No. 24-50267

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Crystal Ayon; M.R.A. by and through her Parent and Next Friend Crystal Ayon,

Plaintiffs–Appellants,

v.

Austin Independent School District,

Defendant–Appellee.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Case No.: 1:21-CV-209-RP
The Honorable Robert Pitman

BRIEF OF PUBLIC JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN FAVOR OF REVERSAL

Shariful Khan
Sean Ouellette
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 797-8600
skhan@publicjustice.net
souellette@publicjustice.net

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* states that it has no parent corporation, is not owned in whole or in part by any publicly held corporation, and is not itself a publicly held company.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Interests of the Proposed Amicus Curiae

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. In its Students' Civil Rights Project, Public Justice focuses on ensuring that educational institutions comply with the Constitution and anti-discrimination laws, including Title IX. Public Justice often represents students denied equal educational opportunities because of sex-based harassment at school. Public Justice has particular expertise and interest in the types of pre-assault claims available under Title IX and the responsibility of schools to address employees' harassment.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no person or entity, other than *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

Introduction

Every year, thousands of students experience sexual harassment by classmates and employees. This abuse has the potential to derail a victim's education. Fortunately, federal law provides students with essential protections: Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, requires schools to address known harassment to stop its recurrence and protect students' opportunity to learn. This case arises from Austin Independent School District's failure to live up to that obligation. The school district's official policies amounted to deliberate indifference because they created an obvious and substantial risk of employee harassment. Because the district court below wrongly granted the school district's motion for summary judgment against the Plaintiff's Title IX claims, its decision should be reversed.

In this brief, *Amicus Curiae* seeks to provide an overview of key principles of Title IX law and clarify why the holding below is erroneous. First, Title IX plaintiffs may bring both harasser-specific and "official policy" pre-assault claims, which are legally distinct concepts that are both available in the Fifth Circuit. Second, contrary to the district court's holding, plaintiffs can pursue official policy claims in contexts beyond

peer harassment. With those established principles in hand, a jury could reasonably conclude that the district's official policies establish liability under Title IX and § 1983.

Argument

I. Title IX permits two types of pre-assault claims, including claims based on official policies.

Title IX "broadly prohibits a funding recipient from subjecting any person to 'discrimination' 'on the basis of sex.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). Although Title IX does not hold schools vicariously liable for the acts of their employees, it implies a cause of action to hold schools accountable when their "own misconduct" violates the statute. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642-43 (1999). Thus, a school district is "liable in damages" when its "own deliberate indifference effectively 'cause[s]' [sex] discrimination," including sexual harassment. *Id.* at 642.

Title IX sexual harassment claims come in three primary forms: (1) post-assault claims, (2) harasser-specific pre-assault claims, and (3) official policy pre-assault claims. With a post-assault claim, a plaintiff seeks to hold an educational institution liable for its deliberate

indifference to her reports that she was sexually harassed.[1] By contrast, in a pre-assault claim, a plaintiff contends that the institution's deliberate indifference to past harassment, or to a "substantial risk" of future harassment, helped cause the harassment she then experienced. *M.E. v. Alvin Indep. Sch. Dist.*, 840 F. App'x 773, 776 (5th Cir. 2020) (quoting *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 652-53 (5th Cir. 1997)); *Forth v. Laramie Cnty. Sch. Dist. No. 1*, 85 F.4th 1044, 1054 (10th Cir. 2023); *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1099 (9th Cir. 2020); *Hernandez*, 274 F. Supp. 3d at 614-15 & n.4. Amicus focuses here on the two types of pre-assault claims.

1. *Harasser-specific pre-assault claims*. In a harasser-specific pre-assault claim, a plaintiff challenges an institution's deliberate indifference to the risk that a specific student or employee with a history

---

[1] In a post-assault claim, a recipient is liable if its deliberate indifference either causes the plaintiff to suffer further harassment or if it forces her to lose out on educational opportunities by leaving her vulnerable to further harassment. *See, e.g.*, *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 274 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022); *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, 1296 (11th Cir. 2007); *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103, 1106 (10th Cir. 2019); *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 613 (W.D. Tex. 2017).

of harassment posed to the student body, alleging that its deliberate indifference allowed the same harasser to go on to abuse the plaintiff. For example, in one Eleventh Circuit case holding a school liable under Title IX, the school received (though did not substantiate) reports that a teacher had harassed two students, but failed to respond appropriately—and, as a result, the teacher later harassed the plaintiff. *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1257-59 (11th Cir. 2010); *see also, e.g.*, *C.K. v. Wrye*, 751 F. App'x 179, 184 (3d Cir. 2018); *Doe v. Bd. of Supervisors of Univ. of La. Sys.*, 650 F. Supp. 3d 452, 467 (M.D. La. 2023); *Chenier v. Bd. of Supervisors for La. Sys.*, No. 16-4125, 2017 WL 3425442, at *7-9 (E.D La. Aug. 8, 2017).

