in the District, was required to identify and enact methods to prevent reoccurrence of harassment, including addressing all issues of bullying, stopping and correcting bullying, and preventing retaliation. Ex. 8, Brewer Dep. Tr. 83:22-84:8, 90:5-8.

126. The District's principals learned about new or revised policies by attending the District's Board meetings. Ex. 8, Brewer Dep. Tr. 60:1-11.

127. McPherson was responsible for any discipline for his school's students,. Ex. 8, Brewer Dep. Tr. 24:23-25:18, 64:9-21; Ex. 11, Board HIB Policy (Investigation Procedures) at 1. If McPherson determined a report of sexual harassment was founded, he was empowered by District policy to discipline any harassing students as appropriate. Ex. 11, Board HIB Policy (Investigation Procedures) at 1.

128. The District's Board expected McPherson to document his investigations of alleged harassment. Ex. 9, Tague Dep. Tr. 64:11-19; Ex. 10, Moore Dep. Tr. 49:6-8.

129. The District's Board expected McPherson to document any discipline of students. Ex. 6, Tontz Dep. Tr. 43:16-20; Ex. 9, Tague Dep. Tr. 65:11-22.

130. As a principal, McPherson was responsible for notifying Brewer when any student was suspended. Ex. 8, Brewer Dep. Tr. 111:12-24.

131. Brewer and McPherson had the authority and ability to investigate and take meaningful corrective action to end or prevent the sexual assaults and harassment of Child Doe. Ex. 1, Shakeshaft Report at 56, 62, 66.

The District's "Phantom" Title IX Coordinator and Failure to Provide Sexual Harassment Training

132. In 2015, Brewer designated McPherson as the District's Title IX Coordinator. Ex. 8, Brewer Dep. Tr. 100:3-8. During the two academic years when Child Doe reported that he was sexually assaulted at WMS, McPherson was the District's Title

IX Coordinator. *See id*. at 100:3-8, 101:21-23; *see also* Ex. 21, McPherson Dep. Tr. 15:9-16:7, 20:1-14.

133. Brewer chose McPherson because Brewer associated Title IX with girls' sports and thought that McPherson's position as athletic director made him most well-suited for the position. Ex. 8, Brewer Dep. Tr. 100:6-11, 101:11-20.

134. As the District's Title IX Coordinator, McPherson was responsible for carrying out the District's sexual harassment policies, processing student's sex discrimination complaints, and identifying, addressing, and correcting sexual harassment. Ex. 8, Brewer Dep. Tr. 101:5-10, 108:16-21; Ex. 24, Board Discrimination Complaint and Procedures at 1.

135. As the District's Title IX Coordinator, McPherson was expected to investigate any allegations of bullying, harassment, and sexual assault promptly, thoroughly and objectively, and impose discipline. Ex. 6, Tontz Dep. Tr. 53:19-22; Ex. 8, Brewer Dep. Tr. 114: 3-8, 133:17-25.

136. At all times relevant to this case, including when he was appointed to the position, McPherson did not know he was the District's Title IX Coordinator. *See* Ex. 21, McPherson Dep. Tr. 15:9-16:7, 44:13-15. McPherson learned he was the Title IX Coordinator in the fall of 2017. Ex. 21, McPherson Dep. Tr. 20:1-14.

137. Prior to learning he was the Title IX Coordinator, McPherson did not receive any Title IX training. Ex. 8, Brewer Dep. Tr. 101:11-13; Ex. 21, McPherson Dep. Tr. 16:11-13, 22:3-6. Nor did McPherson understand what he was required to do as Title IX Coordinator. *Id*. at 16: 19-21.

138. McPherson did not receive any Title IX training until April 25, 2018, when he attended a half-hour session on "Title IX Basics" that was part of the District's annual "in-service" training. Ex. 21, McPherson Dep. Tr. 18:23-22:6.

139. Other than the half-hour Title IX training he got in 2018, McPherson did not attend any trainings or conferences that provided education on Title IX, sexual harassment, or sexual abuse prevention. Ex. 21, McPherson Dep. Tr. 25:1-16.

140. Brewer said he had not received any recent Title IX training. Ex. 8, Brewer Dep. Tr. 40:18-41:4.

141. Prior to Child Doe's seventh grade reports, the only HIB training District employees and staff received was during the District's annual in-service training sessions, but those sessions did not cover sexual harassment or sexual abuse prevention. Ex. 21, McPherson Dep. Tr. 24:10-25:12; Ex. 31, Reynolds Dep. Tr. 151:5-153:2.

142. Prior to Child Doe's seventh grade reports, the District did not train administrators and employees to recognize, prevent, and address sexual harassment. *See* Ex. 1, Shakeshaft Report at 50-51; Ex. 21, McPherson Dep. Tr. 24:10-25:12; Ex. 31, Reynolds Dep. Tr. 151:5-153:2.

