No. 22-1742

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Natasha Grace; Minor Child MG; Minor Child MG2; Minor Child MG3; Minor Child AG; Minor Child MP,

Plaintiffs-Appellants,

v.

Board of Trustees, Brooke East Boston; Brooke School Foundation, Inc.,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the District of Massachusetts
Civil Action No. 19-10930, Judge George A. O'Toole, Jr.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Introduction

Early in this litigation, Brooke East Boston described plaintiff-appellant MG's lawsuit as making "mountains from molehills." ECF 51 at 1. That indifferent outlook comports with how, since day one, Brooke has minimized the harassment that MG endured. School officials were disinterested in his wellbeing. They blamed his suffering on him instead of holding his peers accountable or looking in the mirror. Brooke persists in that approach on appeal, criticizing MG for "struggl[ing] to cope" and "act[ing] out," Resp. Br. 1, while ignoring the reality that MG's behavioral challenges were a consequence of the school's own inaction.

Brooke might view what has happened to MG as trivial, but a jury could see things differently. The record illustrates that MG suffered severe and pervasive harassment on the basis of sex. Brooke officials knew that the hostile environment was interfering with MG's ability to participate fully in his education. And yet they claimed they could not intervene because, as a result of their failure to investigate the harassment, they were not sure exactly which students were targeting MG. A reasonable jury could find that MG's circumstances were untenable and that Brooke's inaction was clearly unreasonable. Accordingly, this Court should reverse the district court's grant of summary judgment on MG's Title IX claim.

Argument

I. MG was subjected to unlawful sex discrimination.

MG's academic environment at Brooke was infected with homophobic and transphobic harassment. The bullies' ringleader, MV, physically attacked MG and led the charge in verbally abusing him. As other members of the student body joined in, the anti-gay and anti-transgender harassment grew so constant and so vicious that life at Brooke became a "daily battle" for MG. JA-2 827. As our opening brief explains (at 14-24), this harassment was severe, pervasive, and sex based and thus amounted to sex discrimination in violation of Title IX. Brooke's responses badly mischaracterize the seriousness of the abuse and ignore the overtly sex-based nature of the harassment.

A. MG faced severe and pervasive harassment.

Brooke tries to downplay the hostile educational environment MG suffered by describing the harassment as simple "childhood teasing." Resp. Br. 20-21. That label ignores the physical attacks MG endured. And even standing alone, the verbal harassment was severe and pervasive and therefore violated Title IX.

1. MG was both physically and verbally harassed. He was attacked all three years he was enrolled at Brooke. He was punched, tripped, kicked, and body checked. JA-1 489; JA-2 556-58, 782, 827. Although Brooke tries to characterize these physical attacks as mutual "peer conflict," Resp. Br. 22,

viewing the evidence in the light most favorable to MG requires the conclusion that he was a victim of physical violence, *see* Opening Br. 21.

Brooke also stresses that the physical attacks and the "sexually charged name-calling" were not simultaneous. Resp. Br. 22-23. But the physical and verbal abuse had a common point of origin—MV, the bully who was MG's original abuser. When a harasser uses both homophobic epithets and physical violence against a victim, it is reasonable to infer that the entire course of conduct stems from the same underlying discriminatory animus. That remains true even if the bully does not use the slurs at the precise moment when he carries out the physical attacks. That is the upshot of *Johnson v. Spencer Press of Maine*, 364 F.3d 368 (1st Cir. 2004), a decision Brooke ignores. When a perpetrator engages in consistent "harassment that specifically invoke[s]" a victim's protected characteristic as well as harassment that does not, a "jury c[a]n easily … conclude[] that the underlying motivation"—sex-based discrimination—is "the same for each." *Id.* at 376; Opening Br. 21.

For this reason, it does not matter that the physical attacks were not "sexually inappropriate." Resp. Br. 14 n.5. "[H]arassing conduct need not be motivated by sexual desire" to be motivated by sex. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998).

Moreover, the physical attacks intensified the severity of the other mistreatment MG suffered. Whether sex-based conduct "rises to the level of actionable 'harassment' … 'depends on a constellation of surrounding

circumstances, expectations, and relationships.'" *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (quoting *Oncale*, 523 U.S. at 82). The "inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale*, 523 U.S. at 81. A jury could find that the ongoing physical abuse, regardless of whether it was itself sex based, made MG more vulnerable to the expressly homophobic and transphobic bullying and exacerbated its severity.

