**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF OKLAHOMA**

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|---|---|---|
| (1) CHILD DOE, by his parents and next friends, JOHN and JANE DOE, | ) | |
| Plaintiff, | ) | |
| v. | ) | Case No.: CIV-18-271-F |
| (1) WASHINGTON PUBLIC SCHOOLS;<br>(2) A.J. BREWER, Superintendent, in his official and individual capacities; and<br>(3) STUART McPHERSON, Principal and Athletic Director, Washington Middle School, in his official and individual capacities, | ) | |
| Defendants. | ) | |

**PLAINTIFF'S MEMORANDUM IN OPPOSITION**
**TO DEFENDANTS' MOTION TO DISMISS**

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# INTRODUCTION

Child Doe is a middle school student in Washington Public Schools ("the "District"). He alleges in his Complaint that he was subjected to three sexual assaults by his male peers in an 18-month period, almost daily verbal harassment and bullying, and threats of physical harm and death at Washington Middle School ("WMS") that were reported to, and left unchecked by, the school's principal, Stuart McPherson, and the District's Superintendent, A.J. Brewer. Although Child Doe told both Brewer and McPherson that some of his male peers had forcibly shoved their fingers in his rectum—and that he had witnessed this happening to another male student—both school officials refused to treat this information as reports of sexual assault. Instead, both Brewer and McPherson downplayed the abuse as normal "horseplay" between boys or, at worst, "accidental" touching. Child Doe alleges that Defendants' practice of treating male-on-male sexual assault as normal "horseplay," while admitting that they would respond differently to reports of the same conduct against a female student, is sex discrimination prohibited by Title IX of the Education Amendments of 1972 ("Title IX") and the United States Constitution's Equal Protection Clause.

Child Doe further alleges that, as a result of Defendants' deliberate indifference to his reports of sexual assault and harassment, male students at WMS were emboldened to continue, and escalate, their abuse. This abuse, coupled with Defendants' failure to take any meaningful action to address it, derailed Child Doe's education. For example, although

academically qualified to advance to the next grade, Child Doe repeated seventh grade to avoid his main tormentors.

Child Doe asserts two claims against the District, one under Title IX for acting with deliberate indifference to his reports of peer sexual assault and harassment, and one under 42 U.S.C. § 1983 for violating the Equal Protection Clause.[1] Both claims arise from Defendants' practice of treating reports of sexual harassment differently based on a victim's sex—which is quintessential sex discrimination. The District has moved to dismiss both claims by cherry-picking some of the alleged facts and ignoring others. For example, Defendants ignore Child Doe's allegations that both McPherson and Brewer admitted they would have responded differently to his reports if he had been female. Defendants also ignore Child Doe's allegation that McPherson and Brewer refused to recognize that the abuse Child Doe reported was sexual assault. Accepting *all* the well-pleaded facts as true, as this Court must, Child Doe has stated claims under both Title IX and the Equal Protection Clause.

Defendants' motion to dismiss is premised on two meritless arguments. First, they argue that they did not act with deliberate indifference because they took some action in response to Child Doe's reports of abuse. But courts have repeatedly permitted plaintiffs to proceed with their Title IX claims where, as here, the plaintiff alleges that a school district downplayed male-on-male sexual assault as mere "horseplay" or "hazing." By failing to investigate Child Doe's reports as sexual assaults, Defendants effectively took

[1] Child Doe also asserts an equal protection claim against Brewer and McPherson (Compl. ¶¶ 116-25), but Defendants have not moved to dismiss that claim.

no action whatsoever. And even if the District's investigation of the "horseplay" counts as "action," courts have permitted plaintiffs to proceed with their Title IX claims where they allege that school officials took action that could not reasonably end the harassment.

Second, Defendants argue that Child Doe has not stated a Title IX claim because he was not sexually assaulted again after reporting the second and third sexual assaults. But it is well established that an allegation of just one sexual assault is sufficient to plead a Title IX claim. Moreover, Child Doe pled that he was sexually assaulted two more times because of Defendants' ineffective response to his first report of sexual assault.

Defendants' argument for dismissing Child Doe's equal protection claim under 42 U.S.C. § 1983 is similarly meritless. The District argues that Superintendent Brewer cannot act on its behalf because he does not have final policymaking authority under Oklahoma law. But recent Oklahoma precedent shows that a superintendent may have final policymaking authority if the district's harassment policy charges the superintendent with implementing the policy—which is precisely what the District's policy does. Moreover, Defendants fail to address Child Doe's allegations of two additional bases for the District's liability under § 1983: the District's failure to train its employees to respond appropriately to reports of sexual harassment and its custom of deliberate indifference toward male-on-male sexual assault.

