IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10815

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

Appellant,

v.

TRAMENE MAYE, et al.,

Appellees

Appeal from the United States District Court
for the Middle District of Alabama, Northern Division
District Court Docket No. 2:15-cv-924-WKW

BRIEF OF APPELLEE MONTGOMERY COUNTY BOARD OF EDUCATION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to *Federal Rules of Civil Procedure*, Rule 26.1, and the *Federal Rules of Appellate Procedure*, Rule 26.1-1, Appellee Montgomery County Board of Education certifies as follows:

A. Pursuant to *Federal Rule of Appellate Procedure 26.1* and the Eleventh Circuit *Rules 26.1-1, 26.1-2, and 26.1-3*, Appellee Montgomery County Board of Education ("Board") submits the following list of persons or entities which, upon information and belief of the undersigned attorney for the Board, have or may have an interest in the outcome of this case:

1. Ball, Ball, Matthews & Novak, P.A. - Counsel for Defendant/Appellees Vaughn and Maye

2. Clarkson, Abigail H. - Counsel for Plaintiff/Appellant Stinson

3. * Geltzer, Joshua A. - Counsel for Plaintiff/Appellant Stinson

4. * Hill, Dana B. - Counsel for Defendant/Appellee Montgomery County Board of Education

5. Hill, Hill, Carter, Franco, Cole & Black, P.C. - Counsel for Defendant/Appellee Montgomery County Board of Education

6. Institute for Constitutional Advocacy & Protection at Georgetown University Law Center - Counsel for Plaintiff/Appellant Stinson

7. Georgetown University Law Center - Affiliated Home of the Institute for Constitutional Advocacy & Protection at Georgetown University Law Center

8. Lloyd & Hogan - Counsel for Plaintiff/Appellant Stinson

9. Marks, Emily C. - Former Counsel for Defendants/Appellees Vaughn and Maye

10. * Marsh, John W. - Counsel for Defendants/Appellees Vaughn and Maye

11. Maye, Tramene - Defendant/Appellee

12. * McCord, Mary B - Counsel for Plaintiff/Appellant Stinson

13. Montgomery County Board of Education - Defendant/Appellee

14. Perkins, Vernetta Rochelle - Former Staff Attorney for Defendant/Appellee Montgomery County Board of Education

15. Riley, Nicolas Y. - Counsel for Plaintiff/Appellant Stinson

16. Seale, James R. - Counsel for Defendant/Appellee Montgomery County Board of Education

17. Stinson, Arvilla - Plaintiff/Appellant

18. Vaughn, Rafiq - Defendant/Appellee

19. * Walker, Hon. Susan R. (Magistrate Judge)

20. Watkins, W. Keith - United States District Judge, Middle District of Alabama

B. Appellee Montgomery County Board of Education is a governmental entity of the State of Alabama. It has no parent companies or subsidiaries to report. Appellant Arvilla Stinson is an individual.

Respectfully submitted,

/s/ Dana Bolden Hill
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested.

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INTRODUCTION

Make no mistake about it. The allegations asserted in this matter are, at once, disheartening and horrifying. On the one hand, they suggest middle school students are willingly engaging in promiscuous, sexual activity on any given day after school. On the other hand, they also suggest a middle school girl is subject to being ambushed and gang raped by her peers while walking home from school. Now, this Court must determine whether Stinson's allegations sufficiently demonstrate the Board's response to an incident involving sex and middle school students and *occurring outside of school hours* and in an abandoned building *not alleged to be owned by the Board* was clearly unreasonable in light of the known circumstances. After a thorough analysis, the district court correctly determined Stinson simply "does not adequately allege that the Board was deliberately indifferent to student-on-student sexual harassment" so as to violate Title IX. (Doc. 48, pp. 14-15; JA17-18). The Montgomery County Board of Education respectfully requests this Court affirm the decision of the lower court.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT PROPERLY HELD THE MONTGOMERY COUNTY BOARD OF EDUCATION'S RESPONSE TO THE ALLEGED HARASSMENT OF K.R. WAS NOT CLEARLY UNREASONABLE IN LIGHT OF KNOWN CIRCUMSTANCES?

II. WHETHER THE DISTRICT COURT PROPERLY DETERMINED THE MONTGOMERY COUNTY BOARD OF EDUCATION WAS NOT DELIBERATELY INDIFFERENT TO STUDENT-ON-STUDENT SEXUAL HARASSMENT SO AS TO VIOLATE TITLE IX?

III. WHETHER THE MONTGOMERY COUNTY BOARD OF EDUCATION'S RESPONSE TO AN ALLEGED SINGLE INSTANCE OF HARASSMENT OF K.R., WHICH THE DISTRICT COURT DETERMINED NOT TO BE DELIBERATELY INDIFFERENT AS A MATTER OF LAW, YIELDED THE SYSTEMIC EFFECT OF DENYING K.R. EQUAL ACCESS TO ITS EDUCATIONAL PROGRAMS?