The Unchecked Sexual Harassment Deprived Child Doe of Equal Access to Educational Opportunities

143. As a result of the sexual harassment, bullying, and intimidation Child Doe experienced at WMS, his academic performance suffered. Ex. 12, Child Doe Dep. Tr. 21:1-3; Ex. 23, Jane Doe Dep. Tr. 66:25-67:7, 67:13-68:1.

144. Child Doe's grades dropped from nearly straight "As" in fifth and sixth grades at his previous school to a mix of "As" and "Bs" each semester, and a "D" on a "semester test," in sixth grade at WMS. *Compare* Ex. 28, Child Doe's Report Cards 2014-2017 at CHILDDOE000108, CHILDDOE000109 (fifth and part of sixth grade at previous school) *with id.* at CHILDDOE004753 (sixth grade at WMS); *see also* Ex. 26, Deposition of Howard Fradkin, Ph.D. at 56:8-25 (April 3, 2020). Child Doe's grades slipped even further at WMS in seventh grade (2016-2017 academic year), where he earned some "As," mostly "Bs," and one "C" for his semester grades. Ex. 28, Child Doe's Report Cards 2014-2017 at CHILDDOE004754.

145. Although Child Doe was academically qualified to advance to eighth grade, he repeated seventh grade so he would feel safer at school and no longer be in the same grade as his main harassers. Ex. 12, Child Doe Dep. Tr. 37:7-15, 39:11-14, 40:10-24, 70:15-20. After he was held back, Child Doe did not experience further sexual harassment. Ex. 12, Child Doe Dep. Tr. 71:3-9.

146. In 2017-2018, Child Doe was ineligible to play any sports—extracurricular activities he loved—because of repeating seventh grade. Ex. 12, Child Doe Dep. Tr. 41:3-13; Ex. 27, Expert Report of Howard R. Fradkin, Ph.D., LICDC-CS, at 83 (October 23, 2019) ("Fradkin Report"); Ex. 29, Oklahoma Secondary School Activities Association Rules Manual 15, Rule 7, Section 3 (2016-2017).

147. In January 2019, Child Doe and his family moved to Gore, Oklahoma to get away from the sexual harassment Child Doe had experienced. Ex. 12, Child Doe Dep. Tr. 8:25-9:7, 9:13-15, 10:1-9; Ex. 15, John Doe Dep. Tr. 6:8-7:7.

148. The family decided to move after learning that the father of Student #1, one of Child Doe's early assailants, had put a "bounty" on Child Doe's head, offering to pay anyone who would hurt Child Doe so badly that Child Doe could no longer play football or would quit the team. Ex. 15, John Doe Dep. Tr. 10:18-12:24; Ex. 27, Fradkin Report 54. John Doe told Reynolds, the District's new superintendent, about the "bounty." Ex. 31, Reynolds Dep. Tr. 124:12-19.

149. To address the trauma Child Doe suffered at WMS, he needed mental health counseling. Ex. 23, Jane Doe Dep. Tr. 66:4-66:24. His therapist diagnosed with him with post-traumatic stress disorder, depression, and social anxiety, and found that he was also dealing with "institutional betrayal." Ex. 30, Gina Jordan, M.Ed., LPC, Status Update Report Regarding Child Doe, at 3 (June 13, 2019). "Institutional betrayal" or "betrayal trauma" occurs when an institution, such as a school, fails to prevent or respond supportively to wrongdoing perpetrated on an individual within the context of the institution. Ex. 27, Fradkin Report at 21-23. Howard Fradkin, Ph.D, LICDC-CS, a sexual trauma expert believes that, given "these serious diagnoses" and the "extensive history of physical and sexual assaults [Child Doe] has experienced," Child Doe needs to work with "an experienced psychotherapist." Ex. 27, Fradkin Report at 76.

150. Dr. Fradkin found that Child Doe suffered and continues to suffer from the abuses he experienced while attending WMS. Ex. 27, Fradkin Report at 83. In support of this finding, Dr. Fradkin explained that Child Doe became hyper-vigilant to the possibility of attack, especially in the locker room; Child Doe's confidence dropped; Child Doe's grades fell; Child Doe withdrew from friends and family; Child Doe's ability to trust others,

especially school administrators and staff, but also peers, was severely damaged; and Child Doe can be easily triggered, and does not yet have the psychological tools to effectively cope with triggering events without resorting to his own form of violence. *Id*. at 83.

FACTUAL BACKGROUND

In February 2016, sixth-grader Child Doe was sexually assaulted for the first time at WMS. SOF ¶¶ 23-24, 28-29. As dozens of students watched, Student #1 restrained Child Doe so Student #2 could shove his fingers into Child Doe's anus. SOF ¶ 29. Child Doe did what we teach children to do when they are in danger: He asked an adult for help. The day of the first sexual assault, Child Doe and his family told Principal McPherson about the incident. SOF ¶¶ 40-42.