2. Even setting the physical abuse to the side, MG has established actionable discrimination. His classmates' verbal harassment was "so severe, pervasive, and objectively offensive" that it deprived MG of the "equal access to education that Title IX is designed to protect." *Davis*, 526 U.S. at 652. He was mocked for his perceived sexual orientation and gender identity, constantly called "gay" and "faggot," and grew to feel that "his life at school [was] a daily battle." JA-2 559, 734, 822, 827, 843. The widespread hostility and isolation caused MG to develop depression, anxiety, and post-traumatic stress disorder. *E.g.*, JA-2 607-09. These conditions had a "concrete, negative effect" on his "ability to receive an education." *Davis*, 526 U.S. at 654. They caused him to miss instruction. JA-2 626-27. They provoked misbehavior that interfered with his learning. JA-2 866, 873, 881. And the harassment and its effects on MG ultimately contributed to Ms. Grace's conclusion that MG was not safe at Brooke. JA-1 79, 328-30, 511.

Brooke's attempt to redefine the campaign of harassment against MG as "isolated incidents" of "teas[ing]" and "offensive name[]" calling, Resp. Br.

21-23, distorts the record. The cases Brooke cites that found a lack of severe and pervasive harassment might fairly meet that description. *Morgan v. Town of Lexington*, 823 F.3d 737, 745 (1st Cir. 2016) ("[T]here is only one incident that can even arguably be deemed sex-based."); *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 166-67 (5th Cir. 2011) (finding no severe and pervasive harassment of a student who was "called a 'ho' once"); *Tyrrell v. Seaford Union Free Sch. Dist.*, 792 F. Supp. 2d 601, 629 (E.D.N.Y. 2011) (finding two weeks of harassment insufficient). Here, though, MG was mercilessly bullied for multiple years to his significant academic detriment. *See* Opening Br. 14-15. And Brooke completely ignores the effect this abuse had on MG's mental health.

Equating what happened to MG with the "simple acts of teasing and name-calling among school children," Resp. Br. 21 (quoting *Davis*, 526 U.S. at 651-52), that fall outside Title IX's purview would edge dangerously close to creating a categorical rule that verbal harassment alone is never actionable. This Court should not follow that path for at least three reasons.

First, contrary to Brooke's suggestion, *Davis* does not require that result. *Davis* contrasted "simple acts of teasing and name-calling among school children" with behavior that is "severe, pervasive, and objectively offensive" enough to deprive the victim of "equal access to education." 526 U.S. at 652. It did not hold that teasing and name-calling can never give rise to liability, only that this type of conduct cannot do so until it becomes "sufficiently severe." *Id.* at 650.

Second, a per se rule for cases involving verbal abuse would run afoul of *Davis*'s instruction that courts should focus on the "constellation of … circumstances" surrounding the harassment. 526 U.S. at 651 (quoting *Oncale*, 523 U.S. at 82). As the Fourth Circuit has noted, "in certain cases," "the damaging effects of verbal sexual harassment may equal or even exceed those of physical sexual assault." *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 275 (4th Cir. 2021). The fact-intensive severity-and-pervasiveness inquiry is a "matter[] of degree … best left to the jury." *Doe v. Sch. Dist. No. 1*, 970 F.3d 1300, 1311-12 (10th Cir. 2020).

Finally, *Davis*'s discussion of name-calling and teasing was not necessary to the result in that case, and there is particular reason not to read the language maximally. Whether an educational environment is hostile enough to be actionable depends, as just noted, on the totality of the circumstances, including "social context." *Oncale*, 523 U.S. at 81. Cultural norms about the harm done by language and the propriety of the use of slurs can change over time. *Compare Woods v. Cantrell*, 29 F.4th 284, 285 (5th Cir. 2022) (finding a single use of the n-word states an actionable claim of a hostile work environment under Title VII), *with Frazier v. Sabine River Auth. La.*, 509 F. App'x 370, 374 (5th Cir. 2013) (finding a single use of the n-word insufficient to state a Title VII hostile-work-environment claim, even when accompanied by other offensive language and gestures). That is as true on the playground as it is in other walks of life. A jury is "far more capable of determining what constitutes an objectively hostile [educational] environment … than is a

judge." *Carvalho v. Santander Bank, N.A.*, 573 F. Supp. 3d 632, 644 (D.R.I. 2021) (applying Title VII). Rather than place undue weight on two-decade-old dicta, this Court should leave to the jury the task of determining whether the harassment of MG constituted severe, pervasive, and objectively offensive conduct.