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Arvilla Stinson, as next friend of K.R., a minor, filed a *Complaint* against the Montgomery County Board of Education (hereinafter "Board"), former Assistant Principal Tramene Maye, former Principal Rafiq Vaughn and a fictitious defendant coach on December 15, 2015. (Doc. 1, pp. 1-23; JA 99-121). Tramene Maye and Rafiq Vaughn filed their *Motion to Dismiss* on January 7, 2016. (Doc. 9, pp. 1-3; JA 96-98). The Montgomery County Board of Education filed its *Motion to Dismiss* on January 7, 2016. (Doc. 7, pp. 1-8; JA 88-95).

Stinson filed her *First Amended Complaint* on September 27, 2016. (Doc. 21, pp. 1-23; JA 64-86). Maye and Vaughn filed a *Motion to Dismiss* the *First Amended Complaint* on October 11, 2016. (Doc 22, pp. 1-2; JA 62-63). The Board of Education filed a *Renewed Motion to Dismiss* on October 13, 2016. (Doc. 27-1, pp. 1-4; JA 58-61). The district court entered an Order on August 30, 2017 granting Stinson's *Motion for Leave to Amend* and denying the pending *Motions to Dismiss*. (Doc. 32, pp. 1-6; JA 52-57).

Stinson then filed a *Second Amended Complaint* on September 11, 2017. (Doc. 33, pp. 1-21; JA 31-51). Maye and Vaughn filed a *Motion to Dismiss the Second Amended Complaint* on September 25, 2017. (Doc. 34, pp. 1-2; JA 29-30). The Board of Education filed a *Motion to Dismiss the Second Amended Complaint* on September

25, 2017. (Doc. 36, pp. 1-4; JA 25-28).

The district court entered its *Memorandum Opinion and Order* on February 5, 2019. (Doc. 48, pp. 1-19; JA 4-19). The district court also entered its *Final Judgment* on February 5, 2019. (Doc. 49; JA 3). Stinson filed her *Notice of Appeal* with this Court on March 4, 2019. (Doc. 50, pp. 1-2; JA 1-2). On April 19, 2019, Stinson filed her principal brief on appeal.

B. STATEMENT OF RELEVANT FACTS

Arvilla Stinson is the mother and next friend of K.R., a minor and former student of Southlawn Middle School. (Doc. 33, pp. 2, 7; JA 32, 37). Montgomery County Board of Education ("Board") is a school district organized and existing under the laws of Alabama with the Southlawn Middle School under its operation. (Doc. 33, p. 2; JA 32). Tramene Maye, at all relevant times, was the assistant principal at Southlawn Middle School. (Doc. 33, p. 7; JA 37). Rafiq Vaughn, at all relevant times, was the principal at Southlawn Middle School. (Doc. 33, p. 7; JA 37).

On or about October 23, 2014, K.R. was walking off the campus of the Southlawn Middle School at the end of the school day. (Doc. 33, p. 8; JA 38). Stinson alleges a group of three boys then grabbed K.R. and dragged her into an abandoned building on the perimeter of the school property. (Doc. 33, p. 8; JA 38). The three boys also attended Southlawn Middle School. (Doc. 33, p. 11; JA 41). K.R.'s stepsister, who had been walking with K.R., alerted Assistant Principal Maye. (Doc.

33, p. 8; JA 38). Maye allegedly saw the three boys grabbing and dragging K.R. (Doc. 33, p. 8; JA 38). K.R. later claimed she was "gang raped" by two of the boys while the third boy kept a lookout. (Doc. 33, p. 8; JA 38).

Parent Stinson, who was already at Southlawn Middle that day participating in a parent-teacher meeting with K.R.'s teachers, was promptly notified about the incident. (Doc. 33, p. 8; JA 38). Stinson reported to Principal Vaughn's office to discuss the alleged sexual assault. (Doc. 33, p. 8; JA 38). Principal Vaughn immediately contacted the local police, who later deemed the incident as involving "consensual sex." (Doc. 33, p. 9; JA 39).

Following the October 2014 incident, K.R. only missed approximately 7-8 days of school. (Doc. 33, p. 9; JA 39). K.R. was granted a transfer to a different school within the Board's system. (Doc. 33, p. 10; JA 40).

The Board's Handbook ("Handbook") contains grievance procedures for discrimination, including Title IX, ADA, Title VI, and Section 504. (Doc. 33, p. 3; JA 33). The Handbook provides for an informal investigation of any suspected Title IX violation. (Doc. 33, p. 3; JA 33). The Handbook contains provisions for bullying and harassment among students. (Doc. 33, p. 3; JA 33). "Harassment" includes, but is not limited to, subjecting another student to physical contact. (Doc. 33, p. 3; JA 33). "Sexual harassment" includes unwelcome touching or other inappropriate physical acts of a sexual nature toward a student in school. (Doc. 33, p. 4; JA 34). The

Handbook states that any teacher or school staff who witnesses or receives reports regarding acts of bullying or harassment should promptly notify the school principal or his/her designated staff. (Doc. 33, p. 4; JA 34). The principal or his/her designee is required to notify the parent or guardian of a student who commits a verified act of harassment or bullying of the response of the school staff and consequences of the verified act and/or the consequences that may result from further acts of bullying. (Doc. 33, p. 4; JA 34).

