APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

Appendix Table of Contents

Appellate Case: 18-2816
Date Filed: 06/27/2019 Entry ID: 4802317

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2816

Jane Doe, (originally named as John Doe individually and as a parent and next friend to Jane Doe, a minor), Plaintiff - Appellant

v.

Dardanelle School District, Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock (4:17-cv-00359-JLH)

Submitted: April 18, 2019
Filed: June 27, 2019

Before COLLOTON, GRUENDER, and ERICKSON, Circuit Judges.

GRUENDER, Circuit Judge.

Jane Doe appeals the district court's[1] grant of Dardanelle School District's ("Dardanelle") motion for summary judgment and its partial denial of her motion for leave to amend her complaint. We affirm.

While Doe was a student at Dardanelle, she claims that another student, R.C., sexually assaulted her at least twice. The first incident took place in October 2014 during a kickball game. While running the bases, R.C. ran into Doe, who was standing on second base. Doe testified that R.C.'s upper arm "bump[ed]" her breast and that he called her a bitch. Doe said she did not know why R.C. called her a bitch but that she may have been "blocking his way" and that the comment may have been "out of frustration."

The second incident took place in October 2015. Doe and R.C. were seated next to each other while watching a movie with the lights off in a home economics class. Doe testified that R.C. reached up her shorts and touched the outside of her "private parts." After Doe pushed him away, R.C. attempted to force Doe to touch his groin. Doe pulled her arm away, and R.C. "grabbed" Doe's breast over her shirt. Doe testified that nobody else at the table at which she and R.C. sat saw or heard what happened.

Doe reported both incidents to Dardanelle administrators, who discussed them with R.C. Alleging that Dardanelle was deliberately indifferent, Doe filed a complaint under 20 U.S.C. § 1681 et seq. ("Title IX") and 42 U.S.C. § 1983 in May 2017. Doe

---

[1] The Honorable J. Leon Holmes, United States District Judge for the Eastern District of Arkansas.

later moved to amend the complaint, and the district court denied her motion in part. Dardanelle moved for summary judgment, and the district court granted its motion. Doe appeals both orders.

We review a grant of summary judgment de novo, considering the facts "in the light most favorable to the nonmoving party." *Hiland Partners GP Holdings, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 847 F.3d 594, 597 (8th Cir. 2017). A motion for summary judgment will be granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The district court explained that Title IX and § 1983 have the same deliberate indifference standard and concluded that Dardanelle was not deliberately indifferent.[2] It reasoned that the first incident did not

---

[2] Doe does not argue that the district court erroneously applied the same deliberate indifference standard to her Title IX and § 1983 claims. Thus, we do not address whether the district court should have separately considered whether Dardanelle was deliberately indifferent to unconstitutional conduct and the rights of students under Doe's § 1983 claim and to student-on-student harassment under her Title IX claim. *Compare Plamp v. Mitchell School Dist. No. 17-2*, 565 F.3d 450, 459, 461 (8th Cir. 2009) (requiring deliberate indifference to or tacit authorization of unconstitutional misconduct for § 1983 failure-to-act claims and deliberate indifference to the rights of students for § 1983 failure-to-train claims), *with Davis Next Friend LaShonda D. v.*

put Dardanelle on notice that R.C. might sexually assault Doe and that though Dardanelle might have taken more "prudent" steps after the second incident, it is not liable for "failing to take the most reasonable course of action or even for responding negligently." *Doe v. Dardanelle School District*, No. 4:17cv00359, 2018 WL 3795235, at *4 (E.D. Ark. Aug. 9, 2018). It additionally observed that even if Dardanelle were deliberately indifferent, the harassment was not "so severe, pervasive, and objectively offensive" that it deprived Doe "of access to the educational opportunities or benefits provided by the school." *Id.* (*quoting Davis*, 526 U.S. at 650, 119 S.Ct. 1661). The district court therefore granted Dardanelle's motion for summary judgment.

"Deliberate indifference is a stringent standard of fault that cannot be predicated upon mere negligence." *Doe v. Flaherty*, 623 F.3d 577, 584 (8th Cir. 2010) (internal quotation marks and citation omitted). Under Title IX, Dardanelle is liable only if its "deliberate indifference effectively `cause[d]' the discrimination." *Davis*, 526 U.S. at 642-43, 119 S.Ct. 1661 (alteration in original). We "should refrain from second-guessing the disciplinary decisions made by school administrators." *Id.* at 648, 119 S.Ct. 1661. Summary judgment is proper unless Dardanelle was "clearly unreasonable in light of the known circumstances." *Id.* at 648-49, 119 S.Ct. 1661.

