

**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

**MEMORANDUM OF LAW IN SUPPORT  
OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT**

On May 7, 2007, Gilberto Lopez, a nine-year old autistic child, was compelled to perform an act of fellatio on a nineteen-year old male student while riding a special needs school bus operated by Defendant Metropolitan Government of Nashville and Davidson County (“Metro”).<sup>1</sup> The perpetrator, a former Metro student named Kolby Harris, was criminally indicted for rape of a child as a result of the May 7 incident.

A wealth of evidence reveals not only that Kolby Harris had a lengthy and well-documented history of sexual misconduct prior to the May 7 incident, but that numerous Metro officials were aware of this history and had previously expressed concern about the sexual threat that Kolby posed to the students around him. Undisputed facts further demonstrate that Metro failed to take any remedial steps to protect the passengers on Kolby Harris’ school bus from his dangerous sexual proclivities. Indeed, in an ironic and misguided attempt to provide a safer

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<sup>1</sup> The sexual assault of Gilberto Lopez is hereinafter referred to as “the May 7 incident.”

school bus environment for Gilberto Lopez, Metro officials actually moved Gilberto onto Kolby's special needs school bus one week before the May 7 incident.

As elaborated below, the record in this case establishes beyond material dispute that Metro violated Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 (2000), by depriving Gilberto Lopez of equal access to educational benefits through its deliberate indifference to the known and substantial risk of sexual harassment posed by Kolby Harris.

## STATEMENT OF UNDISPUTED FACTS

### I. The Period Preceding the May 7 Incident

Gilberto Lopez, the son of Plaintiff Kimberly Lopez, is a special needs child who suffers from a range of disabilities, including autism, mental retardation, emotional disturbance, speech impairment, and language impairment. (Metro's Answer to Fourth Amended Complaint at ¶ 1 ("Answer"), filed July 28, 2008 (Docket No. 102); M. Adams<sup>2</sup> 68:10-12; McRaney<sup>3</sup> 12:25-13:9). In August 2006, Gilberto moved from Chicago to Nashville and enrolled in Inglewood Elementary School in the Metropolitan Nashville Public Schools System ("MNPS" or "District"). (Answer at ¶ 9; Affidavit of Kimberly Lopez at ¶ 4 ("Lopez Affidavit"), filed September 30, 2008 (Docket No. 119); 8/14/06 Individual Education Program ("IEP") for Gilberto Lopez at GLC 285, attached hereto as Exhibit 3). MNPS is managed and supervised by Metro, which receives federal financial assistance. (Metro's Answer to Second Amended Complaint at ¶ 18, Stahling v. Metro. Gov't of Nashville & Davidson County, No. 3:07-797, 2008 WL 4279839 (M.D.Tenn. Sept. 12, 2008), (Stahling Docket No. 48)).<sup>4</sup>

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<sup>2</sup> The deposition testimony of Melissa Adams is attached hereto as Exhibit 1. A complete list of exhibits is appended to this document as Appendix A.

<sup>3</sup> The deposition testimony of Dr. Lyn McRaney is attached hereto as Exhibit 2.

<sup>4</sup> Metro stated that it receives federal financial assistance in Stahling, 2008 WL 4279839, at \*1. Plaintiff Kimberly Lopez has similarly alleged that Metro receives federal financial assistance (Fourth Amended Complaint at ¶ 8, filed June 27, 2008 (Docket No. 98)), and Metro failed to respond to this allegation in its Answer. (Answer at ¶ 8).

Shortly after the 2006-07 school year commenced, Metro assigned Gilberto to Genesis Academy (“Genesis”), a contract school operated by Defendant Genesis Learning Centers. (Answer at ¶¶ 9, 12; Exhibit 4 at GL\_33).<sup>5</sup> Genesis contracted with Metro to provide educational services to students with disabilities who could not be accommodated at another school in the District. (Answer at ¶ 4). The contract between Metro and Genesis in operation at the time of the May 7 incident specifies that Metro is solely responsible for providing transportation services to the students who attend Genesis. (Contract Between Metro and Genesis Learning Centers at GLC 470, attached hereto as Exhibit 5; Answer at ¶ 10). Accordingly, Genesis did not have the authority to control the school buses that transported its students to and from school. (Phillips<sup>6</sup> 11:9-12, 24:6-9; Hayes<sup>7</sup> 24:6-25:2, 83:19-84:13; Sawyer<sup>8</sup> 64:6-12, 74:9-16, 101:15-102:9; Pyle<sup>9</sup> 31:1-17; M. Adams 40:23-41:5).

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<sup>5</sup> All documents bearing a “GL” designation are documents produced by Metro from Gilberto Lopez’s cumulative education file; they are attached hereto in numeric order as Exhibit 4.

<sup>6</sup> Phillips<sup>2</sup> deposition designations refer to the continuation of Keith Phillips’ deposition on October 27, 2008. The testimony from this deposition is attached hereto as Exhibit 6.

<sup>7</sup> Hayes<sup>2</sup> deposition designations refer to the continuation of Marcus Hayes’ deposition on August 18, 2008. The testimony from this deposition is attached hereto as Exhibit 7.

<sup>8</sup> The deposition testimony of Susan Sawyer is attached hereto as Exhibit 8.

<sup>9</sup> The deposition testimony of Jason Pyle is attached hereto as Exhibit 9.

Genesis is a school where Metro assigns students with severe behavior problems. (Garcia<sup>10</sup> 35:6-19; Rackard<sup>11</sup> 46:3-47:10; Phillips<sup>12</sup> 32:12-18; DePriest<sup>13</sup> 15:15-16:11; Hayes<sup>14</sup> 9:1-24; Sawyer 9:7-18; Gaines<sup>15</sup> 12:22-13:4; Smith<sup>16</sup> 38:21-39:1). According to Kaye Rackard, the second highest-ranking official in MNPS's Department of Special Education (Rackard 7:13-20), a student would not be assigned to Genesis unless they were identified as engaging in problematic behavior that required modification through a Severe Behavior Intervention ("SBI") program. (Rackard 48:24-49:13; DePriest 16:7-11). Terry Adams, the co-founder and executive director of Genesis (M. Adams 9:10-17), testified that the "mere fact" that a student attends Genesis should put the District on notice that the student is "at risk of creating an environment that could be construed as dangerous or at risk." (T. Adams<sup>17</sup> 41:12-42:6).

When Metro enrolled Gilberto at Genesis, it originally assigned him to a regular school bus. (M. Adams 152:17-153:4; Exhibit 4 at GL\_33). Gilberto was harassed by other students riding this bus, who pressured Gilberto to throw gang signs (M. Adams 152:13-153:1; DePriest 36:3-16; Lopez<sup>18</sup> 107:7-14; 12/9/06 & 2/22/07 Genesis Academy Community Contact Logs,

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<sup>10</sup> The deposition testimony of Pedro Garcia is attached hereto as Exhibit 10.

<sup>11</sup> The deposition testimony of Kaye Rackard is attached hereto as Exhibit 11.

<sup>12</sup> The deposition testimony from the first day of Keith Phillips' deposition, conducted February 20, 2008, is attached hereto as Exhibit 12.

<sup>13</sup> The deposition testimony from the first day of Linda DePriest's deposition, conducted December 19, 2007, is attached hereto as Exhibit 13.

<sup>14</sup> The deposition testimony from the first day of Marcus Hayes' deposition, conducted February 20, 2008, is attached hereto as Exhibit 14.

<sup>15</sup> The deposition testimony of Christopher Gaines is attached hereto as Exhibit 15.

<sup>16</sup> The deposition testimony of Gloria Smith is attached hereto as Exhibit 16.

<sup>17</sup> The deposition testimony of Terry Adams is attached hereto as Exhibit 17.

