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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DOE and JANE DOE #1, on behalf of their minor child, Jane Doe #2 (20-6225); SALLY DOE, on behalf of her minor child, Sally Doe #2 (20-6228), *Plaintiffs-Appellants*,	Nos. 20-6225/6228
v.	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, dba Metropolitan Nashville Public Schools, *Defendant-Appellee*.	

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
Nos. 3:17-cv-01159 (20-6225); 3:17-cv-01209
(20-6228)—Aleta Arthur Trauger, District Judge.

Argued: October 27, 2021

Decided and Filed: May 19, 2022

Before: GUY, MOORE, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Mary Parker, PARKER & CROFFORD, Brentwood, Tennessee, for Appellants. J. Brooks Fox, METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Nashville, Tennessee, for Appellee. **ON BRIEF:** Mary Parker, Stephen Crofford, PARKER & CROFFORD, Brentwood, Tennessee, for Appellants. Melissa Roberge, METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Nashville, Tennessee, for Appellee.

GIBBONS, J., delivered the opinion of the court in which MOORE, J., joined. GUY, J. (pp. 13-21), delivered a separate dissenting opinion.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Jane Doe and Sally Doe,[1] two female students at Metropolitan Nashville Public Schools ("MNPS"), were videoed by other students engaging in sexual activity with male students at school. Through their parents, they sued MNPS alleging violations of Title IX and constitutional violations under 42 U.S.C. § 1983. The district

[1] In the district court proceedings, the two students went by "Jane Doe #2" and "Sally Doe #2" because their mothers used "Jane Doe" and "Sally Doe." For ease of reference, we refer to the students as Jane Doe and Sally Doe here.

court granted summary judgment in favor of MNPS on the students' claims. We vacate in part, reverse in part, and remand.

I.

In this consolidated appeal, two students from different high schools allege similar treatment by MNPS. We begin with Jane Doe.

Jane Doe was a freshman at Maplewood High School. On September 21, 2016, four upperclassmen male students brought unwelcome sexual activity to Jane Doe and another female student in a stairwell at Maplewood. Unbeknownst to Jane Doe, the incident was recorded on video and circulated. Jane Doe later became aware of the video and that people were calling her "slut" and "whore." DE 92-8, Affidavit, Page ID 3410. Jane Doe's brother also found out about the video and informed their parents. Jane Doe's parents reported the video to Assistant Principal Marvin Olige, explaining the video was made without Jane Doe's knowledge and was being circulated at the school. Olige called in two School Resource Officers ("SROs") and questioned Jane Doe on whether the conduct was forcible rape. Jane Doe's parents asked whether it was safe for Jane Doe to return to class, and when school officials confirmed that it was, Jane Doe returned to class. However, she was afraid to remain at Maplewood and enrolled in a new school the next day.

Sally Doe was a freshman at Hunters Lane High School. On February 21, 2017, Sally Doe was led to the

bathroom by a male student and pressured into performing oral sex. The male student videoed the incident, without Sally Doe's knowledge. School administrators learned the students went into the bathroom together, so Assistant Principal Melanie McDonald questioned Sally Doe about what occurred. Sally Doe provided a written statement that the students only talked. The next day, Sally Doe and her mother met with Assistant Principal Nicole Newman and an SRO where Sally Doe admitted to kissing the male student but not to any further sexual activity.

About a month and a half later, a female student posted the video of Sally Doe in the bathroom on Instagram. Several of Sally Doe's friends saw the video, and a family member sent the video to her mother. Sally Doe's mother and grandmother went to Hunters Lane and met with Newman and an SRO to report the video. Sally Doe's mother told Newman she wanted something done and her daughter protected, but Newman told her it was now a criminal matter and to contact Metro Police.

After the video was circulated, Sally Doe was called names in the hallway and threatened. Sally Doe's mother emailed Newman detailing the harassment and seeking an alternative arrangement for the rest of the school year. Newman helped arrange for Sally Doe to finish the rest of the school year at home. Sally Doe returned to Hunters Lane during the summer. Again, Sally Doe was called names, such as "slut" and "whore." DE 83-3, Dep. Tr., Page ID 2358-59. Sally Doe's mother told McDonald, and McDonald said she

would keep an eye out for Sally Doe. Sally Doe also attended Hunters Lane for the 2017-18 school year. That year, a male student touched Sally Doe's buttocks when they were in class taking a picture and posted the photo to social media. This resulted in a fight involving three students, including Sally Doe.

In August 2017, Jane Doe and Sally Doe sued MNPS in federal court, alleging violations of Title IX and constitutional violations under § 1983. MNPS moved for summary judgment against both students. In May 2019, the district court denied MNPS's motion as to Jane Doe, but granted the motion as to Sally Doe only in part. However, on MNPS's motion, the district court certified issues in the summary judgment order for interlocutory appeal.

In December 2019, this court decided *Kollaritsch v. Michigan State University*, 944 F.3d 613 (6th Cir. 2019). Believing *Kollaritsch* raised similar issues to those in Jane Doe's and Sally Doe's cases, a motions panel of this court granted MNPS's petition to appeal, vacated the district court's summary judgment order, and remanded the matter back to the district court. *See In re: Metro. Gov't Nashville & Davidson Cnty.*, 19-0508. On remand, the district court granted MNPS's summary judgment motions with respect to all of Jane Doe and Sally Doe's claims. This appeal followed.

II.

We review de novo the district court's grant of summary judgment. *Pearce v. Chrysler Grp. LLC Pension*

Plan, 893 F.3d 339, 345 (6th Cir. 2018). Summary judgment is appropriate only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 56(a)). We view the facts and reasonable factual inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is not proper "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III.

Title IX prohibits discrimination on the basis of sex in any education program receiving federal funding. 20 U.S.C. § 1681(a); *Chisholm v. St. Mary's City Sch. Dist. Bd.*, 947 F.3d 342, 349 (6th Cir. 2020). In *Davis v. Monroe County Board of Education*, the Supreme Court held that a school could be liable under Title IX for subjecting "students to discrimination where [the school] is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority." 526 U.S. 629, 646-47 (1999). After *Davis*, this court required plaintiffs alleging violations of Title IX via student-on-student harassment to establish a three-part prima facie case: (1) sexual harassment that "was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the

school"; (2) the school "had actual knowledge of the sexual harassment"; and (3) the school "was deliberately indifferent to the harassment." *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 362 (6th Cir. 2012) (quoting *Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999)); *see also Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258-59 (6th Cir. 2000).

In *Kollaritsch v. Michigan State University*, this court limited certain Title IX claims based on student-on-student sexual harassment. 944 F.3d 613 (6th Cir. 2019). Four female students at Michigan State University were sexually assaulted by male students and reported the assaults to administrative authorities. *Id.* at 618. They alleged the administration's subsequent response was inadequate. *Id.* This court held the plaintiffs must show "that the school had actual knowledge of some actionable sexual harassment and that the school's deliberate indifference to it resulted in *further* actionable harassment of the student-victim." *Id.* at 620 (emphasis added). Because the students were each only assaulted once, this court concluded the women could not show the school's conduct (or lack thereof) caused them to suffer harassment. *Id.* at 625. The court observed, "the further harassment must be inflicted against the same victim." *Id.* at 621-22.

A.

Jane Doe and Sally Doe allege two theories of liability under Title IX: liability for MNPS's conduct *before* the students were harassed and liability for

MNPS's conduct *after* the students were harassed. These theories have been respectively labelled the students' "before" and "after" claims. We begin with the students' "before" claims.

Under their "before" theory, Jane Doe and Sally Doe contend MNPS had a widespread problem in its schools: numerous instances of sexual misconduct and the dissemination of sexual images of minor students without their consent. Jane Doe and Sally Doe allege that MNPS was deliberately indifferent to these widespread problems, causing them to be sexually harassed and videoed by fellow students on school property without their consent. Following *Kollaritsch*, the district court determined that the students' "before" claims were precluded. In fact, the district court recognized that no "before" theories of liability under Title IX would be viable if *Kollaritsch* applies because they rely on notice *before* an incident involving the plaintiff and *Kollaritsch* requires two instances of harassment against the same plaintiff-victim.

The district court's reading of *Kollaritsch* does not take into account the very different context and facts of this case. In *Kollaritsch*, Michigan State University had no knowledge of any threat to the four female students prior to the assaults against them. 944 F.3d at 618, 624-25. And the adequacy of the university's response could not be assessed unless the students suffered further harm. The allegations here and the facts developed in discovery are quite different.

During discovery, Jane Doe and Sally Doe requested disciplinary records across MNPS schools from 2012 to 2016 related to sexual misconduct, resulting in documentation of "over 950 instances of sexual harassment, over 1200 instances of inappropriate sexual behavior, 45 instances of sexual assault, and 218 instances of inappropriate sexual contact." DE 101, Dist. Ct. Order, Page ID 4131. Many of those incidents involved students taking and/or distributing sexually explicit photographs or videos of themselves or other students. Despite the frequency of inappropriate sexual behavior in MNPS facilities, the incidents were handled on an individual basis by the principal of the school in which the sexual offender was enrolled. And although the Department of Education guidance to schools recommended that the Title IX coordinator address all complaints raising Title IX issues, the systemwide Title IX coordinator for MNPS was not involved at all in resolution of the sexual misconduct incidents. *See* 45 C.F.R. § 83.15(a). Rather, she was only notified if the untrained principals determined there was a Title IX violation. Unlike the *Kollaritsch* plaintiffs, Jane Doe and Sally Doe allege that their unwelcome sexual contact was a result of MNPS's indifference to the problem of pervasive sexual misconduct in the schools.

The purpose of Title IX is to protect "individuals from discriminatory practices carried out by recipients of federal funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). Extending *Kollaritsch*'s same-victim requirement to Title IX "before" claims like those here would thwart that purpose as it would

allow schools to remain deliberately indifferent to widespread discrimination as long as the same student was not harassed twice. The majority and the dissent in *Davis* both appear to reject this result: "Even the dissent suggests that Title IX liability may arise when a funding recipient remains indifferent to severe, gender-based mistreatment played out on a 'widespread level' among students." *Davis*, 526 U.S. at 653 (quoting *id.* at 683). Our sister circuits have found viable "before" claims. *See Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1111-12 (9th Cir. 2020); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017); *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1288-90, 1296 (11th Cir. 2007); *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007).[2] For a Title IX "before" claim, the Ninth Circuit held a student must show:

> (1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or obvious (3) in a context subject to the school's control, and (4) as a result, the plaintiff suffered harassment that was "so severe, pervasive, and objectively offensive that it can be said to [have] deprive[d] the [plaintiff] of access to

[2] The dissent asserts that *Kollaritsch* rejected this authority. Dissent Op., at 15. But *Kollaritsch* does not mention these cases, which is not surprising, because *Kollaritsch* did not consider a fact pattern like the one before us. Moreover, *Kollaritsch* was decided before *Karasek*.

> the educational opportunities or benefits provided by the school."

Karasek, 956 F.3d at 1112 (footnote omitted) (quoting *Davis*, 526 U.S. at 560). We adopt this test for a student alleging that a school's deliberate indifference *before* she was harassed caused the harassment.

Contrary to the dissent's argument, this test parallels *Kollaritsch*'s overall logic. In *Davis*, the Supreme Court held that in a student-on-student harassment claim under Title IX, the school's "deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." 526 U.S. at 645 (citations omitted). *Kollaritsch* interpreted this language to mean that a student must allege that post-notice[3] harassment occurred to satisfy causation under Title IX. 944 F.3d at 623-24. Specifically, the panel there noted that "[t]he critical point . . . is that the *Davis* formulation requires that the school had actual knowledge of some actionable sexual harassment and that the school's deliberate indifference to it resulted in further actionable harassment of the student-victim." *Id.* at 620.

When a student shows that a school's deliberate indifference to a pattern of student-on-student sexual misconduct leads to sexual misconduct against the student, *Kollaritsch*'s requirements for causation have

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[3] As one of the concurrences indicated, *Kollaritsch* does not speak to what a student must show to demonstrate a school had notice of previous incidents of harassment. 944 F.3d at 630 (Rogers, J., concurring).

been satisfied. A quick comparison demonstrates why. "Before" claims require that the student show that a school's response to reports of sexual misconduct "be clearly unreasonable and lead to further [misconduct]," exactly what *Kollaritsch* requires for "after" claims brought by university students. *Id.* at 622. Rather than premise liability on a school's "*commission* (directly causing further [misconduct])," a "before" claim is premised on the school's "*omission* (creating vulnerability that leads to further [misconduct])," a category of wrongful conduct that *Kollaritsch* recognized as giving rise to liability. *Id.* at 623 (citation omitted). "Before" claims consequently keep a student's vulnerability to harassment or sexual misconduct, without more, from forming the basis of a Title IX claim, just as *Kollaritsch* did in the context of student-on-student, university-based harassment claims. *See id.* at 622-23. "Before" claims require that more than a single incident of sexual misconduct occur to trigger liability, a requirement that mirrors *Kollaritsch*. *See id.* at 623. Put differently, in a successful "before" claim, a school's deliberate indifference to known past acts of sexual misconduct must have caused the misconduct that the student currently alleges.

In distinguishing this case from a *Kollaritsch*-type claim, we reiterate that plaintiffs here assert a drastically different theory of Title IX liability than was asserted in *Kollaritsch*, in which college women alleged inadequate responses to their specific instances of harassment. 944 F.3d at 618. Specifically, the university in *Kollaritsch* was not on notice of a possible Title IX

violation until after the plaintiffs reported these incidents of sexual harassment. As the disciplinary records cited by Jane Doe and Sally Doe demonstrate, MNPS was aware of issues with sexual harassment in the school system well before the two students reported their incidents. Many of these incidents involved photos or videos. To hold MNPS is immune from liability as long as no student is assaulted twice, regardless of its indifference to widespread instances of sexual harassment across its schools, would defeat Title IX's purpose of eliminating systemic gender discrimination from federally funded schools.

Kollaritsch thus does not bar Jane Doe and Sally Doe's Title IX "before" claims. We vacate the district court's grant of summary judgment to MNPS on the students' "before" claims and remand these claims for the district court to consider whether the students have presented sufficient evidence for their claims to go to the jury under the *Karasek* standard.[4]

B.

Turning to their Title IX "after" claims, Sally Doe and Jane Doe claim MNPS's inadequate responses to their harassment caused them further harm. The

[4] The dissent notes faults with the student's deliberate indifference evidence and emphasizes that the district court must decide in the first instance whether there was deliberate indifference. Dissent Op., at 18–19. We make no finding as to the sufficiency of the students' evidence and we remand to the district court to determine whether the record evidence is sufficient to satisfy the standard elaborated in *Karasek*.

district court granted summary judgment to MNPS on these claims. We vacate in part and reverse in part.

1.

We begin with Sally Doe. The district court determined, in light of the school's response, "the facts were not sufficient to allow a reasonable juror to conclude that the school was deliberately indifferent" to Sally Doe's harassment. DE 124, Dist. Ct. Order, Page ID 4355. Viewing the facts in the light most favorable to Sally Doe, we disagree.

When Sally Doe's mother met with and notified Assistant Principal Newman that her daughter had experienced unwelcome sexual contact and that a video of the incident was circulating on social media, Newman responded by saying that the matter "was out of [Newman's] hands" and telling the mother to contact the police. DE 92-5, Affidavit, Page ID 3396. Newman did not recall informing the head of the school about this meeting. Newman did not refer Sally Doe to the Title IX coordinator or any other administrator. And Newman did not provide Sally Doe or her mother with information about any steps that the school would take to address the consequences of the incident. Sally Doe continued to suffer further harassment every day at school, including one incident where a student attempted to show a teacher the video during one of Sally Doe's classes. Yet the school took no additional action, other than assisting her parents with arranging homeschooling. For the dissent, the fact that an SRO filed a

report with the police is sufficient to conclude that MNPS's response was not deliberately indifferent as a matter of law. But MNPS has Title IX obligations that are separate and apart from any criminal matter. We note that the SRO, like Newman, did not investigate the incident further and did not inform the head of the school of the incident. In fact, the SRO was not even familiar with Title IX.

A reasonable jury could conclude that, rather than take steps to remedy the violation, MNPS opted to avoid the problem, resulting in Sally Doe having no choice but homeschooling or enduring further misconduct. *Cf. Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 962 (6th Cir. 2020) (en banc) (noting how the school "ratcheted up protections" as more reports of harassment came to the institution's attention); *Stiles ex rel. D.S. v. Grainger Cnty., Tenn.*, 819 F.3d 834, 849 (6th Cir. 2016) (detailing how the school followed up complaints of student-on-student harassment with a series of investigations and disciplinary actions). Therefore, we reverse the district court's grant of summary judgment to MNPS on Sally Doe's "after" claim.

2.

Unlike Sally Doe, Jane Doe's Title IX "after" claim was dismissed pursuant to *Kollaritsch*. *Kollaritsch* dealt with university students. 944 F.3d at 618. Cases that we have decided since *Kollaritsch* have applied the decision only to universities. *See*, *e.g.*, *Doe v. Univ. of Ky.*, 971 F.3d 553, 555 (6th Cir. 2020). Jane Doe,

however, was a high school student when the sexual harassment of which she complained occurred. Due to the varying degrees of oversight that these two kinds of institutions exercise over their students, the distinction between a university and a high school makes a difference for the purposes of a student-on-student-harassment claim under Title IX.

"Deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment." *Davis*, 526 U.S. at 644. The Supreme Court has underscored that the standard for imposing liability on a school under Title IX for deliberate indifference to student-on-student harassment "is sufficiently flexible to account . . . for the level of disciplinary authority available to the school." *Id.* at 649. Authority depends largely on the level of schooling. Universities, for instance, cater primarily to adult students. *See Foster*, 982 F.3d at 970; *Kollaritsch*, 944 F.3d at 621-22. For this reason, the Court recognized that "[a] university might not . . . be expected to exercise the same degree of control over its students" as other kinds of educational institutions would be required to exercise. *Davis*, 526 U.S. at 649. With the salience of control in mind, an en banc majority of this court recently stressed the importance of analyzing a Title IX claim within the institutional setting from which it arose. *See Foster*, 982 F.3d at 970. Juxtaposing universities to primary schools, the en banc court noted that liability under Title IX is on a spectrum, with "deliberate indifference claims hav[ing] special resonance when the

school 'exercises substantial control over both the harasser and the context in which the known harassment occurs,'. . . ." *Id*. (quoting *Davis*, 526 U.S. at 645).

In formulating the same-victim requirement, the *Kollaritsch* panel stressed the need for a university to be on notice about past incidents of harassment before being subject to liability under Title IX. *See Kollaritsch*, 944 F.3d at 622. However, because of their age, a school's power over students in high school "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Davis*, 526 U.S. at 646 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)). Indeed, the Supreme Court emphasized in *Davis* "the importance of school officials' 'comprehensive authority . . . , consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools," citing cases involving high school students to support this proposition. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969); citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985)). Considering this difference in oversight and recognizing that Title IX liability is to be analyzed based on the institutional setting, we decline to extend *Kollaritsch*'s same-victim requirement to a Title IX claim in a high school setting.

Therefore, we vacate the district court's grant of summary judgment to MNPS on Jane Doe's "after" claim and remand for the district court to consider whether the claim survives summary judgment without applying *Kollaritsch*.

C.

Jane Doe and Sally Doe also brought claims under § 1983. "To state a claim under 42 U.S.C. § 1983, a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law." *Doe v. Miami Univ.*, 882 F.3d 579, 595 (6th Cir. 2018) (citation omitted). Jane Doe and Sally Doe allege MNPS violated the Equal Protection Clause of the Fourteenth Amendment. The district court determined the § 1983 claims rose and fell with the Title IX claims and dismissed all the claims together. As we vacate in part and reverse in part the district court's dismissal of the students' Title IX claims, we also vacate its dismissal of the § 1983 claims.

Kollaritsch is limited to Title IX "after" claims, does not apply to "before" claims, and does not apply to students in high school. Therefore, we reverse the district court's dismissal of Sally Doe's "after" claim. We vacate the district court's dismissal of the students' Title IX "before" claims, § 1983 claims, and Jane Doe's "after" claim. We remand to the district court for a determination of whether the students have presented sufficient evidence to survive summary judgment on these claims.

DISSENT

RALPH B. GUY, JR., Circuit Judge, dissenting. I cannot join the majority opinion's significant enlargement of school district liability for student-on-student sexual harassment under Title IX because, in my view, it cannot be squared with our published decision in *Kollaritsch* or the Supreme Court's holdings in *Gebser* and *Davis* that define the contours of this judicially implied private right of action under Title IX. *See Kollaritsch v. Michigan State Univ. Bd. of Educ.*, 944 F.3d 613 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554 (2020); *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). That precedent establishes the outer limits of the cause of action, which courts may not expand "no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). The urge to want to blame someone for failing to prevent the sexual misconduct inflicted on Jane in the stairwell and Sally in the bathroom—albeit by different perpetrators at different high schools—and the subsequent peer-to-peer sharing of videos of those encounters cannot justify supplanting or side-stepping what is required to hold a school district liable under Title IX.

Indeed, the district court applied the controlling authority faithfully, if reluctantly, after this court

remanded for reconsideration in light of *Kollaritsch*. First, the district court properly recognized that *Kollaritsch*'s articulation of a *Davis* claim for student-on-student harassment leaves no room for plaintiffs to prevail on a "before" theory (*i.e.*, a Title IX claim "based on MNPS's general knowledge of the risk of sexual misconduct of the type [plaintiffs] suffered"). (PageID 448.) Second, the district court correctly concluded that *Kollaritsch*'s interpretation of *Davis* as requiring proof of *further* post-actual-notice harassment could not be limited to university level students because "*Kollaritsch* made abundantly clear that it was extrapolating the principle . . . from the Supreme Court's opinion in *Davis*, which involved a fifth grader" (*i.e.*, "the rule applies just as much to Maplewood [H.S.] and Hunters Lane [H.S.] as it did to MSU"). (PageID 447.) Because I agree, I would affirm.

I.

The place to start is Title IX, which declares that no one "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). For example: "A school might directly interfere with a student's participation in an education program on the basis of sex. Or it might indirectly do the same thing by being 'deliberately indifferent to known acts of student-on-student sexual harassment.'" *Foster v. Bd. of Regents of Univ. of Michigan*, 982 F.3d 960, 965 (6th Cir. 2020) (en banc) (quoting *Davis*, 526 U.S. at

647). Title IX may be enforced through a judicially implied private right of action for damages based on the "conditioning an offer of federal funding on a promise by the recipient not to discriminate," but the Supreme Court has said that its enactment under the spending power "has implications for our construction of the scope of available remedies." *Gebser*, 524 U.S. at 286, 287.[1]

In particular, the Court in *Gebser* held "that it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official." 524 U.S. at 285. Nor would the school district's failure to promulgate an effective policy and grievance procedure be sufficient to impose liability. *Id*. at 292. Instead, "the district could be liable for damages *only* where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge." *Davis*, 526 U.S. at 642 (emphasis added) (citing *Gebser*, 524 U.S. at 290).

Against that backdrop, *Davis* held that, "in certain limited circumstances," a school district's "deliberate indifference to known acts of harassment" could

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[1] Although not before us here, the Supreme Court recently held that emotional distress damages are not recoverable in implied private actions to enforce certain antidiscrimination statutes enacted under the Spending Clause. *See Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562 (2022).

constitute "an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher." *Id*. at 643. In fact, explaining that the identity of the harasser matters, *Davis* expressly limited a school district's liability for student-on-student harassment "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs." *Id*. at 630. And, "the harassment must occur 'under' 'the operations of' a recipient." *Id*. (quoting 20 U.S.C. § 1687 (defining "program or activity")). Critically, *Davis* also held that a recipient "may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Id*. at 644–45 (quoting Random House Dictionary of the English Language 1415 (1966)). What this additional causation requirement meant was the question that *Kollaritsch* sought to answer. *See Doe v. Univ. of Ky.*, 959 F.3d 246, 250 (6th Cir. 2020) (describing *Kollaritsch* as a rearticulation of *Davis*'s pleading standard). That answer matters because it is what precludes the plaintiffs here from prevailing under their so-called "before" theory.

A. "Before" Theory

First, as this court recently explained, *Kollaritsch* "addressed a question that divided our sister circuits following *Davis*—what is required to find that a school has 'subjected' a student to discrimination?" *Wamer v.*

Univ. of Toledo, 27 F.4th 461, 466 (6th Cir. 2022). And, departing from the First, Tenth, and Eleventh Circuits' interpretation, *Kollaritsch* instead read *Davis* as "introduc[ing] a causation element requiring additional post-notice harassment in deliberate indifference claims alleging student-on-student harassment." *Id*. That is, we acknowledged that *Kollaritsch* rejected those other circuits' interpretation of *Davis*, which only require students to demonstrate "that a school's deliberate indifference made harassment more likely, not that it actually led to any additional post-notice incidences of harassment." *Id*. at 467 (citing *Farmer v. Kansas State Univ.*, 918 F.3d 1094, 1103-05 (10th Cir. 2019); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172-73 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009); and *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1297-98 (11th Cir. 2007)). In other words, *Kollaritsch* rejected the very authority that would leave open the possibility of Title IX liability under a "before" theory.[2]

Second, any doubt on that score is dispelled by *Kollaritsch* itself. There, we expressly rejected the argument "that the isolated phrase *make them vulnerable* means that post-actual-knowledge *further* harassment is not necessary" because it would be a "misreading of

[2] Although the *Kollaritsch* majority did not mention these cases by name, it explained that "plaintiffs cite several cases that rely on their same misreading of *Davis* to support that same inapt logical argument. But none of those cases is controlling. And, because we find none of them persuasive, we decline to address them specifically or discuss them here." 944 F.3d at 623. This court was not mistaken to recognize as much in *Wamer*.

Davis as a whole and the causation requirement in particular." *Kollaritsch*, 944 F.3d at 622, 623. Instead, *Kollaritsch* explained that *Davis*'s two-part causation statement gives "two possible ways that a school's 'clearly unreasonable' response could lead to further harassment: that response might (1) be a detrimental action, thus fomenting or instigating further harassment, or it might (2) be an insufficient action (or no action at all), thus making the victim vulnerable to, meaning unprotected from, further harassment." *Id.* at 623; *see also id*. at 623 (further harassment could occur by "*commission* (directly causing further harassment) [or] *omission* (creating vulnerability that leads to further harassment)" (citation omitted)). Moreover, *Kollaritsch* also specifically rejected the argument that "a single, sufficiently severe sexual assault is enough to state a viable action." *Id*.

Nor can *Kollaritsch* be side-stepped on the grounds of "the very different context and facts of this case." (Maj. Op. 6.) As the district court aptly noted: "'Before' claims and 'after' claims are, for statutory purposes, all just Title IX claims, subject to the applicable Title IX jurisprudence." (PageID 445.) And, "*Kollaritsch*'s central holding *does* implicate 'before' claims, albeit by unavoidable implication." (PageID 446.) The district court's reasoning is worth repeating:

> A "before" claim, by definition, only satisfies the first element and cannot satisfy the second and fourth elements [articulated in *Kollaritsch*] without becoming an "after" claim. Moreover, the court in *Kollaritsch* was unambiguous that

> a claim cannot be premised on a school's failure to address risk of sexual harassment based on past incidents of harassment against students other than the plaintiff. 944 F.3d at 621-22. *The type of hypothetical claim rejected—a claim based on a school's failure to protect the plaintiff from risks apparent from prior misconduct directed at other students—is simply a description of what a "before" claim is.*

(PageID 446.) (Emphasis added.) In other words, *Kollaritsch* precludes the plaintiffs' "before" claims "because such claims are categorically incapable of satisfying its requirements." (PageID 447.)

Third, the majority opinion misleadingly points to a statement in *Davis* as supporting its conclusion that it would "thwart" Title IX's broad remedial purposes to allow "schools to remain deliberately indifferent to widespread discrimination as long as the same student was not harassed twice." (Maj. Op. 6.) Not only is this precisely what *Kollaritsch* requires, the actual passage from *Davis* does not support the proposition either. The *Davis* majority commented that even the dissent suggested liability may arise from deliberate indifference to "severe, gender-based mistreatment played out on a 'widespread level' among students." *Davis*, 526 U.S. at 653. But the *Davis* dissent directly contradicted that characterization, explaining that it only meant that a pattern of discriminatory enforcement of a school's own rules could be the basis of a Title IX action and rejecting the theory that "mere indifference to gender-based mistreatment—even if widespread—is enough

to trigger Title IX liability." *Davis*, 526 U.S. at 683 (Kennedy, J., dissenting). More importantly, the *Davis* majority made its assertion to bolster the conclusion that it was "unlikely that Congress would have thought" that "a single instance of sufficiently severe one-on-one peer harassment" was sufficient to have the "systemic effect of denying the victim equal access to an educational program or activity." *Davis*, 526 U.S. at 652-53. Indeed, that conclusion is consistent with *Kollaritsch*'s understanding of *Davis*.

