No. 19-10815

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ARVILLA STINSON,
as next friend of K.R., a minor,

Plaintiff-Appellant,

v.

TRAMENE MAYE, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
(No. 2:15-cv-924-WKW)

OPENING BRIEF FOR APPELLANT ARVILLA STINSON

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, counsel for Plaintiff-Appellant, Arvilla Stinson, certifies that the following have an interest in the outcome of this appeal:

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Dated: April 19, 2019

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STATEMENT REGARDING ORAL ARGUMENT

The district court dismissed Plaintiff-Appellant Arvilla Stinson's complaint without giving her an opportunity to present oral argument. In this appeal, she contends that the district court misapplied federal law. She believes that oral argument will aid this Court in properly applying the relevant law.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

* Key authorities are marked with an asterisk, pursuant to Eleventh Circuit Rule 28-1.

INTRODUCTION

This case arises from a middle school's failure to stop the violent rape of one of its students and its unwillingness to remedy the trauma she suffered as a result. In the fall of 2014, Plaintiff's daughter was an eighth-grader at Southlawn Middle School in Montgomery, Alabama. As she was leaving school with her stepsister one day, three of her classmates grabbed her and dragged her into an abandoned building on the edge of campus, where they raped her. Although the school's assistant principal saw the boys drag her into the building, he chose not to intervene or call the police, even after the girl's stepsister told him what was happening. It was not until later that day—after the incident occurred, when Plaintiff confronted the school's principal directly—that the school finally called the police. To date, that belated phone call remains the school's only response to the brutal assault on Plaintiff's daughter.

Plaintiff brought this Title IX suit on behalf of her daughter, who continues to suffer from the traumatic after-effects of the rape. The district court reviewed her pleading and drew the only conclusion it reasonably could: "If the allegations in this case are true, Southlawn Middle School in Montgomery, Alabama, is a place where rape is not taken seriously." Yet, despite reaching that conclusion, the court dismissed Plaintiff's complaint. It held that Southlawn officials had done all that Title IX required of them by calling the police (after the rape occurred) and relying on the police's determination that the incident involved "consensual sex" (even though the victim was too young to consent under Alabama law).

The district court's holding was erroneous. Several courts—including this one—and the U.S. Department of Education have recognized that school officials cannot satisfy their Title IX obligations merely by notifying law enforcement that a student was sexually assaulted on campus. Rather, they must take reasonable steps to prevent such assaults from occurring in the first place. And, when those preventative steps fail, they must make at least some minimal effort to document what occurred and alleviate the resulting harm to the victim.

In this case, Southlawn's highest-ranking officials eschewed those basic responsibilities in two key respects: first, by failing to stop the gang rape of Plaintiff's daughter as it was happening and, then, by failing to make any efforts to record what happened, discipline her attackers, or ease her suffering in the wake of the assault. Those failures—whether viewed separately or as a whole—violated Title IX. The district court's decision must therefore be reversed.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331 and § 1367. On February 5, 2019, the district court dismissed Plaintiff's complaint and entered final judgment in favor of Defendants Tramene Maye, Rafiq Vaughn, and the Montgomery County Board of Education. Joint Appendix (JA) 3, 19. Plaintiff filed a timely notice of appeal on March 5, 2019. *See* JA 1; Fed. R. App. P. 4(a). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether Defendants' failure to prevent, document, investigate, or remedy the harms caused by the gang rape of Plaintiff's daughter constitutes "deliberate indifference" under Title IX.

STATEMENT OF THE CASE[1]

A. Factual Background

Plaintiff's daughter, K.R., attended Southlawn Middle School from 2012 to 2014. JA 37 (Second Amended Complaint). One afternoon, in the fall of her eighth-grade year, she was leaving school with her stepsister when she was physically attacked by three of her male classmates. JA 38. The three boys grabbed her and dragged her into an abandoned building at the edge of campus, where two of them raped her as the third stood lookout. JA 38.

The school's assistant principal, Tramene Maye, saw this incident unfolding but took no action to intervene. JA 38. When K.R.'s stepsister ran to tell him what was happening, Maye simply told her to "go on about her business." JA 38. At no point did he make any effort to stop the rape, call the police, or notify any other school officials, despite a Southlawn policy requiring all employees to report incidents of physical harassment to the principal. JA 34, 38.

[1] The following facts are derived from Plaintiff's Second Amended Complaint. Relevant statutory and regulatory provisions are included in an addendum to this brief.

Plaintiff happened to be on campus that afternoon for parent-teacher conferences. JA 38. As soon as she learned that her daughter had been raped, she immediately went to meet with the school's principal, Rafiq Vaughn. JA 38. During that meeting, Vaughn expressed little concern for K.R.'s well-being and, instead, focused on trying to dissuade Plaintiff from calling the media. JA 39. He also made several inappropriate comments about K.R.'s body, even going so far as to compare K.R.'s figure to that of his own girlfriend. JA 39. Although he eventually called the police to report the rape, he took no further action to inquire about K.R.'s health and did not offer Plaintiff any assistance in seeking counseling or support for her daughter. JA 39-40.

Plaintiff then took K.R. to the hospital for treatment. JA 39. Medical staff there examined her and determined that she showed clear signs of sexual assault, which they promptly reported to local child-welfare agencies. JA 39. Despite the hospital's findings, however, the police who responded to Principal Vaughn's call ultimately concluded that the incident had involved "consensual sex" and ceased investigating further. JA 39.

In the weeks and months following the rape, K.R. suffered from severe post-traumatic stress. She fell into a deep depression and withdrew from her ordinary social life. JA 39. She began to receive psychological treatment and take medication. JA 39, 41. And she missed more than a week of school, as she was unable to leave the house for several days following the rape. JA 39.

No one from Southlawn or the school board reached out to K.R.'s family during her absence to offer counseling or ask about her well-being. JA 40. Nor did anyone notify the family of the grievance procedures available to them. JA 40. Instead, Plaintiff's first interaction with school officials following the rape—besides her brief meeting with Vaughn on the day of the rape itself—occurred one week later, when she visited campus to submit a doctor's note explaining the reasons for K.R.'s prolonged absence. JA 40. During that visit, Plaintiff spoke with Vaughn about K.R.'s ongoing trauma. JA 40. Rather than offering guidance or support, Vaughn responded by urging Plaintiff not to let K.R. return to Southlawn. JA 40. He noted that K.R.'s classmates had been gossiping incessantly about the incident since it happened, with many saying that the three boys had "run a train" on her—a vulgar colloquialism for gang rape. JA 40.

To protect K.R. from the hostile environment she would have faced at Southlawn, Plaintiff transferred K.R. to another school within the district. JA 40. But the transfer did little to shield K.R. from harassment. *See* JA 41. Word of the gang rape spread quickly to K.R.'s new school via social media, leading to fresh torment by her new classmates. JA 41. Enduring this verbal abuse from her peers only exacerbated the anxiety and distress that K.R. was already experiencing after moving to a new school, half-way through her eighth-grade year, still reeling from the trauma of her recent sexual assault. JA 41-42.

