No. 21-13379

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JANE DOE,
Plaintiff-Appellant,

v.

GWINNETT COUNTY SCHOOL DISTRICT,
Defendant-Appellee.

PLAINTIFF-APPELLANT'S OPENING BRIEF

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Doe v. Gwinnett County School District, No. 21-13379

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, Plaintiff-Appellant Jane Doe states that the following people and entities have an interest in the outcome of this appeal:

- Ackourey, Mary Anne
- Bala, Anita K.
- Beck, Monica H.
- Brodsky, Alexandra
- Buckley Beal, LLP
- Buechner, Jr., William H.
- Doe, Jane
- Fierberg, Douglas E.
- The Fierberg National Law Group, PLLC
- Freeman Mathis & Gary, LLP
- Gilbride, Karla
- Gwinnett County School District
- Jones, Steve C., U.S. District Judge
- Kimmel, Adele P.
- Kramer, Michael E.
- Marcovitch, Robert P.

- Mathis, Benton J.
- Menendez, Kenneth G.
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December 8, 2021

Respectfully submitted,

s/ Alexandra Z. Brodsky

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Jane Doe requests oral argument. This case involves a lengthy record and significant disputes of material fact. Argument will allow the Court to investigate further the relationship between the facts and the elements of Jane's claims. Argument would also aid the Court in understanding the distinctions between Jane's different theories of liability.

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STATEMENT OF JURISDICTION

Jane Doe filed suit against Gwinnett County School District ("Gwinnett") under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1343 and 1331. The district court granted summary judgment to Gwinnett on all claims on September 1, 2021. Doc. 188. Jane timely filed a notice of appeal on September 29, 2021. Doc. 190. This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

One would "hope[] we were long past the day where victims of sexual assault could find themselves charged with disciplinary violations on account of having been raped." *Doe v. Bibb Cnty. Sch. Dist.*, 688 F.App'x 791, 799 (11th Cir. 2017) (Martin, J., concurring). But that is exactly what happened here. When Jane Doe was a high school student, she was raped by a classmate on school grounds. The next morning she confided in two trusted teachers, then told Gwinnett administrators. Rather than provide Jane with the support she needed to continue to learn in the wake of violence, Gwinnett suspended Jane—twice—for the very conduct she reported. Then it left her to fend for herself against subsequent peer harassment that created such a hostile environment that she transferred to a new district.

Title IX does not tolerate such discrimination. Decades ago, the Supreme Court made clear that Title IX requires schools to address students' reports of peer sexual harassment, including sexual assaults. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633, 653–54 (1999). Shortly after, it announced an equally pressing rule: Schools may not punish those who report sex discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005). "Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished," the Court explained. *Id.* at

180. "Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Id*.

Nonetheless, the district court granted summary judgment to Gwinnett on Jane's Title IX claims. In doing so, it overlooked significant disputes of material fact and its own finding that Gwinnett had not determined whether Jane had been raped. Viewing the record in the light most favorable to Jane, a jury could readily find that Jane suffered severe, pervasive, and objectively offensive discrimination and that Gwinnett violated Title IX by responding to Jane's reports with deliberate indifference. A jury could also find, based on both direct and circumstantial evidence, that Gwinnett violated Title IX by retaliating against Jane for reporting her rape. Accordingly, this Court should reverse the district court's grant of summary judgment to Gwinnett.

STATEMENT OF THE ISSUES

Title IX prohibits sex discrimination in education. 20 U.S.C. § 1681. Jane, a high school sophomore, reported to school officials that another student, "MP," forcibly kissed her, forced his penis into her mouth, and then masturbated in front of her without her consent. In response, Gwinnett suspended Jane twice for violating a school rule prohibiting "oral sex" without determining whether the contact was sexual assault.

This appeal presents two issues:

I. Whether there is a genuine dispute of material fact as to whether Gwinnett was deliberately indifferent to the sexual harassment Jane reported, in violation of Title IX.

II. Whether there is a genuine dispute of material fact as to whether Gwinnett retaliated against Jane in violation of Title IX.

STATEMENT OF THE CASE

I. Factual Background

A. MP Rapes Jane

On February 4, 2015, Jane Doe was a sixteen-year-old sophomore at Peachtree Ridge High School ("Peachtree"), part of Gwinnett. Docs. 132-3 at 5; 132-8 at 2.[1] That day, while Jane waited for her mother to pick her up after school, a classmate and friend from middle school, MP, approached her. Doc. 132-11 at 232, 239. MP invited Jane to see the Ridge Vision News ("RVN") room, a studio for the school's news program. *Id.* at 28, 241.

MP led Jane to a smaller control room within the RVN room. *Id.* at 243. MP then sat in a chair and grabbed Jane, pulling her closer to him. Doc. 132-16 at 2–3.

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[1] Citations to the record include the district court docket number at which the document is available ("Doc.") followed by the relevant page numbers.

MP tried to pull down Jane's pants. *Id.* at 3. In response, Jane pushed him away and said "No, stop! What are you doing?" *Id.* MP jumped up from the chair, grabbed her wrists, and forced her into the chair. *Id.* MP then forcibly kissed her. *Id.* Standing between Jane and the closed door, MP told her, "[Y]ou can't leave until you suck my dick." *Id.* MP unzipped his pants, "grab[bed her] head and hair and shove[d] his [penis] in [her] mouth." *Id.* Jane "gag[ged] and cr[ied]" through the assault. *Id*. at 4. MP then got off her and began masturbating. Doc. 132-16 at 3.[2] Jane stood up, told MP to "stop" again, and left the room. *Id.*

That night, MP messaged a friend: "Just feels like every time I try to change, something always gets me right back into my bad ways. U know? I am trying hard not to do bad things but I guess I just needa try a little harder." Doc. 132-25 at 13.

B. Jane Reports That She Was Sexually Assaulted and Gwinnett Investigates Her for Possible Rule Violations

The next morning, Jane was visibly distraught at school. Doc. 132-24 at 9. She told her friends how MP had sexually assaulted her the day before. Docs. 132-11 at 249–51; 132-24 at 8–9. At a friend's encouragement, Jane called her mother to tell her about the assault around 7:30am. Doc. 132-11 at 253. Then, in her first class, Jane—upset and crying—told her teacher that she had been "basically raped" the

[2] MP repeatedly told administrators he did not ejaculate in the RVN room after the assault. Doc. 132-15 at 6. However, later forensic testing by law enforcement found evidence of MP's semen there. Doc. 132-78 at 2.

day before. *Id.* at 224. The teacher allowed Jane to go speak with Linda Brimmer, a teacher Jane knew better. *Id.* at 224, 227 When Jane arrived, Brimmer could tell immediately she was distraught. *Id.* at 228. After Jane tearfully described the assault, Brimmer took Jane to School Resource Officer ("SRO") Anthony Lockard. *Id.* at 229–30.

1. Jane's First Round of Interviews

In his office, Lockard questioned Jane. *Id.* at 255. Jane later described that interview as "absolutely horrible," with Lockard asking her the most "humiliating questions." *Id*. at 256. Lockard asked why Jane had not bitten MP's penis, why she had not grabbed MP's "balls," why she had not fought harder or screamed louder, and whether she understood that she could get MP in "big trouble" by reporting that he sexually assaulted her. *Id.*; Doc. 132-24 at 10. He asked what Jane had been wearing and why she had not reported sooner. Doc. 132-11 at 256. Lockard later testified that he had not been trained to interview victims of sexual assault in a trauma-informed way and could not recall anything from the training he had received about interviewing minors who report sexual assaults. Doc. 132-6 at 12.

Assistant Principal LaShawnia Stinson then questioned Jane. Doc. 132-24 at 10. Stinson asked similar questions as Lockard, including what Jane was wearing during the assault. *Id.* Jane's mother, who had left for the school after receiving Jane's call, arrived when the interview was nearly over. *Id.* at 9, 11. Jane completed

a written statement without assistance. Docs. 132-19; 132-24 at 12. She then left school with her mother. Doc. 132-24 at 11.

Gwinnett officials did not offer Jane any accommodations or services, such as counseling or academic assistance. Doc. 132-8 at 5. Administrators did not inform the Does of Jane's Title IX rights or refer them to Gwinnett's sexual harassment policy. *Id.*; Docs. 132-13 at 5; 132-14 at 4.

2. MP's Interview

After Jane's interview, SRO Lockard and Assistant Principal Jon Weyher wanted to interview MP. Docs. 132-3 at 14; 132-11 at 122–24. MP, however, had left school. Docs. 132-3 at 14; 132-11 at 124. Weyher—who knew MP's mother, a Gwinnett teacher—arranged to interview MP later that day with his parents present. Docs. 132-3 at 12, 14; 136-10 at 5–6.

During this interview, MP described his version of what happened. Doc. 132-15 at 3. When MP explained that, while headed to the RVN room, he had thought he and Jane might have sex, Lockard responded, "I mean, yeah. You're a teenage boy." *Id.* at 7. At one point, Weyher asked MP for a written statement. *Id.* at 10. Weyher then pivoted, asking whether MP's mother "want[ed] to write [the statement] for him." *Id.* (Weyher later falsely testified that MP had written his own statement. Doc. 132-3 at 15.) Before concluding the interview, Weyher thanked MP and his parents for their "support." Doc. 132-23 at 7. Although Jane reported that

MP had masturbated in front of her without her consent after the assault, Gwinnett officials never asked MP about this allegation. *E.g.*, Docs. 132-3 at 26; 132-6 at 30.

