IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JANE DOE, by and through parent and next friend JANE ROE, Plaintiff, v. FULTON COUNTY SCHOOL DISTRICT, Defendant.	)	Civil Action File No. 1:20-CV-00975-AT

UNITED STATES' STATEMENT OF INTEREST

INTRODUCTION

Plaintiff Jane Doe, a minor with significant physical, developmental, and intellectual disabilities, alleges that she was sexually assaulted on numerous occasions by male students. The alleged assaults, which occurred while the students were riding a Fulton County School District ("FCSD" or "District") bus dedicated to serving students with special needs, escalated over the course of two weeks and culminated in the rape of Plaintiff. According to the First Amended Complaint ("Amended Complaint"), the driver of the bus never intervened to protect Plaintiff during these sexual assaults and did not report the assailants until Plaintiff was raped. Given these circumstances, Plaintiff asserts that the District is liable for unlawful discrimination under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*, Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 701 *et seq.*[1]

The District has moved to dismiss Plaintiff's Amended Complaint, arguing primarily that Plaintiff fails to state a Title IX claim because the District cannot be held liable for the deliberate indifference of a bus driver. *See* Def.'s Br. in Supp. of

[1] Plaintiff also asserts the District violated the Georgia Open Records Act, O.C.G.A. § 50-18-70 *et seq.*, by failing to produce video recordings related to her claims.

Its Mot. to Dismiss Pl.'s First Am. Compl. ("Br."), ECF 23-1, *passim*. In support of this position, the District specifically contends that a bus driver is categorically excluded from being an "appropriate person" whose knowledge is attributable to the District.[2] Br. 1-2, 8-17.

The United States of America ("United States") files this Statement of Interest to assist the Court in evaluating the sufficiency of Plaintiff's Title IX claim.[3] An

[2] In addition to its arguments regarding the legal sufficiency of the driver's knowledge of the sexual assaults, the District argues that Plaintiff's allegations do not establish that the District had the knowledge of a substantial risk of sexual harassment needed to state a "before-assault" Title IX claim. Br. 19-21. Finally, the District argues that Plaintiff's "claims" about the District's failure to provide Plaintiff with "a bus monitor and functioning iPad are FAPE-related" and should be dismissed for failure to exhaust administrative remedies. Br. 17-19. To the extent the District characterizes Plaintiff's Title IX claim as "FAPE-related" and therefore subject to exhaustion, its argument fails because the gravamen of Plaintiff's Title IX claim is not the denial of a FAPE. *See Doe v. Dallas Indep. Sch. Dist.*, 941 F.3d 224, 227-28 (5th Cir. 2019) (holding exhaustion requirement does not apply where student with disabilities alleged sexual assault on school property and references to her special needs served "primarily to give context that the school had notice regarding [her] inability to protect herself").

[3] Because courts often look to Title IX precedent for guidance when adjudicating Title II and Section 504 cases, the District extends its reasoning regarding actual knowledge in the context of Title IX to Plaintiff's Title II and Section 504 claims. Br. 10-16. To the extent the District argues that Plaintiff's Title II and Section 504 claims fail because bus drivers cannot be "appropriate persons" whose knowledge is attributable to the District, the United States' views apply to Title II and Section 504 by extension. The United States does not otherwise take a position on Plaintiff's Title II and Section 504 claims or on the merits of Plaintiff's claim under the Georgia Open Records Act, O.C.G.A. § 50-18-70 *et seq*.

individual seeking damages for sexual harassment under Title IX must demonstrate that an "appropriate person" within the school district had actual knowledge of the sexual harassment and that the district acted with deliberate indifference in the face of such knowledge. A school district official's title—standing alone—cannot be the basis for categorically excluding the official as an "appropriate person." The problem with such an approach is illustrated here, where a student with significant communication disabilities is subjected to sexual harassment by her peers and the official with actual knowledge of the harassment exercises control over the perpetrators and the context in which the harassment occurred.

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court. The United States has a significant interest in ensuring that all students, including students with disabilities, have access to an educational environment free of sex discrimination and that the proper legal standards are applied to claims under Title IX. The United States Department of Justice coordinates the implementation and enforcement of Title IX across all executive agencies. *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); 28 C.F.R. § 0.51. Where it serves as a federal funding agency, or

upon referral from the Department of Education or other funding agencies, the Department of Justice may bring suit to enforce Title IX and its implementing regulations. *See* 20 U.S.C. § 1682. Under this authority, the United States recently initiated a Title IX administrative compliance review of FCSD, a recipient of financial assistance from the Departments of Justice and Education.