Not surprisingly, this social alienation took a heavy toll on K.R.'s mental health. She continues to take medication and receive psychological treatment for the lingering trauma caused by her rape. JA 41. Her grades have dropped and her social life has declined. JA 42. And she now struggles with anger-management issues, occasionally even lashing out at her younger siblings. JA 42.

In the four and a half years since K.R.'s rape, the local school board has not offered her any counseling, treatment, or support, even though she continues to attend school in the same district. JA 40, 43. Nor has the board made any efforts to formally document the incident or undertake any independent inquiry into what happened, JA 41-43, despite a board policy requiring officials to do so, JA 34-35. The three boys who raped her, meanwhile, never faced any punishment and continued to attend school at Southlawn. JA 41.

B. Procedural Background

Plaintiff filed this suit, as her daughter's next friend, in 2015. JA 33-51 (Second Amended Complaint). The operative complaint asserts claims against the school board under Title IX of the Education Amendments of 1972 and against Vaughn and Maye under Alabama tort law. *See* JA 43-48.

In September 2017, Defendants moved to dismiss all claims under Rule 12(b)(6). JA 25-30 (Motions to Dismiss). Fifteen months later, when the district court had yet to act on those motions, Plaintiff requested a status conference to set a discovery schedule. JA 20-24 (Motion for Status Conference) (noting that the delay in

resolving the Rule 12(b)(6) motions threatened to impede Plaintiff's ability to gather relevant evidence). The district court declined to rule on that request for another two months. Finally, in February 2019—nearly a year and a half after Defendants moved to dismiss and more than four years after the rape that precipitated this lawsuit—the district court issued an opinion dismissing Plaintiff's complaint. *See* JA 4-19 (Dist. Ct. Opinion). It never held any hearings in the case.

The district court's opinion openly acknowledged the shortcomings in the school board's response to the gang rape. *See, e.g.*, JA 14 ("[T]he Board's alleged response fell below what other school boards might have done."). It noted, for example, that Maye "could have intervened" to stop the rape, "but instead he watched as her attackers dragged her away." JA 11. The opinion also highlighted Vaughn's inappropriate comments on the day of the rape and repeatedly cited the fact that K.R.'s "attackers suffered no consequences." JA 11; *see also* JA 5 ("They were never punished."). Recounting these details, the court described the school's conduct in blunt terms, writing, "[i]f the allegations in this case are true, Southlawn Middle School in Montgomery, Alabama, is a place where rape is not taken seriously." JA 5.

Despite that frank recognition of the deficiencies in the board's response to the incident, however, the district court dismissed Plaintiff's Title IX claim. It held that the school board's conduct did not rise to the level of "deliberate indifference" needed to establish a violation of Title IX. *See* JA 13-15. The court reasoned that this was not "a case in which the Board did nothing." JA 14. Instead, the court held, "the

Board may use Principal Vaughn's call to the police as a defense." JA 14. The court placed particular emphasis on the police's determination that the rape involved "consensual sex," concluding that "[t]hat finding keeps the Board from being liable here." JA 14; *see also* JA 15 ("[O]nce the police cleared the boys of rape, it was not clearly unreasonable for the Board to act as if they had no further obligation to report or investigate the rape claim.").

Based on its dismissal of the Title IX claim, the court declined to exercise supplemental jurisdiction over Plaintiff's state-law claims against Vaughn and Maye. JA 18-19. It therefore entered final judgment in favor of Defendants. JA 3 (Judgment).

C. Standard of Review

The district court's order granting Defendants' motions to dismiss is reviewed *de novo*. *Echols v. Lawton*, 913 F.3d 1313, 1319 (11th Cir. 2019). In reviewing a ruling under Rule 12(b)(6), this Court "accept[s] the factual allegations in the complaint as true and construe[s] them in the light most favorable to the plaintiff." *Id.*

SUMMARY OF ARGUMENT

Montgomery school board officials responded to the tragedy at the heart of this case with remarkable apathy. An assistant principal witnessed a physical attack on one of his students and declined to act. He was then told that the attackers were going to rape the student and, still, he declined to act. When the school's principal learned of the incident, he responded by making inappropriate comments about the

victim's body and trying to dissuade her mother from telling the media. Nobody from the school or board ever offered the victim any counseling, guidance, or support following the attack, even as her post-traumatic anguish grew ever more apparent. Nor did they ever seek to investigate or formally document what happened. Indeed, neither the school nor the board ever made any inquiry at all into her rape allegations, despite their firsthand knowledge about what transpired that day.

The conduct of these officials violated Title IX. The Supreme Court has recognized that educational institutions run afoul of Title IX when they act with "deliberate indifference" to sexual harassment, either by leaving students "vulnerable" to sexual assault or by responding to such assaults in a "clearly unreasonable" manner. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 645, 648 (1999). In this case, the school board's stubborn disregard for K.R.'s well-being—both on the day of the rape itself and in the period that followed—evinced both forms of deliberate indifference.

The district court, nevertheless, held that the board did not act with deliberate indifference here because Southlawn's principal reported the incident to the police. But that call cannot shield the board from Title IX liability, for several reasons. Most notably, the call came too late—well after the assistant principal had a chance to stop the assault. Logic and precedent dictate that calling the police *after* a student has been sexually assaulted cannot protect school officials from liability for their deliberately indifferent conduct *prior* to the assault. Here, the assistant principal's actions (or, more accurately, inaction), as he stood by and watched K.R.'s assailants drag her into

an abandoned building, exposed the board to liability before the principal ever called the police.

What's more, even if school officials had called the police earlier, that would still not absolve school officials—as a legal matter—of their failure to perform their other Title IX obligations. A vast body of case law and longstanding federal guidance both make clear that schools should attempt to independently document and investigate all sexual-assault allegations, even if they have separately reported those allegations to law enforcement. In addition, schools must seek to remedy the effects of such assaults on the victims. These responsibilities cannot be delegated to law-enforcement officials, whose mandate—to investigate and prosecute crimes—differs markedly from that of school officials. For all of these reasons, the district court erred in concluding that the board could comply with Title IX here merely by reporting the incident to the police and taking no further action.

ARGUMENT

I. The conduct of school board officials—both before and after K.R.'s rape—constitutes "deliberate indifference" under Title IX.

Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In *Davis v. Monroe County Board of Education*, the Supreme Court held that "student-on-student sexual harassment, if sufficiently severe, can . . . rise to the

level of discrimination actionable under the statute." 526 U.S. 629, 650 (1999). Specifically, the Court held, recipients of federal funds may incur liability under Title IX "where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment." *Id.* at 646-47. To qualify as "deliberate indifference" under *Davis*, the recipient's conduct must either "'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Id.* at 645 (citations omitted; alterations in original).

