No. _____

In The Supreme Court of the United States

JANE DOE, ***Petitioner***

v.

DARDANELLE SCHOOL DISTRICT

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

In *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), this Court held that a recipient of federal education funding may be liable for damages under 20 U.S.C. § 1681 *et seq.* ("Title IX") for discrimination in the form of student-on-student sexual harassment where the recipient acts with deliberate indifference. The Court further noted that "courts should refrain from second-guessing the disciplinary decisions made by school administrators," *Id.* at 648. And the Court wrote that the recipient may only be held liable where the sexual harassment "can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id.* at 650.

The questions presented are:

1. Whether a recipient of federal funding may be held liable where it takes any action in response to complaints of sexual harassment.
2. Whether a victim can be deprived of educational opportunities or benefits absent a decline in grade point average.

Parties to the Proceeding

Jane Doe (originally named as John Doe, individually and as a parent and next friend to Jane Doe, a minor), Petitioner.

Dardanelle School District, Respondent.

Related Proceedings

Jane Doe v. Dardanelle School District, No. 17-cv-00359, U.S. District Court for the Eastern District of Arkansas, Western Division. Judgement entered August 9, 2018.

Jane Doe v. Dardanelle School District, No. 18-2816, U.S. Court of Appeals for the Eighth Circuit. Judgement entered June 27, 2019.

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1. Eastern District of Arkansas; Case No. 4:17-CV-00359-JLH, 2018 WL 3795235 (E.D. Ark. Aug. 9, 2018).

2. Eighth Circuit Court of Appeals; Case No. 18-2816; 928 F. 3d 722 (8th Cir. 2019).

Statement of Jurisdiction

The Judgement of the Court of Appeals for the Eighth Circuit was entered on June 27, 2019. This Court's jurisdiction relies upon 28 U.S.C. §1254.

Statutes and Regulations

20 U.S.C. § 1681 ("Title IX") guarantees 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...."

Statement of the Case

I. PROCEDURAL HISTORY AND JURISDICTION

On May 31, 2017, Doe, through her father, filed her Complaint in the District Court alleging violations of her civil rights under Title IX of the Education Amendments Act of 1972 ("Title IX"), 20 U.S.C. § 1681, et seq., and the Civil Rights Act of 1871 ("section 1983"), 42 U.S.C. § 1983. App. 1. The District Court had jurisdiction to hear this action pursuant to 28 U.S.C. § 1331 in that each claim thereunder constitutes a federal question. The District Answered, generally denying the allegations and raising affirmative defenses. CA JA 15.

On July 12, 2018, the District moved for summary judgment pursuant to Fed. R. Civ. P. 56. CA JA 56. Doe filed a response on August 2, 2018, CA JA 105, and the District filed its reply on August 9, 2018. CA JA 126. That same day, without a hearing, the District Court issued its Order and Opinion granting summary judgment in favor of the District. CA JA 135. The District Court held, in relevant part, that the actions of the District were not clearly unreasonable and that Doe was not deprived of any educational benefits or opportunities.

Doe timely appealed. CA JA 145. The Eighth Circuit affirmed. Due to the important societal considerations for which this case stands, and to address the split of the circuits about the deference enjoyed by educational funding recipient institutions for these matters under Title IX, this Petition follows.

II. STATEMENT OF FACTS

In October 2014, Appellant Jane Doe ("Doe") was a freshman student in Appellee Dardanelle School District in Dardanelle, Arkansas ("the District") when she was assaulted on school grounds by another student, R.C., who touched her breast and called her a gendered slur. CA JA 100. Doe reported the assault to school administrators who noted that similar incidents had evidently occurred "several times." *Id.*; App. 61(a). The District's only responsive action was to speak "sternly" with R.C. and to advise Doe that it is a woman's responsibility to set boundaries to make sure men don't sexually harass or assault them. CA. JA. 97, 100; *see also* App. 50(a)-51(a). At least one other student had complained of similar conduct against R.C., though because of the District's failure to document the event, it is unclear when. CA JA 102; App. 49(a), 60(a).

Then, in October 2015, R.C. sexually assaulted and battered Doe in their shared classroom. CA JA 101; App. 50(a). Doe stated that R.C. grabbed her breast, attempted to force her hand onto his penis, and stuck his hand up her shorts, touching her vagina. CA JA 101; App. 31(a). Once more, the District's response was to give R.C. a "talking to," ultimately deciding based on his statement alone that the assault did not happen. CA JA 101; App. 57(a).