In light of the foregoing, the United States respectfully submits this Statement of Interest to provide the proper legal standards governing Title IX sex discrimination claims. Applying those standards, the allegations set forth in the Amended Complaint are sufficient to survive the District's Motion to Dismiss.

I. FACTUAL BACKGROUND

The United States recites the following facts based on the well-pleaded allegations contained in Plaintiff's Amended Complaint,[4] as well as publicly-available information regarding District policies and procedures.[5] The United States

[4] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (noting that on a motion to dismiss, a court must take all well-pleaded allegations as true).

[5] *See Smith v. Sec'y of Veterans Affairs*, 808 F. App'x 852, 853 (11th Cir. 2020) ("When ruling on a Rule 12(b)(6) motion to dismiss, the district court is permitted to take judicial notice of public records without needing to convert the motion into a motion for summary judgment … .").

expresses no view regarding the likelihood that Plaintiff will succeed in proving the allegations at trial.

A. The Sexual Assaults and Rape of Plaintiff

Plaintiff is a 14-year-old child with physical and mental disabilities that leave her "wholly dependent on her family, caregivers, and educators in the performance of her everyday major life activities."[6] First Am. Compl. ("FAC") ¶¶ 1, 14. As a result of neurodevelopmental disabilities, she functions at "a cognitive and communicative level far below her actual age." FAC ¶ 13. Plaintiff "struggles to interact with and clearly communicate with other individuals and to express her feelings and protect herself in potentially dangerous interactions with other[s]." FAC ¶ 16. Indeed, Plaintiff is effectively non-verbal and relies on assistive technology in order to communicate. FAC ¶ 15.

Plaintiff attends a middle school operated by FCSD. FAC ¶ 3. She has been identified as an eligible student with intellectual disabilities under the Individuals with Disabilities Education Act, and she has an Individualized Education Program ("IEP"). FAC ¶ 14. Plaintiff depends upon transportation provided by the District

[6] Plaintiff was 14 years old when the original Complaint was filed on March 3, 2020. Compl. ¶ 1; FAC ¶ 1. The Complaint does not indicate Plaintiff's age at the time of the alleged assaults, but given that they occurred in April 2019, Plaintiff would have been 13 or 14 years old.

to get to and from school, and she is transported on a small bus designated and specifically designed for students with special needs ("the Bus"). FAC ¶¶ 17-18. The Bus—which contains only three or four rows of seats—is equipped with electronic safety monitors to ensure that students remain in their seats and a wide-view safety mirror that allows the driver to see the interior of the Bus. FAC ¶¶ 18-19. The Bus is also equipped with audio/video monitoring equipment that recorded the events that form the basis of Plaintiff's Amended Complaint. FAC ¶ 24.

The Bus is owned, operated, and maintained by FCSD. FAC ¶ 17. The driver of the Bus and, when there is one, the monitor on the Bus are employees of FCSD. FAC ¶ 20. FCSD placed a monitor on the Bus "due to [Plaintiff's] severe communication and cognitive deficiencies" and "based on its actual knowledge that special needs school buses and disabled students, including [Plaintiff], require active supervision to ensure their safety and welfare." FAC ¶ 21. Before the series of sexual assaults, the District removed the monitor from the Bus. *See* FAC ¶¶ 22-23. The District elected to remove the monitor from the Bus despite the fact that the male students on the Bus who sexually assaulted Plaintiff "had exhibited dangerous behaviors in the past [and] the District was aware of those behaviors." FAC ¶ 42. Thus, at the time of the assaults, the Bus was staffed by a single driver. FAC ¶ 22.

Between April 4 and April 20, 2019, Plaintiff was the victim of an escalating series of sexual assaults that culminated in rape. FAC ¶¶ 29-38. The assaults occurred over approximately two weeks, starting on April 4 with Student A moving to Plaintiff's seat, groping her and attempting to kiss her breasts. FAC ¶ 29. The same day, after seeing Student A's behavior go unchecked, Student B subsequently moved to Plaintiff's seat and groped and kissed her breasts. FAC ¶ 30.