In this case, Montgomery school board officials acted with deliberate indifference in two ways: first, in failing to prevent K.R.'s rape (despite clear opportunities to do so) and, second, in failing to take any corrective or remedial actions following the rape (despite ample reason to know that such actions were necessary). The board's conduct at each of these stages—that is, either before or after the rape—would provide sufficient grounds, on its own, to establish "deliberate indifference" under Title IX. Moreover, when viewed as an uninterrupted course of conduct, the board's actions provide an irrefutable basis for Title IX liability.

A. Assistant Principal Maye's failure to prevent or report the attack on K.R. was clearly unreasonable.

A Title IX claim based on student-on-student harassment must contain five elements. *Hill v. Cundiff*, 797 F.3d 948, 970 (11th Cir. 2015). First, "the defendant must be a Title IX funding recipient." *Id.* Second, a representative of the funding recipient—often called an "appropriate person"—must have had "actual knowledge

of the alleged discrimination or harassment." *Id.* Third, the harassment must have been "severe, pervasive, and objectively offensive." *Id.* (citation omitted). Fourth, the funding recipient must have "act[ed] with deliberate indifference to [the] known acts of harassment." *Id.* And fifth, the harassment must have "effectively barred the victim's access to an educational opportunity or benefit." *Id.*

The district court's decision turned on the fourth of these elements: deliberate indifference. *See* JA 10-11. To satisfy that element, a defendant's conduct "must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Davis*, 526 U.S. at 645 (citations omitted; alterations in original). "A school is not deliberately indifferent if it takes remedial measures and those measures are ultimately ineffective." *G.P. v. Lee County School Bd.*, 737 F. App'x 910, 915 (11th Cir. 2018). Rather, to rise to the level of deliberate indifference, the defendant's conduct must have been "clearly unreasonable in light of the known circumstances." 526 U.S. at 648.

Here, the conduct of Southlawn's assistant principal, Maye, rises to that level. As the district court recounted, "Maye *saw* three boys drag K.R. into an abandoned building" and chose not to intervene in any way. JA 5 (emphasis in original). The court did not mince words in describing how easily Maye could have prevented the rape, noting that he "was entrusted with protecting K.R." and "could have intervened, but instead he watched as attackers dragged her away." JA 11. Moreover, the court made clear, there was no way for Maye to misinterpret what he saw because "K.R.'s

stepsister *told* [him] what the boys were doing to K.R." JA 8 (emphasis added). Yet, "Maye ignored the incident and told K.R.'s stepsister to 'go on about her business.'" JA 8.

This conduct, standing alone, is sufficient to state a violation of Title IX. Although Title IX claims based on student-on-student sexual assaults often focus on a school's response to the assault *after* it happens, a school's failure to take obvious preventive measures *before* an assault may also give rise to liability. *See, e.g.*, *Simpson v. University of Colorado Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007) (holding that a university may be held liable under Title IX where the plaintiffs' assaults resulted from the school's deliberate indifference toward its football players' history of menacing conduct toward women).

In *Williams v. Board of Regents of the University of Georgia*, 477 F.3d 1282 (11th Cir. 2007), for instance, this Court held that a student had stated a valid deliberate-indifference claim against her university where the school failed to protect her against sexual harassment by its student-athletes. *Id.* at 1288-90. The plaintiff filed the suit after she was gang-raped by a group of student-athletes in a dorm room; in her complaint, she argued that the school's failure to properly monitor its student-athletes "substantially increased the risk faced by female students" on campus. *Id.* at 1296. In sustaining her Title IX claim, this Court relied, in particular, on her allegations that the university had (1) recruited the student-athlete who orchestrated the assault, despite knowing his history of sexual misconduct; (2) failed to properly supervise him while

he was on campus; and (3) neglected to provide its student-athletes with adequate information about the school's sexual-harassment policies. *Id.* at 1296-97. These lapses in basic oversight, the Court reasoned, were enough to establish deliberate indifference because they "subjected [the plaintiff] to . . . further harassment and caused her to be the victim of a conspiracy between [student-athletes] to sexually assault and rape her." *Id.* at 1296.

Notably, in reaching that conclusion, the Court focused on the university's conduct *prior* to the assault itself. *See* 477 F.3d at 1297 (relying on the fact that university officials "exercised almost no control over [the ringleader of the assault], even though they knew about his past sexual misconduct," and "failed to inform student-athletes about the applicable sexual harassment policy"); *id.* at 1304-05 (Jordan, J., concurring) ("[The plaintiff] has claimed that the deliberate indifference . . . *preceded*, and proximately *caused*, her sexual assault and rape." (emphasis added)). *Williams* thus makes clear that a school's failure to address milder forms of known harassment may support a finding of deliberate indifference when that harassment culminates in an assault on the plaintiff. *See Doe v. Broward County Sch. Bd.*, 604 F.3d 1248, 1258 (11th Cir. 2010) ("[As] *Williams* demonstrates, lesser harassment may still provide actual notice of sexually violent conduct, for it is the risk of such conduct that the Title IX recipient has the duty to deter."). Although the *Williams* Court also found that the university's actions *after* the rape provided separate

grounds for liability,[2] its opinion made clear that the school's pre-rape conduct—combined with the rape itself—sufficed independently to establish deliberate indifference.

The same reasoning applies here. Just like the university officials in *Williams*, Maye failed to properly supervise the students who assaulted K.R., even after he witnessed the attack begin. Any rational adult, let alone a middle-school administrator, would have recognized the grave threat that the boys posed to K.R. as soon as they "grabbed" her and began "dragg[ing]" her into an abandoned building. JA 38. Indeed, the conduct that Maye witnessed—especially when juxtaposed with K.R.'s warning about the boys' intentions—fell squarely within the school board handbook's own definition of "sexual harassment." *See* JA 34 (noting that board's handbook defined the term to include "unwelcome touching or other inappropriate physical acts of a sexual nature"). Maye's decision not to intervene at that point—even before K.R. disappeared from his sight—can only be characterized as willful.

