No. 23-_____

In the
Supreme Court of the United States

CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT,
Applicant,

V.

JANE ROE,
Respondent.

_____

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

To the Honorable Samuel A. Alito, Jr., as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

I.
OVERVIEW

Pursuant to Supreme Court Rules 13.5, 30.2 and 30.3, Applicant Cypress-Fairbanks Independent School District ("Cy-Fair ISD") hereby requests an extension of time within which to file a petition for writ of certiorari.

The Fifth Circuit issued its opinion in this matter on November 14, 2022. Cy-Fair ISD timely filed a Petition for Rehearing *En Banc*, which the Fifth Circuit denied on June 12, 2023. Cy-Fair ISD's petition for a writ of certiorari is currently due on or before Monday, September 11, 2023. Cy-Fair ISD respectfully requests a 14-day extension of time within which to file a petition for a writ of certiorari, up to and including Monday, September 25, 2023.

II.
JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Roe v. Cypress-Fairbanks Independent School District*, 53 F.4th 334 (5th Cir. 2022) (attached as Exhibit 1). The Fifth Circuit's order denying rehearing *en banc* is attached as Exhibit 2, the district court's amended memorandum opinion and order (*Roe v. Cypress-Fairbanks Independent School District*, 2020 WL 7043944 (S.D. Tex. Dec. 1, 2020)) is attached as Exhibit 3, and the district court's final judgment is attached as Exhibit 4.

III.
JURISDICTION

The Court will have jurisdiction over any timely filed petition for a writ of certiorari in this matter pursuant to 28 U.S.C. § 1254. As noted above, Cy-Fair ISD's petition is due to be filed on or before September 11, 2023. This Application is filed at least ten days prior to the current deadline, as required by Supreme Court Rule 13.5.

IV.
REASONS FOR GRANTING AN EXTENSION OF TIME

This case implicates the proper scope of school district liability for student-on-student sexual harassment under Title IX of the Education Amendments of 1972—an issue of great importance to school districts (and other educational institutions that receive federal funding) across the country. Given the significance of the legal issues presented, an extension of time will allow counsel to thoroughly analyze the split of authority between several circuit courts of appeals, and the extent to which various lower courts have strayed from stringent liability standard set forth in *Davis*

v. Monroe County Board of Education, 526 U.S. 629 (1999). *Compare Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 171 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009); *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 273–74 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022); and *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1295–96 (11th Cir. 2007) *with Kollaritsch v. Michigan St. Univ. Bd. of Trustees*, 944 F.3d 613, 623–24 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554 (2020); *K.T. v. Culver-Stockton College*, 865 F.3d 1054, 1057–58 (8th Cir. 2017); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000); and *Escue v. Northern Ok. College*, 450 F.3d 1146, 1155–56 (10th Cir. 2006). The decisions from the First, Fourth, and Eleventh Circuits—which allow for Title IX liability where a school's alleged indifference results in a mere "vulnerability" to further harassment—also implicate important issues of Article III standing. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211 (2021) (noting a "significant difference between (i) actual harm that has occurred but is not readily quantifiable . . . and (ii) a mere risk of future harm," and rejecting argument that "the mere risk of future harm, without more, suffices to demonstrate Article III standing in a suit for damages").

Additionally, the undersigned has had a number of unexpected client matters arise on short notice, including seven depositions noticed in a Voting Rights Act lawsuit for the weeks of August 21, 2023 and August 28, 2023. [Civil Action No. 3:22-cv-00387, *Shafer et al. v. Pearland Independent School District*, In the United States District Court for the Southern District of Texas, Galveston Division)]. In late July 2023, the undersigned was asked to defend a school district in a teacher termination

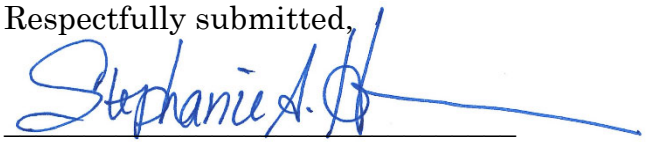
hearing under Chapter 21 of the Texas Education Code, which involves relatively short statutory deadlines. And, over the course of the summer, the undersigned has assisted numerous school districts and community colleges with various personnel complaints and grievances stemming from employment decisions made at the end of the 2022–2023 academic year, and with various leave and accommodation requests submitted in advance of the 2023–2024 academic year.

CERTIFICATE OF CONFERENCE: The undersigned conferred with counsel for the Respondent regarding this request. Respondent is not opposed.

V.
CONCLUSION

For the foregoing reasons, Cypress-Fairbanks Independent School District respectfully requests that its application for a 14-day extension within which to file its petition for a writ of certiorari, up to and including Monday, September 25, 2023, be granted.

Respectfully submitted,



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DATED: August 23, 2023

EXHIBIT 1

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 14, 2022
Lyle W. Cayce
Clerk

No. 20-20657

JANE ROE,

Plaintiff—Appellant,

versus

CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-2850

Before DENNIS, ELROD, and DUNCAN, *Circuit Judges*.

JENNIFER WALKER ELROD, *Circuit Judge*:

Jane Roe alleges that when she was fourteen years old, she was brutally sexually assaulted by another student in a stairwell at Cypress Creek High School, following an abusive relationship with the same student. After suffering severe injuries and weathering subsequent harassment, Roe says that instead of investigating her assault and providing her with academic or other appropriate support, Cypress Creek recommended that she drop out of school. After doing so—and never returning to any high school—Roe sued the school district under Title IX, arguing that it was deliberately indifferent both to the risk of her sexual assault and in response to her abusive

relationship, sexual assault, and subsequent related harassment and bullying on school property. The district court granted Cypress Creek's motion for summary judgment, and Roe now appeals from that decision. We affirm in part and reverse in part. Because the district court correctly concluded that the District was not deliberately indifferent to Roe's risk of sexual assault, we AFFIRM that portion of the judgment. However, because a reasonable jury could find that the District was deliberately indifferent to the totality of the harassment at issue here, we REVERSE that portion of the judgment.

I.

Jane Roe and John Doe began dating in middle school. Their relationship continued into high school at Cypress Creek, where it grew increasingly dysfunctional over the course of their freshman year. Among other things, Roe and Doe began engaging in sexual activity in school stairwells. They argued frequently and publicly. If Roe looked at anyone else, Doe would grab her arm. And if he thought her clothes were too revealing, he would make her wear his jacket. Doe would make her hug or kiss him before leaving his side, and he "mark[ed] his territory" by leaving large hickies on her neck. According to Roe's mother, Doe isolated Roe from her friends and family, in part by keeping tabs on her location and discouraging her from participating in sports and other extra-curricular activities. Roe's grades steadily declined during this time.

Roe's mother did not like Doe and his control over her daughter. But when she forbade Roe from seeing him, Roe retaliated by cutting herself. In December of her freshman year, Roe was diagnosed with bipolar disorder and treated at a hospital for two weeks. Roe's mother spoke to Cypress Creek assistant principal Carol Gibson and other district administrators several times that year to express her concern regarding the relationship between Roe and Doe, and his controlling behavior. According to Roe's mother, she

told Gibson that Doe was "controlling, emotionally abusive[,] and possibly physically abusive." The school refused to help. Her prior efforts unavailing, Roe's mother arranged a meeting for herself, Roe, Gibson, and other district administrators in March of 2014. At the meeting, she pleaded with the school to change Roe's schedule to keep her away from Doe. When they refused, Roe's mother recalls telling the administrators that "[Doe is] going to end up hurting [Roe]." Just six days later, on March 10, Roe and Doe met in the hallway after school dismissed. Doe walked Roe to an after-school math tutorial, but Roe left after 15 minutes to rejoin Doe. They then walked into a stairwell where they frequently engaged in sexual activity.[1] Doe began touching Roe and—at some point—shoved his fist into her vagina, lifting her off the ground. Roe began to bleed profusely. She walked out of the stairwell with Doe, threw away her blood-soaked spandex in the bathroom, and called her grandfather to pick her up. When Roe's grandfather arrived to take her home, Roe—explaining that she was having "female issues"—sat on a binder to keep blood from ruining the seat in his car. When the pain did not abate several hours later, her mother called their pediatrician for advice. Roe finally told her mother what had happened, and they went to the emergency room. Roe, who we reiterate was only fourteen at the time, underwent two surgeries over the next few days as a result of the violent encounter.

Roe checked in to the hospital at around 10:00 p.m. The hospital called campus police, and two officers arrived a short time later. The hospital also conducted a "Sexual Assault Nurse Examiner" (SANE) exam, which, due to the extent of Roe's injuries, was postponed until she went into surgery shortly thereafter. Campus police returned to the hospital at around 3:30

[1] Roe has presented evidence that it was well-known to both Cypress Creek students and employees that students would regularly engage in sexual activity in the stairwells, which were not monitored by cameras or school employees.

a.m. to follow up and collect the SANE forensic documents (but not the photographs of Roe's injuries). Campus police spoke to Roe about what happened immediately after she came out of surgery at 3:30 am, while she was still under the effects of anesthesia. Roe says that she does not remember what she told the hospital or the police.

According to the post-surgery police report, Roe told police that she and Doe were "fooling around" when Doe shoved his "entire hand" into her vagina. And medical records relate that "events were reported to be consensual," Roe "allowed [Doe] to put his entire hand into her vagina," and Roe "state[d] she was not assaulted but agreed to the act." However, these post-surgery statements conflict with Roe's later denials, including her statement given to a Sheriff's deputy about a month later that when "I tried to go [back] to tutoring[,] he pulled me back and he just shoved his whole fist up me . . . from the back" and that "I didn't want him to do it."[2] Left unreported was that Roe was pregnant at the time of the assault. Roe's mother believed that Doe intentionally injured Roe in order to cause her to miscarry.

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[2] Even assuming that Roe—merely hours from assault and minutes from surgery—did report initially that the encounter was consensual, there are numerous reasons why she might have inaccurately said so, including shock, fatigue, shame, the desire to protect Doe, or some combination of the above. *See* "Fast Facts: Preventing Sexual Violence," CTRS. FOR DISEASE CONTROL AND PREVENTION (last updated June 22, 2022), https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html; "Why Don't They Tell? Teens and Sexual Assault Disclosure," Nat'l Child Traumatic Stress Network (last visited Oct. 27, 2022), extension://oemmndcbldboiebfnladdacbdfmadadm/https://www.nctsn.org/sites/default/files/resources/fact-sheet/why_dont_they_tell_teens_and_sexual_assault_disclosure.pdf.

In any event, there are fact issues about whether anyone with the District ever received any report from either the campus police or the Sheriff, including the dueling statements in the respective reports about whether the encounter was consensual. *Infra* Part III.B.

The next day, a campus officer arrived at the school and watched the available video footage, which only showed Roe and Doe walking in the hallway after school had dismissed and before Roe attended her tutorial. A few days later, on March 21, campus police turned its documents and the video footage over to the Harris County Sheriff's Office. After obtaining this evidence, the Sheriff's Office interviewed Roe and her mother. Despite Roe's vigorous denial, the District Attorney would later determine that the encounter was consensual and not to charge Doe. [3]

Roe's mother called Gibson the day after the incident and told her that Roe was sexually assaulted and that she intended to press charges. According to Roe's mother, Gibson did not ask any questions, did not indicate that she would investigate, and never provided a written report of any findings.

Gibson did not interview Roe, and the parties dispute whether Gibson took Roe's written statement. The District also says that Gibson and assistant principal Rashad Godbolt interviewed Doe and took his written statement, but the District has not produced any documentation of any interview or statement. After viewing the footage and taking statements, Gibson says that she decided, "probably pretty early on," that it was a consensual sexual encounter that went "too far." Based on this and her professed belief that if she punished Doe she would have to punish Roe as well, Gibson decided not to discipline Doe. Even so, Gibson says that she

[3] An entry in a Sheriff's Office "case supplemental report" describes the District Attorney's decision not to charge Doe. According to Sergeant Ruth J. Weast, the District Attorney decided not to charge Doe "[b]ecause the act was consensual between the complainant and suspect, and the fact that the affirmative defense to prosecution applies in this case, criminal charges were not accepted. The suspect did not use duress[,] coercion[,] or threats. The suspect is not a registered sex offender and the sexual acts were consensual and the age difference is not more than 3 years."

met with Doe and his mother, though possibly at different times, and instructed him to stay away from Roe.

Gibson admits that her communication with campus police and other law enforcement was sparse. Despite not recalling the exact timeline, she concedes that she did not speak to campus police until a few weeks after the incident, at which point they told her that the Sheriff's Office was investigating. Gibson never obtained a police report from campus police. And while she claims that Roe's mother gave her a copy of the Sheriff's report, Roe disputes that the District ever obtained any records from the Sheriff's Office—according to her, it was she who subpoenaed and produced the records during discovery. Although Gibson testified that she was open to changing her mind based on the outcome of the Sheriff's investigation, she did not follow up with the Sheriff and admits that she made her decision without significant input from law enforcement.

