

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

T.E., et. al.,

Plaintiffs,

v.

PINE BUSH CENTRAL SCHOOL
DISTRICT, et. al.,

Defendants.

12-CV-2303 (KMK)(PED)

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' PARTIAL MOTION FOR SUMMARY JUDGMENT**

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“If you want your kids to hang out with more Jewish children or have more tolerance, why would you pick a community like Pine Bush?”¹

“Q: Do you have *any concept* of what anti-Semitic bullying is?
A: I am not sure. If you could define that for me, that would be very helpful.”²

-Pine Bush Superintendent Philip Steinberg

PRELIMINARY STATEMENT

In defendants’ view, swastikas, anti-Semitic slurs, Holocaust “jokes,” threats and taunts, coin-throwing, and physical assaults in Pine Bush Schools are mere “teasing and name-calling.” Def. Br. 28. A jury will not likely agree: these acts are “reprehensible,” “vile and despicable,” one of the Simon Wiesenthal Center’s “Top Ten Anti-Semitic . . . Slurs” in 2013, worldwide.³

The anti-Semitic harassment in the District is not an allegation. It is a fact. A fact confirmed repeatedly by defendants, in their own sworn testimony, photos, and records. Though defendants claim all is well in public, under oath they admit anti-Semitic harassment in the District is a “problem” (Winter), a “serious issue” (Peters), a result of “inbred prejudice” defendants would not even attempt to “undo” (Steinberg and Winter).

The District responded to this “serious issue” with callousness, apathy, threats, and open hostility, in short, deliberate indifference. When the assistant principal tells two Jewish girls they are “just looking for trouble,” because they reported “fuck the Jews” written next to a “Star

¹Declaration of Ilann M. Maazel dated January 21, 2014, Ex. 56. All exhibits (except deposition transcripts) are attached to the Maazel Declaration. All deposition transcripts are attached to the Declaration of O. Andrew F. Wilson dated January 21, 2014. Deposition transcripts are referred to as follows: Steinberg (“St.”); Carbone (“C.”), Winter (“W.”), Fisch (“F.”), Boyle (“B.”), Peters (“P.”), Hopmayer (“H.”), T.E., S.E. (T.E.’s mother), O.C., D.C., David C. (O.C./D.C.’s father), D.R., J.R. (A.R./D.R.’s father), and the two third-party deponents W.H. and S.H. Carbone was an Assistant Superintendent of the District, the District’s 30(b)(6) witness, Ex. 3, and is the current Superintendent. At her deposition, Carbone had (and took) many opportunities to review records, make phone calls, and consult counsel, *C. passim*, and Carbone had the opportunity to review the deposition transcript before signing and preparing an errata. Carbone’s testimony binds the District. Fed. R. Civ. P. 30(b)(6).

²St. 121/24-122/3.

³Ex. 60 (Governor Cuomo); Ex. 61 (NYS Department of Education); Ex. 57 (Simon Wiesenthal Center).

of David with [a Jewish boy's] name on it" in the bathroom, that is deliberate indifference. When, as defendants concede, there was no discipline at all for *substantiated* anti-Semitic harassment (swastikas in planners; "dirty disgusting Jew"; "should have been burned"; swastika on T.E.'s desk; "die Jew" on O.C.'s desk; "go back to picking up pennies off the street," etc.), that is deliberate indifference. When the Superintendent suggests a Jewish family get out of Pine Bush, that is deliberate difference. When he believes the "repeated[] chant[of] white power and pro-Hitler statements" on the bus is "just being a meathead," that is deliberate indifference. When defendants treat each one of dozens of anti-Semitic episodes on an "individual" basis (if at all), that is deliberate indifference. When the assistant principal doesn't understand what "bias-related" means on his disciplinary forms, the principal has never heard of his own Title VI compliance officer, and the Superintendent thinks it is not "bullying" when an anti-Semitic, male 12th grader tells a 7th grade Jewish girl "you are going to get your ass kicked," that is deliberate indifference. When the Code of Conduct recommends greater discipline for "tardiness" (detention) than for "harassment, discrimination and bullying" (warning), that is deliberate indifference. When defendants do not document, track, report, discuss, address, or attempt in any way to combat *anti-Semitic* harassment, that is deliberate indifference.

When defendants (then and now) ignore D.C.'s and his father's complaints—about "many Jewish jokes" and "slurs" from "a lot of kids," "systemic" harassment, an entire year of students "who pushed him around while chanting 'White Power' and telling him that he should have died in the Holocaust"—that is deliberate indifference.

The Pine Bush Central School District is a case study in deliberate indifference. What they could do wrong, they did. If *ever* plaintiffs had sufficient evidence to present a case of deliberate indifference to a jury, this is it. Defendants' motion should be denied.

I. A CULTURE OF ANTI-SEMITISM IN THE DISTRICT

Historically, the KKK has had a strong presence in the town of Pine Bush, in the Pine Bush Central School District (“District”), and on its Board of Education (“Board”). C. 41-42; D.C. 39; Exs. 63-68 (KKK member/wife of KKK Grand Dragon formerly on Board). When it comes to Jewish students, the District is anything but diverse. With one exception, not one defendant who was asked could name a single Jewish student other than plaintiffs.⁴ St. 109/7-18; F. 203/22-204/9; W. 373/2-14; B. 104-05.

Only a small fraction of anti-Semitic incidents in school have been documented by the District. *See* Facts § III(F). Even from this small subset, discovery has revealed an enormous number of documented anti-Semitic incidents and graffiti in District schools. *See, e.g.*, Ex. 11 (chart summarizing photos of anti-Semitic graffiti taken by High School security); C. 79/11-18 (authenticating #1-13 of Ex. 11); Ex. 6 (school security photos); C. 60/8-12 (authenticating photos); Ex. 7 (photos of anti-Semitic graffiti in Crispell taken by students); T.E. 237-50, 258-61 (describing photos); O.C. 128-53 (describing more photos); Ex. 4 (summary of just some anti-Semitic incidents in T.E./O.C.’s 7th grade); W. 400/16-22 (admitting he knew of at least “18 or more anti-Semitic incidents” in just 2010-11, almost all involving T.E. or O.C. and substantiated by the District); W. 377-400 (discussing in summary form those 18 incidents); St. 328/4-7 (swastikas in T.E. and O.C.’s textbooks); Ex. 5 (Winter’s notes from April-June 2011, documenting anti-Semitic slurs, graffiti, threats, physical attacks, and Holocaust “jokes”); Ex. 8 (documenting dozens of anti-Semitic incidents); St. 127-47, 152-65 (discussing dozens of reported anti-Semitic incidents); W. 307/18-23 (admitting “a problem with anti-Semitism in

⁴ Winter identified a single other Jewish student whose name was written inside a Jewish star, next to “Hitler” and “Fuck the Jews” in the boys’ bathroom. W. 259/24-260/2; Ex. 7 (bate # 000011); W. 143/12-145/6, 424/9-425/14. At deposition, defendants claimed they kept no statistics concerning the ethnicity of students, St. 110/4-9, B. 104/25-105/11, but on summary judgment, apparently, they do. Carbone Aff. ¶ 7. Defendants still offer no statistics concerning the number of *Jewish* students in the District. *Id.*

Crispell”); P. 265/14-26/9 (“regarded [anti-Semitism] as a serious issue” at Crispell).

Defendants subpoenaed two third-party witnesses, both District students. In depositions and declarations, Exs. 9-10, both painted a picture of out-of-control anti-Semitism in the District:

A. W.H.

W.H. attended Crispell since 6th grade, and all four years in the High School:

Q. So just to summarize, in Crispell and in the high school there’s been anti-Semitic slurs, right? A. Yes. Q. Anti-Semitic jokes? A. Yes. Q. Swastikas all over the place? A. Yes. Q. For about a year in eighth grade rolling of pennies and statements like pick up the penny, Jew? Q. Right? A. Yes. Q. Hitler salutes? A. Yes. Q. White power chanting? A. Yes. Q. In some cases tripping, pushing and shoving? A. Yes. Q. And no one in any of these schools, employed by any of the schools ever did anything to stop any of this, right? A. Not that I saw.

W.H. 186-87. W.H. believed “anti-Semitism [is] out of control in Pine Bush School District,” *id.*

179-80, estimating “at least 30 to 40 percent” of the high school “is anti-Semitic,” *id.* 184.

Anti-Semitic graffiti was “all over the high school,” *id.* 165, “on desks, lunch tables,” “doors,” “bathroom stalls, bathroom walls,” “lockers,” *id.* 114, “cafeteria tables,” “school walls,” “classroom doors,” “textbooks,” “notebooks,” “backpacks,” “student clothing,” “kids’ shoes,” *id.* 165-67, the “art table” and the “lab table,” *id.* 192-93. Twice a month throughout the entire of tenth grade, a student openly spent “the whole day in Pine Bush High School with a swastika visible on his shoulder,” without consequence. *Id.* 166-67. Swastikas are “such a common thing that like I’m actually, I’m starting to pass them by now.” *Id.* 152; *id.* 169 (sees “swastikas almost every day in high school”). Asked when he’d last seen a swastika at school, W.H. testified he saw one the morning of the deposition (“on the sandwich and salad line”), the day before (“cafeteria table”), and the Friday before (“a desk in [his] English classroom”). *Id.* 152-54. Swastikas often remained on school property “all year long.” *Id.* 170.

Anti-Semitic slurs were common at Crispell (“Kike, stupid Jew, fucking Jew”), W.H. 176, and in PBHS (“Kike, fucking Jew, stupid Jews, I hate the Jews, things like that”), *id.* 173.

Holocaust jokes were common. *Id.* 174-76. School bus rides were a nightmare: students would yell out “[the ‘n’ word] or fucking Jew or keep walking Jew boy or kike.” *Id.* 178.

B. S.H.

S.H., an eleventh-grader when she was deposed by defendants, attended the High School since ninth grade, and Crispell from 6th through part of 7th grade. S.H. 5-7. She was so afraid of retaliation that she signed her declaration “Jane Doe.” Ex. 10 ¶ 12. She testified that “[a]nyone who works for the [high] school would see there were swastikas all over the school.” She witnessed “[s]wastikas all over Pine Bush High School,” including “the girls’ bathroom, in books, and on desks.” *Id.* ¶ 9 (emphasis added); *id.* (swastika “carved in” desk in English class; student laughed: “Oh, look, there’s a swastika on my desk.”); S.H. 68-69, 78-79. In ninth grade, a student defaced S.H.’s junior varsity soccer jersey with a giant swastika. The soccer coach let K., the admitted perpetrator, “select her own punishment.” K. “chose to sit out the next game,” and S.H. “became an outcast on the soccer team.” Ex. 10 ¶¶ 2-8; S.H. 58-59, 74-76, 97-99.

C. All Five Plaintiffs Experience Severe, Pervasive Anti-Semitism For Years

Defendants have now abandoned their attempt to dismiss any of D.R. or A.R.’s claims. But all five plaintiffs had the same core experience: repeated, virulent, and shocking anti-Semitic harassment and bullying in school, on school buses, and on school trips, day after day, month after month, year after year. *See* Pl. Counter 56.1 #1-5.

For **T.E.**, anti-Semitic incidents “happened on a daily basis”: “people would use Jew like they would use the N word.” T.E. 195-96. Swastikas were “everywhere, school textbooks, the desks, on people, in my books,” *id.* 196, “desks, posters, I said people, binders, notebooks . . . walls . . . pretty much everywhere,” *id.* 267-68. Groups of students did Hitler salutes and sang white power chants on the school bus “daily” or “all the time.” *Id.* 197-203, 50-52. T.E. was called “crispy,” told she “should have burned” in the Holocaust, *id.* 109-115, forced to watch

students “saluting Hitler” at “the end of the math midterm,” *id.* 213, made to listen to Holocaust “jokes” in health class, *id.* 216-18. She repeatedly found swastikas drawn on her school desk, *id.* 167-69, was physically threatened on the school bus, *id.* 153-57, had a coin thrown at her in the hallway, *id.* 221, and this just scratches the surface. Pl. Counter 56.1 #1; S.E. 38/16-22, 89/10-91/9, 115/2-18, 174/5-23.

O.C. was subjected to “ethnic slurs” “not just during sixth grade but seventh, eighth, ninth,” “in classrooms, in the hallway, at recess, anywhere I was. Even in the lunch room,” O.C. 19-21, including “Jesus killer”, “Christ killer, damn Jew, dirty Jew,” *id.* 95-99, “stupid Jew,” “dirty disgusting Jew.” “Basically if someone calls you a Jew, it’s [an] insult,” *id.* 21; *see id.* 38-39, 57. “[E]very day I will hear ‘Jew’ in the hallway.” *Id.* 217. In a violent attack at recess, two students “held [O.C.’s] hands behind [her] back and they tried to shove a quarter down [her] throat.” *Id.* 63. On a school trip, a student found a penny, said ‘look, I’m being a Jew,’ then smashed sand in O.C.’s hair. *Id.* 14-15. O.C. repeatedly found swastikas on her school desk, once next to the words “die Jew or damn Jew,” *id.* 43, 45-46, on her yearbook picture, *id.* 84, on her school locker, *id.* 89, on “binder[s],” bathrooms and on desks and in books and on the walls, on people’s belongings,” *id.* 107-08, “windowsills... bathroom stalls...in the tiles,” *id.* 119, and the cafeteria door (where a school guard admitted it had existed for “five years”), *id.* 215; Ex. 13 (O.C.’s photo of swastika on cafeteria door); C. 115/17-116/6. O.C. faced Holocaust “jokes,” *id.* 100, had pennies thrown at her for “an entire month” in recess, *id.* 79, and *this* just scratches the surface. Pl. Counter 56.1 #2.