Monroe Cty. Bd. of Educ., 526 U.S. 629, 633, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (requiring "deliberate indifference to known acts of harassment in ... programs or activities" for Title IX student-on-student harassment claims).

First, Doe claims that Dardanelle was deliberately indifferent because it had "received at least one other report from a second student, T.R., complaining that R.C. had attempted to touch her inappropriately." R.C. said that he sometimes hit T.R. on the arm. Vice Principal Lynn Balloun discussed T.R.'s complaint with R.C., who promised that he would stop. The record does not indicate when T.R. made the complaint. Even if we assume the complaint came before the first incident with Doe as she claims, we cannot say that Dardanelle's response to the complaint "effectively caused" the first incident with *Doe*. *See Davis*, 526 U.S. at 642, 119 S.Ct. 1661.

Doe next argues that Dardanelle's "inaction in the face of" the first incident involving Doe "led to the second, more severe assault." But Dardanelle did take action after the first incident. Doe reported the first incident to a teacher and to Principal Marcia Lawrence. In response, Balloun and Counselor Cynthia Hutchins discussed the incident with R.C. Both Balloun and Hutchins "sternly" talked to R.C. "about proper behavior."

While Balloun's notes from his discussion with R.C. after the first incident indicate that he believed R.C. had touched Doe several times, Doe testified in deposition and without reservation that R.C. had never touched her before the kickball incident. She also testified that, according to her memory of the 2014 school year, there was only one incident when R.C. touched her. Accepting Doe's statement is not a "failure to apply the proper summary judgment standard," as Doe contends. Rather, the unambiguous

testimony of the only witness with firsthand knowledge demonstrates that there is no genuine dispute of fact. *Cf. Prosser v. Ross*, 70 F.3d 1005, 1008 (8th Cir. 1995) ("We have held that a party cannot avoid summary judgment by contradicting his own earlier testimony.")

Dardanelle's response to the allegation that R.C. ran into Doe during a kickball game, hitting her breast with his upper arm and calling her a bitch, is not "clearly unreasonable in light of the known circumstances." *See Davis*, 526 U.S. at 648-49, 119 S.Ct. 1661. Indeed, the "clearly unreasonable standard is intended to afford flexibility to school administrators." *Estate of Barnwell by and through Barnwell v. Watson*, 880 F.3d 998, 1007 (8th Cir. 2018) (internal quotation marks omitted). Thus, Dardanelle's alleged deliberate indifference did not effectively cause the second incident.

Doe additionally argues that Dardanelle's response to the second incident "exacerbated [her] injuries." Dardanelle again took steps to address R.C.'s misconduct. Immediately after the incident, Doe went to the school office to speak with Lawrence. According to Lawrence, Doe did not tell her at that time that R.C. had tried to touch her vagina, but Doe testified that she had told Lawrence.[3] During the conversation, Lawrence asked Doe whether she was "feeling more upset about this than [she was]

---

[3] We view the facts "in the light most favorable to" Doe, giving her "the benefit of all reasonable inferences that can be drawn from the record." *Pedersen v. Bio-Med. Applications of Minn.*, 775 F.3d 1049, 1053 (8th Cir. 2015).

showing" and called a school counselor to talk with Doe.

Lawrence referred the incident to Balloun, who met with R.C. and the school resource officer, the school's police officer. Balloun testified that he and the resource officer questioned R.C. "extensively," and R.C. denied the incident. Lawrence and Balloun also talked with the home economics teacher "about keeping a light on" during movies and informed her that some "inappropriate touching" had been alleged. They told the teacher to separate Doe and R.C. in her class. R.C. was eventually moved to a different class in April 2016. Balloun testified that after the second incident, he "tried to pay particular attention, as it was warranted," to R.C. and that Lawrence likewise "was trying to keep an eye on" Doe. In light of the fact that R.C. denied the second incident and nobody else in the home economics class witnessed it, Dardanelle's response was not "clearly unreasonable in light of the known circumstances." *See Davis*, 526 U.S. at 648-49, 119 S.Ct. 1661.