Roe did not return to school for the rest of the 2013–2014 school year. Instead, she began taking homebound classes. District employees delivered coursework to her home but did not give her any instruction. Roe's mother asked one of the Cypress Creek counselors about counseling and the counselor responded that the school "does not do that."[4] Roe failed multiple classes that semester.

Roe returned to Cypress Creek for the 2014–2015 school year. She saw Doe frequently at school and spoke to him once. After Doe exchanged choice words with Roe's mother and her mother's boyfriend at the grocery store, Roe called Doe a "b****" at school, to which—according to Roe—

[4] Roe's counselor remembers having a conversation with Roe about her academic performance prior to taking "homebound" status, but does not recall any allegation of sexual assault, any conversation with Roe's mother, or even that Roe was dating anyone.

Doe responded, "I've got a something coming for y'all, a tool," referencing a gun. Roe reported the threat to assistant principal Godbolt, who told her to "leave [Doe] alone and not talk to him." Godbolt also called Doe into the office to speak with him.

Other classmates harassed Roe as well. Doe's friends bullied her in person and on social media. In person, a group of girls confronted Roe in a school bathroom and accused her of trying to get Doe arrested by falsely accusing him of rape. And on social media, classmates called her a "baby killer," "scum," "a horrible human being," tagged her in a picture of a dead fetus, and told her to kill herself. The harassment had a large impact on Roe, and she attempted suicide by intentionally overdosing on Benadryl in June of 2015.

Roe survived the overdose and decided to transfer to a school near her father's house in Indiana. But in March of 2016, she—missing the rest of her family—decided to move back and re-enroll for the remainder of the 2015–2016 school year. Roe's mother repeatedly discussed her re-enrollment with a Cypress Creek counselor. She again asked the school to reschedule Roe's classes to avoid contact with Doe. The counselor responded that she would do what she could but that nothing could be done about the past. School personnel refused to provide any reassurances or resources to help Roe as she confronted returning to the school where she had been abused, controlled, and assaulted by Doe, and bullied and attacked by other students on account of the assault and her pregnancy. Nothing was done, and Roe soon became overwhelmed. Eventually, someone in the registrar's office encouraged Roe's mother to withdraw Roe and homeschool her to avoid truancy charges. Roe did withdraw from Cypress Creek and never returned—to it or any other school.

Roe sued the District, bringing claims under Title IX among other things. The district court granted the District's motion to dismiss the § 1983 claim. Roe alleged that the District: (1) had Title IX policies and practices that created a "heightened risk" that she would be assaulted; (2) was deliberately indifferent to the warning signs of her assault; and (3) was deliberately indifferent in response to her abusive relationship, sexual assault, and subsequent related harassment. The district court granted the District's motion for summary judgment on the Title IX claim.

Roe appeals that order. She argues here that the District was deliberately indifferent both to (i) her risk of sexual assault and (ii) in response to her abusive relationship, sexual assault, and subsequent related harassment.

II.

We review a district court's grant of summary judgment *de novo*. *Green v. Life Ins. Co. of North Am.*, 754 F.3d 324, 329 (5th Cir. 2014). Summary judgment is appropriate only when there is no genuine dispute of any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "The sole question is whether a 'reasonable jury drawing all inferences in favor of the nonmoving party could arrive at a verdict in that party's favor.'" *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021) (quoting *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991)).

III.

"Congress enacted Title IX in 1972 with two principal objectives in mind: '[T]o avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective protection against those practices.'" *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286

(1998) (alteration in original) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)). In line with those objectives, Title IX states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

Title IX includes a private right of action. *Id.*, *see e.g.*, *Cannon*, 441 U.S. at 694–98. Through it, school districts may be liable for, among other things, student-on-student sexual harassment if: (1) the District had actual knowledge of the harassment; (2) the harasser was under the District's control; (3) the harassment was based on the victim's sex; (4) the harassment was "so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit"; and (5) the District was deliberately indifferent to the harassment. *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011) (alteration in original) (quoting *Davis ex rel. Lashonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)).

Two elements are at issue here: the first and the fifth. The first element, actual knowledge, means that the school must have actual, not constructive, knowledge of sexual harassment. *Davis*, 526 U.S. at 650; *K.S. v. Nw. Indep. Sch. Dist.*, 689 F. App'x 780, 784 (5th Cir. 2017). Specifically, the school must have actual knowledge that harassment has occurred, is occurring, or that there is a "substantial risk that sexual abuse would occur." *M.E. v. Alvin Indep. Sch. Dist.*, 840 F. App'x 773, 775 (5th Cir. 2020) (quoting *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 652–53 (5th Cir. 1997)). Accordingly, liability requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of

serious harm exists, and he must also draw the inference." *Rosa H.*, 106 F.3d at 659 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

The fifth element, deliberate indifference, is also a high bar. Deliberate indifference requires the District's response to be "clearly unreasonable in light of the known circumstances." *Sanches*, 647 F.3d at 167 (quoting *Davis*, 526 U.S. at 648). This is more than negligence. Courts afford broad deference to school officials and should not "second-guess[] the disciplinary decisions made by school administrators." *Davis*, 526 U.S. at 648. Schools need not "accede to a parent's remedial demands" or actually succeed in remedying the harassment. *Sanches*, 647 F.3d at 167–68. However, when there is "an official decision by the [school district] not to remedy the violation" such that its deliberate indifference "caus[es] the discrimination," a school commits a Title IX violation. *Gebser*, 524 U.S. at 290–91; *Davis*, 526 U.S. at 642–43.

A.

First, we consider whether the district court properly concluded that the District was not deliberately indifferent to Roe's risk of sexual assault. Roe offers two arguments for the District's deliberate indifference to the risk of her sexual assault. While genuinely disturbing, neither shows actual knowledge of Roe's risk of sexual assault.

Roe first argues that the district's Title IX policies and practices were so deficient that the District was deliberately indifferent to the risk of her sexual assault. She contends that the District failed to adequately train its employees about Title IX and its own sexual harassment and dating policies. She further claims that the District engaged in "disciplinary and record-keeping and reporting practices" designed to conceal incidents of sexual assault and harassment.

Relatedly, Roe also argues that the District was deliberately indifferent to the known risk of dating violence and sexual assault at Cypress Creek. She provides evidence that Cypress Creek had a history of student sexual conduct in stairwells. She also compiles employees' recollections of dating violence and other sexual misconduct on campus. Roe contends that the District was deliberately indifferent to these past incidents of sexual misconduct, which form the background for her sexual assault.

However, these theories do not suffice under our circuit's binding case law. Even if Roe is correct that the District failed to appropriately implement its Title IX obligations, she does not connect this failure to the District's knowledge about her in particular. *See, e.g.*, *Sanches*, 647 F.3d at 169. Furthermore, the District's response to other incidents of sexual harassment do not show the District's knowledge of a substantial risk of *Roe's* sexual assault. We have not defined precisely whether and to what extent the harassment of persons "other than the plaintiff" may constitute actual knowledge of the plaintiff's specific risk of Title IX harm. *Doe v. Edgewood Indep. Sch. Dist.*, 964 F.3d 351, 363 (5th Cir. 2020). Nonetheless, assorted incidents of sexual misconduct involving neither the Title IX victim nor the aggressor are generally insufficient to give a school district actual knowledge of the plaintiff's assault. At most, these arguments show only "constructive notice by another name." *Id.* at 364.

For these reasons, Roe is unable to create a genuine issue of material fact about whether the District is liable for pre-assault deliberate indifference.

B.

We next consider if the district court erred in finding that the District was not deliberately indifferent in response to Roe's abusive relationship, sexual assault, and subsequent related harassment. The totality of the circumstances, including the District's lack of investigation, awareness of the

pre-assault abusive relationship, failure to prevent in-person and cyber-attacks from Doe and other students post-assault, and failure to provide any academic or other appropriate support to Roe, culminated in exactly what Title IX is designed to prevent—the tragedy of Roe dropping out of school. A reasonable jury could find that the District violated Title IX based on these facts.

i.

To be actionable under Title IX, harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Sanches*, 647 F.3d at 165 (5th Cir. 2011) (alteration in original) (quoting *Davis*, 526 U.S. at 650). There is a circuit split regarding whether a "single instance of sufficiently severe one-on-one peer harassment" could ever rise to the level of "pervasive" harassment. *Davis,* at 652–53. Three circuits have held that "pervasive" student-on-student harassment for Title IX purposes "means *multiple* incidents of harassment; one incident of harassment is not enough." *Kollaritsch v. Mich. State Univ. Bd. of Trustees*, 944 F.3d 613, 620 (6th Cir. 2019), *see K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000). On the other side of the split, four circuits have held that students must demonstrate only that a school's deliberate indifference made harassment more likely, not that it actually led to any additional post-notice incidences of harassment. *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 274 (4th Cir. 2021); *Farmer v. Kansas State Univ.*, 918 F.3d 1094, 1108 (10th Cir. 2019); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172 (1st Cir. 2007), *reversed and remanded on other grounds*, 555 U.S. 246 (2009); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1295–97 (11th Cir. 2007)).

Our Circuit has not yet opined on what constitutes "pervasive" harassment, and the District did not raise this issue in its brief nor did the district court consider it. Even though no party contests this point, we hold that, based on these unique circumstances, a reasonable jury could conclude that the harassment Roe experienced was pervasive was no matter on which side of the circuit split we fall.

Roe suffered a years-long abusive relationship that culminated in a brutal sexual assault. Her sexual assault lead directly to further harassment and bullying by her peers. This is far more than a "single instance of . . . harassment." *Davis,* at 652–53. Although Roe's abusive relationship *on its own* was not sufficient to show the District's deliberate indifference towards her risk of sexual assault, when combined with the sexual assault and subsequent harassment, the totality of the circumstances shows "severe, pervasive, and objectively offensive" harassment that resulted in Roe dropping out of school—a clear bar to an "educational opportunity or benefit." *Sanches*, 647 F.3d at 165 (5th Cir. 2011) (alteration in original) (quoting *Davis*, 526 U.S. at 650).

There is no need for Roe to show that her post-assault harassment and bullying was on its own "severe, pervasive, and objectively offensive," although a reasonable jury could find that it met that standard. Roe was accosted and accused of trying to get Doe arrested by falsely accusing him of rape, called "scum," "a horrible human being," and a "baby killer;" tagged in pictures of dead fetuses, told her to kill herself, and threatened by Doe with his "tool" comment. She was harassed to the point of attempted suicide. This harassment was not the mere "insults, banter, teasing, shoving, pushing, and gender-specific conduct" that the Supreme Court has held to

fall short of Title IX standards, *Sanches*, 647 F.3d at 167 (quotation omitted), especially in the wake of a violent sexual assault and abusive relationship.[5]

ii.

We next consider if the district court erred in finding that the District was not deliberately indifferent in response to Roe's abusive relationship, sexual assault, and subsequent related harassment.

Roe alleges numerous factual and procedural errors in the District's response to her years-long abusive relationship, sexual assault, and subsequent related harassment and bullying. According to her, Gibson—the assistant principal tasked, along with assistant principal Godbolt, with investigating Roe's assault[6]—did not interview her or even take her written statement. Gibson never saw the campus police's initial report and never saw Roe's hospital records. The District did not investigate at all after turning its records over to the Sheriff's Office. Gibson spoke to campus police for the first—and only—time "a few weeks" after the incident occurred, never spoke to the Sheriff's Office, and never received a report on its investigation. No effort was made at any point to ensure that Doe and Roe

[5] The District also mentions in passing that it lacked control over at least some of Roe's post-deliberate-indifference harassment and that her post-deliberate-indifference harassment was not based on sex. The District forfeits these arguments by failing to adequately brief them both in district court and on appeal. *United States v. Scroggins*, 599 F.3d 433, 449 (5th Cir. 2010); (mentioning control twice only in passing, and not mentioning whether the post-deliberate-indifference harassment was harassment based on sex); (not mentioning control or harassment based on sex); (mentioning control twice only in passing, and mentioning harassment based on sex once). Similarly, the District forfeits any argument that Roe *must* show that it had control over her post-deliberate-indifference harassment. In any event, Roe has presented competent summary judgment evidence that her post-deliberate-indifference harassment occurred at least in part during the school year.