O.C.’s older brother, **D.C.**, had an even more violent experience. “In all of my grades, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth I received both physical and verbal threats including change that was pelleted at me and being told that I was going to be burned in an oven or that if I did anything that they knew where I lived.” D.C. 28. Students threw coins at

D.C. in the cafeteria, hallways, in class, and the library. *Id.* 99. D.C. faced “swastikas everywhere in the high school and in the middle school, and the teachers see them all the time. It would be *impossible* for them to miss the swastikas,” *id.* 11, including “on binders, they were on lockers, they were under desks,” *id.* 14, “in the condensation on [bus] windows,” *id.* 34. “[T]hroughout ninth grade,” a student said “my family and my ancestors died in the Holocaust and he would call me ashes ... he would slap me in the face and would smirk at me Some of the other kids also slapped me in the face...and say ‘Shut up D., or I will burn you in an oven.’” *Id.* 69-70. D.C. was called a “dirty Jew or filthy Jew or stupid Jew or fat Jew or Jew faggot or fucking Jew kike ... mocky fuck,” *id.* 68, heard white power songs “always being sung in the cafeteria” about “killing the Jews and washing off their blood,” *id.* 72-73, was spat upon, and “chewing tobacco was thrown at [him],” *id.* 78, faced constant Hitler salutes, *id.* 85, anti-Semitic jokes in the middle of class, *id.* 92, 94, and was told to fetch coins “thrown in garbage receptacles,” *id.* 37. The bus was a place of particular danger: once a student punched D.C. in the stomach and said “I was going to hell because I was Jewish.” *Id.* 33. “I was always made fun of for being Jewish and coins would be thrown at me and people would tell me Jewish jokes.” *Id.* 34. Another time on the bus, an anti-Semitic student put his finger in his girlfriend’s vagina and “he rubbed it on my upper lip.” *Id.* 81.

“[D]ay in and day out in all of my years at Pine Bush High School, I was harassed, alienated, ostracized and I was punished for being an individual.” *Id.* 42. “There was really nowhere in the school I was usually safe from any of this stuff happening.” *Id.* 100. “Every day seemed like it was the wors[t] day of my life, and when I got home I was constantly considering just killing myself to finally not have to deal with it anymore. I didn’t have – I just couldn’t do it, and when I had to go to school the next day and the torture persisted, I kicked myself for not doing it when I had the chance, and that was pretty much my entire life in the Pine Bush School

District starting from grade three to even recently.” *Id.* 123-24; *id.* 125-129 (summarizing experience); Pl. Counter 56.1 #3.⁵

II. DEFENDANTS’ RESPONSE TO PLAINTIFFS’ CRIES FOR HELP

A. T.E. in Pine Bush Elementary School (“PBES”)

T.E. attended PBES through fifth grade, which was 2008-09. T.E. 6, 17.⁶ Steve Fisch was PBES’s principal from 1991 through July 2011. F. 17/15-18; T.E. 11. Part of Fisch’s job was to “make sure there was a safe environment at school,” “free of harassment and bullying.” F. 19. Fisch was ultimately responsible for discipline. *Id.* 256/18-257/13. Fisch has some unusual views concerning anti-Semitic harassment. Fisch believes it is “[n]ot necessarily” “anti-Semitic conduct” to “draw[] a swastika on a locker, a desk or a bathroom on school property.” F. 90/19-23. Fisch sees nothing anti-Semitic about “throwing change at other students,” or “rolling change”/“throwing change in the garbage and telling someone to pick it up.” F. 97. When students “make Hitler salutes on the [school] bus,” that is not “anti-Semitic bullying.” F. 189/2-14. And it is not “misconduct” for Pine Bush students to “celebrate [Hitler’s] birthday.” F. 191/12-17; *see id.* 299/5-300/9.

In April 2009, T.E. saw a swastika carved into the slide of the elementary school playground. T.E. 40-42; Ex. 14 (photo of swastika); Ex. 17. The swastika was visible to hundreds of 1st-5th grade schoolchildren who (weather permitting) used the playground every day. F. 153-54, 158/3-12, 295/17-19. Ms. Eccleston reported the swastika to Fisch no later than May 1. F. 152; S.E. 73-75. Fisch saw the swastika etched into the slide. F. 156, 164/20-25.⁷

⁵ Given defendants’ abandonment of their attempt to dismiss D.R. and A.R.’s claims, we do not describe their experience in any detail. Suffice it to say, their experience was similarly horrific. *See* Pl. Counter 56.1 #4-5; J.R. Dep., *passim*; D.R. Dep., *passim*.

⁶ For the convenience of the Court, plaintiffs prepared a chart, summarizing which plaintiff attended which school in which year, with which defendant/administrator. Ex. 2.

⁷ Even though hundreds of children used the slide, the Ecclestons were the only ones sufficiently offended by a swastika to report it to administration, F. 295/20-22, which suggests how common and accepted swastikas were in this school.

On May 5, Fisch allegedly put in a work order to remove the swastika, Ex. 15; F. 156, 159, but the “date completed” section was never filled out, Ex. 15; F. 161-62; C. 105/6-18, and no one removed the swastika. Ex. 17; F. 178/11-15, 177/16-19, 179/16-18. Ms. Eccleston complained to Fisch again in June 2009; again it wasn’t removed. Ex. 17; S.E. 76. Ms. Eccleston complained to Fisch again in September 2009; again it wasn’t removed. Ex. 17.⁸

Between April 2009-April 2010, while a visible swastika remained on the elementary school slide, and notwithstanding Ms. Eccleston’s repeated complaints, Fisch never checked to “make sure that swastika was gone,” and no one told Fisch it was gone. F. 179/5-18, 162/9-11. On April 19, 2010, Ms. Eccleston went to PBES, saw the swastika *still* there on the slide, photographed it, and emailed the photo to Assistant Superintendent Deborha Brush. Ex. 14, Ex. 19; S.E. 102-05; T.E. 44/11-18. Brush forwarded the email to Fisch, Hopmayer, and Boyle. Ex. 19.; F. 169-70. When Brush suggested Fisch get the swastika removed, Fisch joked: “I say we go out and look at it on cannabis culture day.” Ex. 16; F. 173-176. After waiting a day (“What difference was it going to make[?], *id.* 178/3), Fisch went with Brush, and found the swastika still on the slide. *Id.* 177/16-19.

Even then, through his retirement in *July 2011*, Fisch never checked to see if the swastika was removed. F. 196/10-15. As of his deposition (April 19, 2013), Fisch could not say if the swastika was “still there *today*.” *Id.* 196/4-7 (emphasis added). Fisch never did “any investigation to determine how the swastika got on the playground slide,” and absent investigation, no one was disciplined. F. 163/12-15.⁹

In March 2009, the spring of fifth grade, a PBES student (K.L.) harassed T.E. on the bus, “called [T.E.] a Jew” and gave the middle finger to T.E. and his mother. T.E. 34; Ex. 32. Ms. Eccleston reported to Fisch that K. “got in [T.E.’s] face,” “put his face up to hers to call her

⁸ Fisch did not deny, but did not remember, Ms. Eccleston’s June or September 2009 complaints. F. 167-68.

⁹ Carbone now claims the swastika on the slide is not a swastika. C. 96/21-25; *cf.* Ex. 14 (photo of swastika).

names,” “calling her Jew” and “variations” such as “[d]irty Jew, disgusting Jew,” F. 111/12-15, 110/10-22, and gave Ms. Eccleston “the finger,” *id.* 113/6-17. K.L. admitted to Fisch that “he called T[E.] a Jew and dirty Jew and other epithets.” *Id.* 122/15-17. Fisch’s “discipline” for this anti-Semitic bullying was a 50-minute “recess detention,” meaning, for one lunch period, the student missed recess. *Id.* 131/24-133/4. Fisch did not ask the student to apologize, do any assignment, or face any in- or out-of-school suspension, or even an afterschool detention. *Id.* 133. Fisch did not reach out to T.E., or speak to her at all. *Id.* 134.

A month later, in April 2009, two students (K.L. again, and N.B.) showed T.E. swastikas drawn in their planners, during a class in T.E.’s homeroom classroom. T.E. 25-27; F. 49/12-51/18. One of the perpetrators (N.B.) was the son of PBES’s (and T.E.’s) school psychologist. F. 51/19-53/13. Ms. Eccleston reported to Fisch “there were two boys in the class who had drawn swastikas on their planners and were flashing them in T.E.’s face and tormenting her with them.” F. 54/3-6; S.E. 56/18-57/24. Fisch said: “What’s the big deal, they didn’t aim [the swastikas] towards [T.E.], they were just writing in their book.” S.E. 57/17-24. Fisch denies the comment now, but admits such a response would be “outrageous.” F. 56/23-57/3. Ms. Eccleston persisted until Fisch reluctantly agreed at least to “talk with the kids.” S.E. 58. Fisch found the swastikas in both planners in the classroom, F. 59-60, told Superintendent Steinberg, St. 133/3-15, 169-70, and spoke to both boys for 15-20 minutes, F. 63. But, to quote Fisch: “*There were no disciplinary consequences as a result of that incident.*” F. 63/24-64/5 (emphasis added). Fisch did not ask either boy to apologize to T.E., to get to know her or Jewish people, *id.* 302/24-303/6, to do any assignment, “[o]r anything” related to the swastika incident. *Id.* 65. Nor did Steinberg recommend discipline. St. 174. Fisch did not reach out to T.E., or speak to her at all. *Id.* 134. In May, Fisch reduced K.L.’s cumulative discipline (such as it was) and others who had been bullying to “zero” so that they could “start[] fresh.” *Id.* 303/16-304/6, 285.

In contrast to Fisch's complete lack of discipline for two students who paraded a symbol of hate to a Jewish student in the middle of class, T.E. was disciplined and barred from participating in Field Day, after (falsely) being accused of taking someone's "cupcake." T.E. 37-38; Ex. 33; F. 219-23; S.E. 82/20-22. Fisch considered this "very significant" punishment. F. 143/12-16. As Fisch put it, "[t]his is about not respecting someone else's property." F. 222/4-14; S.E. 80/17 ("zero tolerance" for cupcake stealing). K.L. and N.B., in contrast, did not miss Field Day. F. 224/14-22; S.E. 80 (S.E. asked Fisch: "if there is a zero tolerance, then why are those kids going[?]"). Though Fisch met with T.E. to mete discipline for the cupcake episode, F. 236/7-10, he never met with T.E. after she was called a Jew or dirty Jew, tormented by students showing her swastikas in class, or forced to use a school slide with a swastika that remained for at least a year, *id.* 236/11-14, *all* incidents Fisch substantiated.

Fisch admits that though PBES had a generalized "bullying problem" in T.E.'s fifth grade, F. 139, Ex. 34; he called an assembly in May 2009 to discuss it, *id.*; and the assembly post-dated the swastikas in the planners, T.E. "being called a dirty Jew on the bus," and a (*still-present*) "swastika on the slide that everybody was using," Fisch failed to "discuss anti-Semitism in the assembly" at all. F. 296/21-297/21.¹⁰

B. T.E. and O.C.'s Complaints (Crispell/PBHS) to Peters, Winter, Mummery, Boyle, Steinberg, Teachers, Bus Drivers, and Others Go Nowhere

T.E. and O.C. both started sixth grade in Crispell (2009-10). Peters was the assistant principal, Boyle the principal. P. 21; B. 20. Per District policy, the elementary school files of anti-Semitic bullies (and all elementary students) never made it to Crispell. W. 54/25-57/12. T.E./O.C.'s experiences of anti-Semitic harassment in Crispell were comparable: sixth grade was

¹⁰ The entire fifth grade went on a school trip to Ellis Island, returning after sundown on the evening of Yom Kippur, the holiest day on the Jewish calendar. T.E. 21/3-19. T.E. could not attend, or meaningfully complete any of her assignments in the "couple week unit" based on the trip. T.E. 23/3-9, 18; F. 199/20-22. Ms. Eccleston expressed her concern to Fisch, F. 205/2-8; S.E. 45-50. Fisch did not tell the teachers to change the date. F. 211/20-23.

bad, seventh, horrific, and in eighth, T.E. dropped out. In all those years, the District's response was indifferent, hostile, and/or non-existent:

i. Sixth Grade (2009-10)

Towards the beginning of sixth grade, students on T.E.'s school bus "would chant for white power," and "talk about Hitler," almost "every day." T.E. 51-52. "The bus driver had told [one of the students] to stop on occasions," but "that was about it" in terms of any response. *Id.* 53/10-15. When a student in class (M.K.) "put up his hands in the shape of a gun and point[ed] it to the back of [O.C.'s] head and s[aid] 'Look, I'm killing Jews,'" in front of T.E., O.C. and T.E, complained to the teacher, T.E. 77, who only "talk[ed] to him . . . in the hallway." O.C. 9-12. This approach failed: M.K. "kept making ethnic slurs towards [O.C.]." O.C. 13/19-20. On a school trip in Mamakating Park, a student picked up a penny, said "Look, I am being a Jew," and "smashed [sand] in [O.C.'s] hair," leading to a physical altercation "broken up" by a "teacher." O.C. 14-18; T.E. 81-84. The school told T.E. they would only look into the fight, not "the anti-Semitism that started it." S.E. 113. Mr. Cohen reported to Peters that a penny was thrown at O.C., and that she was the victim of a number of "Jewish jokes." Peters said he would "look into it," David C. 18-19, but never did get back to Mr. Cohen, *id.* 60-61, forgot about Mr. Cohen's complaints, P. 214/17-20, and lost or destroyed *three years* of notes of complaints by students and parents of anti-Semitic harassment in school. P. 110-15; St. 91/11-92/23, 104/15-18.¹¹

On April 19, 2010, T.E. texted her mom on the bus that "kids were chanting" and planned to "do something to celebrate" Hitler's birthday on April 20, and that "she was afraid." S.E. tried but failed to reach Steinberg, reported the incident to Steinberg's assistant Deb June (who said "how do they know she is Jewish[?]), and to Assistant Superintendent Brush. S.E. 92-

¹¹ At whatever point the Court believes it appropriate prior to trial, plaintiffs intend (whether by *in limine* motion or otherwise) to seek appropriate relief, including precluding defendants from presenting a defense, as a result of defendants' serial spoliation of evidence in this case.