As explained in detail below, Defendants' Motion to Dismiss Plaintiff's Title IX and equal protection claims should be denied.

## FACTUAL BACKGROUND

In his first 18 months as a student at WMS, Child Doe suffered three sexual assaults by male students, constant verbal harassment, and threats of beatings and death. (Compl. ¶ 1.) Child Doe's nightmare began within weeks of matriculating as a sixth-grade student at WMS, when he was shoved into a vent cover by a large football player and wound up in the hospital to receive stitches. (Compl. ¶¶ 30-33.) Child Doe was soon targeted for worse abuse. A few months later, in February, 2016, the same football player restrained Child Doe while a second male student forced his fingers in Child Doe's rectum. (Compl. ¶ 36.) A third student stood by laughing, while a classroom full of thirty to forty students witnessed the sexual assault. (*Id.*) Traumatized, Child Doe called his mother from school, crying uncontrollably. (Compl. ¶ 38.)

Child Doe's parents then joined him at school so they could report the sexual abuse together to McPherson. (Compl. ¶¶ 38-39.) McPherson downplayed the abuse, calling it normal "horseplay" among boys. (Compl. ¶ 40.) He also said he would handle the matter and would require the students involved in the incident to write a letter of apology. (*Id.*) Child Doe and his parents never received the promised apology and believe that only one of the three students involved in the sexual assault was disciplined. (Compl. ¶¶ 42-44.)

Child Doe's hellish year only worsened after this. Friends of the perpetrators taunted Child Doe relentlessly, calling him "snitch" or "prison snitch" for reporting the sexual assault. (Compl. ¶ 45.) Soon, nearly the entire sixth grade joined in the harassment, constantly calling Child Doe the kid who was "butt-fucked" or "raped." (Compl. ¶ 46.) Then, in May of 2016, a student told Child Doe that the three students involved in sexually

assaulting him were planning to beat him up. (Compl. ¶ 48.) The following month, Child Doe received a text from one of the perpetrators—the same one who had shoved his fingers in Child Doe's rectum—saying, "Fuck you, I am going to kill you." (Compl. ¶ 50.) Child Doe's father reported these threats to McPherson and told him about the constant harassment Child Doe was experiencing at school. (Compl. ¶¶ 48-51.) McPherson did nothing in response. (Compl. ¶¶ 49, 52.)

Child Doe reluctantly returned to WMS for seventh grade, only to suffer intensified verbal harassment and two more sexual assaults by male students apparently emboldened by the school's inaction. (Compl. ¶ 55.) In the winter, Child Doe suffered his second sexual assault while changing in a locker room. (Compl. ¶ 56.) A male student-athlete approached him from behind and stuck his fingers in Child Doe's rectum, saying "This will happen to you in high school; better get used to it!" (*Id.*) While Child Doe was being sexually assaulted, he witnessed another student in the locker room being sexually abused in the same way. (Compl. ¶ 57.) In the spring, Child Doe was sexually assaulted a third time at WMS. (Compl. ¶ 58.) Again, a male student approached Child Doe while he was changing in a locker room and shoved his fingers in Child Doe's rectum. (*Id.*) Weeks later, a student involved in the first sexual assault threatened to "rip [Child Doe's] fucking head off and shove it down [his] throat" because Child Doe had said "good morning" to the student's girlfriend. (Compl. ¶ 61.)

Demoralized by McPherson's response to his reports of sexual assault and harassment in sixth grade, Child Doe did not report the sexual abuse and harassment he was suffering in seventh grade until later in the school year. (Compl. ¶¶ 59, 71-74.) On

May 1, 2017, in a meeting with Brewer, McPherson, and his father, Child Doe provided a detailed account of the abuse he had suffered and witnessed during the school year. (Compl. ¶¶ 69-79.) As before, his report fell on deaf ears. Instead of recognizing that Child Doe had been sexually assaulted and harassed, the administrators minimized the seriousness of the incidents. They characterized the incidents as normal "horseplay" or "hazing" among boys, asked if the students had accidentally stuck their fingers in Child Doe's rectum, and admitted they would have called the police if students had stuck their fingers in a girl's rectum. (Compl. ¶¶ 67, 79.) McPherson also suggested that Child Doe was lying about the abuse and had instigated the recent threats against him. (Compl. ¶¶ 71, 77.) When Child Doe's father tried to explain the scope and frequency of the abuse his son was experiencing at school, McPherson interrupted, asking, "What do you want me to do, hold his hand?" (Compl. ¶ 66.) At one point, Brewer suggested that Child Doe could resolve the problem himself with a baseball bat. (Compl. ¶ 80.)

