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

REPLY 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: June 24, 2019

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INTRODUCTION

Plaintiff's opening brief identified two distinct ways in which Montgomery school board officials ignored their basic responsibilities under Title IX: first, by failing to *prevent* K.R.'s rape (despite clear opportunities to do so) and, second, by failing to take any corrective or remedial actions *following* the rape (despite ample reason to know that such actions were necessary). Rather than respond to each of these arguments separately, the school board's answering brief simply asserts a blanket denial of culpability. As explained below, that blanket denial—which rests on repeated mischaracterizations of Plaintiff's complaint—falls short in several major respects.

ARGUMENT

I. The school board's excuses for Assistant Principal Maye's failure to intervene before or during the rape are unavailing.

The school board's brief says conspicuously little about Assistant Principal Maye's failure to act before or during K.R.'s rape. The board does not dispute, for instance, that Maye was an "appropriate person" capable of acting on behalf of the board. *See* Montgomery Cnty. Bd. Ed. Br. 11 (referring to Maye as one of "the Board's officials").[1] Nor does it dispute that, as a general matter, Title IX requires such persons to make reasonable efforts to protect their students against sexual

[1] Plaintiff's opening brief is cited herein as "Stinson Br. __." The school board's answering brief is cited as "MCBE Br. __." The Joint Appendix is cited throughout this brief as "JA __."

assault. Instead, the board seeks to excuse Maye's conduct by arguing that he did not receive adequate "notice" of the assault to allow him to act. That argument lacks merit.

The board repeatedly asserts that Plaintiff's complaint contains "no allegations suggesting Maye should have suspected K.R. would be sexually assaulted." MCBE Br. 18-19; *see also id.* at 16 ("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."). Contrary to those assertions, however, the complaint explicitly states that K.R.'s stepsister "alerted" Maye to the assault *as it was occurring*. JA 38 (Complaint). In addition, the complaint alleges that Maye personally witnessed "three boys *grabbing* and *dragging* K.R."—a thirteen year-old girl—into an abandoned building, where one of them then stood as a lookout. JA 38 (emphases added). No rational adult, when faced with those circumstances, could have misunderstood the dangers awaiting K.R. inside that building. Thus, the board's contention that Maye "could have reasonably believed he had no responsibility to intervene," MCBE Br. 19, not only is unpersuasive on its own terms but also raises serious questions about the board's expectations of its school administrators.

The board's remaining excuses for Maye's inaction fare no better. For example, the board argues that Plaintiff failed to allege "that K.R.'s stepsister *specifically* informed Maye that K.R. was being sexually assaulted." MCBE Br. 16 (emphasis

added). But, as noted, the complaint expressly states that K.R.'s stepsister "alerted Defendant Maye to the conduct" of the three boys. JA 38. It is obvious from context that the "conduct" referenced in that sentence encompasses the full physical assault on K.R., including the rape; after all, that assault is the only "conduct" attributed to the three boys in the entire complaint. *See Magluta v. Samples*, 375 F.3d 1269, 1274 (11th Cir. 2004) (noting that a plaintiff's allegations "must be read within the context of the other allegations of the . . . Complaint").

In any event, even if the meaning of "conduct" were not obvious here, the Court would still be obliged—at the Rule 12(b)(6) stage—to construe the sentence in the light most favorable to Plaintiff. *See Magluta*, 375 F.3d at 1276 ("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."). And, when read in that light, the allegation easily satisfies Title IX's "notice" element. *See* JA 8 (Dist. Ct. Op.) (construing the complaint as alleging that "K.R.'s stepsister told Assistant Principal Maye *what the boys were doing to K.R.*" (emphasis added)).

In sum, the school board has offered no valid reasons for disregarding Plaintiff's allegations that Maye had sufficient notice of the sexual assault in order to intervene, had he chosen to do so. Those allegations—combined with Plaintiff's other allegations about Maye's conduct (which the board fails to address)—are sufficient to state a claim under Title IX. *See* Stinson Br. 11-17, 30-33.