Fourth, in adopting the Ninth Circuit's recent articulation of a "before" or "pre-assault" claim in *Karasek v. Regents of University of California*, the majority opinion implies that the Eighth, Tenth, and Eleventh Circuits have adopted a similar test. A closer look, however, reveals that the Ninth Circuit's decision is an outlier. For example, take the Eighth Circuit's decision in *K.T. v. Culver-Stockton College*, which described *Davis*'s "actual knowledge" element as requiring prior notice of a substantial risk of peer harassment in the recipient's programs based on evidence such as previous similar incidents of assault. 865 F.3d 1054, 1058 (8th Cir. 2017). While the allegations in *K.T.* were insufficient to state a claim, the court gave three examples where actual knowledge could be established: (1) prior knowledge of "harassment previously committed by the same perpetrator" or "previous reports of sexual harassment occurring on the same premises," *id*. (citing *Ostrander v. Duggan*, 341 F.3d 745, 750 (8th Cir. 2003)); (2) "actual knowledge that [the assailant] posed a substantial risk of sufficiently severe harm to

students based on [the assailant's] *previous known conduct*," *id.* (quoting *Thomas v. Bd. of Trustees of Neb. State Colls.*, 667 F. App'x 560, 562 (8th Cir. 2016)); and (3) where "school officials had actual knowledge of the discrimination in part because they recruited the student assailant despite having 'preexisting knowledge' of the student's previous sexual misconduct," *id*. at 1058-59 (citing *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1293-94 (11th Cir. 2007)). None of those situations are alleged here. As for the Tenth Circuit, its decision in *Simpson v. University of Colorado* rested entirely on an "official policy" theory under which policymakers would know to a moral certainty of the need to do something about the specific risk of sexual assault. 500 F.3d 1170, 1178-80 (10th Cir. 2007). Emphasizing that in *Gebser* and *Davis* "there was no element of encouragement of the misconduct by the school district," the court in *Simpson* explained that "the gist of the complaint [was] that CU sanctioned, supported, even funded, a program (showing recruits a 'good time') that, without proper control, would encourage young men to engage in opprobrious acts." *Id*. at 1177. Thus, even if we were free to look beyond *Kollaritsch*, the test articulated in *Karasek* hardly represents a consensus with respect to "before" theories of liability under Title IX.

Finally, even in *Karasek*, the Ninth Circuit expressly declined to decide whether the allegations were sufficient and remanded with the additional caveat that "adequately alleging a causal link between a plaintiff's harassment and a school's deliberate indifference to

sexual misconduct across campus is difficult." 956 F.3d at 1114. The same is true here. The majority seems to suggest that evidence of MNPS's indifference may be found in the summary of disciplinary actions, occurring over a four-year period, that reflect "over 950 instances of sexual harassment, over 1200 instances of inappropriate sexual behavior, 45 instances of sexual assault, and 218 instances of inappropriate sexual contact." (PageID 4131.) What to make of those numbers, however, is less than clear. In terms of magnitude, MNPS is a particularly large district with an enrollment of nearly 80,000 students that operates more than a hundred schools, including twenty-some high schools. In terms of relevance, plaintiffs seem to recognize that the numbers are both overinclusive and underinclusive. (PageID 4131.) And, even then, these are all incidents that resulted in disciplinary action, which is relevant to whether MNPS's responses were "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. It will be for the district court to determine in the first instance whether there was an official policy of deliberate indifference, but, as in *Karasek*, the remand should go with the additional caveats that "[t]he element of causation ensures that Title IX liability remains within proper bounds" and that "Title IX does not require [a funding recipient] to purge its campus of sexual misconduct to avoid liability." *Karasek*, 956 F.3d at 1114.

I would affirm the district court's rejection of the "before" theory as irreconcilable with *Kollaritsch*'s interpretation of *Davis*.

B. "After" Theory

Although it is conceded that *Kollaritsch* governs the so-called "after" claims, the majority summarily excises the "same-victim requirement" for student-on-student harassment occurring between high school students. (Maj. Op. 10-11.) Nothing in *Kollaritsch* even faintly suggests that harassment of third parties could satisfy the requirement of *further* post-actual-notice harassment in cases involving non-university students. Indeed, in explicating that requirement, *Kollaritsch* specifically relied on a case involving a middle school student harassed by a high school student. *See Kollaritsch*, 944 F.3d at 621-22. That is, *Kollaritsch* said: "Because the further harassment must be inflicted against the same victim, the plaintiff 'cannot . . . premise the [further harassment] element of her Title IX claim on conduct [by the perpetrator] directed at third parties.'" *Id*. (quoting *Pahssen v. Merrill Comm. Sch. Dist.*, 668 F.3d 356, 363 (6th Cir. 2012)). The district court recognized as much, concluding that "*Kollaritsch* was unambiguous that a claim cannot be premised on a school's failure to address a risk of sexual harassment based on past incidents of harassment against students other than the plaintiff." (PageID 446 (citing *Kollaritsch*, 944 F.3d at 621-22).) *Kollaritsch* can be read no other way.

Nor does this court's decision in *Foster* support a contrary result. To be sure, *Foster* recognized that "the deliberate-indifference inquiry operates differently [for adults enrolled in an off-site graduate school program] than it does for elementary-age 'schoolchildren'

over whom grade schools possess a unique degree of 'supervision and control.'" *Foster*, 982 F.3d at 970 (quoting *Davis*, 526 U.S. at 646). Significantly, however, both *Foster* and *Davis* involved further harassment of the *same* victim. In fact, *Foster*'s focus on the degree of control pertained only to the reasonableness of the university's response to the reports of further harassment. *See id*. at 965-70; *see also id.* at 981-82 (Moore, J., dissenting). The continuum of control is represented by *Foster* on one end (mid-career executive graduate program held off-site at a hotel) and *Davis* on the other ("a fifth-grade boy [who] waged a months-long campaign" of sexual harassment of a classmate mostly in the classroom under the direct supervision of a teacher). A high school's control over a harasser and the context—particularly given greater autonomy of students than elementary school, difficulty controlling all contexts where students interact, and the ubiquity of social media in and outside of school—falls somewhere between those extremes. While *Davis* instructs that the degree of control is relevant to judging the reasonableness of a school district's responses, it does not speak to the same-victim requirement. The district court did not err in finding that Jane Doe could not establish her Title IX "after" claim under *Kollaritsch*.

Finally, with respect to the "after" claim asserted by Sally Doe, the district court found no basis to reconsider its prior decision granting MNPS's motion for summary judgment in light of *Kollaritsch*. (PageID 444.) The majority opinion reverses on the grounds that a reasonable jury could find that "MNPS opted to

avoid the problem" of harassment that followed the circulation of the video "resulting in Sally Doe having no choice but homeschooling or enduring further misconduct" (Maj. Op. 10.) That conclusion, however, rests on a selective misreading of the testimony from Sally's mother.

It is true that Sally's mother said she asked Assistant Principal Newman to do something about the perpetrator and Newman responded that it was a criminal matter that was "out of her hands." (RE 83-3, pp. 67, 69.) But, even by Sally's mother's account, that was not the end of the meeting with Newman. In fact, Sally was called to the office and questioned about what happened and the SRO who was present at the meeting initiated a formal complaint to get the video taken down. (RE 83-3, pp. 72-74, 76.) Sally's mother met with a police detective less than two weeks later, who confirmed that the video had been taken down. (RE 83-3, pp. 82-84.) Also, when Sally's mother reported in emails on April 11 and 12 that Sally was experiencing harassment about the video from other students, Newman's response was to ask to meet to "figure out a plan to get [Sally] through the rest of the year." (RE 83-7.)

The district court specifically found the "assertion that the school did nothing . . . is simply factually untrue" and concluded that Newman's response "cannot be treated as a total abdication of responsibility such that an inference of deliberate indifference would arise." (No. 17-cv-1098, RE 101, p. 52.) The district court reiterated on remand that Newman

> treated the incident—including, in particular, the videotaping aspect—as serious and maintained ongoing communication with Sally Doe's parents. The initial perpetrator in the Sally Doe incident, moreover, faced significant consequences for his actions, including criminal prosecution. . . . [And,] although MNPS made some errors in its handling of Sally Doe's case, the facts were not sufficient to allow a reasonable juror to conclude that the school was deliberately indifferent.

(PageID 438.) We recognized in *Foster* that, "[i]n an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not [deliberately indifferent] as a matter of law." *Foster*, 982 F.3d at 971 (quoting *Davis*, 526 U.S. at 649). The district court did not err finding that was the case with respect to Sally Doe's "after" claim.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 20-6225/6228

JOHN DOE and JANE DOE #1, on behalf of their minor child, Jane Doe #2 (20-6225); SALLY DOE, on behalf of her minor child, Sally Doe #2 (20-6228),

Plaintiffs - Appellants,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, dba Metropolitan Nashville Public Schools,

Defendant - Appellee.

Before: GUY, MOORE, and GIBBONS, Circuit Judges.

JUDGMENT

(Filed May 19, 2022)

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is VACATED IN PART, REVERSED IN PART, and REMANDED for

further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

John Doe, et al.

Plaintiff,

v.

Case No.:
3:17–cv–01159

Metropolitan Government of
Nashville and Davidson County, Tennessee

Defendant,

ENTRY OF JUDGMENT

(Filed Sep. 29, 2020)

Judgment is hereby entered for purposes of Rule 58(a) and/or Rule 79(a) of the Federal Rules of Civil Procedure on 9/29/2020 re [58].

Lynda M. Hill
s/ Dalaina Thompson, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

Sally Doe, et al.

Plaintiff,

v. Case No.: 3:17–cv–01209

Metropolitan Government of Nashville and Davidson County Tennessee

Defendant,

ENTRY OF JUDGMENT

(Filed Sep. 29, 2020)

Judgment is hereby entered for purposes of Rule 58(a) and/or Rule 79(a) of the Federal Rules of Civil Procedure on 9/29/2020 re [69].

Lynda M. Hill
s/ Dalaina Thompson, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

T.C. ON BEHALF OF HER MINOR CHILD, S.C., Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	Civil No. 3:17-cv-01098 Judge Trauger LEAD CASE

JOHN DOE AND JANE DOE #1 ON BEHALF OF THEIR MINOR CHILD, JANE DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	Civil No. 3:17-cv-01159 Judge Trauger Member Case

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SALLY DOE ON BEHALF OF HER MINOR CHILD, SALLY DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	Civil No. 3:17-cv-01209 Judge Trauger Member Case

MARY DOE #1 ON BEHALF OF HER MINOR CHILD, MARY DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	Civil No. 3:17-cv-01277 Judge Trauger Member Case

MEMORANDUM

(Filed Sep. 25, 2020)

Pending before the court in these consolidated cases are five sealed Motions for Summary Judgment. Four Motions for Summary Judgment were filed by the

Metropolitan Government of Nashville and Davidson County d/b/a/ Metropolitan Nashville Public Schools ("MNPS"). (Doc. No. 71 (regarding S.C.[1]); Doc. No. 76 (regarding Jane Doe); Doc. No. 82 (regarding Mary Doe); Doc. No. 83 (regarding Sally Doe).) Jane Doe, Sally Doe, and Mary Doe collectively filed a Motion for Partial Summary Judgment (Doc. No. 87) regarding a portion of their claims. On May 6, 2019, following briefing on the Motions, the court entered an Order granting MNPS summary judgment with regard to one of Sally Doe's claims and otherwise denying all five motions. (Doc. No. 102.) On June 11, 2019, the court granted MNPS a Certificate of Appealability regarding its ruling. (Doc. No. 112.) On January 24, 2020, the Sixth Circuit granted permission to appeal, vacated

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[1] The naming conventions used by the parties are, in the context of the cases' having been consolidated, somewhat confusing and, therefore, will be streamlined slightly by the court. Three of these plaintiff students have taken the fictive surname Doe (despite not sharing the same actual surname), along with different fictive first names. However, their mothers—who, alone or with the students' fathers, filed the suits on the students' behalf—have taken the same fictive first name/surname combinations as their daughters, differentiated from the daughters only numerically. For example, Mary Doe #1 is the mother of Mary Doe #2, Jane Doe #1 is the mother of Jane Doe #2, and so forth. The court will simply refer to each student by the chosen pseudonym, without a numerical modifier, and refer to any parent just as the student's parent—e.g., as "Mary Doe" and "Mary Doe's mother." When discussing procedural matters in this court, the court will use the unmodified pseudonym to refer to the student acting through her parent or parents. For the one plaintiff using a different naming convention—S.C., who is suing through her mother T.C.—the court will use "S.C." to refer to both the individual student and to T.C. when acting in this court on S.C.'s behalf.

this court's order, and remanded the case for reconsideration in light of *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019). (Doc. No. 113.) At the direction of the court, the parties filed Supplemental Briefs regarding the effect of *Kollaritsch* (Doc. Nos. 122 (plaintiffs' joint Brief), 123 (MNPS's Brief). For the reasons set out herein, the court will deny the plaintiffs' motion, grant MNPS's motions regarding Sally Doe and Jane Doe, and grant in part and deny in part MNPS's motions regarding Mary Doe and S.C.

I. BACKGROUND[2]

"Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides 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.'" *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 465–66 (1999). Title IX, like other federal antidiscrimination laws,[3] recognizes that

[2] The relevant facts were set forth in detail in the court's original Memorandum. (Doc. No. 101.) The court will provide a slightly amended version here, with additional facts regarding procedural and legal developments following the court's prior ruling.

[3] *See*, *e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (discussing harassment under Title VII); *Brown v. Metro. Gov't of Nashville & Davidson Cty.*, 722 F. App'x 520, 525 (6th Cir. 2018) (discussing harassment under the Age Discrimination in Employment Act); *Trepka v. Bd. of Educ.*, 28 F.

discrimination can, in some cases, take the form of harassment. See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999). In 2016 and 2017, at least four female MNPS students, all minors, were videotaped[4] by other students while engaged in sexual encounters with male students on the premises of their respective MNPS schools. The resulting video files were circulated among the students' peers electronically. The plaintiffs, through their parents, have sued MNPS, arguing that its handling of the matters and general approach to harassment at its schools led to the deprivation of the plaintiffs' rights under Title IX and their constitutional rights to equal protection.

A. Title IX in MNPS

Federal regulations require that a recipient of funding under Title IX "shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX rules], including any investigation of any complaint

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App'x 455, 461 (6th Cir. 2002) (discussing harassment under the Americans with Disabilities Act); *Greenan v. Bd. of Educ. of Worcester Cty.*, 783 F. Supp. 2d 782, 788 (D. Md. 2011) (discussing harassment under the Pregnancy Discrimination Act).

[4] The parties use various terms to refer to the video recordings at issue here, including "videos" and "videotapes." The actual recordings appear all to have been made on mobile phones and thus were not, as a literal matter, "tapes," insofar as that term suggests the existence of an actual physical cartridge encasing magnetic tape. Rather, the recordings existed as files on electronic devices. The court will use the various terms that may refer to a video recording interchangeably to refer to copies of the files.

communicated to such entity alleging its noncompliance with [Title IX rules] or alleging any action which would be prohibited by [Title IX rules]." 45 C.F.R. § 83.15(a). That employee is known as the recipient's "Title IX coordinator." The funding recipient must "notify all of its students and employees who work directly with students and applicants for admission of the name, office address and telephone number of the" Title IX coordinator. *Id.* MNPS's Title IX coordinator, from 2012 through the 2016–17 school year, was Julie McCargar. (Doc. No. 92-25 at 18, 24.)

McCargar testified that she and others in her office received outside training and worked closely with the city's legal department in understanding how to conduct Title IX investigations. (*Id.* at 50.) She testified that, in contrast, principals and assistant principals did not, to her knowledge, receive training regarding how to conduct a Title IX investigation until late in her tenure as coordinator. (*Id.* at 50.) Principals and assistant principals also were not required to read the Dear Colleague letters that the Title IX coordinator was expected to read to stay abreast of federal Title IX policy. (*Id.* at 51–52.) Phyllis Dyer, who worked with McCargar and succeeded her as Title IX coordinator, explained that principals did finally receive some training at some time around or after May 2016. (Doc. No. 92-18 at 54).

Even before they received training, however, the principals and assistant principals were permitted to perform Title IX investigations themselves, rather than relying on the Title IX coordinator. (Doc. No.

92-25 at 53, 59–60.) McCargar further testified that she could not recall ever telling the principals to contact her when they became aware of possible Title IX violations. (*Id.* at 59.) If the principal determined that an incident did, in fact, rise to the level of a Title IX violation, only then would the principal inform the coordinator. (*Id.* at 79–82.)

The plaintiffs suggest, persuasively, that the policy McCargar described violated the guidance that had been provided by the U.S. Department of Education's Assistant Secretary for Civil Rights in a Dear Colleague Letter issued on April 24, 2015. (Doc. No. 1-5.) According to the letter, a Title IX funding recipient "must inform the Title IX coordinator of all reports and complaints *raising Title IX issues*, even if the complaint was initially filed with another individual or office or the investigation will be conducted by another individual or office." (*Id.* at 3 (emphasis added).) As the plaintiffs point out, the universe of complaints raising Title IX issues is presumably significantly larger than the universe of complaints where a principal has made an affirmative finding of a confirmed Title IX violation. This may be especially true where the principal has not received sufficient Title IX training and therefore fails to identify some Title IX concerns.

When asked about MNPS's compliance with the Department of Education's guidance, McCargar admitted that she was not informed of all complaints "raising Title IX issues," if "informed" meant that she was directly contacted in writing or by phone. While she did receive direct notice of cases where principals

ultimately concluded that a violation had occurred, she was not informed in that manner where a complaint raised Title IX issues, but the principal ultimately found no violation. (Doc. No. 92-25 at 95.) Rather, McCargar explained, she had interpreted the Department's guidance as requiring only that incidents that had raised Title IX issues, but that principals had not deemed to be violations, be entered into a "student management system," to which the coordinator had access. (*Id.* at 96.)

Dyer, as McCargar's successor, provided some context regarding how the Title IX coordinator's duties were structured during the relevant time period. Dyer explained that, while MNPS, as required, did have a designated Title IX coordinator, Title IX coordinator was not that person's sole job. Rather, the duties of Title IX coordinator were rolled into the job of the executive director of federal programs, who is responsible for ensuring that federal funding from all applicable federal programs, not just Title IX, is obtained and integrated into MNPS's budget. (Doc. No. 92-18 at 22.) Title IX does not require the Title IX coordinator to perform that job full-time. The April 24, 2015 Dear Colleague Letter, however, addressed the benefits of doing so:

> Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest and in many cases ensure sufficient time is available to perform all the role's responsibilities. If a recipient designates one employee to coordinate the recipient's compliance with

> Title IX and other related laws, it is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution, including those raising Title IX issues.

(Doc. No. 1-5 at 3.) Dyer admitted that there were many days when she did not devote any time to Title IX matters, with weeks sometimes passing without her performing any Title IX-specific duties. (Doc. No. 92-18 at 22, 36.) When asked whether it was "true that [she] spend[s] most of [her] time making sure that [the multimillion-dollar federal funding figure for a particular year] is received by [the] Metro school system," Dyer responded, "Yes." (*Id.* at 23.) When asked about the division of responsibilities between principals and the coordinator, Dyer's position largely echoed McCargar's, with the coordinator's responsibilities only arising after a principal affirmatively determined that a violation occurred. (*Id.* at 64–65.) She confirmed that she, like McCargar, was not made aware of the incidents at issue in these cases. (*Id.* at 89–91.)

B. Incident at Maplewood: Mary Doe and Jane Doe

Mary Doe and Jane Doe were freshmen at Maplewood High School when, on September 21, 2016, they were part of a sexual encounter involving the two of them and four older male students in a school stairwell. Jane Doe has attested that she was intimidated by the age, size, and number of male students involved and, although she did not welcome the sexual activity,

she "did not know how to get out of the situation." (Doc. No. 92-8 ¶ 4.) Mary Doe has similarly attested that she did not expect or welcome sexual activity but was intimidated and did not know how to stop it. (Doc. No. 92-10 ¶ 4.)

A male student videotaped the incident, and the video was ultimately circulated among the students' peers. (Doc. No. 92-3 ¶¶ 19–20.) Both girls have attested that they did not consent to being taped or to the tape's being circulated. (Doc. No. 92-8 ¶ 5; Doc. No. 92-10 ¶ 6.) That night, Mary Doe told her mother a false version of the incident in which she did not reveal the extent of actual sexual activity involved in the encounter. (Doc. No. 92-3 ¶¶ 12.) Mary Doe's mother contacted Assistant Principal Marvin Olige about the event, and Mary Doe, her mother, and her grandmother met with Olige and police officers stationed at the school as "School Resource Officers" ("SROs"). (*Id.* ¶¶ 13–14.) Mary Doe reiterated the inaccurate version of events she had told her mother and provided a written statement to that effect. (Doc. No. 77-3.) The SROs, however, pressed Mary Doe about inconsistencies between her account and other information they had received, and she admitted that the version of the story she had given her mother was inaccurate. Olige, the SROs, and Mary Doe's mother, however, appeared to remain unaware of the actual details of the encounter. (Doc. No. 92-3 ¶ 18.)

The parties disagree about the precise series of events through which MNPS and the girls became aware that the video was being circulated but agree

that, in the ensuing weeks, a number of people became aware of the video's existence and circulation. (*See id.* ¶¶ 19–23.) At some point, the girls became aware that other students had copies of the video. Jane Doe heard that, in connection to the circulation of the video, people were calling her demeaning sexual names like "whore" and "slut." (Doc. No. 92-8 ¶ 6.) Jane Doe's brother also became aware of the video and informed her parents. (Doc. No. 76-4 at 28.) On October 12, 2016, Jane Doe's parents reported the video to school officials and met with SROs and Assistant Principal Olige. (Doc. No. 89 ¶ 43; Doc. No. 92-3 ¶ 24.) Upon learning that Mary Doe was the other female student in the video, Olige pulled her out of class to be questioned. (Doc. No. 89 ¶ 44.)

Jane Doe's mother has attested that she told Olige and the SROs that the video had been made without Jane Doe's knowledge or consent and "circulated at the school and other places." (Doc. No. 92-7 ¶ 3.) She further attested that, in the meeting, Olige and the SROs focused mainly on whether the underlying sexual conduct was forcible rape. (*Id.* ¶ 5.) Jane Doe and Mary Doe confirm that Olige's questioning was focused on whether forcible rape had occurred. (Doc. No. 92-8 ¶ 7; Doc. No. 92-10 ¶ 5.) Olige did not tell Maplewood Executive Principal Keely Mason about the sexual activity or the video file until after at least one of the underlying lawsuits had been filed. (Doc. No. 89 ¶ 55.) Olige also did not refer the students or their parents to MNPS's Title IX coordinator; nor did he suggest to

them that a Title IX investigation would or should occur. (Doc. No. 76-4 at 50.)

Jane Doe attested that, following the meeting, she was "scared to remain at Maplewood." (Doc. No. 92-8 ¶ 11.) The day after the meeting with Olige or shortly thereafter, Jane Doe's parents enrolled her in a new school, and she never returned to Maplewood. (Doc. No. 76-4 at 30–31.) Jane Doe's mother has characterized the school to which she transferred as having less comprehensive classroom and extracurricular opportunities. Moreover, Jane Doe had been participating in a "College Zone" program at Maplewood, which was intended to help students prepare for and gain admission to college, but her new school did not offer such a program. (Doc. No. 92-7 ¶¶ 12–13.) Jane Doe ultimately failed tenth grade at the new school. (*Id.* ¶ 15.)

At first, Mary Doe remained at Maplewood. She has described substantial taunting and bullying she received at Maplewood related to the video, including students calling her "nasty" and saying she "got a train run on" her. She says that she complained to school personnel about the bullying, but they "didn't do anything about it." (Doc. No. 92-10 ¶ 11.) She said that, when she would make a new friend, students would then target and bully the friend for "hanging around a nasty person." (*Id.* ¶ 13.) According to Mary Doe, at one point a boy grabbed her thighs and told her he wanted her to do the same thing to him as she had done in the video. She claims that she told Olige about the event but that he took no action that she was aware of. (*Id.* ¶ 14.)

Mary Doe eventually attended a meeting with Maplewood Dean of Students Jamie Hall and another person about the events and her coping with them. Doe testified that she had informed Hall that she had been having suicidal thoughts in the wake of the incident. In her deposition, Mary Doe described the following exchange:

> They said it was, like, a game called ["]Exposed["] that the seniors do. And I was like, I don't know what that is. . . . I was talking to, I think, Ms. Hall, and she was talking to me—who was I talking to? Who else was in there? There was somebody else in there. And I was upset, at the moment, and I was crying. She was like, What is wrong with you? It was about the situation. She was like, It's the game. It's a game that the seniors play, and you shouldn't worry about it. It's not nothing you should want to kill yourself over and all this. I was like, But it's a video of me out there that I didn't know nothing about, so I should really be upset about it.

(Doc. No. 92-23 at 77.) Mary Doe—who attested that she had, prior to these events, been a content and gregarious Maplewood student—concluded that she could not be happy at Maplewood and transferred to another school. (Doc. No. 92-10 ¶ 16.) Mary Doe's mother has stated that she felt she had no reasonable alternative but to seek the transfer. (Doc. No. 92-9 ¶ 8.)

Olige elected not to punish any of the students involved in the sexual activity or videotaping "beyond verbal discipline," because it was "an opportunity to

impart some wisdom and life instruction," and he "did not want to subject the students to potential humiliation and discipline for a consensual act." No other, higher-level administrator was involved in his decision. (Doc. No. 89 ¶¶ 61–62; *see* Doc. No. 70-16 at 11.)

MNPS provides schools with a two-page "Bullying and Harassment Reporting Form" that includes spaces for specifying what offenders did and what, if any, electronic communications were used. (Doc. No. 70-17 at 1–2.) Olige testified that he knew that, if he had filled out such a form, it would have begun a process of the school's determining whether a Title IX violation had occurred. (Doc. No. 77-1 at 104.) However, he did not fill out a reporting form related to any of the events involving Jane Doe and Mary Doe. (Doc. No. 89 ¶ 66.) Olige testified that, if he had ever been instructed by the district to refer cases involving circulation of sexual videos of students to the school's executive principal or to the Title IX coordinator, he would have done so. (Doc. No. 77-1 at 87.)

Another Maplewood Assistant Principal, Isaiah Long, testified that, in his view, MNPS standard operating procedures, effective as of May 2016, required an assistant principal who became aware of sexual activity being taped at school to report the activity to the executive principal. He further testified that such actions would have warranted substantial punishment, regardless of whether the underlying sexual activity had been consensual. Long, however, was not made aware of the events at issue here until after litigation began. (Doc. No. 89 ¶¶ 70–73.) Executive Principal

Mason agreed that she should have been informed of the events and that the reporting form should have been used for any sexual cyberbullying on the Maplewood campus. (*Id.* ¶¶ 77–81.) Mason testified that, had she been aware of the events, she would have punished the students involved. She further testified that she would have treated the release of a sexually explicit video of a student without the student's consent as itself requiring discipline. (*Id.* ¶ 89; Doc. No. 70-12 at 68.)

Jane Doe, through her parents, filed her Complaint on August 16, 2017. (Case No. 3:17-cv-01159, Doc. No. 1.) Mary Doe, through her mother, filed a Complaint pleading the same causes of action on September 18, 2017. (Case No. 3:17-cv-01277, Doc. No. 1.) Counts I and II of the Complaints are for Title IX violations related to MNPS's actions, respectively, before and after the stairwell incident. Count III is a claim under 42 U.S.C. § 1983, based on MNPS's failure to train its employees with regard to sexual harassment. Count W is a claim under 42 U.S.C. § 1983, based on MNPS's deliberate indifference to ongoing harassment. (Case No. 3:17-cv-01159, Doc. No. 1 ¶¶ 53–73; Case No. 3:17-cv-01277, Doc. No. 1 ¶¶ 38–58.)

C. First Incident at Hunters Lane: Sally Doe

On February 21, 2017, Sally Doe—then a freshman at Hunters Lane High School engaged in a sexual encounter with a boy, O.B., in a Hunters Lane boys' restroom. (Doc. No. 924 ¶ 3.) Sally Doe has attested that

she was pulled into the restroom and did not understand or expect that sexual activity was going to occur, she was pressured to engage in the sexual activity, and, although she did not physically fight the sexual activity, she was scared, did not know how to prevent it, and did not consider it welcome. She stopped the sexual activity before completion. (Doc. No. 92-6 ¶ 4.) The encounter was recorded on video—Sally Doe believes, by O.B. with his phone. Sally Doe attested that she did not realize she was being recorded and did not welcome or consent to the recording. (*Id.* ¶ 5.)

The same day, administrators learned that Sally Doe had been seen in or going into the restroom with O.B., and Assistant Principal Melanie McDonald pulled Sally Doe out of class to explain the situation. McDonald asked Sally Doe what she had been doing in the boys' restroom and if she had had sex while there. Sally Doe responded that she had not had sex in the restroom. (Doc. No. 83-1 at 16–17.) McDonald had Sally Doe provide a written statement about the matter, and, in the statement, Doe stated only that she and O.B. had gone into the bathroom to discuss something. (Doc. No. 83-4 at 23.) Both students were placed on "overnight suspension." (Doc. No. 83-2 at 2–3.) The next day or the day after, Sally Doe and her mother met with Assistant Principal Nicole Newman, and Sally Doe admitted to having kissed O.B. but not to the sexual activity. (Doc. No. 83-1 at 21–22; Doc. No. 83-2 at 9.)