As the result of the 2015 incident, Principal Lawrence and Vice Principal Balloun instructed the teacher in whose class the assault occurred, to ensure that the two students were kept separated in her classroom. She was also told to keep a little more light on in the classroom when showing movies This was the only response and action taken by the school in

response to the sexual assault - to separate a student in the class from another student he had sexually assaulted (not remove him), and to keep the lights brighter. No disciplinary hearing nor investigation or finding on whether the School District determined any policy had been violated occurred. App. 57(a).

Instead, after the 2015 incident, Balloun met with RC along with the school resource officer. *Id.* According to him, he and the SRO questioned the assailant extensively, who denied the assault. Based on this, Balloun decided not to involve Burris, the Title IX Coordinator, who had never received a Title IX complaint. App. 43(a). Based on R.C.'s denial and "the look on his face," and without conducting any further investigation, Balloun concluded that the 2015 incident did not take place. CA JA 99. Balloun never questioned Jane Doe about it. App. 57(a). Balloun failed to pursue any other witnesses or corroborating evidence or even speak with Doe. *Id.*

Until April 2016, when Doe informed her parents of what happened and they intervened, the District kept the students in the same classes and did not inform their teachers or parents. CA. JA. 101-02; App. 64(a). During this time, R.C. continued to confront Doe at school and verbally abuse her. CA. JA. 103. At no time during the interim did the District inform Jane Doe's special education teacher, Ms. Duffel – despite Jane Doe and R.C. being in the same special education class – of the 2015 incident, nor did it tell Ms. Duffle to separate the two. CA JA 101.

After her parents became aware and involved, in April 2016, Principal Lawrence called Doe in and accused her of lying, rather than interviewing her and asking her questions. App. 50(a). Only at that time

was R.C. removed from the classroom where the assault occurred. App. 57(a). Lawrence also wrote a memorandum of the recent events – improperly dated nonetheless – referencing, among other things, her subsequent conversation with Doe and for the first time, her parents, that "we remain convinced we managed the situations appropriately," and, that at that point, "[she] is making a hotline report, well after the fact, and turning the whole thing over for a police investigation." App. 65(a).

Following the assaults and their revelation to her parents, Doe was treated and diagnosed by Dr. Pamela Woodson with recurrent major depressive disorder with anxious distress. CA JA 103; App. 65(a)-71(a). She began self-harming by cutting, reporting that she feared her attacker and that she felt the District blamed and emotionally abused her. CA JA 103; App. 65(a)-71(a).

According to a teacher, after the incidents, Doe became more quiet and withdrawn in class and did not want to socialize much outside of a group of students she felt comfortable with, which included her brother. CA JA 103; App. 65(a)-71(a). That regression continued into the 2016-2017 school year, with her "shrink[ing] away from [her teacher] whenever she tries to help; she never, never participates or asks for help." App. 72(a).

Doe's mental health treatment notes that that Jane Doe felt that school administration was blaming her and not believing her because they had not followed through on her report, to the point that she felt she was being emotionally abused by school administration. App. 65(a)-71(a). While at school,

Jane Doe experienced increased anxiety and felt intimidated by administration. *Id.* at 71(a).

Despite her suffering, and although during the two years she suffered from physical sexual assaults and batteries at school Doe received a GPA of less than 2.0, Doe persisted, and her GPA improved to a 2.7 her junior year. She graduated in 2018. App. 73(a); CA JA 130.

Reasons for Granting the Writ

Courts in the Eighth Circuit are increasingly reluctant to "second-guess" school districts in cases involving student-on-student sexual harassment, relying on the statement in *Davis* that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." 526 U.S. at 648. This common-sense observation risks becoming a rubber-stamp, and the Court should grant certiorari to clarify what actions and inactions are "clearly unreasonable in light of the known circumstances." *Id.*

Further, the Eighth Circuit Court of Appeals held in this case that because "Doe's grade point average increased in both her junior and senior years, and she graduated on time," any deliberate indifference cannot be said to have denied Doe "access to the educational opportunities or benefits provided by the school." App. 7(a) (quoting *Davis*, 526 U.S. at 650). This Court should grant certiorari and hold that academic performance, standing alone, does not reflect the totality of educational opportunities and benefits offered by a school.