Doe claims that Dardanelle's response to the incidents led to depression, self-harm, and isolation, as evidenced by her counselor's notes. Doe told her counselor that she was afraid that R.C. would "harm her again" and that R.C. "calls her names." But Doe testified that after the October 2015 incident she only interacted with R.C. once and sometimes saw him at Walmart. Further, we agree with the district court that, even if Dardanelle were deliberately indifferent, it was not "deliberately indifferent to sexual harassment... that is so severe, pervasive, and

objectively offensive that it can be said to [have deprived Doe] of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650, 119 S.Ct. 1661. Doe's grade point average increased in both her junior and senior years, and she graduated on time. *See also id.* at 652, 119 S.Ct. 1661 ("Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender."). In sum, the district court properly granted Dardanelle's motion for summary judgment.

Finally, Doe argues that the district court should have granted her motion to amend her complaint in full. Doe sought to add a negligence claim against Dardanelle through a direct action against its insurance provider and a claim that Arkansas Code Annotated section 21-9-301 violates the Arkansas constitution.[4] The district court denied her motion as futile.[5] "We review the denial of leave to amend for abuse of discretion and questions of futility de novo." *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 822 (8th Cir. 2009). "Denial of a motion for leave to amend on the basis of futility means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of

---

[4] Section 21-9-301 provides that school districts "shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance."

[5] Doe's motion to amend also included a request to substitute the "parental claim on behalf of Jane Doe with Jane Doe herself." The district court granted that portion of her motion.

Civil Procedure." *Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010) (internal quotation marks omitted). "[I]n reviewing a denial of leave to amend we ask whether the proposed amended complaint states a cause of action under the [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007),] pleading standard ...." *Id.* at 850-51. Under the Twombly standard, a complaint will survive a motion to dismiss if it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted).

We agree with the district court that Doe's negligence claim is futile. As the district court correctly noted, Dardanelle's insurance policy includes an exclusion for claims or suits "alleging Sexual Abuse and Molestation," and Doe does not contest that the policy contains an exclusion against such lawsuits. The court therefore concluded that the plaintiff's proposed amendment to add a direct claim against the insurer is futile.

Doe argues that the district court "erred by drawing inferences in [Dardanelle's] favor." This argument is not persuasive. Though the district court must take her factual allegations as true and draw all inferences in her favor, see *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594-95 (8th Cir. 2009), Doe offered no factual basis to support the possibility that the policy exclusion does not exist or does not apply. Thus, we agree with the district court that Doe's negligence claim is futile.

Likewise, the district court correctly determined that Doe's Arkansas constitutional claim is futile. It relied on an Arkansas Supreme Court decision holding that Ark. Code Ann. section 21-9-301 is consistent with the same Arkansas constitutional provisions to which Doe points. See *White v. City of Newport*, 326 Ark. 667, 672, 933 S.W.2d 800 (1996). Doe nevertheless claims that the Arkansas Supreme Court "signaled a sea change" in *Bd. of Trs. of Univ. of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616 (2018). She contends that *Andrews* "singled out [the court's] 1996-era caselaw," which includes White, "for failing to strictly construe and enforce constitutional provisions." But *Andrews* involved sovereign immunity, and we see no reason why its dicta affects the holding in *White*. Thus, we agree with the district court that this claim is likewise futile.

For the foregoing reasons, we affirm.

Appellate Case: 18-2816
Date Filed: 06/27/2019 Entry ID: 4802321

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2816

Jane Doe, (originally named as John Doe individually and as a parent and next friend to Jane Doe, a minor), Plaintiff - Appellant

v.

Dardanelle School District, Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock (4:17-cv-00359-JLH)

JUDGMENT

Before COLLOTON, GRUENDER and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 27, 2019

Order Entered in Accordance with Opinion:

Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

Case 4:17-cv-00359-JLH Document 53 Filed 08/09/18

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JANE DOE PLAINTIFF

v. No. 4:17CV00359 JLH

DARDANELLE SCHOOL DISTRICT DEFENDANT

OPINION AND ORDER

J. LEON HOLMES, District Judge.

Jane Doe was a student in the Dardanelle School District until her recent graduation. She alleges that while she was a student another student sexually assaulted her on two separate occasions. She sued the District under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., and under 42 U.S.C. § 1983. The District has moved for summary judgment on both claims.