The next week, on April 10, Student B again stood up and moved next to Plaintiff's seat while the Bus was in transit. FAC ¶ 31. He then fully exposed his penis, forced Plaintiff to touch it, grabbed Plaintiff's breasts, and put his mouth on her breasts. FAC ¶ 31. The next day, Student B stood up and moved next to Plaintiff's seat, completely removed Plaintiff's shirt, and fondled and kissed her breasts while he masturbated in front of her. FAC ¶ 32.

The following week, the sexual assaults became daily occurrences. On April 15, Student B moved next to Plaintiff's seat and forced her to touch his penis over his clothing and masturbate him. FAC ¶ 33. The next day, Student B moved next to Plaintiff's seat, took his penis out of his pants, showed it to Plaintiff and forced her to fondle it, removed Plaintiff's shirt completely, and put his mouth on her breasts. FAC ¶ 34. The day after that, Student B crawled under the seats to move next to Plaintiff's seat, forced Plaintiff to touch his exposed penis, and forced

Plaintiff's head down toward his penis. FAC ¶ 35. On April 18, Student B moved next to Plaintiff's seat, removed all of her clothing, tried to climb on top of her, performed oral sex on her, and masturbated while sitting next to her. FAC ¶ 36. On April 19, Student B moved next to Plaintiff's seat, tried to force her to perform oral sex on him, and fondled her breasts. FAC ¶ 37. Finally, on April 20, Student B moved next to Plaintiff's seat, removed all of her clothing and his own clothing, slapped her exposed breasts, performed oral sex on her, and physically put her on top of him, penetrating her vaginally with his penis. FAC ¶ 38.

During these sexual assaults, the driver of the Bus never intervened to protect Plaintiff and did not report Student A or Student B. FAC ¶ 39. Only after Plaintiff was stripped naked, battered, and raped on April 20 did the driver of the Bus mention to another FCSD employee that the driver had "noticed something." FAC ¶ 40.

Given her severe communication disability, Plaintiff lacked the capacity to report the assaults or any resulting distress she experienced.[7] When Plaintiff's mother was informed that "something" had been reported involving Plaintiff's

[7] As an accommodation required by her IEP for her severe communication disability, Plaintiff had been issued an iPad. FAC ¶ 15. However, the iPad had not been working for some time before the assaults began and the District, despite awareness of that fact, had neither repaired nor replaced it. FAC ¶¶ 44-45.

safety, she took Plaintiff for physical evaluation and treatment. FAC ¶ 41. The examining physicians confirmed Plaintiff had been penetrated vaginally. FAC ¶ 41.

B. The District's Policies

District bus drivers wield significant authority and control over students riding their buses and the activity occurring on those buses. All school bus drivers in Georgia, including drivers of special needs buses, are charged with ensuring the safety of students on their bus. FAC ¶ 25 (citing Georgia law). This broad charge includes the obligation to "[r]eport unsafe acts or conditions," "[m]aintain student discipline on the bus to ensure student safety," and "intervene when necessary." FAC ¶ 25. District policies provide drivers even more specific authority over students. According to those policies, "[i]t is the driver's responsibility to keep order on the bus and to report to the principal in writing all students' misbehavior."[8] The policies explicitly note that "[s]tudents may not violate any direction of the school bus driver."[9] They further provide that "[d]rivers may assign seats to students,"

[8] District Procedure, *Code ED: Transportation Services* at II.20, https://go.boarddocs.com/ga/fcss/Board.nsf/goto?open&id=9DZLR7527F24# (last visited July 7, 2020).

[9] 2018-19 and 2019-20 FCSD Student Code of Conduct and Discipline Handbooks ("Code") Rule 20, Interference with School Bus, https://www3.fultonschools.org/CodeConduct/061255-00.pdf (2019-20 version) (last visited July 2, 2020) and https://www.fultonschools.org/site/handlers/filedownload.ashx?moduleinstanceid=

"[s]tudents must be seated as specified by the driver," and "[s]tudents who fail to respond to the direction of bus drivers shall be reported to the school principal."[10]

In addition to affording bus drivers direct authority and control over student riders, the District's policies impose reporting obligations on all staff—including bus drivers. The District identifies this monitoring and reporting as a critical part of ensuring student safety.[11] In both 2018-19 and 2019-20, the District's Student Code of Conduct and Discipline Handbooks ("Code") required that District staff notify administrators and/or police of any sexual offenses occurring on school property, which is explicitly defined to include school buses, Code at 13. *See* Code Rule 16, Sexual Harassment ("Staff members should report instances of behaviors referenced

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8472&dataid=7260&FileName=20180823_2018-19CodeofConduct.pdf (2018-19 version) (last visited June 2, 2020).