* All record references are to district court document numbers and reciprocal reference to the same document at the *Joint Appendix.*

SUMMARY OF THE ARGUMENT

Our United States Supreme Court has noted the inherent unfairness in holding a school district liable for the misconduct of others without actual notice to a responsible school official, further frustrating the purposes of Title IX. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). The district court properly determined Stinson's *Second Amended Complaint* fails to allege sufficient facts demonstrating the Montgomery County Board of Education, through its administrators, acted with deliberate indifference to the alleged assault against student K.R. Additionally, Stinson failed to allege sufficient facts showing the alleged sexual assault of student K.R. or the Board's response to the alleged sexual assault deprived K.R. of access to the educational opportunities and benefits provided by the Montgomery County Board of Education.

The district court properly concluded, as a matter of law, that it was not clearly unreasonable for the Board to act as if it had no further obligation to report or investigate the alleged rape claim once the police cleared K.R.'s alleged attackers. The relevant inquiry is not whether the Board's officials reached the correct conclusion but whether they acted with deliberate indifference. *See Sauls v. Pierce County Sch. Dist.*, 399 F.3d 1279, 1285 (11th Cir. 2005). Here, the Board was not deliberately indifferent after the alleged attack took place. *See Davis,* 526 U.S. at 648. The allegations of the *Second Amended Complaint* demonstrate Principal Vaughn

immediately contacted the local authorities, met with Stinson to discuss the incident, and K.R. continued her education at another school within the district after a transfer, upon her request. Based upon the foregoing, the Montgomery County Board of Education could not have been found to have acted with deliberate indifference whereas its response to the alleged harassment was not "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648.

Our Supreme Court has noted that district courts can find a funding recipient's response as "not clearly unreasonable" as a matter of law and dispose of a Title IX claim on a motion to dismiss. *Davis*, 526 U.S. at 649. The district court reached the appropriate finding in the case at bar and properly disposed of Stinson's Title IX claim in granting the Board's *Motion to Dismiss*. (Doc. 48, p. 15; JA 18). Based upon the foregoing, the district court properly held that the Board's response was not deliberately indifferent as a matter of law. (Doc 48, pp. 1-16; JA 4-19). The Montgomery County Board of Education is entitled to dismissal and a ruling by this Court affirming the lower court's decision.

ARGUMENT

Stinson's Title IX claim was properly dismissed under Rule 12(b)(6) of the *Federal Rules of Civil Procedure* for failure to state a claim upon which relief could be granted. *Fed.R.Civ.P. 12(b)(6)*. In the proceedings below, the district court reviewed the legal sufficiency of Stinson's Title IX claim against the Board of Education and assumed "the truth of the material facts as alleged in the Complaint." *See Davis v. Monroe Co. Bd. of Educ.,* 526 U.S. 629, 632 (1999)(*citing Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 325, 111 S.Ct. 1482 (1991). On appeal, this Court reviews *de novo* the dismissal of a claim under *Federal Rule of Civil Procedure 12(b)(6)*. *Caver v. Cent. Ala. Elec. Coop*, 845 F.3d 1135, 1147 n.9 (11th Cir. 2017).

I. THE DISTRICT COURT PROPERLY HELD THE MONTGOMERY COUNTY BOARD OF EDUCATION'S RESPONSE TO THE ALLEGED HARASSMENT OF K.R. WAS NOT CLEARLY UNREASONABLE IN LIGHT OF KNOWN CIRCUMSTANCES.

As this Court is aware, our Supreme Court has recognized an implied private right of action for money damages against a school board exists under Title IX. *See Franklin v. Gwinnett Co. Public Schs.*, 503 U.S. 60, 112 S.Ct. 1028 (1992). In relevant part, Title IX provides:

> 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).

However, only where a school board, as a recipient of federal funding, is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school, will a Title IX damages action lie against the recipient. *Davis*, 526 U.S. 629 (1999). Certainly, "the deliberate indifference standard is a high one. Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference . . ." *Doe v. Sch. Bd. of Broward County, Fla.*, 604 F.3d 1248, 1259 (11th Cir. 2010)(*citing Doe on behalf of Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998)). Indeed, the standard for deliberate indifference under a Title IX analysis is "stringent," "rigorous," "exacting" and "hard to meet." *Hill v. Cundiff*, 797 F.3d 948, 975 (11th Cir. 2015); *Doe v. Sch. Bd. of Broward County*, 604 F.3d 1248, 1259 (11th Cir. 2010). Here, Stinson failed to allege facts demonstrating "an official decision by the Board not to remedy the alleged violation." *See Davis*, 526 U.S. at 642 (*citing Gebser*, 524 U.S. at 290).

A. The District Court Properly Determined the Montgomery County Board of Education Was Not Deliberately Indifferent to Student-on-Student Sexual Harassment So as to Violate Title IX.

