IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

MERRITT BICHEL	)	
Plaintiff	)	
	)	
	)	
	)	**CIVIL ACTION NOS. 4:23-cv-00804-BP,**
	)	**4:23-00886-BP**
KENNEDALE INDEPENDENT	)	
SCHOOL DISTRICT and	)	
DR. STEPHANIE DEVLIN.	)	
Defendants.	)	

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR RELIEF FROM THE JUDGMENT AND TO AMEND THE COMPLAINT

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INTRODUCTION

Sixteen-year-old Merritt Bichel dropped out of her high school because Defendants failed to protect her from almost daily sex-based harassment by several older boys, which lasted over a year and drove her to the brink of suicide. It is hard for Merritt to discuss the experience. Her prior complaint did not include all the facts pertinent to her claims: it left out, for example, that she attempted suicide, that she left the school district to escape the harassment, that Defendants allowed the harassment to continue for many months after she complained, and that Defendants refused to treat it as sex-based harassment or separate the boys from Merritt because Defendants claimed the abuse was not serious enough. Without those facts, the Court dismissed Merritt's second amended complaint and entered judgment, believing that she "already pleaded her best case, and any further attempts to amend would be futile." ECF. No. 21. Merritt then retained additional counsel at Public Justice. She respectfully requests that the Court grant her relief from the judgment and allow her to amend her complaint so her case may be heard on its merits.

"It is the well-established policy of the federal rules that the plaintiff is to be given every opportunity to state a claim" when she has the facts to support one. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977). That remains true after judgment—leave to amend should still be "freely given when justice so requires." *Calhoun v. Collier*, 78 F.4th 846, 854 (5th Cir. 2023) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Giving Merritt another chance would serve justice here: her proposed amended complaint states claims under Title IX of the Education Amendments of 1972 and 42 U.S.C. § 1983, she filed this motion promptly (within the twenty-eight days provided by Rule 50(e)), discovery has not started, she has had only one past chance to cure the defects in her complaint, and a second chance would not prejudice Defendants.

Accordingly, the Court should grant Merritt relief from the judgment under Rules 60(b)(1) or 59(e) and grant Merritt leave to file the attached proposed amended complaint (**Ex. A**).

I. FACTS

From spring 2020 through the entire 2020-2021 school year, Merritt endured almost daily sex-based harassment from a group of boys in her band classes. Ex. A at ¶¶ 1, 9-12. The prior summer, she had sent an intimate photo of herself to one of the boys, D.M., who shared it with his friends. *Id.* at ¶ 10. After that, the boys harassed Merritt constantly. *Id.* at ¶ 11. Several times per week in the jazz band class they shared with Merritt, they called her a "whore," a "slut," "desperate hoe," and a "bitch." *Id.* They sent her text messages calling her similar names. *Id.* at ¶ 12. In one message, one of the boys told Merritt she should kill herself. *Id.*

The harassment seriously impacted Merritt's education—and her mental health. Once a happy teenager who loved music, Merritt grew to hate her band classes. *Id.* at ¶¶ 8, 13. She began to skip jazz band once every week or two, and she searched for excuses to skip more. *Id.* at ¶ 13. When she did attend, she would have her parents drop her off away from the main entrance to avoid the boys who harassed her. *Id.* And almost every afternoon when he picked her up, Merritt's father would notice her crying. *Id.* Merritt struggled to focus on schoolwork, and her performance in band suffered. *Id.* ¶ 15. The harassment made Merritt feel "worthless." *Id.* at ¶ 14. As Merritt later wrote in a letter to the school, "I feel terrible about most things about me now." *Id.*

In the late fall semester of 2020, Merritt attempted suicide. *Id.* at ¶ 16.