A court should grant summary judgment if the evidence demonstrates that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). If the moving party meets that burden, the nonmoving party

must come forward with specific facts that establish a genuine dispute of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (*en banc*). A genuine dispute of material fact exists only if the evidence is sufficient to allow a reasonable jury to return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). The Court must view the evidence in the light most favorable to the nonmoving party and must give that party the benefit of all reasonable inferences that can be drawn from the record. *Pedersen v. Bio-Med. Applications of Minn.*, 775 F.3d 1049, 1053 (8th Cir. 2015). If the nonmoving party fails to present evidence sufficient to establish an essential element of a claim on which that party bears the burden of proof, then the moving party is entitled to judgment as a matter of law. *Id.*

Doe complains of two incidents[1] The first happened during the first semester of the 2014 school year when Doe was in ninth grade. She was playing kick ball in physical education class when a male student ran into her and called her a "bitch." Document #14-5 at 51. In running into her, the boy's upper arm hit her breast. *Id.* She says that he did not grab her. *Id.* at 67. Doe says that this was the first adverse interaction she had with that student and the

---

[1] The District says that Doe's current accounts of these incidents are very different from and more egregious than her contemporaneous accounts, but as required by the summary judgment standard, the Court will view the evidence in the light most favorable to Doe and recount the incidents as she now reports them.

only one in her ninth-grade year. *Id.* at 56-57. After the incident, Doe told her English teacher as well as the school principal, Marcia Lawrence. Doe says that she told Lawrence that the student "called [her] the `B' word and hit [her]." *Id.* at 58. Doe says that Lawrence said that she would talk to the male student and then sent Doe back to class. *Id.* at 60.

Lawrence testified that she reassured Doe, talked to her about two or three things, told Doe that she was going to refer the matter to the assistance principal, Lynn Balloun, who is a male and ask him to talk to the male student, and told Doe that she should immediately come back and report and further issues. Document #14-2 at 18. Balloun testified that he questioned the male student extensively and counseled the student sternly in the presence of a school counselor. Document #14-3 at 13, 17. Balloun memorialized the meeting with the male student as follows: "Complaint by [Doe] that [the male student] has been trying to touch her inappropriately. It evidently has happened several times. Counseled [the male student] that if it happened again he would have to deal w/the [student resource officer]. He did not deny it." Document #42-14.

The second incident happened on October 26, 2015, when Doe was in tenth grade and involved the same male student. The two students had home economics together. Document #14-5 at 68. Students were not assigned seats by the teacher; they could select their seats themselves. *Id.* Doe and the male student selected seats at the same table next to each other. *Id.* Does says that while she was in home economics watching a movie, the male student "reached his hand up [her] shorts and touched [her]," tried "to make [her] touch him down there," and "tried

to grab [her] boob and then grabbed it." *Id.* at 93. Doe left the classroom and reported the incident to Lawrence. *Id.* at 91. Doe says that Balloun was also in Lawrence's office when she reported the male student's assault. *Id.* at 92. Doe recalls Lawrence saying, "I will talk to him about that. That's not going to happen." *Id.*

Lawrence testified that Doe did not report that the male student put his hand in her shorts and touched her; she remembers Doe telling her that the male student tried to put Doe's hand on his groin and tried to touch Doe's breast. Document #14-2 at 25; Document #14-9. Upon receiving this report she told Doe that action more severe than being counseled would be taken against the male student. Document #14-2 at 25. She says she asked Doe if she wanted to be removed from the class but that Doe said she liked the class and wished to stay. *Id.* at 26. Lawrence says that she told Doe that she would speak with the home economics teacher, that she would ensure different seating arrangements, and that she would instruct the teacher not to pair Doe and the male student up for any class work. *Id.* Lawrence says that she recommended that Doe speak with a counselor but that Doe refused. *Id.* In light of Doe's refusal, Lawrence says that she asked a counselor to come to her office and Doe recounted the event again, this time with both Lawrence and the counselor. *Id.* at 26-27. The counselor confirmed this account. Document #14-12 at 10.

The day of the incident, Lawrence issued a disciplinary referral of the male student to Balloun. Document #14-2 at 27. Lawrence directed the teacher to separate Doe and the male student, and Doe was moved to a different seat. Document #14-11 at 16;

Document #14-5 at 96. Lawrence also discussed the incident with the teacher and instructed her "about keeping a light on, or making sure there was a lamp that was a little bit brighter in the classroom." Document #14-11 at 17.