[10] District Procedure, *Code EDCB: Bus Conduct*, https://go.boarddocs.com/ga/fcss/Board.nsf/goto?open&id=9P5P2V629009# (follow "Policies" hyperlink; then follow "EDCB: Bus Conduct" hyperlink under "E – Business Management") (last visited July 7, 2020).

[11] *See*, *e.g.*, Code at 1 ("We all need to work together to provide a safe and nurturing environment for our students. A safe climate is something we must all own and never take for granted. We are asking everyone to help monitor the security of our students, and communicate with us concerns or challenges you or others are facing. … It's going to take us all working collectively to ensure the safety of everyone who enters our schools."); Code at 5 ("A well-disciplined school promotes the ideal of each student working toward self-management and controlling his or her own actions. At the same time, the school recognizes that adult intervention is both desirable and necessary.").

in this Rule to school administration within a reasonable time period so that administrators may review them in a timely manner.") ("The local school police officer must be notified of such incidents where the behavior involves a sexual offense[.]"); Code Rule 17, Sexual Misconduct/Sexual Offenses ("Any behavior which [is] a violation of Chapter 6 of Title 16 of Georgia law [], or parts B [sexual battery] through C [sexual molestation] below, must be immediately reported to the school police, the Area Superintendent and the system office of student discipline. The Chief of Fulton County Schools Police, or designee will then notify the District Attorney."). The Code clearly contemplates that reports will be made in a timely manner to allow an investigation and prompt response.[12]

Finally, in addition to the precautions specifically outlined in its policies, the District acknowledges that it is appropriate to consider the special needs of students to ensure their safety from harassment. In particular, Code Rule 6, Harassment,

[12] Code Rule 6, Harassment, states: "Staff members are expected to report instances of these behaviors [including threat of physical harm] to the school principal or designated administrator immediately so that administrators may investigate them in a timely manner." It also states that "[s]taff members should report instances of behaviors referenced in this Rule [including offensive touching, harassment based on sex or disability] to school administration within a reasonable time period so that administrators may review them in a timely manner."

states that "[s]tudents with disabilities may be entitled to additional protections and considerations that may not be contained in this Rule or this Code of Conduct."

II. ARGUMENT

A. Motion to Dismiss Standard

To survive the District's Motion to Dismiss, Plaintiff's allegations need only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see Hunt v. Aimco Properties, L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016). A "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hunt*, 814 F.3d at 1221 (quoting *Ashcroft v. Iqbal*, 556 U.S. at 678); *see also Twombly*, 550 U.S. at 556 (explaining that plausibility pleading requirement "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of" alleged violation). In resolving the District's Motion to Dismiss, the Court must "accept factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Tims v. LGE Cmty. Credit Union*, 935 F.3d 1228, 1236 (11th Cir. 2019) (citation omitted).

B. Dismissal of Plaintiff's Title IX Claim Is Improper Because the Amended Complaint Alleges Facts Sufficient To Support a Finding that the Bus Driver Is an "Appropriate Person" Whose Knowledge Constitutes Actual Knowledge on the Part of the District.

In its Motion to Dismiss, the District argues that the Amended Complaint fails to state a claim under Title IX because Plaintiff does not allege facts showing actual knowledge and deliberate indifference by sufficiently high-level District personnel.[13] Br. 8-17. In particular, the District contends that the bus driver's alleged knowledge of the assaults is insufficient to render the District liable because bus drivers are low-level employees whose knowledge cannot, under any circumstances, constitute actual notice to a school district.[14] Br. 11-17. The categorical rule pressed by the District is inconsistent with applicable law.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

[13] As previously noted, the District extends the arguments it makes in the context of Title IX to Plaintiff's Title II and Section 504 claims. *See supra* footnote 3. Because the District addresses actual knowledge primarily in the context of Title IX and extends its reasoning to Title II and Section 504, this Statement of Interest focuses on the District's arguments as made in the context of Title IX.