[6] Gibson testified in her deposition that she was the District's designee in this case. The District does not dispute that Gibson was its representative in its purported investigation.

did not share classes or lunch or to protect Roe from the bullying and attacks from other students. Furthermore, the District did not provide her with any instruction while she took homebound courses and gave her neither academic nor other appropriate support in the wake of her sexual assault, abusive relationship, and resulting harassment and bullying. Instead, Roe says that someone in the registrar's office encouraged her to drop out of school to avoid truancy charges, which she ultimately did. These unique circumstances are sufficient to raise a fact issue as to deliberate indifference

The District sees things differently. According to it, Gibson and Godbolt promptly viewed the available video footage from the school hallway, which showed only Roe and Doe walking in the hallway after school had dismissed and before Roe attended her tutorial. Gibson initially claimed to have viewed video footage from the hallway before and after the assault as well, but the District now admits that no such video footage exists.[7] Gibson took written statements from both Roe and Doe.[8] Gibson and Godbolt interviewed Doe, notified his parents, and instructed Doe to have no further contact with Roe. Based on this information, Gibson determined that Roe had been injured during a consensual sexual encounter that went "too far." After "multiple conversations" with other administrators, she then declined to punish Doe, believing that if she punished Doe for consensual sexual activity, she would have to punish Roe as well. Gibson admits that she first spoke to campus police "a few weeks" after the incident, at which point she

[7] This also conflicts with Godbolt's testimony that the only video they were able to locate was when the bell rang at dismissal.

[8] In the District's objections and answers to Roe's interrogatories, it says that Gibson also interviewed Roe when "Roe and her mother came up to the school to talk with her." But Gibson did not recall meeting with Roe. And while Gibson testified in her deposition that Roe wrote a statement, she did not believe that Roe either wrote the statement in her presence or returned the statement personally to her.

learned that the Sheriff's Office was investigating, but she says she was open to changing her mind based on the results of its investigation. When she received the result of the Sheriff's investigation from Roe's mother, its consensual-conduct conclusion confirmed her own.

Gibson also claims to have thoroughly documented the investigation in accordance with district policy, but the District admits that it cannot produce any of the documentation due to its document retention schedule. This is a generous recounting of the District's account. It is unclear whether the District even claims to have—through Gibson or any other district employee—received *any* documents about the Sheriff's investigation or conclusion, any update from the Sheriff's Office about the result of its investigation, or any word from the Harris County District Attorney's Office about its decision not to charge Doe. While Gibson testified in her deposition that she received the Sheriff's police report from Roe's mother, it is unclear whether she was referring to the Sheriff's final report or some other document. For its part, the District appears to state only that "Gibson testified that she asked Roe's mother for information regarding the incident."

We conclude that a reasonable jury could conclude that the District was deliberately indifferent. Viewing the facts in the light most favorable to Roe, a reasonable jury could conclude—at least—that Gibson never interviewed Roe or took her written statement; never interviewed Doe or took his written statement; spoke to campus police only once weeks after the assault, when campus police notified her that the Sheriff's Office was taking over; never saw a copy of the campus police report; never saw a copy of the Sheriff's police report or spoke to the Sheriff's Office about the status or findings of its investigation; and did not conduct any further investigation of the incident after learning that the matter was referred to the Sheriff's Office.

These particular circumstances are sufficient to support indifference at this stage.

Furthermore, and even more fundamentally, the District has been able to produce virtually no documentation of its alleged investigation. Though perhaps understandable, this failure turns much of this case into a she-said, she-said dispute. She-said, she-said disputes are quintessentially questions for juries, well within not only the jury's bailiwick but also its exclusive jurisdiction. Here, a reasonable jury could simply disbelieve the District's side of the story. For instance, Gibson and Godbolt claim that they interviewed Doe and took his written statement in the wake of Roe's assault. Putting aside the fact that the District's interrogatory answers, Gibson's deposition, and Godbolt's deposition all vary significantly—both in amount of recall and in substance—the District has not produced any documentation of Doe's interview or written statement.

As a result, a jury may simply not believe that the District ever interviewed Doe or took his written statement. On summary judgment, we may not presume that the jury will find Gibson or Godbolt credible. The District fails to carry its summary judgment burden where a reasonable jury may just as easily disbelieve its account. *Deville v. Marcantel*, 567 F.3d 156, 165 (5th Cir. 2009) ("Summary judgment is not appropriate when 'questions about the credibility of key witnesses loom . . . large' and the evidence could permit the trier-of-fact to treat their testimony with 'skeptical scrutiny.'" (quoting *Thomas v. Great Atl. & Pac. Tea Co.*, 233 F.3d 326, 331 (5th Cir. 2000))). And if Roe's account is true—as a jury is entitled to believe—the District's response to a years-long abusive relationship, sexual assault on school property that resulted in the victim's hospitalization and two

surgeries, and subsequent related harassment and bullying was insufficient enough to show deliberate indifference.[9]

Our precedents bolster this conclusion. On the undisputed facts alone, the District's response pales in comparison to the prior investigations that we have held to be sufficient under Title IX. In *Sanches*, the school district responded promptly to each report of verbal harassment; interviewed many of the parties involved, including the accuser, accused, other students, and teachers; and compiled a formal report detailing the District's "investigations of and responses to" five allegations of verbal harassment. 647 F.3d at 160–63.

In *I.F. v. Lewisville Independent School District*, the District responded to a report of rape and subsequent harassment by interviewing fourteen students, taking the accuser's written statement, "work[ing] together with I.F.'s teachers to get her the work she was missing during her absence[,] request[ing] the teachers be flexible with I.F.'s workload, provid[ing] her with information regarding educational opportunities outside of [the school district], and assist[ing] I.F. in enrolling in the Homebound program." 915 F.3d 360, 377 (5th Cir. 2019).

And in *K.S.*, the school district reprimanded some of the students involved (in some cases with suspension), had staff monitor and escort the victim at school, and required the victim to sit behind the bus driver to avoid

[9] A jury might also consider the fact that neither of Roe's two high-school counselors recall being told about her assault. Similarly, it might consider that Roe's teacher accused her of, in Roe's words, failing English because she "dropped out of school."

altercations. 689 F. App'x at 784–85. The list goes on.[10] This case bears no resemblance to these.

The District looks for support in *I.L. v. Houston Independent School District*, but that case does not contradict our holding here. There, we stated that "in 'a situation where there is some indication that the incident may have been consensual, and where there is the potential for criminal charges if it was an assault, it is not "clearly unreasonable" to rely on the investigative expertise of a law enforcement agency.'" 776 F. App'x 839, 843–44 (5th Cir. 2019) (quoting the district court's order). In *Sanches*, the administrator also "relied on law enforcement's investigations [and periodic reports] of the incident." 647 F.3d 156, 170 (5th Cir. 2011). But while a school district may rely on a law-enforcement *investigation* in some circumstances, it may not rely merely on a prosecutor's decision not to accept charges.[11] *See Stinson ex rel.*

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[10] *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 997–99 (5th Cir. 2014) (responding to a pattern of harassment by repeatedly interviewing students and contacting their parents, working to repair students' relationships, monitoring harassment and following up with students, and enforcing separation); *Ruvalcaba*, No. 20-40491, 2022 WL 340592, at *5 (responding to a single incident of sexual assault by immediately taking the victim's written statement; escorting the victim to the campus police's office; contacting the mother; directing the alleged aggressor not to come to school; sending the principal and a campus police officer to speak with the victim at the police station; interviewing the victim, alleged aggressor, and others who interacted with them throughout the day; involving the district's Title IX coordinator; and conducting a lie-detector test and a "several-months-long investigation").

[11] The investigation in *I.L.* was also much more comprehensive than that which a jury could find here. The school responded to the victim's sexual assault by immediately taking the victim's written statement, calling both students' parents, and questioning the accused student until campus police took over the interview. *I.L.*, 776 F. App'x at 840. After reviewing text messages and security video, the school then entered a strict, supervised no-contact order between the victim and her aggressor pending the conclusion of the campus police's investigation. *Id.* at 840–41. The student suffered no further sexual harassment and "[t]he school otherwise tried to support [the victim] in several ways." *Id.* at 840. An assistant principal made herself available to I.L. to talk at any time and "worked

K.R. v. Maye, 824 F. App'x 849, 858–59 (11th Cir. 2020) (rejecting purported reliance on a law enforcement investigation where (on appeal of the complaint's dismissal), the complaint (1) "allege[d] that [the official] only made a phone call to police that allegedly led to their conclusion that something happened to K.R. that should be deemed 'consensual sex,'" and (2) alleged that the official "made no investigation himself and apparently . . . did not inquire as to what investigation was done by the police"); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 (10th Cir. 2008) ("The district's response was not clearly unreasonable as school officials immediately contacted law enforcement officials, cooperated fully in the investigation, *and kept informed of the investigation*." (emphasis added)). And here, there is a fact issue regarding whether Gibson ever even looked at the investigation. It is impossible to rely on an investigation of which one is not aware. Different legal standards apply to criminal prosecutions and educational discipline, and Title IX requires more than parroting a prosecutorial decision. Because there are genuine issues of material fact about whether Gibson (or any other district administrator) saw any police report or had any substantive communications with law enforcement, a reasonable jury may conclude that the district relied merely on a prosecutorial decision not to press charges, not on investigative expertise. Title IX requires more.[12]

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with [the victim's] parents to address her academic and attendance problems." *Id.* Under these circumstances, it was not clearly unreasonable to defer final disciplinary action pending further findings from a law enforcement investigation.

[12] Several of our Sister Circuits have reached similar conclusions. *See also Stinson ex rel. K.R. v. Maye*, 824 F. App'x 849, 858–59 (11th Cir. 2020) (rejecting purported reliance on a law enforcement investigation where (on appeal of the complaint's dismissal), the complaint (1) "allege[d] that [the official] only made a phone call to police that allegedly led to their conclusion that something happened to K.R. that should be deemed 'consensual

Turning to precedent from other Circuits is also instructive. In *Doe v. East Haven Board of Education*, 200 F. App'x 46, 49 (2d Cir. 2006), the Second Circuit upheld a jury verdict for the plaintiff, finding that a "reasonable fact-finder could conclude that school authorities were deliberately indifferent to the harassment [following a student's rape] [even when the plaintiff] was allowed to miss class and work in the guidance office, was offered a private room in the guidance office when she felt uncomfortable with other students there, was offered full home-bound instruction or a security guard to accompany her whenever she was in school, and was offered free psychological counseling and evaluation. Furthermore, approximately five weeks after [plaintiff] reported the rape, whenever [plaintiff] made a specific claim of name-calling, school authorities would call in the accused students and their parents for meetings, at which [school] police officers were sometimes present to emphasize that such behavior had to stop . . . [W]here the alleged victim of a rape complained of verbal harassment based on her sex and related to the rape for five weeks before authorities took concrete action to get the perpetrators of the harassment to stop." *Doe v. E. Haven Bd. of Educ.*, 200 F. App'x 46, 49 (2d Cir. 2006). The District here did much less than this in response to Roe's abusive relationship, sexual assault, and subsequent related harassment and bullying.

* * *

Roe says that her school did not investigate her sexual assault and gave her neither academic nor other appropriate support in the wake of her sexual

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sex,'" and (2) alleged that the official "made no investigation himself and apparently . . . did not inquire as to what investigation was done by the police"); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 (10th Cir. 2008) ("The district's response was not clearly unreasonable as school officials immediately contacted law enforcement officials, cooperated fully in the investigation, *and kept informed of the investigation*." (emphasis added)).

assault, abusive relationship, and resulting harassment and bullying. Her school district says it did all that Title IX requires. Either way, a jury should decide based on the unique record before us. Because the jury may believe Roe and find in her favor, the district court's grant of summary judgment is REVERSED as to whether the District was deliberately indifferent in response to the totality of the harassment at issue here. The district court's decision is AFFIRMED as to whether the District was deliberately indifferent to the risk of her sexual assault. AFFIRMED IN PART, REVERSED IN PART.

EXHIBIT 2

United States Court of Appeals for the Fifth Circuit

No. 20-20657

JANE ROE,

Plaintiff—Appellant,

versus

CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-2850

ON PETITION FOR REHEARING EN BANC

Before DENNIS, ELROD, and DUNCAN, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing *en banc* as a petition for panel rehearing, 5th Cir. R. 35 I.O.P., the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing *en banc*, Fed R. App. P. 35; 5th Cir. R. 35, the petition for rehearing *en banc* is DENIED.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JANE ROE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-18-2850
	§	
CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT,	§	
	§	
Defendant.	§	

AMENDED MEMORANDUM OPINION AND ORDER

Plaintiff, Jane Roe, brings this action against defendant, the Cypress-Fairbanks Independent School District ("CFISD"), for violation of Title IX of the Education Act of 1972, 20 U.S.C. § 1681.[1] Pending before the court are Defendant's Motion for Final Summary Judgment ("Defendant's MSJ") (Docket Entry No. 33), Defendant's Motion to Exclude Testimony of Robert Geffner, PhD ("Defendant's Motion to Exclude") (Docket Entry No. 35), and Plaintiff's Motion for Leave to File Sur-Reply in Opposition to Defendant's Motion for Final Summary Judgment ("Plaintiff's Motion to File Sur-Reply")(Docket Entry No. 47). For the reasons stated below Plaintiff's Motion to File Sur-Reply, and Defendant's MSJ will both be granted. Because the court has been able to rule on Defendant's MSJ without referencing Geffner's testimony, Defendant's Motion to Exclude will be denied as moot.