But going to McPherson only made matters worse. The principal dismissed the sexual assault as normal "horseplay" among boys. SOF ¶ 43. His "investigation" of the incident consisted only of questioning Student #2, who confessed. SOF ¶ 45. The principal suspended Student #2 for five days, but never even asked Student #1 about his involvement or imposed consequences on Student #1 for his role in the assault. SOF ¶¶ 44-46. The District took no further action to ensure Child Doe's safety and access to education. SOF ¶ 46. It had no plan for how to protect Child Doe when Student #2 soon returned to school. *Id*. It did not offer counseling or other accommodations. SOF ¶¶ 46, 84. Because they viewed the incident as "horseplay" rather than sexual assault, neither McPherson nor Superintendent Brewer, to whom he reported, contacted law enforcement. SOF ¶ 47. (Much later, the OSBI investigated the sexual assault based on an anonymous tip. SOF

¶¶ 88-89, 100. Student #2 was charged with rape by instrumentation, pleaded no contest, and stipulated to the factual basis. SOF ¶ 100.)

For the rest of sixth grade, Child Doe's assailants and other classmates subjected him to a barrage of verbal harassment, both for having been victimized and for "snitching." SOF ¶¶ 30-32, 48. After Student #2 completed his short suspension, he sent Child Doe a text message threatening to kill him. SOF ¶ 33. John Doe, Child Doe's father, told McPherson about this threat, and another like it by a group of students involved in the sexual assault. SOF ¶¶ 48, 50. The principal did nothing. SOF ¶¶ 49-50.

Child Doe dreaded returning to WMS for seventh grade. SOF ¶ 52. And his feelings were justified. The verbal harassment escalated. SOF ¶ 34. Worse still, Child Doe was sexually assaulted twice more that year. *Id*. First, in the winter, Child Doe was changing in a locker room when Student #5 approached Child Doe from behind and attempted to digitally penetrate his anus. SOF ¶ 35. As he did so, Student #5 warned, "Get ready because it's going to happen in high school." *Id*. Immediately after attempting to assault Child Doe, Student #5 did the same thing to another male student in the locker room. SOF ¶ 36. A few months later, Student #4 sexually assaulted Child Doe in another locker room. SOF ¶ 37. While Child Doe was talking to friends, Student #4 ran up behind him and digitally penetrated Child's Doe's anus. *Id*. (Later, Student #4 was criminally charged for the assault, and entered into a plea deal. SOF ¶ 100.)

In the spring of 2017, John Doe initiated a series of meetings and phone calls with Brewer and McPherson about the District's continued inaction. SOF ¶¶ 55-58, 62. At a meeting in May 2017, John Doe and Child Doe reported the ongoing harassment, the two

seventh grade assaults, and Student #1's recent threat to "rip [Child Doe's] f[uck]ing head off." SOF ¶¶ 55-58, 62-64. When John Doe asked the officials to help stop the ongoing harassment, McPherson asked, "What do you want me to do, hold [Child Doe's] hand?" SOF ¶ 59.

Brewer promised Child Doe and his father that the District would investigate the reported seventh grade violence. SOF ¶ 65. But McPherson assumed Child Doe's report that Student #5 had sexually assaulted him and another classmate was false from the start: the principal thought Student #5 was one of his best students, and thought the same of Student #6, whom Child Doe said had witnessed Student #5's attack. SOF ¶ 67. For that reason, McPherson assumed they could not have been involved. *Id*.

Even worse, McPherson tasked Student #5 and Student #6 with serving as his "eyes and ears" at the school to see if the widespread sexual abuse Child Doe alleged was real. SOF ¶ 68. McPherson entrusted Student #5—a student accused of sexually assaulting classmates—with finding out whether his classmates were being sexually assaulted. *Id*.

After failing to conduct any investigation at all into the alleged sexual assault by Student #4 or any meaningful investigation into the allegation against Student #5, Brewer called John Doe to inform him of the "results": McPherson had not substantiated Child Doe's allegations, and so the District could do nothing. SOF ¶ 70. Once again, the District offered no accommodations or services, such as mental health counseling or protections from further peer retaliation. *Id*.

Repeatedly, Brewer and McPherson explained—first to Child Doe and his family, and later to the OSBI—that they did not view the incidents as sexual assault. SOF ¶¶ 47,

61, 73. Instead, they viewed the incidents as "horseplay." SOF ¶¶ 43, 47, 61, 73, 98, 105, 107. The distinction, by their own account, turned entirely on Child Doe's sex. SOF ¶¶ 101, 107. Had he been a girl, Brewer and McPherson said, they would have recognized the sexual assaults for what they were and taken more decisive action, including calling the police. SOF ¶¶ 101-03, 107. But Child Doe is a boy, so was left unprotected.