Brewer and McPherson's dismissiveness of the sexual assaults and harassment Child Doe reported on May 1, 2017, were reflected in their "investigation." Instead of investigating Child Doe's allegations of sexual assault in accordance with the District's policies, Brewer tasked McPherson with investigating the incidents as "accidental" touchings. (Compl. ¶ 82.) Making matters worse, McPherson, who was both WMS's principal and athletic director, effectively rigged the result of the "investigation." He interviewed all the students identified by Child Doe together, prefacing the group interview with a warning that their answers to his questions could affect their future athletic careers. (Compl. ¶ 85.) This had the intended effect of silencing the boys and tanking the

investigation. (Compl. ¶ 86.) Brewer subsequently informed Child Doe's father that there was nothing the District could do without witnesses to verify the allegations. (Compl. ¶ 84.)

The District's inadequate response to Child Doe's reports of sexual assault and harassment severely disrupted his education. His grades dropped and he is repeating seventh grade—despite being academically qualified to advance to eighth grade—to escape his main harassers. (Compl. ¶¶ 87-88, 98.) Because of being held back, Child Doe was ineligible to play football, his favorite sport, during the 2017-18 school year. (Compl. ¶ 98.) And he stopped playing basketball because he was afraid he would be sexually assaulted again in the school's locker rooms. (*Id.*) Child Doe has also needed therapy and counseling to address both the trauma of the sexual assaults and the District's failure to take appropriate action to protect him. (Compl. ¶¶ 100-103.)

## STANDARD OF REVIEW

The "Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 (10th Cir. 1989); *see also Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (describing a motion to dismiss as a "harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice."). To overcome a motion to dismiss for failure to state a claim, a plaintiff need only state a "claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible on its face where "the plaintiff pleads factual content that allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In reviewing such a motion, a court must presume as true all well-pleaded facts and "draw all reasonable inferences therefrom in the light most favorable to plaintiffs." *Dias*, 567 F.3d at 1178. The question for this court "is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Tackett v. University of Kansas*, 234 F. Supp. 3d 1100, 1106 (D. Kan. 2017) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

## ARGUMENT

Defendants' motion to dismiss Child Doe's Title IX and equal protection claims against the District should be denied. First, Plaintiff has presented sufficient facts to proceed with his Title IX claim that Defendants acted with deliberate indifference to his reports of peer sexual assault and harassment. He alleges that Defendants acted with deliberate indifference both by refusing to treat his reports of anal penetration as sexual assault and by failing to take steps reasonably calculated to end the harassment. Second, Plaintiff's complaint contains well-pleaded factual allegations supporting three independent bases for the District's liability under 42 U.S.C. §1983: (1) Superintendent Brewer, while acting with final policymaking authority, responded with deliberate indifference to Child Doe's reports of sexual assault and harassment; (2) the District acted with deliberate indifference by failing to adequately train its employees to respond to reports of male-on-male sexual assault; and (3) the District had a custom of acting with deliberate indifference to male-on-male sexual harassment.

## I. Child Doe Has Stated a Title IX Claim Against the District for Acting with Deliberate Indifference to His Reports of Sexual Assault and Harassment.

Title IX of the Education Amendments of 1972 states that "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) (2018). The Supreme Court has made clear that Title IX's prohibition of sex discrimination provides students a right to be free from student-on-student harassment, including acts of sexual violence. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). It is also well-settled that Title IX applies to same-sex sexual harassment. *See, e.g.*, *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 864-65 (8th Cir. 2011); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 65-66 (1st Cir. 2002); *J.H. v. Sch. Town of Munster*, 160 F. Supp. 3d 1079, 1090-91 (N.D. Ind. 2016).

"A school district may be liable under Title IX provided it (1) has actual knowledge of, and (2) is deliberately indifferent to, (3) harassment that is so severe, pervasive, and objectively offensive as to (4) deprive access to the educational benefits or opportunities provided by the school." *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008). Defendants have moved to dismiss Plaintiff's Title IX claim on two bases. First, they argue that the District's response to Child Doe's harassment did not constitute "deliberate indifference." (Defs.' Mot. to Dismiss 11-14, ECF No. 7.) Second, the District argues that even if they were deliberately indifferent to Child Doe's reports, their response did not subject Child Doe to further harassment or discrimination. (Defs.' Mot. to Dismiss 14, ECF No. 7.) As explained below, both arguments lack merit

under the applicable law and the facts alleged in the Complaint. Accordingly, Defendants' motion to dismiss Plaintiff's Title IX claim should be denied.

