IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

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

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

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INTRODUCTION

Nothing in Defendants' opposition refutes that Merritt states plausible claims for relief under Title IX and § 1983. Defendants continue to suggest that a "protracted investigation" bars a Title IX claim, but they fail to address the wall of authority that rejects that idea and holds that a school violates Title IX (1) when it fails to take steps to protect the victim in the interim, or (2) when it conducts an incomplete investigation and takes no "substantive steps" to stop ongoing harassment. Dkt. 25 at 14-17. And while they argue that Devlin is immune to an Equal Protection claim absent a Fifth Circuit decision on point, they do not dispute that a "robust consensus" of "persuasive authority" defeats qualified immunity, *D.C. v. Wesby*, 583 U.S. 48, 63 (2018), or that such a consensus exists here: seven circuits hold that deliberate indifference to student-on-student harassment states an equal protection claim, with none dissenting. *See* Dkt. 25 at 17.

Because Merritt states a claim, Defendants must show there is a "substantial reason" to deny her leave to pursue it, one that overcomes the "bias in favor of granting leave to amend" to "facilitate determination of claims on the merits." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597-98 (5th Cir. 1981). They do not. Defendants chiefly argue that it is too late to consider Merritt's amendments now because she could have pled them earlier. But the Fifth Circuit has repeatedly required post-judgment leave to amend even when the plaintiff "was aware of the facts alleged in the proposed amendment from the beginning." *Id.* at 599; *see infra* pp. 6-7. Here as in those cases, Merritt has a good-faith reason for moving to amend now: she simply did not realize she needed to include the facts at issue until the Court's most recent order identified the specific gaps in her pleadings. And she filed her proposed amendment as promptly as possible after reviewing that order. But even if there were "considerable unexplained delay," such "delay alone" is an "insufficient basis" to deny leave to amend if granting it would not "prejudice" the

defendants. *Salas v. City of Galena Park*, No. 21-20170, 2022 WL 1487024, at *7 (5th Cir. May 11, 2022). Defendants make no argument that granting leave to amend would prejudice them here.

Merritt therefore respectfully requests that the Court exercise its broad discretion to grant her motion for relief from the judgment and for leave to amend.

I. The Proposed Amended Complaint States a Claim

Contrary to Defendants' contentions, Merritt's proposed amended complaint states a Title IX claim against the District and an Equal Protection Claim against its Title IX Coordinator.

A. The Complaint States a Title IX Claim against the District

The proposed amendment fills the gaps in Merritt's Title IX claim. In dismissing that claim, the Court identified three issues: Merritt did not plead the frequency of the harassment or a sufficient impact on her education, and she did not plead the District was deliberately indifferent. Dkt. 22 at 15, 16. As Defendants do not dispute, Merritt now pleads the harassment was frequent (it occurred almost every day), long-lasting (for over a year) and severe (it involved both sexist slurs and the sharing of an intimate photo), and she points to grave effects on her health and education—it pushed her to attempt suicide and drop out of the school district. Dkt. 25 at 11-14.

Merritt also pleads deliberate indifference: her proposed complaint alleges that the District failed to take any concrete steps to protect her from ongoing harassment, that its "investigation" failed to determine whether the alleged harassment occurred, that the District took no remedial measures because it thought her reports were not serious enough, and that it failed to investigate the sharing of the intimate photo at all. *See* Dkt. 25 at 14-17. Her opening brief cites volumes of authority holding that such conduct constitutes deliberate indifference even when the school conducts a "protracted investigation." Dkt. 31 at 9; Dkt. 12 at 15-16. Indeed, that the investigation was "protracted"—because it lasted over three months—makes Defendants' failure to take steps

to protect Merritt in the interim even more unreasonable. Defendants do not address any of Merritt's authority or cite any case suggesting their response was adequate. Dkt. 31 at 9-10.[1]