Merritt and her family reported the harassment to several school officials, but they took no corrective action. Near the end of 2020, Merritt reported the harassment to the band director, but he told her he would not get involved, and there was nothing he could do. *Id.* at ¶¶ 17-18. On February 2, 2021, her father followed up with the director by email and implored him to intervene. *Id.* at ¶ 19. And around February 9, 2021, Merritt told her guidance counselor about the ongoing harassment and the intimate picture D.M. had on his phone and expressed her concern that he had

shared the picture with other students without her consent. *Id.* at ¶ 20. The director and counselor conveyed those reports to Academic Dean Jared Smith and Defendant Devlin, the Title IX Coordinator. *Id.* at ¶ 21. But school officials took no action calculated to stop the harassment: they did not separate Merritt from the harassers, warn them to stop, or even check in with Merritt to determine whether the harassment was continuing. *Id.* at ¶ 22.

In mid-May 2021, over four months after Merritt reported the harassment, the District finally sent her parents a letter stating the outcome of an investigation it claimed to have conducted. *Id.* at ¶ 25. The letter said that there had been no violation of the school harassment or bullying policies because, even if they occurred, "the alleged behaviors did not create an intimidating, threatening or abusive educational environment" for Merritt. *Id.* The District reached that conclusion without even interviewing Merritt. *Id.* at ¶ 27. The letters did not even mention Merritt's allegation that D.M. had shared an intimate picture of her without her consent. *Id.* at ¶ 26. In fact, the District did not investigate that allegation at all. *Id.* The boys were given no apparent discipline (the band director was not aware of any), and the District allowed them to continue to sit next to Merritt in jazz band, where they continued the harassment unchecked. *Id.* at ¶ 28.

Seeing no path forward, Merritt withdrew from the school district. *Id.* at ¶¶ 29-30. She finished her last two years of high school at an online school in another district. *Id.* at ¶ 30.

II. PROCEDURAL BACKGROUND

Merritt brought Title IX and § 1983 claims against the District and Title IX Coordinator Devlin. ECF No. 1.[1] The week after she filed her initial complaint against the District, she filed

[1] Merritt first filed her claim against Defendant Devlin in Texas state court, but Devlin removed the claim to federal court, where the Court consolidated it with her case against the District. *See* Case No. 4:23-00886-BP, ECF No. 1. Unless otherwise noted, all cites to docket entries refer to Case No. 4:23-cv-00804-BP, in which Merritt initially filed her complaint against the District.

the same complaint again and attached the civil cover sheet. ECF No. 3. Defendants filed motions to dismiss, which this Court granted. ECF No. 18. Amid some confusion in the briefing about Merritt's legal theories, the Court dismissed Merritt's Title IX and § 1983 Equal Protection claims because she did not plead that Defendants "intentionally treated her differently . . . on the basis of her sex." *Id.* at 12; *see also id*. at 7. Merritt then amended her complaint to add more facts about the harassment and the District's response. ECF No. 19. Defendants filed another motion to dismiss, to which Merritt's counsel did not respond. ECF No. 20.

On April 24, 2023, the Court granted the motion to dismiss. ECF No. 22. As pertinent here, the Court dismissed Merritt's Title IX claim based on two pleading defects. First, it found she did not plead the alleged harassment was "severe and pervasive" enough to deny an educational benefit because she did not plead "the frequency of the conduct" and did not allege "for example, that she quit the jazz band because of the harassment or considered doing so." *Id.* at 15-16. Second, it held she did not sufficiently allege that the District's response to her reports of harassment was "deliberately indifferent" because she admitted it conducted an investigation in which administrators discussed the issue internally and spoke to one of the harasser's parents. *Id.* The Court dismissed the Equal Protection claim because the complaint "ple[d] no facts suggesting that [Merritt's]'s gender. . . influenced how Defendants treated her during the course of the sexual harassment investigation." *Id.* at 7. The Court did not grant Merritt leave to amend sua sponte because it believed that she had "already ha[d] pleaded her best case, and any further attempts to amend would be futile." *Id.* at 21. It entered judgment the same day. ECF No. 23.[2]

[2] The previous complaints also included claims under the Due Process Clause against both Defendants, an Equal Protection claim against the District, and a Title IX claim against Devlin. Merritt's new proposed amended complaint omits those claims and asserts only her Title IX claim against the District and her Equal Protection claim against Devlin.