### A. Child Doe's Allegations that Defendants Failed to Meaningfully Address His Reports of Sexual Assault Plausibly Constitute Deliberate Indifference.

Child Doe alleges that Defendants failed to respond adequately to his reports of peer sexual assault and harassment because they treated the abuse as normal "horseplay" among boys, rather than serious sexual assaults. Defendants ignore these allegations and argue that the District cannot be liable under Title IX because it took action in response to Child Doe's reports. (Defs.' Mot. to Dismiss 11-14, ECF No. 7.) This argument is meritless. First, courts routinely permit plaintiffs to proceed with Title IX claims based on allegations that a school district trivialized male-on-male student sexual harassment as "horseplay" or "hazing." Second, it is well established that where, as here, a plaintiff plausibly alleges that a district's response was not reasonably calculated to end the harassment, the plaintiff has stated a Title IX claim.

A school district acts with deliberate indifference when its response to the harassment "is clearly unreasonable in light of the known circumstances." *Rost*, 511 F.3d at 1121 (quoting *Davis*, 526 U.S. at 648). Where a school district knows that "its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior." *Vance v. Spencer Cty. Public School Dist.*, 231 F.3d 253, 261 (6th Cir. 2000). Child Doe has sufficiently alleged that the District's response to his reports of sexual assault and harassment failed to meet this standard.

The District appears to believe that it is insulated from Title IX liability because it responded to Child Doe's reports of harassment. (*See* Defs.' Mot. to Dismiss 11-14, ECF No. 7.) But courts have repeatedly rejected the argument that "as long as a school district does something in response to harassment, it has satisfied the [deliberate indifference] standard." *Vance*, 231 F.3d at 260; *see also, e.g.*, *Doe v. Rutherford Cty., Tenn., Bd. of Educ.*, No. 3:13-cv-00328, 2014 WL 4080163, at *13 (M.D. Tenn. Aug. 18, 2014) ("[T]he mere fact that a school does 'something' in response to a harassment claim does not per se insulate it from liability under Title IX.").

Allegations that school officials failed to address sexual assault or harassment against boys, instead dismissing the offensive conduct as "hazing" or "horseplay," state a claim under Title IX. In fact, plaintiffs survive summary judgment motions and proceed to trial based on evidence supporting these allegations.

For example, in *Mathis v. Wayne Cty. Bd. of Educ.*, 496 Fed. App'x 513, 513-14 (6th Cir. 2012), a court of appeals affirmed a judgment against a school board in a Title IX case alleging that the board acted with deliberate indifference to sexual harassment arising from incidents in a locker room involving middle school boys and their basketball teammates. In one incident, members of the basketball team anally penetrated one of the plaintiffs with a marker. *Id.* at 514. Although school officials responded by temporarily suspending the perpetrators from school and the team, a jury found that the board had acted with deliberate indifference to the sexual harassment and awarded the plaintiffs damages. *Id*. at 516. The school board moved to set aside the verdict, but the district court denied the motion. *Id*. at 515. The court of appeals upheld the district court's judgment, holding that

there was ample evidence from which reasonable jurors could have concluded that the board's response constituted deliberate indifference. *Id.* at 516. The court explained that "the jury could have reasonably viewed the evidence of the marker incident not just as horseplay gone awry, but rather as a serious incident of sexual assault, which requires a punishment more severe than an eleven-day suspension from [school] and a month-long suspension from the basketball team." *Id. See also J.H. v. School Town of Munster*, 160 F. Supp. 3d 1079, 1090-91 (N.D. Ind. 2016) (evidence that school officials ignored allegations of hazing on boys' swim team, but not on girls' swim team, and "[m]inimized" reports of hazing as "horseplay," precluded summary disposition of plaintiff's Title IX claim.); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1308 (D. Kans. 2005) (evidence was sufficient to support jury finding of deliberate indifference where school official "made comments to the effect that plaintiff should have taken the hazing incident 'like a man' and trivialized the incident by saying 'boys will be boys.'").

In *Mathis*, the school board was liable for acting with deliberate indifference to male-on-male student sexual harassment, despite taking far more disciplinary action against the perpetrators than Defendants did in this case. Here, instead of conducting a sexual harassment investigation, Defendants minimized Child Doe's reports as "hazing" and "horseplay," asked sarcastically whether they were expected to "hold [Child Doe's] hand," suggested that Child Doe take matters into his own hands to defend himself, and gave a minimal punishment to only one of Child Doe's harassers. In addition, Defendants acknowledged that they would have responded differently if a girl had been anally penetrated.