<sup>18</sup> The deposition testimony of Kimberly Lopez is attached hereto as Exhibit 18.

attached hereto as Exhibit 19), placed stolen items in his clothing and backpack (M. Adams 152:13-153:1; DePriest 36:9-15; Lopez 107:3-6; Exhibit 19 at 8/140, 10/140), and physically abused him on numerous occasions. (4/10/07 CSC-Parent Complaint Log, attached as Exhibit 20 at 140).<sup>19</sup> On April 10, 2007, Kimberly Lopez contacted MNPS's customer service hotline to report these assaults:

Parent called very upset and concerned about her child. The parent states her son is being assaulted on the Special Ed bus on a daily basis and he is coming home with bruises from other children assaulting him on the bus. The parent states the driver is not able to keep an eye on the kids and drive the bus and has no control. The request that a bus monitor be added to this bus route [is] not only for her child's safety but also for the other children being assaulted.

(Exhibit 20 at 140). Ten days later, another student on Gilberto's bus threatened to shoot Gilberto and his parents. (4/27/07 CSC-Parent Complaint Log, attached as Exhibit 20 at 141).

Approximately one week before the May 7 incident, Kimberly Lopez contacted MNPS's Department of Special Education to reiterate her request for a bus monitor on Gilberto's bus. (5/15/07 Email from Linda DePriest to Sharon Wright and Kaye Rackard, attached hereto as Exhibit 20 at 139). Lopez informed Linda DePriest – the MNPS special education coordinator who liaised with Genesis (DePriest 8:2-7, 14:20-15:25; Hayes 6:16-8:1) – that Gilberto “had been frequently threatened by some of the older students and she was fearful that he was on the verge of a mental collapse.” (Exhibit 20 at 139). Ms. Lopez recalls having five separate phone calls with personnel from Metro's special education and transportation departments to request a monitor for Gilberto. (Lopez 107:20-109:20, 306:4-312:19). At an IEP meeting held on April 17, 2007, Metro officials documented in the IEP field entitled “Parent concerns/considerations regarding their child's education” that “[Ms. Lopez] is requesting a bus monitor for Gilberto” (4/17/07 IEP for Gilberto Lopez at GLC 497, attached hereto as Exhibit 21).

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<sup>19</sup> Documents with a Bates designation that lacks a letter prefix (i.e., consisting of just a number) are attached hereto in numeric order as Exhibit 20.

Prior to these requests, Metro knew that Gilberto's most recent IEP, which had been implemented by the Chicago Public School System<sup>20</sup> prior to Gilberto's relocation to Nashville, mandated a bus aide as an accommodation for his disabilities. (Exhibit 3 at GLC 315). A psychoeducational assessment of Gilberto conducted by Metro on September 29, 2006 confirmed Gilberto's previous diagnosis of mental retardation and noted that Gilberto had problems "following safety rules in the classroom and on the playground." (Exhibit 4 at GL\_159).

Nevertheless, Metro denied Kimberly Lopez's repeated requests for a bus monitor. (M. Adams 153:5-19; DePriest 36:25-37:4; Exhibit 20 at 139). It decided instead to assign Gilberto to a smaller special needs school bus. (M. Adams 153:14-16; DePriest 36:3-19; Lopez 312:4-18; Exhibit 20 at 139). Metro transferred Gilberto to this bus on either April 28 or April 29, 2007 – essentially one week before the May 7 incident. (Lopez 312:4-18).

Unbeknownst to Ms. Lopez, Kolby Harris – a male student ten years older than Gilberto (Burton<sup>21</sup> 47:10-14) with a lengthy history of sexual misconduct, see infra at 11-15 – was assigned to the same bus. (DePriest 30:12-20; Gaines 14:13-16, 15:17-19). At a Metro school Kolby attended prior to enrolling at Genesis, his sexual behavior was so troubling that Metro officials established a special bus safety plan specifically to ensure that no other passenger came into close proximity to him. (Exhibit 23 at PO-644<sup>22</sup>; infra at 12). When Kolby transferred to Genesis, Metro agreed not to allow young children to ride the bus with him at his mother's request. (Hayes2 56:15-57:17).

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<sup>20</sup> In accordance with the requirements of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, Metro reviewed Gilberto's Chicago IEP when he enrolled in MNPS. (Exhibit 3 at GLC 289).

<sup>21</sup> The deposition testimony of Sandra Burton is attached hereto as Exhibit 22.

<sup>22</sup> All documents bearing a "PO" Bates designation are documents produced by Metro from Kolby Harris' cumulative education file; they are attached hereto in numeric order as Exhibit 23.

However, Terry Adams, the executive director of Genesis, testified that when Metro officials transferred Kolby to Genesis they never disclosed the existence of Kolby's bus safety plan. (T. Adams 27:7-25). Similarly, Sandra Burton, the District's special education bus route coordinator,<sup>23</sup> was never briefed by special education personnel on Kolby's sexual misconduct or informed that Kolby was a potential threat to other students. (Burton 14:2-15, 47:15-48:4).

Christopher Gaines was the bus driver assigned to the Metro-operated bus that transported Gilberto and Kolby to Genesis. (Gaines 15:17-19). Gaines testified that bus drivers receive "information sheets" for students assigned to their bus, but a student's behavioral history is never described on those sheets. (Gaines 9:2-10:10). Gaines never received an information sheet for Kolby or Gilberto. (Gaines 10:14-20; 13:23-14:12). Nor was he ever informed of Kolby's behavioral history or warned about Kolby's sexual proclivities. (Gaines 13:17-14:8).

## **II. The May 7 Incident and Its Aftermath**

On May 7, 2007, Kolby Harris raped Gilberto Lopez during the bus ride home from Genesis. (Exhibit 23 at PO-717; Sawyer 81:17-82:23, 84:11-85:23; M. Adams 122:21-123:4). That day, the regular driver of the bus, Christopher Gaines, was absent from work. (Gaines 11:5-9). His bus was driven by Gloria Smith, a substitute driver. (Smith 12:22-13:8). Smith received no information about Kolby and Gilberto when she was assigned to drive Gaines' bus. (Smith 15:22-16:11). No monitor was assigned to the bus (Burton 61:21-62:17; M. Adams 159:20-160:17), and the bus plan established for Kolby at his prior school had not been implemented. (M. Adams 96:2-97:17). While driving the students home that afternoon, Smith noticed in the rearview mirror that Gilberto, who was sitting in the front seat, had moved to the back of the bus to sit with Kolby. (Smith 29:9-18). Smith grew concerned when she could not see Gilberto's head. (Smith 19:4-15). She also observed Kolby zipping up his pants. (Smith

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<sup>23</sup> Burton's primary responsibility as special education bus route coordinator was to arrange bus assignments and establish bus routes for each student with a disability to ensure that the student received adequate transportation services to and from the appropriate school. (Burton 11:8-13:9; DePriest 30:21-31:1).

19:4-15).

Worried that Gilberto and Kolby may have engaged in inappropriate behavior, Smith went to the transportation department at the end of her shift to express her concerns to Gwen Sales, her supervisor. (5/7/07 Metro School Bus Incident Report, attached hereto as Exhibit 24; Smith 23:25-24:9, 26:3-17). Smith informed Sales that she had observed Kolby zipping up his pants, and was concerned that something inappropriate occurred. (Smith 26:5-17).

On Tuesday, May 8, Sales issued a download request for the video file from the digital camera on Smith's bus. (Camera Download Request Form, attached hereto as Exhibit 25; Burton 42:17-43:24). Eugenia Roberson, a Safety Investigator employed by Metro, downloaded the video on May 8, 2007. (Metro's Responses to United States' First Set of Interrogatories at Responses 1-3, attached hereto as Exhibit 26). Burton did not view the video until May 11, 2007, and did not alert anyone to the content of the video until May 14, 2007. (Exhibit 26 at Response 3; Burton 45:3-4). The video reflects that Gilberto left his seat at the front of the bus and moved to the back seat to sit with Kolby for approximately twenty minutes. (Video download of May 7 incident ("Video"), filed March 26, 2008 (Docket No. 84); Burton 45:11-16). Over this period, Gilberto's head went down below the back of the seat on several occasions. (Video). After the last occasion, Kolby moaned loudly, at which time Smith ordered Gilberto back to his seat. (Video at time 13:44-13:51).