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[1]Plaintiff's Original Complaint and Jury Demand ("Plaintiff's Complaint"), Docket Entry No. 1, pp. 16-18 ¶¶ 81-92. All page numbers for docket entries refer to the pagination inserted at the top of the page by the court's electronic filing system, CM/ECF. Pursuant to an earlier Memorandum Opinion and Order, Docket Entry No. 14, plaintiff's claims for violation of civil rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution under 42 U.S.C. §§ 1983 and 1988 have been dismissed.

I. Standard of Review

Defendant CFISD seeks summary judgment on the claim that plaintiff has asserted for violation of Title IX of the Education Act of 1972, 20 U.S.C. § 1681. Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and the law entitles it to judgment. Fed. R. Civ. P. 56(c). Disputes about material facts are "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986). The Supreme Court has interpreted the plain language of Rule 56 to mandate the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552 (1986). A party moving for summary judgment "must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting Celotex, 106 S. Ct. at 2553). If the moving party meets this burden, the nonmovant must go beyond the pleadings and show by admissible evidence that facts exist over which there is a genuine issue for trial. Id. Factual controversies are to be resolved in favor of the nonmovant, "but only when . . . both

parties have submitted evidence of contradictory facts." Little, 37 F.3d at 1075. See also Antoine v. First Student, Inc., 713 F.3d 824, 830 (5th Cir. 2013) (same). "[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000).

II. Undisputed Facts

A. Teen Dating Violence

In May of 2007 Texas Governor Perry signed House Bill ("HB") 121 into law mandating that all school districts in Texas adopt and implement a policy addressing teen dating violence. The policy must include (1) a definition of dating violence consistent with the Texas Family Code, (2) safety planning, (3) enforcement of protective orders, (4) school-based alternatives to protective orders, (5) training for teachers and administrators, (6) counseling for affected students, and (7) awareness education for students and parents/guardians. See Texas Education Code § 37.0831. To assist school districts in meeting these statutory requirements, a group of non-profits and government agencies created a document entitled, "A Guide to Addressing Dating Violence in Texas Schools," which outlines a model policy for schools intended to satisfy the statutory mandate.[2]

[2]Exhibit 24 to Plaintiff's Opposition to Defendant's Motion (continued...)

CFISD is the third largest school district in Texas, with 91 campuses and more than 117,000 students.[3] CFISD policy FFH (LOCAL) addresses discrimination, harassment, and retaliation involving students and expressly provides that "[t]he District prohibits dating violence, as defined by this policy."[4] Policy FFH (LOCAL) contains reporting procedures for students to follow if they experience prohibited conduct, and notification that any student who is dissatisfied with the determination of an investigation may appeal pursuant to policy FNG (LOCAL).[5] Information regarding CFISD's policies is available to students and parents both online and in the Student Handbook.[6] CFISD also provides annual staff training on sexual harassment and bullying.[7]

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[2](...continued)
for Final Summary Judgment ("Plaintiff's Opposition"), Docket Entry No. 42-24, p. 7.

[3]Declaration of Marney Collins Sims ("Sims Declaration"), Exhibit 1 to Defendant's MSJ, Docket Entry No. 34-1, p. 2 ¶ 3.

[4]Policy FFH (LOCAL), p. 1, Exhibit A to Sims Declaration, Docket Entry No. 34-1, p. 6.

[5]Sims Declaration, Exhibit 1 to Defendant's MSJ, Docket Entry No. 34-1, p. 2 ¶¶ 4-5 (citing Exhibit B, policy FNG (LOCAL) in effect during the 2013-2014 school year, Docket Entry No. 34-1, pp. 13-19).

[6]Id. ¶ 6 (citing Exhibits C and D, relevant excerpts from the Student Handbook and Student Code of Conduct, respectively, for the 2013-2014 school year, Docket Entry No. 34-1, pp. 20-104).

[7]Id. at 3 ¶ 7 (citing Exhibit E, training provided to staff members during the 2013-2014 school year, Docket Entry No. 34-1, pp. 105-58; Exhibit F, training on bullying provided at CFISD's 2012 Leadership Conference, Docket Entry No. 34-1, pp. 159-86; and Exhibit G, training provided at CFISD's 2013 Leadership Conference,
(continued...)

B. Plaintiff's Relationship with John Doe

Plaintiff met John Doe ("Doe") in 2011 when they were both in seventh grade at a CFISD middle school.[8] While in middle school plaintiff and John Doe became "a couple."[9] As the relationship developed, plaintiff's grades fell and she was disciplined at school for tardiness, truancy, and "inappropriate physical contact with peer."[10] Plaintiff's mother tried to intervene by forbidding plaintiff from seeing Doe outside of school, and expressing concern to an assistant principal.[11]

C. Warning Signs

In 2013 plaintiff and Doe enrolled as freshman at Cypress Creek High School where their relationship continued.[12] Plaintiff and Doe were together as much as possible at school; they walked together to every class, and Doe refused to let plaintiff leave him until she hugged or kissed him. Plaintiff and Doe argued

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[7](...continued)
Docket Entry No. 34-1, pp. 187-215).

[8]Plaintiff's Declaration, Exhibit 1 to Plaintiff's Opposition, Docket Entry No. 42-1, p. 2 ¶ 3.

[9]Id. ¶ 4.

[10]Id. at 3 ¶ 11. See also Student – Behavior History, CFISD-ROE 001034-001035, Exhibit 20 to Plaintiff's Opposition, Docket Entry No. 42-20, pp. 2-3.

[11]Declaration of Plaintiff's Mother ("Plaintiff's Mother's Declaration"), Exhibit 2 to Plaintiff's Opposition, Docket Entry No. 42-2, p. 3 ¶¶ 6-7, 12).

[12]Plaintiff's Declaration, Docket Entry No. 42-1, p. 3 ¶ 7.

frequently in the hallways. Doe would grab plaintiff's arm if he thought she was looking at someone else, and he would make her wear his jacket if he thought her clothing was too revealing.[13] Early in the Fall 2013 semester, plaintiff and Doe left school and went to Doe's house where they had sexual intercourse for the first time.[14] Subsequently plaintiff and Doe engaged in sexual conduct on campus, including having sexual intercourse in stairwells because stairwells did not have security cameras and were not consistently patrolled by staff or officers.[15]

In December of 2013 plaintiff's mother told assistant principal Carol Gibson that plaintiff was having academic and emotional difficulties because of an unhealthy relationship with Doe. She told Gibson that Doe was controlling, emotionally and possibly physically abusive, and she asked Gibson what the school could do about the situation.[16] Subsequently, when Gibson saw plaintiff together with Doe, she reminded plaintiff that her parents did not want her seeing him.[17]

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[13] Id. ¶ 8.

[14] Id. ¶ 14.

[15] Id. ¶¶ 12 and 15.

[16] Plaintiff's Mother's Declaration, Docket Entry No. 42-2, p. 4 ¶ 14. See also Oral and Videotaped Deposition of Carol Alexander (formerly Carol Gibson, ("Gibson Deposition")), pp. 25:9-26:17, Exhibit 7 to Plaintiff's Opposition, Docket Entry No. 42-7, pp. 10-11.

[17] See also Gibson Deposition, pp. 26:18-27:4, Exhibit 7 to Plaintiff's Opposition, Docket Entry No. 42-7, pp. 11-12.

During winter break in late December of 2013, after becoming upset with her mother because she would not let her speak with Doe, plaintiff cut herself on her arms. Concerned for plaintiff's mental health, her mother took plaintiff to Cypress Creek Hospital where plaintiff told doctors that she cut herself to make her mother feel bad for keeping her from Doe.[18] Plaintiff's mother notified plaintiff's softball coach that she would miss practice because of the cutting incident and shared her concern about Doe, but did not share that plaintiff had cut herself intentionally.[19]

On March 4, 2014, plaintiff's mother met with assistant principals, Gibson and Rashad Godbolt, to discuss plaintiff's academic and behavior issues. Plaintiff was present for part of the meeting and while she was present her mother took away her cell phone. Expressing concern that plaintiff's issues were caused by her abusive relationship with Doe,[20] plaintiff's mother asked for a schedule change to ensure that plaintiff and Doe would not have any classes together, but was told that such a change could not be made. The only outcome of the meeting was that plaintiff was required to attend after school tutorials.[21]

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[18]Plaintiff's Mother's Declaration, Docket Entry No. 42-2, p. 4 ¶ 13. See also Plaintiff's Declaration, Exhibit 1 to Plaintiff's Opposition, Docket Entry No. 42-1, p. 3 ¶ 10, and Medical Records, Exhibit 18 to Plaintiff's Opposition, Docket Entry NO. 42-18.

[19]Plaintiff's Mother's Declaration, Docket Entry No. 42-2, p. 4 ¶ 14.

[20]Id. ¶¶ 15-16.

[21]Id. ¶ 17.

On Friday, March 7, 2014, when plaintiff and Doe were together after school waiting for buses, Doe rubbed plaintiff's stomach commenting that her belly felt bigger and that he thought she was pregnant. Plaintiff responded, "Don't say that."[22]

D. Sexual Assault

On March 10, 2014, Doe met plaintiff outside her last class and the two of them walked down the hall together at dismissal time, which was 2:30 p.m. Plaintiff went to an after school tutorial for math but only stayed about 15 minutes, after which she left to meet Doe who was waiting for her in the hallway. Plaintiff and Doe went to Stairwell #2 in one the Freshman area hallways where they engaged in sexual activity. Doe put a hand down plaintiff's pants, digitally penetrated her, and then pressed his entire fist into her vagina lifting her off the floor. When Doe removed his fist, plaintiff began bleeding profusely. They left the stairwell on the second floor and walked together across the campus to bathrooms near the athletic area where plaintiff threw away an undergarment that was soaked in blood. Plaintiff and Doe then walked to the front office area where plaintiff used Doe's phone to call for a ride home.[23]

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[22]Plaintiff's Declaration, Docket Entry No. 42-1, p. 4 ¶ 17.

[23]Id. at 5 ¶ 18.

Plaintiff's grandfather came to take her home. Because she was still bleeding, plaintiff sat on her binder to protect his car seat.[24] Telling her family that she was having "female issues," plaintiff went to her room, showered, and fell asleep. Several hours later plaintiff awoke in pain, admitted to her mother that Doe had assaulted her, and went to the hospital emergency room. At the hospital, plaintiff's mother demanded that the authorities be contacted.[25]

The hospital contacted the CFISD Police Department ("CFISD-PD"), and CFISD officers respond to the call, took a report, and sent it to the Harris County Sheriff's Office ("HCSO"), but did not follow up with the HCSO, investigate the assault, or communicate to school administrators about it.[26] Following an investigation conducted by the HCSO, the Harris County District Attorney's Office refused to accept charges against Doe because it determined the act was consensual between plaintiff and Doe.[27]

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[24]Declaration of Plaintiff's Grandfather ("Plaintiff's Grandfather's Declaration"), Exhibit 4 to Plaintiff's Opposition, Docket Entry No. 42-4, p. 3 ¶ 9.

[25]Plaintiff's Declaration, Docket Entry No. 42-1, p. 5 ¶¶ 20-21; Plaintiff's Mother's Declaration, Docket Entry No. 41-2, p. 5 ¶¶ 19-21.

[26]Oral and Videotaped Deposition of Chanta Mitchell, pp. 27:10-44:10, Exhibit 9 to Plaintiff's Opposition, Docket Entry No. 42-9, pp. 8-23.

[27]HCSO Records, Exhibit 13 to Defendants' MSJ, Docket Entry No. 34-13.

Medical records for plaintiff's visit to the emergency room indicate a preliminary diagnosis of "Sexual Assault Child."[28] Plaintiff underwent a SANE (Sexual Assault Nurse Examiner) exam and her injuries were photographed.[29] Plaintiff suffered severe internal and external injuries from the assault and underwent the first of two surgeries in the early morning hours of March 11, 2014.[30] While waiting for surgery, plaintiff learned that she was five weeks pregnant.[31] Struggling to understand why Doe injured plaintiff, plaintiff's mother concluded that he did it to cause her to miscarry.[32] A medical examination two days later revealed additional injuries that required a second surgery after which plaintiff remained hospitalized for nearly a week.[33] Plaintiff's hospitalization was followed by weeks of wound care, and a procedure to terminate the pregnancy.[34]

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[28]Medical Records, Exhibit 17 to Plaintiff's Opposition, Docket Entry No. 42-17, p. 27.