In *Mathis*, the court also upheld the jury's finding of deliberate indifference based on evidence that the school board failed to conduct any substantive investigation into other allegations of sexual harassment, apart from the "marker incident," or the continuing harassment one plaintiff experienced after students learned about the marker incident. 496 Fed. App'x at 516. The court explained that this evidence supported a finding that the board's remedial steps were insufficient to provide the plaintiff with a safe environment. *Id*. Like the school board in *Mathis*, the District failed to conduct any substantive investigation into Child Doe's allegations of the sexual harassment and threats that followed his report of sexual assault in sixth grade, or the continuing harassment he suffered throughout his first time in seventh grade. And Child Doe's allegations against the District involve much worse conduct than alleged against the school board in *Mathis*. Child Doe alleges that he was sexually assaulted two more times and continually harassed after Defendants' anemic response to the first sexual assault he reported. A court could plausibly infer from these allegations that the District knew its response to the first reported assault was ineffective and acted with deliberate indifference when it failed to take subsequent remedial steps to provide a safe environment for Child Doe.

*Mathis*'s similar facts demonstrate that Child Doe's allegations, if proven, will entitle him to relief under Title IX. In short, Child Doe alleges that Defendants failed to take any meaningful action to stop the sexual assaults and harassment he reported. Child Doe has pled ample facts to support an inference that the District's response was "clearly unreasonable in light of the known circumstances" and was not reasonably calculated to

eliminate the harassment. *Rost*, 511 F.3d at 1121; *Vance*, 231 F.3d at 261. Child Doe has therefore stated a claim for deliberate indifference to sexual harassment under Title IX.[2]

### B. Child Doe Did Not Need To Suffer a Fourth Sexual Assault to Sufficiently Plead that the District Acted with Deliberate Indifference.

The District also argues that it cannot be liable for acting with deliberate indifference to Child Doe's reports of sexual assault because Child Doe was not sexually assaulted again after reporting the second and third assaults. (Defs.' Mot. to Dismiss 9, ECF No. 7.) But there is no "three free sexual assaults" rule—or even a "one free sexual assault" rule—under Title IX. Courts have consistently recognized that a clearly unreasonable response to just one serious sexual assault is actionable and that a student need not allege multiple instances of sexual assault to state a plausible Title IX claim. *Weckhorst v. Kansas State University*, 241 F. Supp. 3d 1154, 1175 (D. Kan. 2017) (citing *Karasek v. Regents of the Univ. of Cal.*, No. 15-CV-03717-WHO, 2015 WL 8527338, at

[2] Defendants' motion mischaracterizes Plaintiff's deliberate indifference allegations in two key ways. First, they argue that a school's failure to follow its own sexual harassment policy cannot establish deliberate indifference. (Defs.' Mot. to Dismiss 8, ECF No. 7.) But Plaintiff does not allege this; rather, Plaintiff includes Defendants' failure to follow its own policy as one of *many* bases that, considered together, could support a finding of deliberate indifference. (*See* Compl. ¶¶ 94-95, 114.) Second, Defendants suggest that Plaintiff's allegations of deliberate indifference rest on the District's refusal to meet particular remedial demands. (*See* Defs.' Mot. to Dismiss 11, ECF No. 7.) This, too, is incorrect. Plaintiff alleges that Defendants failed to follow through even on the minimal action *promised*—namely, a letter of apology from the offending students—which could support a finding of deliberate indifference. (*See* Compl. ¶ 114.) Defendants also argue they did not act with deliberate indifference because it was too late in the school year for McPherson to respond to reported threats against Child Doe in sixth grade. (Defs.' Mot. to Dismiss 12, ECF No. 7.) But a court could plausibly infer that McPherson could have taken action either soon after receiving the report or at the beginning of the next school year. In short, none of Defendants' arguments refute that Plaintiff has sufficiently pled a Title IX claim against the District.

*12 (N.D. Cal. Dec. 11, 2015); *T.Z. v. City of N.Y.*, 634 F. Supp. 2d 263, 270-71 (E.D.N.Y. 2009); *Roe ex rel Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1027 (E.D. Cal. 2009)). In any event, Plaintiff alleges that he suffered further harassment—including two more sexual assaults—because of Defendants' inadequate response to his report of the first sexual assault. (Compl. ¶¶ 55-59, 67, 114.) Child Doe did not need to suffer a fourth sexual assault to state an actionable Title IX claim against the District.