The lower court rightly concluded the Board cannot be held responsible for the

alleged sexual harassment of K.R. because the Board, through its officials, were not deliberately indifferent. (Doc. 48, pp. 10-18; JA 13-18). "A court confronted with a private damages action under Title IX must answer two questions: (1) was the school board deliberately indifferent to sexual harassment about which it had knowledge; and (2) was the sexual harassment so severe, pervasive and objectively offensive that it can be said to have systemically deprived the victims of access to the educational opportunities of the school?" *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279, 1285 (11th Cir. 2003). In *Davis*, the Supreme Court explained a school board may be deemed "deliberately indifferent" to acts of student-on-student harassment only where the board's response to the harassment or lack thereof is "clearly unreasonable" in light of the known circumstances. *Davis*, 256 U.S. at 648, 119 S.Ct. at 1674. This evaluation tool is not a mere "reasonableness" standard or a failure to use reasonable care standard similar to negligence. *Id.* at 649, 119 S.Ct. at 1674. "In an appropriate case," noted by the Court, "there is no reason why courts, on a motion to dismiss, or for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law." *Id.*

Here, the Board was not deliberately indifferent to a purported act of student-on-student harassment of which it had actual knowledge. The allegations of the *Second Amended Complaint* show the Board did not "remain idle in the face of known student-on-student harassment in its schools." *Davis*, 526 U.S. at 641. This

Court has noted that the "deliberate indifference issue is intertwined with the question of notice since whether the Board's actions were clearly unreasonable must be measured by what was known." *Hawkins*, 322 F.3d at 1287. This Court has provided guidance as to what constitutes adequate notice in a Title IX sexual harassment case. In *J.F.K. v. Troup County School District*, a teacher-student sexual harassment case, this Court held that, although the principal knew that the teacher's conduct toward the student plaintiff was "inappropriate, unprofessional and immature," the principal had no knowledge that the conduct was of a sexual nature. This Court thereby determined that the principal's knowledge of the inappropriate conduct was not enough to put the principal on actual notice that there was a risk of sexual harassment. *J.F.K. v. Troup County Sch. Dist.*, 678 F.3d 1254, 1255-56, 1260-61 (11th Cir. 2012).

In the case at bar, this Court must consider what was known by the Board's officials, Principal Vaughn and Assistant Principal Maye, on or about October 23, 2014. Here, there were no prior complaints or allegations of sexual harassment of K.R. or by the unidentified "three boys" as set forth in the *Second Amended Complaint*. Stinson claims that K.R.'s stepsister had been walking off campus with K.R. when she (K.R.) was allegedly grabbed and dragged into an abandoned building "on the perimeter of the school property." *Second Amended Complaint* (Doc. 33, p. 8; JA 38). Stinson does not allege what specifically was told by K.R.'s stepsister to Assistant Principal Maye to alert him about the incident. (See JA 38). According to

Stinson, Assistant Principal Maye saw the three boys pull K.R. into an abandoned building. (See Doc. 33, p. 8; JA 38). There are no allegations that Assistant Principal Maye witnessed the alleged sexual assault take place.

Our Supreme Court has noted a school district may not be liable for damages unless its deliberate indifference "subjects its students to harassment, *i.e.*, at a minimum, cause the students to undergo harassment or makes them liable or vulnerable to it." *Davis*, 526 U.S. at 630. More importantly, the alleged harassment must occur "under" the operations of a recipient of federal funds. See 20 U.S.C. §§1681(a), 1687. Taken in a light most favorable to Stinson, the alleged gang rape of K.R. did not take place in a context which was subject to the Board's control. As alleged, the incident occurred after school and after K.R. walked off of the Southlawn Middle School campus at the end of the school day. (See Doc. 33, p. 8; JA 38). According to Stinson, the location of where K.R. was allegedly sexually assaulted occurred in "an abandoned building on the perimeter of the school property." (See Doc. 33, p. 8; JA 38). There are no allegations that this "abandoned building" was operated, owned or controlled by the Montgomery County Board of Education. The allegations themselves do not clearly establish that the abandoned building was physically located on the campus of the Southlawn Middle School. *See Id.* There are absolutely no allegations that K.R. or the unidentified boys referenced in the *Second Amended Complaint* were engaged in any extracurricular activities under the control

and operation of the Board at the time K.R. was purportedly attacked.

"The harassment must take place in a context subject to the school district's control. These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercised the substantial control over both the harasser and the context in which the known harassment occurs." *Davis*, 526 U.S. at 630. The alleged attack of K.R. was not under the Board's control. Without belaboring the point, the alleged misconduct here did not occur during school hours and the conduct did not occur within the context of a school activity. The allegations do not clearly establish that the incident which made the basis of the *Second Amended Complaint* occurred on school grounds or in a Board-owned building. The allegations simply do not establish that the Board retained substantial control over the incident upon which Stinson seeks to impose liability against the Board under Title IX.