II. The school board's excuses for failing to take any corrective or remedial actions after the rape occurred also fail.

A. The rape occurred on school property.

The school board repeatedly argues that it cannot be held liable for its post-rape conduct because Plaintiff's "allegations do not clearly establish that the [rape] occurred on school grounds or in a Board-owned building." MCBE Br. 13; *see also, e.g.*, *id.* at 19 ("There is no allegation of the 'abandoned' building being owned by the Board."). Here, again, the board ignores the plain language of the complaint.

The complaint states that "a group of three boys grabbed [K.R.] and dragged her into an abandoned building *on the perimeter of the school property*." JA 38 (emphasis added). An ordinary reading of the words "on the perimeter of the school property" makes clear that the building was located on school grounds. *See* "Perimeter," *American Heritage Dictionary of the English Language* (5th ed.), https://perma.cc/9FCJ-9JYY (defining "perimeter" as the "outer limits of an area"); *see also, e.g.*, Jillian Steinhauer, "Chisolm Monument Finds Its Designers," *N.Y. Times*, C1, Apr. 24, 2019 (describing a possible location for a new monument in Central Park as "on the perimeter of" the park). And even if the meaning of "on the perimeter" were somehow ambiguous here, this Court would still be required to construe the term in Plaintiff's favor—just as the district court here did. *See* JA 8 ("[C]onstruing the

allegations in the light most favorable to Stinson, the court assumes that the building was on campus—inside, not outside, the perimeter.").[2]

Even setting aside the board's mischaracterization of the complaint, its argument that it cannot be held liable for its deliberate indifference to an off-campus rape fails as a matter of law. Indeed, courts have recognized that the location of student-on-student harassment is not dispositive as to whether or not a school is ultimately liable under Title IX. *See, e.g.*, *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1122 n.1 (10th Cir. 2008) ("We do not suggest that harassment occurring off school grounds cannot as a matter of law create liability under Title IX."). Rather, as the Supreme Court has explained, the site of the harassment is relevant only insofar as it sheds light on whether the harassment occurred "in a context subject to the school district's control." *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 645 (1999).

In this case, the complaint makes clear that the school board continued to exercise control over the students who attacked K.R. both during and after the attack. Again, the attack began as the students were leaving school grounds, when campus was still open—in short, at a time and place when middle-school officials would have

[2] To the extent the board contends that the allegation about the building's location is somehow insufficient—and that Plaintiff must, instead, explicitly assert that the board *owns* the building—that argument also fails. Nothing in Title IX requires a plaintiff to identify the owner of the building where he or she was assaulted. And, even if it did, it would be reasonable to infer (particularly at the Rule 12(b)(6) stage) that a school board owns the buildings located on its property.

had clear authority to take corrective action. *See* JA 38 (noting that the boys first grabbed K.R. as she was exiting campus). Moreover, given the age of the students involved and the impact the incident had on the educational environment, the board would have also had clear authority to take corrective and remedial action after the incident, as well. *See Davis*, 526 U.S. at 649 (noting that grade schools typically enjoy a relatively high degree of control over their students). Indeed, the board openly asserts the power to discipline students for off-campus behavior: its code of student conduct expressly "applies to behavior off campus that significantly impacts the educational environment." *Montgomery Public Schools, Student Conduct Manual 2018-19*, at 7, *available at* https://perma.cc/48VN-V6S5.[3] The board's reliance on this far-reaching disciplinary authority undermines its claim that it was somehow powerless to take corrective or remedial actions to address a student-on-student assault that occurred just off campus. And it similarly belies any claim that the board lacked authority to intervene in an off-campus assault that began within sight of one of its administrators.

[3] As explained in the complaint, Plaintiff does not have access to the 2014-15 version of the handbook, which was in effect at the time of K.R.'s rape. *See* JA 33. The language quoted above, however, also appears (verbatim) in the 2015-16 version of the handbook, which plaintiff references throughout her complaint. *See id.* ("The allegations regarding the handbook that are set forth herein are taken from the 2015-2016 handbook that is available online. Upon information and belief, the policies will be similar, if not identical, to the policies in the 2014-2015 handbook.").