Defendants' argument that Child Doe had to suffer yet another assault to state a Title IX claim derives from their misreading of the Supreme Court's statement in *Davis* that "deliberate indifference must, at a minimum, cause students to undergo harassment *or make them liable or vulnerable to it*." 526 U.S. at 644-45 (emphasis added) (internal brackets and quotation marks omitted). Courts interpreting this language have explicitly rejected the argument that *Davis* requires a student to suffer further harassment to state a Title IX claim. *See, e.g., Weckhorst*, 241 F. Supp. 3d at 1174 ("*Davis* requires that the funding recipient's deliberate indifference leave the student 'liable or vulnerable to' further harassment, not that further harassment actually occur.") (citing *Kinsman v. Fla. State Univ. Bd. of Trs.*, No. 4:15CV235-MW/CAS, 2015 WL 11110848, at *4 (N.D. Fla. Aug. 12, 2015); *Karasek*, 2015 WL 8527338, at *12; *Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F.Supp.2d 438, 444 (D. Conn. 2006)). Defendants' mistakenly view *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1155–56 (10th Cir. 2006), as supporting their position. But the court in *Escue* merely "noted the absence of further harassment" as part of its deliberate indifference analysis; it did not hold that further harassment was required to show deliberate indifference. *See Weckhorst*, 241 F. Supp. 3d at 1174.

Defendants' argument also fails because Child Doe alleges that he suffered further harassment—including two more sexual assaults—following Defendants' inadequate response to his first report of sexual assault in February of 2016. (Compl. ¶ 74.) The fact that Child Doe was not sexually assaulted after reporting on May 1, 2017, that he had suffered two additional sexual assaults does not insulate the District from Title IX liability. In fact, the court in *Mathis* rejected arguments strikingly similar to the District's argument here. In *Mathis*, the school board argued that it could not be liable under Title IX because the plaintiffs failed to present evidence that sexual harassment occurred after the board had actual notice and because the harassment stopped. 496 Fed. App'x at 516. The court disagreed, upholding the board's Title IX liability for acting with deliberate indifference. *Id*.

Furthermore, a court could reasonably infer from Plaintiff's allegations that the reason he was not sexually assaulted again is that he repeated seventh grade out of desperation, to escape his tormentors. (Compl. ¶¶ 87-88.) This disruption to his education further supports an inference of deliberate indifference. A court could reasonably conclude that holding a student back is not an appropriate method for addressing sexual harassment. Multiple courts have held that where a student "voluntarily withdraws from school to avoid exposure to further harassment, the voluntary withdrawal may yet support a finding that the school 'effectively barred [the victim's] access to an educational opportunity.'" *Spencer v. University of New Mexico Bd. of Regents*, No. 15-CV-141 MCA/SCY, 2016 WL 10592223, at *6 (D. N.M. Jan. 11, 2016) (quoting *Williams v. Bd. of Regents of Univ. Sys. Of Georgia*, 477 F.3d 1282, 1296-98 (11th Cir. 2007)). Voluntarily repeating a grade

is similar to withdrawing from school in that both effectively bar a student's access to equal educational opportunities. Thus, Child Doe has pled ample facts to state a claim against the District under Title IX.

## II. Child Doe Has Stated an Equal Protection Claim Against the District on Three Separate Grounds.

Plaintiff has pled sufficient facts to support his claim that the District's failure to respond adequately to his reports of sexual assault and harassment also violated the Equal Protection Clause of the U.S. Constitution. A school district may be liable under §1983 where the district's "discriminatory actions are representative of an official policy or custom . . . or are taken by an official with final policy making authority." *Murrell v. School Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1249 (10th Cir. 1999) (citing *Randle v. City of Aurora*, 69 F.3d 441, 446-50 (10th Cir. 1995). Moreover, a district may be liable under § 1983 where its "failure to train its employees . . . evidences a deliberate indifference to the rights of its inhabitants." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (1989) (internal quotation marks omitted).

Child Doe has plausibly alleged that Superintendent Brewer exercised final policymaking authority in failing to respond appropriately to Child Doe's reports of sexual harassment, and that the District both failed to train its employees to respond to male-on-male sexual assault and exhibited a custom of deliberate indifference to this form of harassment. In its motion, the District responds unpersuasively to Child Doe's allegation that Brewer acted with final policymaking authority and ignores Child Doe's two

additional bases for the District's liability. Defendants' motion to dismiss Child Doe's equal protection claim under § 1983 should, therefore, be denied.