As noted by the district court, deliberate indifference "is the most important element here." (Doc. 48, p. 10; JA 13). Deliberate indifference requires "an official decision by the board not to remedy the violation." *Davis*, 526 U.S. at 642 (*quoting Gebser v. Lago Vista Indep. Sch. Dist*, 524 U.S. 274, 290 (1998). (Doc. 48, p. 10; JA 13). Thus, Stinson's contention that the Board was deliberately indifferent in failing to investigate the alleged gang rape of K.R. after the police determined K.R.'s sexual encounter with the boys was consensual in nature also lacks merit. Our Supreme Court has determined deliberate indifference will only lie where the recipient of

federal funds makes absolutely "no effort either to investigate or to put an end to the harassment." *See Davis*, 526 U.S. at 654. Yet, as noted by the district court, "the only fair reading of the *Second Amended Complaint* is that [Principal] Vaughn called the police on the afternoon of the rape. The police then determined that no rape had occurred." (Doc. 48, p. 12; JA 15). Here, immediately following an incident with K.R., Principal Vaughn met with Stinson and notified law enforcement of the incident. (Doc. 33, pp. 8-9; JA 38-39). Also, after the incident, K.R. was granted a transfer to a different school within the Board's school system. (See Doc. 33, p. 10; JA 40). Even when this Court draws all reasonable inferences in Stinson's favor, the *Second Amended Complaint* fails to show the Board of Education acted with deliberate indifference. As noted by the district court, "once the police cleared the boys of rape, it was not clearly unreasonable for the Board to act as if [Maye and Vaughn] had no further obligation to report or investigate the rape claim." (Doc. 48, p. 12; JA 15).

In *Davis*, LaShonda, a fifth-grade student at Hubbard Elementary School, was allegedly the victim of sexual assault by G.F., one of her classmates. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). In December 1992, G. F. attempted to inappropriately touch LaShonda's genital area and made several derogatory statements during school. *Id.* After each of these incidents, LaShonda reported them to her mother and to her teacher who assured both LaShonda and her

mother that the principal was also informed of the incidents. *Id.* After the December incidents, the sexual harassment continued for several months and in May 1993, G.F. was charged and pled guilty to sexual battery. *Id.* at 634. Other students in LaShonda's class also purported to be victims of G.F. *Id.* at 635. There was never any disciplinary action of G.F. taken by the principal of Hubbard Elementary or the Monroe County Board of Education (Board). *Id.* The Board also had never instructed any of its personnel on how to handle cases of student sexual harassment, including never establishing a sexual harassment policy. 526 U.S. at 635.

The Supreme Court held in *Davis* that recipients of federal funding may be liable for subjecting "their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority." *Id.* at 647. Deliberate indifference is defined as "conduct that causes the students to undergo harassment or 'make them liable or vulnerable' to it." *Id.* at 645. The Court held that in order to rise to the level of deliberate indifference the conduct must have been "clearly unreasonable in light of the known circumstances." *Id.* at 648. The Court also found that the harassment must take place in a situation subject to the school district's control. *Id.* at 631. The *Davis* Court reasoned that the Board had substantial control over LaShonda's harasser, because of its disciplinary authority and because the harassment happened while the students were involved in school activities. *Id.* at 646.

In applying the deliberate indifference standard to the case at bar, the Montgomery County Board of Education, via its administrators, did not act in a way that is clearly unreasonable in light of known circumstances. Stinson alleges K.R.'s stepsister "alerted" Assistant Principal Maye to the conduct. (Doc. 33, p. 8; JA 38). Yet, there are no allegations to show Maye should have known K.R. would be sexually harassed or sexually assaulted. *Id.* There are no allegations that K.R.'s stepsister specifically informed Maye that K.R. was being sexually assaulted. *Id.* There are no allegations as to what K.R.'s stepsister even knew at the time she allegedly "alerted Assistant Principal Maye of the conduct." *Id.*

Contrary to Stinson's arguments, on appeal, *Davis* is factually distinguishable from this case because the alleged incident of this matter did not occur while the students were involved in school activities or under the supervision of school employees. Although Maye may have seen the boys and K.R. entering the abandoned building, there are no allegations to sufficiently establish Maye knew or should have known an alleged rape was about to occur. (Doc. 48, p. 8; JA 11). The Supreme Court held in *Gebser v. Lago Vista Independent School Dist*., a school district could be liable for damages only where the district itself remained deliberately indifferent to the acts of the harassment of which it had actual knowledge. *Davis*, 526 U.S. at 642 (*quoting* 524 U.S. 274, 290 (1998))(emphasis added). The Montgomery County Board of Education, via Maye and Vaughn, reasonably relied upon the police

department's conclusion that the incident involved consensual sex in its determination of whether to pursue disciplinary action against the boys accused of sexually assaulting K.R. (Doc. 48, p. 11; JA 14). The Board's inaction based on the police's findings, as alleged, is not sufficient to state a violation of Title IX.