Maye's failure to respond to K.R.'s initial harassment mirrors the indifference shown by university officials in *Williams*. In both cases, school officials failed to take

[2] *See Williams*, 477 F.3d at 1296 (explaining that the university "acted with deliberate indifference *again* when it responded to the January 14 incident" (emphasis added)); *Farmer v. Kansas State Univ.*, 918 F.3d 1094, 1108 n.5 (10th Cir. 2019) (noting that "the plaintiff in *Williams* asserted claims alleging the funding recipients were deliberately indifferent both before and after she was sexually assaulted" (citation omitted)). As explained *infra*, pp. 23-24, the *Williams* Court's analysis of the university's post-assault conduct (as an independent basis for liability) only provides further support for Plaintiff's deliberate-indifference claim in this case.

basic steps to address a known threat of sexual harassment, leaving the plaintiff vulnerable to sexual assault. *See Davis*, 526 U.S. at 645 (stating that a school's actions may constitute deliberate indifference where they "'*cause* [students] to undergo' harassment or 'make them liable or *vulnerable*' to it" (citations omitted; emphasis added)). If anything, Maye's failure to act reflects an even greater degree of indifference than the university's conduct in *Williams*: after all, Maye personally witnessed the start of K.R.'s attack and was explicitly asked to intervene before the rape occurred; plus, as a middle-school administrator, he had even broader authority to exercise control over the students who organized the attack than did the university officials in *Williams*. *See* 526 U.S. at 649 ("A university might not . . . be expected to exercise the same degree of control over its students that a grade school would enjoy."). In short, Maye's failure to intervene—after he witnessed a group of (adolescent) boys begin to harass K.R. and was told specifically about their intent to rape her—was even more egregious than the university's general failure monitor its (adult) student-athletes in *Williams*.

The fact that Maye had only a limited time to respond after he witnessed the start of the attack does not shield the board from liability here. As *Davis* makes clear, Title IX requires school officials to respond to peer harassment in a manner that is "not clearly unreasonable *in light of the known circumstances*." 526 U.S. at 648 (emphasis added); *see also Broward Cnty.*, 604 F.3d at 1263 (explaining that "[t]he Title IX inquiry is contextual"). When Maye was told that a thirteen-year-old girl was about to be

sexually assaulted on his school's campus, the only reasonable response under the "known circumstances" was for him to act quickly to try and stop the assault. While Title IX might not have required him to intercede physically, it required him to make at least some effort to intervene. His failure to do so—even with only limited notice—was clearly unreasonable under the circumstances. *See Hill*, 797 F.3d at 971-72 (holding that a school board had adequate notice of a middle-school teacher's plan to use a student "as rape bait" to catch another student in the act of harassment because the assistant principal learned of the plan "a few minutes before" it went into effect).

Nor can the board avoid liability here based on the fact that Maye was the only school official who had a chance to prevent K.R.'s rape. The Supreme Court has made clear that "a Title IX plaintiff can establish school district liability by showing that a *single* school administrator with authority to take corrective action responded to harassment with deliberate indifference." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009) (emphasis added). As Southlawn's assistant principal and second highest-ranking official, Maye had the authority to take corrective action on the board's behalf. *See, e.g.*, *Hill*, 797 F.3d at 971 (treating assistant principals at an Alabama middle school as "appropriate persons capable of putting the [School] Board on actual notice of sexual harassment and discrimination"). His failure to do so here was thus plainly sufficient to establish deliberate indifference.

B. The school board's failure to document or investigate K.R.'s rape allegations, amend its training practices, or remedy her post-traumatic suffering was also clearly unreasonable.

While Maye's conduct before the rape is sufficient to establish deliberate indifference on its own, this Court need not rest its decision on Maye's conduct alone. Indeed, the school board's conduct following the rape—and, in particular, its failure to take even the most basic corrective or remedial measures—lends even further support to Plaintiff's deliberate-indifference claim here.

As the district court recounted, no one from Southlawn or the school board ever attempted to "investigate or write a report" about what happened to K.R., even though school officials considered the incident serious enough to justify police involvement. JA 8. Nor did anyone from the school or board ever pursue disciplinary action against K.R.'s attackers, JA 9, even though the board's own policies required it to do so, JA 10. And no one from the school or board ever "reached out to [K.R.] or offered her counseling," JA 9—not even after receiving a doctor's note describing the rape's impact on K.R.'s mental health. *See* JA 40. Most troublingly, the board based its decision not to take any corrective actions on the police's determination that the incident involved "consensual sex," despite the board's knowledge that K.R. was too young to consent under Alabama law. *See* Ala. Code § 13a-6-70(c) ("A person is deemed incapable of consent if he is . . . [l]ess than 16 years old.").

The board's response to K.R.'s gang rape has all of the hallmarks of deliberate indifference. Among the most glaring deficiencies in its response was its failure to perform any independent investigation of K.R.'s allegations and its decision not to take any corrective measures to prevent similar incidents from occurring in the future. These are precisely the kinds of omissions that courts, including the Supreme Court, have identified as strong indicia of deliberate indifference.[3]

This Court's decision in *Hill v. Cundiff*, 797 F.3d 948 (11th Cir. 2015), illustrates how a school's failure to take corrective actions in the wake of a campus sexual assault can give rise to Title IX liability. In *Hill*, the Court held that a middle school responded with deliberate indifference to a campus rape where it failed to properly document the incident and refused to fix known gaps in its sexual-harassment training for employees. The plaintiff was an eighth-grader who had been raped in a school bathroom after school officials tried to "use her as bait in a sting operation to catch [another student] in the act of sexual harassment." *See id.* at 955-56. At summary

[3] *See, e.g.*, *Davis*, 526 U.S. at 654 ("The complaint also suggests that petitioner may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment."); *S.B. ex rel. A.L. v. Board of Educ. of Harford Cnty.*, 819 F.3d 69, 77 (4th Cir. 2016) (noting that a "half-hearted investigation or remedial action" is not sufficient to shield school from Title IX liability); *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1248 (10th Cir. 1999) ("[The principal's] complete refusal to investigate known claims of [peer harassment], if true, amounts to deliberate indifference."); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 907 (1st Cir. 1988) (finding that a medical school acted with deliberate indifference, in a pre-*Davis* case, where it failed to take "any steps whatsoever to investigate" a medical resident's allegations of sexual harassment).

judgment, she offered evidence that the school failed to preserve most of its disciplinary or investigative records from its inquiries into student-on-student sexual harassment. *See id.* at 958. She also cited the school board's failure to change its record-keeping and employee-training practices following her rape. *See id.* at 965.

This Court held that those failures violated Title IX. It reasoned that "a jury could find the Board should have known it needed to develop a more accurate system for recording sexual harassment in order to adequately monitor and respond to student misconduct and complaints of sexual harassment." 797 F.3d at 974. Similarly, the Court held, a jury could find that "the Board's failure to create an accurate and systematic [disciplinary-records] database policy after [the rape] was clearly unreasonable." *Id.* Finally, the Court added, a "jury might also find it was clearly unreasonable for the Board not to improve its sexual harassment training" following the rape. *Id.* at 975; *see also id.* ("[A] a reasonable jury could find the Board's choice to do nothing to improve its sexual harassment policies was clearly unreasonable."). Taken together, these shortcomings in the board's response to the rape were "enough to establish deliberate indifference under Title IX." *Id.* at 975.