[14] The District notes that "Title IX's 'deliberate indifference' element is intertwined with the 'actual notice' element because whether a response 'is clearly unreasonable must be measured by what was known' by an appropriate person within the district." Br. 11 (internal citation omitted). At no point, however, does the District address the reasonableness of the bus driver's response. It argues only that the bus driver is not an appropriate person for purposes of charging knowledge to the District.

discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court recognized that student-on-student sexual harassment may give rise to a Title IX claim where a school district is deliberately indifferent to known threats or incidents of sexual harassment. *See id.* at 646-47. To sustain a damages claim under Title IX for injuries arising from peer harassment, a plaintiff must demonstrate that: (1) the school district is a recipient of federal funding; (2) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school district; (3) an "appropriate person" within the school district had actual knowledge of the sexual harassment; and (4) the school district was deliberately indifferent to the harassment.[15] *See Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1293 (11th Cir. 2007).

[15] The District does not, and cannot, dispute that it is a recipient of federal funding. Nor can it dispute that the sexual harassment alleged is sufficiently severe, pervasive, and objectively offensive. Numerous courts have concluded that sexual abuse and rape, such as that alleged in the Amended Complaint, qualify as sexual harassment that is so severe, pervasive, and objectively offensive that it can be said to deprive a student of access to educational opportunities or benefits. *See*, *e.g.*, *Soper v. Hoben*, 195 F.3d 845, 854-55 (6th Cir. 1999) (noting that rape and sexual abuse "obviously qualif[y] as being severe, pervasive, and objectively offensive sexual harassment that could deprive [a student] of access to the educational opportunities provided by her school"); *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1248 (10th

1. Bus Drivers Are Not Categorically Excluded From Being Deemed "Appropriate Persons" By Virtue of Their Title.

Contrary to the District's argument, a bus driver is not categorically exempt from being deemed an "appropriate person" simply by virtue of his or her title. As courts have explained, "an 'appropriate person' under Title IX means 'a school official who has the authority to halt the known abuse,' and this fact-based inquiry is not dependent on job title." *S.E.S. ex rel. J.M.S. v. Galena Unified Sch. Dist. No. 499*, No. 18-2042-DDC, 2020 WL 1166226, at *34 (D. Kan. Mar. 11, 2020) (quoting *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247 (10th Cir. 1999)); *see also Doe v. Sch. Bd. of Broward Cty.*, 604 F.3d 1248, 1256 (11th Cir. 2010) (noting that whether a particular school employee is an appropriate person is "necessarily a fact-based inquiry because officials' roles vary among school

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Cir. 1999) (finding wrongdoing was sufficiently severe, pervasive, and objectively offensive where a student "battered, undressed, and sexually assaulted" another student in a secluded area over the course of one month); *Doe 1 v. Howard Univ.*, 396 F. Supp. 3d 126, 136 n.2 (D.D.C. 2019) (noting that a "single, serious sexual assault can meet the severe, pervasive, and offensive standard"); *T.P. ex rel. Patterson v. Elmsford Union Free Sch. Dist.*, No. 11 CV 5133 VB, 2012 WL 860367, at *8 (S.D.N.Y. Feb. 27, 2012) (finding sexual assault constitutes "severe, pervasive, and objectively offensive sexual harassment") (internal citation omitted); *Bliss v. Putnam Valley Cent. Sch. Dist.*, No. 7:06-CV-15509 WWE, 2011 WL 1079944, at *5 (S.D.N.Y. Mar. 24, 2011) (holding single incident of rape may be "sufficiently severe"); *Kelly v. Yale Univ.*, No. CIV.A. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003) ("There is no question that a rape . . . constitutes severe and objectively offensive sexual harassment under the standard set forth in *Davis*.").

districts" (quotations omitted)); *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1286-87 (11th Cir. 2003) (observing the difficulty of creating a list of school district employees who qualify as "appropriate persons," especially in the context of student-on-student harassment). Instead, courts "look beyond title and position to the actual discretion and responsibility held by an official, and consider the type and number of corrective measures available to an official." *Saphir ex rel. Saphir v. Broward Cty. Pub. Sch.*, 744 F. App'x 634, 638 (11th Cir. 2018). In conducting such a fact-based inquiry, a court must examine, *inter alia*, "how [a state] organizes its public schools, the authority and responsibility granted by state law to [employees], the school district's discrimination policies and procedures, and the facts and circumstances of the particular case." *Hawkins*, 322 F.3d at 1286.

