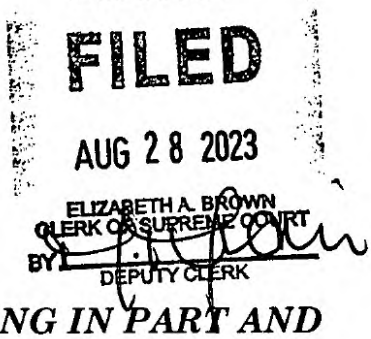
IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT,
Appellant,
vs.
ETHAN BRYAN; AND NOLAN HAIRR,
Respondents.

No. 83557



ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court judgment and order awarding attorney fees in a Title IX action. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Ethan and Nolan raised Title IX claims against CCSD for student-on-student harassment, claiming that CCSD was deliberately indifferent after learning that two schoolchildren, C. and D., targeted classmates Nolan and Ethan with sexual slurs, other insults, and physical assaults in the fall of 2011. *Clark Cty. Sch. Dist. v. Bryan*, 136 Nev. 689, 689-90, 478 P.3d 344, 351 (2020) (reversing and remanding for further findings on the Title IX claim). The parties are familiar with the facts, so we do not recount them further except as pertinent to our disposition. Having carefully considered the parties' arguments and the record on appeal, we affirm in part, reverse in part, and remand for further proceedings consistent with this order.

CCSD first asserts that the district court failed to comply with our mandate on remand. "[W]hether the district court complied with our mandate on remand, [is] a question of law that this court reviews de novo."

Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 263, 71 P.3d 1258, 1260 (2003). "When a reviewing court determines the issues on appeal and reverses the judgment specifically directing the lower court with respect to particular issues, the trial court has no discretion to interpret the reviewing court's order; rather, it is bound to specifically carry out the reviewing court's instructions." *Id.* at 263-64, 71 P.3d at 1260. However, "the district court may consider and decide any matters left open by the mandate of this court." *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) (alteration omitted) (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895).

Having reviewed the district court's order, we conclude that the district court fulfilled its mandate on remand as to Title IX liability. The district court properly made findings as to the events following the October report and resolved credibility issues.

CCSD argues in the alternative that the district court erred in its conclusions of law regarding deliberate indifference by: replacing the "official decision" rule with vicarious liability, replacing the "deliberate indifference" standard with simple negligence, failing to recognize that the school's duty to investigate misconduct ended when the student denied the misconduct, and failing to enter any conclusions or findings as to causation.

We "review issues of law de novo and give deference to the district court's factual findings that are supported by substantial evidence in the record." *Bryan*, 136 Nev. at 694, 478 P.3d at 354.

First, we conclude that the district court did not replace the "official decision" rule with vicarious liability. "[A] damages remedy will not lie under Title IX unless an official who at a minimum has authority to

address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). The district court correctly interpreted and applied the rule to find that the Principal, Vice Principal, and Dean were officials with the authority to address the alleged discrimination and institute corrective measures, had actual knowledge of the discrimination, and failed to adequately respond. *See Warren ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163, 171 (3d Cir. 2002) ("a school principal who is entrusted with the responsibility and authority normally associated with that position will ordinarily be 'an appropriate person' under Title IX"); *id.* at 173 ("The authority to supervise a teacher and to investigate a complaint of misconduct implies the authority to initiate corrective measures such as reporting her findings to her superior or to the appropriate school board official at the very least.").

Second, we conclude that the district court did not replace the deliberate indifference standard with simple negligence. Having reviewed the district court's order, we find that the district court made correct statements of law and properly analyzed its findings. Additionally, substantial evidence supports the conclusion that the school's response was clearly unreasonable in light of the known circumstances.[1] *See Davis ex rel.*

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[1]CCSD seeks to expand the scope of the District Court's factual findings by introducing exculpatory "facts" that were not part of the stipulated findings of fact and conclusions of law below. CCSD did not object to the findings of fact, and indeed, stipulated to its content. We therefore refrain from analyzing CCSD's additional "facts," here. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648 (1999) ("School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.").

Third, we conclude that under the circumstances of this case, the school's duty to investigate misconduct did not end when the students denied the misconduct, and the denial is not fatal to respondents' claim. CCSD's citations to *Benefield ex rel. Benefield v. Board of Trustees of the University of Alabama at Birmingham*, 214 F. Supp. 2d 1212, 1222-23, 1226 (N.D. Ala. 2002), and *P.H. v. School District of Kansas City*, 265 F.3d 653, 660 (8th Cir. 2001), are unavailing because in both cases the school officials lacked actual knowledge. In the present case, school officials had actual knowledge of the misconduct. Thus, the fact that Ethan and Nolan denied ongoing bullying to school personnel out of fear of further retaliation is not fatal to their claim of deliberate indifference. Unlike the caselaw cited by CCSD, school officials in this instance had actual knowledge of the sexual harassment, as well as the victims' reluctance to detail the sexual harassment. Rather than take steps to remedy the harassment, the school opted to avoid the problem or otherwise remained nonresponsive, resulting in Ethan and Nolan having no choice but to endure further harassment. *See Doe ex rel. Doe #2 v. Metro. Gov't of Nashville & Davidson Cty.*, 35 F.4th 459, 467 (6th Cir. 2022), *cert. denied sub nom. Metro. Gov't of Nashville & Davidson Cty. v. Doe*, 143 S. Ct. 574 (2023) ("Sally Doe continued to suffer further harassment every day at school . . . . Yet the school took no

additional action, other than assisting her parents with arranging homeschooling . . . . A reasonable jury could conclude that, rather than take steps to remedy the violation, MNPS opted to avoid the problem, resulting in Sally Doe having no choice but homeschooling or enduring further misconduct.").