Balloun wrote a memo dated October 26, 2015, in which he documents the action he took in response to Lawrence's referral. Document #14-8. The report states that Balloun spoke with the male student in the presence of the school's police officer because "[i]t had been reported once again by [Doe] that [the male student] had touched her in an inappropriate manner." *Id.* It describes the male student's very different account and ends by noting that the officer and Balloun warned the male student "not to let himself be put in a position where there was any question." *Id.* Balloun said that following the second incident he "tried to pay particular attention, as it was warranted, to [the male student]" and Lawrence tried "to keep an eye on [Doe]." Document #14-3 at 17. Lawrence testified that other than questioning by Balloun and the school police officer, no disciplinary action was taken against the male student. Document #14-2 at 34. She said that the student vehemently denied Doe's account and that "it was very much a he said she said situation." *Id.*

Doe did not tell her parents about the October 2015 incident after it happened because she feared they would not believe her. Document #14-5 at 98. She eventually told them months later. *Id.* at 101. In April 2016, Doe's parents confronted Lawrence and Balloun about the District's handling of the October 2015 incident. Lawrence explained that she did not know the incident involved the male student reaching inside Doe's shorts and touching her. Document #14-2 at 44.

Doe also testified that Lawrence told her parents that Lawrence did not "recall [Doe] telling us that that happened." Document #14-5 at 102. After the meeting with Doe's parents, Lawrence says that she immediately reported the sexual assault to a hotline and turned the matter over to the police. Document #14-2 at 44.

Doe continued to attend school in the District and graduated in May 2018. She did not have any other interactions with the male student or any other similar incidents at the school after the October 2015 assault. Document #14-5 at 96-97. Doe's grade point average in the 2014-15 school year was 2.18; in the 2015-16 school year it was 1.86; in the 2016-17 school year it was 2.73; and in the 2017-18 school year it was 3.00. Document #14-1.

The District may be liable for student-on-student harassment under Title IX and section 1983 if it acted with deliberate indifference. See *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633, 119 S. Ct. 1661, 1666, 143 L. Ed. 2d 839 (1999) (recognizing a private cause of action for damages under Title IX); *Doe v. Flaherty*, 623 F.3d 577, 584-85 (8th Cir. 2010). The Supreme Court has instructed that the deliberate indifference standard used to establish municipal liability under section 1983 is the same standard used under Title IX. Davis, 526 U.S. at 642, 119 S. Ct. at 1671. Under this standard, the District will be liable only if its "own deliberate indifference effectively `cause[d]' the discrimination." *See id.* at 643, 119 S. Ct. at 1671 (alteration in original) (citation omitted). Additionally, the District is subject to liability only where it is deliberately indifferent to "known acts of harassment in its programs or activities . . . that is so

severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 633, 119 S. Ct. at 1666.

While a school district may be liable under Title IX for student-on-student harassment, the circumstances in which liability may be imposed are limited and school districts enjoy broad discretion in responding to student-on-student harassment. *Id.* at 646-49, 119 S. Ct. at 1673-74. Courts should not "second-guess[] the disciplinary decisions made by school administrators." *Id.* at 648, 119 S. Ct. at 1674. Victims of harassment are not entitled "to make particular remedial demands," and a school need not necessarily expel "every student accused of misconduct involving sexual overtones." *Id.* Summary judgment is appropriate in cases where a school district's response was not "clearly unreasonable in light of the known circumstances." *Id.* at 648, 119 S. Ct. at 1674 (stressing that the standard "is not a mere `reasonableness' standard"); *Gant ex rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 141 (2d Cir. 1999) (cautioning against "transform[ing] every school disciplinary decision into a jury question").

Deliberate indifference is "a stringent standard of fault." *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 780 (8th Cir. 2001). Here, Doe has not shown that the District was deliberately indifferent to the harassment she experienced. *See Davis*, 526 U.S. at 645, 119 S. Ct. at 1672 (holding that deliberate indifference at a minimum requires a school district to cause a victim to undergo harassment or make the victim vulnerable to it). Doe first informed the District of harassment after the male student called her a "bitch" and ran into her breast with his upper arm. The Court is mindful that the response of school

administrators to student misconduct is tempered and informed by the reality that "students are still learning how to interact appropriately with their peers." *Id.* at 651, 119 S. Ct. at 1675. Lawrence issued a disciplinary referral to Balloun, and Balloun promptly counseled the male student regarding his conduct. The Court cannot say that the District's response was clearly unreasonable upon learning that a ninth-grade male student used a demeaning word against a female student and ran into her breast with his upper arm while playing kick ball.