102. Frustrated and angry, S.E. stopped by PBES, to see if that swastika was *still* on the slide. It was, and she photographed it. S.E. 100-105. At 5:21 p.m., Ms. Eccleston emailed Brush the photo of the slide, and noted that a “handful of kids on [T.E.’s] bus” (including C.C. and M.) repeatedly made “swastika symbols with their hands”; “raised the right hand to the Hitler sign”; “were going to do something tomorrow to celebrate” the “anniversary of Hitler’s birthday,” and that T.E. “is afraid of what is going to happen and does not want to go to school tomorrow.” Ex. 19; S.E. 103. Brush forwarded the email to Fisch (PBES principal), Boyle (Crispell principal), Peters (Crispell assistant principal), and Hopmayer (PBHS principal) on April 19 and 20, 2010. Exs. 18, 19; Fisch 181-82. But *no one* “interview[ed] any kids on T.[E.]’s bus,” C. 297/6-9, or even “ask[ed] T.[E.] who the kids were that were making Hitler salutes and the swastika symbols on the bus,” *id.* 299/13-16. C.C. was disciplined for “leaving school grounds,” but not for “anti-Semitic conduct.” *Id.* 301/8-13; Ex. 12. **Fisch** did not “do[] anything in response” to those complaints, F. 185/2-25; *id.* 291/25-292/4 (“Q: Did you do anything at all once you learned of the swastikas, the bus and the Hitler salutes, yes or no? A: No.”), even though he had the ability to bring these issues to the attention of the appropriate administrator, *id.* 291/16-21. **Boyle** did no investigation, did not interview T.E. or her mother, or do “anything . . . to stop these students from making Hitler salutes and making swastika symbols on T.’s bus.” B. 181/25-187/19, 190/22-192/5. **Peters** did nothing. P. 269/4- 279/9. And **Hopmayer** did no investigation. H. 308/19-309/4; 313/18-22.¹²

T.E. did not go to school on April 20. T.E. 56/20-21. On April 21, the bus driver “yelled at [T.E.] in front of everybody on the bus,” *id.* 56/10-13, 62, and “called [her] a liar,” *id.* 63/7-11. During this public humiliation, T.E. testified: “I took out my phone to tell my mom and [the

¹² O.C.’s complaints to bus drivers about “ethnic slurs” and money thrown at her fared no better. O.C. 24-25.

driver] told me to put my phone away and she was screaming in my face and I started crying.”

Id. 65/11-17. Ms. Eccleston drove T.E. to school for the rest of the year. *Id.* 66/17-19; S.E. 139.

ii. Seventh Grade (2010-11)

In seventh grade (2010-11), Winter was the assistant principal, Boyle the principal. S.E. 137; W. 23; B. 20. Notwithstanding years of complaints to Peters about anti-Semitic bullying in Crispell, Pl. Counter 56.1 #6-7, all of which Peters *believed true*, P. 329/19-25, neither Peters nor Boyle mentioned any of this to Peters’ replacement, Winter. W. 68/7-11; B. 311/22-312/5.

Unlike Peters, who destroyed all of his notes from 2009-10, Winter kept and produced at least some of his notes from 2010-11. Ex. 5; W. 86/11-15. They reflect a litany of anti-Semitic slurs, graffiti, threats, physical attacks, and Holocaust “jokes.” Ex. 5; *see also* Ex. 4 (chart summarizing some of the reported anti-Semitic harassment in seventh grade). T.E. and O.C. made so many complaints to Winter that he said “we should stop coming as often as we did.” T.E. 102/6-8; O.C. 127/20-23 (“at least five times a month”). “When me [T.E.] and O.C. got to the point after he told us to stop coming all the time and complaining about [the anti-Semitic harassment], that we would write it down and bring it to him usually at the end of the week. . . he told us we were now looking just looking for trouble and that we were causing our own problems.” T.E. 102/21-103/8. After Winter told T.E. to “stop coming every single day” to complain about anti-Semitism, T.E. wrote the incidents down in a journal. Winter photocopied part of the journal, then the District lost it. T.E. 159; O.C. 222-23, 226; Maazel Decl. ¶ 2.

The number of reported anti-Semitic incidents in seventh grade is far too many to detail even in a 60-page brief, but here are some highlights:

- Ms. Eccleston complained to Winter about anti-Semitic harassment “[a]t least ten” times, S.E. 117/13, and eventually, “once, twice a week,” *id.* 120/4-5; *id.* 138/3-25 (swastikas, Holocaust jokes, “stupid Jew,” etc.).
- Many times throughout the year T.E. reported to Winter “all of the swastikas that we took pictures of.” O.C. 121/10-21, 128/11-18; Ex. 7.

- 3/8/11: Winter's notes: I.D. called O.C. a "dirty disgusting Jew," in front of T.E. Ex. 5 (DEF1082-83); T.E. 135-36, 135-138; O.C. 38-40; W. 118/21-23, 378/24-25, 393/6-7 (substantiated). **No discipline.** C. 318-19. Instead, Winter "told us to work things out and we were left in the office." O.C. 40, 221-22.
- 3/9/11: Winter's notes: "white power" chants on T.E.'s bus. Ex. 5 (DEF1093); W. 328-29, 380. **No discipline.** Pl. 56.1 #18-21.
- 4/11/11 Eccleston email to Winter & Steinberg: "More anti-Semitic comments. [T.E.] called a Jew and told she should have been burned. . . . She has had enough." Ex. 20; *see* Ex. 5 (DEF1094) (bottom of page/C.O.); T.E. 110-112 (slur was in English class); W. 156-57 (Winter never responded to the email); B. 218-19 (Boyle was told, did nothing). Winter substantiated the complaint, C. 262/4-9; W. 84/5-16, but only "**spoke[] to**" C.O.: no suspension, detention, warning, or document in his disciplinary file. C. 260-262; St. 223/16-224/6; W. 85/15-86/6, 451/12-452/452/4.
- 4/11/11, Winter's notes: T.E. told by another student (S.G.) "she was crispy and should have been burned a long time ago," Ex. 5 (DEF1094) (top of page, S.G.); T.E. 115/12-18 (told Winter "he kept calling me crispy"); Ex. 27 (email to Steinberg, Carbone, Boyle); St. 262-63. **No discipline.** C. 327/3-7; B. 256-66 (no investigation).

As to the last incident, Ms. Eccleston recounted: "T. texted me, she was very upset that somebody had told her she should have been burned in the Holocaust I told her she needed to go down to Mr. Winter, which she did numerous times before. I told her you have to go down and talk to Mr. Winter and talk to him. She is like, 'Mom, you have to pick me up.' She needed to leave the school, she was very upset. I told her I would come and meet her there . . . *I reported to [Winter] I couldn't have my daughter coming home on a daily basis upset and afraid to go to school, and that there was swastikas everywhere, they were in her classroom, that it's being ignored, the kids are allowed to treat her this way.*" (Emphasis added.) Winter "[s]aid anti-Semitism is prevalent in the community, that he has been there for eight years and that it's rather hard to stop something that's inbred in the community." S.E.117-119; *id.* 39 (same).

Three days later (April 14), O.C. reported to Principal Boyle that O.C.'s best friend had been held down while two students put a swastika on her face: "I was crying and I was upset, and he asked me '**why did you find offense to this** if it wasn't directed towards you[?]' " O.C. 68 (emphasis added); B. 97/6-16 (substantiated). More documented complaints:

- 4/27/11, Winter's notes: J.C. threw a penny at O.C. and called her a "fucking Jew"; **no discipline**. Ex. 5 (DEF1081); W. 95/8-12, 382/17-25; C. 303.
- 4/27/11, Winter's notes: B.N. called O.C. a "F'ing Jew" (or "stupid Jew"), **two hours'** detention, Ex. 5 (DEF1081); W. 95/11-12, 100/22-23 (substantiated); Ex. 4 & W. 383/9-10; C. 304-06; Ex. 35.
- 4/27/11, Br. "made a comment about Jewish people" during Spanish class; T.E. reported to Winter. T.E. 158-59. **No evidence of investigation/discipline**.
- 4/27/11, Winter noted: "Jew die" written on O.C.'s desk in English class. Ex. 5 (DEF1081, 1086). **No discipline**. *See infra*.
- Before 5/4/11, swastika on T.E.'s "music desk." Ex. 5 (DEF3682); W. 142/4-8 (substantiated). No interview of T.E. or any student, and **no discipline**. C. 265; T.E. 167-70 (swastika not removed for "two weeks"; her next music desk also had a swastika).
- Around 5/4/11: T.E. told Winter about anti-Semitic graffiti in boys' bathroom, T.E. 242-43; Ex. 7 (bate # 11, the photo) ("fuck the Jews" next to "Star of David with Sh.M.'s name on it"); Ex. 5 (DEF3682); T.E. 243/9-11 ("that's when [Winter] told me I was looking for the trouble now"); W. 143/12-145/6, 424/9-425/14 (substantiated). **No investigation or discipline**. W. 425/9-426/7.

The "Jew die" episode is a microcosm of this District's response to reported anti-Semitic harassment in school. One day in Ms. Forgac's English class, O.C. saw a "swastika on [her] desk," and reported it to Winter. O.C. 43-44; W. 90/8-9 (substantiated). The swastika was removed, but "[t]he next day there was a different swastika on my desk." O.C. again reported it to Winter, but "the day after that there were *three* swastikas on my desk with *my name* in it" and "*die Jew or damn Jew.*" O.C. 45-46 (emphasis added). "I asked [my English teacher] if I could go to Mr. Winter because I was crying at that point because I was threatened. I was scared. She . . . made a speech in front of the class saying that you shouldn't get up during class and ask to go places, and she just told me to sit at a different desk." *Id.* 49. Later, O.C. reported to Winter for the third time: "I was talking to him on a personal level. I was about to cry. Like I asked him what we can do to figure out who did this because I was threatened, I felt threatened and I wanted to figure out who did it . . . but he just told Ms. Forgacs to just watch the desk." *Id.* 48. O.C. later told Winter that C.L. had admitted he was the perpetrator. *Id.* 48/13-25. Winter substantiated the threat to kill a Jewish student in his school, C. 307/5-9 (substantiated), but what

was Winter's response? Did he *interview* any student? No. Did he *discipline* C.L.? No. Did he discipline *anybody*? No. C. 307/10-13, 306/17-21.

Nor did Winter or anyone in Crispell take any broader steps to address the problem of anti-Semitic harassment in school. O.C.'s father had "at least three phone conversations with [Winter] about this has progressed from Jewish jokes to being called Christ killer, dirty Jew, stinking Jew, having pennies thrown at her and having – finding swastikas everywhere. She would just list where these swastikas were and then showing me them in notebooks and telling me about where she was seeing them." David C. 21/4-13; Ex. 5 (DEF1095). He complained about the swastika near her yearbook picture, and a girl who called her a "dirty disgusting Jew or a fucking Jew." David C. 20, 22. Winter repeatedly said "I will deal with it on an *individual* basis," but Mr. Cohen said "this isn't an individual problem, this is systemic, and again my mantra is *you have got a much broader problem and you cannot deal with it individually.*" *Id.* 21-22 (emphasis added). But Winter never did "anything to address . . . systemic anti-Semiti[c] harassment and bullying in the school." *Id.* 59/2-9. *See* W. 60/23-62/23, 70-24-71/14, 77-78, 82, 88/18-19, 95/3-12, 97-98, 113/6-7, 141/13-20, 189/7-15, 303/25, 304/3, 393/12-394/3, 425/12-14 (admitting T.E. and O.C. repeatedly complained about anti-Semitic harassment to him); W. 103/19-21, 124/2-6, 381-82, Ex. 5 (DEF1095) (same from Mr. Cohen); W. 181/8-23, 388/12-14, 388/19-21, 389/17-22, Ex. 4 (same from Ms. Eccleston); Ex. 4 & W. 400/16-22 (admitting notice of at least "18 or more anti-Semitic incidents" in 2010-11).¹³

Steinberg was no help either. Steinberg was the Superintendent in charge of the District since 2008, St. 8-9, 27-28; C. 12, whose job included ensuring students were safe and "free of anti-Semitic harassment and/or bullying," St. 29/15-21, 28/12-16, 32/8-12; F. 23 ("the buck

¹³ Mr. Cohen also told O.C.'s teachers she "was experiencing anti-Semitism and bullying and that she was seeing swastikas everywhere in textbooks and on binders and on walls and in bathrooms; that she had been . . . on the receiving end of all kinds of Jewish jokes and even Holocaust jokes," and that she was struggling because of the "harassment" and "people calling her out for being Jewish." David C. 34, 36. "Nobody offered up any kind of information about what they were going to do . . . Nobody said anything. It got very quiet." *Id.* 35/13-17.

stops” with Steinberg). Steinberg dealt directly with “more serious disciplinary incidents,” St. 88/5-10, but read “[e]very letter of suspension that comes out of any school,” *id.* 128/19-22. Steinberg does not believe “calling a Jewish student ‘crispy’” is “anti-Semitic,” *id.* 141/14-20, or that calling “another student a dirty Jew,” a “disgusting Jew,” or writing “a swastika . . . on someone’s desk in school” is “bias-related.” *Id.* 195/3-12, 185/13-16. “Do you agree it’s a bias-related to draw a swastika on another student’s face? A: ...Is it bias, define what bias is.” *Id.* 144/16-22. Steinberg recently said: “If you want your kids to hang out with more Jewish children or have more tolerance, why would you pick a community like Pine Bush?” Ex. 56.