Finally, we conclude that substantial evidence supports the district court's findings as to causation. The record supports that the behavior of C and D toward Ethan and Nolan continued into November and December 2011.[2] The school officials had actual knowledge of antecedent sexual harassment, and their deliberate indifference exposed Nolan and Ethan to further sexual harassment. *See Davis*, 526 U.S. at 645 (explaining that "the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it") (alteration in original) (citing Random House Dictionary of the English Language 1415 (1966), *see also Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000) ("We hold that Jefferson School District is not liable for the alleged antecedent harassment . . . . There is no evidence that any harassment occurred after the school district learned of the plaintiffs' allegations. Thus, under *Davis*, the school district cannot be deemed to have 'subjected' the plaintiffs to the harassment."). Based on the foregoing, we affirm the district court's imposition of Title IX liability.

CCSD next asserts that the district court abused its discretion regarding damages. We agree.

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[2]CCSD claims that the district court's reference to "bullying" lacked the requisite specificity. This claim is belied by the record including, but not limited to, the testimony of Ethan and Nolan.

As we have explained, there must be an evidentiary basis for the amount of damages awarded. *See Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000). Here, however, it is not clear whether the damages awarded are for economic costs, emotional distress, or both, and what amount was awarded for each. The district court failed to articulate or otherwise parse out the basis for the damages such as tuition costs, medical bills, and the like and further failed to distinguish the basis for the damages award as to each individual plaintiff. The evidentiary basis for any such costs is not immediately apparent from the record. *See Diamond Enter., Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73, 75 (1997) (concluding that the district court abused its discretion by not making findings to support its damages award). Additionally, the district court did not discuss whether Ethan and Nolan had a duty to mitigate their damages and if so, how any such failure to do so impacted the award of damages. *See Bryan*, 136 Nev. at 704 n.11, 478 P.3d at 361 at n.11 ("We also caution courts in civil rights cases to consider whether the plaintiffs have a duty to mitigate damages.").

If the court intended to issue an award for emotional distress, then the court should make sufficient findings to support such an award. Additionally, to the extent that CCSD raises the issue of the unavailability of emotional distress damages in Title IX cases for the first time in its reply, that argument is now waived. *See Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (citing NRAP 28(c) and concluding that an issue raised for the first time in an appellant's reply brief was waived).

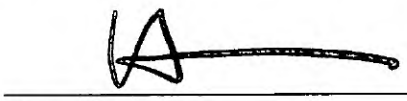
Moreover, we conclude that the district court abused its discretion by again relying on an off-the-record settlement in an unrelated

federal case as a benchmark for comparison in assessing emotional distress damages. Indeed, we previously expressed concern regarding the district court's reliance on the same settlement agreement, and we take this opportunity to again caution the court "that damages cannot be merely speculative or simply based on another case's settlement agreement." *Bryan*, 136 Nev. at 704 n.11, 478 P.3d at 361 n.11.

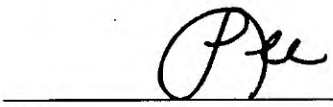
Finally, we agree with CCSD that the new attorney fee award is unsupported by analysis or findings from the district court. As we explained in *Herbst v. Humana Health Insurance of Nevada, Inc.*, "[t]he correct method for determining the amount of attorney's fees under federal statutes has been decided by the United States Supreme Court and other federal courts." 105 Nev. 586, 590, 781 P.2d 762, 764 (1989). "[T]he lodestar amount as well as the use of the *Johnson-Kerr* factors are applicable to all cases in which Congress has authorized an award of attorney's fees to the prevailing party." *Id.* Further, under *Hensley v. Eckerhart*, "[t]he court necessarily has discretion in making this equitable judgment." 461 U.S. 424, 437 (1983). "It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award." *Id.*

Our review of the district court's order awarding attorney fees reveals a lack of analysis, findings, or explanation of its reasons for the award. We therefore reverse and remand for the district court to determine the lodestar amount and analyze the facts of this case under *Hensley* and *Herbst*. In particular, the district court must enter findings as to "the relationship between the extent of success and the amount of the fee award." *See Hensley*, 461 U.S. at 438. Based on the foregoing we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[3]



_____, J.
Herndon



_____, J.
Lee

_____, J.
Parraguirre

cc: Hon. Nancy L. Allf, District Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Allen Lichtenstein, Attorney at Law, Ltd.
Scott Law Firm
Eighth District Court Clerk

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[3]We decline to reassign this case on remand, because there is no indication that Judge Allf has formed an opinion "that would display a deep-seated antagonism or make fair judgment impossible." *See Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996).