Kolby admitted to Susan Sawyer, the principal of Genesis, that he told Gilberto to perform fellatio on him, and that Gilberto complied. (Exhibit 23 at PO-717; M. Adams 122:21-123:4; Sawyer 81:17-82:23, 84:11-85:23).<sup>24</sup> Gilberto similarly reported to Genesis officials and his parents that he "licked another student's wee wee" (5/15/07 Genesis Academy Community Contact Log, attached hereto as Exhibit 27; Referral to Director/Principal Bus Report, attached

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<sup>24</sup> Following the May 7 incident, Kolby Harris was indicted on the charge of rape of a child. (Motion to Quash Deposition Subpoena at ¶ 2, filed January 9, 2008 (Docket No. 42); Notice of Kolby Harris' Present Legal Incompetence at ¶ 1, filed October 14, 2008 (Docket No. 131)).



hereto as Exhibit 28; Genesis Academy Significant Incident/Physical Intervention Report, attached hereto as Exhibit 29), and that Kolby had “gone to the bathroom in his mouth.” (Lopez 128:2-23, 132:6-10, 239:1-16). Ms. Lopez understood this to mean that Kolby had ejaculated in Gilberto’s mouth. (Lopez 239:1-16).

According to Ralph Thompson, the Assistant Superintendent of Student Services for MNPS (Thompson 6:9-22),<sup>25</sup> the District’s policy is to immediately inform parents if officials suspect that their child was the victim of inappropriate conduct. (Thompson 69:3-70:7). However, Burton did not disclose the sexual assault to officials at Genesis until May 14, 2007 – a full week after the May 7 incident. (Exhibit 26 at Response 3; M. Adams 59:14-60:24; 5/14/07 Genesis Academy Community Contact Log, attached hereto as Exhibit 31). That day, Melissa Adams viewed the video download from the school bus camera with Sandra Burton, Terry Adams, Susan Sawyer, and Tracey DeMoss, Metro’s bus route coordinator for non-disabled students. (Exhibit 31 at 112/112; M. Adams 64:6-15; Burton 52:16-53:2). The Metro and Genesis officials who viewed the video agreed that there had been inappropriate sexual behavior. (Exhibit 31 at 112/112; M. Adams 64:16-18; Burton 53:3-5; Sawyer 78:7-79:11). After viewing the video on May 14, Genesis officials contacted Gilberto’s parents and told them for the first time about the May 7 incident. (M. Adams 64:21-66:14). However, between May 7 and May 14, Metro continued to transport Gilberto and Kolby together on the same bus. (M. Adams 60:17-61:11; Gaines 22:17-23:5).

In the aftermath of the May 7 incident, Gilberto exhibited a wide range of disturbing behaviors. He experienced visual hallucinations and nightmares about Kolby Harris, (Lopez 97:7-22, 99:19-100:6), heard voices telling him to kill his family (Lopez 97:7-11), defecated on himself and in his bedroom (Exhibit 27 at 110/112; 6/7/07 LifeCare Family Services Encounter Note, attached hereto as 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),

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<sup>25</sup> The deposition testimony of Ralph Thompson is attached hereto as Exhibit 30.

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). On May 10, 2007, three days after the May 7 incident, Gilberto assaulted another student on the bus and acted aggressively toward the bus driver, prompting the driver to call the police. (5/10/07 Genesis Academy Community Contact Log, attached hereto as Exhibit 33; Lopez 102:4-22). 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). On June 7, 2007, Kimberly Lopez informed a medical case worker that prior progress remedying some symptoms of Gilberto’s disabilities was “all lost” after the May 7 incident. (Exhibit 32).

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; 10/10/07 Email from Heather Olson to Melissa Adams, attached hereto as part of Exhibit 34; 10/11/07 Email from Marci Gregory to Melissa Adams, attached hereto as part of 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.” (Lopez Affidavit at ¶ 13). Gilberto was then committed to the Middle Tennessee Mental Health Institute from July 22, 2008 to August 13, 2008. (Lopez Affidavit at ¶¶ 14-15).

In the opinion of Sandra Burton, Metro’s special education bus route coordinator, the May 7 incident would not have occurred had a monitor been assigned to Kolby and Gilberto’s bus. (Burton 62:13-63:4).

### **III. Prior to the May 7 Incident, Metro Had Actual Knowledge that Kolby Harris Was Sexually Aggressive and Posed a Significant Threat to Other Students**

Long before the May 7 incident, Metro knew that Kolby had an extensive and well-documented history of inappropriate sexual conduct and sexual assault.

From August 2002 to February 2005, Kolby attended Madison School, a K-12 special education school operated by Metro that offered a structured Severe Behavior Intervention (“SBI”) program. (Exhibit 26 at Response 4; Exhibit 23 at PO-544; DePriest 15:15-16:3). On August 20, 2003, Kolby – then sixteen years old – was disciplined for engaging in a sexual act in the school gymnasium. (Exhibit 23 at PO-565). On September 13, 2004, Kolby admitted to having oral sex and sexual intercourse with another student in the girls’ bathroom and stated that he had engaged in intercourse with the same student in the girls’ bathroom the week before. (Exhibit 23 at PO-561, PO-573). Officials at Madison documented this infraction in a Suspension Addendum dated September 20, 2004. (9/20/04 Suspension Addendum, attached hereto as Exhibit 35). The Suspension Addendum states that “Kolby’s behavior is directly related to his disabilities” (Exhibit 35 at GLC 164), and notes that similar behavior “[m]ay happen again if he is not supervised.” (Exhibit 35 at GLC 170).

After these incidents, Madison School established a “Safety Plan” for Kolby, dated September 27, 2004, that implemented the following protocol:

1. HE WILL BE ESCORTED TO THE RESTROOM, **NO EXCEPTIONS**
2. HE WILL REMAIN IN THE CLASS HE IS IN UNTIL ALL STUDENTS HAVE MADE A CLASS CHANGE; THEN HE WILL GO TO HIS NEXT CLASS EITHER WATCHED BY AN ADULT OR ESCORTED BY AN ADULT. **THIS IS FOR ALL CLASS CHANGES.**
3. HE WILL PARTICIPATE ONCE A WEEK IN A BOY’S GROUP.
4. HE WILL BE ESCORTED TO THE LUNCHROOM BY AN ADULT WHERE HE IS TO STAY UNLESS AN ADULT GOES WITH HIM.
5. PLEASE, WE ALL MUST HELP WITH THIS PLAN. IT IS ESSENTIAL WE DO NOT HAVE ANOTHER INCIDENCE WITH KOLBY.

(Exhibit 23 at PO-564) (emphasis in original).

While Kolby was presumably monitored more closely in school, he was accused of engaging in multiple acts of sexual misconduct on his school bus. (Harris<sup>26</sup> 17:3-18:20, 20:12-21:3). A Behavior Incident Report (“BIR”) dated January 10, 2005, reflects a complaint from a student and parent that Kolby exposed his penis to a student on the bus. (Exhibit 23 at PO-557). The complaining student accused Kolby of repeatedly threatening to “show the new kid my privates” and “do it to him.” (Exhibit 23 at PO-557). Madison suspended Kolby for ten days and listed discipline codes for “sexual harassment,” “intimidation/bullying,” and “repeated violations” on the BIR. (Exhibit 23 at PO-557).

On January 14, 2005, Madison required Kolby to sign a “Contract Agreement” which provided, in part, that:

- “I will not have ANY type of sexual activity, including sexual touching, remarks, gestures, or writing letters about sex”;
- “I will not go anywhere in the building without an adult’s permission”;
- “I will ask an adult to escort me to the restroom anytime I need[d] to go”;
- “I will follow the bus safety plan at all times”; and
- “I will tell the school if the bus safety plan is not followed.”

(Exhibit 23 at PO-645) (emphasis in original).

The “Bus Safety Plan” established by Metro and referenced in Kolby’s Contract Agreement mandated the following:

- The front right hand seat of the bus will be reserved for Kolby Harris;
- No one will sit in the two front left side seats and no one will sit in the second right seat; and
- A large X will be taped to the front four seats to remind students not to sit there.

(Exhibit 23 at PO-644). These precautions were designed to ensure that no other student came

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<sup>26</sup> The deposition testimony of Terrilyn Harris is attached hereto as Exhibit 36.

into close proximity to Kolby on the school bus. (DePriest<sup>27</sup> 41:13-42:1; Hayes2 19:3-12).