About a month and a half later, on April 7, 2017, another female student, with whom Sally Doe had

apparently had a personal falling out, posted the video of the February 21 bathroom encounter on Instagram and "tagged"[5] Sally Doe. Sally Doe does not know how the girl who posted the video obtained it. (Doc. No. 92-4 ¶¶ 5–6.) Several of Sally Doe's friends and acquaintances saw the video when it was posted. Sally Doe does not know exactly how many of her peers viewed the video but testified that she believed that "it was a lot of people." (Doc. No. 83-1 at 26.) The same day that Sally Doe first saw the video, her mother found out about the video from a family member who, presumably, had seen or become aware of the Instagram post. (*Id.* at 24.)

The next day, Sally Doe's mother went to Hunters Lane to alert the school of the situation. She met with Assistant Principal Newman, who was in charge of overseeing ninth grade students, and an SRO. (Doc. No. 70-3 at 42–43; Doc. No. 83-1 at 26; Doc. No. 89 ¶¶ 1, 5.) Newman's recollection of the meeting is limited. Newman testified that she does not remember whether she asked Doe who was circulating the video. Newman also does not recall whether she took notes. (Docket No 70-3 at 49.) Sally Doe's mother has attested that she told Newman that she "wanted [her] daughter protected and if that meant that the boy involved had to be

[5] "Tagging" refers to including another person's user name in a social media post, often to indicate that the post depicts the "tagged" person and/or to inform the "tagged" person of the post by causing that user to receive a notification. For example, a person who posted a photograph of herself with her best friend might "tag" the best friend to indicate that she is the other person in the picture and let her know that the photo has been posted.

suspended or expelled, then that is what should occur." (Doc. No. 92-5 ¶ 4.) She also attested that Newman and the SROs focused their questions on the issue of forcible rape and did not raise the issue of a possible Title IX violation or the possibility that the underlying events may have been non-forcible but unwelcome. (*Id.* ¶ 7.)

Newman did not, to her recollection, inform the executive principal of Hunters Lane, Susan Kessler, about the events. (Doc. No. 89 ¶ 5.) Newman testified that she could not recall receiving any training, either at Hunters Lane or outside Hunters Lane, on how to conduct a Title IX investigation. (Doc. No. 70-3 at 108.)

The record includes an email exchange between Sally Doe's mother and Newman, beginning on April 11, 2017. (Doc. No. 83-7 at 1–6.) Sally Doe's mother described the bullying that Doe was apparently facing at school. Other students were "yelling and throwing things at her as she walk[ed] down the hallway," so much so that she had to put her headphones in to attempt to drown them out. (*Id.* at 5.) O.B. "tried to fight her . . . in front of a large crowd" and "told her he was going to have someone . . . beat her up." (*Id.*) "A student in one of her classes had the video[ ] and was talking to the teacher about it[,] even offer[ing] to show the teacher," although the teacher refused. (*Id.*) Sally Doe's account of events confirms that she was taunted by her peers with sexually demeaning names such as "ho" and "slut" and that O.B. threatened her. (Doc. No. 92-6 ¶ 8.)

On April 12, 2017, Sally Doe's mother wrote, "There is absolutely no way I can send my child to this detrimental environment every day." (*Id.* at 5.) Newman expressed her concern for what Sally Doe was experiencing and set up a meeting with Sally Doe's father for the next day to "talk and figure out a plan to get [Sally Doe] thr[ough] the rest of the year." (*Id.* at 4.) Sally Doe's mother responded that Sally Doe's father had tried to encourage Sally Doe to speak to Newman more about the situation, but that Sally Doe had said there was "no point" because the Hunters Lane administration "c[ould]n't control everyone." Sally Doe's mother wrote that she, too, was concerned that "[i]t's just too many children to reprimand." (*Id.*) Sally Doe's parents pulled her out of Hunters Lane for the remainder of the year, and she was allowed to complete her exams at home. (Doc. No. 83-1 at 29.)

By April 18, 2017, the video was, as far as the parties know, off of social media. (Doc. No. 92-4 ¶ 18.) Sally Doe, however, continued to suffer occasional taunting or provocation from other students related to the video. That summer, Sally Doe participated in a summer program at Hunters Lane, and, during the program, she had an altercation with a boy about the video. (Doc. No. 83-1 at 37.) Sally Doe returned to Hunters Lane the next year and, at one point, was mocked by another student about the video in front of her then-boyfriend. Afterwards, an assistant principal found her crying in a stairwell. (*Id.* at 39–40.) Sally Doe originally received an overnight suspension for missing class, but her mother went into the school the next day and

explained the situation, after which the suspension was taken off of Sally Doe's record. (*Id.* at 41–42.)

In November 2017, a male student touched Sally Doe's buttocks without her permission while taking a picture. Thereafter, the student and Sally Doe's boyfriend got into a fight. Sally Doe, her boyfriend, and the student who took the picture while groping her were all suspended based on the fight. Although the disciplinary documentation of the incident does not mention Sally Doe's earlier problems with the video, it does not rule out the possibility that Sally Doe's resultant reputation played a role in the boy's actions.(Doc. No. 83-10 at 5.)

Later that school year, Sally Doe was involved in an altercation, during which a student brought up the video. (Doc. No. 83-1 at 44.) By the 2018–19 school year, however, the active harassment of Sally Doe had stopped. (Doc. No. 92-4 ¶ 22.)

On August 31, 2017, Sally Doe, through her mother, filed her Complaint. (Case No. 3:17-cv-1209, Doc. No. 1.) Counts I and II of the Complaint are for Title IX violations related to MNPS's actions, respectively, before and after the bathroom incident. Count III is a claim under 42 U.S.C. § 1983, based on MNPS's failure to train its employees with regard to sexual harassment. Count IV is a claim under 42 U.S.C. § 1983, based on MNPS's deliberate indifference to ongoing harassment. (*Id.* ¶¶ 38–56.)

D. Second Incident at Hunters Lane: S.C.

On April 17, 2017, S.C., also a freshman at Hunters Lane, was involved in a sexual encounter with a male student, J.J., on school premises during the students' lunch hour. According to S.C., all of the sexual activity that she engaged in was coerced and unwelcome, although she did not know how to stop it. (Doc. No. 92-11 ¶ 4.) Another female student, S.D., recorded the encounter on video. (Doc. No. 92-1 ¶¶ 1, 3.) S.C. testified that S.D. had—unbeknownst, at first, to S.C.—come into the room during the encounter and that, by the time S.C. saw S.D., S.D. already appeared to be recording the encounter on her phone. (Doc. No. 71-1 at 20.) Later that day, when S.C. was preparing to get on the school bus home, S.D. approached S.C. and informed S.C. that, as S.C. would later describe it, "the video was out and . . . everybody had it." (Doc. No. 92-1 ¶ 7; Doc. No. 71-1 at 23.) S.C. left school for the day without informing any teachers or administrators about the sexual encounter or the video. (Doc. No. 92-1 ¶ 8.) At some point that night, a friend sent the video to S.C.'s mother, who became angry at S.C. (Doc. No. 71-1 at 27–28.)

A little after 9:30 p.m. that night, Executive Principal Kessler received a Facebook message from a "community member" with the video attached. (Doc. No. 92-1 ¶ 11; Doc. No. 74 ¶ 3.) Kessler claims that, by early the next morning, she had "begun [a] formal investigation of the incident." (Doc. No. 74 ¶ 5.) Kessler worked with her assistant principals as well as the school's SROs to further the investigation, and

Detective Robert Carrigan, a police detective dedicated to investigating sex crimes, also came to the school. (*Id.*)

Detective Carrigan interviewed S.C. and, after the interview, informed S.C.'s mother that the sexual encounter had been consensual. (Doc. No. 92-1 ¶ 16.) S.C. gave a written statement to Kessler and did not state that she had been forced into the encounter. (Doc. No. 74-1 at 1.) She did, however, state that she had wanted to stop both the encounter and the videotaping but "just couldn't get the urge to say no." (*Id.*) According to Kessler, there was nothing about the content of the video itself suggesting that the sexual activity was non-consensual, and S.C. appeared, in the video, to have been aware of the taping. (Doc. No. 74 ¶¶ 7–8.) According to S.C., police, as part of their questioning of her, told her that she could be prosecuted for the creation of child pornography and suggested that, because J.J. had not struck or otherwise violently forced her, the activity was consensual. (Doc. No. 92-11 ¶¶ 7–8.) S.C.'s mother also stated that police suggested that S.C. could be prosecuted for child pornography offenses and that, because J.J. had not struck her on the video, it was clear that she had been a willing participant. (Doc. No. 92-12 ¶¶ 6, 8.)

Ultimately, the school punished eight students, including J.J., S.C., and S.D., for their involvement in the sexual encounter and/or creating or distributing the video. (Doc. No. 92-1 ¶ 20; Doc. No. 71-1 at 38.) The other students punished were three male and two female students, all of whom were found to have shared

the video. (Doc. No. 74 ¶ 9.) All of the students received the same punishment, a three-day suspension. (*Id.* ¶ 13.) According to S.C. and her mother, Kessler assured them that the matter would "blow over in one day," a prediction that they found shocking. (Doc. No. 92-11 ¶ 12; Doc. No. 92-12 ¶ 14.)

S.C. testified that she received threats directly related to her cooperation with the investigation into the incident. For example, S.D. made violent threats toward S.C. and her family due to S.C's having "snitched" on her. S.C.'s mother reported those threats to the police. (Doc. No. 71-1 at 39.) Two male students who apparently wished to discourage S.C.'s involvement in the investigation also sent messages "warning" S.C. that she would not like the consequences of cooperating because there were people "out looking for" her. (*Id.* at 45–46.) S.C.'s mother confirms that S.C. and S.C.'s sister received those threats and that S.C.'s mother complained to the school and police about the threats during the April 18 meeting. (Doc. No. 92-12 ¶¶ 11–12.) After her suspension, S.C. never returned to Hunters Lane, ultimately moving to another school outside the MNPS system. (Doc. No. 92-1 ¶ 19.)

On July 31, 2017, S.C.'s mother sued MNPS on her behalf. (Doc. No. 1.) Counts I and II of her Amended Complaint are for Title IX violations related to MNPS's actions, respectively, before and after the original incident. Count III is a claim under 42 U.S.C. § 1983, based on MNPS's failure to train its employees with regard to sexual harassment. Count W is a claim under 42

U.S.C. § 1983, based on MNPS's deliberate indifference to ongoing harassment. (Doc. No. 6 ¶¶ 41–61.)

E. The Court's Original Summary Judgment Ruling

In its Memorandum, this court began its analysis from the premise—still valid at this time—that, pursuant to the Supreme Court's opinion in *Davis v. Monroe County Board of Education*, 526 U.S. 629, a school system can be held liable for Title IX damages related to student-on-student harassment, if the school system's "deliberate indifference . . . , at a minimum, 'cause[d] [the student] to undergo' harassment or 'ma[d]e [the student] liable or vulnerable' to it." *Id.* at 645 (quoting Random House Dictionary of the English Language 1415 (1966); Webster's Third New International Dictionary 2275 (1961)). (Doc. No. 101 at 23.) The court noted that "Title IX claims based on harassment or abuse can roughly be separated into two types—'before' claims and 'after' claims"—with "'[b]efore' claims focus[ing] on a school's actions before an underlying incident" and "'[a]fter" claims . . . consider[ing] the school's response after it learns of an underlying incident (*Id.* at 24 (citing *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 791 (M.D. Tenn. 2016).) The court noted, however, that that dichotomy fell somewhat short of capturing the complexities of cases involving the indefinitely ongoing dissemination of recorded sexual images or videos, which could persist for weeks, months, years, or even decades. (*Id.*)

MNPS had argued that it did not have sufficient notice of the underlying risks in this case to support the plaintiffs' "before" claims. MNPS did not dispute that its employees were generally aware of the risks of sexual activity on campus or circulation of sexual videos among students. It argued, rather, that Title IX required more specific, student-specific notice regarding the relevant plaintiff and/or the relevant perpetrators. The court rejected that argument. Regarding MNPS's notice, the court wrote:

> [T]here is ample evidence to allow a jury to conclude that MNPS was on notice of the risk of the dissemination of sexual images of its students without their consent, as well as the possibility of subsequent harassment of the students depicted. First, the risk at issue in this case is an obvious and inevitable danger, given the ages of the students involved and the realities of media and communication technology in this decade. More importantly, however, MNPS schools themselves had witnessed numerous cases that confirmed that risk. One of the SROs who worked at Hunters Lane testified that he could not even put a number on how many instances of students' "sexting pictures" he had dealt with, but estimated that "maybe a dozen" had been "brought to [his] attention" from 2012 to 2017. He estimated having seen five to ten cases involving sexual videos. In all those cases, he testified, he informed the Hunters Lane administration. Detective Carrigan testified that behaviors similar to those at issue in

> these cases have occurred in every MNPS high school and middle school, although he clarified that he was not necessarily referring to the dissemination of videos that themselves had been filmed on campus.

(Doc. No. 101 at 25–26 (citations omitted).)

Regarding MNPS's argument that it could not be held liable without student-specific notice, the court wrote:

> MNPS would have the court erect an artificial barrier around known risks related to widespread misbehavior in favor of a rule that only imposes Title IX liability if a school was aware of a particular problem student or student group likely to commit harassment or a particular student who was especially at risk of being targeted. Nothing in the logic of Title IX or the caselaw construing it supports such a rule. The Title IX standard recognized by the Supreme Court and the Sixth Circuit looks to what is a "clearly unreasonable response in light of the *known circumstances*." [*Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000)] (quoting *Davis*, 526 U.S. at 648) (emphasis added). There is no basis for excluding from the "known circumstances" a school district's knowledge that a problem is widespread and recurring throughout its student population. Nor is there any reason to assume that Title IX categorically permits a school district to turn a blind eye to the group dynamics in which harassment sometimes thrives. *See* [*Patterson v. Hudson Area Sch.*,

551 F.3d 438, 448–49 (6th Cir. 2009)] (holding that a school's "isolated success with individual perpetrators cannot shield [it] from liability as a matter of law" in a case where a student "suffered harassment over many school years perpetrated by various students"). Title IX requires only that the school have "enough knowledge of the harassment that it reasonably could have responded with remedial measures to address the kind of harassment upon which plaintiff's legal claim is based." *Staehling v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:07-0797, 2008 WL 4279839, at *10 (M.D. Tenn. Sept. 12, 2008) (Echols, J.) (quoting *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp.2d 273, 283 (E.D.N.Y. 2002); citing *Johnson v. Galen Health Institutes, Inc.*, 267 F. Supp. 2d 679, 687 (W.D. Ky. 2003)). Actual knowledge of a serious, widespread problem is at least enough to allow a district to reasonably respond in some way, even if it cannot predict or prevent every future incident.

The reasoning that MNPS wishes the court to graft into Title IX, moreover, would not be adopted by any reasonable person or entity with regard to any other risk. When a driver leaves for work in the morning, he does not know that he is likely to have a collision with a *particular* other driver at a *particular* intersection. But the driver still drives safely, because he knows of a general risk of accidents. By the same token, MNPS does not know that any particular school is likely to have a fire, but that presumably does not stop it from

> stocking its fire extinguishers and making sure the sprinklers work. Lack of knowledge of a more specific risk does not exonerate one from deliberate indifference to a known general risk. In any event, MNPS had more than merely a general knowledge of the risks at issue, because its disciplinary records are replete with instances of actual notice that its students might behave in the manner described by the plaintiffs

(Doc. No. 101 at 27–28 (footnote omitted).) Accordingly, "[w]hile it may be true that MNPS did not, for the most part, have warning about the specific students addressed in these cases or the specific acts that would occur, those facts are relevant to the adequacy of the school district's preventive actions, not whether it was on sufficient notice of the risk of harassment to give rise to an obligation not to be deliberately indifferent." (*Id.* at 28 (footnote omitted).) The court also rejected arguments by MNPS related to the welcomeness of the sexual activity at issue in the plaintiffs' cases, whether any discrimination against them was on the basis of sex, and whether the harassment they faced was sufficiently severe and pervasive to be actionable. (*Id.* at 29–38.)

Finally, the court turned to the question of whether there were disputed issues of material fact sufficient to support the plaintiffs' arguments that MNPS had acted with deliberate indifference to known risks. The court noted that

> [t]he Sixth Circuit has stressed that, while a district facing known sexual harassment "must respond and must do so reasonably in light of the known circumstances," "no *particular* response is required" in order to comply with Title IX. *Vance*, 231 F.3d at 260–61 (emphasis added). Accordingly, "courts should avoid second-guessing school administrators' selection of one particular policy or response over another. *Stiles ex rel. D.S. v. Grainger Cty., Tenn.*, 819 F.3d 834, 848 (6th Cir. 2016) (citing *Davis*, 526 U.S. at 648; *Vance*, 231 F.3d at 260).

(*Id.* at 39.) With that in mind, the court addressed two sets of questions: first, whether a reasonable finder of fact could conclude, for the purposes of the "before" claims, that the school district's preventive actions regarding the general risk of sexual misconduct, particularly the creation and circulation of sexual videos, amounted to deliberate indifference; and, second, whether a reasonable finder of fact could conclude, for the purposes of each girl's particular "after" claim, that her school's post-incident handling of the matter amounted to deliberate indifference to the risk of a deprivation of the relevant student's educational rights.

With regard to the "before" claims, the court noted that a number of aspects of MNPS's handling of Title IX matters could be considered to amount to deliberate indifference by a finder of fact, particularly regarding (1) the decision to devolve so much decision-making, including gatekeeping decisions about which cases

implicated Title IX, to individual principals who were not sufficiently trained in Title IX issues, rather than relying on a full-time, proactive Title IX coordinator to promulgate appropriate guidelines and training and recognize district-wide trends, (2) the failure to treat the circulation of videos and pictures as a distinct Title IX problem, regardless of the consensual nature of the original sexual activity, and (3) some principals' tendency to treat incidents as Title IX issues only when pressed by parents. (*Id.* at 40–46).

With regard to the "after" claims, the court noted that, according to guidance from the U.S. Department of Education, there are "three dimensions in which a school should 'tak[e] effective corrective actions'" following an incident of peer-on-peer sexual harassment: "first, it must act to 'stop the harassment'; next, the school must take reasonable steps to 'prevent [the harassment's] recurrence'; finally, the school must do what it can to 'remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.'" (*Id.* at 46 (quoting U.S. Dept. of Education Office of Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties § V.B.2[6]).) The court then went through the respective schools' handling of the plaintiffs' incidents individually to determine whether a reasonable juror could find

[6] Available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

that MNPS acted with deliberate indifference in its handling of its duties.

With regard to the plaintiffs involved in the incident at Maplewood, the court wrote:

> Jane Doe and Mary Doe have introduced ample evidence pursuant to which a jury could conclude that Maplewood significantly mishandled their cases. Specifically, a reasonable juror could conclude that MNPS acted clearly unreasonably by failing to identify the events as cyberbullying; failing to classify them as a potential Title IX violation; failing to involve the school's executive principal; failing to inform the Title IX coordinator; failing to punish those involved in the creation and dissemination of the tape; and failing to provide Jane Doe and Mary Doe assurances that the school would take steps necessary to ensure, insomuch as possible, that they would be able to continue their educations without disruption related to the video or related harassment.

(*Id.* at 48.) The court noted that, although MNPS did not defend every aspect of its handling of the incident, it argued that "even a clearly unreasonable response to harassment cannot form the basis for a Title IX claim, unless it led to future, additional instances of harassment." (*Id.* at 48.) The court conceded that "MNPS may . . . be correct that a clearly unreasonable—but ultimately harmless—response would also be insufficient to establish liability." (*Id.*) The court, however, examined each girl's case in detail and concluded that, for both students, a reasonable finder of fact could

conclude that MNPS's response to the incident resulted in a deprivation of educational benefits. Specifically, for Jane, the school's failure to take the circulation of the video seriously as a problem led her to withdraw from school immediately. Mary, on the other hand, was subjected to disruptive bullying until she, too, eventually withdrew. The court therefore did not grant MNPS summary judgment with regard to the girls' "after" claims—although the court also concluded that they were not entitled to summary judgment themselves. (*Id.* at 49–50.)

The court turned next to Sally Doe's incident at Hunters Lane. The court noted that the assistant principal who primarily handled Sally Doe's case, unlike the administrators at Maplewood, treated the incident—including, in particular, the videotaping aspect—as serious and maintained ongoing communication with Sally Doe's parents. The initial perpetrator in the Sally Doe incident, moreover, faced significant consequences for his actions, including criminal prosecution. The court ultimately concluded that, although MNPS made some errors in its handling of Sally Doe's case, the facts were not sufficient to allow a reasonable juror to conclude that the school was deliberately indifferent. The court therefore granted MNPS summary judgment with regard to Sally Doe's "after" claim. (*Id.* at 50–52.)

In contrast, the court wrote, Hunters Lane's handling of S.C.'s incident more closely resembled Maplewood's response to the incident involving Mary Doe and Jane Doe, particularly regarding its failure to

acknowledge the circulation of the video as a distinct problem that it needed to take ameliorative steps against in order to prevent the disruption of the student's education:

> It may be impossible for a school district to fully shield a student from taunting or bullying after an incident such as the ones at issue here, and Title IX does not expect or require a funding recipient to do so. A reasonable juror could conclude, however, that a school district owes the student, at a minimum, a meaningful assurance that the school recognizes that the circulation of the video poses a distinct and significant risk of harm to the student's education. Without such an assurance, the message sent to the student is that, by engaging in recorded sexual activity, she has forfeited the right to the school's protection from future harassment. S.C., having received no such assurance, was left to assume that she would have to fend for herself against the ongoing harassment she continued to endure, and she, as a result, left Maplewood, disrupting her education in the process. Based on those facts, a reasonable juror could conclude that MNPS's handling of her case gave rise to liability on her "after" claim.

(*Id.* at 53.) As it did with the Maplewood claims, however, the court concluded that contested issues of fact precluded a grant of summary judgment to the plaintiff. The court accordingly denied both motions with regard to S.C.'s "after" claim. (*Id.*)

Finally, the court addressed the plaintiffs' § 1983 claims. The court observed that "[t]he plaintiffs' theories of liability under section 1983 largely mirror their claims under Title IX, and . . . caselaw involving Title IX ensures that shared questions will govern many aspects of both types of claim." (*Id.* at 53–54.) The court considered MNPS's handful of § 1983-specific arguments—primarily involving municipal liability and the standard for failure-to-train claims—and held that MNPS had not established that it was entitled to summary judgment. (*Id.* at 57.) The court also rejected MNPS's argument that it was entitled to summary judgment with regard to the issue of whether the plaintiffs might be entitled to injunctive relief if they prevail. (*Id.* at 57–58.)

Although MNPS had achieved limited success at the time, there can be little doubt that it raised legitimate, debatable legal issues supported by colorable arguments, particularly in light of the relatively limited caselaw available. Accordingly, when MNPS sought to certify the court's ruling for appeal, the court, despite fording MNPS's formulation of the underlying issues lacking, agreed and granted the motion. The court characterized the purely legal issues warranting interlocutory appeal as follows:

> 1. Whether the court erred in denying MNPS summary judgment on its "before" claims based on a lack of sufficient notice, where MNPS did not have actual knowledge of a specific history of harassment involving the plaintiffs, the perpetrators of the

> harassment, or a specific program or activity in which the plaintiffs and/or perpetrators were enrolled other than the general education program.
>
> 2. Whether the court erred as a matter of law in denying MNPS summary judgment on the ground that the plaintiffs were unable to produce facts sufficient to support a finding of sexual harassment that was so severe, pervasive, and objectively offensive that it effectively barred the plaintiffs' access to an educational opportunity or benefit.

(Doc. No. 112 at 15 (footnote omitted).)

F. *Kollaritsch*

While the interlocutory appeal was pending, the Sixth Circuit decided *Kollaritsch*. *Kollaritsch* involved Title IX and § 1983 claims filed by four women students at Michigan State University ("MSU") who had allegedly been assaulted by male peers and who "contend[ed] that the [MSU] administration's response was inadequate, caused them physical and emotional harm, and consequently denied them educational opportunities." *Kollaritsch*, 944 F.3d at 618. The district court dismissed some, but not all, of the plaintiffs' claims, and MSU pursued an interlocutory appeal. *Id.*

The Sixth Circuit held that all of the claims should be dismissed and held that, to prevail on a Title IX claim arising out of peer harassment, "a student-victim plaintiff must plead, and ultimately prove, that the

school had actual knowledge of actionable sexual harassment and that the school's deliberate indifference to it resulted in further actionable sexual harassment against the student-victim, which caused the Title IX injuries." *Id.* at 618. Moreover, the initial sexual harassment giving notice and the later sexual harassment "must be inflicted against the same victim," meaning that a "plaintiff 'cannot . . . premise the [further harassment] element of her Title IX claim on conduct [by the perpetrator] directed at third parties." *Id.* at 621–22 (quoting *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 363 (6th Cir. 2012); citing *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 451 (6th Cir. 2009) (Vinson, J., dissenting)) (alterations in original).[7] In other words, after a student experiences sexual harassment, and the school becomes aware of the harassment, "at least one more (*further*) incident of harassment"—attributable to the school's improper response to the original harassment—"is necessary to state a claim." *Id.* at 621. The court therefore concluded that, "[b]ecause none of the plaintiffs . . . suffered any actionable sexual

[7] The court notes that the cited passage of *Pahssen* contains two arguable formulations of this rule. The first formulation, on which *Kollaritsch* relies, is absolute in its terms but also specifically addressed only the particular appellant in *Pahssen. Pahssen*, 668 F.3d at 363 ("*Appellant* cannot, however, premise the first element of her Title IX claim on conduct directed at third parties. (emphasis added)) Immediately thereafter, the Sixth Circuit states the underlying principle but suggests that it is only "generally" true, seeming to leave open the possibility of exceptions. *Id.* ("Both the plain language of Title IX and controlling case law demonstrate that an individual plaintiff *generally* cannot use incidents involving third-party victims to show severe and pervasive harassment.").

harassment *after* the school's response, they did not suffer 'pervasive' sexual harassment as set out in *Davis* and they [could not] meet the causation element" required to establish liability of the government under Title IX or § 1983. *Id.* at 618.

Although the Sixth Circuit did not explicitly identify it as such, *Kollaritsch* was, among other things, an implicit rejection of the multi-pronged approach to responding to incidents of harassment promoted by the Department of Education and relied upon by this court in its earlier opinion. Under the Department of Education approach, a school, after it learns of harassment, has a duty both to prevent the harassment's recurrence and a duty to ameliorate any damage it has already done to the victim student's education. Under *Kollaritsch*, however, the only post-harassment duty that gives rise to a cause of action is the duty to prevent. "A student-victim's subjective dissatisfaction with the school's response is immaterial to whether the school's response caused the claimed Title IX violation." *Id.* at 618. Even if that "subjective dissatisfaction" is entirely reasonable and interferes in the student's education, it is an injury attributable to the initial harassment—for which the school, under *Kollaritsch*, is not responsible—and therefore cannot be the basis for liability on behalf of the school.

The Sixth Circuit grounded some of its reasoning in traditional principles of antidiscrimination law, but it also—following the lead of the Supreme Court in *Davis*—relied on a presumed congressional intent not to overly burden schools in light of the inevitability of

some peer-on-peer misconduct. *See id.* at 620 ("[W]e think it unlikely that Congress would have thought [a single incident of student-on-student harassment] sufficient to rise to [an actionable] level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment." (emphasis omitted)) (quoting *Davis*, 526 U.S.at 652–53).

Judge Batchelder's full majority opinion in *Kollaritsch* had the support of at least two judges of the three judge panel and therefore became the opinion of the court. Judge Rogers, however, did not join the full opinion and filed a concurring opinion, raising concerns about the majority opinion's breadth. He noted, in particular, that the majority's treatment of actual notice involved discussion of matters "not at issue" in the case and that had not been "discussed by the parties on appeal." *Id.* at 630 (Rogers, concurring). He concluded by quoting Judge Pierre Leval's admonition against judges' tendency "to promulgate law through utterance of dictum made to look like a holding—in disguise, so to speak." *Id.* (quoting Pierre Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1250 (2006)). Judge Rogers quoted Judge Leval's warning that, "[w]hen we do so, we seek to exercise a lawmaking power that we do not rightfully possess." *Id.*

G. The Sixth Circuit's Reversal and Remand of This Case

On January 24, 2020, the Sixth Circuit issued its Order reversing this court's earlier ruling and remanding the case. The court wrote:

> We delayed ruling on Metro's petition pending the outcome of *Kollaritsch* . . . , which raised similar issues. In *Kollaritsch*, we indicated that "a student-victim plaintiff must plead, and ultimately prove, that the school had actual knowledge of actionable sexual harassment and that the school's deliberate indifference to it resulted in further actionable sexual harassment against the student-victim, which caused the Title IX injuries." In *Kollaritsch*, we noted that the initial sexual harassment that triggers a school's notice and the later sexual harassment caused by its unreasonable response "must be inflicted against the same victim." That analysis could affect the district court's decision. But we think it prudent to let the district court decide, in the first instance, *Kollaritsch*'s effect (if any) on these facts.