B. The board cannot evade liability merely because the rape occurred after the school day ended.

The board next argues that it cannot be held liable because K.R.'s rape "did not occur during school hours and the conduct did not occur within the context of a school activity." MCBE Br. 13. The timing of the rape, however, does not excuse the board's conduct any more than the rape's location does.

As an initial matter, this Court has held that a Title IX plaintiff may state a valid claim for "deliberate indifference" based on a sexual assault that occurs outside of school hours. In *Williams v. Board of Regents*, for instance, this Court sustained a Title IX claim even though the claim was based on a rape that occurred in the middle of the night—well after normal school hours and not during any school activity. 477 F.3d 1282, 1288 (11th Cir. 2007). The timing of the plaintiff's rape did not preclude the university from being held liable for its failure to supervise or discipline the students who raped her. *Id.* at 1296.

Williams underscores the folly of the board's attempt to evade liability based on the timing of K.R.'s rape. If anything, the facts here make clear that the board had an even greater responsibility to supervise and discipline the students responsible for the attack on K.R. than the university had in *Williams*. Unlike the plaintiff in *Williams*, K.R. was not attacked in the middle of the night but, rather, in broad daylight immediately after the school day ended. Furthermore, school administrators (like Vaughn and Maye) remained present on campus at the time of the attack, as were

parents (like Plaintiff) who were attending parent-teacher conferences. And, most obviously, K.R.'s attackers were adolescents—not adults, like the students in *Williams*. *See Davis*, 526 U.S. at 649 (noting that a "university might not . . . be expected to exercise the same degree of control over its students that a grade school would enjoy"). Taken together, these facts preclude the board from disclaiming responsibility for supervising or disciplining K.R.'s assailants merely because they waited for the final bell to ring to begin their attack.

C. The police's "consensual sex" determination does not explain or excuse all of the board's conduct.

Plaintiff's opening brief outlined three sets of reasons why the school board cannot hide behind the police's (erroneous) determination that the October 2014 incident involved "consensual sex." *See* Stinson Br. 30-39. First, the complaint nowhere asserts that the board's conduct here was actually based on the police's consent determination and, at the pleading stage, the board is not entitled to such an inference. *See id.* at 29. Second, even if the board were entitled to an inference that it relied on the consent determination, that determination—which was made *after* the incident occurred—cannot excuse Maye's inaction *during* the incident itself. *See id.* at 30-33. And, finally, the consent determination cannot relieve the board of various Title IX obligations that have nothing to do with whether or not K.R. consented. *See id.* at 33-39 (describing certain Title IX obligations, such as documenting sexual-

assault claims and safeguarding students against non-rape forms of harassment, which do not turn on the issue of consent).

Nonetheless, the board continues to cite the consent determination as a blanket justification for its conduct here. In so doing, the board ignores many of the specific deficiencies that Plaintiff identified in the board's response to the incident. *See* Stinson Br. 18-27, 33-39. The board's brief, for instance, says nothing about its failure to document K.R.'s rape allegations, even though K.R. and her mother reported the incident to Principal Vaughn as soon as it happened. *Cf. Hill v. Cundiff*, 797 F.3d 948, 973-75 (11th Cir. 2015) (holding that a middle school responded with deliberate indifference to a student-on-student rape where school officials failed, *inter alia*, to properly maintain records of the incident). Nor does the brief explain the board's failure to amend its sexual-harassment training or policies in the wake of the incident, even though the incident highlighted grave risks to student safety. *Cf. id.* at 975 (holding that "a jury might also find it was clearly unreasonable for the Board not to improve its sexual harassment training [or other policies]" following the incident). Most glaringly, the brief never explains why the board both failed to inquire into K.R.'s well-being after the incident and failed to investigate whether she might have been sexually harassed in other ways, short of forcible rape.