3. Jane's Next Round of Interviews

Jane came to school the next afternoon for a third interview with SRO Lockard and Assistant Principals Lee Augmon, Stinson, and Weyher. Doc. 132-6 at 21. While there, Jane provided another written statement with additional details about the assault, drafted without her parents' assistance. Docs. 132-8 at 4; 132-16; 132-24 at 11, 13; 132-27 at 11. Administrators had Jane return to the RVN room and act out how the assault occurred. Docs. 132-20 at 0:52–11:00; 132-21 at 3–6. During that reenactment, SRO Lockard again asked Jane about whether and how she had fought off MP, including whether she "hit him … in the privates." Doc. 132-21 at 5–6. When Jane explained that she tried to "push" MP away but feared he would "beat" her if she fought back more forcefully, Lockard continued, asking, "And still, you don't have any type of defensive punching? You don't grab his testicles and squeeze? I mean, you know that's an extremely sensitive area. You don't grab and squeeze?" *Id*. Lockard also asked Jane why she had gone to the RVN room with MP even though they were not close friends. Doc. 132-33 at 8.

During the interview, Jane's stepfather, Mr. Doe, informed the administrators that he had previously told MP to stay away from Jane, Doc. 132-33 at 7; MP had sent Jane "very crude and disgusting" messages the year before about what sexual

favors he would like from her, and so Mr. Doe had sent MP text messages warning him to leave her alone, Doc. 132-14 at 2, 10–11; *see also* Doc. 132-11 at 287–91. When Gwinnett asked MP about this interaction, he lied, stating he had never received a text message from Mr. Doe. Doc. 132-23 at 6.

C. Gwinnett Disciplines Jane for Her Report—Twice

1. Jane's First Suspension

On February 10, five days after Jane's initial report, Gwinnett officials met with the Does. Doc. 132-8 at 4. The officials announced that they were suspending Jane pending a disciplinary hearing for violating Gwinnett's Student Behavior Code Rule 9G. *Id*. Rule 9G reads, in its entirety: "Oral sex or any act of sodomy." Doc. 132-41 at 26. Nothing in Rule 9G specifies whether, to constitute a violation, the sex act must be consensual or welcome.[3] Docs. 188 at 21; 132-35 at 19–20. At the meeting, Principal Jeff Mathews, and Assistant Principals Weyher, Stinson, and

[3] "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986); *see also* 34 C.F.R. § 106.30(a) (2020) (defining sexual harassment for Title IX administrative enforcement). Gwinnett's sexual harassment policy uses such a "welcomeness" standard. Doc. 132-84 at 5. Sexual assault is also sometimes defined with respect to "consent." *See, e.g.*, 34 C.F.R. § 106.30(a) (permitting schools "to adopt [their own] definition of consent with respect to sexual assault"). Because the record and district court opinion include both terms, and because Jane neither welcomed nor consented to MP's sexual conduct, *supra* pp. 3–4, this brief uses the terms interchangeably.

Augmon "said they really didn't know what happened and … so they're going to do it at the hearing and have the hearing officers decide." Doc. 132-26 at 16. The handwritten discipline referral the Does received that day did not mention consent or welcomeness or address Jane's report of sexual assault. Doc. 132-38 at 2. Nor did the similar typed letter the Does received confirming that Jane "ha[d] been suspended pending a disciplinary hearing" for "participat[ing] in oral sex." Doc. 132-39 at 2–4.

2. Disciplinary Hearing and Jane's Second Suspension

In the days before the disciplinary hearing, consistent with Gwinnett's hearing procedures and state law, Jane's attorney subpoenaed evidence and witnesses, including SRO Lockard. Docs. 132-45 at 2–4; 132-46 at 2–5. Yet Gwinnett refused to produce records or ensure that Lockard, the "primary person" responsible for the investigation, attended the hearing. Docs. 132-11 at 15–25, 68; 132-45 at 2–4. Gwinnett also refused to answer Jane's attorney's questions about how the issue of consent related to Rule 9G. Doc. 132-11 at 95–97.

At the hearing, the only issue before the two hearing officers was whether Jane and MP had violated Rule 9G; MP was not charged with violating any of the school's rules against sexual assault. Docs. 132-11 at 118–19; 132-41 at 26–27. MP testified that he "could just tell" Jane wanted to have sex in the RVN room because she had a "blank face that didn't really have any expression." Doc. 132-11 at 167.

MP's attorney aggressively cross-examined Jane, repeatedly asking her, for example, why she had not screamed more or louder during or after the assault and why she lacked evidence of physical injuries. *Id.* at 265–66, 273. He also tried to reenact how the sexual assault occurred using his and Jane's bodies. *Id.* at 273–76; Doc. 132-27 at 13. During closing statements, Gwinnett's attorney echoed MP's, arguing that MP was the more credible student because Jane "chose not to scream louder and louder," "ha[d] no physical injuries," and "didn't report this immediately." Doc. 132-11 at 303.

After deliberating for ten minutes, the hearing officers found Jane "in violation of 9G, oral sex or any act of sodomy." *Id.* at 305. "[T]he hearing officers," however, "made no determination on whether [Jane] 'welcomed' [the] oral sex with MP" for which she was punished. Doc. 188 at 11; *see also* Docs. 132-11 at 305; 132-40 at 10.

After the hearing officers informed her of their determination, Jane responded that she "fe[lt] betrayed by the school," which she had "thought … was all about protecting kids," but now "s[aw] that's not the case." Doc. 132-11 at 310. Jane described the emotional impact of both the assault and the repeated interviews. *Id.* at 310–11. She also warned that "when people find out about this and girls do get sexually assaulted, they're not going to want to come forward and tell someone,

because they're going to be scared they're going to get suspended and they have to go through all of this." *Id.* at 310.

The hearing officers then suspended Jane for four additional days, through February 22. Docs. 132-11 at 311–12; 132-48 at 2. MP, who had admitted to violating Rule 9G at the end of the hearing, was suspended for two additional days, through February 20. Docs. 132-11 at 303–04; 136-19 at 7.

D. Jane Attempts to Return to School

On February 23, Jane returned to Peachtree for the first time since the morning after the assault, nearly three weeks prior. Doc. 133-12 at 4. Beyond checking whether she and MP shared any classes or buses, *id.*, Gwinnett officials did nothing to ensure Jane's safe return, Doc. 132-13 at 6, even though Jane had told them she was terrified of seeing MP in the halls between classes, Doc. 132-9 at 21.

Immediately upon her return, multiple students harassed Jane about the rape, calling her a "whore," "slut," and "liar." *Id.* at 23–27; Doc. 132-24 at 18–19. In her first class, a student, "BM," accused Jane of lying about sexual assault to frame MP. Doc. 132-9 at 23–24. Unable to stand the harassment, Jane left class, went to school counselor Teresa Wilson's office, *id.* at 24, and reported that "she would like to commit suicide," Doc. 132-49 at 2.

Jane stayed home from school for three days while her parents tried to arrange for Gwinnett staff to ensure that, when Jane returned, she would not face further

harassment. Docs. 132-13 at 6–7; 132-55 at 2. Jane's parents informed Gwinnett that "[t]he hostile environment on campus had prevented [Jane] from going back to school to continue her education." Doc. 132-51 at 3. While Jane was out of school that week, she received multiple text messages from BM accusing her of lying about the assault: BM said that "if you told the truth he [MP] wouldn't be at school right now," and asked, "Why would you hurt that boys future?" Docs. 132-9 at 24–25; 132-52 at 2, 9. Although Jane reported the texts, Gwinnett never asked to see them. Doc. 132-9 at 27.

At a meeting with Jane's mother on February 26, 2015, Gwinnett presented four options for Jane to continue her schooling, all of which would require her to leave the district altogether, drop classes, or miss some or all of the school day. Doc. 132-13 at 7. Jane ultimately opted to drop her Chinese class, switch into a different chemistry course to avoid BM, and attend school for only half the day. Doc. 132-9 at 26. Jane's mother and psychologist also asked Gwinnett to ensure Jane would have no contact with MP. Docs. 132-54 at 3; 132-55 at 2. In a document labeled a "safety plan," Gwinnett indicated Jane should not "be[] in the presence of" MP or BM. Doc. 132-56 at 2. But it did not instruct MP or BM to avoid contact with Jane at Peachtree. *See* Doc. 160 at 168–69 (recounting Gwinnett's efforts to separate Jane from MP and BM prior to Jane's departure from Peachtree).

When Jane again attempted to return to Peachtree on Friday, February 27, the harassment continued. Classmates whispered, stared, and pointed at her. Doc. 132-9 at 26. On her first day back, one male student, "AT," told Jane that he had heard she had "suck[ed MP] up" and AT now "wish[ed he] was [MP]." *Id.* AT also said Jane's rape report was a lie. *Id*. As a result, Jane felt like she was having a panic attack and left class. *Id*. On the following Monday, March 2, another student, "TA," made Jane cry during class when he approached her, smirked, shook his head, and called her "nasty." *Id.* at 27. Other classmates called her epithets like "whore" and slut." *Id*.