Doe says that the District had adequate notice of the male student's danger based on his disciplinary record and therefore should be liable for the second incident. Doe points to an undated disciplinary referral, wherein the male student was referred to Balloun after a female student (other than Doe) complained that he was "trying to touch her inappropriately." Document #42-12. The referral goes on to say that the male student said that "he would sometimes hit her on the arm in art" and that he promised to stop. *Id.* Doe says that this incident happened "likely before" the kick ball incident. Document #49 at 5. The only evidence of the date of this other incident is Balloun's recollection in his deposition. There, he said that he did not know when the incident took place. Document #42-2 at 8. Doe also says that the District knew of other instances where the male student inappropriately touched Doe because after counseling the male student after the first incident, Balloun noted that the inappropriate touching "evidently has happened several times." *Id.* Conversely, Doe testified unambiguously that she had no incidents prior to the kick ball incident with the male student. Document #14-5 at 56-57.

Even considering these other disciplinary incidents, the District was not on notice that the male student would force himself on Doe and sexually assault her in the way that she alleges. The District's response to the first incident was not deliberate indifference causing the second incident. The District took action after the first incident. While Doe contends that the action should have been more severe, Doe could survive summary judgment only if the District could be vicariously liable for the male student's conduct or liable under a negligence standard. *Cf. Shrum*, 249 F.3d at 778 (explaining that the purpose of the "stringent" deliberate indifference standard is to prevent liability "collapsing into state tort law or into respondeat superior liability").

The question remains whether the District's response to the second incident was deliberately indifferent to Doe. Immediately after Doe reported the assault, Lawrence issued a disciplinary referral of the male student to Balloun. Lawrence also saw to it that Doe and the male student were separated. Lawrence discussed the incident with the teacher and instructed her "about keeping a light on, or making sure there was a lamp that was a little bit brighter in the classroom." Document #14-11 at 17. Balloun confronted the male student with the school's police officer the day of the incident. Balloun also said that he "tried to pay particular attention, as it was warranted, to [the male student]" and Lawrence tried "to keep an eye on [Doe]" following the incident. Document #14-3 at 17. 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.

The District is also not subject to liability here because it was not deliberately indifferent to harassment that was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *See Davis*, 526 U.S. at 650, 119 S. Ct. at 1675. Doe suffered two isolated incidents of harassment separated by a period of a year in her ninth- and tenth-grade years. In the wake of the District's response to the second incident, Doe had no further interactions with the male student, suffered no further harassment, and graduated on time with an improved grade point average. Doe was not effectively denied access to an educational opportunity or benefit. Neither Title IX nor section 1983 imposes liability on the District under these facts. Private actions, such as this one, are limited "to cases having a systemic effect on educational programs or activities." *Id.* at 653, 119 S. Ct. at 1676.

CONCLUSION

For the foregoing reasons, the District's motion for summary judgment is GRANTED. Document #28. The District's motion to exclude Doe's expert and Doe's motion to exclude the District's expert are DENIED AS MOOT. Document #31 and Document #38.

IT IS SO ORDERED this 9th day of August 2018.

/s/J. Leon Holmes
J. LEON HOLMES
UNITED STATES DISTRICT JUDGE

Case 4:17-cv-00359-JLH Document 54 Filed 08/09/18

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JANE DOE PLAINTIFF

v. No. 4:17CV00359 JLH

DARDANELLE SCHOOL DISTRICT DEFENDANT

JUDGMENT

J. LEON HOLMES, District Judge.

Pursuant to the Opinion and Order entered separately today, judgment is entered in favor of the Dardanelle School District on the claims of Jane Doe. The complaint of Jane Doe is dismissed with prejudice.

IT IS SO ORDERED this 9th day of August 2018.

/s/J. Leon Holmes
J. LEON HOLMES
UNITED STATES DISTRICT JUDGE

20 U.S. Code § 1681 (Title IX)

(a) Prohibition against discrimination; exceptions

No 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, except that [exceptions omitted].