(Doc. No. 113 at 2 (citations omitted).) The court vacated this court's summary judgment decision and remanded the case, rendering the previously ruled-on summary judgments once again pending. The plaintiffs argue that *Kollaritsch* has no bearing on this case, and MNPS argues that *Kollaritsch* dictates that this court should grant it summary judgment in full.

II. LEGAL STANDARD

Rule 56 requires the court to grant a motion for summary judgment if "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). To win summary judgment as to the claim of an adverse party, a moving defendant must show that there is no genuine issue of material fact as to at least one essential element of the plaintiffs claim. Once the moving defendant makes its initial showing, the burden shifts to the plaintiff to provide evidence beyond the pleadings, "set[ting] forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Conversely, to win summary judgment as to her own claims, a moving plaintiff must demonstrate that no genuine issue of material fact exists as to all essential elements of her claims. "In evaluating the evidence, the court must draw all inferences in the light most favorable to the non-moving party." *Moldowan*, 578 F.3d at 374 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

At this stage, 'the judge's function is not . . . to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). But "[t]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient," and the party's proof must be more than "merely colorable."

Anderson, 477 U.S. 242, at 252. An issue of fact is "genuine" only if a reasonable jury could find for the nonmoving party. *Moldowan*, 578 F.3d at 374 (citing *Anderson*, 477 U.S. at 252).

III. ANALYSIS

A. Issues Plainly Unaffected by *Kollaritsch*

Although the parties disagree about the scope of the holding in *Kollaritsch*, there are a number of aspects of the court's earlier analysis that are clearly unaffected by the Sixth Circuit's opinion in that case. For example, the court rejected MNPS's arguments that it was entitled to summary judgment because the initial sexual encounters relevant to this case were non-forcible or because the events involved affected both male and female students. Nothing in *Kollaritsch* implicates those issues at all. Similarly, *Kollaritsch* provides no grounds for reconsidering the court's decision to grant MNPS summary judgment with regard to Sally Doe's "after" claim or its decision not to grant the plaintiffs summary judgment. Accordingly, the court will incorporate by reference its earlier Memorandum's analysis of all issues other than those addressed in the remainder of this opinion. The court will focus, here, only on the matters that require reconsideration based on *Kollaritsch*.

B. "Before" Claims

1. Whether to Wait to Apply *Kollaritsch* Now or Hold the Motions in Further Abeyance

As a preliminary matter, the plaintiffs urge the court not to consider the effect of *Kollaritsch* on this case yet, because a petition for certiorari is still pending in that case, and the Sixth Circuit may still be reversed. The Sixth Circuit, however, remanded the case to this court for the express purpose of considering *Kollaritsch*, and the need to consider the issue on remand has already resulted in significant delay in the progression of the case. Moreover, even if certiorari were granted, it would be questionable whether and to what degree any eventual result would dictate how the court should treat this case. As the court will discuss throughout much of this Memorandum, the holding in *Kollaritsch* was, by its own terms, quite broad; it is entirely possible that the Supreme Court could accept review of *Kollaritsch* and issue a narrower opinion that would have minimal bearing on this case. The better course of action, in the view of this court, is to proceed with reconsideration of summary judgment, including, insofar as *Kollaritsch* requires it, the entry of any judgments appropriate in this case, to begin the process of appellate review more directly focused on the issues raised by the unique circumstances of this litigation, should a party appeal.

2. Applicability of *Kollaritsch* to "Before" Claims

With regard to the "before" claims, plaintiffs argue that, because *Kollaritsch* solely involved claims based on MSU's post-incident handling of matters, the court should treat it as having no effect on their "before" claims. MNPS argues that nothing in *Kollaritsch* itself suggests such a distinction and that the holding of *Kollaritsch*, by its own terms, applies to all of the plaintiffs' claims.

The plaintiffs are correct that the Sixth Circuit acknowledged, in *Kollaritsch*, that the case was "not about the sexual assaults," but rather "the University administration and its response." *Kollaritsch*, 944 F.3d at 618. That, however, was merely an accurate statement of the nature of the plaintiffs' claims. What matters is not whether *Kollaritsch* itself was about claims that would be categorized as "before" claims, but whether the Title IX principles that the Sixth Circuit established have implications for such claims. The "before"/"after" claim distinction helpfully refers to different theories of liability under Title IX, but the statute itself does not draw any line confining each theory of liability to its own jurisprudential box. "Before" claims and "after" claims are, for statutory purposes, all just Title IX claims, subject to the applicable Title IX jurisprudence.

There is, moreover, nothing in *Kollaritsch* that suggests that the Sixth Circuit intended to limit its holding in the way that the plaintiffs describe. To the contrary, the majority opinion in *Kollaritsch* is, if

anything, unusually broad in its scope and unusually absolute in the detail it employed to set out exactly what a plaintiff must prove to establish liability. At most, the plaintiffs can argue that *Kollaritsch*'s holding does not reach this case and that the opinion's broader pronouncements about Title IX are merely *dicta*.

The problem with that argument, though, is that *Kollaritsch*'s central holding *does* implicate "before" claims, albeit by unavoidable implication. The core holding of *Kollaritsch* is that "the plaintiff must plead, and ultimately prove, [1] an incident of actionable sexual harassment, [2] the school's actual knowledge of it, [3] some further incident of actionable sexual harassment, that [4] the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment." *Id.* at 623–24. A "before" claim, by definition, only satisfies the first element and cannot satisfy the second and fourth elements without becoming an "after" claim. Moreover, the court in *Kollaritsch* was unambiguous that a claim cannot be premised on a school's failure to address risk of sexual harassment based on past incidents of harassment against students other than the plaintiff. *Kollaritsch*, 944 F.3d at 621–22. The type of hypothetical claim rejected—a claim based on a school's failure to protect the plaintiff from risks apparent from prior misconduct directed at other

students—is simply a description of *what a "before" claim is*.

Although the breadth of the binding holding in *Kollaritsch is* challenging to define, treating the opinion as having no bearing on "before" claims would be to disregard a substantial portion of its central reasoning—something this court is not inclined to do absent an extraordinarily persuasive reason to conclude that the principles at issue were not intended by the Sixth Circuit to be controlling on the circuit's lower courts. The fairest reading of *Kollaritsch* is not only that it applies to the plaintiffs' "before" claims, but that it precludes them, because such claims are categorically incapable of satisfying its requirements.

The court's application of *Kollaritsch* to the plaintiffs' claims should not conceal the fact that there may be serious grounds for concern about the breadth of the *Kollaritsch* decision. For one thing, the Sixth Circuit, in announcing a general rule applicable to all Title IX peer harassment claims, did not appear to account for the extraordinarily significant differences between the various educational settings in which Title IX applies. A rule that liability only attaches after a school learns of an incident and fails to prevent a repeat of that incident might make a certain amount sense when one is discussing a university, whose students are mostly adults over whom the institution exercises very limited control. In contrast, however, the power exercised by a high school or middle school over its students "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free

adults." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995). It strikes this court as questionable that Congress intended for a middle school or high school to have no Title IX duty whatsoever to protect its students from peer sexual assault, as long as the school does not know that a specific student is likely to be assaulted. This court, however, is precluded from treating the type of school or the age of the students involved as a ground for distinguishing *Kollaritsch*, because the majority opinion in *Kollaritsch* made abundantly clear that it was extrapolating the principle it announced from the Supreme Court's opinion in *Davis*, which involved a fifth grader. If the rule in *Kollaritsch* follows from *Davis*, then that rule applies just as much to Maplewood and Hunters Lane as it did to MSU.

The plaintiffs' "before" claims, which were based on MNPS's general knowledge of the risk of sexual misconduct of the type they suffered and MNPS's failure to take reasonable preventative steps, cannot be squared with the principles set forth by *Kollaritsch*, particularly the requirements that liability must be attributable to instances of harassment that occurred after the school became aware that the individual student at issue was being or had been harassed. The court accordingly will grant MNPS summary judgment with regard to all of the plaintiffs" "before" claims.

C. *Kollaritsch*'s Effect on the Plaintiffs' "After" Claims

MNPS argues that *Kollaritsch* also mandates that the court grant it summary judgment with regard to the "after" claims of Jane Doe and S.C., because they both left their respective schools after administrators became aware of the underlying incidents and before additional harassment could occur. MNPS concedes that Mary Doe continued at Maplewood and was, at times, harassed before she eventually left the school. MNPS argues, however, that she too cannot satisfy the requirements of *Kollaritsch*, because she cannot establish a sufficient causal link between the school's response and the later harassment.

1. Jane Doe

Kollaritsch, in no uncertain terms, requires at least one additional incident of actionable harassment to occur after school officials learn of the precipitating incident. As MNPS points out, Jane Doe transferred to KIPP Academy immediately, or at least nearly immediately, after Maplewood officials were informed of the incident in which she was involved. Most importantly for the purposes of *Kollaritsch*, Jane Doe conceded, in response to MNPS's Statement of Undisputed Facts, that she was not subject to further harassment after the video was brought to the attention of school officials. (Doc. No. 92-2 ¶¶ 16–17.) In order to support Jane Doe's "after" claims, she points primarily to the alleged mishandling of the situation on which the court

relied in its earlier opinion. *Kollaritsch*, however, rejected any suggestion that Title IX liability could be based on such shortcomings in the absence of at least one incident of further actionable harassment. Jane Doe also argues that, although she was not directly harassed at Maplewood again, she was aware that some of her former Maplewood peers had used derogatory names to refer to her. However, she has identified no grounds that would allow the court to conclude that Maplewood students using improper names to refer to her, when she was no longer a Maplewood student, would be actionable harassment sufficient to satisfy *Kollaritsch.*

The court wishes to be clear about what *Kollaritsch* requires and why it dictates the result that it does here. Under *Kollaritsch*, a parent whose child was harassed, assaulted, or raped by another student and who recognizes that a school is not responding appropriately to her child's predicament has no cause of action, under Title IX, until the school's improper response leads to at least one additional instance of actionable harassment. This is true, under *Kollaritsch*, even if the parent is reasonable or even obviously correct that the school is failing to take the danger posed to her child seriously. In other words, if a parent's child is, for example, raped by another student at school, and the school district and state do nothing to prevent her rapist from attacking her again, the parent's options are (1) withdrawing the child from school or (2) waiting for her to be sexually harassed again—including, potentially, in the form of a second rape—at which point

the parent can sue on the child's behalf under Title IX.

That does not mean that *Kollaritsch* was wrongly decided, a question beyond this court's authority to consider. *Kollaritsch* reflects a body of caselaw that, both at the Supreme Court level and in the Sixth Circuit, has reasonably recognized that school administrators have only limited control over the behavior of students and that Congress presumably did not intend to place an impossible statutory burden on the recipients of federal education funds. This court takes no issue with that general premise and has tried to apply it throughout this case. The question of where Congress drew the line, however, is a genuinely vexing one. At this stage, the court's only choice is to apply the binding precedents of this circuit, and, under *Kollaritsch*, MNPS is entitled to summary judgment with regard to Jane Doe's "after" claims.

2. S.C.

MNPS argues that S.C. cannot prevail on her "after" claims because she "never returned to Hunters Lane as a student after" the date of the initial incident giving rise to her claims, April 17, 2017. (Doc. No. 123 at 5.) That assertion may be true—in a sense—in that S.C. never attended the physical campus of Hunters Lane as a student again, and her family eventually moved out of the county. MNPS's characterization, however, elides a considerable amount of complexity. Contrary to any suggestion by MNPS that S.C. simply

left Hunters Lane immediately after the incident, she was, in fact, initially *suspended* from Hunters Lane for three days as punishment for her participation in the incident. (Doc. No. 92-11 ¶ 9.) The precise details of the days and weeks immediately following the incident are not entirely clear from the current record, but, according to S.C., "[o]ther than the suspension, [Hunters Lane principal] Dr. Kessler told me that this would blow over in one day," an assurance that left her "shocked," "crushed," frightened of the environment she would face post-suspension. (*Id.* ¶ 12.) S.C. and her parents did not finally decide to withdraw from Hunters Lane until "approximately Early May 2017." (*Id.* ¶ 17.)

S.C. and her mother also complained to Dr. Kessler, while she was still an enrolled MNPS student, that she and her sister were receiving physical threats from other students related to the incident. (*Id.* ¶ 13.) S.C.'s mother, T.C., has corroborated that they informed Dr. Kessler of the threats on April 18,2017, and that the threats were violent in nature, including gendered and sexualized insults. (Doc. No. 92-12 ¶¶ 9–11.) The threats continued throughout S.C.'s suspension, and the video depicting her was placed on a publicly accessible pornography site. (Doc. No. 92-11 ¶ 16.)

It appears, from the statement of S.C.'s mother, that S.C. may have spent a portion of the time after her suspension receiving treatment at the Oasis Center, a local youth crisis intervention center, after which she "finished the 2016–2017 school year on homebound studies." (Doc. No. 92-12 ¶ 18.) S.C. described the

decision not to physically return to Hunters Lane as follows:

> I believed I was in danger if I stayed at Hunters Lane High School and that the school was not taking this matter seriously and failed to reassure me that I would be safe if I returned to school. As a result, a family decision was made for me to withdraw from the school approximately early May 2017, and I finished the school year as a homebound student. The continuing harassment, threats, and sexually-related name calling, as well as the circulation of the video, continued up to my withdrawal from school and, even to this day.

(Doc. No. 92-11 ¶ 17.) Her mother echoes her account, adding that Hunters Lane administrators were aware that she intended to withdraw S.C. from the school because the school had failed to protect her from continued threats and harassment and took no steps to "allow her to remain in school." (Doc. No. 92-12 ¶ 17.) Only later did S.C.'s family move to another county, specifically, "to get away from the threats and environment at Hunters Lane High School." (Docket No. 92-11 ¶ 18.)

There was, in other words, a period of at least around two weeks in which S.C. was still an enrolled MNPS student, and MNPS was aware of harassment being waged against her that arose out of and was intended to thwart an investigation of an on-campus incident. During that period, MNPS allegedly failed to adequately address the matter in a way that would

allow S.C. to resume her studies on the same terms as her peers. Such a situation would seem to fit squarely within the claims that *Kollaritsch* would allow to proceed. The only complicating factor is that S.C. was not on the physical Hunters Lane campus when that harassment occurred. The reason she was not on campus, however, was that the school first suspended her and then apparently tolerated her absence while the matter was addressed.

As broad as *Kollaritsch is*, it does not say anything about such a situation. It may be that Title IX does not typically impose duties related to a student's being harassed outside of school, but the Supreme Court has never held that the on-campus/off-campus distinction presents a categorical bar. To the contrary, the Supreme Court's formulation of potential liability for peer harassment notably shied away from drawing a hard line based on geography, focusing instead on whether the harassment was taking place " 'under' an 'operation' of the funding recipient." *Davis*, 526 U.S. at 646 (citing at *Doe v. Univ. of Ill.*, 138 F.3d 653, 662 (7th Cir. 1998)). The Supreme Court's language has been read by at least one circuit court as requiring only a sufficient "nexus between the out-of-school conduct and the school." *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1122 n.1 (10th Cir. 2008) (citing *Davis*, 526 U.S. at 645). Similarly, Department of Education Guidance has suggested that "there is no 'duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus *and does not involve a program or activity of*

the recipient'. . . . "*Doe v. Pennridge Sch. Dist.*, 413 F. Supp. 3d 393, 410 (E.D. Pa. 2019) (quoting Dep't of Educ. OCR, "Q & A on Campus Sexual Misconduct" (Sept. 2017)) (emphasis added).

There are a number of facts in this case suggesting a nexus between the school's authority and interests and the harassment S.C. experienced while suspended and, later, while absent. First and most obviously, the harassment was related to an incident that itself occurred on campus. Second, and perhaps more importantly, the harassment appears to have been directed, at least in part, at preventing S.C.'s cooperation in the school's own disciplinary investigation related to the in-school incident. Third, S.C.'s physical absence from school was, at least at first, school-mandated in light of her suspension. If a school could escape liability simply by removing a student from its physical premises, the incentive in a case such as this would simply be to suspend or even expel every student in S.C.'s position. The court doubts that Congress intended to create an incentive to punish harassment victims. Fourth, Hunters Lane was specifically informed by S.C.'s mother that the harassment was keeping her out of school—in other words, that it was interfering in her education.

Another potential limitation on a school system's liability for off-campus harassment is that "the deliberate indifference standard holds a school liable for harassment only where the school 'exercises substantial control over both the harasser and the context in which the known harassment occurs.'" *Gordon v.*

Traverse City Area Pub. Sch., 686 F. App'x 315, 324 (6th Cir. 2017) (quoting *Davis*, 526 U.S. at 646). The school's suspension of S.C., however, was, in fact, an exercise of substantial control over the setting in which she might be harassed. Moreover, while a school typically does not have substantial control over students' off-campus actions, the threats in this case were apparently attempts to interfere in the school's own investigation. The court is aware of no settled principle that would prevent a school from exercising disciplinary control over students' attempts to interfere directly in a school disciplinary investigation to intimidate a victim. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015) (holding that a school can address speech "intentionally direct[ed] at the school community . . . , even when such speech originated, and was disseminated, off-campus without the use of school resources"); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012) (holding that a school may take action addressed at out-of-school speech to prevent a "substantial disruption to the educational setting"); *Kowalski v. Berkeley CV. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011) (holding that a school can address off-campus speech based on "nexus" between speech and school's "pedagogical interests"); *but* see *Yoder v. Univ. of Louisville*, 526 F. App'x 537, 545 (6th Cir. 2013) (noting that neither the Sixth Circuit nor the Supreme Court had ruled on "whether schools can regulate off-campus, online speech by students"). A reasonable finder of fact could conclude that MNPS's disciplinary authority to protect its investigation

translated to sufficient control over the off-campus attempts made by students to thwart it.

The court's prior reasoning regarding S.C.'s "after" claim, therefore, remains largely intact. It may be that *Kollaritsch* limits the evidence on which S.C. can rely to establish her Title IX injuries, because she now must focus on the actual post-incident harassment that she endured rather than broader aspects of the school's alleged mishandling of her case. However, a female student's being hounded out of school by threats and harassment related to her participation in a school's investigation into an on-campus sexual event is well within the core Title IX issues that survive *Kollaritsch.* A reasonable juror, moreover, could find that the school's handling of S.C.'s case—which consisted in significant part of treating her as a perpetrator and downplaying the unique problems associated with the circulation of the video—caused the situation to spiral out of control. The court, accordingly, will not grant MNPS summary judgment with regard to S.C.'s "after" claim.

3. Mary Doe

MNPS concedes that Mary Doe, unlike Jane Doe, remained at Maplewood for a period after MNPS became aware of the underlying incident. MNPS argues, however, that Mary Doe's "after" claims fail *Kollaritsch* for a different reason: that she cannot establish that MNPS's allegedly inadequate response caused any later incidents of harassment. In particular, MNPS

relies on the facts that (1) three weeks elapsed between the initial Maplewood incident and the school's learning that there was a video of the incident and (2) Mary Doe's harassment was not by the students who originally participated in the initial incident but by other students who had seen or heard about the video. MNPS's argument, in essence, is that it was given no chance to stem the circulation of the video in time and Mary Doe, accordingly, cannot establish "but for" causation with regard to further harassment related to the video.

MNPS's argument, however, assumes that the only thing it could have done to protect Mary Doe would have been to somehow intercept the video before it was circulated among her peers. The facts that Mary Doe has presented, however, show more than merely a school unable to interdict a video. She has provided evidence that Maplewood administrators were aware that an environment had developed in which the circulation of sexual videos of other students was understood and at least grudgingly accepted as "a game that the seniors play." (Doc. No. 92-23 at 77.) Mary Doe testified that she complained to school personnel about the bullying she experienced, but they "didn't do anything about it." (Doc. No. 92-10 ¶ 11.)

The school's blasé attitude is arguably confirmed by the fact that the school elected not to punish any of the students involved in the sexual activity or videotaping "beyond verbal discipline," ostensibly because it was "an opportunity to impart some wisdom and life instruction," and the principal "did not want to subject

the students to potential humiliation and discipline for a consensual act." (Doc. No. 89 ¶¶ 61–62; *see* Doc. No. 70-16 at 11.) The circulation of Mary Doe's video, however, was not a consensual act, and her humiliation was, if anything, exacerbated by the school's inaction. Although, as this court has repeatedly emphasized in this litigation, a student does not have a right under Title IX to dictate any particular disciplinary course of action with regard to the actions of other students, that does not mean that a reasonable finder of fact cannot consider the discipline handed out as part of an argument that the school displayed deliberate indifference to the risk of future harassment.

MNPS may be correct that it is difficult to establish "but for" causation in a case such as this, in which a school's failures are argued to have created an environment in which multiple different students chose to take part in harassment over time, as opposed to a case in which there is a single, identifiable harasser that the school allegedly failed to constrain. The fact that a factual question is difficult, however, is not a reason to grant summary judgment. The standard, as always, is whether a reasonable finder of fact could reach the conclusion contrary to the conclusion urged by the movant.

Although *Kollaritsch* changes the terrain on which peer-on-peer Title IX harassment cases are litigated, it does not mandate summary judgment here. To the contrary, Mary Doe's claims seem to be the type well within the contemplation of *Kollaritsch*. Mary Doe was harassed, her school was made aware of it, it responded

(or failed to respond), and Mary Doe has put forth a plausible account of how its response contributed to the continuation of ongoing harassment. The court therefore will not grant MNPS summary judgment with regard to Mary Doe's "after" claims.

D. The § 1983 Claims

As the court explained in its previous opinion, the plaintiffs' theories of liability under § 1983 largely mirror their claims under Title IX, and the caselaw governing each of the two statutes mandates that most issues will be resolved in the same manner with regard to each set of claims. *Kollaritsch*, moreover, says relatively little about § 1983 claims against government entities and does not appear to disturb the preexisting status quo that Title IX and § 1983 claims based on school harassment will, on most (though not all), substantive issues, rise and fall together.

MNPS's briefing on this matter largely reiterates the arguments it made prior to the court's earlier ruling on the motions for summary judgment, and the court remains similarly unpersuaded. For example, MNPS emphasizes the plaintiffs' supposed inability to link their schools' actions to district-level failures of training and organization. The evidence on that matter, however, was voluminous and raised significant and plausible allegations that MNPS failed, on a system-wide level, to implement appropriate structures to recognize and adapt to the risks posed to its female students in light of technological and social

developments related to the creation and transmission of sexual videos and images. The court accordingly will not grant MNPS summary judgment with regard to the § 1983 claims of the two plaintiffs who, after *Kollaritsch*, still have viable Title IX claims. The court will, however, grant MNPS summary judgment with regard to the § 1983 claims of Sally Doe and Jane Doe.

IV. CONCLUSION

For the foregoing reasons, MNPS's Motions for Summary Judgment regarding the claims of Jane Doe (Doc. No. 76) and the claims of Sally Doe (Doc. No. 83) will be granted in full, and summary judgment will be awarded to MNPS with regard to those plaintiffs' claims. MNPS's Motions for Summary Judgment regarding S.C. (Doc. No. 71) and Mary Doe (Doc. No. 82) will be granted in part and denied in part. The court will dismiss those plaintiffs' claims based solely on MNPS's actions prior to the underlying incidents described in their Complaints, but not their Title IX or § 1983 claims based on the events thereafter. The plaintiffs' Motion for Partial Summary Judgment (Doc. No. 87) will be denied.

An appropriate order will enter.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
U.S. District Judge

No. 19-0508

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, TN, dba Metropolitan Nashville Public Schools, Petitioner.	)	ORDER (Filed Jan. 24, 2020)

Before: KETHLEDGE, BUSH, and MURPHY, Circuit Judges.

The Metropolitan Government of Nashville & Davidson County ("Metro") has petitioned for our permission to appeal an interlocutory order of the district court granting in part and denying in part its motion for summary judgment. *See* 28 U.S.C. § 1292(b). Plaintiffs in this action—the parents of minor female students S.C., Jane Doe, Sally Doe and Mary Doe—sue Metro under Title IX and § 1983. Other students videotaped S.C., Jane Doe, Sally Doe, and Mary Doe without their consent while they were engaged in sexual conduct on school premises, and then circulated the videos to the victims' peers.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In *Davis v. Monroe County Board of*

Education, 526 U.S. 629 (1999), the Supreme Court held that a student who has been sexually harassed by another student has a private cause of action against the school under this provision if the victim can show that the school acted "with deliberate indifference to known acts of harassment." *Id.* at 633. Plaintiffs in this case alleged that, *before* the specific incidents in question, Metro had obtained the required "notice" under Title IX because it knew of the general "risk of the dissemination of sexual images of its students without their consent" based on prior incidents involving other students. *T.C. ex rel. S.C. v. Metro. Govt. of Nashville*, 378 F. Supp. 3d 651, 668 (M.D. Tenn. 2019). And Plaintiffs further alleged that Metro was deliberately indifferent to this general risk, as shown by the "widespread failures of training, coordination, and monitoring by MNPS administrators." *Id.* at 677. The district court held that these types of " 'before' claims" were cognizable under Title IX, *id.* at 668–71, and that Plaintiffs had raised a genuine issue of material fact, *id.* at 677–80. That was so, even though the district court recognized that Metro "did not, for the most part, have warning about the specific students addressed in these cases or the specific acts that would occur." *Id.* at 670. The court nevertheless certified this issue (and one other one) for an interlocutory appeal under § 1292(b).

We delayed ruling on Metro's petition pending the outcome of *Kollaritsch v. Michigan State University Board of Trustees*, ___ F.3d ___, 2019 WL 6766998 (6th Cir. Dec. 12, 2019), which raised similar issues. In

Kollaritsch, we indicated that "a student-victim plaintiff must plead, and ultimately prove, that the school had actual knowledge of actionable sexual harassment and that the school's deliberate indifference to it resulted in further actionable sexual harassment against the student-victim, which caused the Title IX injuries." *Id.* at *1. In *Kollaritsch*, we noted that the initial sexual harassment that triggers a school's notice and the later sexual harassment caused by its unreasonable response "must be inflicted against the same victim." *Id.* at *4. That analysis could affect the district court's decision. But we think it prudent to let the district court decide, in the first instance, *Kollaritsch*'s effect (if any) on these facts. We therefore **GRANT** Metro's petition for permission to appeal, **VACATE** the district court's summary-judgment decision, and **REMAND** for its reconsideration in light of our recent *Kollaritsch* decision.

ENTERED BY ORDER OF
THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

T.C. ON BEHALF OF HER MINOR CHILD, S.C., Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	Civil No. 3:17-cv-01098 Judge Trauger LEAD CASE

JOHN DOE AND JANE DOE #1 ON BEHALF OF THEIR MINOR CHILD, JANE DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	Civil No. 3:17-cv-01159 Judge Trauger Member Case

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SALLY DOE ON BEHALF OF HER MINOR CHILD, SALLY DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	)	Civil No. 3:17-cv-01209 Judge Trauger Member Case

MARY DOE #1 ON BEHALF OF HER MINOR CHILD, MARY DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	)	Civil No. 3:17-cv-01277 Judge Trauger Member Case

MEMORANDUM

(Filed Jun. 11, 2019)

The Metropolitan Government of Nashville and Davidson County d/b/a/ Metropolitan Nashville Public Schools ("MNPS") has filed a Motion for Certificate of

Appealability (Docket No. 103), to which the plaintiffs have filed a Response (Docket No. 105), and MNPS has filed a Reply (Docket No. 110). For the reasons set out herein, MNPS's motion will be granted and the court's consideration of the consolidated cases will be stayed.

I. BACKGROUND

The plaintiffs are four female MNPS students who were videotaped by other students while engaged in sexual encounters with male students on the premises of their respective MNPS schools. The resulting video files were circulated among the students' peers electronically. A more detailed account of the plaintiffs' individual cases can be found in the court's May 6, 2019 Memorandum. (Docket No. 101 at 4–21.) The plaintiffs, through their parents, have sued MNPS under Title IX, a federal statute forbidding sex discrimination in educational institutions that receive federal funding, 20 U.S.C. § 1681(a), as well as 42 U.S.C. § 1983. The plaintiffs split their claims into "before" claims, based on MNPS's actions leading up to the underlying incidents, and "after" claims, based on MNPS's handling of the incidents after having become aware of them. Following discovery, MNPS filed several Motions for Summary Judgment. (Docket Nos. 71, 76, 82, 83.) On May 6, 2019, the court denied all those motions in full, with the exception of the motion regarding the claims of plaintiff Sally Doe, which the court granted in part and denied in part, granting MNPS summary judgment with regard to Sally Doe's "after" claims but not her "before" claims. (Docket No. 101 at 52.) Because the

court's Order did not resolve the plaintiffs' claims, it was not appealable, by right, to the Sixth Circuit Court of Appeals. On May 20, 2019, MNPS filed a motion seeking a certificate of appealability, which would allow it to apply for an interlocutory appeal. MNPS identified two questions, based on its reading of the court's ruling, that, it argues, justify an interlocutory appeal:

> 1. Whether, in a "before" theory under Title IX, actual notice can be established using district wide statistics that are not accompanied by expert witness testimony.
>
> 2. Whether the circulation of a sexually explicit video is akin to a sexual assault and, thus, in and of itself, can constitute severe and pervasive harassment that can subject a school system to Title IX liability.