Notwithstanding these preventive measures, the escalation of Kolby's sexual behavior prompted Madison to request that Metro transfer him to a SBI program at another school. On January 18, 2005, LuAnn Landrum, the principal of Madison (DePriest2 58:17-22), outlined her concerns about Kolby in a memorandum to Jim Overstreet, a District-level discipline coordinator for Metro. (Exhibit 23 at PO-580; DePriest2 58:23-59:11). Landrum copied this memorandum to two high-ranking officials in the District's Department of Special Education – Sharon Wright, the Executive Director of the District's Department of Special Education (Rackard 7:18-20), and Linda DePriest. (Exhibit 23 at PO-580; DePriest2 58:23-60:1). After recounting the incidents that led to Kolby's ten-day suspension, Landrum writes:

I am very concerned that we now have this incident involving a much younger child. Several students have stated that they are frightened of Kolby and [redacted]'s mother is perusing [sic] legal action. [Redacted] has filed a police report stating she believes her son may have been sexually molested by Kolby. While I have no evidence of anything happening with [redacted] and Kolby the situation has quickly escalated out of control. I feel it would be in the best interest of all concerned, for Kolby to be placed in another Severe Behavior Intervention Program.

(Exhibit 23 at PO-580).

On February 4, 2005, Metro conducted a Functional Behavioral Assessment (“FBA”) of Kolby Harris. (Exhibit 23 at PO 642-PO-643). The FBA 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). It further states that Kolby's “sexual behaviors were determined to be a manifestation of Kolby's handicapping conditions.” (Exhibit 23 at PO-642).

Finally, the FBA documents that:

Mother is aware of these tendencies of Kolby and has requested that he be closely supervised at school . . . . If Kolby is closely supervised at all times these behaviors do not occur. Must escort Kolby everywhere. Having a bus driver

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<sup>27</sup> DePriest2 deposition designations refer to the continuation of Linda DePriest's deposition on October 27, 2008. The testimony from this deposition is attached hereto as Exhibit 37.

driving his bus is NOT adequate supervision.

(Exhibit 23 at PO-642-PO-643) (emphasis in original). Kolby was removed from the Madison School and placed in a Homebound Program on or about February 4, 2005. (Exhibit 26 at Response 4).

In August 2005, Metro enrolled Kolby in a Community Based Transition Program (“CBT Program”) based at White Creeks High School.<sup>28</sup> (Exhibit 26 at Response 4). While enrolled in the CBT Program Kolby continued to engage in sexual misconduct. A Suspension Addendum issued by Metro on December 6, 2005 (attached hereto as Exhibit 38) reflects that Kolby received a ten-day suspension for sexually assaulting another student on November 30, 2005. (Exhibit 38 at PO-635). According to Kolby’s mother, Terrilyn Harris, the police were called to the school and the alleged victim was instructed to receive a rape kit. (Harris 27:18-29:23).<sup>29</sup> Immediately after this incident, Metro officials withdrew Kolby from the CBT Program and began the process of transferring him to Genesis. (Exhibit 26 at Response 4 (reflecting that Kolby left the CBT Program “on or about November 30, 2005”); Harris 29:21-23, 37:15-39:7). In requesting that Genesis accept Kolby as a student, Hayes informed Melissa Adams that Kolby had allegedly engaged in sexual intercourse in a bathroom with a female student at the Madison School. (M. Adams 117:21-24). Metro’s warning to Genesis about Kolby’s prior sexual misconduct is reflected in a New Student IEP Information Sheet created by Genesis, which includes the starred notation: “Supervise with girls, sexual assault.” (New Student IEP Information Sheet at GLC 2, attached hereto as part of Exhibit 39).

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<sup>28</sup> The CBT Program is referred to as “Whites Creek High School” on Kolby’s educational records from this period. (Exhibit 38 at PO-635). Terrilyn Harris, Kolby’s mother, testified that while Whites Creek High School hosted Kolby’s IEP meetings, the CBT Program was provided at a facility called “Tennessee Christian.” (Harris 9:6-11, 26:2-20).

<sup>29</sup> Though there is no indication that Kolby engaged in sexual misconduct on a school bus during this period, the record reflects that Kolby’s mother transported him to and from school every day while he attended the CBT Program. (Harris 51:4-22; Hayes2 79:5-24).

Though Kolby left the CBT Program on or about November 30, 2005, he did not enroll in Genesis until April 3, 2006. (Exhibit 26 at Response 4; Genesis Academy Social History Intake Form, attached as Exhibit 39 at MET-LOP 704). Kolby's enrollment was delayed because Ms. Harris demanded that Metro find a school bus for Kolby that had a bus monitor, no small children, no girls, and sufficiently few passengers that each student could have their own seat. (Harris 47:23-48:12, 83:13-23; Hayes2 56:15-57:17). A monitor rode Kolby's bus to Genesis for approximately four to six weeks after Kolby began attending Genesis, but was then removed from the bus. (Harris 53:8-54:4).

Even in the more structured educational environment at Genesis, Kolby continued to act out sexually. An incident report from Genesis dated May 4, 2006, memorializes a conversation with a parent whose child accused Kolby of "touch[ing] her private parts that day and the day before . . . in the classroom." (Exhibit 23 at PO-740). On March 16, 2007, Dr. Lyn McRaine, a school psychologist and Metro employee (McRaine 7:5-19), conducted a psychological assessment of Kolby after he was referred for an evaluation by his IEP team at Genesis. (Psychoeducational Assessment Report, attached hereto as Exhibit 40). Dr. McRaine's review of Kolby's cumulative education file led her to document the following in her Psychoeducational Assessment Report:

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; McRaine 18:4-7, 43:1-9). This report was received by Metro on March 27, 2007 – six weeks before the May 7 incident. (Exhibit 40 at PO-610; McRaine 66:21-67:18).

Following the May 7 incident, Melissa Adams and Sandra Burton discussed Kolby's prior history of sexual misconduct. (Burton 48:18-23). Prior to this conversation, Burton had never been told about Kolby's sexual proclivities or discipline history. (Burton 47:15-48:4). On

the basis of the information conveyed by Ms. Adams, Burton testified that she would have been concerned about the risk faced by any other student riding a school bus with Kolby. (Burton 49:16-19).

**IV. Prior to the May 7 Incident, Metro Had Actual Knowledge that Students with Disabilities Were at Risk of Sexual Harassment on Special Needs School Buses**

**A. Conditions on Special Needs School Buses Generally**

Prior to October 2006, numerous District-level officials in Metro's special education and transportation departments expressed concern with the escalating incidence of violence on special needs school buses, and the absence of aides and monitors to supervise the passengers on those buses. (Burton 25:24-26:15, 27:18-28:24, 29:16-30:13; Phillips 17:10-18:7; Phillips2 12:8-19; Thompson 9:19-10:4, 37:1-39:18; DeMoss 13:14-24;<sup>30</sup> DePriest 58:13-61:17; DePriest2 95:4-25; Rackard 21:11-24; Hayes 30:16-31:17; Phillips2 Dep. Exhs. 1, 2, attached hereto as Exhibit 42).

Then, on October 5, 2006, Jenna Staehling, a student with disabilities, was sexually molested by another student with disabilities on a Metro special needs school bus.<sup>31</sup> See Staehling, 2008 WL 4279839, at \*1. Testifying about this sexual assault, Sandra Burton stated that prior to October 2006 she was concerned, among other things, about the possibility that a sexual assault would occur on a special needs schools bus:

Q: I take it that you are at least generally aware of what occurred with respect to Jenna Staehling?

A: Yes, I am.

Q: Did you watch the video?

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<sup>30</sup> The deposition testimony of Tracey DeMoss is attached hereto at Exhibit 41.

<sup>31</sup>The United States has reason to suspect that other students with disabilities have been sexually harassed on special needs school buses operated by Metro. See United States' Opposition to Motion to Quash at 2, filed December 9, 2008 (Docket No. 153). It sought to subpoena police files and other Metro documents reflecting such assaults, but Metro moved to quash the subpoena. See Motion to Quash, filed November 24, 2008 (Docket No. 145). As of this filing, the parties are awaiting the Court's ruling on Metro's Motion to Quash.