Harasser-specific pre-assault claims must meet the elements identified by the Supreme Court in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999). In such cases, the institution is liable when an "appropriate person" has "actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Broward*

Cnty., 604 F.3d at 1254; *see also Bd. of Supervisors of Univ. of La. Sys.*, 650 F. Supp. 3d at 467 (applying these elements).[2]

2. *Official policy pre-assault claims*. In contrast to harasser-specific pre-assault claims, official policy pre-assault claims are based on the same theory applicable to claims against school districts under 42 U.S.C. § 1983—a theory distinct from the theory in *Gebser* and *Davis*. In *Gebser*, the Supreme Court explained that the harasser-specific actual knowledge and deliberate indifference requirements only apply in cases "that do not involve official policy of the recipient entity." 524 U.S. at 290. In such cases, those requirements are necessary to ensure that an institution is held liable only for its own "official decision . . . not to remedy the violation," and not "for its employees' independent actions." *Id.* at 290-91. By contrast, a school district's "official policies" are, by definition, "acts of the *municipality*" and not "acts of [its] *employees*." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986). So, when a school's official policy of deliberate indifference exposes a student to

[2] While a harasser-specific pre-assault claim requires actual knowledge of harassment by same person who later harasses the plaintiff, "no circuit has interpreted *Gebser*'s actual notice requirement so as to require notice of the prior harassment of the Title IX plaintiff *herself*." *Broward Cnty.*, 604 F.3d at 1257; *see also C.K.*, 751 F. App'x at 184 (similar).

harassment, the school "need not have had actual knowledge of a specific instance of sexual misconduct" by the same perpetrator or have "responded with deliberate indifference to [it] before damages liability may attach." *Karasek*, 956 F.3d at 1112; *see also Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1176 (10th Cir. 2007) (holding that "the *Gebser* standards do not apply" to Title IX claims based on an "official policy" of the institution, which follows the standard applicable to § 1983 claims).

Instead, as under § 1983, a plaintiff may show that a school violated Title IX through an "official policy . . . of deliberate indifference to a known overall risk of sexual harassment," *Karasek*, 956 F.3d at 1112 (citation omitted), which may include "a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary" to prevent it. *Simpson*, 500 F.3d at 1178 (quoting *Davis*, 526 U.S. at 642).

The cases on which *Gebser* relied support this conclusion. In *Gebser*, the Supreme Court expressly drew from doctrine developed "under § 1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation." 524 U.S. at 291 (citing *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 407 (1997), and *City of Canton v. Harris*, 489 U.S. 378, 388-92 (1989));

see also Davis, 526 U.S. at 642 (explaining that *Gebser* "employ[ed] the 'deliberate indifference' theory already used to establish municipal liability under . . . 42 U.S.C. § 1983"). In such cases, a plaintiff need not show that municipal policymakers knew of or were deliberately indifferent to the employee who harmed her; she need only show "that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." *Bryan Cnty.*, 520 U.S. at 407 (quoting *Canton*, 489 U.S. at 388). Thus, for example, a municipality is responsible for a failure to train police officers when the need for more training is "obvious" enough that "the failure to train amounts to deliberate indifference" to the risk that officers will hurt people without more training. *City of Canton*, 489 U.S. at 388, 390. Indeed, even without *any* pattern of prior misconduct, the municipality is liable if "the risk of constitutional violations was or should have been an 'obvious' or 'highly predictable consequence'" of the inadequacy. *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 624 (5th Cir. 2018) (citation omitted).

The Sixth, Ninth, and Tenth Circuits have all recognized the availability of such official policy claims under Title IX. *See Doe ex rel. Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty.*, 35 F.4th 459, 465

(6th Cir. 2022); *Karasek*, 956 F.3d at 1112; *Simpson*, 500 F.3d at 1178. So have district courts within the Fifth Circuit. *See, e.g.*, *P.S. ex rel. Stephenson v. Brownsboro Indep. Sch. Dist.,* No. 6:21-cv-427, 2022 WL 3697965, at *5 (E.D. Tex. Aug. 25, 2022), *report and recommendation adopted*, 2022 WL 14151208, at *1 (Oct. 24, 2022); *Doe 1 ex rel. Doe II v. Huntington Indep. Sch. Dist.,* No. 9:19-CV-133, 2020 WL 10317505, at *4-5 (E.D. Tex. Oct. 5, 2020); *Lozano v. Baylor Univ.*, 408 F. Supp. 3d 861, 879-80 (W.D. Tex. 2019); *Doe 12 v. Baylor Univ.,* 336 F. Supp. 3d 763, 781-83 (W.D. Tex. 2018); *Hernandez,* 274 F. Supp. 3d at 615 n.4; *Doe 1 v. Baylor Univ.,* 240 F. Supp. 3d 646, 661-62 (W.D. Tex. 2017).