Given Steinberg’s views, it is little wonder he did nothing to help these children. Ms. Eccleston: “I had so many conversations with him over the years about so many issues about the swastikas on the – in the planners, the swastikas on the walls, the chanting on the bus, the inappropriate Jewish jokes that were told at my daughter that she was called crispy, that she was harassed on a constant basis.” S.E. 86-7; *id.* 106/5-107/2 (same); St. 166/10-167/18, 195/13-15, 196/4-11, 196/23-197/8, 197/24-198/14, 199/6-11, 204/10-17, 202/19-23, 312/11-23 (admitting Ms. Eccleston repeatedly, orally complained about anti-Semitic harassment, beginning in November 2008). In sixth or seventh grade, Ms. Eccleston had “a conversation with Mr. Steinberg regarding what was going on in the schools and how upset my daughter was and how I needed something to be done. It couldn’t continue like this, it wasn’t fair to my daughter. My daughter is afraid on the bus, she doesn’t know what to do at school. There is so many things, swastikas again on the bathroom walls, on the desks, on the lockers, on people’s notebooks, people are—everywhere she turned there were swastikas. I said to him, I said ‘I need to do something. My daughter does not feel comfortable here.’ And what Steinberg said to me was, ‘Well, when I had this issue when my kids were in school, **I moved.**’” S.E. dep. 109-110

(emphasis added); *see* St. 26/17-21.¹⁴ More documented complaints:

- 4/28/11: Winter's notes: "[O.C.] told on me that stupid Jew." Ex. 5 (DEF3677).
- 4/28/11: in T.E.'s math class, D.B. said student "didn't know something because he was a Jew." T.E. 160.
- At lunch, Ki. said O.C. "should go back to picking up pennies off the street." T.E. reported to Winter. T.E. 140/22-145; O.C. 36-37. **No discipline:** only "spoke to" the student. Pl. 56.1 #124-26.

At that point, Ms. Eccleston "[w]as talking to just about everybody at the school on almost a daily basis . . . from administration to teachers"; "I was trying to get some help for my daughter and I was getting nowhere." S.E. 41/18-24. By May 2011, T.E. and O.C. "were stressed every single day going to school. My daughter [T.E.] was to the point she is upset every day she came home and complained how terrible it was at school . . . [A]s much as I was complaining, nobody was responding, which is why I finally put it in writing to prove, look, I am complaining to you every day, show me where you are doing something about it, and nothing was done." S.E. 173/13-175/15. "[T]hings were really getting out of control . . . so I started looking for help anywhere I could. So I listed every name I could find on the emails." S.E. 85-6.

- 5/24/11 Eccleston email to Winter, Steinberg, Carbone, Boyle, Board member Eric Meier. Ex. 22. "[I]t has escalated every year to the point that my child now begs me to not have to return to this school," and listing other complaints. Ex. 22; S.E. 162/3-18; W. 179; Ex. 23; St. 225.
- 5/26/11 Eccleston email to Winter, copying Steinberg, Carbone, Boyle, Meier, and others: "You explained to me that the girls would not have to know about most of the Swastikas if they had not asked people to inform them if they saw any. . . . You also suggested to me that if the girls . . . weren't asking to be shown the offenses they wouldn't be as stressed/upset by them." Ex. 24 (point #2); St. 240-44/8 (Winter's indifferent response raised no "red flags" for Steinberg); W. 208/9-12, 209/13-16 (Winter admitting to this response: "if they hadn't asked to see one, then they wouldn't have known about it.").
- 5/31/11 Eccleston email to Winter, Steinberg, Carbone, Boyle, Meier, and others: T.D. drew picture on his stomach, "said it is a Hasidic Jew so lets shove pennies in his mouth." Ex. 25; T.E. 162-65. **No discipline** or document placed in disciplinary file. C. 265-69; 298-99.

On May 31, 2011, Ms. Eccleston emailed Winter, Steinberg, Carbone, and Boyle, a second time:

¹⁴ Ms. Eccleston also orally reported the anti-Semitism to Eric Meier, a Board member. S.E. 151/11-13, 158/12-23.

“I again got a frantic message from my daughter regarding the High School kid Mi. that we have discussed He has a history of chanting white power and pro Hitler statements. . . . T.E. was sitting on the bus and that kid Mi. who is rather large pushed her in and sat with her. T.E. . . . is afraid of him. . . . Mi then said to C. that when T.E. is in 8th grade that she is going to get her ass kicked and that she is lucky that she is younger and that she is a girl. I can not continue like this. My daughter comes home from school upset and afraid everyday and now has been threatened. I will not put my daughter back on that bus since I do believe she is in danger. These kids have caused trouble in the past and nothing has been done to keep my daughter safe from them.” Ex. 26; T.E. 152/3-153, 157/7-14. What did Winter, Steinberg, Carbone, and Boyle do in response? None of them (i) spoke with/interviewed Mi., C. 276/8-11, 277/14-17; W. 224-25; B. 241/5-8; (ii) spoke with/interviewed the victim, T.E., *id.*; (iii) asked for any incident or witness statement, C. 176/11-177/4; (iv) did any investigation at all, other than getting an email from the bus company, *id.* 277/18-278/2; W. 232/18-21; (v) imposed any discipline, C. 278/8-10, W. 234/19-25; (vi) required Mi. to apologize, C. 278/11-12; or (vii) stopped Mi. from riding the bus with T.E., *id.* 278/23-25. Steinberg considers Mi.’s “repeated[] chant[of] white power and pro-Hitler statements” on the bus “just being a meathead.” St. 251/8-13. Nor does Steinberg consider it “bullying” when an anti-Semitic, male 12th grader, St. 250/10-12, tells a 7th grade Jewish girl “you are going to get your ass kicked.” St. 251/14-20.

With anti-Semitic incidents spiraling out of control in Crispell, Ms. Eccleston and Mr. Cohen repeatedly begged Winter and other administrators to have their *first* assembly addressing anti-Semitic bullying, and even gave Winter contact information for outside organizations that could help. Ex. 22 (DEF2361 #1); S.E. 162, 164/17-165/9, 244-45; Ex. 24 (point #1). But at the June 10 assembly, no one thought to address anti-Semitism in Pine Bush schools. St. 264/6-13; Ex. 36. Instead, while a Holocaust survivor spoke, a student told T.E. “[t]hat was fucking

stupid,” T.E. 255; W. 295/2-6 (substantiated); another girl (D.H.) “had to be taken out because she was being disrespectful to the [Holocaust survivor],” O.C. 71, and “after the assembly people were saying that was a waste of their time,” *id.*; Ex. 29 (DEF2376).

When all the complaints at the school level went nowhere, Mr. Cohen told Ms. Eccleston: “[W]e need to go over everybody’s head because nobody is doing anything[.] [W]e will go right to Mr. Steinberg and we will ask him what can you do to protect our kids.” David C. 39/20-25; S.E. 178-82. On June 7, 2010, Ms. Eccleston and Mr. Cohen met with Steinberg, Board member Greer, S.E. 168/14-17, and others. Ex. 36; St. 268-69. “We told [Steinberg] about the swastikas, we told him about the name calling. We told him about the insidious Holocaust jokes. We showed him the pictures [on cell phones] of four or five or six of the swastikas that the girls [T.E. and O.C.] had taken. We told him about being singled out and being bullied for being Jewish. We . . . followed all of that up with they don’t feel safe, they want to go to another school system if you can’t fix the problem.” David C. 46/12-24; *id.* 60/4-20 (reported swastikas, “ashes,” “crispy,” Holocaust jokes). Cohen told Steinberg “you are not handling this intolerance,” asked him to invite groups to school such as the Anti-Defamation League, and to require online classes for the teachers. David C. 42-43. Cohen told (and later emailed) Steinberg about an incident at SUNY Orange (where Cohen worked), where a janitor saw a “little noose on his corkboard,” causing President Richards to invite the NAACP, the Anti-Defamation League, and others; send a letter “to the entire staff”; require all staff “to take online classes about tolerance”; David C. 40, St. 270; invite or initiate four separate investigations; and immediately suspend two supervisors. Ex. 28.

Eccleston/Cohen also asked Steinberg to let T.E./O.C. transfer to Circleville Middle School, but “the only way we could get them there because of our jobs was to have them bused there.” David C. 49-50; St. 271/14-19; B. 269/10-14. Steinberg said “he didn’t know that the

school would pay for that.” David C. 50/5-7; Ex. 29 (email memorializing the meeting: “to[o] costly”). As to the anti-Semitic harassment, Steinberg had no proposals: “it wasn’t that it was three children who were continually making hurtful remarks, but it was different children that were making. So how do you undo the years of inbred prejudice, I don’t have that power to do that.” St. 276; *id.* 277/13-25 (“if you have 30 students doing it [making anti-Semitic comments], how do you handle[?]”). Steinberg’s solution was to give up: “if I couldn’t resolve the issues at Crispell, then I was hoping to move them to Circleville Middle School.” *Id.* 275/22-25; *id.* 286/4-6 (“the best opportunity was to move the girls to Circleville”). More complaints:

- 6/13/11: Winter’s notes: “O[C.] is a dirty Jew,” Ex. 5 (DEF1090); W. 388/12-17. Steinberg informed verbally on 6/13/11, in writing on 6/14/11, with names of perpetrators Ex. 29 (DEF2376) (“stupid disgusting Jew”). **No discipline.** C. 322-23; St. 294-95.
- 6/13/11, Winter’s notes: two students wrote “stupid Jew” in or on a locker. Ex. 5 (DEF1090). **No investigation or discipline.** C. 323/9-21.
- 6/14/11: Cohen email to Steinberg: “Please talk to the girls SOON. They continue to hear slurs on a daily basis.” Ex. 28; St. 284-85. No response. St. 285/13-25.
- 6/14/11: Eccleston email to Winter, Steinberg, Greer, and others: “I have been reporting these issues to you for 3 years and there has been no change.” “[Y]our current system of handling it on a case basis is not working. It has increased to being a daily occurrence.” Ex. 29; St. 287-88.
- 6/15/11: Eccleston email to Winter, Steinberg, Greer, and others: noting fresh acts of anti-Semitic harassment; “We are still waiting for Mr. Steinberg to go speak with the girls.” Ex. 29.
- 6/15/11: A few days after the Holocaust assembly, C.L. (who previously defaced a yearbook with a swastika, with no discipline, Ex. 37, and repeatedly defaced O.C.’s desk with swastikas, with no discipline, O.C. 48/13-25) showed a “swastika made out of pipe cleaner” to T.E., said he would give it to O.C., Winter witnessed the incident, T.E. 95-97; O.C. 56; W. 304/16-18 (substantiated); Ex. 4 & W. 389/24. C.L. is finally disciplined! Exs. 38, 39.¹⁵
- Last week of school: O.C. reported to Winter that a swastika was written near her picture in a yearbook, Ex. 37 (produced by the District); O.C. 84-85. Winter noted who drew the swastika (“drawing by C.L.”), “crossed out the swastika” with a sharpie, Ex. 37; O.C. 85/18-23; W. 393/12-397/18 (substantiated, **no discipline** beyond “speaking with” C.L.).

¹⁵ Winter believed swastika was spelled “schwa sticker.” Ex. 38; W. 200, 309.

On June 15, Steinberg finally responded to the emails, writing Ms. Eccleston: “your expectations for changing inbred prejudice may be a bit unrealistic.” Ex. 30; St. 307-09. Determined to stop further documentation of the District’s legal violations, Steinberg gave Ms. Eccleston an ultimatum: “*If you would like to continue to have a dialogue about what the course of action the district is taking going forward I ask that you or David contact me by phone or in person only. Emails are not for communicating about sensitive issues.*” Ex. 30 (emphasis added); St. 310-11. The ultimatum worked: plaintiffs stopped emailing. S.E. 167/6-14.