A: Yes.

Q: Is this among the types of problems that you were concerned might occur in the absence of monitors?

A: Yes.

(Burton 30:14-23).

Metro's failure to staff monitors on special needs school buses was not the only missing safeguard that impacted the safety of students on special needs school buses. Linda DePriest testified that students with disabilities were assigned to buses primarily on the basis of location, without regard for the nature or symptoms of their disability or the disabilities of other students assigned to the bus. (DePriest 30:21-31:22). Thus, Metro's Department of Transportation did not account for students' particular disabilities to assess whether a new assignee to a particular bus posed a risk to other students or was at risk himself. (DePriest 46:16-22). Indeed, information from Metro's Department of Special Education about a student's disabilities and behaviors was generally not made available to the personnel in Metro's Department of Transportation responsible for arranging bus assignments. (8/6/07 Email from Keith Phillips to Sandy Burton and Guy Morgan, attached hereto as Exhibit 20 at 151 (expressing the "need to have better communications between the two departments regarding potential student behavior"); DePriest 34:18-35:11; Burton 14:2-15).

Furthermore, the drivers of special education buses did not receive special training on the disabilities or behavioral tendencies of their passengers. (DePriest 32:4-33:17; Burton 16:13-17:18; Phillips 24:18-26:9, 27:2-7; Gaines 8:21-9:16; Smith 11:19-12:21). Significantly, Genesis offered on several occasions to train Metro bus drivers to address the unique needs of their students (at no cost to Metro), but each time Metro declined to allow the drivers of special education school buses to receive this training. (M. Adams 42:19-43:7, 57:25-59:9; T. Adams 35:22-37:17).

Metro officials knew that the confluence of these circumstances – the lack of bus monitors, the absence of disability screening during the bus assignment process, and insufficient

training of special needs bus drivers – combined to create a high-risk environment on special needs school buses:

Q: If we know for certainty that there are going to be children with behavioral issues such as we've discussed placed on buses and if we know that there certainly are children who are vulnerable and helpless placed on these same buses and if we know that the driver is not trained in this respect and we know there's no screening mechanism to separate these children in advance, does harm not become virtually inevitable?

A: It is a concern.

Q: Do you think it's close to inevitable?

A: I think it's very possible.

Q: Do you think it's probable? Probable meaning more likely than not.

A: I think it's probable.

(DePriest 49:16-50:10).

After the sexual assault of Jenna Staehling, concerns regarding the safety of special needs school buses were elevated to the highest levels of MNPS. Ralph Thompson, MNPS's Assistant Superintendent of Student Services (Thompson 6:18-22), reported directly to Superintendent Pedro Garcia during the relevant period. (Thompson 16:6-8). Thompson testified that in the aftermath of Jenna's assault he had discussions with Garcia about the possibility of using bus monitors to help ensure that students with disabilities would not behave inappropriately on special needs school buses. (Thompson 35:9-36:25, 81:23-83:3). Ultimately, MNPS failed to hire any full-time bus monitors in the period between the sexual assault of Jenna Staehling on October 5, 2006 and the sexual assault of Gilberto Lopez on May 7, 2007. (Phillips 7:17-10:4).

B. Conditions on Special Needs School Buses Transporting Students to Genesis

The lack of adequate supervision on special education school buses was a particularly acute concern at Genesis, whose entire student body consists of students with disabilities that manifest in severe behavioral problems. See supra at 4. In the years preceding the May 7 incident, officials at Genesis repeatedly requested that Metro assign bus monitors to the school buses transporting students to and from Genesis. (M. Adams 31:24-32:25, 89:11-18, 158:2-

159:19; Burton 59:20-25). Melissa Adams was concerned that her students – who were assigned to Genesis because they required a highly-structured, tightly-monitored environment – would lapse into destructive behavior in an unstructured setting supervised only by a bus driver. (M. Adams 32:16-25). Linda DePriest confirmed the vast disparity in supervision between a Genesis classroom and a Metro school bus:

A: Many times kids that demonstrate behaviors in public school settings will do real well in these contracted settings because there's so much support in that setting. You won't see the behaviors.

Q: By support you mean it's a more restrictive environment?

A: There's a teacher. There's an assistant. The class size is smaller. You've got a lot of staff that are available. You've got counseling services. Any of the related services that would be reflected in a child's IEP.

Q: That sounds very personnel intensive. Is it? It takes a lot of people?

A: Yes.

Q: That contrasts with the environment on a bus with a single person, doesn't it?

A: Yes.

Q: So the school board is placing children who need highly structured environments based upon what is known about them and their past and a high degree of personnel devoted to those things on forms of transportation where none of those things exist. Is that accurate?

A: In the case of severe behavior intervention schools?

Q: Yes.

A: In many cases, yes.

(DePriest 43:4-44:8).

Adams specifically expressed her concerns to Burton and DePriest, who agreed on the importance of assigning monitors to the buses carrying Genesis students. (M. Adams 56:16-57:24; 160:2-17). Significantly, Terry Adams testified that he and his wife operate a separate Genesis school in Rutherford County that serves a similar population of students, all of whom are closely supervised on school buses: “[A]t our request and at the school system's insistence, we have a monitor on every one of our buses.” (T. Adams 44:16-45:12).

## ARGUMENT

### I. Standard of Review

A party may obtain summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In evaluating a motion for summary judgment, the court must determine “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Mohnkern v. Professional Ins. Co., 542 F.3d 157, 161 (6th Cir. 2008) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251-52 (1986)). The court should construe the evidence in the light most favorable to the nonmoving party, drawing all justifiable inferences in its favor. Staehling v. Metro. Gov’t of Nashville & Davidson County, No. 3:07-797, 2008 WL 4279839, at \*4 (M.D.Tenn. Sept. 12, 2008) (Echols, J.) (copy attached) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

The moving party bears the initial burden to show the absence of any genuine issues of material fact. Sigler v. American Honda Motor Co., 532 F.3d 469, 483 (6th Cir. 2008) (citing Plant v. Morton Int’l, Inc., 212 F.3d 929, 934 (6th Cir.2000)). Once the movant satisfies its burden, “the nonmoving party must set forth specific facts showing that there is a genuine issue of material fact for trial.” Staehling, 2008 WL 4279839, at \*4. The facts proffered by the nonmovant must rise to the level of “‘significant probative evidence’ to show 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)); see also Henderson v. Walled Lake Consol. Sch., 469 F.3d 479, 487 (6th Cir. 2006) (“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. A factual dispute concerns a ‘material’ fact only if its resolution might affect the outcome of the suit under the governing substantive law.” (internal citation omitted)).

## II. There Is No Dispute of Material Fact with Respect to Any Element of a Peer Sexual Harassment Claim under Title IX

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 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 ruled that school districts who react with deliberate indifference to known threats or incidents of student-on-student sexual harassment can be liable under Title IX. Id. at 647. To sustain a damages claim for injuries arising from peer harassment or abuse, the plaintiff must demonstrate that: (1) 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; (2) the school district had actual knowledge of the sexual harassment; and (3) the school district was deliberately indifferent to the harassment. Patterson v. Hudson Area Sch., No. 08-1008, \_\_\_ F.3d \_\_\_, 2009 WL 22859, at \*6 (6th Cir. Jan. 6, 2009) (copy attached); Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 258-59 (6th Cir. 2000); Soper v. Hoben, 195 F.3d 845, 854 (6th Cir. 1999) (citing Davis, 526 U.S. at 633); Staehling, 2008 WL 4279839, at \*9.

The Title IX claim asserted by the United States is predicated on Metro’s deliberate indifference to significant and known risks of sexual harassment in the period preceding the May 7 incident. As set forth below, the undisputed facts in this case concretely establish that Metro’s acts and omissions satisfy the three elements of a peer sexual harassment claim under Title IX.