No circuit has adopted a different view. While the Fifth Circuit recently rejected a victim's argument that sounded something like an "official policy" claim, it did so because that plaintiff could not draw a causal connection between the school's conduct and the harassment she suffered. *See Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, 53 F.4th 334, 342 (5th Cir. 2022). The court expressly left open the possibility that a different plaintiff might succeed under a similar theory. *See id.*

II. "Official policy" claims can establish liability for employee-on-student harassment.

The district court erred in holding that pre-assault "heightened risk" claims are limited "to contexts in which students committed sexual assault on other students." *Ayon v. Austin Indep. Sch. Dist.*, 2024 WL 1572408, at *6 (W.D. Tex. Feb. 5, 2024). As this Court has held, in addition to peer harassment, funding recipients can be liable for their deliberate indifference to a "substantial risk" of *teacher-on-student* harassment faced by "students in general." *Rosa H.*, 106 F.3d at 659.

There is no reason a higher standard should apply to prove liability for sexual abuse by a teacher than for harassment by other students. Indeed, to the extent that courts have treated peer harassment claims differently than employee-student harassment claims, they have interpreted employee-student harassment claims more *broadly* than peer harassment claims. *See, e.g.*, *Wamer v. Univ. of Toledo*, 27 F.4th 461, 470 (6th Cir. 2022) ("We conclude that the *more stringent standard* for peer-harassment deliberate indifference claims introduced in *Kollaritsch* should not apply in the context of teacher-student harassment claims." (emphasis added)). This aligns with the Court's suggestion in *Davis* that

Title IX's institutional liability standard is met "most easily and most obviously when the offender is an agent of the recipient." 526 U.S. at 645.

Accordingly, as several courts in this circuit have held, if indifference to a "substantial risk" can establish liability for peer harassment, "commonsense dictates that that theory be available in the teacher-student context too." *Doe v. Beaumont Indep. Sch. Dist.*, 2024 WL 1329933, at *12 (E.D. Tex. Mar. 28, 2024) (collecting cases). The same principle holds true when a school's official policy creates the risk. *See Owens v. La. State Univ.*, No. 21-242, 2023 WL 9051267, at *6 (M.D. La. Dec. 31, 2023) (holding that "substantial risk" official policy claims are available for teacher-student harassment because, according to the Fifth Circuit, "[p]eer harassment is *less* likely to support liability than is teacher-student harassment" (quoting *Sanches v. Carrolton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 166 (5th Cir. 2011))).

In suggesting otherwise—that substantial risk claims based upon official policies are limited to cases involving peer harassment—the district court relied entirely on an unpublished decision that did not even involve sexual harassment, let alone teacher-on-student harassment. *See Poloceno v. Dall. Indep. Sch. Dist.*, 826 F. App'x 359, 363 (5th Cir. 2020).

But *Poloceno* merely acknowledged that, at the time of that decision, other circuits had only had the opportunity to address such claims in cases involving peer harassment; it did not foreclose them in the employee-student context. *Id.* And since then, both this Court and the Tenth Circuit have affirmed the obvious—that a school may be liable for deliberate indifference to a "substantial risk" of sexual abuse committed by a school employee as well as by other students. *M.E.*, 840 F. App'x at 776 (school resource officer); *Forth*, 85 F.4th at 1054 (teacher).

III. A jury could reasonably conclude that the district is liable for its official policies here.

In this case, a jury could reasonably find the district liable for its official policies under both Title IX and § 1983. As explained above, both statutes impose liability when municipal policymakers show deliberate indifference to a substantial risk of sexual abuse. *See supra* § 1.