Stinson's dependence on this Court's ruling in *Williams v. Board of Regents of the University of Georgia* is likewise misplaced. In January, 2002, college student Tiffany Williams, who was then enrolled at the University of Georgia (UGA), was invited to the dorm room of Tony Cole, another UGA student and basketball player. *Williams v. Bd. of Regents of the Univ. of Ga.*, 477 F.3d 1282, 1288 (11th Cir. 2007). Cole and Williams engaged in consensual sex, but Williams did not know that Brandon Williams, a UGA football player, was hiding in Cole's closet. *Id.* When Cole went to the bathroom, Brandon came out of the closet and proceeded to sexually assault Williams. *Id.* Cole called two other student-athletes, inviting them to his dorm room and one of the athletes came into the room and raped Williams. *Id.* Williams' mother reported the incident to UGA police, and UGA police proceeded with an investigation. 477 F.3d at 1289.

Before Cole was recruited by UGA, the UGA basketball coach was aware that Cole had previously been dismissed from two teams due to sexual assault allegations. *Id.* at 1290. UGA officials had done nothing to monitor the student-athletes before the assault and waited eight months before conducting a disciplinary hearing. *Id.* at 1296.

This Court determined the University's neglect in monitoring student-athletes and its failure to supervise Cole while he was on campus were acts of deliberate indifference triggering Title IX liability. *Williams*, 477 F.3d at 1296. UGA school officials had taken no steps to exercise control over Cole, even with knowledge of his prior sexual misconduct. *Id.* at 1297. This Court dismissed the Title IX claim against the Board of Regents because there was no evidence the Board of Regents had "actual knowledge of the acts." *Id.* at 1294.

Here, Stinson offers no allegations as to any knowledge of the Board of Education itself of the alleged sexual harassment of K.R. and fails to demonstrate how the "three boys" were under the control and custody of the school after school had allegedly been dismissed for the day and after K.R. had "walked off of" campus when the alleged attack took place. (See Doc. 33, *passim*; JA 31, *passim*). There are no allegations of any prior complaints of sexual misconduct by K.R.'s alleged attackers of which the Board, through its administrators Vaughn and Maye, knew or should have known prior to the incident which made the basis of suit. The notice of risk of sexual harassment present in *Williams* is simply not present in the allegations asserted by Stinson in the case.

Assistant Principal Maye, even in allegedly witnessing K.R. and "the boys" enter into an abandoned building, also did not act with deliberate indifference under the alleged known circumstances. (Doc. 48, p. 8; JA 11). There are no allegations

suggesting Maye should have suspected K.R. would be sexually assaulted. There is no allegation of the "abandoned" building being owned by the Board. Right or wrong, Maye could have reasonably believed he had no responsibility to intervene and/or discipline students for conduct occurring after school hours, outside of the school building, and outside the school grounds (i.e. "on perimeter of campus"). Given where, when and how this alleged incident unfolded, the Board should not be penalized for taking no further action after the police, as alleged, deemed the encounter as consensual. *Davis*, 526 U.S. at 648. There are no allegations that K.R. was subjected to any further assault or discrimination as a result of any alleged failure by the Board to modify its grievance policies and investigation procedures. The *Second Amended Complaint* establishes that the Board had adopted and implemented policies and investigation procedures specifically addressing harassment of its students. (See Doc. 33, pp. 3-6, ¶¶5-21; JA 33-36).

Despite Stinson's appellate arguments to the contrary, this case simply does not involve the kind of circumstances which Title IX serves to redress. In *Hill v. Cundiff*, this Court carefully examined the requirements of Title IX in the context of peer sexual harassment arising from a reported rape of a female student. Jane Doe, an eighth-grade student at Sparkman Middle School, was raped by another student C.J.C. after school officials attempted to set up a sting operation and use Doe as "rape bait." *Hill v. Cundiff*, 797 F.3d 948, 956 (11th Cir. 2015). In January 2010, Doe reported to

school officials that C.J.C. had propositioned her for sex two weeks prior to the rape. *Id.* at 961. Doe told a teacher's aide that she was being harassed by C.J.C. and Doe agreed to help with the sting operation. *Id.* at 962. Doe told C.J.C. that she would have sex and proceeded into the bathroom. *Id.* Doe tried to stall for time so as to allow the school officials to come in, but the school officials did not enter the bathroom before rape occurred. *Id.* at 963. C.J.C. was referred to the Board's disciplinary unit and was placed in alternative school for the duration of the school year, although he did not finish that punishment and returned to Sparkman by April 2010. *Id.* at 964.