The board's post-rape conduct in K.R.'s case presents an even clearer example of deliberate indifference than the board's conduct in *Hill*. Unlike the school officials in that case, whose deliberate indifference arose (in part) from their failure to preserve certain records, school officials here failed to undertake the very investigative and disciplinary processes needed to generate such records in the first place. Again,

"neither Principal Vaughn nor any other administrative designee did any sort of report or investigation regarding the gang rape." JA 41; *cf. Hill*, 797 F.3d at 974 ("A reasonable factfinder might conclude the Board's refusal to direct its officials to consider all the known circumstances, including the nature, pattern, and seriousness of a student's conduct, was clearly unreasonable."). And because "no legal or disciplinary action was taken against the three boys" who participated in the rape, the school never created any disciplinary records to document the risks the boys might pose to other students. JA 41.

These failures to document or investigate K.R.'s rape not only contravened the board's own policies, JA 34-35, but also flouted longstanding federal guidance. In 2001, following the Supreme Court's decision in *Davis*, the U.S. Department of Education issued guidance clarifying the scope of schools' obligations to address sexual harassment under Title IX. *See U.S. Dep't of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) ("2001 ED Guidance").[4] The 2001 guidance explicitly stated that "[o]nce a school has notice of possible sexual harassment of students—whether carried out by employees, other students, or third parties—it should take immediate and appropriate steps to investigate or otherwise determine what occurred." *Id.* at 15. The guidance also

[4] *Available at* https://perma.cc/68WW-YF4M. The Department of Education issued additional guidance in 2017 emphasizing that the 2001 ED Guidance remains in effect. *See U.S. Dep't of Educ., Q&A on Campus Sexual Misconduct* 1 (2017), https://perma.cc/9V2P-N2LF.

urged schools to adopt centralized "recordkeeping" practices to "ensure that the school can and will resolve recurring problems and identify students or employees who have multiple complaints filed against them." *Id.* at 21. Although the 2001 ED Guidance did not impose binding requirements on schools, it remains an important tool for assessing the reasonableness of an institution's response to harassment. *See Davis*, 526 U.S. at 647-48 (citing prior version of the 2001 ED Guidance). The board's failure to follow the guidance's clear instructions regarding investigations and recordkeeping thus further underscores the unreasonableness of its response to K.R.'s rape.

The board's record-keeping and investigative failures were compounded by its failure to amend its sexual-harassment training practices after the rape. *Compare* JA 41 ("[The board] did not change any of its policies or provide any additional training to staff after the incident."), *with Hill* 797 F.3d at 975 ("[A] jury might also find it was clearly unreasonable for the Board not to improve its sexual harassment training."), *and* 2001 ED Guidance at 21 ("[A] school must make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment."). Indeed, its decision not to augment its training efforts is particularly indefensible here given the board's knowledge that Southlawn officials ignored the board's existing harassment policies during the incident itself. As noted, Maye blatantly disregarded the board's directive to "promptly notify the school principal" of "acts of bullying or harassment." JA 34. And Vaughn, for his part, failed to investigate Plaintiff's sexual-

harassment complaint and "make a written report [concerning the complaint] to the Chief Academic Officer." JA 34-35.

In any event, the board's failure to address Southlawn's botched response to K.R.'s rape represents merely one aspect of its broader "fail[ure] to take any precautions to prevent future attacks." *Williams*, 477 F.3d at 1297; *see also id.* (highlighting the university's failure to "implement[] a more protective sexual harassment policy to deal with future incidents"). That failure also includes the board's decision not to pursue corrective action against the students who assaulted K.R.—an omission that parallels the university's (post-rape) conduct in *Williams*. In that case, this Court cited the fact that the university had "waited almost eleven months to take corrective action" against the plaintiff's attackers as a basis for holding that the school "acted with deliberate indifference again" in responding to her rape (following its earlier deliberate indifference in failing to prevent the rape, which is discussed *supra* Section I.A). *Id.* The Court explained that this delay allowed the plaintiff's assailants to remain on campus after the attack, "effectively denying [her] an opportunity to continue to attend" school following the assault. *Id.* at 1297.

As in *Williams*, school officials' failure to take timely corrective action in this case enabled K.R.'s assailants to remain at Southlawn and prevented her from returning there. Even if the board was reluctant to impose immediate sanctions on K.R.'s suspected attackers, it should have at a minimum assessed whether the boys posed a continuing threat to other students on campus. *Cf. Broward Cnty.*, 604 F.3d at

1263 (explaining that school districts cannot "satisfy their obligations under Title IX without ever evaluating the known circumstances at all"). Once again, Maye personally witnessed the boys physically "grab[]" K.R. and "drag[]" her into an abandoned building. JA 38. That conduct alone—which, again, met the board's own definition of sexual harassment, *see* JA 33-34—should have triggered a disciplinary inquiry.

K.R.'s decision to change schools after the incident did not relieve the board of its obligation to conduct such an inquiry. Indeed, in *Williams*, this Court held that the plaintiff's decision to withdraw from school after her assault was "reasonable and expected" and could not excuse the university's delay in instituting disciplinary proceedings. *See* 477 F.3d at 1297 ("Although Williams withdrew from UGA the day after the January 14 incident, we do not believe that at this stage her withdrawal should foreclose her argument that UGA continued to subject her to discrimination."); *see also Rost ex rel. K.C. v. Steamboat Springs Sch. Dist.*, 511 F.3d 1114, 1123 (10th Cir. 2008) ("Title IX discrimination can occur even after a student withdraws from school where the university fails to timely respond or take precautions to prevent further attacks."). That logic applies with even greater force here, given that K.R. (unlike the plaintiff in *Williams*) did not withdraw from school altogether but, rather, transferred to another school within the *same* district, where the board owed her an ongoing duty of protection. The board's unwillingness to

undertake any disciplinary inquiry—even a belated one—was therefore especially unreasonable here.

So, too, was the board's failure to offer K.R. any counseling or support following her rape. Several courts have recognized that a school's failure to offer counseling or other support to the victim of a sexual assault may reflect deliberate indifference.[5] The Department of Education, too, has repeatedly stated that Title IX requires schools to not only "tak[e] effective corrective actions to stop [sexual] harassment," but also to "remedy the effects on the victim." 2001 ED Guidance at 12; *accord U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter* (Jan. 25, 2006), https://perma.cc/EMG4-2AV5. These authorities underscore the unreasonableness of the board's decision not to make any efforts to remedy the obvious and foreseeable impact that K.R.s gang rape had on her mental health.