Indeed, the only two cases the District *does* cite in support of its Title IX argument highlight how exceptionally deficient its response was here. In *I.L. v. Houston Independent School District*, after the plaintiff reported the harassment, the school "implemented remedial measures that were almost entirely successful in eliminating *any* contact between the students and prevented future sexual contact or harassment." 776 F. App'x 839, 843 (5th Cir. 2019), cited in Dkt. 31 at 9 n.13. It "entered a strict, supervised no-contact order between the victim and her aggressor pending the conclusion" of the investigation, the victim "suffered no further sexual harassment," and "[t]he school otherwise tried to support [the victim] in several ways," including by "work[ing] with [the victim's] parents to address her academic and attendance problems." *Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, 53 F.4th 334, 346 n.11 (5th Cir. 2022) (describing *I.L.*, 776 F. App'x at 840-41). And in *Sanches v. Carrollton-Farmers Branch Independent School District*, the school not only investigated *every* reported incident, but also spoke to the harasser about her conduct and removed her from one of the victim's classes and an after-school activity they shared to stop the harassment. 647 F.3d 156, 168 (5th Cir. 2011); *see also* Dkt. 25 at 16 n.4 (distinguishing *Sanches*). Defendants did none of that here: they took no steps to separate Merritt from her harassers, stop the behavior, or address the effects on her education. Dkt. 24-1 ¶¶ 18, 22, 28.

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[1] Unable to rebut Merritt's argument on its own terms, Defendants opt to mischaracterize it. Nowhere has Merritt argued that Title IX requires a school "to end sexual harassment." Dkt. 31 at 9 (misquoting Dkt. 25 at 14). She relies on the well-accepted standard that schools must take "*actions reasonably calculated*" to end the harassment and avoid a response that is "clearly unreasonable." Dkt. 25 at 14 (first quoting *C.S. v. Madison Metro. Sch. Dist.*, 34 F.4th 536, 548 (7th Cir. 2022) (en banc) and other cases, then quoting *Roe v. Cypress-Fairbanks Indep. Sch. Dist*., 53 F.4th 334, 341 (5th Cir. 2022)) (emphasis added). Here, the proposed amended complaint alleges the District failed that test because it not only failed to stop the harassment, but failed to take any steps reasonably calculated to do so, which was "clearly unreasonable." Dkt. 25 at 14-17.

The District's last Title IX argument—that Merritt does not plead "concrete details"[2] about "whether the harassment continued after she reported it to the District" or about "how she reported" that further harassment and "how Kennedale ISD failed to respond" to it—is wrong on the facts and the law. Dkt. 31 at 9-10. It is wrong on the facts because Merritt does plead that the harassment—including the almost daily sexist slurs—continued long after she reported it, until she withdrew from the school district. *See* Dkt. 24-1 ¶ 11 (alleging that "several times per week *throughout the 2020-2021 school year*, in jazz band, the boys called Merritt a 'slut,' a 'whore,' a 'hoe,' and other sex-based epithets") (emphasis added); *id.* ¶ 28 (alleging that after Merritt complained, the same boys "continued to harass her until the end of the 2020-2021 school year"). And she alleges that she reported further harassment to the District in March 2021. *See id.* ¶ 24.

The District is also wrong on the law. A plaintiff need not plead the harassment continued after she reported it to state a Title IX claim: it is enough that the school's deliberate indifference to her sexual harassment complaint harmed her education.[3] A plaintiff suffers such harm if she "struggle[s] in school," "withdraw[s] from [school] activities," or drops out to avoid further harassment. *Farmer*, 918 F.3d at 1105; *see also Metro. Gov't of Nashville*, 35 F.4th at 467 (holding that jury could find district liable for deliberate indifference to student-on-student harassment

[2] This argument fails from the jump because it applies the wrong pleading standard: although a complaint must allege more than mere "labels and conclusions," Rule 8 "does not require 'detailed factual allegations' to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[3] *See Wamer v. Univ. of Toledo*, 27 F.4th 461, 471 (6th Cir. 2022) (holding that plaintiff states a Title IX claim if, "following the school's unreasonable response," "an objectively reasonable fear of further harassment caused the plaintiff to take specific reasonable actions to avoid harassment, which deprived [her] of the educational opportunities"); *Doe v. Metro. Gov't of Nashville & Davidson Cnty.*, 35 F.4th 459, 465-67 (6th Cir. 2022) (applying the same rule to student-on-student harassment); *accord Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 274 (4th Cir. 2021); *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103, 1106 (10th Cir. 2019); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 171 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1297 (11th Cir. 2007).