On June 17, Steinberg summoned T.E. and O.C. for a meeting. Ex. 31; St. 285. When they asked to go to Circleville, he refused to “pay for a bus.” O.C. 73-78; T.E. 120-21, 177-79; St. 315/24-316/21; B. 269/15-270/4. Steinberg then told Ms. Eccleston the families would “have to pay for a separate bus for the girls and they [the District] weren’t willing to spend the money to keep them safe.” S.E. 187-88, 189/22-190/14. O.C. and T.E. had no way to get to Circleville without a bus. O.C. 76, 78; T.E. 180.

Steinberg never did get back to Mr. Cohen: never called, never emailed, never addressed any of Mr. Cohen’s concerns, David C. 60/24-61/14, and did “not one thing I asked for, not one thing [o]n that list.” *Id.* 56/15-23; St. 279/15-20. “[B]etween June 2011 and March 2012,” when the lawsuit was filed, *no one* in the school system did “anything to address this anti-Semitic . . . bullying [my] children were experiencing”: “nobody called me back, nobody followed up and the same abuses kept happening again and again and they are not better.” David C. 61/4-14. “[E]ven with three Jewish families bringing a lawsuit against the school district, either they don’t see it or they don’t care, but either way it doesn’t matter . . . it’s still there.” *Id.* 61/19-24.

At the end of 2010-11, the District promoted Winter to PBES principal. W. 23; B. 55.

iii. Eighth Grade (2011-12)

Mr. Mummery was the new assistant principal in eighth grade, and Boyle, still the principal. T.E. 181; B. 20. Anti-Semitic slurs continued “on almost a daily basis,” swastikas were “everywhere” in the school, “people would salute Hitler all the time.” T.E. 196-97; S.E. 194/22-196/14, 197/2-13 (same). T.E. told Boyle about a swastika in the girls’ bathroom, he claimed not to see it, but when T.E. “went into the bathroom, it was still there.” T.E. 196-97; S.E. 199/14-20. In December 2011, after a student repeatedly hit T.E. with a hockey stick, fracturing her thumb, T.E. 193/14-16, Ms. Eccleston told Mummery that “anti-Semitism and the bullying has been going on for multiple years now, my daughter is not being kept safe in school.” S.E. 217/4-9; *id.* 218/2-5 (Mummery’s response: “how does she know that T[E.] didn’t slam her own hand into the locker to frame her[?]”).

On **January 23**, 2012, during T.E.’s “math midterm,” two students “sat there saluting Hitler.” T.E. 213. T.E. told Mummery. *Id.* 216. Mummery neither investigated nor disciplined anyone.¹⁶ On **January 24**, a student sitting in the front said in the middle of “health class”: “What’s the difference between Jews and cub scouts, cub scouts come home from camp.” *Id.* 216-17. T.E. told Mummery. *Id.* 218. Mummery substantiated what he calls “the joke,” Mummery Aff. ¶ 20, gave two hours’ lunch detention, *id.* Ex. E, failed to note the anti-Semitic nature of the incident (“culturally insensitive”), and didn’t check off the “bias-related” box, *id.* On **January 25**, a student threw a coin at T.E. in the hallway. T.E. 220-28. T.E. reported it to Mummery, *id.* 230, told her mom she “was going to have a nervous breakdown,” *id.* 234, went to Mobile Mental Health, S.E. 200/15-201/16, and dropped out of school, T.E. 235-36.

As for O.C., she repeatedly asked *two* teachers to remove a swastika from a poster of President Obama *on a classroom wall*, without success. O.C. 103-04; T.E. 269. O.C. then had

¹⁶ Mummery Aff. ¶ 18. He falsely denies receiving the complaint. *Id.*

to report the Obama swastika to Mummery *twice* before he removed it. O.C. 104/14-16; Mummery Aff. ¶¶ 6-7 (found swastika on President’s photo on the classroom wall); B. 29/19-21 (substantiated); Ex. 40; B. 40 (no discipline or evidence of investigation). No action “[was] taken of any kind” after the Obama swastika, other than removing it. B. 42/7-14. O.C. also reported to Mummery that E.P. defaced her locker with anti-Semitic graffiti. O.C. 90-93; T.E. 277. Mummery removed the swastika with a “spray bottle and cloth,” O.C. 92, and allegedly gave E.P. 5 days’ (*i.e.*, hours’) lunch detention and some homework. Mummery Aff. ¶ 10.

iv. Ninth Grade (PBHS/2012-13)

By ninth grade, T.E. was gone. Ninth grade for O.C. was another anti-Semitic nightmare. *See, e.g.*, O.C. 211/24-212/5 (“F’ing Jew”), 213/13-215/3 (violence/swastika), 215/13-216/7 (swastika on cafeteria door for five years), 217/10-218/4 (“ethnic slurs,” “every day I will hear ‘Jew’ in the hallway,” “Holocaust jokes, people calling other people Jew”).

C. D.C./Mr. Cohen’s Complaints to Boyle, Steinberg, Carbone, Brush, Greer, Teachers and Bus Drivers *All Go Nowhere*

D.C.—O.C.’s older brother—also pleaded repeatedly for help, to no avail. One of the first anti-Semitic incidents D.C. experienced was in sixth grade. A girl who “bull[ied D.C.] constantly” on the school bus yelled “‘F’ing Jew’ on the bus.” D.C. told his father, who reported the slur to **Boyle**, Crispell’s Principal. D.C. 29/2-24; David C. 10-11. Mr. Cohen told Boyle that D.C. “had been the butt of *many* Jewish jokes,” and that the “fucking Jew” slur “has crossed a very severe line.” *Id.* 10-11. Mr. Cohen told Boyle: “because of what my son had been going through with *multiple* kids over the course of that year, with all the Jewish jokes and some of the slurs, that the intolerance wasn’t just one kid, it was *a lot of kids*. I wanted to know what he was going to do with it on a general level, not just on an individual basis.” *Id.* 13/7-15 (emphasis added). When Boyle replied “it would be handled on an individual basis . . . I said that this isn’t an individual thing, this is systemic.” *Id.* 13/3-6. Mr. Cohen also reported to Boyle that D.C.

“was hearing the Jewish jokes from the older kids on these bus rides.” *Id.* 14. A few days later, Boyle told Mr. Cohen that “somebody spoke” to the girl. “I said . . . well, that’s one kid. What about all the other kids that are making Jewish jokes, how will that be handled? There was no response to that.” *Id.* 15/7-20. Boyle never did “get back” Mr. Cohen about the litany of complaints of Jewish slurs and jokes on the bus and elsewhere by multiple students, or “do *anything* to address the systemic anti-Semitism in the school.” *Id.* 57/24-58/13 (emphasis added); B. 309/7-10 (“Q: Did you ever make any suggestions to T.E., O.[C.] or their parents about how to deal with anti-Semitism at Crispell? A: I don’t believe I did.”).

As to the individual “F’ing Jew” incident, Boyle also failed. Defendants present no admissible, non-hearsay evidence that the girl who said “F’ing Jew” was disciplined at all (or even spoken to): no disciplinary referral, no document, no testimony of anyone with personal knowledge. As D.C. recounted, “Mr. Boyle . . . called me down to his office and when I attempted to engage him in conversation about the anti-Semitic remark that was made, he dismissed it so that he could reprimand me for playing video games in the computer lab, when all the other students were also playing video games in the computer lab.” D.C. 29/10-18. Boyle didn’t bother even to *ask* the victim (D.C.) about this “F’ing Jew” incident, much less any of the many other anti-Semitic incidents Mr. Cohen reported. Instead, Boyle singled D.C. out for playing a video game. *Id.* Boyle’s response devastated D.C. “[A]fter seeing that Mr. Boyle didn’t really care or couldn’t really do anything about it, I sort of had a distrust for the system or realized that the system had apathy towards me, so I didn’t know who to talk to and I thought I was on my own,” D.C. 41/16-25, which, indeed, D.C. was.

D.C.’s complaints of swastikas in school fared little better. D.C. reported swastikas in school textbooks to **teachers** “a couple of times.” D.C. 20/11-20. “[I]t was made part of like a game, like you would be on page 119, it would say go to page 134, and you follow the pages and

at the end it would be a swastika with like die Jew or something like that.” D.C. 16/8-13.

Neither the teachers nor anyone effectively addressed the problem: swastikas remained “in a majority of the textbooks.” *Id.* 19/6-7.

In eighth grade in Crispell, “there was a giant swastika in the [boys’] bathroom, probably a foot in diameter,” which D.C. “brought . . . to the attention of [his] eighth grade science teacher, **Miss Schumaci**.” She saw it, it was removed, “but a couple days after that the swastika was back.” This time, D.C. told his “Spanish teacher, **Mr. Charchan**.” D.C. 11/24-13/15. D.C. was unsure if that particular swastika was removed, but remembered “there were still swastikas in the bathroom,” *id.* 13/9-15, which no one removed. There is no indication that anyone investigated or disciplined anyone as a result of the repeated swastikas in the boys’ bathroom, much less took any systemic action to address the problem. D.C. got the message. “[A]fter alerting the teachers in eighth grade and seeing their – the inability for them to correct the problem on a major scale made me feel overwhelmed, like I couldn’t do anything. So I did not report a lot of swastikas because I felt like I was fighting a losing battle and I couldn’t make a difference.” D.C. 20/2-10. In any event, “[t]here are swastikas *everywhere* in the high school and in the middle school, and the teachers see them all the time. It would be *impossible* for them to miss the swastikas, and I figured that they either don’t care or they turn a blind eye, so I don’t report swastikas anymore.” D.C. 11/13-19 (emphasis added); *id.* 15/25-16/3 (“It’s very hard not to see a swastika. You have to actually actively avoid them”);

D.C.’s complaints about anti-Semitic harassment on the bus also went nowhere. In seventh grade, a group of students on the bus would sing a “white power” song “about stomping on the niggers and killing the Jews and washing off their blood.” D.C. 72-73. When D.C. complained to the **bus driver**, “not only did nothing happen . . . they found out that it was me and it got worse, the harassment.” *Id.* 73/6-13. The white power chants on the bus continued.

Id. 74/5-16. The ninth grade bus was even worse: D.C. was repeatedly slapped in the face, called ashes, told he was going to burn in an oven, yelled and cursed at, all “done very, very loudly and very confidently,” and for the school bus driver, was “really hard to miss.” D.C. 69-71. But that **bus driver** also did nothing and the harassment continued “throughout ninth grade.” *Id.*; D.C. 86/2-5. In the cafeteria (and the bus), “a lot” of students openly and regularly “heil[ed]” each other and did Hitler salutes: “I can’t really imagine . . . the **monitors** or the **security guards** in the school missing it.” *Id.* 85/18-87/5; *see id.* 107/2-5.

In tenth grade trigonometry, A.O. and another student were “constantly making anti-Semitic jokes in the middle of class,” and picking on a Jewish student (E.B.). D.C. 92/2-20. A.O. was “in the first row,” “two feet” from the math teacher, **Ms. King**. *Id.* 93. D.C. told A.O. in the middle of class: “If you don’t stop the anti-Semitic comments, I will hurt you and that’s a promise.” Ms. King witnessed the incident, but “just went back to teaching.” *Id.* 93. A.O.’s anti-Semitic taunts in math class continued. *Id.* Finally D.C. got up in the middle of class, “marched to the front of the room”: “I stood in front of his desk, I ordered him to get up and he didn’t, he sat back in his seat. . . . This is all in the middle of class. I said ‘A.O. has been making anti-Semitic remarks,’ to which [Ms. King] replied – she just said ‘A. (A.O.), stop it.’ Then she looked at me and told me to sit down.” *Id.* 93-94. Later, A.O. spoke with Ms. King “about how he could kick my ass.” *Id.* 94. Also during King’s math class, “A.C. called A.O. a fucking Jew at the top of his lungs,” then “looked at [D.C.] and he smirked,” all without consequence. *Id.*

D.C. reported “some of the anti-Semitism that happened at the school” to his social studies teacher, **Mr. Nathe**, D.C. 56/22-57/7, again without any apparent consequence. On May 31, 2011, while D.C. was in 10th grade, Mr. Cohen wrote to Superintendent **Steinberg**, Assistant Superintendent **Carbone**, Principal **Boyle**, Assistant Superintendent **Brush**, and Board member **Greer**, that D.C. spent an entire year in high school “in fear” of students “on his bus who pushed

him around while chanting ‘White Power’ and telling him that he should have died in the Holocaust. . . . I am at my wits end and am waiting for something to be done about it.” Ex. 27; C. 281-82; St. 253-54; B. 252-53. But, even as D.C. remained in high school, *none* of these administrators—Steinberg, Carbone, Boyle, Brush, Greer, or anyone—did anything about it. No one did “any investigation,” C. 285/15-17, or “interview[ed] anyone,” *id.* 286/4-7, 289/15-18, much less take any action (disciplinary, preventive, systemic, etc.) to address the problem. B. 253/17-22 (Boyle did nothing). “[N]obody called me back, nobody followed up and the same abuses kept happening again and again and they are not better.” David C. 61/4-14. Indeed, Steinberg doesn’t even consider *this* conduct (*inter alia*, telling a Jewish student for an entire year “he should have died in the Holocaust”) to be “bullying.” St. 259/23-261/5.