### A. The Undisputed Facts Establish that the Rape of Gilberto Lopez on May 7, 2007 Constitutes Severe, Pervasive, and Objectively Offensive Sexual Harassment

#### 1. *Sexual harassment that rises to the level of rape presumptively satisfies Title IX’s severe, pervasive, and objectively offensive requirement*

The undisputed evidence establishes that on May 7, 2007, Kolby Harris compelled Gilberto Lopez to perform fellatio, and ejaculated in Gilberto’s mouth. See supra at 7-9. This assault constitutes rape of a child under Tennessee law, see Tenn. Code Ann. § 39-13-501(7) (definitions); Tenn. Code Ann. § 39-13-522(a) (rape of a child), and Kolby was criminally

indicted for rape of a child as a result of the May 7 incident. (Motion to Quash Deposition Subpoena at ¶ 2, filed January 9, 2008 (Docket No. 42); Notice of Kolby Harris' Present Legal Incompetence at ¶ 1, filed October 14, 2008 (Docket No. 131)).

The Supreme Court ruled in Davis that 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 (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

The Sixth Circuit and other courts applying Davis have almost universally held that sexual harassment which rises to the level of rape satisfies Title IX's severe and pervasive requirement without further inquiry into whether the student suffered a denial of educational resources. See Soper, 195 F.3d at 854-55; M. v. Stamford Bd. of Educ., No. 3:05-cv-0177, 2008 WL 2704704, at \*9 (D. Conn. July 7, 2008) (copy attached), *modified on other grounds*, 2008 WL 4197047 (Sept. 9, 2008); Kelly v. Yale Univ., No. 3:01-CV-1591, 2003 WL 1563424, at \*3 (D. Conn. March 26, 2003) (copy attached); Doe I v. Dallas Ind. Sch. Dist., No. 3:01-CV-1092-R, 2002 WL 1592694, at \*6 (N.D. Tex. July 16, 2002) (copy attached). But see Ross v. Mercer University, 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007).

In Soper, the Sixth Circuit determined that a plaintiff who was raped was not further required to prove a denial of access to educational programs to satisfy Title IX's severe and pervasive requirement:

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.

Soper, 195 F.3d at 854-55; see also Kelly, 2003 WL 1563424, at \*3 ("There is no question that a rape, as alleged by Kelly, constitutes severe and objectively offensive sexual harassment under the standard set forth in Davis.") (citing Soper, 195 F.3d at 855); Doe I, 2002 WL 1592694, at \*6 ("[O]ne single instance of a forced manual penetration of one's vagina seems to qualify as a

‘sufficiently severe one-on-one peer harassment.’”) (citing Davis, 526 U.S. at 650).

In sum, controlling precedent in this circuit, and the great weight of persuasive authority outside this circuit, relieves the United States and Ms. Lopez of the burden to detail precisely how the rape of a nine-year old autistic child had the consequence of denying that child access to educational opportunities and resources.

2. *The undisputed facts establish that Gilberto Lopez was effectively denied access to educational resources and opportunities as a result of the May 7 incident*

Even if the Court declines to apply a presumption that the rape of Gilberto Lopez constitutes “severe, pervasive, and objectively offensive [harassment] . . . [that] effectively denied equal access to an institution’s resources and opportunities,” Davis, 526 U.S. at 651, undisputed evidence establishes that the trauma Gilberto experienced after the May 7 incident not only diminished the quality of his educational experience at Genesis, but resulted in a more profound denial of educational resources and opportunities when Gilberto was institutionalized to receive treatment for the behaviors he exhibited after the rape.

The May 7 incident observably reduced the quality of Gilberto’s educational experiences at Genesis. In the aftermath of the May 7 incident, Gilberto became unglued. He exhibited a wide range of disturbing behaviors, many of which were unprecedented, and others that had not arisen in the months preceding the rape. See supra at 9-10. Not surprisingly, the onset of these new behaviors interfered with Gilberto’s education at Genesis. See supra at 10. Gilberto suffered an additional, more significant denial of educational resources when he was withdrawn from Genesis and institutionalized in October 2007. See supra at 10. In sum, the undisputed facts reflect that in the aftermath of the May 7 incident, Gilberto emotionally and psychologically deteriorated, and consequently lacked the capacity to utilize educational resources and opportunities as he had before the incident. Indeed, the fact 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. “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) (copy attached) (citing Vance, 231 F.3d at 257-59; Doe v. Brimfield Grad 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)).

Accordingly, Plaintiffs have established beyond dispute that the sexual assault of Gilberto on May 7, 2007 satisfies the Title IX threshold for severe, pervasive, and objectively offensive harassment.

B. The Undisputed Facts Establish that Metro Had Actual Knowledge that Kolby Harris Posed a Substantial Threat of Sexual Harassment to Other Students

Title IX liability for peer sexual harassment will not attach to a school district unless the district had “actual knowledge” of the harassment. Davis, 526 U.S. at 650; Staebling, 2008 WL 4279839, at \*10. The actual knowledge requirement has two components: (1) the nature of the school district’s knowledge; and (2) the decision-making authority reposed in the particular school district employees who possessed the relevant information.

With respect to the first criterion, the knowledge possessed by a school district is sufficient under Title IX if it puts the district on notice of a “substantial risk” of sexual harassment, thereby enabling the district to address the type of harassment alleged by the plaintiff. See Williams ex rel. Hart v. Paint Valley Local Sch. Dist., 400 F.3d 360, 363 (6th Cir. 2005) (stating that the school district must have actual notice of “a substantial risk of sexual abuse to children in the school district”); Staebling, 2008 WL 4279839, at \*10 (holding that the actual knowledge requirement is satisfied if “the institution . . . possessed enough knowledge of the harassment that it reasonably could have responded with remedial measures to address the kind of harassment upon which plaintiff’s legal claim is based”) (quoting Folkes v. New York College of Osteopathic Med., 214 F. Supp. 2d 273, 283 (E.D.N.Y. 2002)); see also Delgado v. Stegall, 367 F.3d 668, 672 (7th Cir. 2004) (Posner, J.) (stating that knowledge of a significant



risk of harassment “ought to be enough for liability under Title IX”); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 659 (5th Cir. 1997) (“Students need not show that the district knew that a particular teacher would abuse a particular student; the plaintiff could prevail in this case, for example, by establishing that the school district failed to act even though it knew that [the teacher] posed a substantial risk of harassing students in general.”).

To satisfy the second component of the actual knowledge requirement, information that illuminates a substantial risk of sexual harassment must be brought to the attention of district personnel who are authorized to take steps to prevent that risk from materializing. Staebling, 2008 WL 4279839, at \*10 (“An ‘appropriate person’ . . . is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.”) (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998)). Courts have declined to create an exclusive list of school district employees who qualify as “appropriate persons.” See Hawkins v. Sarasota County Sch. Bd., 322 F.3d 1279, 1287 (11th Cir. 2003) (noting that for Title IX peer harassment cases a “broad[] number of administrators and employees could conceivably exercise at least some control over student behavior”); Murrell v. Sch. Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1247 (10th Cir. 1999) (“Because officials’ roles vary among school districts, deciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry.”). Nonetheless, courts adjudicating Title IX claims have collectively held that employees ranging from superintendents and high-level administrators to school principals and teachers may qualify as “appropriate persons” whose knowledge can be imputed to the school district as a whole. See Vance, 231 F.3d at 259 (teachers and principal); Warren v. Reading Sch. Dist., 278 F.3d 163, 171 (3d Cir. 2002) (principal); Morse v. Regents of Univ. of Colo., 154 F.3d 1124, 1128 (10th Cir. 1998) (college dean and affirmative action officer); Staebling, 2008 WL 4279839, at \*10 (“In applying Gebser, the appellate courts have required actual knowledge by the school board itself, the school superintendent, or at the least, a school principal.”) (quoting Peer v. Porterfield, No. 1:05-cv-769, 2006 WL 3898263, at \*9

(W.D.Mich. Jan. 8, 2007)).

This is not a case in which actual knowledge is subject to dispute. Clear, compelling, and undisputed evidence demonstrates that prior to the May 7 incident Metro was well aware that Kolby Harris posed a sexual threat to the students around him. A litany of documents generated by Metro officials prior to the May 7 incident expressly warned of the sexual threat that Kolby posed to other students in unsupervised environments, including his school bus. See supra at 11-15. For example, the Functional Behavioral Assessment of Kolby that Metro conducted 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), and plainly states the need for appropriate supervision on Kolby’s school bus: “If Kolby is closely supervised at all times these behaviors do not occur. Must escort Kolby everywhere. Having a bus driver driving his bus is NOT adequate supervision.” (Exhibit 23 at PO-643) (emphasis in original).