These deficiencies in the board's response to the incident cannot be explained or excused by the police's consent determination. After all, even if the board believed (incorrectly) that K.R. had not been raped—and that she had, instead, engaged in

consensual group sex—it would have still been obligated to document her allegations to the contrary, inquire into her well-being, and determine whether it needed to pursue any corrective or remedial actions. *See* Stinson Br. 18-27, 37-39. The board's failure to take any of those basic steps here violated Title IX.

This Court's decision in *Hill v. Cundiff* illustrates how Title IX requires school officials to take basic actions in response to a student's rape claim, even when they are uncertain about the veracity of that claim. In *Hill*, the Court held that a school district could be held liable under Title IX for, among other things, failing to keep adequate records documenting the rape of a middle-school student and failing to amend its sexual-harassment training and policies following the rape. *See* 797 F.3d at 973-75; Stinson Br. 19-21, 34-35 (discussing *Hill*). The school's principal and assistant principals initially sought to justify their inaction by citing their uncertainty about whether or not a rape had in fact occurred. *See* 797 F.3d at 965 (noting that the school's principal stated that he "d[id] not know whether he believe[d]" a rape had occurred and that the two assistant principals "never formed an opinion" on the issue); *see also id.* ("Assistant Principal Terrell also never formed an opinion on whether CJC raped Doe because '[w]e turned it over to the police department for them to investigate it. That was not [our] place to make that decision.'"). But this Court rejected that excuse, holding that the school district had an independent duty to maintain documentation of the incident and rectify gaps in its harassment policies and training. *See id.* at 974-75. *Hill* thus makes clear that school officials cannot ignore

their Title IX responsibilities merely because they harbor doubts—even sincere doubts—about a student's sexual-harassment allegations.

The school board's reliance on the police's "consensual sex" determination as a justification for its failure to take any action in response to the incident is unreasonable for another reason. As previously explained, K.R. was below the legal age of consent in Alabama at the time of the incident. *See* Ala. Code § 13a-6-70(c) ("A person is deemed incapable of consent if he is . . . [l]ess than 16 years old."). Thus, even if the police's consent determination were sufficient to excuse the school board's apathetic response to the incident (which it is not), the school board still should have known better than to base its entire course of conduct on that determination. *See* Stinson Br. 33-37 (explaining why the board's reliance on the police's determination was unreasonable).

The school board notes in its answering brief that the boys who attacked K.R. were also likely below the age of consent in Alabama. *See* MCBE Br. 25-26. But that argument misses the point entirely. Once again, the relevant question here is whether it was reasonable for the board to rely on the police's (legally impossible) determination that K.R. consented to have sex with the three boys. That question has nothing to do with the boys' ages or capacity to consent: indeed, whether the *boys* gave consent has never been at issue here because the board has never purported to rely on the fact that the boys consented as a justification for its inaction. Put differently, the boys' capacity for consent cannot convert the board's unreasonable

decision to rely on the police's (legally impossible) consent determination into a reasonable decision.

The board also seems to suggest that it was reasonable for school officials to rely on the fact that "the police never attempted to charge the three boys as youthful offenders." MCBE Br. 26. To the extent the board seeks to rely on that fact as a justification for its inaction here, that argument fails for reasons explained in Plaintiff's opening brief. *See* Stinson Br. 35. As noted in that brief, the alleged assailant in *Hill* was also never charged with a crime and that fact did not excuse the school district's deliberate indifference. *See* 797 F.3d at 964 (noting that the "District Attorney's Office never filed charges against CJC"); *see also Williams*, 477 F.3d at 1289 (holding that the plaintiff's Title IX claim could proceed even though "the prosecutor dismissed the charges against" two of the students who assaulted the plaintiff).

D. The board concedes that it failed to take any action to address K.R.'s post-rape trauma despite her obvious need for assistance.