B. The discrimination MG endured was sex based.

Brooke does not dispute that discrimination on the basis of sexual orientation and gender identity constitutes discrimination on the basis of sex under Title IX. Nevertheless, it maintains that no sex discrimination occurred. In Brooke's view, MG's peers were motivated by personal animus, not sex, Resp. Br. 25-26, or were too young to understand the sex-based meaning of the words that they used to attack him, Resp Br. 21 & n.10. Neither argument saves Brooke from facing a jury.

1. The record readily supports the conclusion that students at Brooke harassed MG based on their perceptions of his sexual orientation and gender identity, not out of personal animus. The simple fact that his classmates used sex-based language to harass him allows him to survive summary judgment on this score. It is reasonable to infer from the other students calling MG "gay" and "a faggot" and teasing him for wanting to be a girl that they did so because they believed he was gay or transgender. Other evidence, such as MG's classmate's express statement that she did not like him "because the

whole school thought [he] was loud and gay," JA-2 564-65, reinforces the inference that the students' antipathy toward MG was sex based.

In this regard, Brooke ignores *Roy v. Correct Care Solutions*, 914 F.3d 52 (1st Cir. 2019). As our opening brief described (at 19-20), *Roy* held that "there is no doubt that a jury could find that [the harasser] calling [the plaintiff] a 'bitch' was connected to her sex." *Id.* at 63. This Court explained that "the use of sexually degrading, gender-specific epithets … constitutes harassment based upon sex." *Id.* And it cited to a decision summarizing the "raft of case law" to the same effect. *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225, 229 (1st Cir. 2007); *see Roy*, 914 F.3d at 63. Brooke does not address these well-reasoned and well-established principles. Yet applying *Roy* to this case requires the conclusion that when MG's classmates used degrading epithets grounded in his perceived sexual orientation and gender identity, they were motivated at least in part by those characteristics.

Instead of confronting this Court's precedent, Brooke reaches out of circuit, citing two cases that reject Title IX claims on the ground that personal animus motivated the use of gendered language. Neither advances Brooke's position. As our opening brief explained (at 22-23), *Wolfe v. Fayetteville School District*, 648 F.3d 860 (8th Cir. 2011), arose from a jury verdict for the school district and thus sheds no light on what evidence creates a genuine dispute of fact regarding a harasser's motivation. *Id.* at 862. In the second decision, the Fifth Circuit held at summary judgment that a harasser called the plaintiff a "ho" solely out of personal animus. *Sanches v. Carrollton-Farmers*

Branch Indep. Sch. Dist., 647 F.3d 156, 165-66 (5th Cir. 2011). But that conclusion cannot be reconciled with this Court's directive that "the use of sexually degrading, gender-specific epithets," including "whore," "constitute[s] harassment based upon sex." *Forrest*, 511 F.3d at 229; *Roy*, 914 F.3d at 63. Moreover, the record in *Sanches* was unlike the evidence in this case. There, the victim and her lone harasser had a longstanding, mutually acrimonious relationship. *Sanches*, 647 F.3d at 165-66. Here, a multitude of harassers used pointedly sex-based language, and the record contains no specific evidence of past conflict between MG and anyone but MV. A reasonable jury could conclude that sex motivated the harassment.[1]

2. Brooke's other basis for contending that MG was not discriminated against on the basis of sex is that the harassing students were too young to understand what their homophobic and transphobic language meant. Resp. Br. 21 & n.10. Brooke offers no support for that notion. It might choose to argue to a jury that students between the ages of eight and twelve are categorically unaware of the concepts of sexual orientation and gender identity and thus that MG's harassers were using sex-based epithets