The OSBI viewed the sexual assaults for what they were. SOF ¶ 98. After an anonymous tip and a referral from local police, the OSBI opened a criminal investigation into Child Doe's allegations of sexual assault at WMS. SOF ¶¶ 88-89. Ultimately, the OSBI's investigation led to criminal rape charges against two of Child Doe's assailants, Students #2 and #4. SOF ¶ 100. Student #2 pleaded no contest and stipulated to the underlying facts; Student #4 stipulated to a reduced charged of assault and battery. *Id*.

During its investigation, the OSBI uncovered a pattern of male students digitally penetrating male classmates' anuses without warning. SOF ¶¶ 91-97. Some students admitted to perpetrating or witnessing these assaults; other students disclosed they had been victimized in this way. SOF ¶¶ 91-93. The OSBI also found evidence that Brewer and McPherson had known of this practice but had failed to take action in response. SOF ¶¶ 94-96, 99.

The Defendants' inaction was foreseeable given the District's failure to prepare its employees to recognize and respond to sexual harassment reports. SOF ¶¶ 137-142. During all times relevant to this case, McPherson was the District's Title IX Coordinator, responsible for processing and investigating sexual harassment complaints. SOF ¶ 132, 134-35. But, during that entire period, he had *no idea* he had been assigned that role. SOF

¶ 136. The Title IX Coordinator did not know he was the Title IX Coordinator. *Id*. Nor did he receive any training on Title IX. SOF ¶ 137-39. That lack of training was par for the course. Prior to Child Doe's seventh grade reports, the District had not at any time within recent memory trained employees on how to address sexual harassment. SOF ¶¶ 140-42.

The impact of the Defendants' inaction on Child Doe and his education was devastating. His grades suffered. SOF ¶¶ 143-44. Child Doe repeated the seventh grade in order to avoid his harassers, even though he was academically qualified to advance. SOF ¶ 145. That repetition permanently set back Child Doe's education and rendered him ineligible to participate in school sports. SOF ¶ 146. He became hyper-vigilant to the possibility of attack and withdrew from his friends. SOF ¶ 150. Ultimately, Child Doe's family moved to a different school district in Oklahoma to escape ongoing threats. SOF ¶¶ 147-48.

To this day, Child Doe suffers as a result of his time at WMS. SOF ¶¶ 149-50. He has been diagnosed with post-traumatic stress disorder, depression, and social anxiety. SOF ¶ 149. Child Doe struggles not only because of the sexual harassment he experienced but also because the school officials entrusted with his care failed to address it. *Id*. That betrayal exacted profound damage on his confidence, relationships, and trust in others—and, of course, his access to education. SOF ¶¶ 145-50.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate as a matter of law where there are no genuine disputes as to any material fact. Fed. R. Civ. P. 56(a). Only factual disputes that may "affect the outcome of the suit under the governing law will properly preclude the entry of

summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When the record cannot "lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted). Although the court views the evidence in the light most favorable to the nonmoving party, *see Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011), "[t]he mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is 'genuine.'" *Lawmaster v. Ward*, 125 F.3d 1341, 1346-47 (10th Cir. 1997).

ARGUMENT

I. Child Doe Is Entitled To Summary Judgment On His Title IX Claim.

Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2018). The District receives federal financial assistance and therefore is subject to Title IX. SOF ¶ 1. The undisputed facts establish the District is liable for straightforward disparate treatment: it "subjected [Child Doe] to discrimination" "on the basis of sex" by treating his report less seriously because he is a boy, not a girl. 20 U.S.C. § 1681(a); *see also Piercy v. Maketa*, 480 F.3d 1192, 1204 (10th Cir. 2007) (explaining standard for assessing claims of facial discrimination). McPherson and Brewer *admit* they would have

responded to Child Doe and his family's reports differently if he were a girl subjected to the exact same violence. It hard to imagine a clearer case of sex discrimination.[4]

In 1979, the Supreme Court first recognized a private right of action under Title IX for plaintiffs whose access to education was impeded by different treatment on account of their sex. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 680, 717 (1979) (holding plaintiff could bring suit under Title IX based on a university's decision to deny her medical school because she was a woman). Since then, courts have "consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *see also N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("[T]o give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.").

Every disparate treatment claim boils down to an allegation that the defendant "treats some people less favorably than others because of their" protected characteristic. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *see also G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. 2016) (identifying core elements of a Title IX disparate treatment claim in suit regarding exclusion from school

[4] If the Title IX claim goes to trial, Child Doe will assert that the District also violated Title IX by acting with deliberate indifference to known sexual harassment. This liability standard, established in *Gebser v. Lago Vista Independent School District,* 524 U.S. 274, 290-91 (1998) and *Davis v. Monroe County Board of Education*, 526 U.S. 629, 650 (1999), is the standard courts often apply in student-on-student sexual harassment cases because most plaintiffs have only circumstantial evidence of a school's intentional discrimination. But this is not the only path to liability. *See Simpson v. Univ. of Colorado, Boulder*, 500 F.3d 1170, 1176 (10th Cir. 2007) ("[T]he *Gebser* standards do not apply to some Title IX harassment claims"). Here, Child Doe has direct evidence, through party admissions, of the District's intentional sex discrimination.