Indeed, board officials had ample reason to know that K.R. was struggling with deep emotional anguish in the wake of the assault. Not only were they aware from

[5] *See, e.g.*, *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 693 (4th Cir. 2018) (citing the fact that the university "could have offered counseling services for those impacted by the targeted harassment," but chose not to do so, as relevant to the deliberate indifference analysis); *Doe v. Russell County Sch. Bd.*, 292 F. Supp. 3d 690, 710 (W.D. Va. 2018) ("[A] jury could conclude that the School Board acted with deliberate indifference to Gobble's confessed abuse of Doe by failing to offer counseling or other remedial measures to Doe."); *S.G. v. San Francisco Unified Sch. Dist.*, No. 17-5678, 2018 WL 1876875, at *7 (N.D. Cal. Apr. 19, 2018) (finding that the plaintiff had stated a valid Title IX claim where, *inter alia*, "the District did not offer counseling services to [the plaintiff] or even assess whether she needed them" and "*no* steps were taken to remedy the *effects*" of her abuse).

her doctor's note (among other sources) that she had been raped—a fact that, by itself, should have prompted offers of counseling or support—but they also knew that she had missed "countless hours of instructional time" as a result. JA 46. Furthermore, Vaughn knew that student gossip about K.R. had reached such a fever pitch that it would have been impossible for her to return to Southlawn without incurring further distress. *See* JA 40. And, most importantly, Vaughn received a doctor's note one week after the incident explicitly identifying K.R.'s ongoing emotional suffering as the reason for her prolonged absence. *See* JA 40. Nonetheless, despite the board's access to all of that information, it never once "reached out to K.R. during her absence," "offer[ed] counseling," or took "any other steps to assist her in dealing with her grief." JA 40.

The board's purported justification for refusing to pursue any remedial or corrective measures here only reaffirms that its response to K.R.'s allegations was "clearly unreasonable." *Davis*, 526 U.S. at 648. As the district court noted, the board sought to justify its half-hearted response to the 2014 incident by relying on the police's determination that the incident involved "consensual sex." JA 14-15. But the board had several reasons to question the accuracy of that determination in light of what Maye himself witnessed, what K.R.'s stepsister told him on the day of the attack, and the doctor's note Vaughn received one week later. More importantly, the board had ample reason to recognize the legal impossibility of the police's determination in light of K.R.'s age: as any board member would have known, K.R. was too young to

consent as a matter of Alabama law. *See* Ala. Code § 13a-6-70(c) ("A person is deemed incapable of consent if he is . . . [l]ess than 16 years old."); *see also infra* Section II.C (explaining why the police's "consensual sex" determination does not insulate the board from liability).

Viewed as a whole, the board's apathetic response to K.R.'s rape fails to satisfy even the minimal burdens that *Davis* imposes on Title IX funding recipients. Thus, while the "deliberate indifference standard" may be "rigorous and hard to meet," *Hill*, 797 F.3d at 975, the board's steadfast inaction in the wake of K.R.'s rape satisfies that standard.

C. The district court failed to construe all facts in Plaintiff's favor.

The district court's rejection of Plaintiff's deliberate-indifference claim stemmed, in part, from its failure to construe several important facts in her favor. In particular, the court chose to examine various aspects of the board's response to K.R.'s rape in isolation, rather than reviewing the board's conduct as a whole. That approach—which stands in stark contrast to the holistic analysis this Court performed in *Hill* and *Williams*[6]—ultimately served to downplay several troubling facts in Plaintiff's complaint.

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[6] *See Hill*, 797 F.3d at 975 ("[T]he *cumulative events and circumstances* here, viewed in the light most favorable to Doe, are enough to establish deliberate indifference under Title IX." (emphasis added)); *Williams*, 477 F.3d at 1297 ("*Placed together*, Williams's allegations that she faced several forms of harassment and that UGA and

For example, the court discounted Vaughn's insensitive remarks about K.R.'s body on the day of the rape, reasoning that his "offensive comments" did not "transform the Board's reasonable response into deliberate indifference." JA 16 (quotation marks and citation omitted). But Vaughn's comments about K.R.'s body cannot be viewed in a vacuum. Rather, they must be viewed in light of what preceded them (i.e., an assistant principal's failure to stop the rape of one of his students) and what followed them (i.e., the board's failure to take any corrective or remedial actions). Moreover, they must be assessed against the backdrop of the broader conversation in which they arose—a conversation in which Vaugh tried to dissuade Plaintiff from telling the media what happened to her daughter. *See* JA 39. Viewed in that context, Vaughn's comments fit into a larger pattern of callousness and provide important evidence of deliberate indifference.

The court's fragmented analysis of the facts also glossed over the board's prior failure to investigate complaints of sexual harassment against a Southlawn teacher. *See* JA 36-37. Specifically, the court discounted the board's previous investigative failures because the earlier complaints did not involve student-on-student harassment and were about "inappropriate touching, comments, and requests—not rape." JA 17. But, even if the complaints against the teacher failed to presage the specific attack on K.R., the board's response to those complaints still remains relevant. In particular,

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UGAA repeatedly responded with deliberate indifference are sufficient to meet Williams's burden on a motion to dismiss." (emphasis added)).

the board's delay in responding to those complaints suggests that its response to K.R.'s rape allegations might have been part of a broader pattern of ignoring harassment complaints. And it also suggests that Vaughn, in particular, might have had a history of shirking his investigative obligations. Thus, even if the board's lax response to the prior complaints does not constitute deliberate indifference in itself, it still bears on whether the board's response to Plaintiff's complaint in this case was "clearly unreasonable." The district court therefore erred by failing to properly consider that history.

The district court also erred by drawing factual inferences in favor of the board. The court went out of its way, for instance, to rationalize Vaughn's decision not to investigate even after he learned of rumors suggesting that K.R. had, in fact, been gang-raped. The court explained that Vaughn's inaction was reasonable because, "at that point, the police had already determined that K.R. was not raped." JA 17. But the complaint never actually states when the police made that determination, nor when school officials learned of it. *See* JA 39. The court simply assumed—without any basis in the record—that the timing of those events excused Vaughn's inaction.

Even more distressingly, the court wrote off entirely the possibility that Vaughn might have actually believed some of his students' statements about the incident itself. In the court's view, Vaughn's decision to tell Plaintiff that many students believed three boys had "run a train" on her daughter could not be read to suggest that "Vaughn believed the gossip" because "he could have been trying to

protect K.R. from false rumors." JA 17. But the court's role at the pleading stage is not to speculate about the benevolent motives that might explain a defendant's actions. On the contrary, the court's role is to refrain from doing exactly that. *See Magluta v. Samples*, 375 F.3d 1269, 1276 (11th Cir. 2004) ("Probably the most crucial factor pertinent to this claim is the Rule 12(b)(6) posture. In this posture, we must take all reasonable inferences in favor of the plaintiff."). By ignoring that well-established standard for reviewing a plaintiff's factual allegations, the district court fatally undermined its deliberate-indifference analysis.

II. The district court erred in holding that the school's call to the police insulated the school board from Title IX liability.