In *Moore v. Chilton County Board of Education*, 1 F. Supp. 3d 1281 (M.D. Ala. 2014), the only Title IX case within the Eleventh Circuit to address whether a bus driver is an "appropriate person," the court underscored the necessity of this kind of fact-based inquiry. *See id.* at 1298-1300. Rather than conclude that bus drivers can never be "appropriate persons," the *Moore* court found that the plaintiffs in the case failed to "present a factual basis for making that assessment, notwithstanding clear precedent that 'the ultimate question of who is an appropriate person is necessarily a fact-based inquiry.'" *See id.* (citation omitted) (plaintiffs provided no

evidence on bus driver's authority to take corrective measures, state's organization of schools, responsibility granted to employees, written policies, or other facts).

Because determining whether an official qualifies as an "appropriate person" is highly fact-dependent, resolution of this question at the pleading stage is generally inappropriate. *See K.E. v. Dover Area Sch. Dist.*, No. 1:15-CV-1634, 2016 WL 2897614, at *9 (M.D. Pa. May 18, 2016) (denying motion to dismiss because "[w]hether a person qualifies as 'appropriate,' and their knowledge 'actual,' is a fact-based inquiry more appropriately resolved at a later stage of litigation"); *C.K. v. Wrye*, No. 4:15-00280, 2015 WL 5099308, at *6 (M.D. Pa. Aug. 31, 2015) (denying motion to dismiss because "[w]hether a school official is an 'appropriate person' with the authority to take corrective action is a highly fact-dependent inquiry").

Even if resolution were appropriate at the pleading stage, the District ignores crucial distinctions between teacher-on-student harassment and student-on-student harassment that are fatal to its position. To support its argument that bus drivers are categorically excluded as "appropriate persons," the District relies heavily on teacher-on-student harassment cases in which it contends the Eleventh Circuit "has rejected Title IX claims based on the indifference of other types of employees with even more supervisory authority than a bus driver." Br. 15 (citing *Doe v. Sch. Bd. of Broward Cty.*, 604 F.3d 1248 (11th Cir. 2010) and *Saphir ex rel. Saphir v.*

Broward Cty. Pub. Sch., 744 F. App'x 634 (11th Cir. 2018) in support). The range of employees likely to be deemed "appropriate persons" in teacher-on-student harassment cases, however, is narrower than the range of employees likely to be deemed "appropriate persons" in student-on-student harassment cases. As the Eleventh Circuit has observed, in cases of harassment by teachers, "a limited and readily identifiable number of school administrators" have the authority to address the discrimination and institute corrective measures against the offending teacher. *Hawkins*, 322 F.3d at 1287. In contrast, in cases of peer harassment, "*a much broader number of administrators and employees could conceivably exercise at least some control over student behavior*." *Id.* (emphasis added). Accordingly, while a bus driver is unlikely to have the requisite authority over an offending teacher, a bus driver may have such authority over the students riding his or her bus.

The District's reliance on *Silberman v. Miami Dade Transit*, 927 F.3d 1123 (11th Cir. 2019), does not alter this conclusion. In *Silberman*, the Eleventh Circuit found that Miami Dade Transit ("MDT") bus drivers who prevented the plaintiff from riding MDT buses with his service dog were not "officials" under Section 504 because an "official [must] have the knowledge of *and authority* to correct an entity's discriminatory practices." *Id.* at 1135 (quotations omitted) (emphasis and alterations in original). As discussed *infra*, the Plaintiff in the present case alleges

facts that, if proved, are sufficient to support a finding that her bus driver had authority to take corrective action to end the sexual abuse and assaults that form the basis for her discrimination claims.