facilities), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017); *Jeldness v. Pearce*, 30 F.3d 1220, 1231 (9th Cir. 1994) (applying disparate treatment analysis to Title IX claim regarding women's access to educational programs in prison). "So long as the plaintiff demonstrates in some manner that he would not have been treated in the same way had he been a woman, he has proven sex discrimination." *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999).[5]

In the rare case, like this one, where "facial discrimination has been established in the record, [courts] review only to see (1) if the affected person is a member of the discriminated class for purposes of standing; (2) whether the [discrimination] affects rights protected by the statute; and (3) whether any affirmative defenses exist to the discrimination." *Piercy*, 480 F.3d at 1204; *see also GP by & through JP v. Lee Cty. Sch. Bd.*, 737 F. App'x 910, 916 n.5 (11th Cir. 2018) (unpublished) (applying similar test to Title IX suit); *G.G.*, 822 F.3d at 718 (same). Because the intentional discrimination is direct, not circumstantial, there is no need to search for it using methods like the *Gebser/Davis* standard or *McDonnell-Douglas* burden-shifting test. *E.g.*, *Piercy*, 480 F.3d at 1204 ("[W]here an employer's policy is discriminatory on its face, we need not worry about eliminating nondiscriminatory reasons for an employer's action"); *see also Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 583 (7th Cir. 2014) (explaining

---

[5] In assessing Title IX disparate treatment claims, the Tenth Circuit looks to Title VII case law. *E.g.*, *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832-33 (10th Cir. 1993); *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987).

plaintiff did not need to establish school's deliberate indifference to sex discrimination, as in *Gebser*/*Davis* inquiry, where the challenged policy was facially discriminatory).

Here, the undisputed facts establish all elements of a disparate treatment claim: facial discrimination plus class membership, injury to rights protected by the statute, and the absence of affirmative defenses. *See Piercy*, 480 F.3d at 1204. McPherson and Brewer's facial discrimination is blatant and undeniable. The District's highest-level administrators treated Child Doe's allegations less seriously because he is a boy rather than a girl. SOF ¶¶ 101-03, 107. Brewer and McPherson have repeatedly *admitted* to this discrimination, including in recorded law enforcement interviews and depositions. *See, e.g.*, SOF ¶¶ 101-02, 107. If not for Child Doe's sex, Brewer and McPherson explained, they would have considered forced digital penetration of the anus "sexual assault" rather than "just boys horseplaying." SOF ¶ 101. The administrators told John Doe that, if a student had anally penetrated a girl against her will, they would have taken steps to stop the abuse, like calling the police. SOF ¶ 103. In other words, Brewer and McPherson both admit that they decided to offer Child Doe less protection from sexual abuse because he was a boy, clear-as-day disparate treatment. *See Nabozny v. Podlesny*, 92 F.3d 446, 455-456 (7th Cir. 1996) (holding school administrators who dismissed sexual harassment complaints by boys, but not girls, engaged in disparate treatment). Child Doe was, without a doubt, "subjected to discrimination" by the District. 20 U.S.C. § 1681(a); *see also Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176-1179 & n.2 (10th Cir. 2001) (imputing instructors' anti-male discrimination to university defendant for purposes of Title IX liability). This is as clear-cut a case of sex discrimination as they come.

Child Doe can just as easily satisfy the additional three factors necessary to establish disparate treatment. *See Piercy*, 480 F.3d at 1204. First, Child Doe is a member of the discriminated class, boys. SOF ¶ 21.

Second, the District's discrimination profoundly affected the right protected by Title IX, access to education. *See* 20 U.S.C. § 1681(a). As a result of the sexual harassment and the District's inaction, Child Doe's grades suffered. SOF ¶¶ 143-44. He dreaded returning to the school building he shared with his tormenters. SOF ¶ 52. Child Doe repeated a year of school, permanently setting back his education, in order to avoid the harassers. SOF ¶ 145. As a result, he lost his eligibility to participate in school sports, which he loved. SOF ¶ 146. He became hyper-vigilant to the possibility of attack, especially in locker rooms. SOF ¶ 150. Child Doe withdrew from his friends. *Id*. His ability to trust others, especially school administrators, was severely damaged. *Id*. Eventually, Child Doe's family moved to a different school district in Oklahoma to escape the harassment and ongoing threats. SOF ¶¶ 147-48. Child Doe's access to the District's educational opportunities and benefits was thus impeded in the most profound and absolute way: He could no longer remain a District student at all. *See Jennings v. Univ. of North Carolina*, 482 F.3d 686, 699-700 (4th Cir. 2007) (en banc) (holding that diminished attendance and participation, a decline in performance, severe emotional distress, and lost enjoyment in school programming constitute exclusion from educational opportunities under Title IX); *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1298-99 (11th Cir. 2007) (holding student's disenrollment from the defendant-school as a result of harassment constituted exclusion from educational opportunities under Title IX).