Jane and her mother repeatedly reported the peer harassment to Assistant Principal Augmon and Guidance Counselor Wilson. *E.g.*, Docs. 132-9 at 26–27; 132-57 at 3. In response, Wilson recommended that Jane ignore the bullies and stay calm. Doc. 132-9 at 27. Gwinnett represents that it told AT his "behavior could be considered bullying if it were to continue." Doc. 136-24 at 5.

E. Jane Departs Peachtree and Then Gwinnett

In the month after the sexual assault, Jane did not attend a single full day of classes at Peachtree; after her suspensions, she attended school only three times, and had to leave classes or go home early on each occasion. *See* Docs. 132-9 at 19, 23–26; 132-13 at 3, 26; 132-24 at 11. On March 4, Mrs. Doe informed Gwinnett that her daughter was "too scared to go back to [Peachtree]" and would need to stay home

until a transfer was arranged. Doc. 132-13 at 7, 26. Counselor Wilson responded that "registration for online classes for the semester [was] closed," and that she would not provide information about other options outside the district, even though they existed. *Id.* at 27.

After much advocacy by the Does, Jane transferred to an online school within Gwinnett, where she started classes around March 18, 2015. *E.g.*, Docs. 132-8 at 7; 132-14 at 6–7, 23–27. But still, Peachtree students continued to harass Jane. One student, "RH," posted on social media in reference to Jane, "When Hoes don't use common sense," to which "SM" replied "It's okay she was just trying to quench her thirst," and "But it's not like she doesn't have enough in her mouth yunno." Doc. 132-8 at 8, 31. Other students called her "easy" and a "liar" on social media. *Id.* at 8. A Peachtree student informed Gwinnett officials that Jane, who was still an enrolled Gwinnett student, was being bullied by other students. Doc. 132-68 at 2.

F. The Sexual Harassment and Gwinnett's Response Grievously Injure Jane and Her Education

MP's assault, the ensuing investigation and disciplinary hearing, and the harassment over the course of the following school year derailed Jane's education. In the weeks after the assault, Jane's chemistry grade plummeted from a 91% to a failing grade of 55%. Docs. 132-8 at 7. When Jane then transferred to online school, she had to drop two courses and make up all the work she had missed in her new classes over the previous months. *Id.* at 7–8, 27. This was an immense task for Jane,

who was struggling with post-traumatic stress disorder (PTSD) stemming from the assault. Docs. 132-67 at 29; 132-88 at 4. Jane ended up failing online chemistry and had to attend summer school to graduate on time. Doc. 132-24 at 25. Ultimately, after trying online courses and then a third Gwinnett high school, Jane's family moved out of Gwinnett County to escape the hostility and retaliation that Jane faced throughout the district. *Id.* at 30; *see also* Doc. 1 at 14.[4]

Jane suffered immediate and lasting psychological impacts from the assault, investigation, disciplinary hearing, and continuing harassment. In May 2015, her treating psychologist recorded that Jane was experiencing major depressive disorder and PTSD. Doc. 132-86 at 2. Her psychologist noted that since the sexual assault, Jane had reported experiencing "sleep disturbance, frequent nightmares, decreased appetite, irritability, extreme distress … fearing something bad is going to happen, increased difficulty concentrating, avoidance of … [Peachtree and] her perpetrator, and exaggerated negative expectations about herself and her future." *Id.*

An examining medical expert in this case, Eileen Ryan, also diagnosed Jane with PTSD and major depressive disorder. Doc. 132-88 at 4. Dr. Ryan found that "Jane Doe was subjected to emotionally traumatizing harassment by Gwinnett … and has suffered severe long-term emotional damage." *Id.* at 3. Dr. Ryan explained

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[4] Students at the third high school also harassed Jane for reporting the sexual assault. Docs. 132-9 at 27–28; 132-24 at 22–23.

this damage "has had significant negative repercussions with respect to her mental health, educational attainment, relationships, and functioning in multiple domains," and that Jane "will live with the psychiatric, emotional and behavioral impacts of the sexual violence she experienced at Peachtree … and the negative response of school personnel indefinitely." *Id.* at 3, 5. Jane has also experienced various drug use disorders that Dr. Ryan attributes to the assault and, "more significantly," Gwinnett's response. *Id.* at 4.

II. Proceedings Below

Jane brought three claims against Gwinnett. The first, deliberate indifference under Title IX, alleged that Gwinnett's response to Jane's report of sexual harassment was so clearly unreasonable as to amount to deliberate indifference. Doc. 1 at 20-24. The second claim alleged that Gwinnett retaliated against Jane in violation of Title IX for reporting her sexual assault. *Id.* at 25-26. Jane's third claim, brought under 42 U.S.C. § 1983, alleged that Gwinnett violated her constitutional rights by failing to train school officials how to address sexual harassment reports. *Id*. at 26-30. After discovery, both parties moved for summary judgment. Docs. 132, 133. The district court granted Gwinnett's motion for summary judgment, dismissing all three claims. Doc. 188 at 61. (Jane appeals the dismissal of her two Title IX claims.)

As a preliminary matter, the district court rejected Gwinnett's argument that Jane was collaterally estopped from asserting her Title IX deliberate indifference claim based on findings made at the disciplinary hearing. *Id.* at 22. In determining whether collateral estoppel applied, the district court considered whether Jane had "an adequate opportunity to litigate" her federal claims at the disciplinary hearing, concluding she did not. *Id.* at 20–21. The district court made factual findings that the "*only* issue decided at the disciplinary hearing was whether Plaintiff violated Rule 9G, which prohibits the 'behavior' of '[o]ral sex or any act of sodomy'" and did not "require a finding by the hearing officers that the sexual act was 'consensual.'" *Id.* (emphasis added).

Nonetheless, the district court dismissed Jane's deliberate indifference claim. The court held that "the relevant incidents—including the alleged sexual assault, the suspension hearing, and post-suspension incidents with other [Peachtree] students—were not sufficiently severe, pervasive, and objectively offensive." *Id.* at 36. The district court also held that Gwinnett's "numerous acts and omissions during the investigation and hearing process … could be construed as shortcomings" but were not enough to establish deliberate indifference. *Id.* at 42.

Regarding the retaliation claim, the court held that Jane established a prima facie case of retaliation. *Id.* at 45–49. Yet it held that the school had proffered a non-discriminatory, non-pretextual reason for punishing her: Jane had, Gwinnett said,

"violated Rule 9G by engaging in consensual oral sex with MP." *Id.* at 49–54. The district court noted that the retaliation claim "presents a close call" but ultimately dismissed it. *Id.* at 51, 54.

III. Standard of Review

This Court reviews de novo a district court's grant of summary judgment. *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1311 (11th Cir. 2001). It must "view all of the facts in the record in the light most favor to [Jane], and draw all inferences in her favor." *Id.* The Court may "not make credibility determinations, nor weigh the parties' evidence." *Id.*

SUMMARY OF ARGUMENT

I. Under Title IX, a school district is liable when it responds in a deliberately indifferent manner to reports of actionable sexual harassment. Here, a reasonable jury could conclude that Gwinnett was clearly unreasonable when it suspended Jane for "oral sex" without first determining whether MP had raped her and then failed to address the hostile environment resulting from Jane's rape. A jury could also find the discrimination Jane experienced was so severe, pervasive and objectively offensive as to deprive Jane of educational benefits. The district court therefore erred in granting summary judgment on Jane's Title IX deliberate indifference claim.

II. A reasonable jury could conclude that Gwinnett violated Title IX by retaliating against Jane for reporting sexual harassment when it twice suspended her

for the very conduct she reported. Jane has provided direct evidence of retaliation and circumstantial evidence from which a jury could find that Gwinnett's proffered reason for punishing Jane—that she had engaged in consensual oral sex—is pretextual. In dismissing Jane's Title IX retaliation claim, the district court misapplied the summary judgment standard and overlooked both disputed issues of material fact and its own prior finding that Gwinnett's disciplinary hearing did not determine whether Jane consented to oral sex.

ARGUMENT

I. The District Court Erred in Granting Summary Judgment on Jane's Deliberate Indifference Claim.

Under Title IX, a federally funded school district is liable for student-on-student sexual harassment when an "appropriate person" has "actual knowledge" of the harassment, the school district responds with "deliberate indifference," and the discrimination is "so severe, pervasive, and objectively offensive that it … deprive[d] the victim[] of access to … educational opportunities or benefits." *Davis*, 526 U.S. at 650. Gwinnett does not dispute that it is a recipient of federal funds, Doc. 160 at 4, and did not move for summary judgment on the actual knowledge element, Doc. 133-2 at 7–8. Because a reasonable jury could conclude that Jane can establish the remaining elements, the district court erred in granting Gwinnett summary judgment on this claim.

A. A Jury Could Find Gwinnett Was Deliberately Indifferent.

A school is deliberately indifferent when its response, or lack thereof, to reported sexual harassment "is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. Whether a school acted with deliberate indifference "will often be a fact-laden question," *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456 n.12 (5th Cir. 1994), for a jury to assess based on the "totality of the circumstances," *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 180 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009). Here, a jury could find that Gwinnett's response to Jane's report was clearly unreasonable.