Tormented in school, and abandoned by every authority figure to whom he and his father reported anti-Semitic conduct, D.C. fell apart. D.C.’s distress was evident to school nurses and counselors: frequent “anxiety attacks and panic attacks,” and visits to the nurse’s office. D.C. 50-52. At the end, D.C. came to “believe that no matter where I went, this is what life was like and this is how people would treat me, and that people were just generally ugly or intolerant or hateful.” D.C. 42/21-25.

III. DEFENDANTS’ SYSTEMIC FAILURE TO ADDRESS ANTI-SEMITIC HARASSMENT IN SCHOOL

A. Defendants’ Failure to Address/Investigate/Discipline Anyone for Anti-Semitic Graffiti All Over the Schools

Notwithstanding defendants’ protestations on this motion, they were well aware of anti-Semitic graffiti all over the schools. T.E. and her mother told Fisch about the slide and the planners, Exs. 14-19; F. 46/24-49/14, 67/2-5, 152/2-5, 281/5-11; C. 92/5-13; T.E. 43/5-12; S.E. 53/18-54/9, 57/17-24, 73/13-74/4; T.E. and O.C. repeatedly complained about and actually showed Winter, Boyle and other school officials swastikas in desks, on lockers, in bathrooms,

yearbook pages, on a poster of President Obama in class, and elsewhere, *e.g.*, T.E. 269; O.C. 84-5, 121, 127-28; W. 105, 188/23-189/4 (Winter saw swastikas on multiple school desks, in boys' bathroom, in yearbook). Ms. Eccleston and Mr. Cohen complained in writing and in a meeting to Steinberg, going so far as to show cell phone pictures of swastikas in school, David C. 46/12-24. Yet (excepting E.P.), not a single person was disciplined as a result of these complaints, and in most cases, defendants did not even investigate who was responsible. *See e.g.*, Ex. 37; C. 281/12-15; W. 425/9-426/7; F. 162/12-19; C. 307/10-13, 306/17-21. This, even though drawing a swastika on real property is a Class E Felony in New York State. N.Y.P.L § 240.31(3).

In addition to all of these specific and direct complaints, it is the universal testimony of all the plaintiffs and the two third-party deponents that anti-Semitic graffiti was pervasive in Crispell and the High School: "impossible . . . to miss." D.C. 11. Defendants' claims to the contrary, particularly on summary judgment, are incredible. *See, e.g.*, W.H. 169 ("If Mr. Hopmayer testified that his entire time in Pine Bush High School he's only seen one swastika that was pointed out to him, on a door near a cafeteria, does that strike as you absolutely ridiculous? A. Yes."); *id.* at 204/8-17, 114, 165-67, 192-93; David. C. 23/24-24/10; Ex. 10 ¶ 9; T.E. 268/8-19 ("if you were a principal, vice-principal, you would see these swastikas all over [Crispell]"; "They were very obvious swastikas"); *id.* 278/25 ("they were everywhere"). D.C. 15/25-16/3 ("You have to actually actively avoid them").

T.E., O.C., and others also took photos of some anti-Semitic graffiti in Crispell (girls' bathroom, boy's bathroom, T.E.'s Spanish textbook, etc.). Ex. 7; T.E. 237-50, 258-61 (describing photos); O.C. 128-52 (describing more photos). Winter saw anti-Semitic graffiti in Crispell, but failed to document it. W. 423/9-17. But school security did take pictures of anti-Semitic graffiti all over the high school (walls, desks, bathrooms, rows of swastikas, swastikas on a Star of David, "KKK," "white power"). C. 59/24-80; Ex. 6 (school security photos); Ex. 11

(chart summarizing photos); C. 60/8-12 (authenticating photos); *id.* 79/11-18 (authenticating #1-13 of Ex. 11); St. 325/21-326/7. All of these photos were “likely” shared with “building administration,” which included PBHS Principal Hopmayer. C. 54/6-21. Yet no defendant *investigated* or *disciplined* a *single* student for *any* of this hateful graffiti on school property. C. 69/21-70/5, 66/19-67/4, 69/10-20, 71/22-24, 75/20-76/4, 76/16-25.

Defendants’ failure to address, investigate, or discipline anyone for anti-Semitic graffiti on school walls, lockers, desks, books, yearbooks, etc. was the product not merely of individual decision making, but District-wide policy and practice. For example, the District had no “policy” or “training” requiring security to report anti-Semitic or other racist graffiti to administration. C. 56/15-57/2. It had no “written policy or guideline or procedure to staff or to security about what to do if racist, anti-Semitic or other graffiti is found in school.” C. 57/11-16; 89/13-19. The District did not even “document[] when and where anti-Semitic graffiti is found” in school. C. 65/20-66/2.¹⁷ And at no point did “the district or any employee of the district send any kind of letter, E-mail or communication to parents or students about anti-Semitic graffiti at any time.” C. 85/19-23.¹⁸

Given the above, it is unsurprising that swastikas were all over the schools, and often remained on school property ‘all year long,’ W.H. 170, or even, for ‘five years,’” O.C. 215. Only *after* this lawsuit was filed did defendants “start[] painting over walls” to address anti-Semitic graffiti all over the schools. D.C. 21-22, 131, but even that effort was halfhearted at best. *See, e.g.*, W.H. 152-54; D.C. 23/12-24.6; W.H. 152-54; O.C. 215/Ex. 13 (cafeteria door

¹⁷ Halfway into depositions in this case, the District decided, in a non-written “procedure,” that it should start documenting such graffiti, only in the high school. *Id.* 64-66.

¹⁸ In contrast, Boyle sent a letter to all parents and students about “inappropriate graffiti in the girl’s bathroom near the cafeteria” which “could be interpreted as a bomb threat,” but was later deemed “non-threatening.” Ex. 42; C. 85.

swastika); David C. 61/14-18; C. 109-110; Ex. 41 (photo of scratched out swastika; other graffiti not scratched out).

B. Non-Existent or Inadequate Investigation and Discipline for Anti-Semitic Bullying/Harassment

None of the defendants expelled anyone “for any anti-Semitic conduct, harassment or bullying,” even once. C. 143; W. 432. Steinberg never held a single superintendent’s *hearing*, much less gave a single superintendent’s (5 or more day) suspension, “for any anti-Semitic conduct, harassment or bullying.” C. 137/16-19, 140, 136; St. 173; B. 162/23-163/12. All of the defendants repeatedly imposed minimal or no discipline in individual incidents of anti-Semitic bullying/harassment/conduct. Pl. Counter 56.1 #9.¹⁹ In twenty years, excepting K.L.’s so-called “recess detention,” Fisch never gave any student “any discipline at all” “for anti-Semitic harassment, conduct or bullying.” F. 143/23-144/11.²⁰

With rare exception, defendants did not require anti-Semitic bullies to undergo sensitivity training, do any particular homework, or apologize to the victim. C. 313-14, 334; W. 306/22-307/4 (Winter thought about “tolerance education program” for repeat offenders, but did nothing); W. 404/11-15 (never required tolerance training as part of discipline); B. 176/4-11, 178/25-179/12 (“Jew dodgeball,” the pizza Holocaust joke: no apology, homework, sensitivity training); B. 211/15-216/9 (same for holding student down/swastika on face). No one was required to do community service. B. 214.

¹⁹Also: 3/8/11, Winter’s notes: student K.R. said “we should throw those coins at him to see what happens”; **no discipline**, Ex. 5 (DEF 1083), C. 319/4-20. 6/19/8: “he used me as the joke of the class . . . He tries to gain popularity by being racist to Jews . . . He knows I am part Jewish . . . Today he . . . smacked the stuff off my desk. . . He picks up a book and throws it at my back.” Discipline: “Student was **sent home**.” No apology required or sensitivity training given. Exs. 43, 44; C. 330-34.

²⁰ Fisch claims he is unaware of other anti-Semitic incidents in PBES other than the many described above, but Fisch destroyed “[a]ll of the disciplinary files from 2011, 2010, 2009, 2008, 2007, 2006, 2005 and before,” F. 237/8-14, and all of his notes, *id.* 241-42; does not “remember every discipline,” *id.* 240/22-24; and at his deposition, forgot much of the anti-Semitic harassment described *supra*, until confronted with documents that had *not* been destroyed, *e.g.*, *id.* 184, 294.

Investigations were often minimal at best, or non-existent. *See supra* & F. 236/11-14; C. 265, 276/11, 286/4-7, 299/13-16, 347/24-348/6; B. 181/25-187/19, 190/22-192/5; D.C. 29/10-18. The District had no “policy, procedure or guideline requiring administrators to speak with all the witnesses to an alleged bullying incident,” C. 342/18-23, though they *should* have interviewed “everyone involved,” including “witnesses,” the victim, and the perpetrator(s). St. 88/24-90/5.

C. Defendants Did Not Discuss Anti-Semitic Bullying or Harassment

The School Board makes policy for the District, and meets twice a month. C. 9/23-25; St. 38-39; F. 68. Steinberg attended every Board meeting, *id.* 40, and created agenda items for the Board he thought “particularly important,” *id.* 46/15-21. All of the individual defendants (and Carbone) attended Board meetings, St. 40; C. 11/16-19; F. 70/18-22, 75; B. 43-44; had the opportunity to speak to the Board, St. 42-43, F. 78-80; to “present reports to the board,” St. 43, and to ask Steinberg to place items on the agenda if “they had something that they wanted to share with the board,” *id.* 44. But in his entire career, Steinberg never “raise[d] the issue of anti-Semitism in Pine Bush Schools in any board meeting.” *Id.* 52/9-12; 53/1-10. Nor did Boyle, Winter, Peters, Hopmayer, or Fisch ever mention “the issue of anti-Semitism at any Board meeting,” *id.* 54/18-55/6; F. 71/19-72/4, W. 279/6-11, 281/13-19; B. 46/14-47, or ask that Steinberg place anti-Semitic harassment or bullying on any Board agenda, St. 56/13-57/4.

Steinberg had biweekly “cabinet meetings” with Carbone and principals including Fisch, Boyle, and Hopmayer, high-level meetings where principals were “free to raise whatever issues they think are of importance in the school.” *Id.* 57-60; C. 120/19-20. No one raised “the issue of anti-Semitism in Pine Bush schools” in any meeting. St. 60/8-16; B. 60/25-61/12. Steinberg had monthly “instructional council meetings” with Carbone, Fisch, Boyle, Hopmayer, and others to discuss curriculum, but never “discuss[ed] how to deal with anti-Semitism in Pine Bush schools.” *Id.* 60-63, 63/7-11; C. 120/23-24; B. 66/17-70/7. Steinberg had biweekly “agenda

review meetings” with the President and Vice-President of the Board, but never “raised the issue of anti-Semitism in Pine Bush Schools.” St. 65/9-12, 64-65. Steinberg had “leadership team meetings” four times a year with Carbone, and occasionally Hopmayer and Boyle. They discussed “toilet paper” and “[g]um chewing,” St. 65/13-14, B. 62/21-65/19, but never “raise[d] . . . any questions relating to anti-Semitism in Pine Bush schools.” St. 69/10-14, 65-69. Steinberg had monthly “administrative meetings” with all administrators including Boyle, Peters, Winter, Hopmayer, Fisch, and Carbone to discuss “whatever issues of importance are facing Pine Bush Schools,” St. 72/20-73/6; C. 120/17-18, but before this lawsuit, no one “[brought] up the topic of any anti-Semitic incident in any Pine Bush school,” St. 73/12-16, 78/17-21; B. 48/23-54/6 (no mention, except that lawsuit would “come to the [news]paper”). Steinberg had 12-16 “committee meetings” a year, including “code of conduct,” “professional development,” and “professional performance review” committees, *id.* 83/10-12, 79-80, but no one “raise[d] the issue of anti-Semitism in Pine Bush Schools in any committee meeting,” *id.* 80/7-20.

In over *five hundred* standing meetings over five years, with the Board, with principals, assistant principals, including the individual defendants, *id.* 84/15-18, Steinberg could not remember anyone raising the issue of anti-Semitism in Pine Bush schools *even once*. *Id.* 52-84; C. 122/21-123/5, 126/5-12, 127/3-128/3.

D. Defendants Made No Systemic Effort to Address, Much Less Eliminate, *Anti-Semitic* Bullying or Harassment

Given that none of the defendants *discussed* anti-Semitism in Pine Bush schools in over 500 Board meetings, cabinet meetings, instructional council meetings, agenda review meetings, leadership team meetings, administrative meetings, or committee meetings, defendants made no systemic effort to *address*, much less combat, anti-Semitic bullying or harassment in the District. There were no “anti-bullying efforts in Pine Bush schools specifically addressing anti-Semitism in the schools before June 2011.” St. 234/21-235/3. “We had no programs that addressed

specifically anti-Semitism.” F.147/2-8; *id.* 194/3-4 (“You know, you need to stop focusing on the anti-Semitic piece of this.”); *id.* 304/23-25 (“there was no specific program geared towards dealing with anti-Semitism”); B. 47/19-23 (no “anti-bullying efforts targeted towards anti-Semitism,” except one Holocaust assembly); B. 319/18-25.