Third, and finally, the District has not, and cannot, offer any relevant affirmative defense to justify its discrimination. *See* Defs.' Answer, Doc. 21.

Child Doe has clearly, "on the basis of sex," been "excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination under an[] education program." 20 U.S.C. § 1681(a). Accordingly, Child Doe is entitled to summary judgment on his Title IX claim.

II. Child Doe Is Entitled To Summary Judgment On His § 1983 Equal Protection Claim Against The District.

As a matter of law, the District is also liable under 42 U.S.C. § 1983 for depriving Child Doe of his constitutional right to "equal protection of the laws" under the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. There is no question the District is subject to § 1983. SOF ¶ 1. Nor is it up for debate that student-on-student sexual harassment that a school district refuses to remedy is a form of unlawful sex discrimination that violates a student's equal protection rights. *Murrell v. Sch. Dist. No. 1, Denver, Colo*., 186 F.3d 1238, 1249-50 & n.7 (10th Cir. 1999) (citing cases). Where, as here, a school district has a custom, policy, or practice of acting with "deliberate indifference" to student-on-student sexual harassment, the district is liable under § 1983 for violating the Equal Protection Clause. *See id*. at 1249-50.

The District's failure to train its employees on how to prevent, recognize, and respond to peer sexual harassment constituted deliberate indifference.[6] A municipality is liable under §1983 when its "failure to train amounts to deliberate indifference to the rights

[6] "Peer" sexual harassment is another term for "student-on-student" sexual harassment.

of persons with whom the [municipal employees] come into contact," and the failure caused the constitutional injury. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-90 (1989); *see also Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1283 (10th Cir. 2019). Here, the undisputed facts establish exactly that. The District provided no sexual harassment training at all; this failure demonstrated deliberate indifference to students' rights to be free from sexual harassment in school; and the failure caused Child Doe to suffer ongoing sexual harassment, in violation of the Equal Protection Clause.

1. The District Failed To Provide Any Training On Sexual Harassment.

The District cannot dispute that it failed to train its administrators on peer sexual harassment at all times relevant to this case. This is not a grey area where a defendant provided some training but it was arguably insufficient. *See, e.g.*, *Murphy v. City of Tulsa*, 950 F.3d 641, 652 (10th Cir. 2019) (assessing how much was enough training on how police officers should administer *Miranda* warnings). Here, there was *no* training at all, not even for the official responsible for carrying out the District's sexual harassment policy and handling students' sexual harassment complaints. SOF ¶¶ 137-42. In fact, the District did not even bother to tell the person charged with these duties that it was his job: McPherson had *no idea* he was the District's Title IX Coordinator during the two academic years when Child Doe was repeatedly sexually assaulted. SOF ¶¶ 132, 136. As a result, McPherson did not know what the role required him to do. SOF ¶ 137.

McPherson never received any Title IX training during that time frame either. SOF ¶ 137. If he had been trained, he would have learned he was responsible for carrying out

the District's sexual harassment policies; processing students' sex discrimination complaints; identifying, addressing, and correcting sexual harassment issues; investigating any allegations of bullying, harassment, and sexual assault promptly, thoroughly, and objectively; and imposing discipline. SOF ¶¶ 134-35

But McPherson knew none of this. SOF ¶¶ 136-37. And no one else in the District had the training to pick up the slack. The District did not train its officials, administrators, teachers, or other employees on how to recognize, prevent, and respond to sexual harassment at WMS. SOF ¶¶ 137-42. In short, it is an irrefutable fact that, during all relevant times, the District did not train anyone at all on sexual harassment prevention and responses.

2. The District Was Deliberately Indifferent Because The Need For Sexual Harassment Training Was Patently Obvious.

As a matter of law, the District's failure to train employees on how to handle students' sexual harassment allegations constitutes deliberate indifference, both because of the frequency of such harassment in schools and the patently obvious negative consequences of a failure to train. The District provided no training, even though it was highly likely that peer sexual harassment would occur and highly predictable that school officials "lacking specific tools to handle that situation w[ould] violate [students'] rights." *Bd. of Cty. Comm'rs of Bryan Cty., Okla. v. Brown*, 520 U.S. 397, 409 (1997). Under such circumstances, the "policymakers' decision not to train the officer reflect[s] 'deliberate indifference.'" *Id.*; *Barney v. Pulsipher*, 143 F.3d 1299, 1307-08 (10th Cir. 1998).