The district court, in concluding to the contrary, acknowledged only Jane's "evidence supporting her frustration with the manner in which Defendant conducted its disciplinary hearing," and her "disagree[ment] with the outcome of Defendant's investigation and findings in the hearing process," Doc. 188 at 42. This conclusion overlooked the significant evidence, and the court's own finding, that Gwinnett punished Jane without determining whether MP had raped her, as well as the school's other failures.

1. A Jury Could Conclude That Gwinnett's Decision to Suspend Jane After Its Initial Inquiry Was Clearly Unreasonable.

A jury could conclude that it was clearly unreasonable for Gwinnett to suspend Jane after its initial inconclusive "investigation." Viewing the evidence in the light most favorable to Jane, Gwinnett, at that juncture, "didn't know what [had]

happened" between MP and Jane, opting to conduct a "hearing and have the hearing officers decide." Doc. 132-26 at 16. Yet, even though it had not reached a conclusion about whether Jane had been raped, Gwinnett chose to suspend her for the very sex acts she had reported were forced on her. Doc. 132-39 at 2–3.

It is difficult to conceive of a *less* reasonable response. A jury could find it unconscionable for "victims of sexual assault [to] find themselves charged with disciplinary violations on account of having been raped." *Bibb Cnty.*, 688 F.App'x at 799 (Martin, J., concurring). Indeed, if schools were allowed to proceed in this fashion, "discrimination would go unremedied" because students would be afraid to report. *Jackson*, 544 U.S. at 181. On this basis alone, a jury could conclude Gwinnett was deliberately indifferent. Yet, the district court never mentioned this first, pre-hearing suspension in its deliberate indifference analysis. *See* Doc. 188 at 42.

2. A Jury Could Conclude That Gwinnett's Decision to Suspend Jane After the Hearing Was Clearly Unreasonable.

Compounding its previous error, Gwinnett decided, at the close of the hearing, to suspend Jane a second time for violating Rule 9G. What, exactly, this hearing determined is far from clear; school officials would not or could not explain what Gwinnett had to prove to establish Jane had violated Rule 9G. *See, e.g.*, Doc. 132-11 at 94-97 (Gwinnett officials refusing to answer Jane's lawyer's questions at disciplinary hearing). Based on the different inferences a jury could draw from the

facts, it could find Gwinnett's decision to suspend Jane a second time was clearly unreasonable.

First, a jury could find that the hearing officers never determined whether MP had raped Jane. Because Gwinnett officials "didn't know what [had] happened" between MP and Jane after their initial inquiry, they knew they should allow "the hearing officers [to] decide." Doc. 132-26 at 16. Yet Gwinnett never conducted a hearing to determine whether MP had violated any of its rules against sexual assault. *See* Docs. 132-11 at 303–04 (listing charges); 132-41 at 26–27 (listing school rules). Rather, Gwinnett only pursued a hearing about whether both students had violated Rule 9G, Doc. 132-11 at 303–04, which prohibits "[o]ral sex or any act of sodomy," Doc. 132-41 at 26. As the district court correctly found in its collateral estoppel analysis, "the plain language of Rule 9G does not necessarily require a finding by the hearing officers that the sexual act was 'consensual.'" Doc. 188 at 21. The court also found that "the hearing officers … made no determination on whether [Jane] 'welcomed' oral sex with MP" when it "found [her] to have violated Rule 9G." Doc. 188 at 11; *see also* Doc. 132-40 at 10 (hearing officer noting she did not find Jane welcomed oral sex with MP); *Quinn v. Monroe Cnty.*, 330 F.3d 1320, 1328 (11th Cir. 2003) (noting a district court's factual findings in assessing collateral estoppel "are upheld unless clearly erroneous"). Indeed, Assistant Principal Augmon testified that consent was not an element of 9G that Gwinnett had to prove for Jane to be

sanctioned. Doc. 132-11 at 97; *see also* Doc. 132-35 at 21, 33 (hearing officer testifying similarly). A jury could find, then, that Gwinnett suspended Jane for a second time without deciding whether the conduct at issue was rape—a clearly unreasonable response to her report.

Second, a jury could find that Gwinnett suspended Jane not because it found she had engaged in consensual sex but because it found she had not proven she had been raped—and that Gwinnett was clearly unreasonable in doing so. As noted above, Assistant Principal Augmon testified that, although consent was relevant to a Rule 9G determination, Gwinnett did not bear the burden of demonstrating the sexual conduct at issue was consensual. Doc. 132-11 at 97. A jury could find that, so long as Gwinnett could prove that the contact occurred, Jane bore the burden to demonstrate that it was nonconsensual. Put in more legalistic terms, consent was not an element of 9G, but lack of consent was an affirmative defense. Notably, Gwinnett did not charge Jane with violating Rule 11E, which forbids "[p]rovid[ing] false information." Doc. 132-41 at 28. A jury might conclude, then, that Gwinnett suspended Jane not because it could prove she was lying and had engaged in consensual sex with MP, but instead because Gwinnett believed she had not proven her report was true.

That approach contravenes this Court's admonition that much sexual abuse does not result in sufficient evidence to prove the violation occurred, and schools

must act accordingly. *See Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1262 (11th Cir. 2010) (noting "inconclusive investigations are common, especially when alleged harassment occurs behind closed doors" and so schools should take "cautionary measures"). It would be inappropriate, in such circumstances, for a school to punish the accused, but the school must recognize that an unverified report may still be true. *See id.* Consistent with this instruction, Title IX's regulations forbid schools from disciplining students for "false statements" solely on the basis that their sexual harassment complaints were not ultimately substantiated. 34 C.F.R. § 106.71(b)(2) (2020). Otherwise, every victim who confides in a trusted adult at school would be suspended if they lacked sufficient evidence to prove their abuse, a clearly unreasonable practice. A jury could readily conclude that is exactly what happened here: Gwinnett suspended Jane because, in its judgment, she had not substantiated her report.

3. A Jury Could Find Gwinnett Sought to Protect MP from Jane's Allegation, Regardless of its Credibility.

Record evidence indicates that Gwinnett planned, from the start, to avoid finding that MP, the son of a school employee, had raped Jane. This supports a finding of deliberate indifference. *See Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 272–73 (4th Cir. 2021) (holding that biased investigation and school's other attempts to "sweep the reports under the rug so as not to cause trouble for [the accused]" were

signs of deliberate indifference); *Doe v. Manor Coll.*, 479 F.Supp.3d 151, 167 (E.D. Pa. 2020) (holding a sham investigation is evidence of deliberate indifference).

A jury could find Gwinnett's pre-hearing "investigation" was a sham meant to protect MP. During his initial interview, administrators and MP's mother gently spoon-fed him the "right" answers. *E.g.*, Docs. 132-15 at 6, 7; 132-23 at 4, 6. For example, Assistant Principal Weyher asked MP why Jane had told him not to tell anyone about their encounter, Doc. 132-23 at 6, as MP had recounted but Jane denied, Doc. 132-33 at 6. MP responded unequivocally, "I have no idea," Doc. 132-23 at 6. So Weyher told MP what to think: "You think it's because she's got a boyfriend." *Id.* MP immediately changed his answer to parrot Weyher's. *Id.* Gwinnett also encouraged MP's mother, a school employee, to write his statement for him (and then covered up that fact). Docs. 132-6 at 25; 132-15 at 10. And Gwinnett never asked MP about Jane's report that he had masturbated in front of her, even though school rules prohibited such conduct with or without consent. Docs. 132-3 at 26; 132-5 at 20; 132-6 at 30. At the end of the interview, Weyher told MP and his parents that he "appreciate[d their] support," implying they were helping Gwinnett get to the answer it wanted. Doc. 132-23 at 7.

That approach stood in sharp contrast to Gwinnett's repeated interrogations of Jane, where multiple officials aggressively and incredulously shot questions at her about how loud she screamed, what she wore, why she did not fight back harder,

and why she did not tell anyone sooner than the morning after the assault. *See supra* pp. 5–7 (recounting Gwinnett's interrogations of Jane). Jane suffered these questions alone, while MP was interviewed in the presence of his parents. *Compare* Doc. 132-11 at 124 *with* Doc. 132-24 at 11. A jury might be dismayed to hear, in recordings of these interviews, the strikingly different tones in which Gwinnett officials spoke to the two students. *Compare* Docs. 132-20; 132-31; 132-32 (recorded interviews of Jane) *with* Docs. 132-22; 132-29 (recorded interviews of MP).[5] It might also take note of Gwinnett's instant suspicion of Jane's story, despite her consistency: Officials asked Jane *eighteen times* whether she had sat on MP's lap or straddled him, even though she repeatedly explained she had not. Doc. 132-33 at 4–5, 9–11. To Gwinnett, MP was credible even when he did not know the answers or changed his account, but Jane's consistent responses were inherently suspect.[6]

Gwinnett's decision not to charge MP with a sexual assault offense—even though it did not know whether he had raped Jane, Doc. 132-26 at 16—confirms its

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[5] The full extent of this disparity cannot be gleaned from the transcript alone, but is apparent in the cited video recordings.