Moreover, *Silberman* is inapposite because the MDT bus drivers were the ones who personally and directly perpetrated the discrimination alleged. As the Supreme Court has recognized, "the knowledge of the wrongdoer himself" that he has committed sexual harassment does not make him an "appropriate person" whose actual notice is attributed to a school district. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998) ("[T]he knowledge of the wrongdoer himself is not pertinent to the [actual notice] analysis."). The driver of Plaintiff's bus did not commit the sexual harassment at issue here. Thus, the question is not whether the driver's knowledge of *his own* wrongdoing and ability to cease that wrongdoing constitute authority to correct discriminatory practices, but instead whether the driver's knowledge of *students'* wrongdoing and ability to intervene in that wrongdoing constitute "authority to address the alleged discrimination and to institute corrective measures," *id.* at 290. It bears noting that whether an individual is an "appropriate person" or official is determined by reference to the underlying factual context and the individual's position relative to the wrongdoer. The analysis in *Silberman* addresses the capacity of MDT bus drivers to correct discriminatory

practices undertaken by the bus drivers themselves, while the analysis in this case addresses the capacity of a bus driver to correct discrimination initiated by students whom the driver is charged with supervising. In addition, unlike *Silberman*, the discrimination here affected a minor with severe cognitive disabilities, not an adult.

2. The Bus Driver May Be an "Appropriate Person" Because Plaintiff Sufficiently Alleges that the Driver Had the Authority to Take Corrective Action to End the Discrimination.

The Amended Complaint's allegations and the District's policies are sufficient to support the conclusion that the bus driver is an "appropriate person" whose knowledge constitutes actual knowledge on the part of the District. As noted, an appropriate person is "at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination." *Gebser*, 524 U.S. at 290; *see also Murrell*, 186 F.3d at 1248 (finding employees would meet definition of "appropriate persons" if "they exercised control over the harasser and the context in which the harassment occurred").

That an employee may not possess full authority to discipline a student does not preclude that employee from qualifying as an "appropriate person." *See Walker ex rel. Walker v. Tuscaloosa Cty. Sch. Bd.*, No. 7:17-CV-00381-LSC, 2019 WL 6117616, at *5 (N.D. Ala. Nov. 18, 2019) (concluding that by arguing teacher lacked "full disciplinary authority," defendants conceded that teacher had *some* authority to

address student's behavior and fact question thus existed as to whether teacher was "appropriate person"). The Eleventh Circuit recognizes that an array of remedial actions can constitute corrective measures giving an official the power to remedy harassment under Title IX, including "admonishing the [harasser], conducting a thorough preliminary investigation, swiftly reporting the abuse, and monitoring [the harasser's] behavior." *See J.S., III ex rel. J.S. Jr. v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 990 (11th Cir. 2017) (quotations omitted); *Doe v. Broward Cty.*, 604 F.3d at 1255 (finding employee was "appropriate person" because he could "'initiate corrective action' or place 'other restrictions' on an offending teacher . . . , even if he could not take final adverse employment actions").

Taken as true, the facts alleged in the Amended Complaint—together with the District's publicly-available policies—are sufficient to support a finding that the bus driver possessed the authority necessary to take corrective action to end the sexual abuse and assaults against Plaintiff. The bus driver could exercise control over Students A and B, as well as the context in which the sexual abuse and assaults occurred. *See* FAC ¶ 25 (indicating that bus drivers are obligated to maintain order of student passengers, provide maximum safety for passengers while on the bus, maintain student discipline on the bus to ensure student safety, and intervene when necessary); Code Rule 20 ("Students may not violate any direction of the school bus

driver."); *Code EDCB: Bus Conduct* ("Students must be seated as specified by the driver.") ("Students who fail to respond to the direction of bus drivers shall be reported to the school principal or designee."). Admonishing Students A and B, instructing them to cease the offending conduct, and reporting their conduct to the principal would presumably have ended the first instance of sexual abuse and triggered additional action—including future monitoring of the offending students' behavior—that likely would have prevented the subsequent assaults and rape.

In addition to the bus driver's control over Students A and B and the context in which the harassment of Plaintiff occurred, the driver's duty to report sexual harassment in a timely manner provides further support for concluding that the driver qualifies as an "appropriate person." *See, e.g.*, FAC ¶ 25 (requiring that bus drivers "[r]eport unsafe acts or conditions"); *Code ED: Transportation Services* ("It is the driver's responsibility to keep order on the bus and to report to the principal in writing all students' misbehavior."); Code Rules 6, 16, and 17. The duty to report constitutes additional corrective action available to the driver and, when "effectively carried out, would impart knowledge of the harassment to higher School District officials with even greater authority to act." *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1099 (D. Minn. 2000) (finding possession of some level

of disciplinary control over students and a duty to report sexual harassment defeated claim that teachers could never be "appropriate persons").