Plaintiff's opening brief recounted in detail how the school board never made any effort to remedy K.R.'s post-traumatic suffering in the wake of the October 2014 incident. *See* Stinson Br. 25-26. And she further explained how—even under the board's sanitized version of events—that failure violated Title IX. *See id.* 37-39.

In its answering brief, the board does not dispute that the anguish and anxiety K.R. experienced following the incident was both serious and foreseeable. In fact, the board openly acknowledges that "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." MCBE Br. 25 (emphasis added). Yet, despite that acknowledgement, the board insists that it acted reasonably in declining even to contact K.R. or offer her any guidance or counseling following the incident. Even under the board's own understanding of the incident—which casts K.R. not as a rape victim but, rather, as "a middle school student consensually engaging in inappropriate sexual conduct"—the board's steadfast refusal to remedy her post-incident distress makes no sense. That aspect of the board's response only underscores the board's deliberate indifference here.[4]

Finally, the board's assertion that Plaintiff failed to allege that K.R. was "denied access to any educational program or activity," MCBE Br. 24, cannot be squared with the plain language of the complaint. As previously noted, the complaint states that K.R. was forced to miss over a week of school immediately following the incident, JA 39, and that she missed many more days over the ensuing months as she dealt with the ongoing trauma of the assault. *See* JA 46 ("She has missed weeks of school and

[4] The board's attempt to claim credit for the fact that Principal Vaughn met with Plaintiff on the day of the incident and then, later, "granted K.R. a transfer to another school . . . upon her request," MCBE Br. 26, highlights just how anemic the board's response to incident actually was. Again, the meeting with Vaughn was initiated *by Plaintiff*—not Vaughn. And the board was *legally obligated* to grant Plaintiff's transfer request because she had already moved her family earlier in the year. *See* JA 40 (noting that "Stinson was able to transfer K.R. into a different school" because she "had already moved her family . . . earlier in the school year"). In trying to cast these passive acts as something more affirmative, the board only calls greater attention to how little it actually did here to respond to K.R.'s rape.

countless hours of instructional time dealing with the debilitating aftermath of her sexual harassment."). The complaint further alleges that the incident—and the board's apathetic response to it—have "interfered with K.R.'s ability to attend school and perform her studies and activities," and that "her grades have dropped and her social life has declined" as a result. JA 42; *see also id.* (noting that K.R. "missed out on her 8th Grade Graduation" ceremony at Southlawn and that "[h]er new school did not have a graduation ceremony"). Taken together, these allegations are more than sufficient to establish a denial of access to educational benefits under Title IX.

The board's contention that it cannot be held liable for a "single instance" of sexual assault misses the mark for similar reasons. *See* MCBE Br. 23, 25. As just explained, the consequences of the board's deliberate indifference extended beyond the rape itself and ultimately had a pervasive and ongoing impact on K.R.'s education. Title IX case law makes clear that a "single instance" of sexual assault can suffice to establish liability when school officials' response to the assault is clearly unreasonable. *See, e.g.*, *Williams*, 477 F.3d at 1297-98 (rejecting the university's "single instance" defense because the university's indifference "occurred before and after the incident"). Indeed, several courts have recognized that "a victim does not have to be raped twice before the school is required to respond appropriately." *Spencer v. Univ. of New Mexico Bd. of Regents*, No. 15-cv-141, 2016 WL 10592223, at *6 (D.N.M. Jan. 11, 2016); *see also, e.g.*, *S.S. v. Alexander*, 177 P.3d 724, 741 (Wash. App. 2008) ("S.S. did not have to be raped twice before the university was required to appropriately

respond to her requests for remediation and assistance. In the Title IX context, there is no 'one free rape' rule.").

CONCLUSION

For the foregoing reasons, as well as those set forth in Plaintiff's opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

/s/ Nicolas Y. Riley

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JUNE 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 3,851 words and was prepared in fourteen-point Garamond font, a proportionally spaced typeface, using Microsoft Word.

/s/ Nicolas Y. Riley
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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 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.

/s/ Nicolas Y. Riley
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