I. IN NOT "SECOND-GUESSING" SCHOOL DISTRICT ACTIONS, COURTS ARE RUBBER-STAMPING EVEN "CLEARLY UNREASONABLE" RESPONSES TO SEXUAL HARASSSMENT.

As stated *supra*, the school district in this case merely "talked to" a student accused of inappropriately touching multiple students multiple times across multiple months and left that student in

close proximity to one of his victims, having failed to inform classroom teacher(s) or anyone else, including parents.

The Eighth Circuit panel concluded that this response constituted *some* action, and therefore the school should not be second-guessed. *See* App. 4(a) (citing *Davis*, 526 U.S. at 648); App. 5(a) ("Vice Principal Lynn Balloun discussed T.R.'s complaint with R.C., who promised that he would stop."); App. 5(a) ("But Dardanelle did take action after the first incident.... Balloun and Counselor Cynthia Hutchins discussed the incident with R.C. Both Balloun and Hutchins 'sternly' talked to R.C. 'about proper behavior.'"); *see also* App. 6(a) (the "'clearly unreasonable standard is intended to afford flexibility to school administrators'") (quoting *Estate of Barnwell v. Watson*, 880 F.3d 998, 1007 (8th Cir. 2018)). The District Court held the same. *See* App. 21(a) ("The Court will not second-guess these disciplinary decisions by the District. There were undoubtedly other options available to the District, perhaps even more prudent ones, but the District is not subject to liability for failing to take the most reasonable course of action or even for responding negligently.").

Although this virtually absolute deference to school administrators pervades the opinions of the Eighth Circuit Court of Appeals and district courts throughout the circuit, other courts interpreting *Davis* have taken a different approach and correctly ruled that such nominal judicial review "permit[s] future school districts to satisfy their obligations under Title IX without ever evaluating the known circumstances at all." *Doe v. Sch. Bd. of Broward Co., Fla.*, 604 F.3d 1248, 1263 (11th Cir. 2010) (reversing a grant of summary judgment because the court could

not "accept the district court's conclusion that merely because school officials 'confronted [the assailant],' 'obtained statements' from the complaining students, and 'informed the [School Board's Special Investigative Unit] of the sexual misconduct allegations' (while omitting material details), the School Board's response was reasonable." The Eleventh Circuit noted that it ruled against the school district "even though," as in this case, "it is undisputed that Principal Scavella and the School Board took *some* action in response to K.F. and S.W.'s sexual harassment allegations." *Id.* at 1260 (emphasis in original).

Similarly, the Sixth Circuit Court of Appeals in *Vance* upheld a jury verdict against a school district, observing that "the only evidence before this Court reflecting the Defendant's responses to the [incidents] involves talking to students." *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 263 (6th Cir. 2000) Likewise, in *Murrell*, the Tenth Circuit Court of Appeals reversed dismissal of a Title IX claim on the basis of allegations that the school district "never appropriately disciplined" the assailant, "and he continued to enjoy access to unsupervised parts of the GWHS facility." *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1248 (10th Cir. 1999).

Moreover, like here, the school district in *Murrell* had knowledge of the offensive conduct from "almost the moment it began to occur, and not only refused to remedy the harassment but actively participated in concealing it, including ... refusing to inform [the victim's] mother themselves when presented with myriad opportunities to do so." *Id.*; *see Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 457 n.12 (5th Cir. 1994) ("We can foresee many good faith but ineffective

responses that might satisfy a school official's obligation in these situations," including "notifying the student's parents[] or removing the student from the teacher's class.").

These cases stand in conflict with the application of law in the Eighth Circuit, and this Court should grant certiorari to resolve the discrepancy. *Davis* rightly recognized the challenges facing school districts and the somewhat novel application of discipline in school settings. But *Davis* was not meant to be a shield—in fact, the dissenting justices feared the opposite. Not every school district decision deserves deference; some school district responses to complaints of sexual harassment and assault are clearly unreasonable under the circumstances. If the response in this case does not demonstrate deliberate indifference—viewing the facts in the light most favorable to Doe and drawing all reasonable inferences in her favor—*Davis* might as well not exist.