[1] Brooke cites three other cases finding no sex-based harassment, but none is good law. The Tenth Circuit has abrogated *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996). *See Doe v. Sch. Dist. No. 1*, 970 F.3d 1300, 1310 (10th Cir. 2020). The reasoning of *Tyrrell v. Seaford Union Free School District*, 792 F. Supp. 2d 601 (E.D.N.Y. 2011), was overruled by *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). And *Roy*, 914 F.3d at 63, precludes this panel from following *Patterson v. Hudson Area Schools*, 724 F. Supp. 2d 682 (E.D. Mich. 2010).

inadvertently. But common sense can create a genuine dispute of fact, *United States v. $8,440,190.00 in U.S. Currency*, 719 F.3d 49, 59 (1st Cir. 2013), and a jury would be free to reject the uncorroborated and counterintuitive blanket assertion that children aged twelve and under have no understanding of sexual orientation or gender identity.

Even if Brooke had some support for that position, it does not attempt to argue that children do not understand sex-based stereotypes. The students at Brooke teased MG for wanting to be a girl. JA-2 559, 734. A jury would have no trouble concluding that this evidence demonstrates harassment based on a failure to conform to sex stereotypes and that, regardless of age, this discriminatory motivation is precisely why the harassers chose the terms they did. Yet Brooke does not contend with our point (Opening Br. 23-24) that MG was harassed for failing to conform to sex-based stereotypes, which offers an independent basis for concluding the harassment was sex based.

Finally, even if every last student at Brooke failed to understand the sex-based nature of his or her harassment, MG was still subjected to intentional discrimination on the basis of sex because officials chose to ignore the openly sex-based hostile environment in the school. As described above (at 2-7), the other students' conduct was so severe and pervasive that it created an atmosphere of anti-gay and anti-transgender animus. Accordingly, the conditions in the school differed based on sex. That remains true whether the bullies meant to target MG's sex or simply repeated words they had heard used in an insulting manner; the effect on the victim is the same. And

when Brooke administrators chose to disregard the sex-based differences that hung over the school environment, they necessarily took sex into account and engaged in intentional sex-based discrimination themselves.

Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005), confirms this point. In *Jackson*, a school district removed the coach of the girls' basketball team after he objected that his team received less funding and lacked full access to school facilities. *Id.* at 171-72. The Court held that the coach's retaliation claim alleged intentional discrimination on the basis of sex under Title IX. *Id.* at 174. The majority explained that when a school "retaliates against a person *because* he complains of sex discrimination, this constitutes intentional discrimination on the basis of sex." *Id.* (quotation marks omitted).

Analogously, just as firing a coach for complaining about unequal treatment of the girls' basketball team requires consideration of sex, so does knowingly choosing to allow a sex-based hostile environment to fester. Both actions are inextricably linked to and taken on the basis of sex. As a result, Brooke cannot evade liability on the ground that the discriminatory hostile environment originally stemmed from students who (supposedly) did not understand the meaning of their harassment. As we explain in more detail below (at 16-24), the school officials understood the sex-based effects of the harassment, and they chose not to act. That "deliberate indifference constituted intentional discrimination on the basis of sex." *Jackson*, 544 U.S. at 182.

C. This Court can consider MG's evidence.

Given that the evidence adduced at summary judgment creates a genuine dispute of fact over whether MG suffered actionable sex discrimination, Brooke attempts to exclude much of it. It raises a salvo of challenges to MG's therapist's notes, Ms. Grace's testimony, a police report, and an email from Ms. Grace to a detective with the Boston Police Department's Civil Rights Unit. None of its objections sticks.

1. Therapist's notes. Brooke stresses that the content of the therapist's notes conflicts with other evidence. Resp. Br. 28-29. That only means that a genuine dispute of fact exists, however, not that the evidence is inadmissible.

Brooke next says that the notes "are not made on personal knowledge" and "are not sworn under oath." Resp. Br. 30 (citing Fed. R. Civ. P. 56(c)(4)). That is true, and that might matter if the notes were an affidavit or declaration. Fed. R. Civ. P. 56(c)(4). But they are not.