[6] Gwinnett did not seem concerned that, in the initial investigation, MP denied receiving any text messages from Jane's stepfather admonishing him for sending unwanted sexually explicit material to Jane, but then at the hearing admitted that he had. Docs. 132-6 at 29; 132-11 at 173. Officials' decision to credit an accused student's inconsistent story over a complainant's consistent story can indicate deliberate indifference. *Fairfax*, 1 F.4th at 272–73.

intent to protect MP from Jane's allegations. The hearing officers could not find students responsible for violations other than those charged. Doc. 132-40 at 6. Accordingly, by charging MP only with violating Rule 9G, Gwinnett ensured there was no possibility that the hearing would result in a finding that MP had raped Jane, a far more serious offense. And Gwinnett's hostility toward Jane, and preference for MP, was on full display at the hearing. Although both students were charged with the same offense, Gwinnett was explicitly on MP's "side," treating Jane as a liar and MP as her hapless yet credible victim. *See supra* pp. 9–10. And then Gwinnett suspended Jane for longer than MP. Docs. 132-48 at 2; 136-19 at 7. Accordingly, a reasonable jury could determine that Gwinnett's "investigation" had been nothing but a cover-up.[7]

4. If a Jury Believes Gwinnett Determined the Sex Was Consensual, it Could Find Gwinnett's Determination Was Based on Sexist Stereotypes.

As explained above, a jury could find that Gwinnett did not determine that Jane had consented to sex with MP before suspending her. *See supra* pp. 20–24. If a jury instead credits Gwinnett's story that it determined the oral sex was consensual,

[7] Apart from its clear desire to protect MP, Gwinnett might have had its own reasons for avoiding a finding of non-consent at the hearing: If the hearing officers had found, or otherwise implied, that MP had raped Jane, Gwinnett would have had to answer for the fact that it had suspended Jane for what its fact-finders concluded was her rape.

rather than rape, it could find that the school's reasoning was based on sexist, archaic stereotypes. To be clear, Title IX does not require a plaintiff to demonstrate that a school's deliberate indifference to harassment was motivated by sex-based animus so long as the underlying harassment was sexual or otherwise sex-based. *See Davis*, 526 U.S. at 653–54. But where, as here, a school's actions are motivated by sex stereotypes, they are clearly unreasonable. *Cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) (explaining baseless sex stereotypes are illegitimate reasons for government action); *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1241 (11th Cir. 2016) (explaining an employer may be liable when sex stereotypes factor into its decision-making process); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 881–82 (5th Cir. 2000) (holding schools violate Title IX when they act based on "archaic [sex-based] assumptions" about students).

First, a jury could find Gwinnett did not believe Jane's sexual assault report because she did not conform to the stereotype that women physically resist rape with all their strength. District employees repeatedly interrogated Jane about why she had not fought back harder or screamed louder. *See supra* pp. 5–7. Similarly, Gwinnett's attorney explained at the disciplinary hearing that "the fact that [Jane] … chose not to scream louder and louder as this was going on, leads me to believe [MP]. Based on the fact that she has no physical injuries leads me to believe [MP]." Doc. 132-11 at 303. Those statements reflect outdated stereotypes that women always resist rape

with all their strength, such that any woman who could not show she fought back to her utmost—even if she *did* fight back—was presumed to be lying. *See, e.g., People v. Dohring*, 59 N.Y. 374, 384 (1874) (noting court could not "conceive of a woman" who would not "resist [unwanted sex] so hard and so long as she was able"); Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. Ill. L. Rev. 953, 962–68 (1998); *see also State v. Rusk*, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting) (explaining view that it is "the natural instinct of every proud female to resist"). In fact, only a small fraction of rape victims physically resist their attacker, and American rape law abolished the utmost resistance requirement decades ago. Anderson, *supra*, at 958, 964–68.

Second, a jury could find that, although Jane reported the assault the next morning, Gwinnett disbelieved her because she did not complain sooner. SRO Lockard repeatedly asked Jane why she had not immediately reported, Doc. 132-21 at 7, and Gwinnett's attorney explained at the hearing that "the fact that [Jane] didn't report this immediately after it happened despite the fact that she walked straight to her mother's car leads me to believe [MP]," Doc. 132-11 at 303. That view echoes myths that women who are raped report immediately, so any delay is proof the assault did not occur. *See State v. Hill*, 578 A.2d 370, 374–77 (N.J. 1990); *see also State v. Neel*, 60 P. 510, 511 (Utah 1900) ("The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest

opportunity"). In truth, most victims, especially young victims, take far longer to report than the fifteen hours it took Jane. Konstantin Klemmer, Daniel B. Neill, & Stephen A. Jarvis, *Understanding Spatial Patterns in Rape Reporting Delays*, Royal Soc'y Open Sci. 8–9, 14 (2021), https://royalsocietypublishing.org/doi/pdf/10.1098/rsos.201795; Docs. 132-33 at 3–4 (indicating Jane's rape occurred around 4:30pm); 132-11 at 58 (indicating Jane called her mother around 7:30am).

Accordingly, if a jury found that Gwinnett determined Jane had not been raped, it could easily conclude such a determination was clearly unreasonable because it was based on archaic, sexist stereotypes—exactly the sort that Title IX forbids. *See Parents for Privacy v. Barr*, 949 F.3d 1210, 1228 (9th Cir.) ("Title IX is aimed at addressing discrimination based on sex or gender stereotypes"), *cert. denied*, 141 S.Ct. 894 (2020).

5. A Jury Could Conclude Gwinnett's Failure to Address the Resultant Hostile Environment Supports a Finding of Deliberate Indifference.

Finally, a jury could also find that Gwinnett was deliberately indifferent in failing to provide Jane with accommodations and support services necessary for her to stay at Peachtree. Gwinnett failed to offer Jane support services during the investigation, contrary to school policy. Docs. 132-7 at 8; 132-8 at 5. It never informed Jane about her Title IX rights. *E.g.*, Doc. 132-8 at 5; *see also Stinson ex rel. K.R. v. Maye*, 824 F.App'x 849, 860 (11th Cir. 2020) (holding school's "failure

to advise [victim] of her Title IX rights" supported finding of deliberate indifference). Before Jane returned to school, she told officials she was afraid of seeing MP in Peachtree's hallways, Doc. 132-9 at 21, and her parents and psychologist urged Gwinnett to ensure Jane had no contact with MP, Docs. 132-54 at 3; 132-55 at 2. Gwinnett developed a barebones "safety plan" indicating that Jane should not be near MP, Doc. 132-56 at 2, but never directed MP to stay away from Jane, *see* Doc. 160 at 168–69—meaning Jane alone bore the onus to avoid contact. That was clearly unreasonable: This Court has "repeatedly recognized that a school district's reasonable response to sexual harassment may include corrective action such as monitoring … an accused teacher or student despite the inconclusive nature of the school's investigation." *Broward Cnty.*, 604 F.3d at 1262.

Gwinnett also failed to develop a plan to stop classmates' persistent harassment of Jane for being raped and reporting it, instead instructing Jane to ignore her bullies. Doc. 132-9 at 27. Gwinnett says it spoke to just one of the multiple harassers, AT, before Jane left Peachtree, Doc. 133-1 at 83–91 (recounting sum of Gwinnett's responses to post-suspension harassment), telling him only that his "behavior *could* be considered bullying *if* it were to continue," Doc. 136-24 at 5 (emphasis added). The school's minimal efforts were demonstrably ineffective in ameliorating the ongoing campaign of harassment stemming from the reported rape, which could not be isolated to one bad actor, and which ultimately forced Jane to

leave first Peachtree and then the district. *See supra* pp. 11–14 (recounting campaign of harassment and Jane's transfer). "Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000) (cited by *Broward Cnty.*, 604 F.3d at 1256).

B. A Jury Could Find the Discrimination Was Severe, Pervasive, and Objectively Offensive.

A reasonable jury could conclude that the discrimination Jane suffered was "so severe, pervasive, and objectively offensive that it denie[d her] the equal access to education that Title IX is designed to protect." *Davis*, 526 U.S. at 652. "Whether gender-oriented conduct rises to the level of actionable harassment … depends on a constellation of surrounding circumstances …." *Id.* at 651 (internal quotation marks omitted). In assessing this element, this Court examines both the underlying peer harassment and a school's own acts. *See Hill v. Cundiff*, 797 F.3d 948, 973 (11th Cir. 2015); *Stinson*, 824 F.App'x at 857–58. "[T]he severity and pervasiveness evaluation is particularly unsuited for summary judgment because it is quintessentially a question of fact." *Doe v. Sch. Dist. No. 1, Denver*, 970 F.3d 1300, 1312 (10th Cir. 2020).

Here, MP forcibly kissed Jane, orally raped her, and masturbated in front of her without her consent. Doc. 132-16 at 3–4. Jane was then forced to share a school

building with MP while other students berated her with slurs and accused her of lying. *See supra* pp. 11–14 (recounting post-report harassment). Gwinnett's response compounded the effects of this harassment: It blamed and shamed Jane for her rape, subjected her to hostile interrogations, required her to reenact the assault, and ultimately punished her. *See supra* pp. 5–11 (recounting Gwinnett's response to Jane's report). A jury could certainly conclude that, cumulatively, this discrimination was "so severe, pervasive, and objectively offensive that it denie[d Jane] equal access to education." *Hawkins v. Sarasota Cnty. Sch. Bd.*, 322 F.3d 1279, 1288 (11th Cir. 2003).

In reaching the contrary conclusion, the district court wrongly assessed the rape and verbal harassment separately, improperly drew inferences against Jane, disregarded the impact of the discrimination, and ignored Gwinnett's own acts.