[29]Medical Records, Exhibit 19 to Plaintiff's Opposition, Docket Entry No. 42-19.

[30]Plaintiff's Declaration, Docket Entry No. 42-1, p. 6 ¶ 23; Plaintiff's Mother's Declaration, Docket Entry No. 42-2, p. 5 ¶ 22.

[31]Plaintiff's Declaration, Docket Entry No. 42-1, p. 5 ¶ 22; Plaintiff's Mother's Declaration, Docket Entry No. 42-2, p. 5 ¶ 23.

[32]Plaintiff's Mother's Declaration, Docket Entry No. 42-2, p. 5 ¶ 25.

[33]Plaintiff's Declaration, Docket Entry No. 42-1, p. 6 ¶¶ 25-26.

[34]Id. ¶¶ 27-28.

E. CFISD's Response to Plaintiff's Report of Sexual Assault

Plaintiff's mother notified Assistant Principal Gibson of the assault the morning after it occurred.[35] Plaintiff's grandmother also spoke with Gibson and described to her the seriousness of plaintiff's injuries.[36] Several days later plaintiff's mother and grandfather met with Gibson to discuss the assault. Plaintiff's mother asked if there was a video of the stairwell and, if so, asked to see it. Gibson told plaintiff's mother that she would not be able to see any video. Focused on the fact that plaintiff went willingly into the stairwell with Doe, Gibson concluded that the assault was merely a consensual act that had gone too far.[37] Gibson told plaintiff's mother and grandfather, "If we punish him, we have to punish her."[38]

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[35]Plaintiff's Mother's Declaration, Docket Entry No. 42-2, pp. 5-6 ¶ 26.

[36]Declaration of Plaintiff's Grandmother ("Plaintiff's Grandmother's Declaration"), Exhibit 3 to Plaintiff's Opposition, Docket Entry No. 42-3, p. 3 ¶ 11.

[37]Answer to Interrogatory No. 4, Defendant's Objections and Responses to Plaintiff's First Set of Interrogatories, Exhibit 22 to Plaintiff's Opposition, Docket Entry No. 42-22, p. 4. See also Gibson Deposition, pp. 58:24-59:17, Exhibit 7 to Plaintiff's Opposition, Docket Entry No. 42-7, pp. 40-41 (Gibson relied only on the statements that she had in reaching her conclusion "early on" that it was a consensual act that had gone too far).

[38]Plaintiff's Mother's Declaration, Docket Entry No. 42-2, p. 6 ¶ 28; Plaintiff's Grandfather's Declaration, Exhibit 4 to Plaintiff's Opposition, Docket Entry No. 42-4, pp. 3-4 ¶¶ 12-13.

No one provided plaintiff or her mother a written report of any findings, made plaintiff or her mother aware of CFISD's policies or complaint procedures, or notified plaintiff or her mother of the right to file a complaint or appeal Gibson's decision. Nor were plaintiff or her mother ever notified that they had a right to file a complaint with the United States Department of Education's Office for Civil Rights.[39] CFISD offered no accommodations to the plaintiff and took no measures to protect her from harassment and retaliation. Plaintiff's mother sought assistance in the form of counseling from plaintiff's counselor, Deadrine Rhodes, but was told that the school "does not do that."[40] Plaintiff missed days of instruction and struggled academically. Even though the school designated plaintiff as "homebound," she received only weekly assignments delivered by a coach and did not receive any homebound instruction.[41] Plaintiff failed classes that spring, and earned only 4.5 out of 7 credits.[42]

When plaintiff returned to Cypress Creek for the 2014-2015 school year she did not have any classes with Doe, but he remained at the school, and she saw him frequently.[43] About a month into the school year some of Doe's friends accused her of falsely claiming

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[39] Plaintiff's Mother's Declaration, Docket Entry No. 42-2, p. 6 ¶ 29.

[40] Id. at 7 ¶ 34.

[41] Id. ¶ 35.

[42] Id. ¶ 36.

[43] Id. ¶ 38.

that he raped her and trying to get him arrested.[44] At some point Doe exchanged angry words with plaintiff following an altercation he had with her mother's boyfriend at a grocery store. Doe told plaintiff he had a "tool" for her mother's boyfriend, which plaintiff understood as a threat to use a gun.[45] Plaintiff's English teacher pulled her aside once and told her that she knew plaintiff had failed English the year before because she had dropped out,[46] and plaintiff was unable to play volleyball or softball because of her poor grades.[47]

F. Impact on Plaintiff's Education

In February of 2015 plaintiff withdrew from school for about a week, with plans to move to Indiana to live with her father to get away from Cypress Creek High School. But the plans did not work out and she was forced to re-enroll at Cypress Creek.[48]

On June 30, 2015, plaintiff intentionally overdosed on Benadryl after enduring harassment that included a social media post of a photograph of a dead fetus "tagged" to plaintiff, posts

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[44]Plaintiff's Declaration, Docket Entry No. 42-1, p. 6 ¶ 30.

[45]Id. ¶ 31.

[46]Plaintiff's Deposition, pp. 105:8-106:4, Exhibit 5 to Plaintiff's Opposition, Docket Entry No. 42-5, pp. 69-70.

[47]Plaintiff's Declaration, Docket Entry No. 42-1, p. 6 ¶ 32.

[48]Id.; Plaintiff's Mother's Declaration, Docket Entry No. 41-2, p. 7 ¶ 38.

calling plaintiff a "baby killer," and posts encouraging plaintiff to kill herself.[49]

Subsequently, plaintiff went to live with her father in Indiana and enrolled there for the 2015-2016 school year. But in the spring of 2016, missing her mother, grandparents, and younger siblings, plaintiff returned to Houston and to Cypress Creek High School. Plaintiff's mother met with school counselor, Karen Clarkson, at least three times in an effort to have plaintiff's class schedule arranged so that she would not cross paths with Doe. Clarkson told plaintiff's mother that she would do what she could, but that the past could not be changed.[50] After only a few weeks, plaintiff was overwhelmed and unable to continue school.[51] Plaintiff's mother met with school personnel who encouraged her to withdraw plaintiff from school and to state on the withdrawal form that plaintiff would be home schooled to protect herself from truancy charges.[52] On April 13, 2016, at 17 years of age, plaintiff withdrew during the spring semester of her junior year and never returned to high school.[53]

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[49]Plaintiff's Declaration, Docket Entry No. 42-1, p. 7 ¶ 33.

[50]Plaintiff's Mother's Declaration, Docket Entry No. 41-2, p. 8 ¶ 41.

[51]Plaintiff's Declaration, Docket Entry No. 40-1, p. 7 ¶¶ 34-35.

[52]Plaintiff's Mother's Declaration, Docket Entry No. 41-2, p. 8 ¶ 42.

[53]Plaintiff's Declaration, Docket Entry No. 40-1, p. 7 ¶ 35.

III. Plaintiff's Motion for Leave to File Sur-Reply

Asserting that "[i]n its Reply, Defendant cites new authorities, advances new arguments and relies on 'new' facts,"[54] plaintiff moves the court for leave to file a sur-reply because "[t]he interest of justice requires Plaintiff be allowed to respond."[55] Asserting that plaintiff "has not shown 'exceptional or extraordinary circumstances that warrant a sur-reply,'" defendant argues that "her motion for leave should be denied."[56] Although the Fifth Circuit has characterized sur-replies as "heavily disfavored," Warrior Energy Services Corp. v. ATP Titan M/V, 551 F. App'x 749, 751 n. 2 (5th Cir. 2014)(per curiam), defendant admits that its reply "cites some cases that were not cited in [its] original summary judgment motion, and . . . respond[s] to specific arguments raised in [plaintiff]'s response brief."[57] Moreover, defendant does not argue that granting plaintiff's motion would cause it any prejudice. Accordingly, to ensure that both parties are fully heard on the issues, the court concludes that plaintiff's motion for leave to file sur-reply should be granted.

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[54]Plaintiff's Motion for Leave to File Sur-Reply in Opposition to Defendant's Motion for Final Summary Judgment, Docket Entry No. 47, p. 2.

[55]Id.

[56]Defendant's Response in Opposition to Plaintiff's Motion for Leave to File Sur-Reply, Docket Entry No. 48, p. 4.

[57]Id. at 3-4.

IV. Analysis

CFISD argues that it is entitled to summary judgment on plaintiff's Title IX claims because it did not have any reason to know that Doe posed a substantial risk of sexually assaulting plaintiff, because it did not respond to plaintiff's assault with deliberate indifference,[58] because plaintiff cannot establish a Title IX violation based on any alleged post-assault harassment,[59] and because the heightened risk theory of liability does not apply to the facts of this case.[60] Asserting that "[t]his case arises from CFISD's deliberate indifference to its duties under Title IX and systemic failure to address sexual harassment and sexual violence on its campuses,"[61] plaintiff argues that CFISD intentionally discriminated against her in violation of Title IX because (1) CFISD's policies, practices, and failure to train students and staff to recognize, report, and respond to dating violence and sexual assault created a heightened risk that she would be assaulted, (2) CFISD acted with deliberate indifference to the known risk of dating violence and sexual assault when it created a high school campus culture in which sexual misconduct was

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[58] Defendant's MSJ, Docket Entry No. 33, pp. 22-29.

[59] Id. at 29-31.

[60] Id. at 32.

[61] Plaintiff's Opposition to Defendant's Motion for Final Summary Judgment ("Plaintiff's Opposition"), Docket Entry No. 41, p. 6.

rampant, ignored clear warning signs and dismissed pleas from plaintiff's mother that her daughter was in danger, and (3) CFISD's actions in response to plaintiff's report of sexual assault were clearly unreasonable in light of the known circumstances because its administrators' investigation was tantamount to no investigation at all, its actions made plaintiff vulnerable to future harassment, and as a result, plaintiff dropped out of school.[62] Defendant replies that plaintiff's pre-assault heightened risk claim fails because the heightened risk theory is not applicable to the facts of this case, and, alternatively, plaintiff has no evidence that an official policy caused her injuries.[63] Defendant also argues that plaintiff's post-assault claims fail because it did not respond with deliberate indifference either to her complaint of sexual assault or to any known acts of post-assault harassment.[64] Plaintiff's sur-reply argues that defendant's reply exposes a summary judgment record laced with contradictions of fact, and that the summary judgment evidence supports a finding for her on each of the four factors that courts use to analyze Title IX pre-assault heightened risk claims.[65]

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[62] Id. at 6 and 7.

[63] Defendant's Reply in Support of Motion for Final Summary Judgment ("Defendant's Reply"), Docket Entry No. 45, pp. 6-20.

[64] Id. at 20-28.

[65] Plaintiff's Sur-reply in Opposition to Defendant's Motion for Final Summary Judgment ("Plaintiff's Sur-reply"), Docket Entry No. 47.

A. Applicable Law

Apart from exceptions not applicable to the facts of this case, Title IX of the Education Amendments of 1972 ("Title IX") prohibits discrimination on the basis of sex in all federally-funded educational programs by providing 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). "A school that receives federal funding may be held liable for student-on-student sexual harassment." I.L. v. Houston Independent School District, 776 F. App'x 839, 842 (5th Cir. 2019) (citing Davis v. Monroe County Board of Education, 119 S. Ct. 1661, 1669 (1999), and Sanches v. Carrollton-Farmers Branch Independent School District, 647 F.3d 156, 165 (5th Cir. 2011)). To prove such a claim, a plaintiff must show that

> the district (1) had actual knowledge of the harassment, (2) the harasser was under the district's control, (3) the harassment was based on the victim's sex, (4) the harassment was so severe, pervasive, and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit, and (5) the district was deliberately indifferent to the harassment.

Id. (quoting Doe v. Columbia-Brazoria Independent School District, 856 F.3d 681, 689 (5th Cir. 2017), and Sanches, 647 F.3d at 165). The Supreme Court has analogized official policy liability under Title IX to municipal liability for a policy or custom under 42 U.S.C. § 1983. See Gebser v. Lago Vista Independent School

District, 118 S. Ct. 1989, 1999 (1998) (distinguishing Title IX claims based on an official policy from those seeking to hold an institution liable for the discriminatory acts of an individual).