III. ARGUMENT

"[W]here the plaintiff may assert a valid claim," "the liberal approach of the federal rules requires that [she] be given the opportunity" to amend the complaint to "state [her] claim and to have it considered on the merits," even after the Court has entered judgment. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981); *see also Wright & Miller*, 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.) ("The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that the plaintiff be given every opportunity to cure a formal defect in the pleading."). Given this "bias in favor of granting leave to amend," "[i]nstances abound in which appellate courts on review have required that leave to amend be granted after dismissal or entry of judgment." *Calhoun*, 78 F.4th at 854 (quoting *Dussouy*, 660 F.2d at 598); *see also Foman*, 371 U.S. 182 (reversing denial of post-judgment leave to amend); *Dussouy*, 660 F.2d at 598 & n.1 (same); *Hitt*, 561 F.2d at 608 (same).

To be sure, the court must first "alter or reopen the judgment under Rule 59 or 60." *Calhoun*, 78 F.4th at 853 (quoting *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003)). But a post-judgment motion to amend under Rule 59(e) calls for the "same considerations" that normally apply under Rule 15(a): "leave to amend 'shall be freely given when justice so requires.'" *Id.* at 583-84 (first quoting *Dussouy*, 660 F.2d at 596 n.1, then Fed. R. Civ. P. 15(a)).[3] As the Supreme Court put it: "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, [s]he ought to be afforded an opportunity to test [her] claim on the

[3] Under Rule 60(b), the Court may vacate the judgment based on any "mistake," "misunderstanding," or "misconception" about the law or facts. *Kemp v. United States*, 596 U.S. 528, 534 (2022). In the alternative to using Rule 59(e), the Court may vacate the judgment under Rule 60(b) because it rests on the misimpression that Merritt had "already pleaded her best case, and any further attempts to amend would be futile." ECF. No. 21. The Court could then apply Rule 15(a) to grant the motion to amend. Merritt focuses on Rule 59(e), however, because the analysis does not require the first step (finding a "mistake"); it simply merges with Rule 15(a).

merits." *Foman*, 371 U.S. at 182. And "unless there is a substantial reason to deny leave to amend," a court must grant it. *Calhoun*, 78 F.4th at 853-54 (quoting *Dussouy*, 660 F.2d at 597-98).

Here, the proposed amended complaint states a Title IX claim against the District and an Equal Protection claim against Devlin, and there is no "substantial reason" to deny leave to amend.

A. The Proposed Amended Complaint States a Title IX Claim

First, Merritt's proposed amended complaint states a claim under Title IX. Under that statute, a school district is liable for "student-on-student sexual harassment if: (1) the District had actual knowledge of the harassment; (2) the harasser was under the District's control; (3) the harassment was based on the victim's sex; (4) the harassment was 'so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit'; and (5) the District was deliberately indifferent to the harassment." *Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, 53 F.4th 334, 341 (5th Cir. 2022) (quoting *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011)).

The Court previously found that Merritt's prior complaint already met the first three elements—actual knowledge, control, and harassment based on sex. ECF No. 22 at 12, 13, 17. The proposed amended complaint meets the last two elements as well: the harassment was severe and pervasive and the facts make a plausible case for deliberate indifference.

1. The Harassment was Severe and Pervasive and Denied Educational Benefits

First, the harassment was "severe, pervasive, and offensive" enough to deny Merritt "an educational benefit." *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 585 (5th Cir. 2020). Whether harassment is "severe and pervasive" is a matter of "degree" "particularly unsuited for summary judgment" and "even less suited for dismissal on the pleadings." *Doe v. Sch. Dist. No. 1, Denver*, 970 F.3d 1300, 1311–12 (10th Cir. 2020). And here, the proposed amended complaint clarifies the