For example, no “district employee ever sent a letter to parents or students about anti-Semitic conduct in any Pine Bush school,” C. 86/9-13; St. 264/22-265/3; W. 432/9-12; B. 161, met with parents as a group to discuss anti-Semitism, F. 235; W. 431/14-432/8; or did a survey to study anti-Semitism (or bullying) in the schools. St. 346; W. 420/14-18; F. 234; B. 327/8-13. Administrators and teachers were not trained “about anti-Semitic bullying issues.” W. 172/7-14; F. 236, 301/19-302/6; B. 195-96, 301/18-302/13. No one set goals to reduce anti-Semitic or bullying incidents in school. F. 235/8-236/2, 216/7-217/15; W. 431/4-9; B. 327/14-19.

PBES never had “an assembly about anti-Semitism,” a class about anti-Semitism, or a DARE program about anti-Semitism. F. 195, 296/21-297/21. For twenty years, Fisch sent weekly “bulletins” to all PBES staff, about anything “important for staff to know,” F. 214-215; Ex. 45—hundreds of topics, including library books, chorus, etc.— but not once about “anti-Semitism,” or “anti-Semitic graffiti, comments, conduct, bullying harassment.” F. 216/7-217/15; Ex. 62, (DEF #897-99) (example of bulletin).

None of the schools had any “school assembly or announcement” about “anti-Semitic harassment or conduct or bullying in the schools.” W.H. 171-72; Ex. 22 (DEF2361, #1); St. 233/14-22 (no assembly addressing anti-Semitism before June 2011); St. 264/14-21 (no assembly “where anyone said anti-Semitism will not be tolerated”); W. 123/16-25, 187/17-20 (“Q: [D]id any of the bullying assemblies that you had talk about anti-Semitic bullying? A: No.”). On May 12, 2011, at plaintiffs’ urging, Winter finally wrote DOJ, admitting Crispell never had an assembly addressing discrimination or hate crimes, but expressing a willingness to

dabble. Ex. 21 (“We have conducted assemblies on bullying etc., but would like to *look into* something that *possibly* addresses discrimination and ‘hate crimes’ specifically.”) (emphasis added); W. 256-65 (describing email); W. 276/12-19 (other than Holocaust assembly, “Did you take any other steps to address the anti-Semitic issues that were going on in Crispell in 2010-11? A: No.”); *id.* 323/16-24 (same).

The sum total of defendants’ efforts to address anti-Semitic harassment on a systemic level: (i) a single Holocaust assembly, for one 7th grade class, only at the repeated urging of Ms. Eccleston, Ex. 22 (DEF2361, #1); St. 227/2-5; B. 47/19-23, 234/13-16, during which students made fun of the speaker, no one addressed anti-Semitism in the school, and soon after which students committed more anti-Semitic acts; and (ii) a Holocaust speaker requested by the teacher of a 10th grade elective, who spoke once in the library to that class and to other 10th graders who happened to be free in that period and decided to attend. St. 232/17-233/22, 281/9-282/16.

Even defendants’ alleged generalized anti-bullying efforts are questionable: in almost three years in the High School, S.H. knew of no “anti-bullying training or workshops,” “assemblies, “discussions,” “classes,” or “anything relating to anti-bullying.” S.H. Dep. 61-62. And not once did “anyone in the Pine Bush School District ever send a letter to parents saying if your child engages in bullying, these will be the disciplinary consequences.” St. 279/2-9.

E. The Code of Conduct and Teacher Handbook

The District had Codes of Conduct from July 2005 (Ex. 46), July 2007 (Ex. 47), and July 2012 (Ex. 48), C. 128, approved by the Board, *id.* 129; F. 252. Steinberg, Hopmayer, and Boyle helped draft the 2012 Code. St. 39; C. 120. Fisch reviewed some of the Codes before they were approved. F. 259. Carbone sat on the Code of Conduct Committee since 2000/2001. C. 128/9-14. Each Code has 12 levels of discipline, from oral warning to long-term (5 or more day)

suspensions. *See, e.g.*, Ex. 47 at 14; F. 254-56, 257; C. 132-34 (describing different levels of discipline).

The word “bullying” did not appear in the Code of Conduct until 2012, C. 130-31; St. 257-58; B. 112-13, 188/3-24. Even then it was included only because an act of the New York State legislature required it, C. 131, and even then, Winter had no idea it was there, W. 52/22-25, and Steinberg had no idea what it meant, St. 250/23-251/7, Pl. 56.1 #33. Though administrators were trained to impose minimum, “consistently enforced” discipline for bullying by students, Ex. 59 (DEF #736) (recommending “clear statement of consequences” for bullying), Ex. 58 (DEF#725) (“Clearly outline the consequences for the bully”; must be “consistently enforced”), defendants had and have no “minimum discipline” for “bullying” or for “anti-Semitic harassment.” C. 335/16-23; W. 241/5-13 (no “zero tolerance” “policy”), 433/20-25; B. 115/13-21. For example, there is “no minimum” discipline “for putting a swastika on a desk or locker or bathroom wall.” C. 336/4-8. None of the three Codes of Conduct required any discipline at all for bias-related (or non-bias related) harassment or bullying. Exs. 46, 47, 48 *passim*.

The District treats harassment and bullying—anti-Semitic or otherwise—as trivial. The 2012 Code recommends a minimum 1-5 day out-of-school *suspension* for “smoking” a cigarette, 1-5 day in-school *suspension* for “leaving building,” and 1-5 day *detention* for “tardiness,” but only “a *warning*” and/or “conference with student” for “harassment, discrimination and bullying.” Ex. 48 (emphasis added), last 2 pages; C. 339-44; St. 332/17-333/9. The same was true of the 2007 Code of Conduct, Ex. 47, bates # 3059-60; F 265. “Warning” is the “lowest level of discipline out of 12 levels.” F. 265/18-20; B. 162.

Nor is anti-Semitic or bias-related harassment considered a “major” offense under the District’s Teacher Handbook. Ex. 69 (DEF #4240); C. 89/20-23. Unlike other offenses, bias-related offenses are not required to be reported to a school administrator. Ex. 69.

F. Defendants' Failure to Document, Track, Monitor, or Report Anti-Semitic or Bias-related Bullying/Harassment/Conduct

The District does not require teachers/staff to document anti-Semitic harassment, bias-related incidents, or Code of Conduct violations. First, teachers can “handle that on the spot,” and choose *not* to report a Code violation to anyone. C. 153/21-154/3; *id.* 152/17-22 (no District “policy, procedure, or guideline”), 176/11-16, 177/11-18 (no requirement for “bias-related” incidents); W. 171/22-172/3, 375/10-25; B. 124/18-125/2. Second, even if staff choose (for whatever reason) to report an anti-Semitic incident, they are not required, and often fail, to report that an incident is anti-Semitic: *e.g.*, they can report “rude comment[.]” instead of “die Jew.” C. 162-69; Ex. 49 (non-specific discipline referral forms); Ex. 50 (example of non-specific Cross Point disciplinary summary); W. 419/14-18 (no requirement to mention anti-Semitism when describing incident); W. 417-419 (Winter unable to determine whether disciplinary incidents involved anti-Semitism); B. 130-31 (same). The District has no “written procedure, policy, or guideline on how to fill out a discipline referral form.” C. 159/10-13; St. 337/24-338/4. Third, as noted *supra*, many or most complaints of anti-Semitic harassment are not investigated at all, much less result in a disciplinary document. *See, e.g.*, B. 103/18-25. Fourth, defendants repeatedly destroyed disciplinary and other records of anti-Semitic complaints, *see, e.g.*, F. 237/8-14 (all disciplinary files before and up to 2011 destroyed); *id.* 275/16-277/3; P. 110-15 (3 years of notes destroyed); T.E. 159 (Winter); B. 71-74/16 (shredded notepad every year).

As a result, defendants have *no idea* “how many times teachers and staff . . . saw incidents of anti-Semitic harassment and bullying.” C. 154/4-10; *id.* 169/24-170/2 (“There is no way to be specific about the number of students that would have been written up for anti-Semitic conduct.”); B. 131/22-132/3, 133/9-20. The only way is to have “conversations” with every single teacher and “ask[.] them specifically,” relying on their memory. C. 154/8-10. But no one asked:

- Q: Did the district ever request any administrator to track anti-Semitic incidents in any school?
- A: No, not that I know of.
- Q: Did the district ever request administrators track bias-related incidents in any school?
- A: Not that I am aware of.

C. 346/20-347/3; W. 419/8-18; B. 154/23-155/20. Even as to the much smaller universe of anti-Semitic incidents in school where (i) a teacher decided to write a disciplinary referral; *and* (ii) decided to mention the anti-Semitic nature of the incident; *and* (iii) the District did not destroy the record, defendants did not and could not track anti-Semitic harassment or bullying. For example, the District identifies and tracks many types of student misconduct with its own “local codes”: being “late to class,” “cheating,” “pornography,” “gambling,” and others. Ex. 51 (code chart); C. 244/14-245/8; F. 227-28. But there is no code for harassment, bullying, bias-related incidents, or anti-Semitic incidents. C. 245/11-22; F. 231 (“Q: Is there any code for harassment or bullying? A: Well—No.”), 232/20-233/2 (no way to track anti-Semitic incidents using the codes), 231/17-22. The District offers no written training, policy, procedure, or guideline “on when and how to fill out local codes.” C. 242/24-243/8. The local code for anti-Semitic harassment could be just about anything. *Id.* 245/23-246/5.²¹ The District could run a report for “cheating” or “gambling” with a click of a button, *id.* 251/18-252/8, but not for “incidents of harassment and bullying,” “bias-related incidents,” or “anti-Semitic incidents.” *Id.* 252.

Defendants never attempted to compile statistics on bias-related or anti-Semitic incidents in school. C. 253/19-24; St. 344; B. 139. (Not “any way to figure [it] out,” even if they wanted to. St. 344/23-345/3.) No defendant retrieved (much less analyzed) discipline forms wasting away in school basements. C. 255-57; B. 82/16-87/14. Steinberg had no idea how many anti-

²¹ There is complete confusion among defendants concerning the appropriate local codes for harassment, bias-related incidents, and bullying. *See* F. 230-32 (could be code 221, 222, 226); C. 246-251 (perhaps code 222, 226, or 229); St. 341-42 (221, 222, 226, 228, 229); W. (226).

Semitic incidents occurred in the District: “I don’t have any records. We don’t track particular anti-bias crimes.” St. 13/8-14/2. Nor did Steinberg “ever attempt to learn.” St. 344/8-22.

In addition to haphazard and incomplete documentation, no tracking, no statistics, and total ignorance as to the number of anti-Semitic and other bias-related incidents in their District, defendants violated their reporting obligations under New York law. Exs. 72-74. Starting in 2006-07, the District was required under New York law to report violent and disruptive incidents (“VADIR”). Ex. 52; C. 185-86. VADIR requires reporting of every incident of “intimidation, harassment, menacing *or* bullying behavior and no physical contact.” Ex. 52, at 2 of 4 (#10); Ex. 51 (“IHMB”); C. 186-87, 244/17-20, which includes “engaging in verbal or physical conduct that threatens another with harm, including intimidation through the use of epithets or slurs involving race, ethnicity, national origin, religion . . . that substantially disrupts the educational process,” Ex. 52, at 2 of 4 (#10), including “anti-Semitic epithets or slurs,” C. 188/9-13. “Incidents involving intimidation, harassment, menacing or bullying behavior *are reportable* if” the student receives a “suspension,” or “are the subject of a written or oral complaint” to a school administrator or observed by an administrator. Ex. 52, at Q&A 10-11. If a suspension, the incident must be reported in category 10; if a complaint but no suspension, the incident must be reported in a summary section on the VADIR form. *Id.* 11; Ex. 53 (sample VADIR form: category #10 on p.2, summary section is #20 on p.3). All “bias-related” VADIR incidents must be reported as “bias-related.” Ex. 52, 4 of 4 (defining “bias-related”); Ex. 53, at 3 (“bias related” box on VADIR form); Ex. 35 (example of disciplinary referral form with “bias related” box at bottom right); C. 235/2-12 (bias acts include anti-Semitic “acts,” “comments” and “slurs”).

But the District has no written “policy, procedure, or guideline” concerning “how to fill out VADIR codes on discipline referral forms,” C. 197/4-9, nor did administrators have “any idea” when to fill one out, B. 143/4-144/7. The District has no oral or written policy,

guideline, procedure, or any training for anyone, on when to fill the “bias-related” box on disciplinary forms. *Id.* 197/10-198/2; St. 189/6-13; W. 410/10-13; B. 141/3-18. Not *once* in the history of the High School *or* Crispell has any administrator checked off the bias-related box on a discipline referral form, C. 200/22-201/7; W. 410/6-9, 438/2; Ex. 47; W. 313/4 (“I don’t know how to term the bias thing . . . I have never used those boxes.”), 314/23, 438/10-11 (“I’ve never really considered using them.”). PBES didn’t even have a bias-related box. C. 201/8-11. “[T]he district [n]ever reported a bias-related incident in New York State.” *Id.* 231/24-232/2.

After 27 pages of discussion, C. 201-28, Ex. 54, Carbone admitted that “if a student says F’ing Jew to another student in a way that’s intimidating,” “that should be reported in [VADIR] code 10” to New York State. C. 228/7-12. Even by that standard, and by the standard set forth in Ex. 52, the District plainly and systematically violated its reporting obligations. Pl. Ex. 12; W. 411/23-412/13, 439/2-10; B. 154/4-9 (no idea when to use code 10). In 2008-09, 2009-10, and 2010-11, Crispell reported *not one* bullying incident to New York State. Exs. 72-74. The District had a motive to violate New York law: “if you have too many incidents reported to New York State, then a school is labeled a persistently dangerous school.” C. 236/3-7.