1. The Discrimination Must Be Assessed As a Whole.

The district court erred in artificially dividing the sexual harassment into two separate categories—the initial rape and the subsequent harassment—then concluding that neither category was independently severe and pervasive. Doc. 188 at 31–39. That approach contradicts both precedent and common sense. The Supreme Court has repeatedly emphasized that sexual harassment must be assessed holistically. *See, e.g.*, *Davis*, 526 U.S. at 651 (noting inquiry turns on "a constellation of surrounding circumstances"); *Oncale v. Sundowner Offshore Servs., Inc.*, 523

U.S. 75, 82 (1998) (same); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) ("[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances"); *Meritor*, 477 U.S. at 69 (noting "the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of the circumstances'").

In *Davis*, for example, the Court concluded that the plaintiff had pleaded "severe, pervasive, and objectively offensive" harassment by alleging that a classmate engaged in a five-month course of "verbal" harassment and "objectively offensive touching." 526 U.S. at 653. In doing so, the Court assessed the pattern of harassment as a whole, rather than, say, assessing the verbal and physical abuse separately. *See id.* Similarly, in *Hill*, this Court determined that a rape, the rapist's repeated propositions, and the school's own misconduct—considered cumulatively—could be actionable. 797 F.3d at 973.

That holistic approach is only logical: Even the most egregious pattern of harassment may fail to meet the "severe and pervasive" element if each instance is viewed in isolation. The "pervasiveness" requirement, in particular, contemplates that most actionable sexual harassment will entail repeated misconduct with a cumulative impact. *See Davis*, 526 U.S. at 652–53.

Had the district court followed the Supreme Court's directions, it would have recognized that a jury could certainly find that the rape and subsequent

discrimination, taken together, constituted severe, pervasive, and objectively offensive sexual harassment. *See, e.g.*, *Stinson*, 824 F.App'x at 857–58 (holding sexual assault, subsequent related peer harassment, and discrimination by school officials was severe, pervasive, and objectively offensive).

2. All Inferences Must Be Drawn in Jane's Favor.

The district court also improperly drew inferences against Jane, minimizing the peer harassment and substituting its own judgment for a jury's. As the court noted, Jane "provides evidence that, when she returned to school after her suspension, students at Peachtree called her 'slut' and 'whore' and otherwise taunted her about reporting the sexual assault." Doc. 188 at 31–32. Yet the court determined that harassing a rape victim for reporting her rape is not "objectively offensive." *Id.* at 31–33. Setting aside the foundational error of assessing the verbal harassment separately from the rape—when a jury could certainly find the two combined are objectively offensive—the district court misapplied the summary judgment standard.

True, "[d]amages are not available for simple acts of teasing and name-calling among school children." *Davis*, 526 U.S. at 652. A reasonable jury could conclude, however, that taunting a student for being raped, and for reporting it, is a far cry from playground-variety insults. In a closely analogous case, the Tenth Circuit held that students' harassment of a rape victim after she reported their classmate—including

calling her a "dirty slut" —was actionable under Title IX. *Sch. Dist. No. 1*, 970 F.3d at 1309–12. Other courts are in accord. *See, e.g.*, *Stinson*, 824 F.App'x at 858 (noting "the series of events" that occurred after plaintiff's rape, including students gossiping about the assault, was actionable); *Doe v. E. Haven Bd. of Educ.*, 200 F.App'x 46, 48 (2d Cir. 2006) (holding that "name-calling in the context of a reported rape" may be actionable under Title IX); *Goodwin v. Pennridge Sch. Dist.*, 389 F.Supp.3d 304, 315–16 (E.D. Pa. 2019) (similar); *see also Feminist Majority Found. v. Hurley*, 911 F.3d 674, 696 (4th Cir. 2018) (holding Title IX requires schools to address students' retaliatory harassment). Whatever the district court's own views, a jury surely *could* believe that ridiculing a child for her rape is "objectively offensive"—the correct standard on summary judgment, *Frederick*, 246 F.3d at 1311. And that is even clearer when the peer harassment is properly viewed as part of a course of conduct beginning with the rape. *See supra* pp. 33–35. As with other "matters of degree," this question is "best left to the jury." *Sch. Dist. No. 1*, 970 F.3d at 1311–12.

Because of the subsequent discrimination, this case does not pose the question of whether the initial sexual assault could be independently actionable. But the district court was wrong that it could not. *See* Doc. 188 at 36–38. In most cases, a single incident will not be actionable because it will not have a substantial effect on the victim's education. *See Davis*, 526 U.S. at 652–53. But a sufficiently serious

sexual assault may have the requisite impact. *See, e.g.*, *id.* (noting "a single instance of sufficiently severe one-on-one peer harassment could be said to have" a sufficiently severe effect); *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1298 (11th Cir. 2007) (noting a sufficiently serious sexual assault may be actionable); *Fairfax*, 1 F.4th at 274 (same); *Fitzgerald*, 504 F.3d at 172-73 (same). Further, courts recognize that, even absent additional specific acts of harassment, "the possibility of further encounters 'between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a [school].'" *Kinsman v. Fla. State Univ. Bd. of Trustees*, No. 4:15CV235-MW/CAS, 2015 WL 11110848, at *4 (N.D. Fla. Aug. 12, 2015); *see also, e.g.*, *Doe v. Bd. of Regents of the Univ. of Wisconsin*, No. 20-CV-856-WMC, 2021 WL 5114371, at *3 (W.D. Wis. Nov. 3, 2021) (similar and collecting cases); *Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991) (stating similar rule for Title VII).

3. The Impact of the Discrimination on Jane Indicates It Is Actionable.

"Adding to the evidence that the harassment was severe and pervasive are the allegations regarding the impact of the harassment on [Jane]," *Sch. Dist. No. 1*, 970 F.3d at 1312, which the district court erroneously disregarded. In *Davis*, the Supreme Court expressly tied the standard for actionable harassment to the impact on the victim: The question, it said, is whether "the behavior is so severe, pervasive, and

objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Davis*, 526 U.S. at 652; *see also Hawkins*, 322 F.3d at 1288 (posing the question whether the discrimination is "so severe, pervasive, and objectively offensive that it denies its victims equal access to education").

Here, a jury could find the harassment had such an effect on Jane. *See infra* pp. 40–41 (describing educational impact). As a result of the discrimination at issue, Jane missed over a month of school. *See supra* pp. 13–14. She missed school when suspended, and then when she stayed home to avoid a hostile environment. *See supra* pp. 8, 11–14. When Gwinnett refused to address the hostile environment, Jane was forced to transfer to a new school. *See supra* pp. 13–14.

The district court's analysis of the educational impact element misread circuit precedent. The court wrote that taunting "is generally not so severe, pervasive, and objectively offensive to have a systemic effect of denying equal access to education," Doc. 188 at 38–39, citing *Hawkins*, 322 F.3d at 1288. But that is not what *Hawkins* said. There, this Court held that the alleged peer harassment—which included nothing as serious as rape—might indeed have been "severe, pervasive and objectively offensive." *Id*. But "it was not *so* severe, pervasive, and objectively offensive that it had the systemic effect of denying the [victims] equal access to education," because "[t]he record … reflects no concrete, negative effect on either [the plaintiffs'] ability to receive an education or the[ir] enjoyment of equal access

to educational programs or activities." *Id.* at 1289–89. Here, the harassment includes more profound violence and, unsurprisingly, affected Jane's education in more profound ways. *See infra* pp. 40–41. *Hawkins*, then, only underscores that the inquiry here is a fact-dependent one, and that Jane's educational injuries could support a jury's conclusion that she suffered actionable discrimination.[8]

4. Gwinnett's Own Actions Are Part of the Pattern of Discrimination.

In assessing the "severe, pervasive, and objectively offensive" element, this Court looks not only to peer harassment but to Gwinnett's own acts. For example, in *Hill*, this Court determined that the plaintiff met this requirement based on the combination of a sexual assault, verbal harassment, and her school's related actions and inactions. 797 F.3d at 973. Similarly, in *Stinson*, a panel of this Court looked at the combined effect of the student's rape, subsequent harassment by peers, inappropriate comments made by the principal to whom she reported, and the principal's minimal response. 824 F.App'x at 857–58. Here, too, the Court must consider not only abuse by peers but also Gwinnett's own bad acts, including comments officials made during the investigation and hearing, the repeated

[8] The district court also discounted the offensiveness of the taunting because Gwinnett told one student to stop harassing Jane. Doc. 188 at 33. That is relevant to an assessment of the school's response, but does not lessen the offensiveness of the peer harassment.

reenactments of Jane's rape, and Gwinnett's decision to suspend Jane rather than offer support. *See supra* pp. 5–11.

This approach makes sense. As explained above, the benchmark for actionable harassment is its impact on the victim's education. *See supra* pp. 37–38. Where a school's response "exacerbate[s] the situation," *Stinson*, 824 F.App'x at 858, its conduct may cause an educational deprivation even if the peer harassment on its own would not. Here, even if the peer harassment Jane experienced had been far less severe, Gwinnett's response—most obviously its decision to suspend her twice—would have still deprived her of educational opportunities. Accordingly, a jury could find that the discrimination to which Jane was subjected by both her peers and Gwinnett officials "was so severe, pervasive, and objectively offensive that it denie[d] its victim[] the equal access to education that Title IX is designed to protect." *Davis*, 526 U.S. at 652.