### A. Child Doe Has Stated a Claim Against the District Based on Defendant Brewer's Final Policymaking Authority Under the District's Sexual Harassment Policy.

The District argues that, under Oklahoma law, a superintendent does not have final policymaking authority within a school district and, therefore, the District cannot be liable under § 1983. This argument ignores recent precedent in this Court explaining that a superintendent may have final policymaking authority "if s/he is authorized to implement the [school district's sexual harassment] policy." *Najera v. Ind. School Dist. of Stroud No. I-54 of Lincoln Cty.*, No. CIV-14-657-R, 2015 WL 4310552, at *5 (W.D. Okla. July 14, 2015). Child Doe pled that the District's policies for "Preventing Harassment, Intimidation and Bullying" provide that "[t]he Superintendent shall be responsible for enforcing this policy." (Compl. ¶ 29.) This is sufficient under *Najera* to show that it is plausible to allege that Brewer had final policymaking authority regarding implementation and enforcement of the District's sexual harassment policy.

Moreover, "[t]he Tenth Circuit has explained that 'if an official, who possesses final policymaking authority in a certain area, makes a decision—even if it is specific to a particular situation—that decision constitutes municipal policy for § 1983 purposes.'" *Kerns v. Indep. Sch. Dist. No. 31 of Ottawa Cty.*, 984 F. Supp. 2d 1144, 1153 (N.D. Okla. 2013) (deciding *sua sponte* to allow plaintiffs leave to amend and plead municipal liability) (quoting *Randle v. City of Aurora*, 69 F.3d 441, 447 (10th Cir.1995)).

Plaintiff has pled sufficient facts to plausibly allege that the District acted with deliberate indifference, based on Brewer's failure to respond in accordance with the District's sexual harassment policy to Child Doe's May 1, 2017, report of sexual assault and harassment. The District's policy prohibits sexual bullying, which is defined to include "physical acts of a sexual nature at school, including fondling or touching of private parts of the victim's body," which "may also constitute sexual harassment." (Compl. ¶ 28 (citing Washington Board of Education HIB Policy (Regulation) at 3 (Nov. 10, 2014)).) Child Doe has alleged facts that fit this definition—repeated digital penetration of his rectum by other male students. He has also alleged that, despite his reports of behavior proscribed by the District's policy, Brewer failed to enforce the policy, which calls for prompt investigation of harassment allegations, expeditious correction of the conditions causing the harassment, initiation of appropriate corrective actions, and identification and enactment of methods to prevent recurrence of the harassment. (Compl. ¶¶ 29, 131 (citing Washington Board of Education Bullying Policy at 2 (Nov. 10, 2014); HIB Policy (Investigation Procedures) at 2 (Nov. 10, 2014)).) Thus, Child Doe has stated a claim against the District under § 1983, based on plausible allegations that Brewer exercised final policymaking authority when he failed to enforced the District's sexual harassment policies in response to Child Doe's reports of prohibited conduct.

### B. Child Doe Has Also Stated an Equal Protection Claim Against the District Based on the District's Failure to Train Its Employees and Its Custom of Deliberate Indifference to Sexual Harassment Between Boys.

Child Doe has also pled sufficient facts to state an equal protection claim against the District based on its failure to train its employees to respond appropriately to reports of

male-on-male sexual harassment and its custom of acting with deliberate indifference to this type of harassment. Defendants' motion ignores these grounds for Plaintiff's equal protection claim against the District, which provide independent bases for permitting Plaintiff to proceed with this claim.

First, Child Doe alleges that the District failed to train school officials to respond properly to reports of male-on-male sexual assault. (Compl. ¶¶ 136-37.) "[E]vidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, [can] trigger municipal liability." *Board of County Com'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 409 (1997) (citing *Harris*, 489 U.S. at 390). Moreover, "failure to conduct an adequate training program for implementation of an otherwise valid policy may represent a municipal policy on which liability can rest." *Simpson v. University of Colorado Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007).