"Deliberate indifference under Title IX means that the school's response or lack of response was 'clearly unreasonable in light of the known circumstances.'" I.L., 776 F. App'x at 842 (quoting Sanches, 647 F.3d at 167). Title IX defendants may only be held liable in damages for their own intentional acts. Davis 119 S. Ct. at 1670-71 (citing Gebser, 118 S. Ct. at 1999-2000, for holding that federal funding recipients could be held liable in damages only when their own deliberate indifference effectively caused the discrimination at issue). "Neither negligence nor mere unreasonableness is enough." I.L., 776 F. App'x at 842 (quoting Sanches, 647 F.3d at 167). "Schools need not 'remedy the harassment or accede to a parent's remedial demands,' and 'courts should refrain from second-guessing the disciplinary decisions made by school administrators.'" Id. (quoting Sanches, 647 F.3d at 167-68). See also Davis, 119 S. Ct. at 1673-74 (schools need not purge themselves of all sexual harassment or expel every student accused of sexual misconduct). "There is no reason why courts, on a motion . . . for summary judgment . . . could not identify a response as not clearly unreasonably as a matter of law." Sanches, 647 F.3d at 168 (quoting Davis, 119 S. Ct. at 1674).

B. Application of the Law to the Undisputed Facts

Plaintiff argues that she has asserted two types of Title IX claims: (1) a pre-assault claim for creating a heightened risk that she would be assaulted;[66] and (2) a post-assault claims for responding with deliberate indifference to her assault and subsequent harassment.[67]

1. Plaintiff Fails to Raise Genuine Issues of Material Fact as to Her Pre-Assault Heightened Risk Claim

Plaintiff alleges that CFISD is liable under Title IX for her pre-assault claim by alleging that "[a]s a result of CFISD's deliberate indifference, Plaintiff was subjected to a heightened risk that she would be a victim of dating violence and sexual assault. This risk materialized when she was assaulted on campus."[68] Citing C.T. v. Liberal School District, 562 F.Supp.2d 1324, 1339-40 (D. Kan. 2008), defendant argues that plaintiff's pre-assault heightened risk claim fails as a matter of law because this case does not involve the sort of systemic problems discussed in cases that have recognized such a cause of action.[69] Observing

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[66]Plaintiff's Opposition, Docket Entry No. 41, pp. 18-26; Plaintiff's Sur-reply in Opposition to Defendant's Motion for Final Summary Judgment ("Plaintiff's Sur-reply"), Docket Entry No. 47, pp. 11-21.

[67]Plaintiff's Opposition, Docket Entry No. 41, pp. 26-30; Plaintiff's Sur-reply, Docket Entry No. 47, pp. 21-35.

[68]Plaintiff's Original Complaint, Docket Entry No. 1, p. 18 ¶ 90.

[69]Defendant's MSJ, Docket Entry No. 33, p. 32. See also (continued...)

that Title IX claims based on an alleged deliberate-indifference-to-obvious-need-for-training have only been recognized in circumstances where a federal funding recipient sanctions a specific program that, without proper control, would encourage sexual harassment and abuse, the C.T. court held that in such a case, "the failure amounts to an official policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of the program." Id. Asserting that this case does not involve any allegations of sexual misconduct by anyone other than Doe, defendant argues that "this case is properly evaluated under the traditional Davis standard."[70]

Citing Karasek v. Regents of the University of California, 948 F.3d 1150, amended and superceded upon denial of petitions for rehearing and rehearing en banc, 956 F.3d 1093 (9th Cir. 2020), plaintiff argues that "courts do not limit the heightened risk analysis to allegations of a specific problem in a specific program."[71] Citing Simpson v. University of Colorado Boulder, 500 F.3d 1170 (10th Cir. 2007), plaintiff argues that

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[69](...continued)
Defendant's Reply in Support of Final Motion for Summary Judgment ("Defendant's Reply"), Docket Entry No. 45, p. 6 n. 1 ("[T]he District's summary judgment motion argued — correctly, as shown below — that the heightened risk analysis only applies, if at all, in cases where the defendant had actual knowledge of widespread, systemic problems (i.e., actual notice of specific prior incidents of sexual misconduct), and had an official policy of responding with deliberate indifference, thereby creating a heightened risk of sexual assault.").

[70]Id.

[71]Plaintiff's Opposition, Docket Entry No. 41, p. 20.

> [a] funding recipient can be said to have intentionally acted in clear violation of Title IX when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient.[72]

Citing Does 12-15, et al. v. Baylor University, 336 F.Supp.3d 763 (W.D. Tex. 2018), and Does 1-10 v. Baylor University, 240 F.Supp.3d 646 (W.D. Tex. 2017), plaintiff argues that courts within the Fifth Circuit have recognized the viability of pre-assault heightened risk claims.[73] Plaintiff argues that the evidence in this case supports her claims for heightened risk based on both an official policy of discrimination and pre-assault deliberate indifference.[74]

Defendant replies that Karasek, Simpson, and other cases applying the heightened risk theory of Title IX liability are distinguishable from this case because they all involved allegations of systemic failures on the part of the defendants to reasonably respond to multiple known acts of sexual misconduct. Asserting that this case involves a single incident between two high school students who were otherwise engaged in consensual sexual activity at the time of the assault, defendant argues that the heightened risk theory of liability is inapplicable,[75] and

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[72] Id.

[73] Id. at 19.

[74] Id. at 18. See also Plaintiff's Sur-reply, Docket Entry No. 47, p. 12.

[75] Defendant's Reply in Support of Motion for Final Summary (continued...)

assuming that it is applicable, that plaintiff has no evidence that an official policy caused her injuries.[76] In a Supplemental Reply defendant cites the Fifth Circuit's recent opinion in Poloceno v. Dallas Independent School District, 826 F. App'x 359, 363 (5th Cir. 2020), for the statement that "[w]e have never recognized or adopted a Title IX theory of liability based on a general 'heightened risk' of sex discrimination, and we decline to do so."[77] Plaintiff argues that Poloceno is inapposite.[78] Because the claims at issue in Poloceno did not stem from sexual harassment or assault but, instead, from excessive physical exercise, and the Fifth Circuit explained its decision not to recognize the heightened risk theory in that case by stating that "the cases from our sister circuits that recognize the 'heightened risk' analysis limit this theory of liability to contexts in which students committed sexual assault on other students, circumstances not present here," id., the court concludes that the Fifth Circuit has not foreclosed the possibility of recognizing the heightened risk theory in an appropriate case. But this is not an appropriate case.

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[75](...continued)
Judgment, Docket Entry No. 45, pp. 6-14.

[76]Id. at 14-27.

[77]Defendant's Supplemental Reply in Support of Motion for Final Summary Judgment, Docket Entry No. 51, p. 1.

[78]Plaintiffs' Response to Defendant's Supplemental Reply in Support of Motion for Final Summary Judgment Based on New Authority, Docket Entry No. 52.

(a) Law Applicable to Title IX Heightened Risk Claims

After analyzing the Supreme Court's opinions in Gebser, 118 S. Ct. at 1989, and Davis, 119 S. Ct. 1661, both the Tenth Circuit in Simpson, 500 F.3d at 1170, and the Ninth Circuit in Karasek, 956 F.3d at 1114, have recognized the viability of Title IX claims based on allegations that an official policy heightened the risk that plaintiffs would be sexually harassed or assaulted.

In Simpson a group of female plaintiffs alleged that the University of Colorado Boulder's ("UCB") recruiting efforts included showing football recruits a "good time" by pairing them with female "Ambassadors," and promising at least some recruits an opportunity to have sex. 500 F.3d at 1173. Following a prior assault, but before the plaintiffs were assaulted, a local district attorney had met with UCB officials to warn them of the risk that sexual assault would occur if recruiting was not adequately supervised. The district attorney told the officials that UCB needed to implement sexual-assault-prevention training for football players, and needed to develop policies for supervising recruits. Id. But following the meeting, UCB officials did not heed the warning and "did little to change [UCB's] policies or training." Id. Instead, "[t]he coaching staff . . . [although] informed of sexual harassment and assault by players, . . . responded in ways that were more likely to encourage than eliminate such misconduct." Id. at 1173-74. Describing the conduct by UCB officials as

"sanction[ing], support[ing], even fund[ing], a program (showing recruits a 'good time') that, without proper control, would encourage young men to engage in opprobrious acts[,]" id. at 1177, the Tenth Circuit concluded that

> a funding recipient can be said to have intentionally acted in clear violation of Title IX, Davis, [119 S. Ct. at 1671], when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient."

Id. at 1178.

In Karasek three plaintiffs asserted an official policy claim based on allegations that the defendant university intentionally avoided Title IX reporting requirements by funneling sexual harassment reports through an informal investigation process. The Ninth Circuit considered the appropriate elements of such an official policy claim and citing Davis, 119 S. Ct. at 1674-75, held that:

> [A] pre-assault claim should survive a motion to dismiss if the plaintiff plausibly alleges that (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 the educational opportunities or benefits provided by the school.

956 F.3d at 1112.

Karasek requires the heightened risk to be known or obvious, but does not require the defendant school to have actual knowledge of a particularized risk. Other courts, however, require defendant

schools to have actual knowledge of a particularized risk. For example, district court cases in which Title IX pre-assault heightened risk claims have survived dismissal typically involve allegations that plaintiffs were sexually assaulted, and that the defendant schools knew about the risk of sexual assault from previous assaults but failed to take action to abate the risk. See e.g., Does I-VIII v. University of Tennessee, 186 F.Supp.3d 788, 792, 794, 804-08 (M.D. Tenn. 2016) (female plaintiffs were sexually assaulted by male student athletes, the university had actual knowledge of previous sexual assaults, but had been covering them up so the athletes could continue to compete); Roskin-Frazee v. Columbia University, No. 17 Civ. 2032 (GBD), 2018 WL 6523721, at *5 (S.D.N.Y. November 26, 2018) ("Pre-assault cases have found that universities may be held responsible for pre-assault deliberate indifference when they have 'actual knowledge of sexual assault(s) committed in a particular context or program or by a particular perpetrator or perpetrators.'") (citation omitted).

The cases within the Fifth Circuit that plaintiff cites as examples of cases that have recognized Title IX pre-assault claims are also based on allegations that the defendant university failed to make any change in the sexually hostile environment of its football program even after receiving numerous, detailed reports of sexual assault by football players. See Does 12-15, 336 F.Supp.3d at 782-83 ("Plaintiffs allege that Baylor, 'its staff, and highest

officers,' . . . with knowledge of numerous and detailed reports of sexual assault, . . . 'maintained a set of policies, procedures, and customs . . . that were implemented in a sexually discriminatory manner,' and 'permitted a campus condition rife with sexual assault,' . . . that 'substantially increased Plaintiffs' chances of being sexually assaulted.' . . . Additionally, despite being informed of multiple sexual assaults between 2008 and 2011, Baylor reported to the U.S. Department of Education that no such assaults took place on its campus during that period. . . . These alleged facts, construed as true, 'raise a right to relief above the speculative level' that Baylor's policy or custom of inadequately handling and even discouraging reports of peer sexual assault constituted an official policy of discrimination that created a heightened risk of sexual assault, thereby inflicting the injury of which Plaintiffs complain."); Does 1-10, 240 F.Supp.3d at 662 ("Plaintiffs allege Baylor and its staff repeatedly misinformed victims of sexual assault as to their rights under Title IX, . . . failed to investigate reported sexual assaults, . . . and discouraged those who reported sexual assaults from naming their assailants or otherwise coming forward. . . Additionally, despite being informed of multiple sexual assaults between 2008 and 2011, the university reported to the U.S. Department of Education that no such assaults took place on its campus during that period. . . These alleged facts, if construed as true, could allow a jury to

infer that Baylor's policy or custom of inadequately handling and even discouraging reports of peer sexual assault created a heightened risk of sexual assault, thereby inflicting the injury of which the Plaintiffs complain.").

(b) Application of the Karasek Factors to the Summary Judgment Evidence

Assuming without deciding that the Fifth Circuit would recognize plaintiff's ability to assert a Title IX claim based on her allegations that CFISD maintained an official policy that created a heightened risk that she would be sexually assaulted, and would adopt the four factors articulated in Karasek for analyzing such claims, the court concludes that CFISD is entitled to summary judgment on plaintiff's pre-assault heightened risk claim because plaintiff has failed to cite evidence capable of raising a genuine issue of material fact as to three of Karasek's four factors.[79]

(1) Plaintiff Fails to Raise a Genuine Issue of Material Fact as to Whether CFISD Maintained a Policy of Deliberate Indifference to Reports of Sexual Misconduct

As evidence that CFISD maintained a policy of deliberate indifference to reports of sexual misconduct in violation of Title IX, plaintiff cites responses that CFISD's witnesses provided

[79]There is no dispute that the incidents at issue occurred in a context subject to CFISD's control. Karasek, 956 F.3d at 1112.

to the question, "What is Title IX?" Plaintiff argues that the responses to this question by CFISD witnesses show that school counselors, assistant principals, four CFISD police officers, and CFISD's Title IX coordinator all lacked a fundamental understanding of Title IX and the significance of their roles in ensuring CFISD's compliance with it.[80] But as defendant argues,

> Title IX liability does not turn on whether lay witnesses are able to provide legal definitions during their depositions, but instead, turns on what information the defendant actually had, and what it did (or did not do) with that information. Whether witnesses are able to attach legal labels or definitions to their duties, responsibilities, or actions is irrelevant.[81]

Citing the deposition testimony of Gibson and Godbolt, plaintiff argues that despite the state mandate to provide training to staff and awareness education to students and parents regarding dating violence, Cypress Creek High School's assistant principals admitted that no training or information regarding dating violence was provided to students or staff, and that the Student Handbook contained no reference to dating violence.[82] Plaintiff argues this evidence shows that

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[80]Plaintiff's Opposition, Docket Entry No. 41, pp. 21-22.