C. A Jury Could Find Gwinnett's Response Deprived Jane of Access to an Educational Opportunity or Benefit.

Although the district court never reached this element, a jury could readily find that "the discrimination 'effectively bar[red Jane's] access to an educational opportunity or benefit.'" *Williams*, 477 F.3d at 1298. A plaintiff satisfies this element where the discrimination in question had a "concrete, negative effect on [their] ability to receive an education." *Davis*, 526 U.S. at 654. A victim's "missed time at school," decline in academic performance, mental health struggles, and transfer to a

new school to escape harassment are prime examples of such effects. *Hill*, 797 F.3d at 976; *see also Fairfax*, 1 F.4th at 275 (listing cognizable effects).

The record is replete with evidence from which a jury could find the assault and subsequent discrimination impeded Jane's access to education. Most obviously, Gwinnett twice suspended Jane. *See supra* pp. 8, 11; *see also Williams*, 477 F.3d at 1298 (acknowledging a formal ban as the quintessential educational deprivation). After returning to Peachtree, Jane continued to miss days of school. *See supra* pp. 11–14 (detailing school time missed). To escape ongoing hostilities stemming from her rape report, Jane transferred schools three times, ultimately leaving the school district altogether. *See supra* pp. 14–15; *see also Hill*, 797 F.3d at 976 (holding student experienced educational deprivation where she "had to transfer due to the school's clearly unreasonable response"); *Stinson*, 824 F.App'x at 854, 860 (similar). Through all of this, Jane experienced suicidal thoughts, depression, anxiety, and panic attacks, and suffered from PTSD. Docs. 132-24 at 32–33; 132-88 at 3–4.

* * *

For the reasons stated above, this Court should reverse the district court's grant of summary judgment to Gwinnett on Jane's deliberate indifference claim.

II. The District Court Erred in Granting Summary Judgment on Jane's Retaliation Claim.

"Retaliation against a person because that person has complained of sex discrimination is [a] form of intentional sex discrimination encompassed by Title IX's private cause of action." *Jackson*, 544 U.S. at 173. A plaintiff alleging retaliation can survive summary judgment "by presenting direct evidence of an intent to discriminate or circumstantial evidence using *McDonnell Douglas*'s burden-shifting framework." *Crawford v. Carroll*, 529 F.3d 961, 975–76 (11th Cir. 2008) (describing framework for Title VII retaliation claim) (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)); *see also Kocsis v. Fla. State Univ. Bd. of Trs.*, 788 F.App'x 680, 686 (11th Cir. 2019) (applying Title VII framework to Title IX retaliation claim).[9] The district court erred in granting summary judgment to Gwinnett on Jane's retaliation claim because she presented both kinds of retaliation evidence.

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[9] This Court has not decided in a published opinion whether a Title IX plaintiff must establish that her complaint was a "motivating factor" or "but-for cause" of the retaliatory conduct. The Court need not decide that question here because Jane can meet either standard. Nonetheless, if the Court chooses a position, it should apply the "motivating factor" test. The Supreme Court in *University of Texas Southwestern Medical Center v. Nassar* assumed that Title IX uses a "motivating factor" test, and justified its adoption of "but-for causation" for Title VII retaliation cases based on differences in the statutes' text. 570 U.S. 338, 356, 362 (2013); *see also Varlesi v. Wayne State Univ.*, 643 F.App'x 507, 518 (6th Cir. 2016).

A. Jane Has Presented Direct Evidence of Retaliation.

Jane has presented direct evidence that Gwinnett engaged in unlawful retaliation under Title IX. Direct evidence is "evidence, which if believed, proves existence of fact in issue without inference or presumption." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189 (11th Cir. 1997). Direct evidence exists when the defendant's practice is "facially discriminatory." *Maddox v. Grandview Care Ctr., Inc.*, 780 F.2d 987, 991 (11th Cir. 1986); *Mullins v. Crowell*, 228 F.3d 1305, 1312 (11th Cir. 2000) (same). "The absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 188 (1991). For example, "[w]hen an employee's participation in statutorily protected activity is the determining factor in an employer's decision to take adverse employment action, that action is invalid regardless of the employer's intent"—that is, regardless of its "motivation for adopting or invoking the policy." *E.E.O.C. v. Bd. of Governors of State Colls. & Univs.*, 957 F.2d 424, 428 (7th Cir. 1992) (holding that halting grievance proceedings once an employee files a legal charge is per se retaliatory); *see also Watford v. Jefferson Cnty. Pub. Schs.*, 870 F.3d 448, 455 (6th Cir. 2017) (same).

Here, as detailed above, there is direct evidence from which a jury could find that Gwinnett suspended Jane for the very same conduct that she reported as sexual

assault, without first deciding whether the conduct was consensual. *See supra* pp. 20–23. Gwinnett said that Jane was suspended for oral sex in violation of Rule 9G, which by its plain terms does not require any finding of consent. *See* Docs. 132-39 at 2–3; 132-41 at 26; 188 at 21. Gwinnett officials also told Jane's family they "didn't know what [had] happened" when they first suspended her. Doc. 132-26 at 16.

Punishing students for reported sexual activity—without first deciding whether that activity was sexual assault—is per se retaliation under Title IX. The Supreme Court in *Jackson* recognized retaliation was a form of intentional discrimination prohibited by Title IX because "if retaliation were not prohibited, Title IX's enforcement scheme would unravel." 544 U.S. at 180. That logic applies here. Sexual activity is inherent to any report of sexual assault. If Gwinnett doles out punishment for sexual activity, regardless of whether it is consensual, then students will be deterred from ever reporting sexual assault. That cannot, per *Jackson*, be lawful under Title IX. *See id.*; *cf. Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1269 (11th Cir. 2010) (holding an employer retaliates when it fires a complainant due to the "awkward[ness]" inherent to "work[ing] with people who complain that you have discriminated against them").

At a minimum, there is direct evidence that Gwinnett suspended Jane for failing to substantiate her report of sexual assault, which is also per se retaliation.

Assistant Principal Augmon testified that, although consent was relevant to Rule 9G, Gwinnett did not bear the burden of proving the sexual contact was consensual. Doc. 132-11 at 96–97. In other words, Jane would be punished for engaging in sexual activity unless she could affirmatively prove she had been raped. Punishing a student simply because the school does not believe her complaint constitutes retaliation. *See Pye v. Nu Aire, Inc.*, 641 F.3d 1011, 1016, 1020 (8th Cir. 2011) (holding plaintiff provided "direct evidence of retaliation" where emails showed he was fired because his employer did not believe his complaints); *Young-Losee v. Graphic Packaging Int'l, Inc.*, 631 F.3d 909, 912 (8th Cir. 2011) (holding there was direct evidence of retaliation where employer called plaintiff's complaint of harassment "total bullshit" and fired her); 34 C.F.R. § 106.71(b)(2) (prohibiting as retaliatory the discipline of students for falsely reporting sexual harassment based solely on students' failure to substantiate); *see also Gilooly v. Missouri Dep't of Health & Senior Servs.*, 421 F.3d 734, 740 (8th Cir. 2005) ("[A]n investigator's independent determination of truth or falsity of [the plaintiff's] allegation … [can]not legally be grounds for discharge." (internal quotation marks omitted)).

B. Jane Can Satisfy the Burden-Shifting *McDonnell Douglas* Test.

This Court should also reverse because a jury could conclude, based on circumstantial evidence, that Gwinnett retaliated against Jane. Under the *McDonnell Douglas* test, the plaintiff first must establish a prima facie case of retaliation by

showing that: "(1) she engaged in statutorily protected conduct…; (2) she suffered an adverse action; and (3) there is some causal relationship between the two events." *Tolar v. Bradley Arant Boult Commings, LLP*, 997 F.3d 1280, 1289 (11th Cir. 2021). "The burden then shifts to the [defendant] to articulate a legitimate, nonretaliatory reason for the adverse action." *Id.* "Assuming [the defendant's] burden is met, the burden shifts back to the plaintiff to establish that the reason offered by [the defendant] was not the real basis for the decision, but a pretext for retaliation." *Id.* (internal quotations and brackets omitted). The district court correctly held that Jane established a prima facie case of retaliation but erred in holding that she failed to present evidence of pretext.

1. Jane Can Establish a Prima Facie Case of Retaliation.

The district court correctly held that Jane established a prima facie case of retaliation. Doc. 188 at 46–48. *First*, Jane engaged in protected conduct when she reported her sexual assault to numerous administrators. *See supra* pp. 4–5, 7. "Reporting [such] incidents of discrimination" is protected conduct under Title IX. *Jackson*, 544 U.S. at 180. *Second*, Jane suffered an adverse action each time she was suspended. Docs. 132-11 at 311–12; 132-38 at 2, since each suspension "might have dissuaded" a reasonable student. *Tolar*, 997 F.3d at 1293; *see also Shinabargar v. Bd. of Trs. of Univ. of D.C.*, 164 F.Supp.3d 1, 17 (D.D.C. 2016) (recognizing school suspension as adverse action). *Third*, Jane established a causal link between the

protected activity and the adverse actions by demonstrating that "the decision-makers were aware of the protected conduct, and that the protected activity and the adverse action were not wholly unrelated." *Munoz v. Selig Enters., Inc.*, 981 F.3d 1265, 1277 (11th Cir. 2020). She also demonstrated a causal link "by showing close temporal proximity between the statutorily protected activity and the adverse … action." *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007).