frequency of the harassment: the older boys harassed Merritt with sex-based slurs "several times per week" for over a year. Ex. A ¶ 11. *See Sewell*, 974 F.3d at 585 (holding that sex-based "ridicule" and other "verbal abuse" that occurred "'every other day' for much of the school year" was severe and pervasive); *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1119 (9th Cir. 2023) (holding that "bullying [the adult plaintiff] experienced from his college-age peers"—in which they called him "gay," a "fag," and other names—was "severe and pervasive" where it "occurred 'almost daily' for about a year"); *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 681-84, 686 (4th Cir. 2018) (holding without dispute that several months of online verbal sex-based harassment by other students created a hostile environment); *Doe v. E. Haven Bd. of Educ*., 200 F. App'x 46, 48-49 (2d Cir. 2006) (holding student called a "whore" and other gendered epithets by other students experienced severe and pervasive harassment, even though it lasted "at most five weeks" and did not affect her grades); *see also Fennell v. Marion Indep. Sch. Dist*., 804 F.3d 398, 409 (5th Cir. 2015) (holding that racially offensive remarks by other students created a hostile environment); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 806 (5th Cir. 1996) (holding that comments and questions about plaintiff's sex life, which a co-worker made "two or three times a week," amounted to "severe and pervasive" harassment, even though the plaintiff was an adult).

Indeed, the harassment here was arguably more serious than in several of the cases listed above. As this Court noted in its prior order, courts also consider the "number" of harassers, their "ages" relative to the victim, whether the acts were "humiliating," and whether they "unreasonably interfere[d] with the learning environment." *Bichel v. Kennedale Indep. Sch. Dist.*, No. 4:23-00886, 2024 WL 1776405, at *7 (N.D. Tex. Apr. 24, 2024) (citing Fifth Circuit cases). Here, there were at least four harassers, who were older than Merritt. Ex. A ¶ 9. Their harassment involved more than just slurs: one (an 18-year-old adult) shared an intimate photo of Merritt (still a minor) without

her consent, *id.* ¶ 10, and another urged her to kill herself, *id.* ¶ 12. And the harassment had a grave impact on Merritt's health and education—she suffered panic attacks before class, cried when her parents picked her up from school, skipped class, attempted to commit suicide, and eventually withdrew from the school district altogether. *Id.* at ¶¶ 13-16, 29-30.

To be sure, Merritt did not need to plead that she quit jazz band to state a claim. *Contra* ECF No. 22 at 15. Harassment denies an "educational benefit" when it has "concrete, negative effect" on a student's education. *Sewell*, 974 F.3d at 585 (quoting *Fennell*, 804 F.3d at 410). Harassment has that effect not only when it forces a student to drop classes or change schools, but also when it simply creates a "disparately hostile educational environment relative to [her] peer[s]." *Fennell*, 804 F.3d at 410. In other words, harassment that leaves a victim "depressed" and "traumatized" is actionable even when she's dogged enough to stay in the class where it occurs. *Sewell*, 974 F.3d at 585; *see also Peltier v. Charter Day Sch., Inc.,* 37 F.4th 104, 135-36 (4th Cir. 2022) (Keenan, J. concurring) ("We cannot excuse discrimination because its victims are resilient enough to persist in the face of such unequal treatment."); *see also Dey v. Colt Constr. & Dev. Co.,* 28 F.3d 1446, 1454 (7th Cir. 1994) (explaining that Title VII's protections extend to the worker "who possesses the dedication and fortitude to complete her assigned tasks even in the face of" sexual harassment). That makes sense: students who must endure regular sex-based slurs in class inevitably find it harder to learn—and thus learn less—than their peers. So they lose an "educational benefit" all the same. *Sewell*, 974 F.3d at 585.

In any event, Merritt's proposed amended complaint *does* plead even more tangible impacts on her education: she skipped class, her music performance suffered, and she dropped out of the school district to avoid further harassment. These facts easily show a "concrete, negative effect" on her education. *See Fennell*, 804 F.3d at 410 (explaining that "forcing the student to change his

or her study habits or move to another district" has such an effect); *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 262 (4th Cir. 2021) (holding that a reasonable jury could find that sexual harassment denied the plaintiff an educational benefit where she "found it difficult to enjoy and fully participate in band activities" and missed band classes due to the harassment).