(Docket No. 103 at 1–2.)

II. LEGAL STANDARD

Interlocutory appeals may be granted when there is substantial ground for differing opinions regarding a controlling issue of law and when an immediate appeal from the order would materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). Interlocutory appeals are an exception to the general policy against piecemeal appellate review embodied in the final judgment rule. *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 29 F. Supp. 2d 825 (S.D. Ohio 1998). Therefore, certification under section 1292(b) is to be "sparingly" applied. *Vitols v. Citizens*

Banking Co., 984 F.2d 168, 170 (6th Cir. 1993); *Kraus v. Bd. of Cty. Road Commis*, 364 F.2d 919, 922 (6th Cir. 1966). Avoiding a piecemeal appeal is preferable except in the extraordinary type of case contemplated by § 1292(b). *Cardwell v. Chesapeake & Ohio Ry. Co.*, 504 F.2d 444, 446 (6th Cir. 1974); *Kraus*, 364 F.2d at 922.

Section 1292(b) applies to interlocutory orders that are not otherwise appealable and requires the existence of three elements: (1) the order must involve a controlling question of law; (2) there must be substantial ground for difference of opinion about it; and (3) immediate appeal must materially advance the ultimate termination of the litigation. *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002); *Cardwell*, 504 F.2d at 446. While review is discretionary, "[i]nterlocutory appeal is favored where reversal would substantially alter the course of the district court proceedings or relieve the parties of significant burdens." *Gaylord Entm't Co. v. Gilmore Entm't Group*, 187 F. Supp. 2d 926, 957 (M.D. Tenn. 2001) (Haynes, J.) (citation omitted). Moreover, interlocutory appeal is "most appropriate early in the proceedings," *id.*, and in "protracted and expensive litigation, where failure to resolve a question of law early in the case could lead to the placement of an enormous burden on the parties." *In re James River Coal Co.*, 2006 WL 3761965, at *3 (M.D. Tenn. 2006) (citation and internal quotation marks omitted).

III. ANALYSIS

A. Timeliness of Motion

The plaintiffs argue that MNPS's motion is untimely pursuant to 28 U.S.C. § 1292(b), which provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, *if application is made to it within ten days after the entry of the order*: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C.A. § 1292(b) (emphasis altered). MNPS responds that, by its plain language, the ten-day deadline for seeking an interlocutory appeal applies to the filing of an application to appeal with the Sixth Circuit, not the filing of a motion seeking a certificate of appealability with the district court. MNPS's reading of the language of the statute is persuasive. The statute leaves some room for ambiguity by requiring an "application" to be filed "within ten days after the entry of

the order," when, in practice, district courts often decide an issue with one order and certify appealability in a second, separate order. In context, however, it is clear that the "application" mentioned is the "application to [the Sixth Circuit]." Accordingly, it would make little sense to begin the ten-day limitations period until an order of the district court makes such an application possible.

The court agrees with those courts that have held that "[s]ection 1292(b) does not impose" a "deadline for requesting certification from a district court." *McKinstry v. Sergent*, No. CIV. 11-133-ART, 2012 WL 3731304, at *3 (E.D. Ky. Aug. 28, 2012); *see also In re City of Memphis*, 293 F.3d at 348 ("[A]n application for appeal must be made within 10 days after the entry of the district court's certification order."). That is not to say that a district court would be remiss in denying such a motion based on its having been filed following an unreasonable delay. *See McKinstry*, 2012 WL 3731304, at *3. The 14-day lapse between the court's Order and MNPS's motion, however, was not unreasonable. The court, accordingly will consider MNPS's motion on the merits.

B. Notice

Title IX does not impose liability for a school system's failure to address harassment within its schools unless the school system had "enough knowledge of the harassment that it reasonably could have responded with remedial measures to address the kind

of harassment upon which plaintiff's legal claim is based." *Staehling v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:07-0797, 2008 WL 4279839, at *10 (M.D. Tenn. Sept. 12, 2008) (Echols, J.) (quoting *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 283 (E.D.N.Y. 2002); citing *Johnson v. Galen Health Institutes, Inc.*, 267 F. Supp. 2d 679, 687 (W.D. Ky. 2003)). That rule flows from the principle that a Title IX recipient can only be sued for damages based on harassment by a student or teacher if the recipient's actions were "clearly unreasonable in light of the *known circumstances*." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) (emphasis added). Typically, this standard requires a plaintiff to show that a school district acted "with deliberate indifference to known acts of harassment." *Id.* at 633. Those "known acts of harassment," however, do not have to have been perpetrated by the same individual harasser whose actions ultimately gave rise to the plaintiff's claim. *See Patterson v. Hudson Area Schs.*, 551 F.3d 438, 449 (6th Cir. 2009).

The court relied on a number of facts to hold that a reasonable finder of fact could conclude that MNPS had actual notice of harassment in its schools that was sufficient to support the plaintiffs' claims. A school resource officer assigned to MNPS schools testified that he was aware of numerous instances of students' sexual pictures and videos circulating at school. (Docket No. 101 at 25–26.) A detective who investigated such matters testified that similar issues had arisen in every MNPS high school and every MNPS middle

school. (*Id.* at 26.) Moreover, the incident involving two of the plaintiffs predated the incidents involving the others, and MNPS personnel were aware of the first incident before the latter incidents occurred. There was also some evidence of a potential additional incident, involving a sexual encounter recorded in a school dugout, that is not part of this litigation. (*Id.* at 27.) Accordingly, there was substantial evidence that MNPS personnel were or should have been aware of a risk of sexually abusive and harassing behavior involving sexual pictures and videos of its students.

MNPS's formulation of its issue for appeal does not address any of the aforementioned evidence. It chooses, instead, to focus on one aspect of the court's analysis: the court's reliance on cumulative documentation of disciplinary incidents involving student sexual misconduct in MNPS schools. In discovery, the plaintiffs sought and received information about disciplinary incidents involving inappropriate sexual activity at MNPS schools from the 2012-13 school year through the 2015-16 school year. In light of the voluminous nature of the results, the plaintiffs, in addition to providing the court a full list of incidents, offered their tabulation of the number of incidents uncovered, finding over 950 instances of sexual harassment, over 1200 instances of inappropriate sexual behavior, 45 instances of sexual assault, and 218 instances of inappropriate sexual contact. (Docket No. 101 at 26.) The court, in its notice analysis, cited those tabulations but stressed that it was not relying on the plaintiffs' specific numbers, because "it is not the precise number of

incidents that matters, but [whether] the incidents were pervasive enough to give MNPS notice of the problem it faced." (Docket No. 101 at 26 n.5.) Accordingly, "[e]ven if the court excluded [the plaintiffs'] tabulations, the plaintiffs could simply point . . . to the documents themselves."[8] (*Id.*) The court also went beyond merely the counting of the incidents and cited specific prior incidents that shared features with the plaintiffs' situations, particularly with regard to the making and/or circulation of sexual pictures or videos of students. (*Id.* at 26 (citing Docket No. 92-14 at 97, 102, 146, 162).) Nevertheless, MNPS construes the court's analysis as relying on the principle that "actual notice can be established using district wide statistics that are not accompanied by expert witness testimony."

MNPS's argument seems to envision a special rule for "statistics" that does not apply to any other type of evidence offered to establish notice. It is worth focusing, therefore, on what exactly it means to characterize the evidence on which the court relied as "statistics." The court's discussion of notice did not cite to any sophisticated statistical analysis. There were no regressions, slopes, or extrapolations. The evidence that the court cited, to the extent that it could be called

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[8] The court notes, however, that the Federal Rules of Evidence do provide avenues through which a party can submit a summary of data into evidence, *see* Fed. R. Evid. 1006, or, in the alternative, present such a summary as a pedagogical device, *see* Fed. R. Evid. 611(a). *See United States v. Bray*, 139 F.3d 1104, 1111 (6th Cir. 1998); *Gomez v. Great Lakes Steel Div., Nat. Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986).

statistical, relied on the simplest type of statistic there is: counting—specifically, the counting of identifiable, individual incidents documented in MNPS's own records. It is often said that laypeople, and attorneys in particular, need to remember that "[t]he plural of anecdote is not data"—meaning that one should not mistake one or two incidents for a robustly demonstrated statistical phenomenon. *United States v. Anthem, Inc.*, 855 F.3d 345, 380 (D.C. Cir. 2017). As true as that may be, there is a kernel of truth underlying the joke—namely, that what people call "data" or "statistics" is merely the aggregation of individual observations in such volume that those observations have to be discussed numerically. That numerical language, however, does not negate the reality of the individual incidents observed. In other words, while 950 instances of sexual harassment may be a statistic, 950 instances of sexual harassment are also just *950 instances of sexual harassment*. Indeed, the only reason that it makes sense to speak of the plaintiffs' evidence as statistical is that the incidents of inappropriate sexual conduct in MNPS schools were simply so numerous. That fact may be less supportive of MNPS's "lack of notice" defense than MNPS thinks it is.

Moreover, MNPS's argument that an expert was necessary here relies on an analogy that ignores the purpose for which the evidence was offered. MNPS cites cases in which courts found particular data to be unhelpful because there was no expert evidence explaining whether the numbers presented showed a departure from the norm. For example, in *Martin v. City*

of Taylor, No. 05-70367, 2006 WL 1779394, at *9 (E.D. Mich. June 26, 2006), the court found raw data of the number of civil rights complaints against a department to be "meaningless" in terms of demonstrating an unconstitutional policy, because there were no comparator data sets from other similarly-sized jurisdictions showing that the defendant jurisdiction was an outlier. *Id.*; *see also Thomas v. City of Chattanooga*, 398 F.3d 426, 431 (6th Cir. 2005) (holding that the court could not infer police department policy from raw statistics about use of excessive force without comparator statistics from other jurisdictions). By the same principle, comparison statistics would be necessary to demonstrate, for example, that a school district has an unusually severe sexual harassment problem. When evidence is offered only to establish notice, however, comparison evidence is beside the point, because Title IX imposes an obligation not to be deliberately indifferent to known risks of sexual harassment, whether those risks are unusual or not. Notice is not negated by the fact that other school systems were put on notice, as well, by similar patterns in their own schools.

Nevertheless, MNPS is correct that the question of notice in this case presents issues on which reasonable legal minds may differ. As the court has observed, notice serves two complementary roles in a Title IX harassment case. First, actual notice of harassment within a school system is required for any potential Title IX liability related to harassment to arise. *See Davis*, 526 U.S. at 633. MNPS's argument focuses on that part of the analysis, arguing that the court should have

applied a more stringent notice standard before concluding that MNPS had any Title IX duty to take steps to address the risk of sexual harassment in its schools. As the court has pointed out, however, the question of whether there is sufficient notice to create some duty is not the only way that Title IX accounts for a recipient's type and degree of notice. Notice comes up again, in defining the scope of a funding recipient's duty and the standard of care it must exercise. A school system will only be held liable if its actions were "clearly unreasonable in light of the known circumstances." *Id.* at 648. Accordingly, a school system with less notice or notice that is only general in nature will typically have more leeway under Title IX than a school system with strong notice of a specific threat. The court's view has been that, as long as notice plays its proper role in this second inquiry, there is no reason to apply too stringent an approach when answering the all-or-nothing question of whether notice was sufficient to impose at least *some* Title IX duty not to be deliberately indifferent to the known risk. The court recognizes, however, that many courts have been hesitant to allow any potential for liability to arise out of notice that is only general in nature. *See*, *e.g.*, *Roskin-Frazee v. Columbia Univ.*, No. 17 CIV. 2032 (GBD), 2018 WL 6523721, at *5 (S.D.N.Y. Nov. 26, 2018); *Tubbs v. Stony Brook Univ.*, No. 15 CIV. 0517 (NSR), 2016 WL 8650463, at *9 (S.D.N.Y. Mar. 4, 2016); *Doe v. Bibb Cty. Sch. Dist.*, 83 F. Supp. 3d 1300, 1307–08 (M.D. Ga. 2015), *aff'd*, 688 F. App'x 791 (11th Cir. 2017); *Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052, 1081 (D.N.M. 2010); *Ross v. Corp. of*

Mercer Univ., 506 F. Supp. 2d 1325, 1356 (M.D. Ga. 2007).

This is a developing area of the law, and no definitive signposts exist in this circuit for when a Title IX funding recipient is on sufficient notice of risk to give rise to a duty not to be deliberately indifferent. Resolution of the issue, moreover, would be controlling on at least many of the claims in the case, as that term is used in the interlocutory appeal context. "A legal issue is controlling," for the purposes of interlocutory appeal, "if it could materially affect the outcome of the case." *See In re City of Memphis*, 293 F.3d at 351 (citing *In re Baker & Getty Fin. Servs., Inc. v. Nat'l Union Fire Ins. Co.*, 954 F.2d 1169, 1172 n.8 (6th Cir. 1992)). It is possible that the Sixth Circuit might adopt a rule on this issue that would render trial consideration of some or all of the plaintiffs' "before" claims unnecessary. Alternatively, consideration by the Sixth Circuit might, at the very least, provide guidance on the governing standard that would apply at trial. Finally, a better understanding of how the Sixth Circuit will resolve this issue may assist the parties in evaluating their respective positions and determining if there is a possibility of settling the plaintiffs' claims without the necessity of trial. Accordingly, while the court does not find MNPS's formulation of the question presented to create a sufficient ground for interlocutory appeal, the underlying issue, properly framed, is a strong candidate for a certificate of appealability.

C. Severity and Pervasiveness

In order for sexual harassment to rise to the level of actionable discrimination under Title IX, it must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633. The court held that the plaintiffs' allegations and supporting evidence were sufficient to allow a finder of fact to conclude that they had met that standard. In addressing the issue of severity and pervasiveness, the court wrote that, "[d]espite the fact that the caselaw speaks in terms of conduct that is 'severe *and* pervasive' it is well settled that relatively isolated incidents, if sufficiently egregious, can satisfy the standard for sexual harassment." (Docket No. 101 at 37 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)). As an example illustrating that principle, the court cited the fact that "[m]ost courts [that] have addressed the issue have concluded that even a single incident of rape is sufficient to establish that a child was subjected to severe, pervasive, and objectively offensive sexual harassment for purposes of Title IX." *Lopez v. Metro. Gov't of Nashville & Davidson Cty.*, 646 F. Supp. 2d 891, 913 (M.D. Tenn. 2009) (Echols, J.) (citing *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 WL 4446712, at *12 (D. Ariz. 2008); *Kelly v. Yale Univ.*, No. Civ. A. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. 2003); *Doe v. Dallas Indep. Sch. Dist.*, No. CIV.A.3:01-CV-1092-R, 2002 WL 1592694, at *6–7 (N.D. Tex. 2002); *Ross v. Mercer Univ.*, 506 F.Supp.2d 1325, 1358 (M.D. Ga. 2007)). The court stressed, however, that it was

citing those cases only as an example and that they are not determinative here, because, while the plaintiffs have alleged that the underlying sexual encounters were unwelcome, and at least one plaintiff characterized the sexual activity as coercive, their claims were not staked on the premise that they were raped, as the term was understood in the cited cases. Moreover, the harassment alleged extended beyond the initial sexual encounters to include (1) the taking of the videos without consent and, in most of the cases, without the plaintiff's knowledge; (2) the circulation of the videos; and (3) post-incident peer harassment in varying degrees, depending on the plaintiff.

MNPS characterizes the court's holding as concluding that "circulation of a sexually explicit video is akin to a sexual assault and, thus, in and of itself, can constitute severe and pervasive harassment that can subject a school system to Title IX liability." Insofar as the court's analysis was amenable to that reading, it will clarify the issue here. The court did not attempt to, and Title IX does not ask or require it to, calculate some equivalency between the plaintiffs' actual experiences and other hypothetical types of sexual harassment or abuse. As the court explained, the yardstick against which a Title IX harassment allegation is to be judged is not whether the harassment was objectively "akin to" some other form or type of sexual mistreatment in an abstract sense, but whether the harassment, in light of the totality of the circumstances, "deprived [the plaintiffs] of access to the educational opportunities or benefits provided by the

school." *Davis*, 526 U.S. at 650. The events alleged by the plaintiffs and supported by their proffered evidence were not merely severe but also extraordinarily disruptive of the educational process, leading most of the plaintiffs to leave their preferred schools and creating a significant obstacle to each plaintiff's ongoing participation in school life. Moreover, the plaintiffs' experiences were not isolated events in the same manner as a single rape or a single sexual assault; circulation of the videos involved or implicated numerous students, over an indefinite period of time. The plaintiffs who were spared the worst post-incident harassment only avoided that harassment because their parents foresaw the danger and quickly kept them home and/or moved them to new schools. The disruptions in the plaintiffs' educations, in other words, were real and documented. One need not engage in a crass ranking of traumatic sexual experiences against each other to conclude that a reasonable juror could find actionable harassment based on the plaintiffs' facts.

Nevertheless, as with the notice issue, MNPS has, despite its framing, identified a genuinely contestable issue on which appellate guidance is relatively limited. The norms and dangers of constant electronic communication and documentation were simply not contemplated by most of the existing Title IX case law. As courts have recognized, moreover, there are legitimate risks to defining actionable peer-on-peer sexual harassment in the school setting too broadly, particularly with regard to younger students who are still developing the capacities for empathy, foresight, and judgment

needed to humanely and appropriately navigate the adult world. *See Davis*, 526 U.S. at 651–52 (noting that, "at least early on, students are still learning how to interact appropriately with their peers" and may "engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting"). It is at least debatable where the line should be drawn in a case such as this, including at the summary judgment stage.

The plaintiffs point out that, even if the Sixth Circuit were to conclude that circulation of sexual videos of the plaintiffs was insufficiently severe and pervasive to amount to actionable harassment, other aspects of their claims might remain, such as the fact that they were subjected to unwelcome sexual encounters on school grounds. That fact, though, merely affects the scope of the determinative question, not whether there is one. The question of how a court should consider the issue of unwelcomeness in a case such as this is itself a largely unresolved area of the law. Accordingly, while the plaintiffs are correct that MNPS's formulation of the question presented is flawed, those flaws can be rectified to uncover a genuinely contestable determinative issue.

D. Appealability and Stay

Interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is typically reserved for "exceptional cases where a decision of the appeal may avoid protracted and expensive litigation." *Frantz v. City of Pontiac*, No. 04-CV-72904, 2005 WL 8154763, at *1 (E.D. Mich. Apr. 15,

2005) (quoting *Kraus*, 364 F.2d at 921). It is not clear how protracted the litigation in this case is likely to be, given that trial is currently set for next month. That trial, however, appears likely to be complex and expensive, as well as potentially highly demanding for individual witnesses, including the plaintiffs. If some or all of the plaintiffs' claims are non-viable, then it would benefit the court and the parties to know that sooner rather than later. Moreover, if the claims are viable, trial will be facilitated by as much guidance as possible regarding the contours of liability in a case such as this in the Sixth Circuit. An interlocutory appeal of potentially determinative questions of law is, therefore, justified.

Based on the foregoing, the court concludes that it is appropriate to issue MNPS a certificate of appealability pursuant to 28 U.S.C. § 1292(b) with regard to two issues:

> 1. Whether the court erred in denying MNPS summary judgment on its "before" claims based on a lack of sufficient notice, where MNPS did not have actual knowledge of a specific history of harassment involving the plaintiffs, the perpetrators of the harassment,[9] or a specific program or activity in which the plaintiffs and/or perpetrators were enrolled other than the general education program.

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[9] As the court noted in its opinion, this premise does not apply to Sally Doe's claims, because the male student involved in her sexual encounter did have a history of investigation for sexual assault. (Docket No. 101 at 28 n.7.)

> 2. Whether the court erred as a matter of law in denying MNPS summary judgment on the ground that the plaintiffs were unable to produce facts sufficient to support a finding of sexual harassment that was so severe, pervasive, and objectively offensive that it effectively barred the plaintiffs' access to an educational opportunity or benefit.

There is substantial ground for disagreement regarding how those questions should be answered; they are determinative of some or all of the plaintiffs' claims; and addressing the underlying legal issues now would be likely to materially advance the resolution of this litigation. It is, of course, up to MNPS how it wants to characterize these issues to the Sixth Circuit, but the holding of this court is that the above formulations, not MNPS's, are necessary to render the issues controlling.

Section 1292(b) permits, but does not require, the court to stay proceedings while a party seeks an interlocutory appeal. A district court "has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706–07 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes [on] its docket with economy of time and effort for itself, for counsel and for litigants, and the entry of such an order ordinarily rests with the sound discretion of the District Court." *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 626–27 (6th Cir. 2014) (quoting *Ohio Envtl. Council v. U.S. Dist.*

Court, 565 F.2d 393, 396 (6th Cir. 1977)). When considering whether to stay proceedings pending the resolution of an appeal, the court typically considers "(1) whether the defendant has a strong or substantial likelihood of success on the merits; (2) whether the defendant will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies." *Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002).

This case is currently set for trial beginning on July 16, 2019. It would make little, if any, sense to grant a certificate of appealability if the court did not also stay proceedings until the Sixth Circuit either declines the appeal or has fully considered it.[10] The court, accordingly, will stay proceedings in this court while MNPS pursues its appeal.

IV. CONCLUSION

For the foregoing reasons, MNPS's Motion for Certificate of Appealability (Docket No. 103) is hereby **GRANTED**. All deadlines and hearings scheduled in this case, including the trial set to begin on July 16, 2019, are hereby **CONTINUED** until further order of the court and the court's consideration of the case is

[10] The court also notes that a stay would likely allow the court the opportunity to benefit from any opinion issued in the pending interlocutory appeal in *Kollaritsch v. Mich. State Univ. Bd. of Trustees*, 285 F. Supp. 3d 1028, 1033 (W.D. Mich. 2018).

STAYED until such time as (1) MNPS fails to timely apply for an interlocutory appeal, (2) the Sixth Circuit denies MNPS's application, or (3) the interlocutory appeal is resolved.

It is so **ORDERED**.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

T.C. ON BEHALF OF HER MINOR CHILD, S.C., Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	Civil No. 3:17-cv-01098 Judge Trauger LEAD CASE

JOHN DOE AND JANE DOE #1 ON BEHALF OF THEIR MINOR CHILD, JANE DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	Civil No. 3:17-cv-01159 Judge Trauger Member Case

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SALLY DOE ON BEHALF OF HER MINOR CHILD, SALLY DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	)	Civil No. 3:17-cv-01209 Judge Trauger Member Case

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MARY DOE #1 ON BEHALF OF HER MINOR CHILD, MARY DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	)	Civil No. 3:17-cv-01277 Judge Trauger Member Case

MEMORANDUM

(Filed May 6, 2019)

Pending before the court in these consolidated cases are five sealed Motions for Summary Judgment. Four Motions for Summary Judgment were filed by the

Metropolitan Government of Nashville and Davidson County d/b/a/ Metropolitan Nashville Public Schools ("MNPS"). (Docket No. 71 (regarding S.C.[1]); Docket No. 76 (regarding Jane Doe); Docket No. 82 (regarding Mary Doe); Docket No. 83 (regarding Sally Doe).) The plaintiffs have collectively filed a Response addressing all four MNPS motions (Docket No. 92), to which MNPS has filed a Reply (Docket No. 99). Jane Doe, Sally Doe, and Mary Doe have collectively filed a Motion for Partial Summary Judgment (Docket No. 87), to which MNPS has filed a Response (Docket No. 88). For the reasons discussed herein, MNPS's Motion for Summary Judgment regarding the claims of Sally Doe will be granted in part and denied in part, and all of the other motions will be denied.

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[1] The naming conventions used by the parties are, in the context of the cases' having been consolidated, somewhat confusing and will, therefore, be streamlined slightly by the court. Three of these plaintiff students have taken the fictive surname Doe (despite not sharing the same actual surname), along with different fictive first names. However, their mothers—who, alone or with the students' fathers, filed the suits on the students' behalf—have taken the same fictive first name/surname combinations as their daughters, differentiated from the daughters only numerically. For example, Mary Doe #1 is the mother of Mary Doe #2, Jane Doe #1 is the mother of Jane Doe #2, and so forth. The court will simply refer to each student by the chosen pseudonym, without a numerical modifier, and refer to any parent just as the student's parent—e.g., as "Mary Doe" and "Mary Doe's mother." When discussing procedural matters in this court, the court will use the unmodified pseudonym to refer to the student acting through her parent or parents. For the one plaintiff using a different naming convention—S.C., who is suing through her mother T.C.—the court will use "S.C." to refer to both the individual student and to T.C. when acting in this court on S.C.'s behalf.

I. BACKGROUND

"Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides 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.'" *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 465-66 (1999). Title IX, like other federal antidiscrimination laws,[2] recognizes that discrimination can, in some cases, take the form of harassment. See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999). In 2016 and 2017, at least four female MNPS students, all minors, were videotaped[3] by other students while engaged in sexual encounters with male students on the premises of their respective

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[2] *See*, *e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (discussing harassment under Title VII); *Brown v. Metro. Gov't of Nashville & Davidson Cty.*, 722 F. App'x 520, 525 (6th Cir. 2018) (discussing harassment under the Age Discrimination in Employment Act); *Trepka v. Bd. of Educ.*, 28 F. App'x 455, 461 (6th Cir. 2002) (discussing harassment under the Americans with Disabilities Act); *Greenan v. Bd. of Educ. of Worcester Cty.*, 783 F. Supp. 2d 782, 788 (D. Md. 2011) (discussing harassment under the Pregnancy Discrimination Act).

[3] The parties use various terms to refer to the video recordings at issue here, including "videos" and "videotapes." The actual recordings appear all to have been made on mobile phones and thus were not, as a literal matter, "tapes," insofar as that term suggests the existence of an actual physical cartridge encasing spooled magnetic tape. Rather, the recordings existed as files on electronic devices. The court will use the various terms that may refer to a video recording interchangeably to refer to copies of the files.

MNPS schools. The resulting video files were circulated among the students' peers electronically. The plaintiffs, through their parents, have sued MNPS, arguing that its handling of the matters and general approach to harassment at its schools led to the deprivation of the plaintiffs' rights under Title IX and their constitutional rights to equal protection.

A. Title IX in MNPS

Federal regulations require that a recipient of funding under Title IX "shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX rules], including any investigation of any complaint communicated to such entity alleging its noncompliance with [Title IX rules] or alleging any action which would be prohibited by [Title IX rules]." 45 C.F.R. § 83.15(a). That employee is known as the recipient's "Title IX coordinator." The funding recipient must "notify all of its students and employees who work directly with students and applicants for admission of the name, office address and telephone number of the" Title IX coordinator. *Id.* MNPS's Title IX coordinator, from 2012 through the 2016-17 school year, was Julie McCargar. (Docket No. 92-25 at 18, 24.)

McCargar testified that, when she took the position of Title IX coordinator in 2012, no one from MNPS provided her with any training regarding what her duties were. (*Id.* at 21.) She did say, however, that she and others in her office received outside training and

worked closely with the city's legal department in understanding how to conduct investigations. (*Id.* at 50.) She testified that, in contrast, principals and assistant principals did not, to her knowledge, receive training regarding how to conduct a Title IX investigation until late in her tenure as coordinator. (*Id.* at 50.) Principals and assistant principals also were not required to read the Dear Colleague letters that the Title IX coordinator was expected to read to stay abreast of federal Title IX policy. (*Id.* at 51-52.) Phyllis Dyer, who worked with McCargar and succeeded her as Title IX coordinator, explained that principals did finally receive some training at some time around or after May 2016 (Docket No. 92-18 at 54), although, as the facts below will show, when and if individual principals were trained appears to have varied.

Even before they received training, the principals and assistant principals were permitted to perform Title IX investigations themselves, rather than relying on the Title IX coordinator. (Docket No. 92-25 at 53, 59-60.) McCargar further testified that she could not recall ever telling the principals to contact her when they became aware of possible Title IX violations. (*Id.* at 59.) If the principal determined that an incident did, in fact, rise to the level of a Title IX violation, only then would the principal inform the coordinator. (*Id.* at 79-82.)