It is entirely predictable that, in the absence of any training on how to prevent peer sexual harassment and how to handle reports when it does occur, students will continue to be sexually harassed and administrators will mishandle their reports—all in violation of students' statutory and constitutional rights to be free from such unchecked harassment in school. *See* 20 U.S.C. § 1681(a); *Murrell*, 186 F.3d at 1249-50 & n.7. "Because sexual assault claims arise frequently in the public high school context, it is certainly foreseeable that the failure to train school staff on how to handle such claims would cause disastrous results." *Doe v. Forest Hills Sch. Dist.*, No. 1:13-cv-428, 2015 WL 9906260, at *17 (W.D. Mich. March 31, 2015). The District's own representative recognized that "it would be very difficult" for a Title IX Coordinator to fulfill his legal duties without any training on Title IX. Ex. 31, Reynolds Dep. Tr. 180:22-181:2.[7]

The District was deliberately indifferent in failing to provide training that was obviously necessary. In *City of Canton*, the Supreme Court explained that the need to train police officers on the constitutional limits of their use of deadly force is so obvious that failure to do so constitutes deliberate indifference. 489 U.S. at 390 n.10. The same is true for the need to train school officials on how to address student sexual harassment allegations. As one district court explained:

> Just like failing to train a police officer on when to use his or her gun, failing to train a school principal on how to investigate sexual assault allegations constitutes deliberate indifference. It is inevitable that these situations would arise at some point, and the complex Title

[7] The District's representative, who became the superintendent after Brewer retired and McPherson had left, also testified that it "would be extremely worrisome" if McPherson had not received training on Title IX. Ex. 31, Reynolds Dep. Tr. 26:11-12, 181:16-19.

> IX requirements virtually ensure that an investigation done without any formal training would be deficient.

Forest Hills Sch. Dist., 2015 WL 9906260, at *17; *see also Simpson*, 500 F.3d at 1184-85 (finding failure to provide sexual assault-prevention training to college students deliberately indifferent because "the need for more or different training" was "so obvious" and "the inadequacy so likely to result in [Title IX violations]") (citing *Canton*, 489 U.S. at 390) (alteration in original).

The need for training on how to prevent and respond to student-on-student sexual harassment at WMS was patently obvious. And it was foreseeable that the District's failure to provide any training on the topic would result in unchecked sexual harassment in school. No reasonable jury could find otherwise. The District's failure to train therefore constitutes deliberate difference.

3. The District's Failure To Train Caused Child Doe's Constitutional Injury.

Finally, the District's failure to train caused Child Doe's constitutional injury. Peer sexual harassment that a school district refuses to remedy is a form of unlawful sex discrimination that violates a student's equal protection rights. *Murrell*, 186 F.3d at 1249-50 & n.7. Child Doe was deprived of his equal protection right to attend school free from sexual harassment as a direct result of the District's failure to train its employees.

Child Doe suffered ongoing sexual harassment, including three sexual assaults, during his first 18 months at WMS. SOF ¶ 24. All three incidents involved male students forcing, or attempting to force, their fingers into Child Doe's anus. SOF ¶ 25. And—crucially for summary judgment—witnesses, perpetrating students' admissions and

criminal pleas, and the Defendants' own statements conclusively substantiate two of the three sexual assaults. SOF ¶ 26. One of the assailant's threats to kill Child Doe after he reported the assault is also indisputable: A screenshot of the threatening text message is in the record. SOF ¶¶ 33, 50. Right after the second of his assaults, Child Doe saw one of his assailants sexually assault another student in the same way. SOF ¶ 36. During its 2017 investigation, the OSBI uncovered a disturbing pattern of male students at WMS digitally penetrating other male students' anuses without warning. SOF ¶¶ 91-92, 94, 97.

The District knew about the sexual harassment: Child Doe and his father reported the three sexual assaults to McPherson and Brewer. SOF ¶¶ 40, 42, 47, 63. They also reported the repeated threats and other verbal harassment. SOF ¶¶ 48, 50, 63. If the District had trained McPherson or Brewer, they would have recognized the reports as sexual harassment complaints and known they were required to conduct a thorough, prompt, and documented investigation into Child Doe's allegations. SOF ¶ 74. They also would have known how to stop further harassment and help keep Child Doe safe. SOF ¶¶ 14, 85, 70. But they had not been trained at all, so they failed on all counts. SOF ¶¶ 46, 51, 67, 68, 71, 80, 81, 85, 87.

The very first failure was Brewer and McPherson's inability to recognize the sexual assaults for what they were, rather than "horseplay." SOF ¶¶ 61, 73. Any adult with basic sexual harassment training would have known that students anally penetrating their classmate against their will is sexual assault, regardless of the parties' genders. SOF ¶ 107. But, without that training, Brewer and McPherson did not realize the assaults fell within

the District's "sexual bullying" policy and should have triggered the prescribed response. SOF ¶ 106.

Instead, they made up their own procedures as they went along. Prime evidence of the District's absurd response is the manner in which McPherson conducted his "investigation" of one of the sexual assaults Child Doe reported in seventh grade. McPherson tasked Student #5, *one of the students accused of sexually assaulting Child Doe*, and Student #6, an alleged witness to Student #5's attack, with investigating whether Child Doe and other male students were being targeted for forced digital penetration of their anuses. SOF ¶ 68. It is truly difficult to imagine a more ill-informed response than assigning students to investigate the sexual abuse they were accused of committing or witnessing. Even the District's representative agreed that would be inappropriate. Ex. 31, Reynolds Dep. Tr. 198:22-199:7. In addition, McPherson assumed Child Doe's sexual assault report involving Students #5 and #6 was false because McPherson liked them and thought they were two of his best students. SOF ¶ 67. McPherson never really tried to figure out the truth because he assumed he knew it from the start. A trained school official would never do this.