2. The District's Response was Clearly Unreasonable

Merritt also pleads that the District acted with deliberate indifference. To comply with Title IX, a school that learns of sex-based harassment must take steps "reasonably calculated to end [the] harassment." *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669 (2d Cir. 2012); *C.S. v. Madison Metro. Sch. Dist.*, 34 F.4th 536, 548 (7th Cir. 2022) (en banc) (explaining that school must take "actions reasonably calculated" to end the sex discrimination); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 261 n.5 (6th Cir. 2000) (same). A school is liable when its response was "clearly unreasonable in light of the known circumstances." *Cypress-Fairbanks*, 53 F.4th at 341 (citation omitted). It plausible that the District's response fell below that bar here.

First, although Merritt initially reported the harassment at the end of 2020, the District did not take any real steps to protect her. Instead, it allowed the boys to continue to harass her several times per week for over four months. Ex. A at ¶¶ 11, 18, 22. This inaction alone states a plausible claim for deliberate indifference. To "respond [to harassment] in a manner that is not deliberately indifferent," a school must offer "reasonably available" "supportive measures" "designed to protect the [complainant's] safety" and safeguard her "educational environment." 34 C.F.R. § 106.30(a), 106.44(g) (2020). As many courts have held, for example, a "failure to separate" the alleged victim from her harasser to prevent ongoing sex-based harassment may "support a claim of deliberate indifference," even when the school conducts an investigation. *Pogorzelska v. VanderCook Coll. of Music*, 442 F. Supp. 3d 1054, 1064 & n.7 (N.D. Ill. 2020) (collecting cases);

see also, *e.g.*, *Butters v. James Madison Univ.*, 208 F. Supp. 3d 745, 760 (W.D. Va. 2016) ("[A] university's failure to separate an alleged victim and attacker during a grievance process could support a claim of deliberate indifference.").

Here, it is plausible that taking *some* protective measure to address the immediate problem—like simply separating the harassers from Merritt, monitoring them closely, or warning them to stop—was not only "appropriate," but necessary to protect Merritt from harassment. *See*, *e.g.*, *Doe v. Morgan State Univ.*, 544 F. Supp. 3d 563, 580 (D. Md. 2021) (holding that jury could find school liable because it failed to issue no-contact order to allow student to avoid interactions with her alleged harasser when both students were on the same track team, even though it did an investigation); *Totten v. Benedictine Univ.*, 2021 WL 3290926, at *7 (N.D. Ill. Aug. 2, 2021) (holding that student stated a Title IX claim in part because the school failed to provide supportive measures to allow her to avoid being in the same class as the harasser, even though it did an investigation); *Pogorzelska*, 442 F. Supp. 3d at 1062 (holding that students stated a claim because school failed to enforce a no-contact order or other accommodations to allow student to avoid being in the same classroom as her harasser, even though school investigated).

Second, the District's investigation did not even determine whether the pattern of harassment was occurring. Instead, it found that even if the harassment occurred, it did not violate the school's bullying or sexual harassment policies because it did not create a "an intimidating, threatening or abusive educational environment." Ex. A at ¶ 25. And the District did not investigate the allegation that D.W. shared the intimate photo *at all*. *Id.* at ¶ 26. As a result, the District did not discipline the harassers or even separate them from Merritt in band. *Id.* at ¶ 28.

It is plausible that the District's refusal to take such corrective action to stop ongoing sex-based harassment—simply because the District believed it was not *yet* serious enough to support

a federal lawsuit—was "clearly unreasonable." *Cypress-Fairbanks*, 53 F.4th at 341. A school cannot wait to take action until harassment escalates to the point that a student leaves school or attempts suicide: once it knows of a "substantial risk of serious harm," the school must act. *Id.* (quoting *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997)); *see also C.S.*, 34 F.4th at 548 (explaining that the school's response must take the "risk of escalation" into account). To hold otherwise would undermine a key purpose of Title IX: to give students "effective protection" against sex discrimination. *Cypress-Fairbanks*, 53 F.4th at 340 (citation omitted).[4] And here, the District was especially unreasonable to downplay the effects of the harassment—and to fail to take commensurate action to stop it—given that it did not even interview Merritt and did not investigate her allegation regarding the photo sharing at all. Ex. A ¶¶ 26-27.