The plaintiffs suggest, persuasively, that the policy McCargar described violates the guidance provided by the U.S. Department of Education's Assistant Secretary for Civil Rights in a Dear Colleague Letter

issued on April 24, 2015. (Docket No. 1-5.) According to the letter, a Title IX funding recipient "must inform the Title IX coordinator of all reports and complaints *raising Title IX issues*, even if the complaint was initially filed with another individual or office or the investigation will be conducted by another individual or office." (*Id.* at 3 (emphasis added).) As the plaintiffs point out, the universe of complaints raising Title IX issues is presumably significantly larger than the universe of complaints where a principal has made an affirmative finding of a confirmed Title IX violation.

When asked about MNPS's compliance with the Department of Education's guidance, McCargar admitted that she was not informed of all complaints "raising Title IX issues," if "informed" meant that she was directly contacted in writing or by phone. While she did receive direct notice of cases where principals ultimately concluded that a violation had occurred, she was not informed in that manner where a complaint raised Title IX issues, but the principal ultimately found no violation. (Docket No. 92-25 at 95.) Rather, McCargar explained, she had interpreted the Department's guidance as requiring only that incidents that had raised Title IX issues, but that principals had not deemed to be violations, be entered into a "student management system," to which the coordinator had access. (*Id.* at 96.)

B. Incident at Maplewood: Mary Doe and Jane Doe

Mary Doe and Jane Doe were freshmen at Maplewood High School when, on September 21, 2016, they were part of a sexual encounter involving the two of them and four older male students in a school stairwell. Jane Doe has attested that, while she had expected there to be flirting and probably kissing in the stairwell, she did not expect and was not prepared for the sexual activity. She attested that she was intimidated by the age, size, and number of male students involved and, although she did not welcome the sexual activity, she "did not know how to get out of the situation." (Docket No. 92-8 ¶ 4.) Mary Doe has similarly attested that she did not expect or welcome sexual activity but was intimidated and did not know how to stop it. (Docket No. 92-10 ¶ 4.)

A male student videotaped the incident, and the video was ultimately circulated among the students' peers. (Docket No. 92-3 ¶¶ 19-20.) Jane Doe testified that she saw a light during the encounter but did not realize that it was from someone recording the activity. (Docket No. 76-4 at 20.) The parties agree that Mary Doe did not, at least immediately, know that the encounter had been taped. (Docket No. 92-3 ¶ 19.) Both girls have attested that they did not consent to being taped or to the tape's being circulated. (Docket No. 92-8 ¶ 5; Docket No. 92-10 ¶ 6.)

That night, Mary Doe told her mother that someone at school had held her down and put hickeys on her

neck. She did not, at the time, reveal the extent of actual sexual activity involved in the encounter. (Docket No. 92-3 ¶¶ 12.) Mary Doe's mother contacted Assistant Principal Marvin Olige about the event, and Mary Doe, her mother, and her grandmother met with Olige and police officers stationed at the school as "School Resource Officers" ("SROs"). (*Id.* ¶¶ 13-14.) Mary Doe reiterated the inaccurate version of events she had told her mother and provided a written statement to that effect. (Docket No. 77-3.) The SROs, however, pressed Mary Doe about inconsistencies between her account and other information they had received, and she admitted that the version of the story she had given her mother was inaccurate. Olige, the SROs, and Mary Doe's mother, however, appeared to remain unaware of the actual details of the encounter. (Docket No. 92-3 ¶ 18.)

The parties disagree about the precise series of events through which MNPS and the girls became aware that the video was being circulated but agree that, in the ensuing weeks, a number of people became aware of the video's existence and circulation. (*See id.* ¶¶ 19-23.) At some point, the girls became aware that other students had copies of the video. Jane Doe heard that, in connection to the circulation of the video, people were calling her demeaning sexual names like "whore" and "slut." (Docket No. 92-8 ¶ 6.) Jane Doe's brother also became aware of the video and informed her parents. (Docket No. 76-4 at 28.) On October 12, 2016, Jane Doe's parents reported the video to school officials and met with SROs and Assistant Principal

Olige. (Docket No. 89 ¶ 43; Docket No. 92-3 ¶ 24.) Upon learning that Mary Doe was the other female student in the video, Olige pulled her out of class to be questioned. (Docket No. 89 ¶ 44.)

Jane Doe's mother has attested that she told Olige and the SROs that the video had been made without Jane Doe's knowledge or consent and "circulated at the school and other places." (Docket No. 92-7 ¶ 3.) She further attested that, in the meeting, Olige and the SROs focused mainly on whether the underlying sexual conduct was forcible rape. (*Id.* ¶ 5.) She described her perception of Olige's approach to the matter as follows:

> The principal's reaction was as though it was no big deal. There was no indication that anyone was going to be punished, suspended, or expelled. The principal never indicated there would be any investigative procedure by the school. The principal never informed us of any action the school would take to ensure that my child would be safe from this type of activity or from any retaliatory acts for reporting the activity. [Mary Doe] was simply sent back to class, as though nothing had happened, and they wanted to handle my daughter the same way.

(*Id.* ¶ 7.) Jane Doe and Mary Doe confirm that Olige's questioning was focused on whether forcible rape had occurred. (Docket No. 92-8 ¶ 7; Docket No. 92-10 ¶ 5.)

Olige did not take any notes during the October 12 meetings. (Docket No. 89 ¶ 45.) He did have Jane Doe and a male student write out statements regarding the

incidents, but those statements were eventually shredded and are, therefore, not in the record. (*Id.* ¶ 50.) Olige testified that he did not know why the statements were shredded, but MNPS maintains that the shredding was inadvertent. (*Id.*; Docket No. 77-1 at 30-31.) Olige did not tell Maplewood Executive Principal Keely Mason about the sexual activity or the video file until after at least one of the underlying lawsuits had been filed. (Docket No. 89 ¶ 55.) Olige also did not refer the students or their parents to MNPS's Title IX coordinator; nor did he suggest to them that a Title IX investigation would or should occur. (Docket No. 76-4 at 50.)

Olige did not contact Mary Doe's mother to inform her that the incident that they had discussed earlier had included, not merely hickeys, but at least some students having sex and that a video had been made. Mary Doe's mother only learned those details later, during the summer between her daughter's freshman and sophomore years. (Docket No. 92-9 ¶¶ 5-6.) MNPS suggests that, because Olige did not view the video himself, he did not specifically know that Mary Doe had engaged in sexual activity beyond hickeys. At the very least, however, he did know that she was in a video involving a sexual encounter in which other minor students had sex.

Jane Doe attested that, following the meeting, she was "scared to remain at Maplewood." (Docket No. 92-8 ¶ 11.) The day after the meeting with Olige or shortly thereafter, Jane Doe's parents enrolled her in a new school, and she never returned to Maplewood. (Docket

No. 76-4 at 30-31.) MNPS concedes that, although Olige knew that Jane Doe's parents were concerned and planned to seek a transfer away from Maplewood, he "did not take steps to reassure the family that their daughter would be safe if she stayed at Maplewood, nor did he reassure the family that there was no need to pull her out of school." (Docket No. 89 ¶ 54.) Jane Doe's mother has characterized the school to which she transferred as having less comprehensive classroom and extracurricular opportunities. Moreover, Jane Doe had been participating in a "College Zone" program at Maplewood, which was intended to help students prepare for and gain admission to college, but her new school did not offer such a program. (Docket No. 92-7 ¶¶ 12-13.) Jane Doe ultimately failed tenth grade at the new school. (*Id.* ¶ 15.)

At first, Mary Doe remained at Maplewood. She has described substantial taunting and bullying she received at Maplewood related to the video, including students calling her "nasty" and saying she "got a train run on" her. She says that she complained to school personnel about the bullying, but they "didn't do anything about it." (Docket No. 92-10 ¶ 11.) She said that, when she would make a new friend, students would then target and bully the friend for "hanging around a nasty person." (*Id.* ¶ 13.) According to Mary Doe, at one point a boy grabbed her thighs and told her he wanted her to do the same thing to him as she had done in the video. She claims that she told Olige about the event but that he took no action that she was aware of. (*Id.* ¶ 14.)

Mary Doe eventually attended a meeting with Maplewood Dean of Students Jamie Hall and another person about the events and her coping with them. Doe testified that she had informed Hall that she had been having suicidal thoughts in the wake of the incident. In her deposition, Mary Doe described the following exchange:

> They said it was, like, a game called [“]Exposed[“] that the seniors do. And I was like, I don’t know what that is. . . . I was talking to, I think, Ms. Hall, and she was talking to me—who was I talking to? Who else was in there? There was somebody else in there. And I was upset, at the moment, and I was crying. She was like, What is wrong with you? It was about the situation. She was like, It’s the game. It’s a game that the seniors play, and you shouldn’t worry about it. It’s not nothing you should want to kill yourself over and all this. I was like, But it’s a video of me out there that I didn’t know nothing about, so I should really be upset about it.

(Docket No. 92-23 at 77.) Mary Doe—who attested that she had, prior to these events, been a content and gregarious Maplewood student—concluded that she could not be happy at Maplewood and transferred to another school. (Docket No. 92-10 ¶ 16.) Mary Doe’s mother has stated that she felt she had no reasonable alternative but to seek the transfer. (Docket No. 92-9.) Mary Doe has said that she still gets harassed at the new school due to the video, but only occasionally. (Docket No. 92-10 ¶ 17.)

Olige elected not to punish any of the students involved in the sexual activity or videotaping "beyond verbal discipline," because it was "an opportunity to impart some wisdom and life instruction," and he "did not want to subject the students to potential humiliation and discipline for a consensual act." No other, higher-level administrator was involved in his decision. (Docket No. 89 ¶¶ 61-62; *see* Docket No. 70-16 at 11.)

MNPS provides schools with a two-page "Bullying and Harassment Reporting Form" that includes spaces for specifying what offenders did and what, if any, electronic communications were used. (Docket No. 70-17 at 1-2.) Olige testified that he knew that, if he had filled out such a form, it would have begun a process of the school's determining whether a Title IX violation had occurred. (Docket No. 77-1 at 104.) However, he did not fill out a reporting form related to any of the events involving Jane Doe and Mary Doe. (Docket No. 89 ¶ 66.) Olige testified that, if he had ever been instructed by the district to refer cases involving circulation of sexual videos of students to the school's executive principal or to the Title IX coordinator, he would have done so. (Docket No. 77-1 at 87.)

Another Maplewood Assistant Principal, Isaiah Long, testified that, in his view, MNPS standard operating procedures, effective as of May 2016, required an assistant principal who became aware of sexual activity being taped at school to report the activity to the executive principal. He further testified that such actions would have warranted substantial punishment,

regardless of whether the underlying sexual activity had been consensual. Long, however, was not made aware of the events at issue here until after litigation began. (Docket No. 89 ¶¶ 70-73.) Executive Principal Mason agreed that she should have been informed of the events and that the reporting form should have been used for any sexual cyberbullying on the Maplewood campus. (*Id.* ¶¶ 77-81.) Mason testified that, had she been aware of the events, she would have punished the students involved. She further testified that she would have treated the release of a sexually explicit video of a student without the student's consent as itself requiring discipline. (*Id.* ¶ 89; Docket No. 70-12 at 68.)

The handling of the matter by Olige and the SROs did result in a referral to local police. On October 19, 2016, Detective Michael Adkins of the Metropolitan Nashville Police Department interviewed Mary Doe and Jane Doe about the incident. (Docket Nos. 76-1 & -2.) In the interviews, the girls characterized the sexual activity as consensual. (Docket No. 76-1 at 22; Docket No. 76-2 at 10.) However, Jane Doe told Detective Atkins that she had not known that she was being recorded during the encounter, although she did, as she would later testify, see a boy turning off the flash on his phone at the end. (Docket No. 76-1 at 22-23.) She told Adkins that she found out that the video had been circulated about a week later, when her cousin told her she had seen it. (*Id.* at 26.) Mary Doe told Detective Atkins that she was completely unaware that she was being filmed and only learned of it later, once the video

had been circulated. (Docket No. 76-2 at 8.) The record does not show that any criminal prosecutions resulted.

Jane Doe, through her parents, filed her Complaint on August 16, 2017. (Case No. 3:17-cv-01159, Docket No. 1.) Mary Doe, through her mother, filed a Complaint pleading the same causes of action on September 18, 2017. (Case No. 3:17-cv-01277, Docket No. 1.) Counts I and II of the Complaints are for Title IX violations related to MNPS's actions, respectively, before and after the stairwell incident. Count III is a claim under 42 U.S.C. § 1983, based on MNPS's failure to train its employees with regard to sexual harassment. Count IV is a claim under 42 U.S.C. § 1983, based on MNPS's deliberate indifference to ongoing harassment. (Case No. 3:17-cv-01159, Docket No. 1 ¶¶ 53-73; Case No. 3:17-cv-01277, Docket No. 1 ¶¶ 38-58.)

C. First Incident at Hunters Lane: Sally Doe

On February 21, 2017, Sally Doe—then a freshman at Hunters Lane High School—engaged in a sexual encounter with a boy, O.B., in a Hunters Lane boys' restroom. (Docket No. 92-4 ¶ 3.) Sally Doe has attested that she was pulled into the restroom and did not understand or expect that sexual activity was going to occur, she was pressured to engage in the sexual activity, and, although she did not physically fight the sexual activity, she was scared, did not know how to prevent it, and did not consider it welcome. She stopped the sexual activity before completion. (Docket No. 92-6

¶ 4.) The encounter was recorded on video—Sally Doe believes, by O.B. with his phone. Sally Doe attested that she did not realize she was being recorded and did not welcome or consent to the recording. (*Id.* ¶ 5.)

The same day, administrators learned that Sally Doe had been seen in or going into the restroom with O.B., and Assistant Principal Melanie McDonald pulled Sally Doe out of class to explain the situation. McDonald asked Sally Doe what she had been doing in the boys' restroom and if she had had sex while there. Sally Doe responded that she had not had sex in the restroom. (Docket No. 83-1 at 16-17.) McDonald had Sally Doe provide a written statement about the matter, and, in the statement, Doe stated only that she and O.B. had gone into the bathroom to discuss something. (Docket No. 83-4 at 23.) Both students were placed on "overnight suspension." (Docket No. 83-2 at 2-3.) The next day or the day after, Sally Doe and her mother met with Assistant Principal Nicole Newman, and Sally Doe admitted to having kissed O.B. but not to the sexual activity. (Docket No. 83-1 at 21-22; Docket No. 83-2 at 9.)

About a month and a half later, on April 7, 2017, another female student, with whom Sally Doe had apparently had a personal falling out, posted the video of the February 21 bathroom encounter on Instagram and "tagged"[4] Sally Doe. Sally Doe does not know how

[4] "Tagging" refers to including another person's user name in a social media post, often to indicate that the post depicts the "tagged" person and/or to inform the "tagged" person of the post by causing that user to receive a notification. For example, a

the girl who posted the video obtained it. (Docket No. 92-4 ¶¶ 5-6.) Several of Sally Doe's friends and acquaintances saw the video when it was posted. Sally Doe does not know exactly how many of her peers viewed the video but testified that she believed that "it was a lot of people." (Docket No. 83-1 at 26.) The same day that Sally Doe first saw the video, her mother found out about the video from a family member who, presumably, had seen or become aware of the Instagram post. (*Id.* at 24.)

The next day, Sally Doe's mother went to Hunters Lane to alert the school of the situation. She met with Assistant Principal Newman, who was in charge of overseeing ninth grade students, and an SRO. (Docket No. 70-3 at 42-43; Docket No. 83-1 at 26; Docket No. 89 ¶¶ 1, 5.) Newman's recollection of the meeting is limited. Newman testified that she does not remember whether she asked Doe who was circulating the video. Newman also does not recall whether she took notes. (Docket No 70-3 at 49.) Sally Doe's mother has attested that she told Newman that she "wanted [her] daughter protected and if that meant that the boy involved had to be suspended or expelled, then that is what should occur." (Docket No. 92-5 ¶ 4.) She also attested that Newman and the SROs focused their questions on the issue of forcible rape and did not raise the issue of a possible Title IX violation or the possibility that the

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person who posted a photograph of herself with her best friend might "tag" the best friend to indicate that she is the other person in the picture and let her know that the photo has been posted.

underlying events may have been non-forcible but unwelcome. (*Id.* ¶ 7.)

Newman did not, to her recollection, inform the executive principal of Hunters Lane, Susan Kessler, about the events. (Docket No. 89 ¶ 5.) Newman testified that she could not recall receiving any training, either at Hunters Lane or outside Hunters Lane, on how to conduct a Title IX investigation. (Docket No. 70-3 at 108.)

The record includes an email exchange between Sally Doe's mother and Newman, beginning on April 11, 2017. (Docket No. 83-7 at 1-6.) Sally Doe's mother described the bullying that Doe was apparently facing at school. Other students were "yelling and throwing things at her as she walk[ed] down the hallway," so much so that she had to put her headphones in to attempt to drown them out. (*Id.* at 5.) O.B. "tried to fight her . . . in front of a large crowd" and "told her he was going to have someone . . . beat her up." (*Id.*) "A student in one of her classes had the video[ ] and was talking to the teacher about it[,] even offer[ing] to show the teacher," although the teacher refused. (*Id.*) Sally Doe's account of events confirms that she was taunted by her peers with sexually demeaning names such as "ho" and "slut" and that O.B. threatened her. (Docket No. 92-6 ¶ 8.)

On April 12, 2017, Sally Doe's mother wrote, "There is absolutely no way I can send my child to this detrimental environment every day." (*Id.* at 5.) Newman expressed her concern for what Sally Doe was

experiencing and set up a meeting with Sally Doe's father for the next day to "talk and figure out a plan to get [Sally Doe] thr[ough] the rest of the year." (*Id.* at 4.) Sally Doe's mother responded that Sally Doe's father had tried to encourage Sally Doe to speak to Newman more about the situation, but that Sally Doe had said there was "no point" because the Hunters Lane administration "c[ould]n't control everyone." Sally Doe's mother wrote that she, too, was concerned that "[i]t's just too many children to reprimand." (*Id.*) Sally Doe's parents pulled her out of Hunters Lane for the remainder of the year, and she was allowed to complete her exams at home. (Docket No. 83-1 at 29.)

By April 18, 2017, the video was, as far as the parties know, off of social media. (Docket No. 92-4 ¶ 18.) Sally Doe, however, continued to suffer occasional taunting or provocation from other students related to the video. That summer, Sally Doe participated in a summer program at Hunters Lane, and she, during the program, had an altercation with a boy about the video. (Docket No. 83-1 at 37.) Sally Doe returned to Hunters Lane the next year and, at one point, was mocked by another student about the video in front of her then-boyfriend. Afterwards, an assistant principal found her crying in a stairwell. (*Id.* at 39-40.) Sally Doe originally received an overnight suspension for missing class, but her mother went into the school the next day and explained the situation, after which the suspension was taken off of Sally Doe's record. (*Id.* at 41-42.)

In November 2017, a male student touched Sally Doe's buttocks without her permission while taking a

picture. Thereafter, the student and Sally Doe's boyfriend got into a fight. Sally Doe, her boyfriend, and the student who took the picture while groping her were all suspended based on the fight. Although the disciplinary documentation of the incident does not mention Sally Doe's earlier problems with the video, it does not rule out the possibility that Sally Doe's resultant reputation played a role in the boy's actions. (Docket No. 83-10 at 5.)

Later that school year, Sally Doe was involved in an altercation, during which a student brought up the video. (Docket No. 83-1 at 44.) By the 2018-19 school year, however, the active harassment of Sally Doe had stopped. (Docket No. 92-4 ¶ 22.)

Meanwhile, Nashville police had begun a criminal investigation of O.B. arising out of the creation and dissemination of the video. O.B. was ultimately convicted of sexual exploitation of a minor. (Docket No. 92-4 ¶¶ 10-11.) Police records show that O.B. had previously been investigated, while in middle school, for having allegedly inappropriately touched a female student. (Docket No. 83-4 at 16.) He has now withdrawn from MNPS. (Docket No. 92-4 ¶ 23.)

On August 31, 2017, Sally Doe, through her mother, filed her Complaint. (Case No. 3:17-cv-1209, Docket No. 1.) Counts I and II of the Complaint are for Title IX violations related to MNPS's actions, respectively, before and after the bathroom incident. Count III is a claim under 42 U.S.C. § 1983, based on MNPS's failure to train its employees with regard to sexual

harassment. Count IV is a claim under 42 U.S.C. § 1983, based on MNPS's deliberate indifference to ongoing harassment. (*Id.* ¶¶ 38-56.)

D. Second Incident at Hunters Lane: S.C.

On April 17, 2017, S.C., also a freshman at Hunters Lane, was involved in a sexual encounter with a male student, J.J., on school premises during the students' lunch hour. According to S.C., all of the sexual activity that she engaged in was coerced and unwelcome, although she did not know how to stop it. (Docket No. 92-11 ¶ 4.) Another female student, S.D., recorded the encounter on video. (Docket No. 92-1 ¶¶ 1, 3.) S.C. testified that S.D. had—unbeknownst, at first, to S.C.—come into the room during the encounter and that, by the time S.C. saw S.D., S.D. already appeared to be recording the encounter on her phone. (Docket No. 71-1 at 20.) Later that day, when S.C. was preparing to get on the school bus home, S.D. approached S.C. and informed S.C. that, as S.C. would later describe it, "the video was out and . . . everybody had it." (Docket No. 92-1 ¶ 7; Docket No. 71-1 at 23.) S.C. left school for the day without informing any teachers or administrators about the sexual encounter or the video. (Docket No. 92-1 ¶ 8.) When S.C. got home, she told her mother that she had had sex for the first time, but she did not tell her mother that a video had been taken of the incident. At some point that night, however, a friend sent the video to S.C.'s mother, who became angry at S.C. (Docket No. 71-1 at 27-28.)

A little after 9:30 p.m. that night, Executive Principal Kessler received a Facebook message from a "community member" with the video attached. (Docket No. 92-1 ¶ 11; Docket No. 74 ¶ 3.) Kessler claims that, by early the next morning, she had "begun [a] formal investigation of the incident." (Docket No. 74 ¶ 5.) Kessler worked with her assistant principals as well as the school's SROs to further the investigation, and Detective Robert Carrigan, a police detective dedicated to investigating sex crimes, also came to the school. (*Id.*)

Detective Carrigan interviewed S.C. and, after the interview, informed S.C.'s mother that the sexual encounter had been consensual. (Docket No. 92-1 ¶ 16.) S.C. gave a written statement to Kessler and did not state that she had been forced into the encounter. (Docket No. 74-1 at 1.) She did, however, state that she had wanted to stop both the encounter and the videotaping but "just couldn't get the urge to say no." (*Id.*) According to Kessler, there was nothing about the content of the video itself suggesting that the sexual activity was non-consensual, and S.C. appeared, in the video, to have been aware of the taping. (Docket No. 74 ¶¶ 7-8.) According to S.C., police, as part of their questioning of her, told her that she could be prosecuted for the creation of child pornography and suggested that, because J.J. had not struck or otherwise violently forced her, the activity was consensual. (Docket No. 92-11 ¶¶ 7-8.) S.C.'s mother also stated that police suggested that S.C. could be prosecuted for child pornography offenses and that, because J.J. had not struck

her on the video, it was clear that she had been a willing participant. (Docket No. 92-12 ¶¶ 6, 8.)

Ultimately, the school punished eight students, including J.J., S.C., and S.D., for their involvement in the sexual encounter and/or creating or distributing the video. (Docket No. 92-1 ¶ 20; Docket No. 71-1 at 38.) The other students punished were three male and two female students, all of whom were found to have shared the video. (Docket No. 74 ¶ 9.) All of the students received the same punishment, a three-day suspension. (*Id.* ¶ 13.) According to S.C. and her mother, Kessler assured them that the matter would "blow over in one day," a prediction that they found shocking. (Docket No. 92-11 ¶ 12; Docket No. 92-12 ¶ 14.)

S.C. attested that she had heard of the practice of "exposing" since the sixth grade and understood it to mean the sharing of sexual photos and/or videos that were not intended to be shared. According to her, at one point, a website had existed specifically for that purpose within the Nashville area, using the name "615exposed." She believed that at least two other incidents of "exposing" had occurred at Hunters Lane before the events involving her; one of those prior instances appears, from S.C.'s description, to have been the Sally Doe incident, while the other involved activity in a baseball dugout. (Docket No. 92-11 ¶ 11.)

S.C. never returned to Hunters Lane, ultimately moving to another school outside the MNPS system. (Docket No. 92-1 ¶ 19.) She testified that another student, R., "put [the video] on Pornhub" two days after it

was recorded, which he told her about via Snapchat. (Docket No. 71-1 at 35-36.) S.C. testified that, although she left Hunters Lane, she was taunted about the video "mostly every day" by being called "a ho," "nasty," or "worthless." (*Id.* at 35.) The taunting came from both peers in her neighborhood and at her new school. (*Id.* at 37.) She also testified that S.D. made violent threats toward her and her family due to S.C's having "snitched" on her. S.C.'s mother reported those threats to the police. (*Id.* at 39.) Two male students also sent messages "warning" S.C., although she did not characterize those messages to be as threatening as S.D.'s. (*Id.* at 45-46.) S.C.'s mother confirms that S.C. and S.C.'s sister received threats and that she complained to the school and police about the threats. (Docket No. 92-12 ¶¶ 11-12.)

S.C. concedes that Kessler had no knowledge of anything in J.J.'s disciplinary history that would have suggested that he was at risk of harassing any female student. (Docket No. 92-1 ¶ 23.) Nor was there anything in the disciplinary records of the students punished for distributing the video that would have alerted Kessler to the possibility that they were particularly predisposed to engage in such an activity. (*Id.* ¶ 25.) Kessler testified that she had never heard the term "exposing" used to refer to the practice of MNPS students' circulation of other students' sexual pictures or videos before this lawsuit. (*Id.* ¶ 26.)

On July 31, 2017, S.C.'s mother sued MNPS on her behalf. (Docket No. 1.) Counts I and II of her Amended Complaint are for Title IX violations related to MNPS's

actions, respectively, before and after the bathroom incident. Count III is a claim under 42 U.S.C. § 1983, based on MNPS's failure to train its employees with regard to sexual harassment. Count IV is a claim under 42 U.S.C. § 1983, based on MNPS's deliberate indifference to ongoing harassment. (Docket No. 6 ¶¶ 41-61.)

II. LEGAL STANDARD

Rule 56 requires the court to grant a motion for summary judgment if "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). To win summary judgment as to the claim of an adverse party, a moving defendant must show that there is no genuine issue of material fact as to at least one essential element of the plaintiff's claim. Once the moving defendant makes its initial showing, the burden shifts to the plaintiff to provide evidence beyond the pleadings, "set[ting] forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Conversely, to win summary judgment as to her own claims, a moving plaintiff must demonstrate that no genuine issue of material fact exists as to all essential elements of her claims. "In evaluating the evidence, the court must draw all inferences in the light most favorable to the non-moving party." *Moldowan*, 578 F.3d at 374 (citing *Matsushita Elec.*

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

At this stage, "'the judge's function is not . . . to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). But "[t]he mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient," and the party's proof must be more than "merely colorable." *Anderson*, 477 U.S. 242, at 252. An issue of fact is "genuine" only if a reasonable jury could find for the nonmoving party. *Moldowan*, 578 F.3d at 374 (citing *Anderson*, 477 U.S. at 252).

III. ANALYSIS

A. Private Cause of Action Under Title IX

"The express statutory means of enforcement" of Title IX "is administrative: The statute directs federal agencies that distribute education funding to establish requirements to effectuate the nondiscrimination mandate, and permits the agencies to enforce those requirements through 'any . . . means authorized by law,' including ultimately the termination of federal funding." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280-81 (1998) (quoting 20 U.S.C. § 1682). The existence of an administrative, funding-based enforcement mechanism does not, however, necessarily preclude additional means of supporting a federal spending program's guarantees, such as private enforcement by

those whom the program is intended to benefit. To that end, the Supreme Court has long recognized that "Title IX implies a private right of action to enforce its prohibition" that can be brought by or on behalf of the students harmed by a Title IX violation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690-693 (1979)).

In *Gebser v. Lago Vista Independent School District*, the Supreme Court addressed the question of whether and when a Title IX funding recipient may be liable for damages arising out of sex-based harassment by a teacher. 524 U.S. at 281. In attempting to "define the contours of that liability," *id.*, the Court held that, as in actions under 42 U.S.C. § 1983, an institution's liability for the actions of an individual could not be premised on a theory of vicarious liability or *respondeat superior*. *Id.* at 285. Rather, the Court held that, "in cases . . . that do not involve official policy of the recipient entity, . . . a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and institute corrective measures on the recipient's behalf ha[d] actual knowledge of discrimination in the recipient's program and fail[ed] to adequately respond." *Id.* at 290.

On one hand, the holding in *Gebser*, by precluding simple vicarious liability in favor of a focus on the culpability of the institution, erected a hurdle for plaintiffs seeking to recover for harms done to them at school. The focus on institutional responsibility,

however, also eliminated any need to rely on the employer/employee relationship as essential to establishing liability. The rationale for liability arising out of an institution's failure to address harassment by a teacher could just as easily be applied to its failure to address harassment by a student's peers. Accordingly, in *Davis v. Monroe County Board of Education*, 526 U.S. 629, the Supreme Court extended the holding in *Gebser* to apply to Title IX cases involving student-on-student harassment. The Court, however, made clear that a school is not liable for all student-on-student harassment. The school's "deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Id.* at 645 (quoting Random House Dictionary of the English Language 1415 (1966); Webster's Third New International Dictionary 2275 (1961)).