because as a result, plaintiff withdrew from in-person classes to avoid further harassment). Merritt pleads such harm here. *See*, *e.g.*, Dkt. 24-1 ¶ 30 (alleging that Merritt withdrew from the school district because of its deliberate indifference to the sex-based harassment she reported).

B. Devlin is Not Entitled to Qualified Immunity against the Equal Protection Claim

Defendants' opposition does not dispute that, assuming Merritt pleads deliberate indifference, she states a plausible claim that Defendant Devlin violated the Equal Protection Clause. Instead, they argue that Devlin is entitled to qualified immunity because the Fifth Circuit has not addressed whether a school official's deliberate indifference to student-on-student harassment violates the Equal Protection Clause. Dkt. 31 at 11. But a "robust consensus" of out-of-circuit authority overcomes qualified immunity even without a Fifth Circuit case on point, *Hicks v. LeBlanc*, 81 F.4th 497, 503 (5th Cir. 2023), and such a consensus exists here: Merritt's opening brief cites no less than seven circuits to hold that allegations of deliberate indifference to student-on-student harassment state a claim under the Equal Protection Clause. *See* Dkt. 25 at 17-18. Defendants do not cite a single case holding otherwise. *See* Dkt. 31 at 11.

In any event, the Supreme Court has made clear that the state violates the Equal Protection Clause when it "den[ies] its protective services to certain disfavored minorities" on a discriminatory basis. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989). Even if Merritt must ultimately prove that Devlin had discriminatory intent to recover on this theory, her proposed complaint would still overcome qualified immunity. As every circuit to address the question agrees, allegations or evidence of deliberate indifference to sex-based harassment permit a reasonable inference of discriminatory intent. *See*, *e.g.*, *Locke v. Haessig*, 788 F.3d 662, 670 (7th Cir. 2015) ("[A] reasonable jury could infer—though it would not be required to infer—the specific intent to discriminate from evidence that a supervisor knew about the

harassment and chose not to intervene, so evidence of that nature was sufficient to survive summary judgment."). In this case, therefore, Merritt's allegations that Defendant Devlin downplayed the harassment and failed to take action to stop it, *see* Dkt. 24-1 ¶¶ 21-28, raise a plausible inference that Devlin acted with discriminatory intent. *See DiStiso v. Cook*, 691 F.3d 226, 245 (2d Cir. 2012) (denying qualified immunity on Equal Protection claim against school officials because evidence suggested that principal was "deliberately indifferent to [other] kindergarten students'" verbal racial harassment of the plaintiff); *see also Locke*, 788 F.3d at 670; *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 703 (4th Cir. 2018) (holding that plaintiff adequately pled discriminatory intent when defendant "sought to downplay the [student-on-student] harassment and threats, and he made no effort to stop them").

Thus, Defendants have not shown that Devlin is entitled to qualified immunity.

II. Defendants Identify No "Substantial Reason" to Deny Leave to Amend

Defendants do not meet their burden to identify a "substantial reason" to deny leave to amend. They make two arguments: (1) that Merritt knew the facts in her proposed amended complaint before judgment, so it is too late to add them now, Dkt. 31 at 6, 12, and (2) that her proposed amended complaint raises new legal theories, which suggests it is a bad-faith attempt to get the Court to consider "theories seriatim" (that is, to present a new legal theory only after the Court rejected a previous one), *id.* at 10; *see also id*. at 7-8. Neither is correct.