As recently as March 16, 2007, Dr. Lyn McRainey, a school psychologist employed by Metro, conducted a psychological evaluation of Kolby and issued the following assessment after reviewing Kolby’s cumulative educational file:

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). This report was received by Metro on March 27, 2007 – six weeks before the May 7 incident. (Exhibit 40 at PO-610; McRainey 66:21-67:18).

The undisputed evidence further establishes that Metro acknowledged this threat and reacted to it by taking steps (albeit temporary ones) to separate Kolby from other students. At Madison School, which Kolby attended from 2002 to 2005, the faculty and administration responded to Kolby’s repeated acts of sexual misconduct, see supra at 11-13, by establishing a “Safety Plan” that prohibited Kolby from going anywhere outside the classroom – including the

bathroom, the lunchroom, or to other classrooms – without an adult escort. (Exhibit 23 at PO-564). When Kolby was subsequently accused of exposing himself and intimidating a younger child on the school bus (Exhibit 23 at PO-557), officials at the Madison School implemented a “Bus Safety Plan” to ensure that no other student could come into physical contact with Kolby during the bus ride to or from school. (Exhibit 23 at PO-644).

Yet even with these restrictive safety plans in place, the principal of Madison School was so concerned about the sexual threat that Kolby posed to other students at Madison that on January 18, 2005, she asked Metro to transfer Kolby to a SBI program at a different school. (Exhibit 23 at PO-580). This request, which was copied in writing to the Executive Director of MNPS’s Department of Special Education (Sharon Wright) and one of the six Special Education Coordinators employed by Metro (Linda DePriest), quickly resulted in Kolby’s removal from Madison. (Exhibit 26 at Response 4) (reflecting Kolby Harris’ transfer to a “Homebound Program” on or about February 4, 2005). The record indicates that Kolby’s continued pattern of sexual misconduct while enrolled in the CBT Program led Metro officials to transfer Kolby a second time to Genesis Academy. See supra at 14. Indeed, this transfer was delayed for over four months while Metro sought to accommodate Ms. Harris’ request that Kolby not be assigned to a bus with young students. (Harris 47:23-48:12, 83:13-23; Hayes2 56:15-57:17; Exhibit 26 at Response 4). Thus, the District’s awareness of the sexual threat posed by Kolby Harris is manifest not only in the remedial steps ordered by officials at Madison School, but also in the series of school transfers prompted by Kolby’s pattern of sexual misconduct.

The purpose of Title IX’s actual knowledge requirement is to confine statutory liability to school districts who possessed enough information *a priori* to reasonably anticipate the harassment alleged by the plaintiff. See Staehling, 2008 WL 4279839 at \*10. As the Sixth Circuit has noted, a school district cannot be said to “cause” or “subject” a student to peer sexual harassment in violation of Title IX, see Davis, 526 U.S. at 644-45, unless it had some advance warning that the harassment might occur. See Winzer v. School District for City of Pontiac, 105

F. App'x 679, 681 (6th Cir. 2004).

Here, however, Metro possessed such a high quantum of actual knowledge as to dispense with any suggestion of insufficient warning, and instead beg the question of why the District failed to act on the basis of what it knew. The undisputed facts establish that teachers, school-level administrators, district-level administrators, and a school psychologist employed by Metro knew that Kolby Harris had engaged in numerous acts of aggressive sexual misconduct; knew that Kolby had been accused of sexually harassing and intimidating other students on his school bus; knew that Kolby's predatory behavior could only be controlled through safety plans that eliminated unsupervised peer interaction; and knew that Kolby posed a particular threat to other students on an unmonitored school bus. Against this backdrop, it could not have come as a surprise to Metro that Kolby would continue a well-documented pattern of sexual aggression in unsupervised environments by sexually assaulting a younger child on a school bus unsupervised by a monitor or aide. It certainly did not come as a surprise to Dr. Lyn McRainey, who testified that in light of the information reflected in her report, she was not surprised to learn that Kolby had sexually assaulted Gilberto Lopez, "[b]ecause it was a behavior he had demonstrated before." (McRainey 72:10-22).

The undisputed facts in this record compel the conclusion that Metro had actual knowledge of the substantial risks that Kolby posed to the students around him. Accordingly, the critical inquiry in this case is not whether Metro knew enough to prevent the May 7 incident, but why Metro failed to take obvious steps to protect other students from Kolby.

C. The Undisputed Facts Establish that Metro Was Deliberately Indifferent to the Known Risk that Kolby Harris Would Sexually Assault Another Student on His School Bus

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, 2009 WL 22859, at \*6; Vance, 231 F.3d at 260. The deliberate indifference standard does not compel

school districts to eradicate all sexual harassment. Vance, 231 F.3d at 261. However, 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. Patterson, 2009 WL 22859, at \*6; Williams, 400 F.3d at 364; Vance, 231 F.3d at 260; see also Davis, 526 U.S. at 645 (“[T]he deliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable to it.’” (citation omitted)). A school district with the requisite knowledge of potential harassment violates Title IX if it fails to respond in a timely fashion, or implements a timely remedy that is obviously inadequate. See Vance, 231 F.3d at 260-61; Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 175 (1st Cir. 2007), cert. granted, 128 S. Ct. 2903 (2008) (observing that an institution’s timely response to harassment “may be carried out so inartfully as to render it clearly unreasonable”); Doe v. East Haven Bd. of Educ., 200 F. App’x 46, 49 (2d Cir. 2006) (finding deliberate indifference when the school district waited five weeks after the plaintiff first complained of sexual harassment before taking concrete steps to address the perpetrators’ harassing conduct).

The Sixth Circuit has stated that:

[W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

Vance, 231 F.3d at 261; accord Patterson, 2009 WL 22859, at \*7; see Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999) (“If the institution . . . learns that its [response] measures have proved inadequate, it may be required to take further steps to avoid [] liability.”).

Courts adjudicating Title IX claims have recognized that deliberate indifference to student-on-student sexual harassment can arise from events that occur either before or after an episode of sexual harassment:

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) (copy attached) (citing Ross, 506 F. Supp. 2d at 1346 (M.D. Ga. 2007)); see also Fitzgerald, 504 F.3d at 172; Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1173 (10th Cir. 2007). For instance, in Simpson, the Tenth Circuit found that Colorado University’s (“CU”) failure to adequately supervise high school athletic recruits prior to the sexual assault of the female plaintiffs by high school recruits could constitute deliberate indifference under Title IX. 500 F.3d at 1173. The court observed that “[b]y the time of the alleged assaults of Plaintiffs, there were a variety of sources of information suggesting the risks that sexual assault would occur if recruiting was inadequately supervised.” Id. at 1173. This information derived from “reports not specific to CU regarding the serious risk of sexual assaults by student-athletes,” as well as an incident in 1997 where a high school girl was assaulted by CU recruits at a party hosted by a CU football player. Id.

Like the claim in Simpson, the Title IX claim asserted by the United States in this case arises primarily from Metro’s deliberate indifference to substantial and well-known risks of sexual harassment in the period preceding the May 7 incident.

*1. Metro acted with deliberate indifference by failing to take obvious and necessary precautions to protect other students from Kolby Harris*

Kolby Harris’ well-established pattern of sexual misconduct portended the May 7 incident even more strongly than the events culminating in the sexual assault of the plaintiffs in Simpson. Kolby Harris’ modus operandi was easy to decipher and control. Prior to the May 7 incident, a broad and varied cross-section of individuals – including Metro teachers, administrators, IEP team members, a school psychologist, and even Kolby’s mother – recognized and documented that Kolby presented a grave threat of sexual aggression when he interacted

with other students in unsupervised environments.<sup>32</sup> At the same time, Kolby refrained from engaging in acts of sexual aggression or misconduct when monitored by an authority figure. See supra at 13-14.