[81]Defendant's Reply, Docket Entry No. 45, p. 17.

[82]Plaintiff's Opposition, Docket Entry No. 41, pp. 22-23 (citing Gibson Deposition, p. 99:1-14, Exhibit 7 to Plaintiff's Opposition, Docket Entry No. 42-7, p. 75; and Oral and Videotaped Deposition of Rashad Godbolt ("Godbolt Deposition"), pp. 71:21-72:1, Exhibit 8 to Plaintiff's Opposition, Docket Entry No. 42-8, pp. 44-45).

> [s]even years after the mandate and despite being provided a road map and a tool kit from the Texas School Safety Center to ensure successful implementation of FFH (LOCAL), CFISD intentionally did nothing. The CFISD Board of Trustees approved the dating violence policy but the District never took a single step toward implementing it.[83]

But the evidence does not support plaintiff's argument. The assistant principals did not admit that no training or information about dating violence was provided to CFISD students or staff, and undisputed evidence establishes that CFISD not only adopted, but also disseminated policies prohibiting sex-based discrimination, including dating violence to students, parents, and staff.[84] The question posed to Gibson was not whether any training or information was provided to staff or students, but whether she was aware of any publications addressing dating violence other than CFISD's policies.[85] Godbolt was asked if dating violence was referenced in the Student Handbook, but was not asked about Policy FFH, which is the policy that addresses sexual harassment and dating violence and is referenced in both the Student Handbook and the Student Code of Conduct.[86] Policy FFH (LCOAL) not only defines

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[83]Plaintiff's Opposition, Docket Entry No. 41, p. 23.

[84]See Sims Declaration, Exhibit 1 to Defendant's MSJ, Docket Entry No. 33-1, p. 2 ¶¶ 4-5 (citing Exhibit A, policy FFH (LOCAL)).

[85]Gibson Deposition, p. 99:1-14, Exhibit 7 to Plaintiff's Opposition, Docket Entry No. 41-7, p. 75.

[86]Godbolt Deposition, p. 71:3-20, Exhibit 8 to Plaintiff's (continued...)

and prohibits dating violence as a type of harassment, but also gives examples of dating violence.[87] Moreover, undisputed evidence establishes that CFISD has adopted and disseminated policies prohibiting sex-based discrimination and harassment against students, including dating violence,[88] made information regarding its policies available both in the Student Handbook and online,[89] and provided annual staff training on sexual harassment.[90]

Citing the deposition testimony of CFISD's Title IX Coordinator, Deborah Stewart, plaintiff argues that CFISD has no discipline code for dating violence or sexual harassment, that sexual misconduct is encompassed in a broader discipline category that includes students pushing each other in the hallway, that determining whether an action involved sexual misconduct requires

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[86](...continued)
Opposition, Docket Entry No. 41-8, p. 44.

[87]See Policy FFH, Exhibit A to Sims Declaration, Docket Entry No. 34-1, pp. 6 (prohibiting dating violence), and 7 (defining and giving examples of dating violence).

[88]See Sims Declaration, Exhibit 1 to Defendant's MSJ, Docket Entry No. 34-1, p. 4 ¶¶ 4-5.

[89]Id. ¶ 6. See also CFSID Student Handbook 2013-2014, pp. 41-42, Exhibit 1-C to Defendant's MSJ, Docket Entry No. 34-1, pp. 40-41).

[90]Id. ¶ 7 (citing Exhibit E, training provided to staff members during the 2013-2014 school year, Docket Entry No. 34-1, pp. 105-58; Exhibit F, training on bullying provided at CFISD's 2012 Leadership Conference, Docket Entry No. 34-1, pp. 159-86; and Exhibit G, training provided at CFISD's 2013 Leadership Conference, Docket Entry No. 34-1, pp. 187-215).

reviewing descriptions of conduct for every action coded as "inappropriate contact with peer,"[91] and that the Title IX Coordinator is not notified of any incident of sexual misconduct unless formal disciplinary action is taken.[92] Plaintiff argues that cumulatively, this evidence could lead a reasonable jury to conclude that CFISD is engaged in a record-keeping practice designed to minimize the number of reports of sexual harassment and assault, and to conceal from the public the extent of the problem on its campuses and avoid accountability.[93]

Plaintiff's summary judgment evidence does not raise a genuine issue of material fact as to the existence of any official CFISD policy of deliberate indifference to reports of sexual misconduct. It is undisputed that CFISD's official policies prohibit sex-based discrimination and harassment, including dating violence, and that CFISD's policies are — and were during the 2013-2014 school year — available to staff, students, and parents in the Student Handbook and online. And contrary to plaintiff's contention that "dating

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[91] Plaintiff's Opposition, Docket Entry No. 41, pp. 23-24 (citing Oral and Videotaped Deposition of Deborah Stewart ("Stewart Deposition"), pp. 51:20-52:16, Exhibit 15 to Plaintiff's Opposition, Docket Entry No. 42-15, pp. 32-33).

[92] Id. at 23 (citing Steward Deposition, pp. 50:2-52:16, Exhibit 15 to Plaintiff's Opposition, Docket Entry No. 42-15, pp. 31-33).

[93] Id. at 23-24 (citing Stewart Deposition, pp. 51:20-52:16, Exhibit 15 to Plaintiff's Opposition, Docket Entry No. 42-15, pp. 32-33). See also Plaintiff's Sur-reply, Docket Entry No. 47, pp. 18-20.

violence is not referenced in the Student Code of Conduct,"[94] the Student Code of Conduct for the 2013-2014 school year both references and defines dating violence.[95] Moreover, any claim that CFISD did not do enough to publicize or to implement its sexual harassment or dating violence policies, or to comply with state or federal guidelines, is not sufficient to establish liability under Title IX. See Gebser, 118 S. Ct. at 2000 ("[Defendant's] failure to comply with the regulations, however, does not establish the requisite actual notice and deliberate indifference. And in any event, the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. . . . We have never held . . . that the implied right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.").

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[94] Id. at 23.

[95] Student Code of Conduct, Exhibit D to Sims Declaration, Docket Entry No. 34-1, pp. 54 (CFISD-ROE 000265)("Students shall not: . . . 9. engage in conduct that constitutes dating violence (see glossary); p. 100 (CFISD-ROE 000311) ("Dating Violence occurs when a person in a current or past dating relationship uses physical, sexual, verbal, or emotional abuse to harm, threaten, intimidate, or control another person in the relationship. Dating violence also occurs when a person commits these acts against a person in a marriage or dating relationship with the individual who is or was once in a marriage or dating relationship with the person committing the offense, as defined by Section 71.0021 of the Family Code.").

(2) Plaintiff Fails to Raise a Genuine Issue of Material Fact as to Whether CFISD Maintained a Policy that Created a Heightened Risk of Sexual Harassment that Was Known or Obvious

Asserting that CFISD's discovery responses indicate there were no incidents recorded as dating violence, sexual harassment, or sexual assault at Cypress Creek High School for the school years 2012-2013 through 2016-2017, plaintiff argues that Gibson and CFISD police officers recall otherwise. As evidence that sexual misconduct was a district-wide issue, plaintiff cites Assistant Principal Gibson's testimony that she investigated four incidents while she was at Cypress Creek High School in 2012-2013 and 2013-2014, that the incidents involved students in current or former dating relationships, and included claims of "inappropriate touching" as well as "grabbing and confining to areas."[96] Plaintiff cites the testimony of CFISD Police Officer Cedric Nolly who recalled that another female student in addition to the plaintiff reported that she was sexually assaulted on the Cypress Creek campus in 2013-2014.[97] Plaintiff also cites the testimony of CFISD police officer Patrick Arnett who estimated there to be two sexual assaults per year district-wide.[98] As evidence that sex in the

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[96]Plaintiff's Opposition, Docket Entry No. 41, p. 25 (citing Gibson Deposition, pp. 90:8-92:23, Exhibit 7 to Plaintiff's Opposition, Docket Entry No. 42-7, pp. 66-68).

[97]Id. (citing Oral and Videotaped Deposition of Cedric Nolly ("Nolly Deposition"), pp. 25:15-28:2, Exhibit 10 to Plaintiff's Opposition, Docket Entry No. 42-10, pp. 8-11).

[98]Id. at 25-26 (citing Oral and Videotaped Deposition of (continued...)

stairwells was both common and overlooked, plaintiff cites the testimony of CFISD police officers Mitchell and Arnett, and Cypress Creek High School counselor Karen Clarkson.[99]

Plaintiff argues that "[b]ased on this cumulative evidence, a reasonable jury could find that CFISD's actions created a heightened risk that [her] injuries would occur."[100] Plaintiff also argues that this evidence shows that CFISD acted with deliberate indifference to the known risk of dating violence and

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[98](...continued)
Patrick Arnett, p. 25:2-14, Exhibit 11 to Plaintiff's Opposition, Docket Entry No. 42-11, p. 5). Plaintiff also cites the deposition testimony of CFISD police officer Jimmy Banks, but did not provide the referenced pages in the exhibit filed with the court. See Oral and Videotaped Deposition of Jimmy Banks, pp. 11:20-12:15, Exhibit 12 to Plaintiff's Opposition, Docket Entry No. 42-12, not included in the exhibit filed with the court).

[99]Id. at 26 (citing Mitchell Deposition, p. 20:1-6, Exhibit 9 to Plaintiff's Opposition, Docket Entry No. 42-9, p. 4; Arnett Deposition, pp. 47:16-48:23, Exhibit 11 to Plaintiff's Opposition, Docket Entry No. 42-11, pp. 18-19; and Oral and Videotaped Deposition of Karen Clarkson ("Clarkson Deposition"), p. 14:14-19, Exhibit 14 to Plaintiff's Opposition, Docket Entry No. 42-14, p. 5). Plaintiff also cites her own declaration as evidence that sex in the stairwells at Cypress Creek High School was so common that it has become the school's stereotype among students — so much so that it made it into a local comedian's Instagram account. See Id. (citing Plaintiff's Declaration, Docket Entry No. 42-1, pp. 3-4 ¶¶ 12-13A). Defendant objects to the comedian's Instagram posting as inadmissible hearsay, see Defendant's Reply, Docket Entry No. 45, p. 19 n. 9. Plaintiff has not responded to defendant's objection, and the court agrees that the Instagram posting is inadmissible hearsay. Accordingly, defendant's objection to the Instagram posting is **SUSTAINED.**

[100]Id.

sexual assault on its campuses, specifically at Cypress Creek High School.

But, again, the evidence does not support plaintiff's argument. Although the witnesses whose testimony plaintiff cites testified that students went to the stairwells to do things that they should not be doing, none of the witnesses testified that they knew students used the stairwells to engage in sexual conduct. For example, Mitchell testified:

> Q. Were there areas in the school that you were aware of that kids went to do things that kids shouldn't be doing at school?
>
> A. I would have to say that could be pretty much all staircase -- staircase, stairwells.[101]

Clarkson testified that students were frequently caught in the stairwells, but she did not testify that students were frequently caught engaging in sexual conduct in the stairwells:

> Q. No[w], that you said -- you started to say, "We had another," and I -- you were about to say -- were saying a situation where kids were caught in the stairwell?
>
> A. We have kids caught in the stairwell, not frequently, but from time to time.
>
> Q. And I'm gathering it's because stairwells are a place where students can go and do whatever they might should not be doing and go undectected?

[101]Mitchell Deposition, p. 20:1-6, Exhibit 9 to Plaintiff's Opposition, Docket Entry No. 42-9, p. 4.