McPherson's mishandling of Child Doe's reports in sixth grade further shows how utterly unprepared he was to address Child Doe's reports. The principal never even *questioned* Student #1, who participated in sexually assaulting Child Doe by physically restraining him so Student #2 could digitally penetrate Child Doe's anus against his will. SOF ¶ 45. Needless to say, McPherson did not discipline Student #1 for the assault either. SOF ¶ 29, 44. And the District did not discipline Student #1 or any other students for

verbally harassing or threatening to harm Child Doe in the wake of the sexual assault and Child Doe's report of it. SOF ¶¶ 48-51.

Only one of the students who sexually harassed Child Doe ever faced any consequences from the District, and those limited measures were clearly ineffective. According to McPherson, Student #2, who *admitted* he had forcibly penetrated Child Doe's anus, was suspended for five days. SOF ¶¶ 45, 46. Upon Student #2's return, the District had no plan to ensure Child Doe's safety, such as a method to keep him and Student #2 apart. SOF ¶ 46. When McPherson learned that Student #2 had threatened to "kill" Child Doe a few months later, the principal took no action. SOF ¶¶ 49-51.

Apart from student discipline, McPherson had many options at his disposal to stop the ongoing harassment and support Child Doe, as detailed by the District's own policies. SOF ¶¶ 60. Yet he implemented *no* prevention plans or remedial measures. He did not offer Child Doe any post-trauma services, such as counseling. SOF ¶ 84. He never took steps to protect Child Doe from further harassment and retaliation, like a safety plan or escort. SOF ¶¶ 81-84.

Instead, when John Doe asked Brewer and McPherson to protect his son from ongoing sexual harassment, McPherson callously asked, "What do you want me to do, hold his hand?" SOF ¶ 59. His question demonstrates McPherson's profound need for training: He could not imagine a single thing he could do to help Child Doe, even though providing measures to protect a complainant is a core responsibility of a Title IX Coordinator. As a result, Students #1 and #2 continued to harass Child Doe after he reported, even threatening

to "kill him." SOF ¶¶ 32-33, 39. And, when McPherson learned of that ongoing harassment, he did absolutely nothing. SOF ¶¶ 48-51, 63, 71.

These failures, while egregious, are predictable given the District's failure to train employees. As the District's representative testified, "[i]t's hard to be the Title IX coordinator, if you don't know that you're the Title IX coordinator." Ex. 31, Reynolds Dep. Tr. 180:8-10. Brewer, as McPherson's supervisor, should have known the principal was falling down on the job. SOF ¶¶ 119, 122-23. After all, it was ultimately Brewer's responsibility to make sure the District responded appropriately to all sexual harassment complaints. SOF ¶¶ 112, 117. But because Brewer *also* had not been trained on sexual harassment within recent memory, he did not fulfill this responsibility either. SOF ¶ 140.

Ultimately, the District's abject failure to train McPherson, Brewer, and other employees on how to recognize and address harassment caused Child Doe to suffer unchecked sexual harassment without any meaningful response from the District. Given the obviousness "that its program w[ould] cause constitutional violations," the District's failure to train "is the functional equivalent of a decision by the [District] itself to violate the Constitution." *Connick v. Thompson*, 563 U.S. 51, 61-62 (2011). This Court should grant summary judgment against the District on Child Doe's equal protection claim for failure to train.

CONCLUSION

For the reasons set forth above, this Court should grant Plaintiff's Motion for Partial Summary Judgment, enter judgment against the District on his Title IX claim and his equal protection claim under 42 U.S.C. § 1983, and award such other relief as is just and proper.

Dated: June 5, 2020

Respectfully Submitted,

s/ Nathan D. Richter
Nathan D. Richter, OBA # 22003
Renee D. Little, OBA #22630
DENTON LAW FIRM
925 West State Highway 152
Mustang, Oklahoma 73064
Telephone: (405) 376-2212
Facsimile: (405) 376-2262
nathan@dentonlawfirm.com
renee@dentonlawfirm.com

Adele P. Kimmel*
Alexandra Brodsky*
Adrienne Spiegel*
PUBLIC JUSTICE, P.C.
1620 L Street NW, Suite 630
Washington, DC 20036
Telephone: (202) 797-8600
Facsimile: (202) 232-7203
akimmel@publicjustice.net
abrodsky@publicjustice.net
aspiegel@publicjustice.net
*Admitted *pro hac vice*

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2020, I filed the foregoing electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Nathan D. Richter
Nathan D. Richter