Brooke also contends that the therapist's notes are irrelevant after *Cummings v. Premier Rehab Keller*, 142 S. Ct. 1562 (2022). Resp. Br. 32. *Cummings* held emotional distress damages are unavailable in private actions brought under two statutes that, like Title IX, were enacted pursuant to the Constitution's Spending Clause. *Id.* at 1576. *Cummings* is doubly inapposite. Brooke sought summary judgment on liability, not damages. ECF 51 at 1-2. And in any event, MG has claims for pecuniary damages, such as the costs of transferring to a new school. JA-1 40, 42.

Finally, Brooke doubles down on its position that the notes constitute inadmissible hearsay, even though our opening brief explains otherwise (at 17).[2] The school casts aspersions on the therapist's credentials, suggesting her notes do not qualify for the exception for statements made for medical diagnosis or treatment because it "does not appear she is a physician, psychiatrist or even a psychologist." Resp. Br. 31 n.13. But the medical-statement exception contains no such requirement. Fed. R. Evid. 803(4); *Danaipour v. McLarey*, 386 F.3d 289, 297 (1st Cir. 2004); *Davignon v. Clemmey*, 322 F.3d 1, 8 & n.3 (1st Cir. 2003) (admitting testimony of "a family therapist and social worker not licensed to practice medicine").

Brooke then focuses on MG's classmates' out-of-court assertions about his sexual orientation, which the notes document. It protests that these remarks are inadmissible hearsay because the declarants are unidentified. Resp. Br. 32-33. But MG does not seek to introduce those statements under an exception to the hearsay rules. They are offered for their effect on MG, not their truth, and thus are not hearsay. Opening Br. 17.

Next, Brooke turns to MG's and his mother's statements to the therapist. It contends those statements cannot fall under the medical-statement exception because MG and Ms. Grace "certainly had a motive other than seeking diagnosis or treatment." Resp. Br. 32. Namely, they "were aggrieved by what they perceived as improper discipline." *Id.* Brooke has nothing to

[2] Brooke also maintains that the notes are unauthenticated, but we have already fully addressed that argument. Opening Br. 16-17.

support that assertion other than the fact that MG and Ms. Grace were upset enough to file a lawsuit later. If that were enough to defeat the exception, though, it could never benefit a plaintiff.

True, this Court has recognized that some circumstances involving minor victims warrant particular caution before applying Rule 803(4) to admit a parent's statements. But those circumstances are not remotely present here. They arise "[i]n sexual abuse cases, especially where one parent accuses the other of abuse." *Danaipour*, 386 F.3d at 298. This case bears no resemblance to a case about shifting blame for abuse among relatives. The record contains no suggestion that Ms. Grace sought care for MG for any reason other than to address the serious mental health consequences of Brooke's inaction.

2. Bus monitor's comment. As for Ms. Grace's testimony that the bus monitor told MG "that he has to watch his flamboyant hands—the way he moves his hands and the way he talks," JA-1 451, Brooke has no response to our opening brief (at 17-18). To recap our position, since 2010, the Federal Rules of Civil Procedure have allowed courts to consider evidence at summary judgment if it could be "presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2); *cf. Est. of Rahim v. Doe*, 51 F.4th 402, 412 (1st Cir. 2022) (endorsing the proposition that "[t]he standard is not whether the evidence at the summary judgment stage would be admissible at trial—it is whether it *could* be presented at trial in an admissible form"). Brooke does not address the point or explain why Ms. Grace's "flamboyant hands" testimony cannot be considered at summary judgment

in light of that rule. Instead, it cites caselaw that predates the amendment, *Garside v. Osco Drug, Inc.*, 895 F.2d 46 (1st Cir. 1990), that does not address the amendment, *Rivera-Rivera v. Medina & Medina, Inc.*, 898 F.3d 77, 89-90 (1st Cir. 2018), or that supports our view of the amendment's import, *see Martínez v. Novo Nordisk*, 992 F.3d 12, 18 (1st Cir. 2012) (noting that inadmissible hearsay "cannot suffice to create a genuine dispute of material fact (*at least absent a showing that the statements can 'be presented in a form that would be admissible in evidence'* …)" (emphasis added) (quoting Fed. R. Civ. P. 56(c)(2))). Ms. Grace's testimony could be presented in an admissible form at trial, *see* Opening Br. 17, and it is thus appropriate for consideration in its current form at summary judgment.[3]

3. Police report. Brooke's challenge to one of the police reports Ms. Grace filed is likewise unpersuasive. When MG was in fifth grade, Ms. Grace reported an assault by MV and recounted that MG had "been verbally assaulted, threatened," and "called 'gay and a fag'" by MV. JA-2 782. She also informed the officers that she had "notified several school officials" but "nothing[had] been done." *Id.* Brooke complains that Mr. Clark testified that the police report was not provided to the school and that Ms. Grace did not

[3] Because no panel has considered the amendment, this Court is not bound by decisions holding that inadmissible hearsay cannot be considered at summary judgment. *United States v. Barbosa*, 896 F.3d 60, 74 (1st Cir. 2018) (noting the law-of-the-circuit doctrine's exceptions); *see Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record … are not to be considered as having been so decided as to constitute precedents.").

report the name-calling directly. Resp Br. 34. But we cite it only for the point that MV physically attacked MG and that Ms. Grace filed a police report. Opening Br. 5. Brooke's objections are not responsive.

4. Ms. Grace's email to the Boston Police Department. Brooke also misses the mark when it challenges an email that Ms. Grace sent to a detective with the Boston Police Department's Civil Rights Unit. Resp. Br. 33. The email informed the detective that after Ms. Grace told officials that MG had raised the topic of suicide, the officials "said they w[ould] send out a letter [to] all parents telling them about bullying" and that officials would have law enforcement "come in and talk to every class about bullying." JA-2 960. Ms. Grace also recalls that these measures were "supposed to happen when [the detective] spoke to [t]hem last year" but that they did not. *Id.* Brooke protests that "the email on its face is devoid of any police 'recommendations'" and was not sent to the school. Resp. Br. 34. But the point is not that the email itself conveyed a list of recommendations to the school. The point is only that Ms. Grace had not seen Brooke implement the measures described in the email. She could testify to that at trial; indeed, her deposition is consistent on the point. JA-1 519-20. Like all the objections just reviewed, this one too provides Brooke no cover.

II. Brooke exhibited deliberate indifference.

Our opening brief explains (at 25-33) that a jury could find that Brooke's extremely limited response to MG's harassment was clearly unreasonable.

The school contends that administrators met and communicated with Ms. Grace, MG, and his therapist; disciplined students; and investigated every instance of harassment of which they knew. But a jury could conclude that the first two measures fall short of what Title IX requires. As for the third, the record contradicts Brooke's claim that it investigated all known harassment.

A. Communicating with Ms. Grace and punishing MG were not an adequate response.

Brooke's willingness to meet with Ms. Grace and take her phone calls would not preclude a jury from finding it acted with deliberate indifference toward harassment. The deliberate-indifference inquiry focuses on steps taken "to remedy the violation" of Title IX. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). A school's response does not need to be perfect. *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 174 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009). But it must actually target sex discrimination. *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669 (2d Cir. 2012).

Brooke stresses that officials "frequently communicated" and "set up meetings" with Ms. Grace. Resp. Br. 15. But those interactions, whether well-intentioned or begrudging, do not preclude a finding of deliberate indifference. They must translate into actual action to remedy the harassment. Meeting with Ms. Grace did not target the harassment at all. As

Ms. Grace put it, "[w]hat's the purpose of [officials] meeting with me if [the school was] not going to do anything?" JA-1 320-21.

Nor did the meetings that Brooke held with MG and his therapist constitute a meaningful response to harassment. Even by the school's own telling, the meetings it relies on aimed "to address M.G.'s disruptive behaviors and poor relationship with his teacher, who was upset by MG's refusal to follow instructions" and "to develop strategies to address MG's behavioral problems and provide … support[] for [his] frustrations with accepting redirection from teaching staff." JA-1 75-76 (citing ECF 46-13). Those are not measures to remedy discrimination. Efforts to encourage MG to stop "distracting the class" and "talk[ing] back" don't abate harassment. ECF 46-13 at 2. They indicate that the school punished MG instead of addressing the problem with his classmates.

Indeed, this line of argument is representative of Brooke's ongoing effort to shift accountability from itself to MG. Disciplining MG for the consequences of the harassment put the onus on him in the same way that talking to him (but not his harassers) about sexuality or encouraging him to watch his "flamboyant hands" did. JA-1 451-53; *see* Opening Br. 27. A jury could find that blaming MG for his reaction to his mistreatment rather than stepping in to stop that mistreatment was a clearly unreasonable response.

B. The two detentions that Brooke issued were inadequate and underscore the failure to impose other disciplinary measures targeting the harassment.

Nor is Brooke entitled to summary judgment on the ground that it "disciplin[ed] student offenders when appropriate, consistent with school policies." Resp. Br. 15. Even affirmative disciplinary action can fall short of a legally sufficient response if it is unduly delayed or disproportionately weak in light of the scope of the problem. *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 668-71 (2d Cir. 2012).

The school did nothing to respond to verbal harassment aside from issuing detentions when MG was called "skittles." As explained (Opening Br. 29-31), that response came far too late. It occurred in February or March of MG's sixth-grade year, JA-1 126; JA-2 879, well over a year after he first began reporting the harassment. Further, the discipline did not confront the larger pattern of bullying. It addressed only the immediate, isolated incident. And the detentions were only a partial response to the incident itself. Various other students heard the derogatory term, and even though they began "laughing and making fun of" MG, the teacher who was present did nothing more than penalize the students who made the remarks. JA-2 879. Unsurprisingly, the one-off detention and failure to address the systemic nature of the problem offered no relief to MG. JA-2 535-36. The detentions had no notable deterrent effect, so the harassment continued. *Id.*

Brooke tries to explain its failure to take broader disciplinary action by arguing that none of the other harassment constituted bullying under school

policy. Resp. Br. 15. That is of no consequence. Brooke cannot decline to respond to sexual harassment on the ground that the harassment does not violate its policies. Whether it qualified as bullying or not, as explained above (at 2-11), a jury could find the harassment of MG constituted prohibited sex discrimination, and Brooke offers no authority suggesting otherwise. As a result, Title IX obligated Brooke to respond in a way that was not clearly unreasonable, regardless of how it defined bullying internally. A contrary conclusion would leave a gaping hole in Title IX.

C. Brooke did nothing about the rampant verbal harassment.

Brooke's claim (Resp. Br. 15, 18) that it investigated all known harassment fails as well, for two reasons. First, as our opening brief explained (at 27-28), a genuine dispute of fact exists about whether administrators conducted a meaningful inquiry into the instances of verbal abuse that they claim to have scrutinized. Second, as we now detail, school officials knew that the harassment spread far beyond those select examples but chose to let it continue unchecked.

Brooke insists that it had no knowledge of any incidents of verbal sex-based harassment aside from 1) two students calling MG "skittles," 2) a student telling the bus monitor that she did not like MG because the whole school thought he was gay, and 3) a student using homophobic epithets about MG at summer camp. Resp. Br. 18. The record belies that assertion.

MG and his mother repeatedly informed Brooke administrators about the widespread homophobic and transphobic harassment he was enduring. Immediately before the incident in fifth grade when Ms. Nissan left *Gracefully Grayson* on MG's desk, he was in Ms. Dudley's office, talking to her about how the other children were teasing him about his sexuality. JA-1 453-54, 458. Ms. Grace emailed Mr. Clark shortly thereafter and told him what the other students were saying about MG. JA-1 340. The problem became severe enough that administrators informed the school counselor that students were calling MG homophobic names. JA-2 720-21, 726-28. In the fall of sixth grade, after a student called MG gay at summer camp and it "went around" the school and his best friend stopped speaking to him, JA-1 123, 521-22; JA-2 562-63, 651-52, Ms. Grace called Brooke to report what was going on, JA-2 960. Administrators told her there was nothing they could do because the rumors began during summer, so Ms. Grace met with the principal, Ms. Dudley, and MG's therapist. *Id.* They "discussed [the] ongoing issues of bullying by other students." JA-2 866. To convey the gravity of the situation, Ms. Grace informed the officials that, because of the bullying, MG had told her, "[M]ommy [I] want you to know this is why people kill their selfs." JA-2 960. Viewing this evidence in the light most favorable to MG, Brooke cannot plausibly claim it knew about only a handful of instances of verbal sex-based harassment.

Yet Brooke did nothing to stem that tide of harassment. The only penalties it meted out were in response to the "skittles" incident. Administrators did

not discipline or try to educate the girl from the bus who said she did not like MG because he was gay. They did not explain to the girl who called MG gay at summer camp why her actions were inappropriate. And they never even attempted to identify the other perpetrators. Further, aside from perhaps sending out a letter about bullying, Brooke did not address its students' transphobic and homophobic conduct on a more systemic level. And it maintained its policy of inaction even after it became crystal clear that "sp[eaking] to all of the parties involved" in the bus incident and capitulating to harassment that purportedly began at summer camp, JA-2 668-71, 651-53, were not effective strategies. In short, Brooke took no action to address the undercurrent of abuse. In light of all the circumstances known to school officials, a reasonable jury could find Brooke's failure to investigate or intervene in any meaningful way was woefully inadequate.

Brooke's only defense of its failure to respond proportionately is to protest that it was not required to address these background "rumors." Resp. Br. 19. To begin with, characterizing the harassment as mere rumors fails to take the evidence in the light most favorable to MG. The evidence indicates that his classmates were calling him homophobic names to his face, Ms. Dudley knew that other students were teasing him about his sexuality, Ms. Grace and MG's therapist reported the bullying, and administrators informed the school counselor that he was being called these epithets. JA-1 453-54, 458; JA-2 720-21, 726-28, 812, 819, 822, 827, 843, 866, 960. Further, Brooke offers no support for its assertion (Resp. Br. 19) that, as a matter of

law, Title IX does not require a school to respond to bullying from unidentified sources. Brooke's decision to ignore the many reports of sex-based harassment cannot be excused on the ground that it did not know exactly who was harassing MG. Burying one's head in the sand and refusing to investigate further is a classic form of deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 843 n.8 (1994). A jury could find that the administrators bore some responsibility for putting a stop to the abuse by trying to identify the harassers.

In an attempt to bolster its contention that rumors cannot support liability, Brooke cites *Johnson v. Elk Lake School District*, 283 F.3d 138 (3d Cir. 2002), arguing that unsubstantiated rumors cannot constitute actual notice. Resp. Br. 19-20. Whether or not that proposition is right, it is irrelevant. In *Johnson*, the plaintiff argued that rumors about an employee's misconduct put the school on notice of that misconduct. 283 F.3d at 144 n.1. That case might be on point if MG were relying on rumors to show that Brooke knew he was gay. But that is an assertion MG has not made and that would be legally irrelevant in any event.[4]

[4] Moreover, the actual-notice element of MG's Title IX claim cannot provide an alternative basis for affirmance. Brooke argued below that its response was not clearly unreasonable in light of the known harassment, but it did not seek summary judgment based on lack of notice. ECF 51. MG thus had no occasion to introduce evidence establishing a genuine dispute of fact with respect to that element, and this Court should "not resolve the issue." *Good v. Altria Grp., Inc.*, 501 F.3d 29, 45 (1st Cir. 2007).

Notable, too, is Brooke's silence on multiple other ways in which its response amounted to deliberate indifference. It does not justify its delayed, incomplete effort in implementing anti-harassment measures like those recommended by the Boston Police Department. Opening Br. 26, 28-29. It does not explain why it failed to implement—or even consider—interventions like those recommended by the U.S. Department of Education's Office for Civil Rights. Opening Br. 31-32. It does not grapple with the fact that after MG left Brooke, his new school swiftly stamped out an initial surge of verbal harassment. Opening Br. 32. And it does not dispute that the harassment escalated over the course of MG's three years at Brooke, which a jury could attribute to the school's indifferent inaction. Opening Br. 32-33.

In the end, Brooke's lack of any meaningful response might be easiest to understand on the theory that administrators believed that the years of homophobic and transphobic harassment MG endured were simply not that big of a deal. But a reasonable jury could reach the opposite conclusion. And in light of that reality, Brooke's lack of concern with MG's suffering amounts to "an official decision … not to remedy the violation." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). That nonchalance qualifies as deliberate indifference.

Conclusion

This Court should reverse the district court's order and remand plaintiff-appellant MG's Title IX claim for trial.

Respectfully submitted,
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