This Court found the Madison County School Board acted with deliberate indifference to the rape of Doe. 797 F.3d at 974. Given C.J.C.'s prior sexual misconduct that was reported to school officials and the Board's failure to change any sexual harassment policies after Doe's rape, a reasonable jury could find that the Board's choices were clearly unreasonable. *Id.* at 975. The Board had not established a concrete and accurate record keeping system so that school could have known about the C.J.C.'s previous disciplinary history. *Id.* at 974. The Board canceled the staff training on sexual assault and the principal was not even aware of the Code of Conduct section on sexual harassment. *Id.* at 975. Doing nothing to improve the policies and inform school officials as well as students was clearly unreasonable under the circumstances. *Id.*

The facts of *Hill* are incongruent with the factual allegations before this Court. In *Hill*, the board officials were aware of prior misconduct of C.J.C. to anticipate a sexual assault of Doe. The rape of Doe was undisputed as a sexual assault and it took place during school hours and in the school building. By contrast, here, the police in the present case concluded that the encounter between K.R. and the three boys was consensual. (Doc. 48, p. 14; JA 17). There were no prior harassment complaints to the Board concerning any of the three boys who allegedly attacked K.R. The alleged attack on K.R. happened "after school," "walking off campus," at the "perimeter" of campus and in an abandoned building, not alleged to be owned by the Board. (Doc. 33, p. 8, ¶33; JA 38). Principal Vaughn reported the incident to the police and the district 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 determined the sexual encounter was consensual." (Doc. 48, p. 12; JA 15).

Stinson argues on appeal that the Board's failure to take remedial action after the October 2014 incident would still constitute deliberate indifference; yet, as the lower court noted, the Board is only liable if its actions were "clearly unreasonable in light of known circumstances." *Davis*, 526 U.S. at 648; Doc. 48, p. 10; JA13. There is not one allegation in the *Second Amended Complaint* demonstrating K.R. suffered additional sexual harassment or actionable discrimination following the alleged incident of October 23, 2014. Stinson argues the Board should have had different

policies in place; that the Board's harassment policy was insufficient to constitute a Title IX policy; that the Board failed to promulgate a grievance procedure; that Principal Vaughn should have conducted a separate investigation from the police investigation; that the Board did not offer counseling to K.R. following the incident made the basis of the suit; and that the Board, even though it had harassment policies in place, did not comply with its policy by conducting a separate investigation. *See Stinson's Brief, pp. 37-39*. All of Stinson's arguments lack the requisite muster to justify imposing Title IX liability against the Board *under the alleged circumstances in this case*.

First, as the lower court noted, the police may have reached the wrong conclusion in determining that the encounter between K.R. and the three boys was consensual in nature. (See Doc. 48, p. 11; JA 14). Nevertheless, there are no allegations that the police investigation of the incident involving K.R. and the boys was somehow inadequate or carried out in an attempt to minimize the incident. (See Doc. 48, p. 11; JA 14, *citing Rex v. W. Va. Sch. of Osteopathic Medicine*, 119 F.Supp. 3d 542, 541 (S.D.W. Va. 2015); *see also Doe v. Bibb County Sch. Dist.*, 126 F.Supp. 3d 1366, 1378 (M.D. Ga. 2015), *aff'd*, 688 F. App'x 791, 798 (11th Cir. 2017)(*per curiam*)). Nor are there any allegations that the police investigation, as relied upon by Principal Vaughn, was somehow inconclusive in nature whereby a reasonable expectation would arise for the school to conduct its own investigation. *See Doe v.*

Sch. Bd. of Broward County, 604 F.3d 1248, 1262 (11th Cir. 2010).

As the district court noted, none of Stinson's counter-arguments are persuasive enough to establish deliberate indifference. (Doc. 48, pp. 12-14; JA 15-17). Once Principal Vaughn was informed by the police that K.R. had not in fact been raped, any alleged failures associated with the Board's grievance procedures, alleged investigation obligations, and disciplinary decisions after the incident do not demonstrate deliberate indifference under the alleged circumstances. *Id.* Our Supreme Court has noted that deliberate indifference requires more than mere negligence and urges other courts against "second guessing the disciplinary decisions made by school administrators" who have to contend with students of an impressionable age engaging in conduct of which they do not fully understand the ramifications. *Davis*, 526 U.S. at 648-649; *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d at 1288. The district court determined that the alleged failure to "promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX." (Doc. 48, p. 13; JA 16) *(citing Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998)).

B. <u>The Montgomery County Board of Education's Response to an Alleged Single Instance of Harassment of K.R., Which the District Court Determined Not to Be Deliberately Indifferent as a Matter of Law, Did Not Yield the Systemic Effect of Denying K.R. Equal Access to its Educational Programs</u>.

As previously noted herein, our Supreme Court has determined that funding recipients are liable in damages only where they are deliberately indifferent to

harassment, of which they have actual knowledge, that is so severe, pervasive and objectively offensive that it could be said to deprive student victims of access to educational opportunities and benefits provided by the school. *Davis*, 526 U.S. at 650. Notwithstanding, and as determined by the lower court, the Board did not act with deliberate indifference to the incident which made the basis of Stinson's Title IX claim against the Board. (Doc. 48, p. 12; JA 15). The Board, through its officials, did not act with deliberate indifference in light of known circumstances pertaining to the incident between K.R. and the three boys.