3. Concluding that the Bus Driver May Be an "Appropriate Person" Is Consistent with the Department of Education's Recent Title IX Regulations.

Deeming bus drivers "appropriate persons" whose actual knowledge of sexual harassment can be attributed to school districts is consistent with the final Title IX regulations published by the Department of Education on May 19, 2020.[16] Those regulations define "actual knowledge" as notice of sexual harassment or allegations of sexual harassment "to *any* employee of an elementary or secondary school." U.S. Dep't of Educ., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance ("Title IX Regulations"), 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. Part 106) (citing § 106.30) (emphasis added); *see also* Title IX Regulations, 85 Fed. Reg. at 30,109 ("[N]otice to any elementary and secondary school employee—including a teacher, teacher's aide, *bus driver*, cafeteria worker, counselor, school resource officer, maintenance staff worker, or other school employee—charges the recipient with actual knowledge, triggering the recipient's response obligations." (emphasis added)).

[16] These regulations, which govern how recipients of federal financial assistance must respond to sexual harassment in their educational programs and activities, take effect August 14, 2020.

Under the regulations, a bus driver's observation of student-on-student sexual assault and rape in the K-12 context would constitute actual knowledge regardless of whether the students involved had disabilities. *See* Title IX Regulations, 85 Fed. Reg. at 30,040 (discussing broad concept of notice that could include witnessing sexual harassment). Nevertheless, it is significant that the student assaulted and raped in this case has significant disabilities that render her non-verbal and effectively unable to report. In adopting the regulatory definition of "actual knowledge," the Department of Education specifically accounted for the challenges students with disabilities face in reporting sexual harassment.[17] *See id.* at 30,082 ("Students with disabilities are less likely to be believed when they report sexual harassment experiences and often have greater difficulty describing the harassment they experience, because of stereotypes that people with disabilities are less credible or because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.")

[17] In explaining its definition of "actual knowledge," the Department of Education notes that "[s]everal commenters asserted that designating a single individual as the person to whom notice triggers a recipient's obligation to respond creates significant hurdles to reporting for certain populations of students, including students with disabilities." Title IX Regulations, 85 Fed. Reg. at 30,108.

Accordingly, concluding that the bus driver in this case may be an "appropriate person" is consistent not only with applicable law but also with measures taken by the Department of Education to ensure adequate Title IX protection of students with disabilities. Students like Plaintiff would be effectively excluded from Title IX's protections while riding a school bus if Title IX were interpreted to categorically disqualify as an "appropriate person" a bus driver who serves students with significant disabilities, witnesses multiple student-on-student sexual assaults while transporting those students, and fails to intervene or report the misconduct.

CONCLUSION

The United States respectfully requests that the Court find that Plaintiff's Amended Complaint alleges facts sufficient to support the conclusion that a District bus driver is an appropriate person whose knowledge of sexual harassment constitutes actual knowledge on the part of the District under Title IX. There is a particularly strong public interest in such an outcome where, as here, the student subject to sexual harassment has a significant communication disability and is unable to report sexual harassment observed in real-time by the bus driver.

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Dated: July 7, 2020

L.R. 7.1(D) CERTIFICATION

I certify that the United States' Statement of Interest has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C). Specifically, this brief has been prepared using 14-pt Times New Roman Font.

This 7th day of July, 2020.

/s/ Aileen Bell Hughes
AILEEN BELL HUGHES
ASSISTANT U.S. ATTORNEY

CERTIFICATE OF COMPLIANCE

I certify that counsel for the United States has read the Court's Standing Order in cases proceeding before the Honorable Amy Totenberg and that I will comply with its provisions during the pendency of this litigation.

This 7th day of July, 2020.

/s/ Aileen Bell Hughes
AILEEN BELL HUGHES
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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing Statement of Interest with the Clerk of Court using the CM/ECF system, which automatically sent counsel of record e-mail notification of such filing.

This 7th day of July, 2020.

/s/ Aileen Bell Hughes
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