The Court in *Gebser* had considered whether a school could be liable under Title IX for the ongoing harassment of one student plaintiff by one particular peer, concluding that liability was appropriate so long as the school had acted "with deliberate indifference to known acts of harassment" that were "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 633. The Sixth Circuit, however, has extended the holdings in *Gebser* and *Davis* to allow liability where the funding recipient was deliberately indifferent to prior acts of harassment against the plaintiff by different third-party perpetrators. *Patterson v. Hudson Area Schs.*, 551 F.3d 438, 449 (6th Cir.

2009); *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000).

With regard to what would constitute deliberate indifference, the Sixth Circuit has held that, "[w]here 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 known circumstances." *Vance*, 231 F.3d at 261. However, it has also cautioned that "[d]eliberate indifference" in the context of liability for sexual misconduct, "does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference to" the underlying conduct or risk. *Doe v. Claiborne Cty., Tenn. ex rel. Claiborne Cty. Bd. of Educ.*, 103 F.3d 495, 508 (6th Cir. 1996).

As this court has previously observed, Title IX claims based on harassment or abuse can roughly be separated into two types—"before" claims and "after" claims. "Before" claims focus on a school's actions before an underlying incident (or, at least, before the school's knowledge of that incident) and consider whether the school acted adequately to prevent and prepare for foreseeable risks of harassment or abuse. "After" claims, in contrast, consider the school's response after it learns of an underlying incident to determine whether the school met its obligation to handle the matter without deliberate indifference to its potential discriminatory effect. *See Doe v. Univ. of Tenn.*, 186 F.Supp.3d 788, 791 (M.D. Tenn. 2016). In a case such as this one, however, involving the dissemination of

recorded material, that terminology may be somewhat misleading. While it is simple enough to identify a time "before" the events at issue in this case, the nature of digital media complicates the inquiry of when, if ever, one can say that the parties reached the time "after." Once illicit, private images or videos of a person have been distributed electronically, there may be no guarantee that the person can ever be totally confident that their circulation has been stopped. *See Paroline v. United States*, 572 U.S. 434, 440 (2014) (discussing circulation of child pornography on the internet). In extreme cases, an electronic depiction of a brief, traumatic (or even simply private) experience in one's life may go on to be transmitted to thousands of computers and devices, for years or even decades after the original event. *Cf. id.* In that regard, the better terminology might not be "before" and "after," but "before" and "during"—before the depiction was created and during the indefinite period thereafter when it could resurface at any time. Nevertheless, the before/after distinction is helpful in clarifying the nature of the claims at issue here, and both parties use that terminology. The court will as well.

1. Lack of Notice Necessary for "Before" Claims

MNPS argues that, with regard to the plaintiffs' "before" claims, it lacked sufficient notice or actual knowledge of any underlying risk of sexual harassment to qualify for liability under Title IX. Although some general risk of sexual harassment and circulation of illicit pictures or videos in schools might be

obvious enough, MNPS argues that it did not have any basis for suspecting that any of the particular students involved in these incidents posed a risk of engaging in such behavior. MNPS also points to the lack of evidence that its personnel, with perhaps a few exceptions, were specifically aware of an "exposing" trend among its students.

Regardless of whether particular MNPS personnel knew specifically of the use of the term "exposing," there is ample evidence to allow a jury to conclude that MNPS was on notice of the risk of the dissemination of sexual images of its students without their consent, as well as the possibility of subsequent harassment of the students depicted. First, the risk at issue in this case is an obvious and inevitable danger, given the ages of the students involved and the realities of media and communication technology in this decade. More importantly, however, MNPS schools themselves had witnessed numerous cases that confirmed that risk. One of the SROs who worked at Hunters Lane testified that he could not even put a number on how many instances of students' "sexting pictures" he had dealt with, but estimated that "maybe a dozen" had been "brought to [his] attention" from 2012 to 2017. (Docket No. 83-5 at 26.) He estimated having seen five to ten cases involving sexual videos. (*Id.* at 27.) In all those cases, he testified, he informed the Hunters Lane administration. (*Id.*) Detective Carrigan testified that behaviors similar to those at issue in these cases have occurred in every MNPS high school and middle school, although he clarified that he was not necessarily referring to the

dissemination of videos that themselves had been filmed on campus. (Docket No. 92-15 at 24-25.)

The plaintiffs sought discovery from MNPS regarding disciplinary incidents related to sexual harassment, sexual assault, inappropriate sexual behavior, and/or inappropriate sexual contact at MNPS schools from the 2012-13 school year through the 2015-16 school year. The documentation that they received showed over 950 instances of sexual harassment, over 1200 instances of inappropriate sexual behavior, 45 instances of sexual assault, and 218 instances of inappropriate sexual contact. (*See* Docket Nos. 92 at 16; Docket No. 92-14 1-95.) There were also numerous incidents specifically involving digital communications. Indeed, many of the incidents described involved students taking and/or distributing sexually explicit photographs or videos of themselves and/or other students. (*See*, *e.g.*, Docket No. 92-14 at 97, 102, 146, 162.) Regardless of whether one might challenge those numbers on the margins,[5] it is plain that MNPS, through

[5] The plaintiffs point out that the list provided is almost certainly underinclusive, because it omits cases where no discipline was imposed as well as cases that, despite involving sexual activities, were not coded as such in MNPS systems. It is also possible that the list may be overinclusive with regard to some entries—for example, if a student was actually innocent of the actions alleged but the incident was not recorded as such. In any event, it is not the precise number of incidents that matters, but that the incidents were pervasive enough to give MNPS notice of the problem it faced. For the same reason, MNPS's argument that the court should disregard the plaintiffs' tabulations has no weight. Even if the court excluded those tabulations, the plaintiffs could simply point a jury to the documents themselves.

its teachers and administrators, had ample reason to know that inappropriate sexual behavior, including behavior involving sexual pictures and videos, was widespread in MNPS schools.

Moreover, the events involving Mary Doe and Jane Doe in 2016 only added to the notice of the problem available to MNPS before the events involving Sally Doe and S.C. at Hunters Lane. There is also some evidence that Hunters Lane itself experienced a similar, earlier instance of the same problem, involving the circulation of the video of students engaged in sexual activity in an allegedly on-campus dugout. (*See*, *e.g.*, Docket No. 71-1 at 25; Docket No. 92-11 ¶ 11; Docket No. 92-32 at 84-91.)

MNPS would have the court erect an artificial barrier around known risks related to widespread misbehavior in favor of a rule that only imposes Title IX liability if a school was aware of a particular problem student or student group likely to commit harassment or a particular student who was especially at risk of being targeted. Nothing in the logic of Title IX or the caselaw construing it supports such a rule. The Title IX standard recognized by the Supreme Court and the Sixth Circuit looks to what is a "clearly unreasonable response in light of the *known circumstances*." *Vance*, 231 F.3d at 260 (quoting *Davis*, 526 U.S. at 648) (emphasis added). There is no basis for excluding from the "known circumstances" a school district's knowledge that a problem is widespread and recurring throughout its student population. Nor is there any reason to assume that Title IX categorically permits a school

district to turn a blind eye to the group dynamics in which harassment sometimes thrives. *See Patterson*, 551 F.3d at 448-49 (holding that a school's "isolated success with individual perpetrators cannot shield [it] from liability as a matter of law" in a case where a student "suffered harassment over many school years perpetrated by various students"). Title IX requires only that the school have "enough knowledge of the harassment that it reasonably could have responded with remedial measures to address the kind of harassment upon which plaintiff's legal claim is based." *Staehling v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:07-0797, 2008 WL 4279839, at *10 (M.D. Tenn. Sept. 12, 2008) (Echols, J.) (quoting *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F.Supp.2d 273, 283 (E.D.N.Y. 2002); citing *Johnson v. Galen Health Institutes, Inc.*, 267 F.Supp.2d 679, 687 (W.D. Ky. 2003)). Actual knowledge of a serious, widespread problem is at least enough to allow a district to reasonably respond in some way, even if it cannot predict or prevent every future incident.

The reasoning that MNPS wishes the court to graft into Title IX, moreover, would not be adopted by any reasonable person or entity with regard to any other risk. When a driver leaves for work in the morning, he does not know that he is likely to have a collision with a *particular* other driver at a *particular* intersection. But the driver still drives safely, because he knows of a general risk of accidents. By the same token, MNPS does not know that any particular school is likely to have a fire, but that presumably does not

stop it from stocking its fire extinguishers and making sure the sprinklers work. Lack of knowledge of a more specific risk does not exonerate one from deliberate indifference to a known general risk.[6] In any event, MNPS had more than merely a general knowledge of the risks at issue, because its disciplinary records are replete with instances of actual notice that its students might behave in the manner described by the plaintiffs.

While it may be true that MNPS did not, for the most part,[7] have warning about the specific students addressed in these cases or the specific acts that would occur, those facts are relevant to the adequacy of the school district's preventive actions, not whether it was on sufficient notice of the risk of harassment to give rise to an obligation not to be deliberately indifferent. Because MNPS was not on notice of any risks involving these specific students, it had no obligation to take any targeted steps to preemptively protect the plaintiffs or restrain the other students involved. That lack of

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[6] Indeed, even the case that MNPS cites in support of the its proposed rule acknowledges that it "does not foreclose the possibility of Title IX liability based on a defendant's knowledge of prior harassment of victims other than the plaintiff by different perpetrators." *Doe v. Bibb Cty. Sch. Dist.*, 83 F. Supp. 3d 1300, 1309 (M.D. Ga. 2015), *aff'd*, 688 F. App'x 791, 796 (11th Cir. 2017) ("[W]e do not foreclose the possibility that a plaintiff may demonstrate adequate notice based upon similar prior incidents that involve different victims and perpetrators."). (*See*, *e.g.*, Docket No. 78 at 8.)

[7] The investigation of O.B. in middle school suggests that MNPS did have some general notice of a possible propensity by him to engage in inappropriate and unwanted sexual behavior.

specific knowledge does not, however, excuse the district from its responsibility not to recklessly disregard the widespread risk of which it *was* aware. No one could have looked at the information available to MNPS by 2016 and doubted that it was fully on notice that it needed to be prepared to deal with the risk of sexual misconduct and harassment at its schools, including, specifically, harassment involving the electronic distribution of sexual depictions of its students. Because the plaintiffs have produced facts sufficient to establish notice of a risk of harassment, MNPS can be held liable for harms caused by its deliberate indifference to that risk.

2. Unwelcomeness of Sexual Activity

MNPS argues next that the plaintiffs' claims should fail because (1) the evidence is insufficient to show that the underlying sexual encounters were unwelcome and (2) insofar as the encounters were unwelcome, MNPS was, at least in some of the cases, not informed of that fact and therefore had no duty to respond accordingly. The plaintiffs respond that they have presented evidence that none of the underlying sexual encounters was welcome and that the plaintiffs never consented to the creation and dissemination of the videos.

MNPS is correct that the Sixth Circuit has suggested, at least in an unpublished case, *Winzer v. School District for the City of Pontiac*, that "sexual activity among students who are voluntary participants,

absent any evidence of unwelcome sexual advances," is insufficient to support a Title IX sexual harassment claim. 105 F. App'x 679, 681 (6th Cir. 2004). What MNPS's argument neglects to account for, however, is that that rule, by its own language, assumes voluntary participation, not in merely some sexual behavior, but in the specific behavior at issue in the claim. Courts have recognized that circulation of sexual videos and related harassment can give rise to distinct Title IX issues, even if a school is not liable, under Title IX, for claims related to the initial underlying sexual encounter. *See*, *e.g.*, *Butters v. James Madison Univ.*, 145 F.Supp.3d 610, 618, 621 (W.D. Va. 2015) (recognizing Title IX claim based on circulation of video of off-campus sexual assault, despite plaintiff's conceding that the school did not have liability for the assault). By the same principle, a student can allege harassment related to the non-consensual circulation of her sexually suggestive or explicit photos, regardless of whether she played a role in the creation of the photos or even took them herself. *See*, *e.g.*, *Doe v. Town of Stoughton*, No. CIV.A. 12-10467-PBS, 2013 WL 6498959, at *2 (D. Mass. Dec. 10, 2013); *Logan v. Sycamore Cmty. Sch. Bd. of Educ.*, No. 1:09-CV-00885, 2012 WL 2011037, at *6 (S.D. Ohio June 5, 2012).

The circulation of sexual photos or videos is a distinct set of events that must be considered in its own right for any Title IX implications. For MNPS's defense to prevail, then, the plaintiffs would need to have been voluntary participants, not only in the sexual encounters, but also in the creation and dissemination of the

videos. The plaintiffs, however, were not voluntary participants in the circulation of the videos. Many were unaware that they were being taped, and others came to notice or suspect taping only after it had begun. None of the plaintiffs, however, actively assented to being taped or voluntarily participated in the video's circulation.

There are, moreover, disputed issues of fact with regard to whether the underlying sexual encounters involved elements of unwelcomeness that might support a finding of harassment, particularly in light of the plaintiffs' affidavits. All of the plaintiffs have characterized the underlying encounters as at least unwelcome. Even the caselaw cited by MNPS makes clear that "unwelcome sexual advances" can form the basis of liability, despite the fact that a student ultimately voluntarily participates in sexual activity with a party making those advances. *Winzer*, 105 F. App'x at 681. Indeed, it is well-settled that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986); *accord Wisniewski v. Pontiac Sch. Dist.*, 862 F. Supp. 2d 586, 597 (E.D. Mich. 2012); *see also J.M. ex rel. Morris v. Hilldale Indep. Sch. Dist. No. 1-29*, 397 F. App'x 445, 455 (10th Cir. 2010) (acknowledging that consent did not preclude a finding of actionable harassment under Title IX); *Chancellor v. Pottsgrove Sch. Dist.*, 529 F. Supp. 2d 571, 576 (E.D. Pa. 2008) (explaining, in Title IX case, that, based on the allegations at issue,

"consent [was] not a defense"); *cf. Bouveng v. NYG Capital LLC*, 175 F. Supp. 3d 280, 312 (S.D.N.Y. 2016) (explaining differences in elements between sexual harassment and sexual battery).

The Sixth Circuit's mention, in *Winzer*, of "unwelcome sexual advances" recognizes two layers of complexity that a myopic focus on consent to sexual contact would fail to take into account. First, by acknowledging that sexual advances may have been unwelcome, regardless of the existence of later voluntary sexual activity, the Sixth Circuit has recognized that sexual interactions may be multi-staged and multi-faceted; consent at one stage does not necessarily imply consent or welcomeness at every other. Second, by emphasizing the issue of welcomeness, rather than merely consent, the Sixth Circuit accounts for the fact that, even if sexual activity is consensual, the underlying interaction may be sufficiently unwanted or unwelcome that its intrusion into an educational setting can contribute to an environment of discriminatory harassment. For example, a student might face unwanted, harassing sexual overtures but ultimately consent to sexual activity out of a sense of social pressure. The student's decision to engage in the sex act itself, however, does not absolve the school of its responsibility to take appropriate steps to address the environment that allowed the unwanted advance to happen, if it has notice that a discriminatory environment had arisen. For the same reason, an environment in which girls consent to sex but are then subjected to severe,

gendered harassment and humiliation is not rendered Title IX-compliant by the initial consent.

The circulation of private sexual videos without consent, alone, would be sufficient to preserve a Title IX claim from a defense based on the voluntariness of the underlying sexual activity. Moreover, enough questions exist regarding the characterization of the underlying sexual encounters that the court cannot conclude, for the purposes of summary judgment, that all aspects of those encounters were welcome. The court, accordingly, will not grant MNPS summary judgment on that ground.

3. Basis of Sex

MNPS argues next that the circulation of the videos depicting the plaintiffs cannot form the basis of a Title IX claim because the videos depicted both the plaintiffs and the boys involved and, therefore, humiliated, exposed, and/or otherwise interfered with the education of male and female students equally. Accordingly, any harm that the plaintiffs suffered would not have been on the basis of sex, and the plaintiffs' claims would fail because they cannot establish causation.

As the Sixth Circuit has recognized, where harassment involves actions of an explicitly sexual or gendered nature, the question of whether that harassment amounted to sex discrimination is different than it would be in a case where, for example, a supervisor, teacher, or peer was simply accused of being abusive to others in a non-sexual, gender-neutral way. *See*

Gallagher v. C.H. Robinson Worldwide, Inc., 567 F.3d 263, 271 (6th Cir. 2009); *see also* David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. Pa. L. Rev. 1697, 1700 (2002) (observing that courts have generally recognized that "sexual conduct per se establishe[s] the 'causation' element necessary under Title VII to prove that the conduct was 'because of sex.' "). In a case involving abusive but non-sexual, facially gender-neutral behavior, it is necessary for the plaintiff to introduce additional facts establishing that the abusive behavior was somehow discriminatorily applied—for example, that a supervisor was abusive toward women more often than men. Otherwise, while the behavior may have been worthy of condemnation—and may even have been "harassment," as the term is commonly used—the behavior would not have been discriminatory. *Gallagher*, 567 F.3d at 272. Abusive behavior that is explicitly sexual or gender-coded in nature, however, may have a discriminatory effect, even if it is technically visited upon men as well as women. For example, the Sixth Circuit has recognized that the public use of "'sex specific' words," such as "'bitch,' 'whore,' and 'cunt' that . . . may be more degrading to women than men" may, if sufficiently severe and pervasive, amount to sexual harassment, even if men are exposed to the words as often as women. *Id.* (quoting *Reeves v. C.H. Robinson Worldwide, Inc.*, 525 F.3d 1139, 1144 (11th Cir. 2008), *reh'g en banc granted, opinion vacated*, 569 F.3d 1290 (11th Cir. 2009), *same result reached on reh'g en banc*, 594 F.3d 798 (11th Cir. 2010)).

Although both male and female students had their privacy violated by these events, the plaintiffs' claims under Title IX are not based on the bare violation of their privacy interests. Under Title IX, what matters is whether the plaintiffs' educations were disrupted in a manner that amounted to discrimination. In order for MNPS's argument to succeed, then, the facts would have to suggest that male and female students faced the same level of educational disruption from being the subjects of circulated sexual videos. The plaintiffs, however, have produced ample evidence based on which a jury could find to the contrary. The girls describe being called graphic, obviously gendered names in the wake of the tapings. The sexual and social dynamics they describe are not ones that treated male and female students equally in terms of the stigma and embarrassment associated with the dissemination of sexual recordings. To the contrary, the bullying described follows the easily recognizable script of treating women and girls as uniquely tainted and lessened by their engagement in sexual activity—a dynamic with which MNPS administrators, as ordinary people living in the world, were undoubtedly familiar.[8] A reasonable juror, therefore, could conclude that male and female students were not harmed equally by MNPS's

[8] Particularly strangely, MNPS suggests that the plaintiffs' sexual harassment allegations are somehow negated by the fact that female students were involved in the taping and/or dissemination of the videos. (*See*, *e.g.*, Docket No. 72 at 11.) It is well-settled that it is no defense to sexual harassment that a perpetrator was of the same sex as the victim. *See Oncale*, 523 U.S. at 82.

failure to prevent the development of a culture of digital sexual humiliation in its schools.

MNPS argues next that the circulation of the videos, at least in some of the cases, could not amount to sexual harassment because there is evidence that the students engaged in circulating them were motivated by "personal animus," which MNPS suggests is mutually exclusive with sexual harassment. MNPS's argument appears to be based on assumption—unsupported by caselaw—that the determinative question with regard to causation in a sexual harassment case is the harasser's subjective understanding of his or her own motivations. To the contrary, the Supreme Court has explained that a court must look to the "real social impact of . . . behavior," "judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Oncale*, 523 U.S. at 75 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993)). Accordingly, while sexual harassment—in the words of the case MNPS cites in support of this argument—must be "gender-*oriented*," *Davis*, 526 U.S. at 651 (emphasis added), that determination can be made, "irrespective of the harasser's motivation." *Gallagher*, 567 F.3d at 271. Harassers may have any of a range of personal motivations—desire, revenge, peer pressure, jealousy, or even just general sadism, to name a few. All of those motivations, however, can play a role in driving discriminatory behavior. A person seeking revenge, for example, might find gendered sexual humiliation to be a particularly effective tool for tormenting her target. If the content and nature of

harassment is gender-oriented and results in a denial of equal educational benefits on the basis of sex, the murky depths of the harasser's psychology are no defense to a Title IX claim. That is particularly true where, as here, the harasser is not even an employee of the defendant, and the defendant is being sued based on its institutional failures, not the motivation of any one person. Because a reasonable juror could conclude that the harassment in these cases amounted to discrimination on the basis of sex, MNPS is not entitled to summary judgment in that regard.

4. Severity/Pervasiveness

MNPS argues next that the behavior to which the plaintiffs were subjected was not sufficiently severe or pervasive to give rise to a claim for sexual harassment. "[W]hile 'severe and pervasive conduct' is a familiar phrase—one borrowed from the 'hostile work environment' jurisprudence of Title VII—it has a distinct application in Title IX." *Hoffman v. Saginaw Pub. Sch.*, No. 12-10354, 2012 WL 2450805, at *6 (E.D. Mich. June 27, 2012) (citing *Meritor Sav. Bank*, 477 U.S. at 67; *Davis*, 526 U.S. at 651). A school is not perfectly analogous to a workplace, and minor students are not perfectly analogous to adults. Accordingly, some behaviors that plainly would be out of place in a workplace may be tolerable in a school setting as part of the ordinary social development of the school's students. *See Davis*, 526 U.S. at 651-52 (noting that, because, "at least early on, students are still learning how to interact appropriately with their peers," it is unsurprising that they

may "engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting"). As in the Title VII context, however, the line between what gives rise to a cause of action and what does not is determined, not by some abstract question of what behavior is acceptable, but rather by returning to the conceptual basis of the statutory protection at issue: discrimination. Accordingly, while it may be impossible to ensure that students will never be cruel, inappropriate, or unfair with their peers, a cause of action arises "where 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." *Id.* at 652.

There can be little doubt that a juror could conclude that the conduct at issue here was severe and objectively offensive. MNPS presumably needs no reminder of the extraordinary seriousness with which our justice system treats the dissemination of graphic sexual depictions of minors. Indeed, Congress has determined that involvement in the production and distribution of child pornography may warrant imprisonment for years or even decades. *See* 18 U.S.C. § 2252A(b)(1). The potential psychological harms of being included in such images are well documented. *See Paroline*, 572 U.S. at 440. It would be strange if criminal laws treated these matters as possessing the highest level of gravity and yet Title IX did not even consider the conduct "severe" or "objectively offensive." Unsurprisingly, then, multiple courts have found that circulation of sexual pictures or videos and

accompanying harassment can rise to the level of severity necessary to support a harassment claim. *See Butters*, 145 F.Supp.3d at 619; *Doe v. Town of Stoughton*, No. CIV.A. 12-10467-PBS, 2013 WL 6195794, at *2 (D. Mass. Nov. 25, 2013); *Logan*, 2012 WL 2011037, at *6; *but see Higgins v. Saavedra*, No. CIV 17-0234 RB/LF, 2018 WL 327241, at *8 (D.N.M. Jan. 8, 2018) (holding that insults after circulation of video of student showering were insufficiently pervasive to give rise to a sexual harassment claim); *Tyrrell v. Seaford Union Free Sch. Dist.*, 792 F.Supp.2d 601, 629 (E.D.N.Y. 2011) (holding that "insults, name-calling and pushing" following circulation of picture of off-campus sexual assault were not sufficiently severe and pervasive to give rise to a Title IX claim).

What is left, then, is MNPS's argument that the harassment to which the plaintiffs were subjected was not pervasive. There is variation, among the plaintiffs, with regard to how widely they were mocked or bullied by other students after their tapes were circulated. Even for the plaintiffs whose post-video fallout was less severe, however, the initial circulation of the videos is sufficient to allow a juror to conclude that it amounted to a denial of equal access to education. Despite the fact that the caselaw speaks in terms of conduct that is "severe *and* pervasive" it is well settled that relatively isolated incidents, if sufficiently egregious, can satisfy the standard for sexual harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (observing that even "isolated incidents" can alter the terms and conditions of employment, if

"extremely serious"). For example, "[m]ost courts which have addressed the issue have concluded that even a single incident of rape is sufficient to establish that a child was subjected to severe, pervasive, and objectively offensive sexual harassment for purposes of Title IX." *Lopez v. Metro. Gov't of Nashville & Davidson Cty.*, 646 F.Supp.2d 891, 913 (M.D. Tenn. 2009) (Echols, J.) (citing *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 WL 4446712, at *12 (D. Ariz. 2008); *Kelly v. Yale Univ.*, No. Civ.A. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. 2003); *Doe v. Dallas Indep. Sch. Dist.*, No. CIV.A.3:01-CV-1092-R, 2002 WL 1592694, at *6-7 (N.D. Tex. 2002); *Ross v. Mercer Univ.*, 506 F.Supp.2d 1325, 1358 (M.D. Ga. 2007)). While the cases currently before the court do not include allegations of forcible rape, they do involve substantial violations of the students' sexual autonomy, which is relevant to just how pervasive the ensuing conduct needed to be to rise to the level of actionable harassment.

Moreover, it is inaccurate to characterize these cases as involving simple, isolated events. Being taped during sexual activity without permission would be an isolated event. The video's being sent to another person is a second event. The next transmission is a third. Although the evidence does not (and likely never could) show how widely the plaintiffs' videos were circulated, there is ample evidence that the circulation, or at least the availability, of the videos was widespread. Indeed, the impossibility of knowing how widely the videos were disseminated is part of why the conduct was so serious. In a contemporary high school, there is little

that is more "pervasive" than electronic communication.

The court notes, also, that, insofar as the plaintiffs were taunted less in the wake of the circulation of the videos than they could have been, that was largely the result of most of their parents' perceiving the humiliation that their children were likely to face—as well as the schools' apparent inability to prevent that humiliation—and quickly withdrawing the students from the schools. If anything, MNPS's attempted defense is only possible because the underlying situations got so out of control, so fast, that the students fled. A reasonable juror could conclude that, by the time they did so, the harassment had already reached an actionable level.

For the foregoing reasons, the evidence is sufficient for a reasonable juror to conclude that the conduct to which each of the plaintiffs was subjected was so severe, pervasive, and objectively offensive that it denied her equal access to education. The court, accordingly, will not grant MNPS summary judgment on that ground.

5. Deliberate Indifference

Finally, MNPS argues that, even if claims of the type plaintiffs have raised might, in theory, be viable, they have not identified facts sufficient for a jury to conclude that MNPS's actions, either before or after the videos of the plaintiffs were circulated, were deliberately indifferent. In order to establish deliberate indifference, a plaintiff must show that school administrators

responded to the known risk of harassment in a way that was "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648.

As the plaintiffs' evidence makes clear, the problem of students' creation and circulation of sexual images and videos is widespread in MNPS. The district's approach to such matters, therefore, potentially implicates the education and futures of numerous students—including both the students depicted and those who circulated the videos. The Sixth Circuit has stressed that, while a district facing known sexual harassment "must respond and must do so reasonably in light of the known circumstances," "no *particular* response is required" in order to comply with Title IX. *Vance*, 231 F.3d at 260-61 (emphasis added). Accordingly, "courts should avoid second-guessing school administrators'" selection of one particular policy or response over another. *Stiles ex rel. D.S. v. Grainger Cty., Tenn.*, 819 F.3d 834, 848 (6th Cir. 2016) (citing *Davis*, 526 U.S. at 648; *Vance*, 231 F.3d at 260). The court, moreover, cannot assume that the only acceptable path is the strictest or most aggressive one, employing the harshest possible discipline against perpetrators, the most invasive surveillance of students' activities and communications, and the most rigorous and time-intensive administrative attention to the problem from school personnel. There are legitimate countervailing concerns that might lead a school district to take a more moderate approach. The bar that a plaintiff in a case such as these must clear, therefore, is high—not merely that schools could have

handled matters differently or even that they could have handled them better, but that the district's decisions took it clearly outside the bounds of the reasonable execution of its duties to its students and the federal government under Title IX.

a. "Before" Claims. The plaintiffs argue that the harassment they received was, at least in part, the product of widespread failures of training, coordination, and monitoring by MNPS administrators. As a result, the plaintiffs argue, the district did not realize the depth of the problem it faced, did not train teachers or administrators on how to properly address or respond to incidents involving circulation of inappropriate student pictures or videos, and did not take adequate steps either to prevent harassment or to have in place adequate structures to support students who were the victims of it.