First, because of its strong preference to "permit liberal amendment to facilitate determination of claims on the merits," the Fifth Circuit has repeatedly required leave to amend when the proposed complaint states a viable claim—even when it asserts facts the plaintiff could have pled before judgment. *Dussouy*, 660 F.2d at 599-600 (requiring leave to amend even though "Dussouy was aware of the facts alleged in the proposed amendment from the beginning"); *see*

also Calhoun v. Collier, 78 F.4th 846, 854 (5th Cir. 2023) (requiring leave to file second amended complaint even after summary judgment because the complaint stated a claim, explaining that although "counsel could have filed [the second] amended complaint before summary judgment," this did "not vest the district court with authority to punish the litigant"); *Salas*, 2022 WL 1487024, at *7 (requiring leave to amend even though there was no indication the plaintiff could have alleged the same facts before judgment, and even though there was "considerable unexplained delay" in moving to amend); *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (requiring leave to amend without making any finding that the plaintiff could not have pleaded the new allegations before judgment). The Supreme Court has done the same. In *Foman v. Davis*, the Court reversed the denial of leave to amend where the proposed amended complaint stated a claim, even though "the amendment would have done no more than state an alternative theory for recovery" that the plaintiff could have pled in the original complaint. 371 U.S. 178, 182 (1962).

As in those cases, Merritt's proposed amended complaint states a claim, and she should be allowed to proceed. The cases Defendants cite do not justify denying her the chance to do so. In *Rosenzweig v. Azurix Corp.*, where (unlike here) the plaintiffs always intended to amend the complaint but made a "strategic decision" to wait, the amended complaint was also futile because it failed to state a claim. 332 F.3d 854, 865 (5th Cir. 2003). And in *Hebert v. Dizney*, the case had been pending for more than *four and a half years* when the court dismissed the plaintiffs' second amended complaint, and the plaintiffs had "previously amended their complaint twice" before they again moved to amend. 295 F. App'x 717, 720-21, 725 (5th Cir. 2008). Here, in contrast, "[t]he District recognizes Plaintiff has filed *one* amended complaint to date," and she filed it just over

two weeks after the court dismissed her first complaint. Dkt. 31 at 5 n.5 (emphasis added). [4]

Unlike in *Rosenzweig* or *Hebert*, Merritt did not unduly delay filing the proposed amended complaint. Merritt filed her present motion to amend within 28 days of the court's order identifying the deficiencies in her last complaint—the time it took for her new counsel to interview her, review the relevant documents, and draft the amended complaint and motion to amend. That is not "undue delay." *See Calhoun*, 78 F.4th at 850, 854 (requiring leave to amend even though plaintiff moved to file her second amended complaint two years after she filed suit, more than three months after defendants moved for summary judgment, and after the court entered judgment against her). But even if there were "considerable unexplained delay," such "delay alone is an insufficient basis for denial of leave to amend." *Salas*, 2022 WL 1487024, at *7 (quoting *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 427 (5th Cir. 2004)). "The delay must prejudice the [defendant]; for instance by preventing it from preparing for trial, or by adding a new claim after the close of discovery." *Id.* Defendants do not argue that granting leave to amend would cause them *any* prejudice here, and nor could they: since discovery has not begun, they will have a full opportunity to test the claims in Merritt's proposed amended complaint and to prepare to defend them at trial.

Nor do Defendants show "bad faith" or "dilatory motive." Dkt. 31 at 8. "In other circumstances," a "failure to include [known facts] in the complaint might" suggest "the plaintiff was engaging in tactical maneuvers to force the court to consider various theories seriatim. In such a case, where the movant first presents a theory difficult to establish but favorable and, only after that fails, a less favorable theory, denial of leave to amend on the grounds of bad faith may be appropriate." *Dussouy*, 660 F.2d at 599. But that is not the case here: Merritt seeks to pursue the

[4] As explained in Merritt's opening brief, the second complaint that she filed (Dkt. 3) was just a copy of the first (Dkt. 1) with the civil cover sheet attached. *See* Dkt. 25 at 19.

same legal theories she has pursued throughout this case.