Metro was well aware of this pattern and of the need to supervise Kolby at all times. At Madison School, Metro's teachers and administrators implemented a restrictive school safety plan and bus safety plan to ensure that Kolby did not interact with other students outside the immediate presence of an adult monitor. (Exhibit 23 at PO-564, PO-644). Metro subsequently enrolled Kolby in Genesis, recognizing that the disabilities which provoked his sexual outbursts had to be managed in the type of highly-structured and closely supervised classroom environment provided by Genesis. (DePriest 43:4-44:8; McRainey 86:6-17).

Inexplicably, however, Metro failed to provide comparable structure and supervision on Kolby's school bus. (DePriest 43:4-44:8). Indeed, the record demonstrates that Metro failed to implement obvious remedies that would have substantially reduced the likelihood of Kolby sexually harassing other students on his bus.

First, Metro could have assigned a monitor or aide to ride the bus with Kolby. Prior to the May 7 incident, Metro had assigned bus aides and monitors to supervise particular school buses (Phillips 10:5-23). An August 6, 2007 memorandum from Keith Phillips to Sandra Burton reflects that prior to the May 7 incident Metro had staffed monitors on buses servicing another Severe Behavior Intervention program – the Murrell School – and that this initiative had “proven to be effective in previous school years.” (8/6/07 Memorandum from Keith Phillips to Sandy Burton, attached hereto as Exhibit 43). Additionally, Metro had informed Kolby's mother that it would staff a monitor on Kolby's bus when Kolby transferred to Genesis. (Harris 47:23-48:12, 83:13-23). Nevertheless, Metro failed to put a monitor or aide on the bus transporting Gilberto

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<sup>32</sup> Metro's awareness of the sexual threat posed by Kolby Harris, and the behavioral history underscoring that threat, is discussed above at significant length and will not be repeated here. See supra at 10-15.

and Kolby. Burton testified in her deposition that the May 7 incident would not have occurred had this monitor been assigned. (Burton 62:13-17). In light of the extenuating circumstances presented by Kolby's well-documented pattern of sexual aggression – including a series of suspected acts of sexual assault and intimidation on school buses – it was unreasonable and unjustifiable for Metro not to assign a bus monitor to supervise Kolby on the school bus. Davis, 526 U.S. at 648; accord Vance, 231 F.3d at 260.

Alternatively, Metro could have enforced the bus safety plan implemented on the Metro-operated school bus that Kolby rode to Madison School on the Metro-operated school bus that Kolby rode to Genesis. Pursuant to this plan, Kolby was required to sit by himself in the front-right seat of the bus, buffered from other students by empty seats that no passenger was allowed to occupy. (Exhibit 23 at PO-644; DePriest2 41:13-42:1; Hayes2 19:3-12). Kolby's assigned seat under this plan had the clearest line of sight to the bus driver through the rear mirror. (DePriest2 41:1-12). However, this bus safety plan was never implemented on the school bus Kolby rode to Genesis (M. Adams 96:2-97:17), and the video download from the May 7 incident reveals that Kolby raped Gilberto while sitting in the back seat of the bus, obstructed from the driver's view by the high-backed seat immediately in front of him. (Video). The record further reflects that Metro failed to provide Kolby's regular bus driver with any alert, warning, or special instruction about Kolby, or even to furnish him with the standard student information sheet for Kolby that was routinely provided to school bus drivers. (Gaines 10:14-20; 13:17-14:12).

Unlike S.S. v. Eastern Kentucky University, 532 F.3d 445 (6th Cir. 2008), where the plaintiffs could not identify an effective remedial measure that the defendant failed to adopt, see id. at 455, in this case Metro failed to implement obvious precautionary measures that were demonstrably effective in limiting Kolby's opportunities to sexually harass other students at his prior educational placements. Indeed, Metro neglected to account for the dangerous threat posed by Kolby by adopting any remedy, or taking any precaution that might have afforded Kolby's



fellow bus passengers some measure of protection.

2. *Metro acted with deliberate indifference in assigning Gilberto Lopez to an unmonitored school bus with Kolby Harris*

Metro's failure to take precautions to protect other bus passengers from Kolby Harris is, without more, sufficient to satisfy Title IX's deliberate indifference requirement. However, the unreasonableness of Metro's actions in the period preceding the May 7 incident is amplified by its assignment of Gilberto Lopez – a nine-year old autistic student with a known history of victimization by older students – to the same bus as Kolby Harris.

The undisputed evidence reveals Metro's awareness of numerous factors that counseled heavily against putting Gilberto in the path of a known sexual predator on a school bus with no bus monitor or aide. Most obviously, Metro knew that in the months preceding the May 7 incident, Gilberto's mother strenuously and repeatedly requested that Metro assign a monitor to Gilberto's bus to protect Gilberto from intimidating threats, physical assaults, and acts of manipulation by older students who pressured Gilberto into throwing gang signs and placed stolen items in his backpack. See supra at 4-5. Compounding these aggravating circumstances, Metro was aware from its review of Gilberto's Chicago IEP that Gilberto required a bus monitor in his previous educational placement. (Exhibit 3 at GLC 315).

In the final analysis, Metro officials deemed Kolby Harris sufficiently dangerous that they implemented a bus safety plan to prohibit Kolby from physically interacting with any other student on his Metro-operated bus to Madison. On his Metro-operated bus to Genesis, however, Kolby was governed by no safety plan and left free to physically interact with an autistic, mentally challenged student ten years his junior who had previously been harassed and manipulated by older students on a school bus. These undisputed facts compel a finding that Metro acted with deliberate indifference.

3. *Metro acted with deliberate indifference by disregarding the risk of sexual harassment to Gilberto at a time when there was a known risk of sexual harassment on school buses*

Irrefutable evidence further reveals Metro's larger awareness that students with disabilities were at risk of sexual harassment on special needs school buses prior to the May 7 incident. See supra at 16-18. Under these circumstances, Metro's failure to adopt precautionary measures on the special needs school buses transporting high-risk students like Kolby Harris is particularly egregious.

Prior to October 2006, numerous District-level officials in Metro's special education and transportation departments expressed concern with the escalating incidence of violence on special needs school buses and the absence of monitors to supervise those buses. (Burton 25:24-26:15, 27:18-28:24, 29:16-30:13; Phillips 17:10-18:7; Phillips2 12:8-19; Thompson 9:19-10:4, 37:1-39:18; DeMoss 13:14-24; DePriest 58:13-61:17; DePriest2 95:4-25; Rackard 21:11-24; Hayes 30:16-31:17). Then, on October 5, 2006, a student with disabilities was sexually assaulted on a Metro-operated special needs school bus. See Staehling, 2008 WL 4279839, at \*1. This incident presented Metro with poignant and undeniable evidence that its failure to effectively supervise special needs school buses could result in the sexual harassment of students with disabilities.<sup>33</sup>

Yet even after the sexual assault of Jenna Staehling, and notwithstanding numerous requests from officials at Genesis (M. Adams 31:24-32:25, 89:11-18, 158:2- 159:19; Burton 59:20-25), Metro declined to staff bus monitors or adopt any other programmatic initiative to increase the level of supervision on the special needs buses transporting Genesis students – students who were assigned to that particular contract school in recognition of their high risk behaviors. See supra at 17-18.

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<sup>33</sup>As noted above, the United States has reason to suspect that other students with disabilities have been sexually harassed on special needs school buses operated by Metro. See supra note 31.

## CONCLUSION

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

EDWARD M. YARBROUGH  
United States Attorney  
Middle District of Tennessee

MARK H. WILDASIN (BPR #015082)  
Assistant United States Attorney  
110 Ninth Avenue South, Suite A-961  
Nashville, Tennessee 37203-3870  
Tel: (615) 736-5151

Respectfully submitted,

GRACE CHUNG BECKER  
Acting Assistant Attorney General  
Civil Rights Division

BY: s/ Jonathan Fischbach  
AMY I. BERMAN  
JONATHAN FISCHBACH  
LUKE A. MCLAURIN  
Educational Opportunities Section  
Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Patrick Henry Building, Suite 4300  
Washington, D.C. 20530  
Tel: (202) 305-3753  
Fax: (202) 514-8337

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