The plaintiffs first argue that the district's policies and poor training resulted in the failure of its Title IX coordinator to be informed of, or realize the depth of, the problems within the district regarding the circulation of sexual pictures and videos. For example, the punishment of students involved in the distribution of the video of S.C. had been coded, in MNPS's systems, as "severe disruption of school activities," a designation that did not flag them as Title IX-related and, therefore, did not result in the Title IX coordinator's being notified. (*See* Docket No. 92-18 at 75.) A contemporaneous e-mail exchange about the incident and surrounding events included a number of high-level administrators, including Executive Principal

Kessler and MNPS Director Shawn Joseph, but did not include the Title IX coordinator. (Docket No. 92-13 at 75-78.) That misclassification and lack of involvement of the coordinator, the plaintiffs argue, was typical.

In her deposition in these cases, McCargar, as the Title IX coordinator at the relevant times, was questioned about when a principal should consider events involving on-campus sexual activity and filming to implicate Title IX. She explained that her position was that, if sexual activity at school was consensual, then that activity would not, in and of itself, amount to a Title IX issue and would not need to be reported to her. She continued that the consensual taping of sexual activity also would not, in and of itself, be a Title IX issue that would require the involvement of the Title IX coordinator. McCargar, however, conceded that, if a tape of students engaged in sexual activity were circulated on social media and it led to the students' being harassed at school, "the potential for a Title IX compliance issue would come into place." (Docket No. 92-25 at 74, 77-89.)

Finally, McCargar was asked whether she, as Title IX coordinator, "t[ook] any steps to ensure that there was any punishment sufficient to deter sexual videotaping of students and/or dissemination of sexting pictures of students." She responded:

> Well, first thing, I actually was not aware that that activity was going on. I hadn't heard about it, no. So—so my answer would be, no, I

> didn't do anything, because, first thing, I wasn't even aware it was going on. And as far as any kind of discipline if that activity had been going on, I didn't get involved with that because I didn't know the activity was going on.

(*Id.* at 121-22.) She clarified shortly thereafter that she had been generally aware of some "incidents like this, but no one specifically told [her] about specific incidents or how numerous they were." (*Id.* at 138.) When asked whether she considered it "a problem that the Title IX coordinator [wa]sn't made aware that this type of activity was going on and therefore could not take steps to try to remediate the behavior," she replied, "Let's say that I—if I had to look at it now, I wish I knew that there were these incidents, but I didn't know." (*Id.* at 122.)

McCargar's successor, Dyer, provided some context regarding how the Title IX coordinator's duties were structured during the relevant time period. Dyer explained that, while MNPS, as required, did have a designated Title IX coordinator, Title IX coordinator was not that person's sole job. Rather, the duties of Title IX coordinator were rolled into the job of the executive director of federal programs, who is responsible for ensuring that federal funding from all applicable federal programs, not just Title IX, is obtained and integrated into MNPS's budget. (Docket No. 92-18 at 22.) Title IX does not require the Title IX coordinator to perform that job full-time. The April 24, 2015 Dear Colleague Letter, however, addressed the benefits of doing so:

> Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest and in many cases ensure sufficient time is available to perform all the role's responsibilities. If a recipient designates one employee to coordinate the recipient's compliance with Title IX and other related laws, it is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution, including those raising Title IX issues.

(Docket No. 1-5 at 3.) Dyer admitted that there were many days when she did not devote any time to Title IX matters, with weeks sometimes passing without her performing any Title IX-specific duties. (Docket No. 92-18 at 22, 36.) When asked whether it was "true that [she] spend[s] most of [her] time making sure that [the multimillion-dollar federal funding figure for a particular year] is received by [the] Metro school system," Dyer responded, "Yes." (*Id.* at 23.) When asked about the division of responsibilities between principals and the coordinator, Dyer's position largely echoed McCargar's, with the coordinator's responsibilities only arising after a principal affirmatively determined that a violation occurred. (*Id.* at 64-65.) She confirmed that she, like McCargar, was not made aware of the incidents at issue in these cases. (*Id.* at 89-91.)

Despite the fact that MNPS's policies relied on principals to involve the Title IX coordinator, Kessler testified that she could not remember contacting the coordinator, in her capacity as principal of Hunters Lane, about any Title IX issue at any point during the

2016-17 school year. (Docket No. 92-21 at 37.) When asked why the incident involving S.C. had not been treated as an instance of harassment under Title IX, Kessler explained as follows:

> Kessler: Because the . . . situation was a consensual sexual act. She also consented to be videotaped. When I dealt with the situation, it was only dealing with that particular incident, and then she didn't return back to school. She was issued a penalty, et cetera. But sexual harassment has to be unwanted. And once she had told me that she consented to participate, it wasn't a sexual harassment investigation.
>
> Counsel: Did she ever tell you she consented to a videotape being circulated within the . . . school?
>
> Kessler: I didn't ask her that.

(*Id.* at 44.) When asked whether the nonconsensual circulation of a sex video at school could constitute a Title IX issue, Kessler answered that "hypothetically, it could or it couldn't." (*Id.* at 45.) Kessler emphasized that whether an issue ended up being addressed at the district level often depended on whether parents were unhappy with its handling at the school level. (*Id.* at 83.)

In other words, the responsibility for ensuring Title IX compliance was vested in the Title IX coordinator, but the coordinator, contrary to Department

of Education guidance, over-relied on principals to identify which cases should be brought to her attention; the principals, in turn—at least insofar as Kessler was typical—over-relied on parents to let them know whether an incident had been adequately addressed. In some cases, moreover, even executive principals were excluded from the process because assistant principals did not understand that involving the executive principals, let alone the Title IX coordinator, was necessary.

One immediately apparent flaw in MNPS's approach is that, by addressing matters at the highest level only when parents complained, MNPS was likely to neglect students who, through no fault of their own, were not fortunate enough to have highly engaged, assertive, and skeptical parents. Even with regard to students whose parents were highly involved, however, the ability of parents to effectively advocate for their children would have required the parents to know their children's Title IX rights and how to assert them. MNPS's efforts to educate parents, however, were limited. Dyer cited the district's 2016-17 Student-Parent Handbook as an example of how the district had informed parents and students of their Title IX rights, as did Director Joseph. (Docket No. 92-18 at 58; Docket No. 92-29 at 52; *see* Docket No. 92-13 at 19.) The Handbook includes a short section on Civil Rights Compliance that briefly lists Title IX as among the antidiscrimination laws with which MNPS must comply and provides an address for the Title IX coordinator

with little additional detail about a student's rights. (Docket No. 92-13 at 68.)

Based on the foregoing, a reasonable juror could conclude that MNPS was deliberately indifferent with regard to its approach to the circulation of sexual videos and images of students, up to and through the dates of all of the incidents at issue here. The court has no doubt that the problem is a difficult one and that schools and school districts may reasonably disagree about the best approach without running afoul of Title IX. What the plaintiffs have alleged, however—and what a reasonable juror might infer from the facts presented—is not simply the selection of one policy over another, but a failure to build, or at least use, the basic structures that would have made even an attempt at an appropriate response possible. MNPS did not perceive the depth of its problem, despite having the mechanisms for doing so and despite its ground-level personnel being widely aware of what was going on. In a large school system, some decentralization of responsibility is likely inevitable. But the role of a Title IX coordinator is to *coordinate.* A reasonable juror, however, could look at the facts presented and see, not coordination, but a mass of already-busy, non-expert individual principals and assistant principals dealing with a new and systemic problem on an essentially ad hoc basis, with little support from the high-level administrators who were supposed to be the ones making sure that Title IX issues were properly addressed. The court cannot conclude that that failure, as a matter of law, did not amount to deliberate indifference.

A reasonable juror, moreover, could conclude that the structural problems that the plaintiffs have identified were exacerbated by a fatally flawed understanding of the Title IX issues raised among the principals who were, despite the Department of Education's warnings, acting as gatekeepers of what the Title IX coordinator would address. At least some of the MNPS administrators' discussions of the underlying events show a myopic focus on the consensualness of the underlying sexual contact, at the expense of considering whether the circulation of the videos itself could have had Title IX implications. The court stresses that there is nothing wrong with administrators inquiring into, and giving great weight to, whether or not sexual activity on campus was consensual; the possibility of rape and sexual assault on campus has implications both for Title IX and well beyond it. As an antidiscrimination statute, however, Title IX is not *only* concerned with consent to sexual activity, particularly when other aspects of an incident involved unwelcome actions taken without the affected student's consent. There is, moreover, nothing novel about that need to consider a broader set of issues. No competent human resources manager in any workplace would look at widespread circulation of personal sexual videos among employees, without the consent of those depicted, and then close the book on the matter because the initial sexual contact was consensual. While the school setting presents unique challenges that workplaces do not, the same wider focus is required.

Based on the foregoing, the plaintiffs have demonstrated that a reasonable juror could find deliberate indifference with regard to their "before" claims. The court, accordingly, will not grant MNPS's request for summary judgment in that regard.

b. "After" Claims. Department of Education guidelines describe a school's responsibilities after learning of peer-on-peer sexual harassment as follows:

> If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school's own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program on the basis of sex.

U.S. Dept. of Education Office of Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third

Parties § V.B.2 (internal footnotes omitted).[9] The Department's guidance identifies three dimensions in which a school should "tak[e] effective corrective actions": first, it must act to "stop the harassment"; next, the school must take reasonable steps to "prevent [the harassment's] recurrence"; finally, the school must do what it can to "remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively." *Id.*

Because these cases involve alleged ongoing failures of MNPS to recognize and address the Title IX issues raised by the underlying events, the facts supporting the plaintiffs' "after" claims overlap substantially with those supporting their "before" claims. For example, Principal Kessler's testimony that she classified S.C.'s case as not involving harassment because she concluded that the initial sexual activities were consensual supports both the "before" and "after" theories. It supports the "before" theory because it shows that Kessler—who, as principal, had been charged with performing functions that federal authorities contemplated being performed by the Title IX coordinator—had not been appropriately trained and instructed in identifying all of the Title IX dimensions of events involving circulation of sexual videos. The same event supports the "after" theory because the result of Kessler's decision was that no Title IX investigation

[9] Available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

was initiated and no Title IX-focused response was considered.

Many of MNPS's arguments against the "after" claims, moreover, are mere reiterations of the arguments the court has already addressed involving, for example, severity and pervasiveness or the fact that male students also appeared in the videos. The court will not reiterate its analysis on those points.

Nevertheless, the plaintiffs' "after" claims do pose distinct factual and legal questions. The "before" claims involved MNPS's notice of—and alleged failure to recognize and address—a widespread problem that threatened the Title IX rights of its student population broadly and generally. Accordingly, the kind of structural and conceptual missteps that the plaintiffs have identified had particular salience to those claims; a failure to recognize and appropriately understand the problem precluded the possibility of an adequate, district-wide response, which, a reasonable juror could conclude, increased the risk of harassment faced by the plaintiffs. When considering the response to each individual case, however, those high-level errors may carry less weight. It is entirely possible for a school to handle a specific situation appropriately, even if it has not been given the kind of guidance and support that it should have by the district. Accordingly, the court will consider MNPS's response to each of the underlying incidents separately.

Also, although none of the plaintiffs has sought summary judgment with regard to their "before" claims,

all but S.C. have sought summary judgment with regard to their "after" claims. Accordingly, the court must consider not only whether those plaintiffs' claims should survive summary judgment but whether the plaintiffs are entitled to summary judgment themselves.

Jane Doe and Mary Doe

Jane Doe and Mary Doe have introduced ample evidence pursuant to which a jury could conclude that Maplewood significantly mishandled their cases. Specifically, a reasonable juror could conclude that MNPS acted clearly unreasonably by failing to identify the events as cyberbullying; failing to classify them as a potential Title IX violation; failing to involve the school's executive principal; failing to inform the Title IX coordinator; failing to punish those involved in the creation and dissemination of the tape; and failing to provide Jane Doe and Mary Doe assurances that the school would take steps necessary to ensure, insomuch as possible, that they would be able to continue their educations without disruption related to the video or related harassment. Indeed, although MNPS does not concede liability, even it does not appear to endorse the school's handling of the matter, which ran counter to district policy and other MNPS employees' understanding of their duties. MNPS points out, however, that merely failing to follow its own policies is not necessarily a Title IX violation. MNPS also argues, based primarily on a case from the Eastern District of Tennessee, *Doe v. Hamilton County Board of Education*, 329 F.Supp.3d 543, 571 (E.D. Tenn. 2018), that even a

clearly unreasonable response to harassment cannot form the basis for a Title IX claim, unless it led to future, additional instances of harassment.

MNPS is correct that Title IX does not create a cause of action based solely on a recipient's failure to follow its internal procedures. *See Gebser*, 524 U.S. at 291-92. MNPS may even be correct that a clearly unreasonable—but ultimately harmless—response would also be insufficient to establish liability. For example, in *Hamilton County Board of Education*, a school official at first seemed to suggest a cover up of violent hazing—a clearly unreasonable step—but that potential cover up quickly fell by the wayside when the victim's injuries brought the incident immediately to light. Although some later harassment did occur, the school had no knowledge of it. The court concluded, therefore, that the aborted cover up alone did not give rise to liability under Title IX. 329 F.Supp.3d at 571.

A reasonable juror, however, could conclude that what Jane Doe and Mary Doe have presented is more than merely an inconsequentially botched response. Their situation involved, among other things, the creation of a video that, for all they knew at the time, could have resurfaced at any moment during any ordinary school day. Accordingly, in order for Jane Doe and Mary Doe to be able to participate fully in school life and receive their educations unimpeded, a jury could reasonably conclude that they needed, at a minimum, some indication that the school took the circulation of the video seriously as a distinct issue. The school's response, however, provided no such assurances. To the

contrary, Assistant Principal Olige apparently took the view that the only thing that mattered, from a harassment standpoint, was that the girls had seemingly consented to the initial sexual activity. He did not even inform Mary Doe's mother when he learned there was a video. A reasonable juror could conclude that Jane Doe and Mary Doe were justified in inferring that the school did not take seriously the ongoing threat that the video played to their dignity, privacy, and ability to receive an education. In response, Jane Doe left the school immediately—likely a significant disruption in her education—and Mary Doe had to deal with the anxiety and distraction of continuing to go to Maplewood without a basis for believing that the administration would protect her. Indeed, when she brought the issue up to the dean of students, the dean—presumably in an attempt to be supportive—seemed to minimize the video and suggest that nothing could be done about it. Finally, after enduring bullying to the point that she considered it unbearable, she, too, transferred. A reasonable juror could conclude that the effects of MNPS's mishandling of the matter were sufficiently severe that it constituted a distinct contribution by the school to the denial of an equal education to Jane Doe and Mary Doe, in addition to MNPS's errors leading up to the incident. The court, accordingly, will not grant summary judgment to MNPS with regard to the "after" claims of those students.

The plaintiffs, however, have also fallen short of establishing that summary judgment in their favor is appropriate. Under the standard adopted by the

Supreme Court and the Sixth Circuit, the determinative question with regard to liability is whether the school's response was clearly unreasonable. That highly factual question is beyond what the court can resolve at the summary judgment stage here, particularly given the genuine challenges faced by a school district in attempting to craft a response to the problem of sexual cyberbullying.

Sally Doe

Sally Doe's case, like the situation at Maplewood, involved an assistant principal who failed to inform the school's executive principal of the underlying events and failed to initiate a referral to the Title IX coordinator. Assistant Principal Newman's handling of the matter, however, differed substantially from the course of action taken at Maplewood. At Maplewood, Assistant Principal Olige treated the events involving Jane Doe and Mary Doe as primarily involving on-campus consensual sex, largely neglecting the distinct issues posed by the circulation of the video. Newman, on the other hand, clearly demonstrated concern and understanding that the video, itself, was harming Sally Doe and interfering in her education. At least based on what is in the record, Olige at Maplewood did little, if anything, to work with the students' parents to try to develop a plan for moving forward. Newman, in contrast, maintained close communication with Sally Doe's parents and worked with them in the decision to temporarily remove Sally Doe from the school. Finally, whereas the punishment of the other students

involved in the video at Maplewood was minimal, one of the students involved in Sally Doe's case was actually criminally prosecuted—which, the parties agree, is a significantly harsher consequence than arises in most cases involving student sex videos or pictures. While Hunters Lane itself was not the party responsible for the criminal prosecution, the involvement of SROs in its response suggests that the administrative and law enforcement responses to events must be judged together.

In her briefing, Sally Doe faults Newman for failing to give Doe and her mother assurances about specific additional steps that were being taken to prevent ongoing harassment. She does not, however, explain what those assurances should have been. The email exchange between Newman and Sally Doe's mother, moreover, shows an open discussion of the issues Sally Doe faced and the difficulties of protecting her over the short term. Indeed, a reasonable educator might conclude that it would have been doing Sally Doe a disservice to paint her mother an unrealistic picture of how successfully the school could protect her. Without identifying a more specific substantive failure that led to the denial of Sally Doe's Title IX rights, the second guessing of Newman's approach is insufficient to allow a jury to find deliberate indifference.

Sally Doe also argues that the school's response should be treated as the equivalent of having done nothing, because Newman failed to refer the matter up the chain of command, and the record does not show that the school itself administered any discipline in the

matter. If MNPS truly did nothing in response to sexual harassment, that decision, the Sixth Circuit has suggested, would, categorically, amount to deliberate indifference or at least give rise to a presumption thereof. *See Vance*, 231 F.3d at 260-61. The assertion that the school did nothing, though, is simply factually untrue. To say that Hunters Lane did nothing is to assume that the only actions that a school can take are either bureaucratic or punitive. Newman, instead, opted for an approach that focused on attempting to provide Sally Doe and her family support, including in their ultimate decision to temporarily withdraw her from Hunters Lane. The court cannot treat that approach as a total abdication of responsibility such that an inference of deliberate indifference would arise.

What is left, then, is the fact that Newman failed to involve Executive Principal Kessler, and the school failed to make a Title IX referral, along with the fact that Sally Doe was taunted or bullied a few more times once she returned to Hunters Lane. Title IX, however, is not a strict liability statute for any time a student is bullied, and it does not become one simply because a school made procedural errors. There is nothing in the record to suggest that, if a Title IX referral had been made, the future mistreatment of Sally Doe would have been prevented. While Sally Doe, like the other plaintiffs, has presented facts sufficient to support a plausible case that MNPS's systemic failures to address the risk of student-on-student sexual harassment contributed, prospectively, to her denial of equal educational benefits, she has not identified facts that

would permit a jury to conclude that MNPS's reaction to her specific case would support an additional finding of liability. The court, accordingly, will grant MNPS summary judgment with regard to that aspect of Sally Doe's claims and deny summary judgment to Sally Doe.

S.C.

In S.C.'s case, as in the others, MNPS personnel failed to involve the Title IX coordinator, despite the matter's having raised colorable Title IX issues. Moreover, the Hunters Lane administration's response to the underlying events bore more resemblance to Maplewood's mishandling of the stairwell incident than to Assistant Principal Newman's comparatively perceptive handling of the events involving Sally Doe at Hunters Lane. Executive Principal Kessler, like Assistant Principal Olige, exhibited a narrow focus on the underlying sexual conduct at the expense of recognizing the unique issues presented by the circulation of the video. Kessler testified that she concluded that, because she believed that S.C. had consented to the sexual activity and to the creation of the video, there was simply no harassment issue to address because "harassment has to be unwanted." (Docket No. 92-21 at 44.) Setting aside the fact that Kessler appears to have conflated not objecting to the videotaping with consenting to the videotaping, Kessler's approach neglected to acknowledge that the unwanted circulation of the video posed a distinct sexual harassment threat.

It may be impossible for a school district to fully shield a student from taunting or bullying after an incident such as the ones at issue here, and Title IX does not expect or require a funding recipient to do so. A reasonable juror could conclude, however, that a school district owes the student, at a minimum, a meaningful assurance that the school recognizes that the circulation of the video poses a distinct and significant risk of harm to the student's education. Without such an assurance, the message sent to the student is that, by engaging in recorded sexual activity, she has forfeited the right to the school's protection from future harassment. S.C., having received no such assurance, was left to assume that she would have to fend for herself against the ongoing harassment she continued to endure, and she, as a result, left Maplewood, disrupting her education in the process. Based on those facts, a reasonable juror could conclude that MNPS's handling of her case gave rise to liability on her "after" claim.

B. Section 1983

The plaintiffs' theories of liability under section 1983 largely mirror their claims under Title IX, and, as the court has explained, the caselaw involving Title IX ensures that shared questions will govern many aspects of both types of claim. To state a claim under section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the violation was committed by a person acting under color of law. *West v. Atkins*, 487 U.S. 42, 48 (1988). The plaintiffs allege that MNPS

violated their rights to equal protection under the Fourteenth Amendment. The Sixth Circuit has recognized that a failure to adequately address student-on-student harassment may give rise to a violation of equal protection. *See Stiles*, 819 F.3d at 851. One manner of establishing a violation, the court has held, is via a "deliberate indifference standard" that is " 'substantially the same' as the deliberate indifference standard applied in Title IX cases." *Id.* at 852 (quoting *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 369 (6th Cir. 2005)).

As under Title IX, a government is responsible under § 1983 only for its "own illegal acts. [It is] not vicariously liable under § 1983 for [its] employees' actions." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (internal citations and quotation marks omitted). Under § 1983, a local government entity can only be held liable if the plaintiff demonstrates that the alleged federal violation was a direct result of its official policy or custom. *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013) (*citing Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 693 (1978)); *Regets v. City of Plymouth*, 568 F. App'x 380, 393-94 (6th Cir. 2014)). A plaintiff can make a showing of an illegal policy or custom by demonstrating one of the following: (1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom or tolerance or acquiescence of federal rights violations. *Burgess*, 735 F.3d at 478.

The plaintiffs argue that MNPS is liable under section 1983 because (1) its deliberate indifference led to their harassment and the resultant denial of their equal access to education; and (2) MNPS personnel's mishandling of their cases and the issues surrounding them were the result of MNPS's policy of inadequate training and supervision. With regard to the deliberate indifference argument, much of the same analysis set forth above applies, and the court will not repeat it here. The plaintiffs have produced facts sufficient for a jury to conclude that MNPS was deliberately indifferent to the problem of sexual harassment related to the circulation of sexual pictures and/or videos depicting its students and that, as a result of that deliberate indifference, the plaintiffs were put at greater risk of, and ultimately subjected to, severe, pervasive, and objectively offensive harassment that resulted in discrimination on the basis of sex.

MNPS argues that the plaintiffs' section 1983 deliberate indifference claims should nevertheless fail because they cannot establish that the harassment they experienced was the result of a municipal policy or custom. The plaintiffs, however, have both identified specific policies they challenge, such as MNPS's Title IX referral policy, and decisions by officials with final decision-making authority, such as McCargar. A reasonable jury could, therefore, find that they have established municipal liability.

The plaintiffs' failure-to-train claims also overlap substantially with their Title IX claims, albeit with a somewhat more specific focus. "To succeed on a failure

to train or supervise claim, the plaintiff must show: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." *Regets*, 568 F. App'x at 394 (quoting *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006)). With regard to inadequate supervision, the plaintiffs point to McCargar's decision, as Title IX coordinator, to delegate the decision regarding whether an incident should be treated as implicating Title IX to non-expert, minimally trained principals. They further point out that there appears to have been no effort, by McCargar or anyone else, to monitor trends at MNPS schools involving harassment related to sexual pictures or videos. McCargar testified that she was only very generally aware that any such problem existed, without any knowledge of its extent or of any specific instances.

Dyer's account of how her time is spent as Title IX coordinator bolsters the case that supervision was minimal. Dyer described going lengthy periods of time without performing Title IX duties at all. (Docket No. 92-18 at 36.) She admitted that the majority of her time spent on Title IX issues was devoted to "making sure that the federal funding and federal grants are properly requested and that the presentation to the Federal Government is made so that these federal grants and federal benefits flow into the Metro Nashville school system." (*Id.* at 22.) As important as those duties may be, a reasonable juror could conclude that

the approach Dyer described was evidence that MNPS personnel were not being adequately supervised and monitored by the official charged with Title IX compliance.

With regard to inadequate training, the plaintiffs argue that MNPS was slow in implementing its policies regarding sexual harassment and in providing the training necessary for ground-level teachers and administrators to carry out that policy. Some training was rolled out to principals and assistant principals beginning during the 2016-17 school year, but McCargar testified that she was not aware of any training given to them regarding how to conduct Title IX investigations prior to that. (Docket No. 92-25 at 50.) Executive Principal Kessler testified that she did not receive the training until spring of 2017 and that, prior to that training, she did not understand or follow MNPS's standard operating procedure regarding Title IX issues. (Docket No. 92-21 at 41.) The testimony of the principals in this case, moreover, generally did not demonstrate that they had been trained to have a full grasp of Title IX policy related to harassment. Based on the foregoing, a reasonable juror could conclude that MNPS's failure to adequately supervise and train its administrators regarding Title IX and how to handle student-on-student harassment resulted in the deprivation of the plaintiffs' constitutional right to equal protection in MNPS schools. The court, accordingly, will not grant MNPS summary judgment on the plaintiffs' section 1983 claims.

C. Request for Injunctive Relief

Finally, MNPS argues that the court should grant it summary judgment with regard to the plaintiffs' requests for injunctive relief. The injunctive relief initially sought by the plaintiffs was formulated broadly—e.g., that MNPS be required "to comply with the requirements of Title IX as outlined in the [Department of Education's] 'Dear Colleague' letters." (Docket No. 1 at 9.) MNPS argues that that type of general edict to comply with the law lacks the specificity required by Rule 65 of the Federal Rules of Civil Procedure.

The Sixth Circuit, however, has recognized that such "obey-the-law injunctions" may be "justified by the facts of the case" in some instances. *Perez v. Ohio Bell Tel. Co.*, 655 F. App'x 404, 412 (6th Cir. 2016). In any event, the plaintiffs' complaints leave room for a more detailed injunction by also requesting whatever additional relief the court deems appropriate. (*See*, *e.g.*, Docket No. 1 at 9.) The court, therefore, has the option of crafting supplemental provisions, adding more specific duties to an injunction if needed. Indeed, the plaintiffs have suggested some more specific requirements that the court might choose. (*See* Docket No. 92 at 34.) The court cannot preclude the possibility that injunctive relief may be necessary, should the plaintiffs prevail, and the general relief initially requested may form an appropriate backbone for that relief. The court, accordingly, will not grant summary judgment to MNPS with regard to the availability of injunctive relief.

IV. CONCLUSION

For the foregoing reasons, MNPS's Motion for Summary Judgment regarding Sally Doe (Docket No. 83) will be granted in part and denied in part. MNPS will be granted summary judgment with regard to Sally Doe's Count II but none of Sally Doe's other claims. All of the other pending Motions for Summary Judgment (Docket No. 71; Docket No. 76; Docket No. 82; Docket No. 83; Docket No. 87) will be denied.

An appropriate order will enter.

ENTER this 6th day of May 2019.

/s/ Aleta A. Trauger
ALETA A. TAUGER
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

T.C. ON BEHALF OF HER MINOR CHILD, S.C., Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	Civil No. 3:17-cv-01098 Judge Trauger LEAD CASE

JOHN DOE AND JANE DOE #1 ON BEHALF OF THEIR MINOR CHILD, JANE DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	Civil No. 3:17-cv-01159 Judge Trauger Member Case

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SALLY DOE ON BEHALF OF HER MINOR CHILD, SALLY DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	)	Civil No. 3:17-cv-01209 Judge Trauger Member Case

MARY DOE #1 ON BEHALF OF HER MINOR CHILD, MARY DOE #2, Plaintiff, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, D/B/A METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant.	)	Civil No. 3:17-cv-01277 Judge Trauger Member Case

ORDER

(Filed May 6, 2019)

For the reasons explained in the accompanying Memorandum, the following Motions for Summary Judgment are hereby **DENIED**: the Motion for

Summary Judgment filed by the Metropolitan Government of Nashville and Davidson County d/b/a/ Metropolitan Nashville Public Schools ("MNPS") regarding the claims of S.C. (Docket No. 71); MNPS's Motion for Summary Judgment regarding the claims of Jane Doe #2 (Docket No. 76); MNPS's Motion for Summary Judgment regarding the claims of Mary Doe #2 (Docket No. 82); and the Motion for Summary Judgment filed by Jane Doe #2, Mary Doe #2, and Sally Doe #2 through their respective parents (Docket No. 87). MNPS's Motion for Summary Judgment regarding the claims of Sally Doe #2 (Docket No. 83) is **GRANTED** in part and **DENIED** in part. MNPS is **GRANTED** summary judgment with regard to Sally Doe #2's Count II. Sally Doe #2's other claims remain pending.

It is so **ORDERED**.

ENTER this 6th day of May 2019.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
U.S. District Judge

Nos. 20-6225/6228

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOE AND JANE DOE #1, ON BEHALF OF THEIR MINOR CHILD, JANE DOE #2 (20-6225); SALLY DOE, ON BEHALF OF HER MINOR CHILD, SALLY DOE #2 (20-6228), Plaintiffs-Appellants, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, DBA METROPOLITAN NASHVILLE PUBLIC SCHOOLS, Defendant-Appellee.	ORDER (Filed Aug. 5, 2022)

BEFORE: GUY, MOORE, and GIBBONS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then

was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Guy would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk