IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

KIMBERLY LOPEZ, as guardian, next friend, and parent of GILBERTO LOPEZ, a minor, Plaintiff, UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; and GENESIS LEARNING CENTERS, Defendants.	NO. 3:07-CV-799 Judge Echols Magistrate Judge Griffin

UNITED STATES' REPLY BRIEF
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On January 15, 2009, the United States moved for summary judgment on its sexual discrimination claim asserted against the Metropolitan Government of Nashville and Davidson County ("Metro") under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 (2000). (United States' Motion for Summary Judgment (Docket No. 164); Memorandum of Law in Support of the United States' Motion for Summary Judgment ("United States' Memorandum of Law") (Docket No. 166)). Metro filed its response on February 5, 2009. (Defendant Metro's Response to Plaintiff-Intervenor United States of America's Motion for Summary Judgment ("Metro's Response") (Docket No. 209)).

To defeat the United States' motion for summary judgment, Metro must demonstrate that evidence in the factual record creates a genuine dispute of material fact that can only be resolved by a trial. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48

(1986); Staehling v. Metro. Gov't of Nashville & Davidson County, No. 3:07-797, 2008 WL 4279839, at *4 (M.D. Tenn. Sept. 12, 2008) ("[T]he nonmoving party must set forth specific facts showing that there is a genuine issue of material fact for trial."). "A dispute is 'genuine' only if based on evidence upon which a reasonable jury could return a verdict in favor of the non-moving party." Henderson v. Walled Lake Consol. Sch., 469 F.3d 479, 487 (6th Cir. 2006). To establish a genuine dispute, Metro must direct the Court to "significant probative evidence" which demonstrates that "there is more than some metaphysical doubt as to the material facts." Blume v. Potter, 289 F. App'x 99, 102 (6th Cir. 2008) (quoting Moore v. Philip Morris Cos., 8 F.3d 335, 339-40 (6th Cir. 1993)).

Metro's response, read in conjunction with the United States' motion for summary judgment, underscores the United States' position that no reasonable jury could return a verdict in Metro's favor on the basis of the evidence in this record. Indeed, not one of the three elements of a Title IX peer harassment claim is seriously contested by Metro. Metro's claim that the rape of Gilberto Lopez on May 7, 2007 ("the May 7 incident") did not result in a denial of equal access to educational opportunities and resources is contrary to the near-unanimous position of courts addressing rape in the Title IX context as well as undisputed facts in this record. Metro's response also ignores extensive evidence that establishes its actual knowledge of the substantial risk of sexual harassment posed by Kolby Harris, and erroneously suggests that its knowledge of Kolby's sexual proclivities was limited to incidents of consensual sexual activity with age-appropriate female students. Finally, Metro's claim that it did not act with deliberate indifference is predicated on the erroneous legal supposition that such deliberate indifference could only arise from events that occurred after the May 7 incident.

In sum, no facts material to the Court's disposition of this Title IX claim are the subject of a genuine dispute between the parties. The governing law, as set forth by Davis and applied by this Circuit, enables the United States to prevail on the basis of the undisputed facts in this case.

ARGUMENT

To prevail on its Title IX claim, the United States must demonstrate: (1) Kolby Harris' sexual harassment of Gilberto Lopez was so severe, pervasive, and objectively offensive that it could be said to deprive him of access to the educational opportunities or benefits provided by Metro; (2) Metro had actual knowledge of the sexual harassment; and (3) Metro was deliberately indifferent to the harassment. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999); Patterson v. Hudson Area Sch., 551 F.3d 438, 444-45 (6th Cir. 2009). As explained in the United States' motion for summary judgment, the undisputed facts in this case affirmatively establish each of these elements. (United States' Memorandum of Law at 21-34). In its response, Metro fails to rebut the United States' legal arguments and does not identify any genuine issues of material fact that require resolution at trial. Accordingly, the Court should grant summary judgment in favor of the United States.

I. The Rape of Gilberto Lopez Constitutes Severe, Pervasive, and Objectively Offensive Harassment that Resulted in a Denial of Equal Access to Educational Resources and Opportunities

To sustain a Title IX claim, "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." Davis, 526 U.S. at 651. In its response to the United States' summary judgment motion, Metro does not dispute the first element of this standard; namely, that the May 7 incident constitutes severe, pervasive, and objectively offensive sexual harassment. (Metro's Response at 5-7). However, it claims that there is at least a material dispute of fact with respect to whether the rape of Gilberto resulted in a denial of equal access to educational resources and opportunities. (Id.)

In its motion for summary judgment, the United States provided two rationales for its position that no trial is necessary to determine whether the rape of Gilberto Lopez on May 7, 2007 satisfies the Davis standard. First, the United States observed that the overwhelming

majority of courts addressing rape in the Title IX context, including the Sixth Circuit, have held that rape is such a severe, pervasive, and objectively offensive form of sexual harassment that it invariably denies the victim equal access to educational resources and opportunities. (United States' Memorandum of Law at 21-23). Metro ignores these cases without comment.

Second, the United States illustrated the adverse impact of the May 7 incident on Gilberto's education through undisputed facts and deposition testimony that document Gilberto's unprecedented pattern of self-destructive behavior in the immediate and continuing aftermath of the May 7 incident. (United States' Memorandum of Law at 9-10, 23-24). Metro fails to proffer any evidence that contradicts or mitigates this evidence. Instead, Metro asserts, without any legal foundation, that the question of whether Gilberto's rape resulted in a denial of equal access to educational resources and opportunities should be consigned to a battle of the experts at trial. (Metro's Response at 6-7). As the United States explains below, the approach urged by Metro is not only inconsistent with governing Sixth Circuit precedent, but would also have the perverse consequence of reducing Title IX's protections for a school district's most fragile students – children with disabilities or a prior history of being victimized.

A. The Overwhelming Majority of Courts Have Determined that an Act of Rape Denies the Victim Equal Access to Educational Resources and Opportunities

Nearly every decision addressing rape in the Title IX context holds that an act of rape presumptively constitutes severe, pervasive, and objectively offensive sexual harassment. See Soper v. Hoben, 195 F.3d 845, 854-55 (6th Cir. 1999); United States' Memorandum of Law at 21-23 (citing cases).[1] Having established that rape is severe, pervasive, and objectively

[1] The United States is aware of only one Title IX case in which a court ruled that an act of rape did not satisfy the severe, pervasive, and objectively offensive prong of the Davis test. See Ross v. Mercer University, 506 F. Supp. 2d 1325 (M.D. Ga. 2007). However, the circumstances in Ross bear little resemblance to the facts of this case. The plaintiff was not a young child with autism, but a college freshman. Id. at 1328-29. Ross alleged that a former boyfriend, with whom she had consensual sex on at least fifteen prior occasions, slipped a date-rape drug into her beverage and raped her after they broke up. Id. Ross was unable to

offensive per se, courts require at most a de minimis denial of access to educational resources or opportunities to satisfy the Davis standard. See, e.g., Kelly v. Yale Univ., No. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. March 26, 2003) (holding that "further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities"); Doe I v. Dallas Ind. Sch. Dist., No. 3:01-CV-1092-R, 2002 WL 1592694, at *6 (N.D. Tex. July 16, 2002) (finding a potential denial of equal access to education where the school prevented the victim from attending P.E. class in order to keep her separated from the assailant).[2] No court addressing an act of rape in the Title IX context has ruled that a substantial factual inquiry or battle of experts is required to establish a causal link between the rape itself and a subsequent denial of equal access to educational opportunities and resources.

The seminal case in this line of jurisprudence is the Sixth Circuit's decision in Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999). In Soper, a mentally impaired second-grade student who attended special education cases alleged that two students fondled her breasts and vagina in the classroom and on the school bus, and that a third boy raped her. Id. at 848-49. The Sixth Circuit ultimately affirmed the district court's dismissal of plaintiffs' Title IX claim on actual knowledge and deliberate indifference grounds. Id. at 855. However, without referencing any evidence probative of the victim's educational experiences after the harassment, the Court concluded:

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produce a toxicology report indicating the presence of this drug, id. at 1329, and the court emphasized that Ross had no memory of actually being raped. Id. at 1328-29, 1358 n.51. The court concluded that "[a]t most, it could be said that Ross's alleged attack meets the requirements of severity and objective offensiveness," but fell short of the threshold for pervasive harassment. Id. at 1358. Significantly, the court acknowledged that its ruling was contrary to other Title IX cases holding that a single incident of sexual harassment could be sufficiently severe, pervasive, and objectively offensive as to deny the victim access to an educational program or activity. Id.

[2] Unless otherwise noted, all unpublished decisions cited in this reply brief were previously filed as attachments to the United States' Memorandum of Law (Docket No. 166).

> With respect to the first prong of the Davis test, there is evidence in the record to support the Sopers' assertion that Renee was raped and sexually abused and harassed. This obviously qualifies as being severe, pervasive, and objectively offensive sexual harassment that could deprive Renee of access to the educational opportunities provided by her school.

Id. at 854-55. The Sixth Circuit reached this conclusion without compelling plaintiffs to demonstrate a causal link between the sexual harassment and a specific denial of access to educational opportunities. Nevertheless, the court had no difficulty concluding that a child afflicted with significant mental impairments could have been denied access to equal educational opportunities as a consequence of being raped and sexually harassed. See id.

B. Metro Fails to Establish a Genuine Dispute of Fact Over Whether Gilberto Lopez Suffered a Denial of Equal Access to Educational Opportunities and Resources After the May 7 Incident

The Court need look no further than Soper and its progeny to hold that the rape of Gilberto Lopez rises to the level of severe, pervasive, and objectively offensive sexual harassment that denied Gilberto equal access to educational opportunities and resources. However, even if the Court compels Plaintiffs to link the May 7 incident to an actual denial of educational access, the evidence establishing that link is undisputed. In its motion for summary judgment, the United States cited poignant, uncontradicted evidence of Gilberto Lopez's emotional and psychological deterioration in the aftermath of the May 7 incident. (United States' Memorandum of Law at 9-10, 23-24). This evidence reflects that Gilberto experienced visual hallucinations and nightmares about Kolby Harris (Lopez 97:7-22, 99:19-100:6 (attached as Exhibit 18)), heard voices telling him to kill his family (Lopez 97:7-11), defecated on himself and in his bedroom (Exhibit 27; Exhibit 32; Lopez 115:10-12, 120:1-2), attempted to cut off his genitals (Lopez 100:4-5, 116:23-24, 207:19-208:1), refused to bathe (Exhibit 32; Lopez 120:5-6), required noise from a television or DVD player to "drown out the voices" so he could fall asleep (Lopez 100:22-101:1), and tried to avoid riding the bus (Lopez 110:6-111:15).[3]

[3] All citations to Exhibits 1-48 in this reply brief refer to exhibits attached either to the United States' Memorandum of Law (Docket No. 166, Exhibits 1-43) or to the United States'

Undisputed evidence further establishes that this trauma diminished the quality of Gilberto's educational experiences at Genesis. A "Six Weeks Summary" issued by Genesis on May 21, 2007 stated that "Gilberto has often refused to do any work. He will completely shut down or try to run away to get out of completing assignments." (Exhibit 4 at GL_533). It further noted: "We are seeing inconsistent behavior with Gilberto. At times he is very oppositional and aggressive . . ." (Exhibit 4 at GL_533). Progress notes from Gilberto's treatment providers dated May 10, 2007 – three days after the May 7 incident, but four days before Ms. Lopez was informed about the rape – corroborate that Gilberto exhibited "increased aggressive behavior for the past 3-4 days," consisting in part of episodes in which Gilberto hit his mom, dad and sister at home. (5/10/07 MHC Progress Note at GLC 3150, attached hereto as Exhibit 49). Gilberto also informed his mother he wanted to die. (Exhibit 49 at GLC 3149-50).

Though Gilberto initially returned to Genesis for the Fall 2007 semester, he still acted "fearful" at school and periodically indicated that he did not want to ride the bus. (Exhibit 4 at GL_558). On September 19, 2007, Gilberto was removed from Genesis and committed to Youth Villages, a residential treatment facility in Memphis, for inpatient mental health treatment. (Lopez 94:14-96:3 (attached as Exhibit 18); Exhibit 34). Gilberto was discharged from Youth Villages on July 14, 2008, but soon after returning home he attempted to set fire to his mother's house because he thought he heard voices saying Kolby "was coming to get him." (Affidavit of Kimberly Lopez at ¶ 13 ("Lopez Affidavit") (Docket No. 119)). Gilberto was then committed to the Middle Tennessee Mental Health Institute from July 22, 2008 to August 13, 2008. (Lopez Affidavit at ¶¶ 14-15).

That Gilberto was withdrawn from Genesis and institutionalized for nine months is, without more, sufficient to establish the requisite denial of educational resources under Davis.

Response to Defendant Metro's Statement of Undisputed Facts as to Intervening Complaint (Docket No. 197, Exhibits 44-48). Exhibits 49-51 are new exhibits which are attached hereto. A complete index of the United States' exhibits is attached hereto as Appendix C.

"When considering actions pursuant to Title IX, several [] courts have found withdrawal from school is a 'concrete and negative effect' on the victim's education." S.G. v. Rockford Bd. of Educ., No. 08-C-50038, 2008 WL 5070334, at *4 (N.D. Ill. Nov. 24, 2008) (citing Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 257-59 (6th Cir. 2000); Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 824 (C.D. Ill. 2008); Seiwert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007); Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 445 (D. Conn. 2006)).

Metro nonetheless asserts that there is a genuine dispute of fact over whether Gilberto's emotional and psychological meltdown in the aftermath of the May 7 incident was simply a continuation of behaviors that preceded the incident. (Metro's Response at 6-7). Metro cites no facts from the record to support its position, but relies exclusively on the reports produced by its two experts. (Bergtrup and Thompson Reports, attached to Metro's Response as Exhibit B).

Metro's reliance on its experts to establish a genuine dispute of fact with respect to whether Gilberto suffered a denial of access to educational opportunities and resources is misplaced. Neither expert was asked to opine on whether the May 7 incident could have resulted in a denial of equal access to educational resources and opportunities. Dr. Bergtrup's report is narrowly confined to the question of whether Gilberto developed acute Post-Traumatic Stress Disorder as a result of the May 7 incident. (Bergtrup Report at 3). Thompson's report addresses only "the severity of the bus incident's impact on Gilberto's emotional functioning and need for psychiatric treatment." (Thompson Report at 5). Significantly, neither expert is willing to assert that the May 7 incident had no impact on Gilberto. (Bergtrup Report at 6; Thompson Report at 5-6). Moreover, Metro does not argue, let alone demonstrate, that the threshold for establishing a denial of access to educational resources, as set forth in Soper, is equivalent or even comparable to the standards of medical causation applied by its experts to address very different questions.

The opinions of Metro's experts also conspicuously fail to reconcile events that immediately preceded and followed the May 7 incident. Indeed, undisputed evidence demonstrates that the negative behaviors associated with Gilberto's disabilities stabilized in the period preceding the May 7 incident. (Youth Villages Discharge Plan at 122, attached hereto as Exhibit 50; Lopez 105:5-106:4 (attached as Exhibit 18)). Ms. Lopez testified that in the months preceding the May 7 incident, Gilberto did not display the self-destructive tendencies he exhibited after being raped. (Lopez 99:19-101:6, 116:9-117:6). Ms. Lopez's account of Gilberto's more stable demeanor in the months preceding the May 7 incident is reinforced by medical records from Gilberto's treatment providers at Youth Villages, who were sufficiently encouraged by Gilberto's progress that they released him into a lower-level intervention plan approximately one week before the May 7 incident. (Exhibit 50 at 122; Lopez 105:5-106:4).

Conversely, after the May 7 incident, Kimberly Lopez informed Gilberto's treatment providers that she "had to start completely over" with teaching Gilberto about consequences and rewards due to the sexual abuse. (6/21/07 LifeCare Family Services Encounter Note, attached hereto as Exhibit 51). She further stated that prior progress remedying some symptoms of Gilberto's disabilities was "all lost" after the May 7 incident. (Exhibit 32).

Metro's experts do not acknowledge Ms. Lopez's testimony or the aforementioned statements to Gilberto's treatment providers, nor do they address the significance of the decision by Youth Villages to reduce the intensity of Gilberto's treatment one week before the May 7 incident. Hence, their reports fail to establish a genuine factual dispute about whether Gilberto suffered a denial of equal access to educational opportunities and resources as a consequence of being raped.

Metro's efforts to attenuate the connection between the May 7 incident and Gilberto's subsequent psychological symptoms and injuries are not immaterial to this lawsuit. Metro and Lopez are engaged in a genuine factual dispute over the extent to which the May 7 incident caused or exacerbated the injuries for which Lopez is seeking monetary damages, and this

dispute will presumably have to be resolved at trial. But unlike Lopez's pursuit of monetary damages, the United States' claim for injunctive relief does not turn on the magnitude of the injuries caused by the rape, simply their existence. As noted above, the United States need only demonstrate, at most, that the May 7 incident caused a nominal denial of access to educational resources and opportunities in order to satisfy the Davis standard. The wealth of evidence documenting Gilberto's disintegration inside and outside school after the May 7 incident easily clears this threshold. See supra at 6-9. Accordingly, there is no merit to Metro's position that it can evade liability on the United States' claim for injunctive relief by injecting complex questions of causation into the pedestrian exercise of determining whether a rape victim suffered a denial of equal access to educational opportunities and resources.

C. The Determination of Whether the May 7 Incident Denied Gilberto Lopez Equal Access to Educational Resources and Opportunities Should Not Be Relegated to a Battle of the Experts at a Trial

Metro asserts that Gilberto's disability status, coupled with various indications of an unstable childhood, raise a factual question of whether Gilberto's undisputed emotional and psychological deterioration after the May 7 incident can be attributed to the rape. (Metro's Response at 5-7). Permitting Metro to proceed to trial on this theory would establish the unsettling precedent that sexual harassment victims with disabilities or a prior history of victimization can be held to a more onerous standard of proof to establish that an act of rape denied the victim equal access to educational resources and opportunities. If Gilberto were a non-disabled student with no alleged history of prior victimization, the court would apply a presumption that the physical, emotional and psychological impact of the rape caused a denial of equal access to educational opportunities and resources. However, Metro has signaled that it intends to exploit Gilberto's fragilities – including his disabilities and alleged history of family instability – to manufacture a causation dispute on this issue. Metro's apparent position is that a reasonable fact-finder could determine that children with disabilities or an unstable family background are immune to the traumatic effects of rape. To the United States' knowledge, no

other court has concluded that school districts can defeat the Title IX peer harassment claims of disabled or previously victimized students by insinuating questions of causation into the calculus of whether an act of rape denied the victim equal access to educational opportunities and resources. In Soper, the Sixth Circuit suggested quite the opposite. 195 F.3d at 855.

It is particularly troubling for Metro to advance this causation argument here. As reiterated below, the undisputed facts in this record concretely establish Metro's culpability under the actual knowledge and deliberate indifference prongs of Davis. See infra at 11-19. In arguing that the issue of whether Gilberto was denied equal access to educational opportunities and resources should be resolved through a battle of experts, Metro ostensibly seeks a trial not to defend its own actions, but to exonerate itself from Title IX liability by painting Gilberto's childhood prior to May 7, 2007 in the most damaging light. To the United States' knowledge, these tactics have no precedent in the relevant jurisprudence.

II. Undisputed Evidence in Metro's Own Records Reveals that Metro Had Actual Knowledge of the Substantial Risk of Harassment Kolby Harris Posed to Other Students

The second element that the United States must establish to prevail on its Title IX claim is that Metro had actual knowledge of a substantial risk of harassment.[4] See Davis, 526 U.S. at 650; Williams ex rel. Hart v. Paint Valley Local Sch. Dist., 400 F.3d 360, 363 (6th Cir. 2005). Contrary to Metro's assertions, the United States is not required to demonstrate Metro's awareness of prior sexual harassment between Kolby and Gilberto in order to satisfy this standard. See Staehling, 2008 WL 4279839, at *10; see also United States' Opposition to Defendant Metro's Motion for Summary Judgment ("United States' Opposition") at 8-9 (Docket

[4] In its motion for summary judgment, the United States argued that Metro's actual knowledge of a substantial risk of harassment derived from three sources: (1) Metro's awareness of Kolby's dangerous sexual proclivities; (2) Metro's awareness of Gilberto's prior history of victimization; and (3) Metro's awareness of prior instances of peer sexual harassment on its special needs buses. (United States' Memorandum of Law at 24-34). Metro has only contested its awareness of the sexual threat posed by Kolby. (Metro's Response at 7-11). Accordingly, the United States limits its discussion to that aspect of Metro's actual knowledge.

No. 198) (citing cases); J.K. v. Arizona Bd. of Regents, No. CV 06-916-PHX-MHM, 2008 WL 4446712, at *14 (D. Ariz. Sept. 30, 2008) (copy attached) ("The Davis court did not limit Title IX liability to a federal education funding recipient's knowledge of, and deliberate indifference to, the alleged harassment of a particular individual, but instead contemplated that Title IX claims could be based on the recipient's knowledge of, and deliberate indifference to, a particular harasser's conduct in general.") (emphasis in original). Rather, the United States can prevail by showing that Metro "possessed enough knowledge of [Kolby's] harassment that it reasonably could have responded with remedial measures to address the kind of harassment upon which [the United States'] legal claim is based." Staehling, 2008 WL 4279839, at *10 (quoting Folkes v. New York College of Osteopathic Med., 214 F. Supp. 2d 273, 283 (E.D.N.Y. 2002)).

In its motion for summary judgment, the United States referenced an abundance of evidence that not only documents Kolby's prior history of sexual aggression toward other students in unsupervised settings, but reflects Metro's awareness of his dangerous sexual proclivities. (United States' Memorandum of Law at 11-15, 26-28). Metro does not dispute this evidence in its response. (Metro's Response at 9-10). Instead, it contends that because Kolby's sexual disciplinary history "includes only offenses of consensual activity with age-appropriate females," this behavior could not have put Metro on notice that Kolby would rape Gilberto, a ten-year old male. (Id. at 9).

Metro's characterization of Kolby's prior sexual misconduct is contradicted by the factual record in two respects. First, substantial and undisputed evidence reveals that prior to the May 7 incident Kolby not only sexually harassed female students in his own age cohort, but also sexually harassed and threatened significantly younger male students on his Metro-operated school bus. Second, Metro's assertion that Kolby's behavioral history was limited to innocuous consensual sex is belied by its own contemporaneous descriptions of – and reactions to – Kolby's acts of sexual aggression. In light of the evidence contained in Metro's own documents, no reasonable jury could conclude that Metro was unaware of the sexual threat Kolby posed to

other students on an unsupervised school bus.

A. Prior to the May 7 Incident, Metro Was Aware that Kolby Had Sexually Harassed Younger Male Students

Undisputed evidence from Metro's own documents reflects that on at least two occasions in late 2004 Kolby sexually harassed younger male students on his Metro-operated school bus. In particular, a Functional Behavioral Assessment of Kolby conducted by Metro officials on February 4, 2005, notes that in November 2004 Kolby committed a "series of reported bus incidents of [a] sexual nature including verbal threats to intimidate." (Exhibit 23 at PO-642). In the first of these incidents, which occurred on November 19, 2004, Kolby "exposed himself" to a ten-year-old male student named [redacted]. (Harris 17:1-22 (attached as Exhibit 36); Exhibit 35 at GLC-169). Then in mid-December Kolby "exposed his penis" to a different student on his bus and threatened to "show the new kid my privates" and "do it to him." (Exhibit 23 at PO-557; Harris 20:12-21 (attached as Exhibit 36)). In this second incident, the victim accused Kolby of attempting to compel him to engage in oral sex on the school bus. (Harris 72:17-25 (attached as Exhibit 48); Affidavit of Terrilyn Harris at ¶ 7 (Docket No. 120)).

Metro concedes that Kolby was reprimanded by Metro officials for these incidents. (Metro's Response at 10). Nevertheless, it argues that the record only contains allegations that Kolby threatened to engage in oral sex, and does not conclusively demonstrate that Kolby "actually engaged in any physical contact with any other student at that time." (Id.) Metro therefore reasons that these incidents did "not portend the type of harassment that is alleged to have occurred in this case." (Id. (quoting Staehling, 2008 WL 4279839, at *10)).

Metro's argument that actual knowledge can only be predicated on acts of harassment established beyond all doubt has no legal basis. See Escue v. Northern Oklahoma College, 450 F.3d 1146, 1154 (10th Cir. 2006) ("Although Gebser makes clear that 'actual notice requires more than a simple report of inappropriate conduct by [the perpetrator] . . . the actual notice standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student.'") (quoting Doe v. Sch. Admin.

Dist. No. 19, 66 F. Supp. 2d 57, 63 (D. Me. 1999)); Johnson v. Galen Health Inst., Inc., 267 F. Supp. 2d 679, 688 (W.D. Ky. 2003) ("[T]he actual notice standard is met when an appropriate official has actual knowledge of a substantial risk of abuse to students based on prior complaints by other students.").

Furthermore, the contemporaneous response by Metro officials to complaints about Kolby's harassing behavior toward younger male students repudiates any claim that Metro was not cognizant of a sexual threat to the other passengers on Kolby's bus. Metro officials did not dismiss these complaints as mere allegations of conduct that may or may not have occurred. To the contrary, they suspended Kolby for ten days and listed discipline codes for "sexual harassment", "intimidation/bullying", and "repeated violations" on his Behavior Incident Report. (Exhibit 23 at PO-557). At the January 14, 2005 Suspension Addendum meeting held to address these parental and student complaints, "the IEP team determined that a bus safety plan should be put in place." (Exhibit 23 at PO-580). This bus plan was designed to ensure that no other students came into close proximity with Kolby. (DePriest2 41:13-42:1 (attached as Exhibit 37); Hayes2 19:3-12 (attached as Exhibit 7)). It required Kolby to sit in the front right hand seat and prevented other students from sitting in any of the surrounding seats. (Exhibit 23 at PO-644). Even with these precautions, LuAnn Landrum, the principal of Madison School, was so "concerned" about "this incident involving a much younger child" that she ultimately requested that Kolby be transferred to another Severe Behavior Intervention Program. (Exhibit 23 at PO-580).

In short, Metro's own documents reveal not only that Kolby was accused of sexually harassing younger male students on his school bus prior to the May 7 incident, but also that these complaints triggered serious concerns among Metro officials, prompting them to institute substantial, albeit temporary, precautionary measures to prevent Kolby from engaging in additional sexual misconduct. In light of this undisputed evidence, Metro cannot credibly claim that it was unaware of the substantial risk Kolby posed to younger students on his bus prior to

the May 7 incident.

B. Prior to the May 7 Incident, Metro Officials Did Not View Kolby's Sexual Misconduct As "Age-Appropriate" or "Consensual"

Metro's own documents also indicate that district officials were troubled by Kolby's acts of sexual misconduct toward female students. At the time Kolby engaged in this misconduct, Metro educators did not blithely dismiss these incidents the way Metro lawyers do now, as "age-appropriate" and "consensual " adolescent behavior. Instead, they documented that these incidents were a symptom of Kolby's disabilities and urged that Kolby be closely supervised at all times.

For example, in a Suspension Addendum issued on September 20, 2004, Metro officials noted that "Kolby's behavior is directly related to his disability," and advised that Metro should provide supervision during unstructured time intervals, such as class transitions, when Kolby was mostly likely to engage in misconduct. (Exhibit 35 at GLC 164). Likewise, at a November 19, 2004 IEP team meeting, Metro officials noted that Kolby's sexual misconduct was "within his disability range," and warned that the behavior "[m]ay happen again if he's not supervised." (Exhibit 35 at GLC 170). Indeed, Metro officials were so concerned about Kolby's sexual behavior with other students that on September 27, 2004 they instituted a "Safety Plan" which required Kolby to be supervised by either a teacher or adult escort at all times while in school, including during transition times and when going to the bathroom. (Exhibit 23 at PO-564). This safety plan implored all Metro personnel to assist and support the plan because "[i]t is essential we do not have another incident with Kolby." (Exhibit 23 at PO-564).

After Kolby left Madison School to participate in a community-based transition program ("CBT Program") at Whites Creek High School, Metro officials continued to express concern with Kolby's sexual aggression. On November 30, 2005, Metro officials suspended Kolby for ten days in response to his "sexual assault" of a female student. (Exhibit 38 at PO-635). Metro officials contacted the police regarding this assault, and the alleged victim was instructed to receive a rape kit. (Harris 27:18-29:23 (attached as Exhibit 36)). In a December 1, 2005

Suspension Addendum documenting this incident, Metro officials again noted that "Kolby's behavior is a direct manifestation of his disability." (Exhibit 38 at PO-637). Shortly after the incident, Metro removed Kolby from the CBT Program and transferred him to Genesis.

At Genesis, Kolby continued to act out sexually. On May 4, 2006, a child accused Kolby of "touch[ing] her private parts that day and the day before . . . in the classroom." (Exhibit 23 at PO-740). Kolby's IEP team at Genesis was so concerned about these incidents that it referred Kolby to Dr. Lyn McRainey, a school psychologist and Metro employee, who conducted a psychological assessment of Kolby. (McRainey 7:5-19 (attached as Exhibit 2); Exhibit 40). Dr. McRainey's review of Kolby's cumulative education file led her to document the following in a report that was sent to Metro six weeks before the May 7 incident:

> Kolby has a history of inappropriate sexual behavior. It is not clear whether the etiology of his behavior is cognitive, predatory, the result of suspected early abuse, or some combination of the three. In any case, it is essential that he be closely supervised. Should his sexual behaviors escalate, he may need to get involved with the Rape and Sexual Abuse Center or another such agency.

(Exhibit 40 at PO-623; McRainey 18:4-7, 43:1-9).

The documented concerns of Metro officials triggered by Kolby's numerous acts of sexual misconduct prior to the May 7 incident directly contravene Metro's present assertion that Kolby's prior behavior consisted only of consensual activity bearing no resemblance to his rape of Gilberto. Indeed, Metro's own prior characterizations of Kolby's sexual misconduct as "assault" (Exhibit 38 at PO-635), and "a manifestation of [his] handicapping conditions" (Exhibit 23 at PO-642) refute its current claim that "Kolby Harris' prior disciplinary history, as it relates to sexual activity, includes only offenses of consensual sexual activity with age-appropriate females." (Metro's Response at 9-10).

In the end, Metro does not contest any of the evidence cited by the United States in its motion for summary judgment. Metro does not dispute that Kolby was disciplined for numerous instances of sexual misconduct prior to the May 7 incident. Metro does not dispute that Kolby's sexual misconduct was a manifestation of his disability. And Metro does not dispute that its own

officials recognized that close supervision of Kolby at all times was the only effective means of preventing him from sexually harassing other students. Against the backdrop of this undisputed evidence, no reasonable jury could conclude that Metro lacked actual knowledge that Kolby posed a sexual threat to other students on an unsupervised school bus.

III. The Undisputed Facts Establish that Metro Acted with Deliberate Indifference to the Known Risk of Peer Sexual Harassment Posed by Kolby Harris

Finally, the United States must establish that Metro was deliberately indifferent to the known risk of sexual harassment posed by Kolby Harris. See Davis, 526 U.S. at 646-47; Patterson, 551 F.3d at 445. In its motion for summary judgment, the United States cited substantial evidence illustrating Metro's failure to implement any measures to protect students on Kolby's bus after his transfer to Genesis. (United States' Memorandum of Law at 28-32). In its response, Metro ignores this evidence and confines its discussion to the period following the May 7 incident. (Metro's Response at 11-15). Metro's underlying assumption – that its deliberate indifference could only arise from events occurring after Gilberto was raped – is erroneous as a matter of law:

> Title IX liability can flow from two "harassment" time periods: (a) when a school exhibits deliberate indifference, before a harassing attack on a student by a fellow student, in a way that makes the student more vulnerable to the attack itself; or (b) when a school exhibits deliberate indifference, after an attack, that causes a student to endure additional harassment.

Snethen v. Bd. of Public Educ. for City of Savannah, No. 406CV259, 2008 WL 766569, at *2 (S.D. Ga. March. 24, 2008) (emphasis in original); see Williams, 400 F.3d at 364 (6th Cir. 2005) ("A school district's duty to respond may be sparked once it is alerted to the possibility of sexual abuse."); United States' Memorandum of Law at 29-30 (discussing cases); United States' Opposition at 9-10 (citing cases).[5]

[5] For purposes of its summary judgment motion, the United States primarily grounds its deliberate indifference argument in the events that preceded the May 7 incident. However, it does not concede that Metro's actions in the week following the May 7 incident satisfied the District's legal obligations under Title IX.

Under Davis, a funding recipient is deliberately indifferent to student-on-student sexual harassment "where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." 526 U.S. at 648; accord Patterson, 551 F.3d at 446. Once a school district is alerted to the risk that an act of sexual harassment may occur, it must take reasonable steps in light of the known circumstances to prevent the threat from materializing. See Williams, 400 F.3d at 364.

In its recent decision in Patterson, the Sixth Circuit held that a school district can be deliberately indifferent where it implements a remedy that successfully thwarts a pattern of peer sexual harassment, but then terminates that remedy without justification. See 551 F.3d at 448-49. Here, Metro acted with deliberate indifference by failing to sustain the level of supervision that it knew was necessary to prevent Kolby from sexually harassing other students. Substantial and undisputed evidence demonstrates that Metro knew the importance of ensuring that Kolby was either closely monitored by an adult or isolated from other students to minimize the threat presented by his sexual proclivities. See supra at 12-16. Metro officials at Madison School acknowledged this threat and responded to it by establishing the in-school "Safety Plan" (Exhibit 23 at PO-564) and the "Bus Safety Plan" (Exhibit 23 at PO-644), which required Kolby to be monitored at all times and isolated him from other students on the bus. Inexplicably, however, Metro discontinued these plans once Kolby left Madison. Though Kolby continued to sexually assault other students in his subsequent educational placements (Exhibit 38 at PO-635; Exhibit 23 at PO-740), Metro failed to reinstate the bus safety plan developed at Madison or otherwise supervise Kolby on the school bus transporting him to Genesis.

The record further reflects that Metro had the capacity to assign monitors to individual students on special needs school buses. (Affidavit of Terrence W. Adams at 2, attached as Exhibit 1 to Genesis Learning Center's Response to Plaintiff's Motion for Summary Judgment (Docket No. 201); Exhibit 43; Phillips 10:5-23 (attached as Exhibit 12)). Yet it chose not to provide a monitor for Kolby, even after Metro's own officials warned that "having a bus driver

driving his bus is NOT adequate supervision." (Exhibit 23 at PO-643) (emphasis in original).

In sum, Metro's failure to assign a monitor to Kolby, its failure to continue implementing the bus safety plan developed at Madison, and its failure to take any other safety precaution to protect the children on Kolby's bus are conclusively established by undisputed facts in the record. These failures, individually and collectively, easily satisfy the legal standard for deliberate indifference.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant the United States' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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