A. Assistant Principal Maye's deliberately indifferent conduct occurred before the call was made to the police.

The district court held that the school board did not act with deliberate indifference in this case because Principal Vaughn reported K.R.'s rape to the police, who "deemed the rape 'consensual sex.'" JA 14 (quotation marks omitted); *see also id.* (concluding that the police's determination "keeps the Board from being liable here"). The district court's reasoning, however, overlooks a key fact about the call to the police itself: namely, that it came only *after* the school's assistant principal declined multiple opportunities to stop the rape from happening in the first place.

As previously noted, in a typical student-on-student sexual assault case, the plaintiff seeks to establish that her school was deliberately indifferent in responding to her assault after it occurs. *See supra* p. 13. But schools may also incur liability under

Title IX if their deliberate indifference "preceded, and proximately caused [the plaintiff's] sexual assault." *Williams*, 477 F.3d at 1305 (Jordan, J., concurring); *see also Simpson*, 500 F.3d at 1178 (recognizing that Title IX liability may arise where the plaintiff's harassment "is caused by" the school's deliberate indifference). In those cases, where a school's deliberately indifferent conduct *precedes* the plaintiff's assault, the school cannot cure its deliberate indifference merely by calling the police *after* it learns of the assault.

This Court recognized as much in *Williams*. There, the plaintiff's deliberate-indifference claim rested on the university's failure to supervise its student-athletes or provide them with adequate sexual-harassment training. *See* 477 F.3d at 1296-97; *supra* pp. 13-15. This Court found those failures—which arose from the university's actions (or inaction) *before* the plaintiff's assault—sufficient to establish deliberate indifference under Title IX. *See id.* Critically, the Court reached that conclusion even though campus police had been called to investigate the plaintiff's rape almost immediately after it occurred. *See id.* at 1288-89. *Williams* thus shows that relying on police assistance *following* a campus rape does not automatically insulate a school from liability for its conduct *preceding* the rape. *Accord Simpson*, 500 F.3d at 1173 (holding that two college students, who immediately called the police after being raped by a group of university football players and recruits, could establish deliberate indifference based on the school's failure to monitor its recruits prior to the rape); *Annamaria M. v. Napa Valley Unified Sch. Dist.*, No. 03-0101, 2006 WL 1525733, at *5 (N.D. Cal. May

30, 2006) ("To be sure, further action (referring the matter to law enforcement) was later taken. But that does not mean any deliberate indifference on her part in the meantime could not give rise to Title IX liability.").

The result in *Williams* accords with common sense. After all, if educational institutions could avoid Title IX liability merely by reporting incidents of sexual assault to law enforcement after the fact, they would be less inclined to adopt safeguards to protect against such assaults in the first place. Such a result would run counter to the basic purpose of Title IX.

For similar reasons, allowing school officials to cure their earlier misconduct with a belated phone call to the police would conflict with broader Title IX principles. As several circuits have recognized, the timing of a school's efforts to address sexual harassment can be critically important in determining whether the school's actions were "clearly unreasonable" under *Davis*. *See, e.g.*, *I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 376 (5th Cir. 2019) ("[A] delay in instituting remedial actions may constitute deliberate indifference under Title IX."); *Hayut v. State Univ. of New York*, 352 F.3d 733, 751 (2d Cir. 2003) ("Deliberate indifference may be found . . . when remedial action only follows after 'a lengthy and unjustified delay.'" (citations omitted)); *Wills v. Brown University*, 184 F.3d 20, 26 (1st Cir. 1999) (noting that Title IX requires institutions to "take[] timely and reasonable measures to end the harassment"). These precedents show that actions that might have been reasonable if taken at Time 1 will not necessarily be reasonable if taken at Time 2—especially when the delay permits a

preventable tragedy to occur in the interim. By ignoring the timing of the school's call to the police in this case (which came *after* a school administrator saw the attack on K.R. begin and chose not to stop it), the district court's decision contravenes that basic proposition.

B. Neither the call to the police, nor the police's "consensual sex" finding, relieved the board of its other obligations under Title IX.

Even setting aside the belated timing of Principal Vaughn's call to the police, the district court's reliance on the call is flawed for a more fundamental reason: it conflicts with settled authority recognizing that "turning a sexual-assault investigation over to local law enforcement does not necessarily shield school officials from Title IX liability." *Doe v. Bibb County School District*, 688 F. App'x 791, 799-800 (11th Cir. 2017) (Martin, J., concurring).

Many courts—including this one—have recognized that a school may be held liable for deliberate indifference to sexual harassment in cases where school officials have reported the harassment to the police.[7] Although these cases acknowledge that

[7] *See, e.g.*, *Cavalier v. Catholic University of America*, 306 F. Supp. 3d 9, 17 (D.D.C. 2018) (finding that college student had stated a valid deliberate-indifference claim based on university's deficient response to her sexual-assault allegations, even though university officials notified police as soon as they learned of the allegation); *Doe v. University of Alabama in Huntsville*, 177 F. Supp. 3d 1380, 1384 (N.D. Ala. 2016) (finding that the plaintiff had adequately pled deliberate indifference by pointing to deficiencies in university disciplinary process, even though police had investigated her allegations); *Doe v. Forest Hills School District*, No. 13-cv-428, 2015 WL 9906260, at *10 (W.D. Mich. Mar. 31, 2015) (finding allegations of delayed school investigation

police can play an important role in investigating campus sexual assaults, they also implicitly recognize that Title IX often imposes other (non-investigative) duties on schools that police cannot perform. *See, e.g.*, *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000) ("If this Court were to accept [the defendant]'s argument, a school district could satisfy its obligation where a student has been raped by merely investigating and absolutely nothing more. Such minimalist response is not within the contemplation of a reasonable response."). Depending on the nature of the underlying harassment, for instance, a school may need to offer counseling to affected students, increase its supervision over certain student groups, or revise its sexual-harassment training policies. *See* 2001 ED Guidance 12-13, 21; *supra* Section I.B. These responsibilities cannot simply be outsourced to law-enforcement officials.

This Court's decisions in *Hill* and *Williams* are instructive on this point. In both cases, the police responded promptly to investigate reports that the plaintiff had been sexually assaulted by other students. *Hill*, 797 F.3d at 964 (indicating that police spoke to the plaintiff on the day of the assault); *Williams*, 477 F.3d at 1289 (noting that police responded on the night of the plaintiff's assault). And, in both cases, this Court held that school officials nevertheless had acted with deliberate indifference in responding to the assaults. *See supra* Section I.B (discussing the Court's post-rape deliberate-indifference analysis in each case). The fact that both schools had diligently

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sufficient to support deliberate-indifference finding, even though school called police immediately upon learning of assault).

cooperated with law enforcement, in short, did not relieve them of their other Title IX responsibilities (such as creating and preserving disciplinary records in *Hill* or instituting timely disciplinary proceedings in *Williams*).