Indeed, the facts potentially giving rise to liability in *Davis* are strikingly similar to those in this case. Despite multiple victims, the school district's response was to "threaten [the assailant] a little bit harder." 526 U.S. at 635. Otherwise, "at no point during the many months of his reported misconduct was G. F. disciplined for harassment." *Id.* As recognized by the courts below in this case, the supposed "discipline" amounted only to "sternly" talking to the abuser. *See, e.g.*, App. 4(a)-6(a).

Similarly, as described *supra*, the school district failed to separate the students, just as it failed in *Davis*. 526 U.S. at 635 ("Nor, according to the complaint, was any effort made to separate G. F. and LaShonda. On the contrary, notwithstanding

LaShonda's frequent complaints, only after more than three months of reported harassment was she even permitted to change her classroom seat so that she was no longer seated next to G. F.") (citation omitted). And, like here, the school district "had not instructed its personnel on how to respond to peer sexual harassment and had not established a policy on the issue." *Id.*; *cf.* App. 40(a)-48(a) (describing the lack of instruction and policies in this case).

The panel decision below is incompatible with *Davis* and other circuit court decisions interpreting *Davis*. This Court should grant the petition and reverse the Eighth Circuit Court of Appeals.

II. "EDUCATIONAL OPPORTUNITES AND BENEFITS" GUARANTEE MORE THAN PASSING GRADES.

The Eighth Circuit Court of Appeals held in this case that because "Doe's grade point average increased in both her junior and senior years, and she graduated on time," any deliberate indifference cannot be said to have denied Doe "access to the educational opportunities or benefits provided by the school." App. 7(a) (quoting *Davis*, 526 U.S. at 650).

This narrow view of "educational opportunities or benefits" does not recognize the vital role schools play in students' lives. Schools do not exist merely to assign homework and grade papers. They are homes-away-from-homes, and they offer students an environment to grow socially and become healthy, productive adults. Indeed, schools "may be said to control children's environments to the same or even greater degree than state-sponsored foster care services, which have been held ... to bear affirmative

obligations to their client children." *Johnson v. Dallas Independent School Dist.*, 38 F.3d 198, 208 n. 7 (5th Cir. 1994). The school district's response in this case deprived Doe of that environment—of a place she could learn and mature without fear of harassment and attack.

As explained *supra*, Doe began to suffer from depression stemming from the Defendant's failure to remedy or prevent the assaults, and she began cutting her arms to inflict self-harm. App. 65(a)-71(a). According to her therapist, Doe presented with depression and cutting in May 2016, and stated that she was "scared that he [the abuser] is going to try to do something else to me." *Id.* She reported that the abuser was permitted to contact her at school, and he continued to verbally abuse her, including taunting her and calling her names. *Id.*

Doe also reported feeling that school administrators were "blaming her and did not follow through on her report." *Id.* She felt "anxiety at school" and reported "few friends." *Id.* She stated that she was "being emotionally abused by the school principal," and she reported "intimidation since the incident." *Id.* The therapist determined that she was "depressed, fearful, withdrawn, irritable, angry." *Id.*

On these facts, viewed in the light most favorable to Doe, it cannot seriously be said that the school district provided Doe all the educational benefits and opportunities inherent in enrollment. Doe walked the halls in fear, and her deteriorating mental health unsurprisingly resulted in a diminished social life and a tendency to withdraw. *See Davis*, 526 U.S. at 634 (noting that one alleged injury in that case was suicidal thoughts). Thus, the fact that Doe's grades

eventually improved and she managed to graduate is a testament to her strength, her recovery, and the support of her family. It does not mean the school district provided the educational benefits and opportunities to which she was entitled. *See Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 699-700 (4th Cir. 2007) ("slight improvements in [student's] grades" does not mean she was not denied educational opportunity; "[i]f anything, it shows how hard [student] was trying, and what she believed she was achieving, in spite of the hostile environment."). Moreover, at the summary judgment stage, who is to say that Doe's grades would not have been even better absent the ongoing harassment? *See id.* at 706 (Gregory, J., concurring) ("Discriminatory impact would be shown if [student's] grades, though improved, had risen less than they would have had she not been subjected to a hostile environment.").

Nothing in the text of Title IX requires a student to fail out of school to be deprived of educational benefits. This Court should grant certiorari to reverse the Eighth Circuit Court of Appeals and make that point clear.

Conclusion

For these reasons, Petitioner respectfully requests that this Court grant the petition for certiorari.

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Respectfully submitted,

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