Here, the district maintained several policies that the jury could conclude amounted to deliberate indifference to a substantial risk of sexual abuse. The school district knew that four employees—including a bus driver—and several students had sexually abused students in the five years leading to M.R.A.'s abuse, it knew that many of those assaults occurred when single staff members were left alone with students, and it

knew that many of those incidents went initially undetected and uninvestigated because of a lack of camera footage. *See* Appellant's Br. at 17-18. Still, the district maintained largely the same customs and policies as before: bus monitors regularly left children alone with a single school employee on the bus. *See id.* at 22. On top of that, although the district knew security cameras were needed to prevent and detect such abuse, the district *prohibited* employees from checking the cameras unless there was a reported incident, a policy its employees followed even when Ayon reported that her five-year-old daughter was inexplicably being dropped off at home late. *See id.* at 13-14, 16. To make matters worse, employees knew that the district did not check the security cameras. *See* ECF 96-6 at 10 (perpetrator testifying that he knew no one was watching the camera footage and that he would not have assaulted student otherwise). A reasonable jury could conclude that the district's persistence in these policies—after *nine* incidents of abuse in under five years—disregarded the "'obvious' or 'highly predictable consequence'" of its inaction: more abuse. *Littell*, 894 F.3d at 624.

The district court erred by considering each of these deficient policies in isolation instead of considering their cumulative effect. As this

Court has made clear, deliberate indifference depends on the "totality of the circumstances." *Cypress-Fairbanks*, 53 F.4th at 342. Thus, courts regularly find deliberate indifference based on the combined effects of multiple deficient practices. *See*, *e.g.*, *Karasek*, 956 F.3d at 1113-14; *J.K.J. v. Polk Cnty.*, 960 F.3d 376, 381-84 (7th Cir. 2020). Siloing the district's policies misses how each successive failure impacts the next. While refusing to review camera footage when red flags are raised by a parent may be a deliberately indifferent policy on its own, it certainly is when considered alongside the custom in which bus monitors regularly left children alone with adults. While the district was not required to change any particular practice to comply with the law, a jury could reasonably conclude that failing to do *something* to stop the known pattern of sexual abuse by school employees was deliberate indifference.

The district court also incorrectly rejected the Plaintiff's § 1983 claim because it assumed the school district needed to have "failed to address previous incidents of sexual assault" for an official policy claim to succeed. *Ayon*, 2024 WL 1572408, at *6-7. As the Supreme Court has made clear, past failures are unnecessary when "the need for more or different training is so obvious, and the inadequacy so likely to result in

the violation" that the district could reasonably be said to have been deliberately indifferent. *City of Canton*, 489 U.S. at 390.

In any event, Ayon *has* pointed to several instances where district employees sexually assaulted students. *See Ayon*, 2024 WL 1572408, at *3. The district court ignored most of these incidents, focusing solely on an assault that took place on a school bus to assess whether the school district acted with deliberate indifference. *Id.* at *3-4. But the school's defective policies applied beyond the school bus, so there was no reason to limit the inquiry to that location. That the school's existing policies had repeatedly failed to prevent sexual abuse in other areas, a jury could conclude, "put [the school] on notice" that a different approach was needed. *Bryan Cnty*, 520 U.S. at 407; *see Metro. Gov't of Nashville*, 35 F.4th at 464-66 (considering defendant "aware of issues with sexual harassment in the school system" because of previous incidents, without differentiating previous incidents based on location); *S.C. v. Metro. Gov't of Nashville*, 86 F.4th 707, 715 (6th Cir. 2023) (same); *Karasek*, 956 F.3d at 1113 (rejecting defendants' argument that official policy claims must be limited to a particular program, instead holding that a "plaintiff could

adequately allege causation even when a school's policy of deliberate indifference extends to sexual misconduct occurring across campus").[3]

Conclusion

For the reasons set forth above, we respectfully suggest that the Defendant's motion for summary judgment should be denied.

Respectfully submitted,

/s/ Shariful Kahn
Shariful Khan
Sean Ouellette
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, DC 20036
Phone: (202) 797-8600
skhan@publicjustice.net
souellette@publicjustice.net

Attorneys for Amicus Curiae Public Justice.

[3] In demanding proof of a "widespread pattern of inappropriate sexual conduct by an AISD bus driver," the district court erroneously relied on the standard for assessing whether a pattern of constitutional violations itself amounts to an unlawful *custom*, which is a different question from whether past failings put a municipality on notice that its policies are deficient. *Ayon*, 2024 WL 1572408, at *3; *see*, *e.g.*, *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir. 2009) (evaluating whether various incidents of excessive force were themselves "so common and well-settled as to constitute a custom that fairly represents municipal policy").

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,258 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Century Schoolbook font.

Dated: July 3, 2024

/s/ Shariful Khan
Shariful Khan
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 3, 2024

/s/ Shariful Khan
Shariful Khan
Counsel for Amicus Curiae