As circuits have roundly held, that a school conducted an investigation does not show its response was adequate. *See supra* at 10; *Grace v. Bd. of Trustees, Brooke E. Bos.*, 85 F.4th 1, 6-9, 14 (1st Cir. 2023) (holding that jury could find school district was deliberately indifferent to student-on-student verbal harassment in elementary school, even though it investigated some incidents, because it "took no substantive steps to protect [the student] from the hostile environment"); *Czerwienski v. Harvard Univ.*, 666 F. Supp. 3d 49, 91 (D. Mass. 2023) (finding plausible claim of deliberate indifference despite full investigation); *Wamer v. Univ. of Toledo*, 27 F.4th 461, 472 (6th Cir. 2022) (holding that student stated deliberate indifference claim even

[4] The District's failure to even determine whether the pattern of sex-based harassment occurred, separate Merritt from her harassers, warn the harassers to stop, or investigate the picture-sharing allegation at all stands in sharp contrast to school district's responses in other cases the Court cited in its April 24, 2024 opinion. *See*, *e.g.*, *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 168 (5th Cir. 2011) (finding no deliberate indifference where the school responded to the harassment—including calling the plaintiff a "ho"—by not only investigating the incidents, but also by removing the offending student from one of plaintiff's classes and from cheerleading try-outs even though the harassment did not create a hostile environment).

though school conducted an investigation, which it closed without taking any action against the harasser); *Fairfax Cnty.*, 1 F.4th at 271 ("[H]alf-hearted investigation or remedial action will [not] suffice to shield a school from liability."); *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1259-61 (11th Cir. 2010) (holding jury could find deliberate indifference even though school conducted two investigations). Here, the alleged facts make it plausible that the District's response was clearly unreasonable, not "reasonably calculated to the harassment." *Zeno*, 702 F.3d at 669.

B. The Proposed Amended Complaint States an Equal Protection Claim

The proposed amended complaint states an Equal Protection claim against Devlin for similar reasons—because it raises a plausible inference she acted with deliberate indifference to Merritt's reports of sexual harassment and exposed her to further sex-based harassment at school.

As every circuit to address the question agrees, a student states a Fourteenth Amendment Equal Protection claim under § 1983 when she pleads that a school official showed "deliberate indifference" to student-on-student sex-based harassment. *See Feminist Majority Found. v. Hurley*, 911 F.3d 674, 702-03 (4th Cir. 2018) (holding that the Equal Protection Clause "protects students from a school administrator's deliberate indifference that allows such harassment to occur and persist"); *Hill v. Cundiff*, 797 F.3d 948, 978 (11th Cir. 2015) ("[A] governmental official . . . may be held liable under section 1983 upon a showing of deliberate indifference to known [student-on-student] sexual harassment."); *Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 851–52 (6th Cir. 2016) ("The Sixth Circuit recognizes . . . an equal protection violation based on . . . deliberate indifference to discriminatory peer harassment."); *DiStiso v. Cook*, 691 F.3d 226, 241-45 (2d Cir. 2012) (holding that equal protection claim survived summary judgment based on evidence that school officials failed to adequately respond to student-on-student harassment); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135-36 (9th Cir. 2003) (same); *Murrell v. Sch. Dist. No. 1*,

186 F.3d 1238, 1250 (10th Cir. 1999) (holding that student stated an equal protection claim based on allegations "that the principal and the teachers knew about [student-on-student harassment] and acquiesced in that conduct by refusing to reasonably respond to it"); *Nabozny v. Podlesny*, 92 F.3d 446, 454-55 (7th Cir. 1996) (holding that plaintiff could state equal protection claim if she pled school officials showed "deliberate indifference" to sex-based harassment).