Despite Child Doe's complaints of multiple anal penetrations, constant verbal harassment over being the kid who was "butt fucked" or "raped", and threats of beatings and death by the perpetrators, Brewer and McPherson trivialized this conduct by treating it as normal "horseplay" or "hazing" among boys, instead of serious sexual harassment. (Compl. ¶¶ 67, 82, 114(c).) Based on these facts, it is reasonable to infer that Brewer and McPherson had not been adequately trained to implement the school's sexual harassment policy or to otherwise respond to reports of sexual harassment. (*See id.*)

Courts have concluded that "[b]ecause sexual assault claims arise frequently in the public high school context, it is certainly foreseeable that the failure to train school staff on

how to handle such claims would cause disastrous results . . . . [J]ust like failing to train a police officer on when to use his or her gun, failing to train a school principal on how to investigate sexual assault allegations constitutes deliberate indifference." *Doe v. Forest Hills Sch. Dist.*, No. 1:13-cv-428, 2015 WL 9906260, *17 (W.D. Mich. March 31, 2015); *see also Schaefer*, 716 F. Supp. 2d at 1063-64 (recognizing that a school district's failure to train may give rise to District liability under 42 U.S.C. § 1983). Based on Child Doe's well-pleaded facts, this Court can infer not only that the District failed to train school administrators on how to respond to complaints of sexual assault, but that this failure could constitute deliberate indifference. Accordingly, Child Doe should be permitted to proceed with his equal protection claim against the District and be given an opportunity to discover and present evidence of the District's lack of training.

Second, Child Doe has plausibly pled that the District has a "custom of failure to receive, investigate, or act on complaints of" male-on-male sexual harassment, providing another basis for the District's liability under § 1983. *See Rost*, 511 F.3d at 1125. To establish a custom of deliberate indifference to sexual harassment, a plaintiff must identify "a continuing, widespread, and persistent pattern of misconduct by the state." *Murell*, 186 F.3d at 1249-50 (citing *Gates v. Unified Sch. Dist. No. 449 of Leavenworth Cty., Kan.*, 996 F.2d 1035, 1041 (10th Cir. 1993)). Child Doe has alleged that McPherson and Brewer failed to respond appropriately to two distinct reports of sexual assault, at least three reports of sexual harassment and associated bullying, as well as Child Doe's report that another male student was sexually assaulted. (Compl. ¶¶ 37-44, 48-52, 75-84.) These allegations

plausibly support Plaintiff's claim that the District had a custom of acting with deliberate indifference to male-on-male sexual assault, in violation of the Equal Protection Clause.

In sum, Child Doe has pled three independent bases for the District's liability under § 1983. Defendants' motion to dismiss Child Doe's equal protection claim should therefore be denied.

## III. Child Doe's Equal Protection Claims Against Brewer and McPherson in Their Official Capacities Are Appropriate.

Defendants do not challenge Plaintiff's equal protection claims against Brewer and McPherson in their individual capacities, but argue that these District employees cannot be sued in their official capacities. This is incorrect. Punitive damages under § 1983 are available against these employees in their official capacity. Though Defendants correctly note that, generally, "a suit against a person in his or her official capacity is the same as a suit against a public entity," Defs.' Mot. to Dismiss 17, ECF No. 7, the Tenth Circuit has held that "[t]the fact that municipalities are immune from punitive damages does not, however, mean that individual officials sued in their official capacity are likewise immune." *Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1307 (10th Cir. 2003). This Court recently considered this question and declined to dismiss a plaintiff's punitive damages claims under § 1983 against a defendant sued in his official capacity. *Estep v. City of Del City ex rel. Del City Police Dep't*, No. CIV-17-625-M, 2018 WL 1598674, at *4 (W.D. Okla. March 30, 2018). Because Child Doe brings a claim for punitive damages against Brewer and McPherson in their official capacities, Compl. ¶ 125(b), those claims are

significant independent of his claims against the District. Thus, Defendants' motion to dismiss on this basis should be denied.

## IV. Defendants' Argument that Plaintiff Failed to Comply with Fed. R. Civ. P. 10(a) and Fed. R. Civ. P. 17(a) is Moot.

Defendants argue that Child Doe's Complaint should be dismissed under Fed. R. Civ. P. 12(b)(1) because he "failed to sufficiently identify the real parties in interest." (Defs.' Mot. to Dismiss 18, ECF No. 7.) However, on May 4, 2018, this Court granted Plaintiff's unopposed motion to use pseudonyms in the case. (Agreed Order Permitting Use of Pseudonyms 1-2, May 4, 2018, ECF No. 10). Defendants' motion to dismiss on this ground is therefore moot.

## CONCLUSION

The factual allegations in Child Doe's Complaint are detailed and conform to the elements of his claims against the District under Title IX and the Equal Protection Clause. Defendants' Motion to Dismiss ignores key facts pled by Child Doe, misrepresents the applicable law, and fails to address pertinent authority. This Court should deny Defendants' motion in its entirety.

Date: May 10, 2018

Respectfully Submitted,

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## Certificate of Service

I hereby certify that on the 10th day of May, 2018, I filed the foregoing electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

s/ Nathan D. Richter
Nathan D. Richter