Contrary to Defendants' contention, Merritt did not "disavow" her claim for deliberate indifference to student-on-student harassment in her response to Defendants' first motion to dismiss, Dkt. No. 31 at 8; she tried to clarify that she was not seeking to hold the District liable for its students' harassment, but rather for the District's *own* "acts and omissions" in response to that harassment. Dkt. No. 12 ¶ 90. That is exactly what a Title IX deliberate indifference claim seeks to do. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640-41 (1999) (explaining that a Title IX deliberate indifference claim seeks to hold the school "liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools," not for the harassment itself); *Salazar v. S. San Antonio Indep. Sch. Dist.*, 953 F.3d 273, 278 (5th Cir. 2017) ("[L]iability under Title IX arises not from the discrimination or harassment itself but from *an official decision by the [funding] recipient* not to remedy the violation."). And ultimately, the Court analyzed her claim as one for deliberate indifference under *Davis*, a student-on-student harassment case. *See* Dkt. 18 at 12. While Merritt's prior filings could have been clearer, none of this suggests she engaged in "gamesmanship." Dkt. No. 31 at 8.

Defendants' other similar argument—that Merritt did not previously assert an Equal Protection claim against Devlin (Dkt. 31 at 10)—is also meritless. In its previous orders, this Court properly understood Merritt's prior complaints to assert an Equal Protection claim against both Defendants. Dkt. 22 at 6-7; Dkt. 18 at 7. Those complaints alleged that both "Defendants' lack of response" to her sexual harassment complaints "subjected [her] to a hostile environment" and violated her constitutional rights. Dkt. 19 ¶¶ 23, 43; Case No. 4:23-cv-00886, Dkt. 1-8 ¶¶ 5.4, 6.2 (making the same allegation against Defendant Devlin alone). Merritt's complaint did not need to cite the Equal Protection Clause or specify her legal theory with precision to assert this claim. *See*

Johnson v. City of Shelby, 574 U.S. 10, 11-12 (2014) (explaining that a complaint need only allege the *facts* that entitle the plaintiff to relief: "federal pleading rules . . . do not countenance dismissal of a complaint for imperfect statement of the legal theory"). And even if Merritt's equal protection claim were new, that would not foreclose her from adding it now. *See Dussouy*, 660 F.2d at 598 (explaining that in *Foman*, "[t]he Supreme Court required that the amendment be permitted even though it changed the theory of the case"); *see also Foman*, 371 U.S. at 182.

Merritt brought this case to get justice and make school better for other kids in Kennedale. She wants to show Defendants' actions violated the law and push them to take sexual harassment seriously so that other students do not suffer the same harm she endured. She has consistently showed her good faith in pursuing this goal. Far from providing a reason to end this case, her pre-suit depositions show the care she took to investigate her claims—and to obtain the District's side of the story—before she filed suit. *See* Dkt. 32.[5] And her proposed amended complaint makes reasonable concessions to streamline her case: it drops her due process claim, her § 1983 claim against the District, her Title IX claim against Devlin, and her request for a declaratory judgment. As the Fifth Circuit has held, such voluntary concessions "tend[ ] to establish [a plaintiff's] good faith." *Dussouy*, 660 F.2d at 599. Merritt's targeted persistence on her two strongest claims under Title IX and § 1983 reflects her commitment to justice, not "bad faith" or "dilatory motive."

Because "the underlying facts or circumstances" are "a proper subject of relief," Merritt "ought to be afforded an opportunity to test [her] claim[s] on the merits." *Foman*, 371 U.S. at 182. The Court should grant her motion for relief from the judgment and for leave to amend.

[5] Merritt's counsel's failure to respond to the last motion to dismiss does not show that Merritt has exercised undue delay or bad faith in *moving to amend*, either, and it does not justify denying her the opportunity to proceed, especially given that she has retained new counsel. *See Silas v. Sears, Roebuck & Co.*, 586 F.2d 382, 385 (5th Cir. 1978) ("Dismissal is generally inappropriate . . . where neglect is plainly attributable to an attorney rather than to his blameless client.").

Respectfully submitted,

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