The Supreme Court has determined, in the context of student-on-student harassment, school districts will be liable for damages under Title IX where "the behavior is so severe, pervasive and objectively offensive that it denies its victims equal access to education." *Hawkins*, 322 F.3d at 1288 (*citing Davis*, 526 U.S. at 650). In a light most favorable to Stinson and student K.R., the incident involving K.R. and three unidentified boys, as alleged, was severe and objectively offensive. Nevertheless, the Board's response to the alleged harassment, as deemed consensual by the police, was not *so* severe, pervasive and objectively offensive that it had the systemic effect of denying K.R. equal access to education. *Hawkins*, 322 F.3d at 1288 (*emphasis added*). There are absolutely no allegations to support that K.R., following the incident made the basis of this suit, was excluded or otherwise denied access to any educational program or activity of the Montgomery County Public School

System. *Id.* The incident made the basis of this suit was not a widespread, pervasive phenomenon but rather an alleged "single instance of one-on-one peer harassment" that did not "touch the whole or entirety of an educational program or activity" of the Board. *Id.* at 1289.

In the case at bar, the alleged conduct between K.R. and the three boys was not persistent or continuing in nature. The alleged conduct, as determined by the police, was consensual. (Doc. 33, p. 9, ¶45; JA 39). Even if this Court were to nevertheless deem the alleged behavior to be sexual harassment, the record is devoid of sufficient allegations demonstrating a complete denial of access to any of the Board's resources and opportunities. Stinson alleged that K.R. dealt with stress of voluntarily transferring to a new school, that her grades dipped and her social life declined. *Id.* at 11; JA 41. Nevertheless, these allegations are reasonably consistent and expected from either a victim of gang rape or a middle school student consensually engaging in inappropriate sexual conduct as allegedly determined by the police.

As an aside, Stinson argues on appeal that due to the age of K.R., she could not have consented to the encounter. *See* Stinson's Brief, p. 37*; Ala. Code §13a-6-70(c)(1975)*. However, the allegations made by Stinson that the three boys who allegedly participated in the incident were also students of Southlawn Middle School indicate that the boys too could not have legally consented to sexual intercourse with K.R. due to their own age(s). *Id., n. 9* (*citing Ala.Code §13a-6-61(a)(3)*; *§13a-6-*

62(a)). Indeed, Alabama law allows for minors who are charged with a crime, such as rape, to be prosecuted under a youthful offender status. *See Ala.Code §15-19-1 (1975)*. There are no allegations in the *Second Amended Complaint* the police attempted to charge the three boys as youthful offenders. No youthful offender charges were pursued likely because the police found the encounter between K.R. and the three boys to be consensual.

The event of October 23, 2014, as alleged, is serious and unfortunate, but at the same time, a one-time occurrence involving K.R. and the three other unidentified middle school students which could not have been reasonably expected or prevented by the Board. The District, through Principal Vaughn, took immediate action to notify the police of the attack, met with Stinson to discuss the incident, relied upon the police to investigate the incident, and granted K.R. a transfer to another school within the District upon her request. Whereas the Board took immediate action to address the incident after it was reported to Principal Vaughn, the *Second Amended Complaint* falls short to demonstrate that K.R. was systemically deprived access to the educational opportunities of the school District. Therefore, the district court's dismissal of Stinson's Title IX claim against the Board was appropriate and is due to be affirmed by this Court.

CONCLUSION

The district court properly viewed the facts of this case in the light most favorable to Stinson. Even in the most favorable light, Stinson's twice *Amended Complaint* does not contain factual allegations sufficient to demonstrate the Montgomery County Board of Education was deliberately indifferent to the alleged student-on-student sexual harassment. On appeal, Stinson's legal arguments are unavailing because she cannot demonstrate the Board's officials acted with deliberate indifference in light of the known circumstances, as alleged. Specifically, and as highlighted by the district court, with respect to the alleged incident of sexual harassment, Principal Vaughn immediately contacted the police and met with parent Stinson following notice of the incident. As alleged, the police deemed the purported rape as consensual sex and took no further action. (Doc. 33, p. 9; JA 39; Doc. 48, p. 11; JA 14).

This Court must conclude Stinson's Title IX claim fails under the deliberate indifference standard as set forth in *Davis* and *Gebser*. As alleged, the Board's administrators, former Principal Vaughn and former Assistant Principal Maye, did not act with deliberate indifference in response to the alleged sexual assault of K.R. The district court, therefore, correctly granted the dismissal for the Montgomery County Board of Education on Stinson's Title IX claim. The Montgomery County Board of Education respectfully requests this Court affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of *Fed.R.App.P. 32(a)(7)(B)* because it contains 7,939 words, excluding the parts of the brief exempted by *Fed.R.App.P. 32(a)(7)(B)(iii)*. This brief complies with the typeface requirements of *Fed.R.App.P. 32(a)(5)* and the type style requirements of *Fed.R.App.P. 32(a)(6)* because it has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14-pt Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this the **3rd** day of **June**, **2019**, I electronically filed the Brief of Appellee Montgomery County Board of Education with the Clerk of Court. In addition, seven copies of the foregoing was filed with the Clerk of Court via U.S. First Class mail. I also hereby certify that a copy of the foregoing has been served upon the following counsel of record via the Court's Electronic Case Files system (ECF) on this the **3rd** day of **June**, **2019.**

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