Here, Gwinnett learned of Jane's sexual assault report and then, five days later, suspended her. *See supra* pp. 4–8; *see also McCann v. Tillman*, 526 F.3d 1370, 1376 (11th Cir. 2008) (holding that "five days … satisfies the 'close temporal proximity' test"). Other evidence shows Gwinnett was hostile toward Jane's report, creating an inference of retaliation. *See infra* pp. 50–51. Finally, Gwinnett suspended Jane for the very conduct that Jane herself reported to the school as sexual assault. The protected activity and the adverse action are therefore not just related, but inextricably intertwined.

Thus, as the district court correctly held, the record evidence shows Jane established a prima facie case of retaliation. Doc. 188 at 46–48. "The grant of summary judgment, though appropriate when evidence of discriminatory intent is totally lacking, is generally unsuitable where plaintiff has established a prima facie case because of the elusive factual question of intentional discrimination." *Maddow*

v. Procter & Gamble Co., 107 F.3d 846, 851 (11th Cir. 1997) (internal quotation marks, ellipses, and brackets omitted).

2. There Is a Genuine Issue of Material Fact as to Whether Gwinnett's Proffered Reason for Suspending Jane was Pretext for Discrimination.

Jane can satisfy her final burden under the *McDonnell Douglas* framework because she presented evidence that Gwinnett's proffered reason for suspending her was pretextual. To rebut Jane's prima facie case, Gwinnett provided what the district court found was a legitimate, nonretaliatory justification: Gwinnett claimed it suspended Jane because "she violated Rule 9G by engaging in consensual oral sex with MP." Doc. 188 at 49.

This requires Jane to present evidence that, "viewed in the light most favorable" to her, "raise[s] a genuine issue of material fact" as to whether Gwinnett's proffered reason for suspending Jane was not the real reason. *Maddow*, 107 F.3d at 851. She can do this by showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [Gwinnett's] proffered legitimate reasons for its action." *Munoz*, 981 F.3d at 1277. Because Jane presented such evidence, "the court may not preempt the jury's role of determining whether to draw an inference of intentional discrimination from the plaintiff's prima facie case taken together with rejection of [Gwinnett's] explanations for its action." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997). Where, as here, "the proffered reason for

termination is inextricably intertwined with the protected conduct at issue," courts apply extra scrutiny in determining whether the defendant's purported reason for the adverse action is an honestly held belief or pretext for retaliation. *Pye*, 641 F.3d at 1022; *see also Louis v. Sun Edison, LLC*, 797 F.Supp.2d 691, 705 (D. Md. 2011).

Here, Jane has presented sufficient evidence from which a jury could conclude that Gwinnett's proffered reason for suspending Jane was pretextual. The district court reached the contrary conclusion by misapplying the summary judgment standard. It erroneously wrote that "to defeat summary judgment, Plaintiff must show that [Gwinnett's] stated reason was mere pretext," and granted Gwinnett's motion on the basis that "a reasonable jury could believe [Gwinnett's] proffered reason." Doc. 188 at 50, 52. But "[b]ecause this is a summary judgment motion, [Jane] need only raise a genuine issue of material fact that the reason was a pretext; [she] do[es] not need to actually prove it." *Maddow*, 107 F.3d at 851. The district court also erred in overlooking both disputes of fact and its own previous findings.

i. A Jury Could Conclude Gwinnett Did Not Find Jane Consented to Sex.

Most important, as explained above, there is ample evidence that Gwinnett did not determine, before either of Jane's suspensions, that she had consented to oral sex. *See supra* pp. 20–23. Indeed, in rejecting Gwinnett's collateral estoppel argument, the district court noted that a Rule 9G violation did not turn on whether the oral sex was consensual and that the hearing officers made no such

determination. Doc. 188 at 11. If Gwinnett had not decided whether Jane consented to oral sex, it could not have suspended her for "engaging in consensual oral sex." *Id.* at 48–49. The mere fact that the "asserted justification is false, may permit the trier of fact to conclude that the [defendant] unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

ii. A Jury Could Find Gwinnett Was Hostile to Jane's Report.

Jane has also presented evidence that Gwinnett was immediately hostile toward her report of sexual assault, which further supports a jury finding that Jane was not suspended for engaging in consensual oral sex, but instead for reporting sexual assault. "[A]ntagonism or hostility toward protected activity" are "indications of pretext." *Hess v. Union Pac. R.R. Co.*, 898 F.3d 852, 858 (8th Cir. 2018); *see also Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1071 (9th Cir. 2003) (recognizing "exasperation, lack of sympathy, and even animosity towards the plaintiff" is evidence of pretext and retaliatory animus); *Sirois v. Long Island R.R. Co.*, 797 F.App'x 56, 59–60 (2d Cir. 2020) (similar).

As detailed above, Jane was subjected to extreme levels of hostility upon reporting the assault. *See supra* pp. 5–11. For example, over multiple interviews, officials repeatedly asked Jane the "most humiliating questions" including why she did not bite MP's penis, why she did not "grab his testicles and squeeze" them, and what she was wearing during the assault. Docs. 132-11 at 255–56; 132-21 at 5–6;

132-24 at 10. Jane was forced to go back into the RVN room where she had been raped and act out the assault. Doc. 132-24 at 12. SRO Lockard also warned Jane she could get MP in "big trouble" by reporting the sexual assault. Doc. 132-11 at 256.

A reasonable jury could conclude that questions and comments of this nature were intended to shame and humiliate Jane, make her believe that the assault was her fault, and intimidate her into recanting—indicating Gwinnett's animus toward Jane for reporting sexual assault. The disparity between Gwinnett's questioning of Jane and gentle treatment of MP, *supra* pp. 25–26, further suggests that Gwinnett's hostility and adverse action were motivated by Jane's report of sexual assault. *See Rioux v. City of Atlanta*, 520 F.3d 1269, 1276 (11th Cir. 2008) (recognizing disparate treatment as evidence of pretext); *Paul v. Murphy*, 948 F.3d 42, 52 (1st Cir. 2020) ("[E]vidence that an employee was subjected to a double standard on the basis of sex-based stereotypes can supply evidence of pretext"). So does Gwinnett's decision to suspend Jane for longer than MP. Docs. 132-48 at 2; 136-19 at 7. A jury could find that this hostility shows Gwinnett's proffered justification is pretextual and its real reason was retaliatory. The district court erred in usurping the jury's decision on this issue.

iii. A Jury Could Conclude That, Even if Gwinnett Technically Found Jane Consented to Oral Sex, It Lacked an Honest, Good Faith Belief.

Even if a jury found that Gwinnett made some pro forma determination that Jane engaged in consensual oral sex, there is ample evidence from which a jury could conclude that Gwinnett lacked an honest, good faith belief that Jane consented to the sex. Where a defendant purportedly punishes a complainant for reasons related to the underlying report's credibility, courts have held that "the facts and circumstances of the [defendant's] investigation" are relevant to determining if the defendant's proffered reason is a reasonable, honest belief or merely pretext. *Pye*, 641 F.3d at 1022. In these "particularly unique" cases, the "quality of the investigation is a material fact." *Equal Emp. Opportunity Comm'n v. HP Pelzer Auto. Sys., Inc.*, No. 1:17-CV-31-TAV-CHS, 2018 WL 3723708, at *7 (E.D. Tenn. Aug. 3, 2018); *see also Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 905 (4th Cir. 2017) ("[E]vidence of an obviously inadequate investigation into the employee's misconduct could tend to show that claimed employee misconduct was actually a pretext for prohibited animus").

As detailed above, a jury could find Gwinnett treated Jane (but not MP) with hostility and tried to protect MP from a finding of sexual assault. *See supra* pp. 24–27, 50–51. In addition:

- Gwinnett charged MP with violating Rule 9G, not any rules against sexual assault. Doc. 132-11 at 303–04.

- The hearing officers deliberated for just ten minutes. Doc. 132-8 at 6.

- Gwinnett failed to ensure that SRO Lockard, the "primary person" responsible for the investigation, appeared at the hearing pursuant to the subpoena requested by Jane's attorney and issued by Gwinnett. Docs. 132-11 at 68; 132-46 at 2–5.

- Investigators knew MP's mother was a longtime Gwinnett employee, and Weyher knew her personally, but the potential conflict was never disclosed. Docs. 132-3 at 12, 14; 132-4 at 6; 136-10 at 7; *see also Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147–48 (1968) (recognizing failure to disclose potential conflict suggests improper motives).

Thus, there is ample evidence from which a jury could reasonably conclude that Gwinnett did not conduct a good faith investigation but instead tried to suppress and discredit Jane's allegation of sexual assault.

Jane, then, has raised numerous material factual disputes as to whether Gwinnett's proffered reason for suspending her was the actual reason—or simply cover for its retaliatory animus—precluding summary judgment.

CONCLUSION

This Court should reverse the district court's judgment on Jane Doe's Title IX claims and remand the case for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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I certify that, on December 8, 2021, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

Dated: December 8, 2021

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