The outcomes of these cases are not surprising. After all, police investigations are not designed to vindicate the same goals as Title IX. Whereas Title IX seeks to eradicate sex-based discrimination in education, police investigations aim to uncover violations of criminal statutes—most of which have no overriding antidiscrimination purpose. Thus, many behaviors that would ordinarily trigger a Title IX response (e.g., disseminating sexist literature on a college campus) do not trigger police investigations. And, by the same token, many behaviors that might trigger police investigations (e.g., robbery) do not trigger a Title IX response.

Moreover, police investigations typically apply different standards of proof and produce different disciplinary outcomes than Title IX inquiries. That's why the failure of law-enforcement officials to charge or obtain convictions of most of the assailants in both *Hill* and *Williams* did not absolve the schools in those cases of their duties to independently pursue disciplinary measures against those individuals. *See Hill*, 797 F.3d at 964 (noting that the "District Attorney's Office never filed charges" against the plaintiff's rapist); *Williams*, 477 F.3d at 1297 (noting that the university did not institute disciplinary proceedings for "another four months after [one student-athlete]'s acquittal and the dismissal of charges against [two others]"). It is also why the Department of Education has long made clear that "police investigations or

reports may not be determinative of whether harassment occurred under Title IX and do not relieve [a] school of its duty to respond promptly and effectively." 2001 ED Guidance at 21.[8]

These authorities highlight the folly of the district court's conclusion that the school board could treat the police investigation of K.R.'s assault as a substitute for its own Title IX response. The court found that "it was not clearly unreasonable for the Board to act as if they had no further obligation to report or investigate the rape claim" once the police had determined that the incident involved consensual sex. JA 15; *see also id.* (concluding that the board's failure to take any corrective actions did not "make[] the Board deliberately indifferent given that the police found that K.R. had not been raped"). But even a basic Title IX investigation requires more than just a narrow inquiry into the question of consent. After all, a determination that a student was not forcibly raped does not mean that the student did not suffer any other forms of sexual harassment. Similarly, the fact that a given sexual encounter was consensual does not mean it was reasonable for school officials to allow the encounter to occur

[8] *Available at* https://perma.cc/68WW-YF4M. The agency reiterated this position in a 2011 guidance document, which was still in effect at the time of the 2014 assault on K.R. *See U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter* 10 (Apr. 4, 2011) ("[A] criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably."), https://perma.cc/A7TG-67QE. Although the agency rescinded the 2011 guidance in 2017, it expressly preserved the 2001 ED Guidance, as noted above. *See supra* p. 21 n.4.

on campus—especially in a middle-school setting. In short, Title IX directs schools to concern themselves with more than just the narrow question of consent.

That is especially true here, given that K.R. was below the legal age of consent at the time of the 2014 incident. As noted above, Alabama law explicitly provides that a "person is deemed incapable of consent if he is . . . [l]ess than 16 years old." Ala. Code § 13a-6-70(c). Given the board's knowledge that middle-schoolers are younger than sixteen, its deference to the police's consent determination was patently unreasonable here. Accordingly, the district court's conclusion that "it was not clearly unreasonable for the Board to act as if they had no further obligation to report or investigate the rape claim" is plainly untenable.[9]

C. Even if it were reasonable for the board to rely on the police's "consensual sex" finding, the board's failure to take remedial action would still constitute deliberate indifference.

As explained, school board officials had ample reason to doubt the police's determination that the October 2014 incident involved "consensual sex." *See supra* pp. 26-27. They knew, for instance, that multiple witnesses—including Maye—saw K.R. being grabbed and dragged into an abandoned building by three male students.

[9] Notably, K.R.'s attackers were also under the age of sixteen at the time of the October 2014 incident and, therefore, could not be convicted of statutory rape under Alabama law. *See* Ala. Code § 13a-6-61(a)(3) (requiring that a person be "16 years old or older" to be guilty of first-degree statutory rape); *id.* § 13a-6-62(a) (same for second-degree statutory rape). This is likely why law-enforcement officials did not pursue statutory-rape charges against K.R.'s attackers, despite the fact that she was under age.

They knew that K.R. experienced severe post-traumatic stress immediately after the event and that many of her peers believed that she had been raped. And they knew that K.R. was below the legal age of consent in Alabama. That information should have made clear to board officials that the police's "consensual sex" finding did not relieve them of their obligation to pursue corrective actions of their own. *See Broward Cnty.*, 604 F.3d at 1262 (explaining that a "reasonable response" to an "inconclusive" investigation typically includes taking additional corrective measures).

But even if the board had *no* reasons for questioning the outcome of the police investigation, its failure to take remedial actions would have still been unreasonable here. During the weeks and months after the incident, school officials became aware that K.R. was dealing with intense post-traumatic stress, which was compounded by her mid-year transfer to a new school and the torment she faced there. Even if school officials did not believe that her distress was the result of a forcible gang rape, they still knew that her suffering was the result of peer harassment and, thus, remained obligated to "remedy the effects on [her]." 2001 ED Guidance at 12; *see also supra* pp. 25-26 & n.5 (discussing schools' duty to remedy the effects of harassment). Their unwillingness to offer her any support or counseling would therefore provide an independent basis for deliberate indifference liability, regardless of whether or not the incident itself involved consensual sex.

The same goes for the board's failure to amend its sexual-harassment policies and training practices. Even if the board had accepted the police's consent finding, it

should have still implemented certain changes to remedy the obvious oversights in Southlawn's handling of the incident. Indeed, even under the police's version of events, a high-ranking school official watched four children enter an abandoned building together and, after being told that they were going to engage in sexual activity, declined to intervene. The students—all of whom were under age—then engaged in "consensual sex," while on campus. And, when the principal learned of the incident, he responded by trying to prevent the media from learning about the incident and making inappropriate comments about the only female student involved. Even under that sanitized (and legally impossible) version of events, the board's unwillingness to change its policies or training practices was clearly unreasonable.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, with instructions to reinstate all of Plaintiff's claims.

Respectfully submitted,

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APRIL 19, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 10,190 words and was prepared in fourteen-point Garamond font, a proportionally spaced typeface, using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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ADDENDUM OF KEY STATUTES

TABLE OF CONTENTS

20 U.S.C. § 1681. Sex.

(a) Prohibition against discrimination; exceptions

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

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and

continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal

appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

Ala. Code § 13a-6-70. Lack of Consent.

(a) Whether or not specifically stated, it is an element of every offense defined in this article, with the exception of subdivision (a)(3) of Section 13A-6-65, that the sexual act was committed without consent of the victim.

(b) Lack of consent results from:

(1) Forcible compulsion; or

(2) Incapacity to consent; or

(3) If the offense charged is sexual abuse, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

(c) A person is deemed incapable of consent if he is:

(1) Less than 16 years old; or

(2) Mentally defective; or

(3) Mentally incapacitated; or

(4) Physically helpless.