The Fifth Circuit has not held to the contrary. In its April 24 dismissal order, the Court cited *Fennell* for the proposition that a plaintiff asserting an Equal Protection claim must allege that she "received treatment different from that received by similarly situated individuals" and "that the unequal treatment stemmed from a discriminatory intent." 804 F.3d at 412. But that is consistent with Merritt's theory here: she plausibly alleges that at least four other students harassed her—treating her differently from other students in her class—based on her sex. ECF 22 at 14. Here, Devlin (a state actor) was responsible for that discrimination because, like the cases above, she had a duty to address the harassment but showed deliberate indifference to it. *See*, *e.g.*, *Hill*, 797 F.3d at 978. *Fennell* did not address such a claim because the plaintiff did not allege the individual school officials named in that case were deliberately indifferent to race-based harassment. *See* 804 F.3d at 414-16 (assessing claims that the defendants themselves acted with discriminatory animus though their own alleged harassment, enforcement of school rules, and response to a race-neutral altercation between students). So *Fennell* does not foreclose liability here.

In this case, Merritt states a claim that Devlin's deliberate indifference exposed her to sex-based harassment. Devlin was informed of Merritt's reports of harassment, and as Title IX Coordinator, she had the responsibility to coordinate the District's response to complaints of sex-based harassment, including by offering the victim supportive measures and ensuring that complaints were properly investigated. Ex. A at ¶ 21; 34 C.F.R. § 106.44(a) (2020). For the same

reasons it states a Title IX claim against the District, the proposed amended complaint raises a plausible inference that Devlin's failure to fulfill those duties constituted deliberate indifference and violated Merritt's right to equal protection. Merritt thus states a claim under § 1983.

C. There is No "Substantial Reason" to Deny Leave to Amend

Because Merritt can state claims under Title IX and § 1983, she should be allowed to test those claims on their merits. *See Foman*, 371 U.S. at 182. There is no "substantial reason" to deny her that opportunity. *Calhoun*, 78 F.4th at 854. The harm in this case is serious: it had grave and lasting impacts on Merritt's mental health and cost her two years of high school. Ex. A at ¶¶ 13-16. It has also cost her over $30,000 in attorneys' fees that she will never recoup if this case is dismissed. ECF No. 19 at 11. Merritt filed this motion promptly—within the 28 days provided under Rule 59(e)—discovery has not begun, and granting the amendment would not prejudice Defendants. She should be allowed to pursue the remedies that federal civil rights law grants her.

As explained above, that Merritt did not file her proposed amended complaint before the court entered judgment does not defeat her motion now. As the Fifth Circuit has held, although "[a] litigant's failure to assert a claim as soon as he could have" is "a factor to be considered," it is not fatal: "merely because a claim was not presented as promptly as possible . . . does not vest the district court with authority to punish the litigant." *Calhoun*, 78 F.4th at 854 (quoting *Carson*, 689 F.2d at 584). Nor should the court deny leave to amend because Merritt previously amended her complaint. Merritt's first "amended complaint" was the same as her original pleading—filed to correct a technical error (to add the civil cover sheet) on the same day she filed the case. ECF 1, 3. Although her second complaint responded to general deficiencies the Court identified—that it simply lacked enough detail to state claim—the Court's first dismissal order did not zero in on the same targeted concerns that came into focus when Merritt filed her second amended complaint.

And in any event, although a court may deny leave to amend based on a "*repeated* failure to cure deficiencies by amendments previously allowed," *Foman*, 371 U.S. at 182 (emphasis added), Merritt was allowed only *one* prior chance to address court-identified defects before the Court dismissed her second amended complaint. And this time, Merritt has stated a claim.

IV. CONCLUSION

Accordingly, we respectfully request that the Court grant Merritt relief from the judgment and leave to file her proposed amended complaint.

Respectfully submitted,

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**Motion for Admission Pro Hac Vice Pending*