A. There are 38 stairwells in my building, 38.[102]

Officer Arnett testified that he knew students would use the stairwells to do things that they were not supposed to be doing at school, but he also testified that he never encountered students engaged in sexual activity in the stairwells:

> Q. At Cy-Creek, when you were there, were there areas of the campus that kids were known to go to do things that they shouldn't at school, like anything that would be a violation of the code of conduct, like smoking?
>
> A. Yeah, kids being kids, dug outs in the baseball field, like any other school. We know from working a campus where you normally have your common problems. In the cars, we try to look for kids loitering and hanging out in the cars. You just -- just where a kid would, you know, where -- if I wanted to hide, where would I hide?
>
> Q. What about the stairwells?
>
> A. Yea, kids going into the stairwells. I mean, kids -- it's just, we -- we check the bathrooms. Kids hang -- we'll knock on the bathroom, go in the bathrooms, guys bathrooms, guys hang out in the bathrooms. Sometimes they try to smoke in the bathrooms. So, you know those areas, but, you know, they're in all of these -- they -- they go in all these areas. They are just kids being kids.
>
> Q. Were you -- did you ever encounter any kids making out or --
>
> A. Yes.
>
> Q. -- engaged in sexual activity in the stairwells?
>
> A. No, not in the stairwells, but I've seen kids trying to get it on in the car or you catch them

[102]Clarkson Deposition, p. 14:14-19, Exhibit 14 to Plaintiff's Opposition, Docket Entry No. 42-14, p. 5.

> out in the backstop. You might not catch them doing nothing in the dug out, but you just say you-all aren't supposed to be out here, you know, let's get to class, you take the information. Normally, when they're out of place like that, they give them Saturday school.[103]

Plaintiff alleges that CFISD failed to provide adequate training on preventing sexual assault and teen dating violence at Cypress Creek High School, but noticeably absent from plaintiff's briefing and exhibits is any assertion or evidence that school officials had notice of previous sexual assaults. Instead, plaintiff merely argues that school officials were on notice that teen dating violence and sexual assault were concerns for all high schools and that CFISD was deliberately indifferent to the need for proper training. But even accepting plaintiff's allegations as true and viewing the summary judgment record in the light most favorable to her, the facts of this case do not fall within the framework of either the Tenth Circuit's holding in Simpson, or the Ninth Circuit's holding in Karasek. The deliberate indifference to obvious need for training standard adopted by those courts is confined to circumstances where the need for training or guidance is obvious due to numerous instances of sexual misconduct. In that situation the failure amounts to an official policy of deliberate indifference to providing adequate training or guidance that is obviously necessary. Here, the only concrete incidence of sexual

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[103]Arnett Deposition, pp. 47:16-48:23, Exhibit 11 to Plaintiff's Opposition, Docket Entry No. 42-11, pp. 18-19;

assault that plaintiff cites is the assault that she suffered at the hands of her boyfriend. The other allegations of sexual misconduct to which the CFISD witnesses testified are too vague, abstract, and unmoored in time to create a genuine issue of material fact regarding the existence of a systemic problem either at Cypress Creek High School in particular or at CFISD in general. Viewing the facts in alight most favorable to plaintiff, the incidents to which CFISD's witnesses testified during their depositions do not rise to the level of egregiousness and actual notice required by Simpson, or to the level of obviousness required by Karasek. As defendant argues, "[e]stablishing a material fact issue as to the existence of a widespread, systemic problem in such a large school district surely requires more than a small handful of vague allegations about isolated and unrelated incidents."[104]

(3) Plaintiff Fails to Raise a Genuine Issue of Material Fact as to Whether CFISD Maintained a Policy that Caused Her to Suffer the Sexual Assault that Occurred

Even assuming that plaintiff's evidence was capable of raising genuine issues of material fact as to whether CFISD maintained an official policy of deliberate indifference towards known acts of sexual misconduct, she neither argues nor cites any evidence capable of establishing that any such policy caused her injuries.

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[104] Defendant's Reply, Docket Entry No. 45, p. 8.

The summary judgment evidence — including plaintiff's own admissions — shows that despite having been instructed by her mother and the school counselor to stay away from Doe, she ignored those instructions and voluntarily entered the stairwell with Doe for the express purpose of engaging in the sexual activity that lead to her injury. Even if CFISD maintained a policy of deliberate indifference to reports of sexual misconduct, no reasonable jury could conclude that policy caused plaintiff's injuries.

(c) Conclusions

Because plaintiff has failed to raise genuine issues of material fact on three of the four Karasek factors that courts apply to Title IX pre-assault heightened risk claims, the court concludes that the CFISD is entitled to summary judgment on plaintiff's claim that an official CFISD policy created a heightened risk that she suffer the sexual assault that occurred.

2. Plaintiff Fails to Cite Evidence Raising a Genuine Issue of Material Fact as to Her Post-Assault Claims

Plaintiff alleges that CFISD is liable under Title IX for her post-assault claims because

> [o]ne or more CFISD administrators or officials, with authority to take corrective action on [her] behalf, had actual notice of the sexual assault, harassment and discrimination and failed to adequately respond, in violation of their own policies. Those failures amounted to deliberate indifference toward the unlawful sexual conduct and retaliatory conduct that had occurred, was

> occurring, or was likely to occur. The District's action — and inaction — was clearly unreasonable. As a result, [plaintiff] was subject to continuing harassment and a loss of educational opportunities.[105]

To prove her post-assault Title IX claims, plaintiff must establish that CFISD

> (1) had actual knowledge of the harassment, (2) the harasser was under the district's control, (3) the harassment was based on the victim's sex, (4) the harassment was so severe, pervasive, and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit, and (5) the district was deliberately indifferent to the harassment.

I.L., 776 F. App'x at 842. The only factor in dispute is whether CFISD responded with deliberate indifference to plaintiff's assault and post-assault harassment.

Plaintiff argues that CFISD's response to her assault was clearly unreasonable because it should have done more to investigate her complaint of sexual assault, and should have been more responsive to her mother's concerns. Plaintiff also argues that the facts surrounding CFISD's investigation — or lack thereof — are substantially disputed.[106] But neither failing to investigate nor failing to respond to acts of sexual harassment to a complainant's liking is sufficient to impose liability under Title IX. CFISD was not required to provide plaintiff with her chosen remedy. Courts have repeatedly held that "schools are not required

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[105]Plaintiff's Original Complaint, Docket Entry No. 1, p. 17 ¶ 82.

[106]Plaintiff's Opposition, Docket Entry No. 41, pp. 28-29.

to remedy the harassment or accede to a parent's remedial demands," and that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." Sanches, 647 F.3d at 167-68 (citing Davis, 119 S. Ct. at 1673-74). CFISD might have suspended or expelled Doe, but the law does not require that response in order to avert Title IX liability. See Davis, 119 S. Ct. at 1673-74 ("We stress that our conclusion here — that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment — does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.").

Moreover, plaintiff ignores the undisputed evidence showing what CFISD did do. CFISD police officers immediately responded to the report of assault made from the hospital, and passed their report onto the HCSO's, which investigated the assault. Following the HCSO's investigation, the Harris County District Attorney's Office refused to accept charges against Doe. Assistant Principal Gibson searched for and reviewed video evidence, which showed plaintiff and Doe walking arm-in-arm in the hall. Based on the evidence available to her, Gibson concluded that the assault resulted from a consensual encounter that went too far. Even if the school's investigative and disciplinary response could have been better, neither "negligence nor mere unreasonableness is

enough" to support a Title IX deliberate indifference claim. I.L., 776 F. App'x at 842 (quoting Sanches, 647 F.3d at 167).

This case involves a single incident of sexual assault on a school campus. Plaintiff does not allege or cite any evidence showing that CFISD knew of any prior sexual assaults or harassment by Doe or anyone else. Although plaintiff complains that when she returned to school after the assault, Does' friends harassed her at school by confronting her once in the bathroom, and by calling her offensive names such as "baby killer" in social media posts, plaintiff does not cite any evidence showing that Doe harassed her or that he spoke to her more than once when they exchanged angry words following a chance encounter that Doe had with plaintiff's mother and boyfriend at a grocery store. To the contrary, plaintiff's mother stated in her declaration that following the assault plaintiff had no classes with Doe, but did have the same lunch period.[107] Nor does plaintiff cite any evidence showing that she or her mother ever notified school administrators about the harassment she experienced from Does' friends, or that she or her mother disclosed the identities of the people who were harassing her or specifics about the harassment that she was experiencing. Because the deliberate indifference inquiry focuses on the school's response to known harassment, the response must be so deficient as

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[107]Plaintiff's Mother's Declaration, Docket Entry No. 42-2, p. 7 ¶ 38.

to itself constitute harassment. No reasonable jury could conclude that the school's responsiveness was clearly unreasonable under the circumstances.

Plaintiff argues that summary judgment should be denied because of factual discrepancies between CFISD's answers to interrogatories regarding its investigation of her assault and Gibson's testimony regarding that same investigation — i.e., whether Gibson spoke with or obtained written statements from plaintiff and Doe, whether Gibson kept notes or drafted a written summary or conclusion of the investigation, whether CFISD possessed or disclosed all of the video evidence, and the basis on which Gibson concluded the sexual conduct at issue was consensual. But these factual disputes are immaterial to whether the school's response was clearly unreasonable as a matter of law.

Whether the assault was actually consensual is not relevant. The relevant issue is whether the school acted with deliberate indifference to plaintiff's complaint of sexual assault, consensual or not. In this case, where there was evidence that the incident may have been consensual, plaintiff's mother made it clear to Gibson that she intended to pursue criminal charges against Doe,[108] and where there was a potential for criminal charges, it was not clearly unreasonable for the school to rely on the investigative expertise of a law enforcement agency such as the Harris County

[108] Id. at 6 ¶ 28.

Sheriff's Office. The court's analysis does not presume that the act was consensual, but instead, gauges the school's response to a factually complex situation. The Texas Family Code § 261.103(a)(1) allows a report of child abuse to be made to a local law enforcement agency such as the Harris County Sheriff's Office.

The discrepancies between CFISD's answers to interrogatories and Gibson's description of the investigation she conducted do not foreclose summary judgment. Even when viewed in the light most favorable to the plaintiff, these discrepancies are insufficient to establish that CFISD possessed any knowledge that might have rendered its response deliberately indifferent. Plaintiff argues that the school was deliberately indifferent to her emotional and physical health problems, which she contends resulted from the assault, but the cited testimony is vague and establishes only that plaintiffs' mother notified Cypress Creek High School that plaintiff did not feel comfortable at school. The vague communications that plaintiff's mother had with the assistant principal and with plaintiff's counselor at Cypress Creek High School raise no genuine, material issues as to whether CFISD responded with deliberate indifference to plaintiff's condition following the assault.

The conclusion that plaintiffs' evidence does not raise genuine issues of material fact for trial is supported by decisions in other courts arising from similar facts. In Gabrielle M. v.

Park Forest-Chicago Heights, Illinois School District I63, 315 F.3d 817 (7th Cir. 2003), the court rejected the plaintiff's argument that a school's response to peer harassment was clearly unreasonable because the school was unsuccessful in preventing future harassment. The court explained that

> in arguing that in order not to act with deliberate indifference, the school district must have effectively ended all interaction between the two students to prevent conclusively any further harassment, Gabrielle misunderstands the law. Davis does not require funding recipients to remedy peer harassment. . . Davis disapproved of a standard that would force funding recipients to suspend or expel every student accused of misconduct. [] All that Davis requires is that the school not act clearly unreasonably in response to known instances of harassment.

Id. at 825. See also M.D. v. Bowling Green Independent School District, 709 F. App'x 775 (6th Cir. 2017) (finding no Title IX liability following a sexual assault because the defendant school district prevented the male student offender from further harassing the female student victim even though the offender was allowed to return to campus, the two students shared the same lunch period, and they continued to see each other daily). The court does not minimize the consequences to plaintiff and to her well being that resulted from the assault. But based on the law applicable to recipients of federal funding, and the facts established by the summary judgment record, no reasonable jury could conclude that CFISD exhibited deliberate indifference in responding either to the assault or to the alleged post-assault harassment.

V. Conclusions and Order

For the reasons stated in § III, above, Plaintiff's Motion to File Sur-Reply in Opposition to Defendant's Motion for Final Summary Judgment, Docket Entry No. 47, is **GRANTED**.

For the reasons stated in § IV, above, Defendant's Motion for Final Summary Judgment, Docket Entry No. 33, is **GRANTED**.

Because the court has been able to rule on Defendant's Motion for Final Summary Judgment without considering Geffner's testimony, Defendant's Motion to Exclude Testimony of Robert Geffner, PhD, Docket Entry No. 35, is **DENIED as MOOT**.

SIGNED at Houston, Texas, on this the 1st day of December, 2020.

SIM LAKE
SENIOR UNITED STATES DISTRICT JUDGE

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JANE ROE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-18-2850
	§	
CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT,	§	
	§	
	§	
Defendant.	§	

FINAL JUDGMENT

In accordance with the Memorandum Opinion and Order granting defendant's motion for final summary judgment, this action is **DISMISSED WITH PREJUDICE.**

Costs shall be taxed against the plaintiff.

This is a **FINAL JUDGMENT.**

SIGNED at Houston, Texas, on this the 20th day of November, 2020.

SIM LAKE
SENIOR UNITED STATES DISTRICT JUDGE