The District also violated its reporting obligations to the U.S. Department of Education’s Office for Civil Rights (“OCR”) under Title VI. *See* 34 C.F.R. § 100.6(b). Beginning in 2009-10, the District was required to collect and report data on bias-related harassment, including harassment based on race, color or national origin. Ex. 70 (2009-10 CRDC Questions and Answers). But in the 2009-10 academic year (the only year for which data is available), Crispell reported that “0” (zero) students reported harassment of any kind, including harassment based on race, color or national origin. Ex. 71. Given the numerous incidents of anti-Semitic harassment plaintiffs reported at Crispell in 2009-10, Facts § II(B)(ii); P. 262/8-264/17; 268/19-279/10, 284/21-285/15, 292/20-299/21, Crispell’s report was demonstrably false.

G. The District’s Phantom “Title VI Compliance Officer”

Joan Carbone, the District’s only alleged Title VI compliance officer, forgot at her deposition that she was the Title VI officer, C. 33/21-34/4, until prompted, *id.* 35/12-14; did not know when she became Title VI officer, *id.* 35/17-18; does not appear to know what Title VI covers, *id.* 36/14-16, 43/10-12; and has no “job description that describes [her] role as a Title VI compliance officer,” *id.* 148-49; Ex. 55 (“Defendants are not in possession of a job description for Title VI compliance Officer.”). Her “job duties” supposedly included “responding to *any* complaints that may be brought to [her] attention,” ensuring an investigation if necessary, and “that the complaints are resolved.” *Id.* 37/2-9 (emphasis added). She had plenty of opportunity: plaintiffs often reported anti-Semitic harassment directly to her. Exs. 22, 25, 24, 26, 27

(swastikas, white power, talk of Hitler, Jewish jokes, physical assaults, threats). Yet Carbone:

- Never interviewed T.E., O.C., or D.C. or their parents. C. 347/24-348/6;
- Never “interviewed *anyone* concerning *any* anti-Semitic complaints in *any* of the schools.” *Id.* 348/7-11 (emphasis added).
- Never “discussed anti-Semitic harassment or bullying in any of the Pine Bush schools with Boyle, Peters, Winter, Hopmayer, Fisch and Steinberg.” *Id.* 46; W. 435/23-436/4; B. 327/20-22.
- Failed to attend the Eccleston/Cohen meeting with Steinberg about anti-Semitic harassment, or to learn what happened at the meeting. C. 23/19-24/7.

Carbone’s Title VI role was not made known to parents/students, S.E. 84; St. 347/24-348/9; W. 436/5-8; B. 326/11-23, or even to *administrators*, B. 57/2-9 (“Q: Are you familiar with something called a Title VI compliance officer? A: I have heard of it. Q: Do you know what that means? A: No.”), B. 327/2-7. Administrators were “not trained to report discipline” or “anti-Semitic conduct” to Carbone. C. 135-136/15, 151/15-20. There was no “coordinator dealing with bullying incidents before July 2012,” whether Carbone or anyone else. C. 157.

H. No Services or Counseling to Plaintiffs

The District provided no services or counseling to plaintiffs, as victims of the anti-Semitic harassment, as advised by the U.S. Department of Education. W. 286/15-23; Ex. 1 at 3

“Appropriate steps to end harassment” include “providing counseling for the target”; “A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment”). Often defendants didn’t bother to *meet* the victim, F. 236/11-14; C. 265, 276/8-11, 286/4-7, 299/13-16, 347/24-348/6; B. 181/25-187/19, 190/22-192/5; or if they did, they failed to discuss the harassment, D.C. 29/10-18, much less offer counseling.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if defendants show there is no genuine issue of material fact and they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Binder & Binder PC v. Barnhart*, 481 F.3d 141, 148 (2d Cir. 2007). The Court must “draw all factual inferences in favor of, and take all factual assertions in the light most favorable to” plaintiffs. *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996). “[I]f there is any evidence in the record from any source from which a reasonable inference in [plaintiffs’] favor may be drawn, [defendants] simply cannot obtain a summary judgment.” *Binder*, 481 F.3d at 148.

II. SUBSTANTIVE LEGAL STANDARDS

A. Title VI Standard

Plaintiffs each bring claims under Title VI of the Civil Rights Act of 1964 against the District. Dkt. #25 (Claims 1-5); 42 U.S.C. § 2000d (“Title VI”). Title VI provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id.*²² This section applies to exclusion

²² There is no dispute that the District receives federal financial assistance.

of/discrimination against Jewish students. Ex. 1 (“OCR Letter”).²³ The OCR letter is itself a virtual roadmap in opposition to defendants’ motion. *Id.* 4-6.

“[I]n the educational setting, a school district is liable for intentional discrimination when it has been ‘deliberately indifferent’ to . . . peer harassment of a student.” *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 (2d Cir. 2012) (collecting cases). The District is liable “if a plaintiff establishes: (1) substantial control, (2) severe and discriminatory harassment, (3) actual knowledge, and (4) deliberate indifference.” *Id.* “Substantial control” is undisputed here: the District “exercises substantial control over the circumstances of the harassment when it occurs ‘during school hours and on school grounds’. Similarly, a school district’s authority to take remedial action lies in its longstanding disciplinary oversight over its students.” *Id.* (collecting cases). The District concedes it was responsible for, and had disciplinary oversight over, misconduct in school, on school buses, on school-sponsored trips, and on school playgrounds. C. 118/23-119/8; St. 111/15-17, 113/9-13; F. 85, 267/4-6; B. 58/10-13, 106; Ex. 47 at 15 Sec. E.

The harassment must be “severe, pervasive, and objectively offensive and discriminatory in effect Discrimination under Title VI is not limited to being excluded from, or denied the benefits of, a particular school program. Discriminatory actions [r]estrict an individual in *any* way in the enjoyment of *any* advantage or privilege enjoyed by others receiving any service . . . or other benefit” under the school system. *Zeno*, 702 F.3d at 665-66 (citing, *inter alia*, 34 C.F.R. § 100.3(b)(1)(iv)). “Educational benefits include an academic environment free from racial

²³ *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (anti-Semitic harassment is form of “racial” discrimination under 42 U.S.C. § 1982); *Felber v. Yudof*, 851 F. Supp. 2d 1182, 1187 n.3 (N.D. Cal. 2011) (University of California did “not dispute that plaintiffs’ identification as Jewish brings them within the scope of Title VI’s protections”); September 13, 2004 OCR Letter (OCR will not tolerate “race or national origin harassment commingled with aspects of religious discrimination against Arab Muslim, Sikh, and Jewish students . . . [as such harassment is] prohibited by Title VI and Title IX.”) (<http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>); April 3, 2006 U.S. Commission on Civil Rights Findings and Recommendations (anti-Semitism “[w]hen severe, persistent or pervasive . . . may constitute a hostile environment for students in violation of Title VI of the Civil Rights Act of 1964,” at <http://www.usccr.gov/pubs/050306FRUSCCRRCAS.pdf>).

hostility.” *Id.* at 666 (collecting cases). “[A] school district must know of the harassment.” *Id.* The District does not dispute that it acquires knowledge through, *inter alia*, its administrators, including principals, assistant principals, and the Superintendent. All of the defendants are administrators. Finally, a district is deliberately indifferent where its action or inaction was “clearly unreasonable in light of the known circumstances.” *Id.* (citing cases).

B. Equal Protection Standard

Plaintiffs bring Equal Protection claims against various individual defendants in their individual capacities. Dkt. #25 (Claims #6-10). Given the Magistrate’s prior opinion on the motion to dismiss, Dkt. #19, these claims are: T.E. against Steinberg, Fisch, and Winter (Claim #6); O.C. against Steinberg and Winter (#7); A.R. against Peters (#9); and D.R. against Peters (#10). Only T.E. and O.C.’s claims are at issue on this motion.

“[T]o succeed on a § 1983 equal protection claim of deliberate indifference to student-on-student . . . harassment, well established law requires a plaintiff to prove (1) that the child in question was in fact harassed by other students based on his [membership in a protected class]; (2) that such . . . harassment was ‘actually known’ to the defendant school official; and (3) that the defendant’s response to such harassment was so ‘clearly unreasonable in light of the known circumstances’ as to give rise to a reasonable inference that the defendant himself intended for the harassment to occur.” *DiStiso v. Cook*, 691 F.3d 226, 241 (2d Cir. 2012). As to the first element (harassment), unlike in the Title VI context, severe/pervasive harassment is not required. *DiStiso*, 691 F.3d at 241-43 (courts should dress “caution” in grafting Title VI/IX standard into Equal Protection analysis). This question, however, is unsettled in the Second Circuit, *DiStiso*, 691 F.3d at 242, and the Court plainly need not reach the issue given the overwhelming evidence establishing severe and pervasive harassment of each of the plaintiffs. The second element (actual knowledge) is comparable to the Title VI standard, except that knowledge is assessed

separately for each individual defendant (whereas in Title VI, the knowledge of *all* the administrators and others is imputed to the District). *See generally Farid v. Ellen*, 593 F.3d 233, 249 (2d Cir. 2010) (“personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages [against the individuals] under § 1983.”). The third element (intent) is functionally equivalent to Title VI deliberate indifference: intent “can be based on the deliberate indifference of school boards, administrators, and teachers to invidious harassment, in the school environment, of a student by other children or parents.” *DiStiso*, 691 F.3d at 240-41 (quotation marks omitted). “[I]n cases of alleged student-on-student harassment, . . . deliberate indifference to such harassment can be viewed as discrimination by school officials themselves.” *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 140 (2d Cir. 1999).

C. New York Civil Rights Law § 40-c and 40-d Standard

Plaintiffs bring NYCRL claims against the District and various individual defendants in their individual capacities, dkt. #25 (Claims #11-15); #19 (motion to dismiss opinion): T.E. against Fisch, and Winter (Claim #11); O.C. against Winter (#12); A.R. against Peters (#14); and D.R. against Peters (#15). NYCRL § 40-c(2) provides: No person shall, because of race, creed, color, [or] national origin . . . be subjected to any discrimination in his or her civil rights, or to any harassment, as defined in section 240.25 of the penal law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.” “Any person” who “violate[s]” or “aid[s] or incite[s] the violation” of § 40-c(2) is liable. NYCRL § 40-d.

III. PLAINTIFFS SUFFERED “SEVERE AND DISCRIMINATORY HARASSMENT”

Defendants do not dispute that a reasonable factfinder could find that T.E., O.C., and D.C. experienced “severe and discriminatory harassment” because they are Jewish. *Zeno*, 702 F.3d at 665, 667; Def. Br. 27-8. Nor could they. Pl. Counter 56.1 # 1 (T.E.); #2 (O.C.); #3

(D.C.). Plaintiffs experienced repeated anti-Semitic slurs, Holocaust jokes, swastikas all over the schools (including their own desks and lockers), Hitler salutes, white power chants, anti-Semitic physical assaults, and in some cases threats, in school, and on school buses, on school outings.

Id. Each student was denied the “[e]ducational benefit” of “an academic environment free from racial hostility.” *Id.* at 666 (collecting cases). After years of unrelenting anti-Semitic harassment, T.E. finally thought she “was going to have a nervous breakdown,” went to Mobile Mental Health, who “suggested that [she] shouldn’t go back to school,” and dropped out of school, never to return. T.E. 234/3-4, 173/6-22; S.E. 200/14-201/25, 147/2-23. In Crispell, O.C. repeatedly went to the school nurse “crying or angry because something happened,” and then, to the school psychologist. O.C. 201/23-202/14. “I had a lot of anxiety and panic attacks from the – like from being bullied. . . . So I would go to her when I was having like an anxiety attack.” O.C. 203/20-204/5; *id.* 224 (repeatedly told psychologist about “bullying and anti-Semitism [she was] experiencing at the school”); David C. 25/6-26/2 (“Her reports were coming in that she was not doing as well as she should be. She was having issues with focusing and turning in assignments and I had been getting calls constantly from the school nurse’s office that she wanted to come home or she wasn’t feeling well, she was having panic attacks, anxiety attacks and this was constant.”). D.C. “g[ave] up on the morning [school] bus,” D.C. 47/2-6, sometimes abandoned lunch in the cafeteria for the relative safety of a teacher’s classroom, *id.* 100/22-24, and “frequented the [Crispell] nurse’s office for anxiety attacks and panic attacks because I felt anxiety for being in a school which I believed I didn’t belong in which people constantly reminded me I didn’t belong.” D.C. 49/23-50/12; *id.* 50/19-51/4 (“stomachaches, headaches, dizziness from anxiety or panic”).

IV. DEFENDANTS HAD ACTUAL KNOWLEDGE

Defendants' actual knowledge of anti-Semitic harassment of T.E. and O.C. is not disputed, Def. Br. 30-34, and could not be disputed, *see* Facts § II(A-B), *supra*.

As to D.C. it is apparently insufficient for defendants that D.C. and his father repeatedly complained of anti-Semitic harassment to **one** principal (Boyle), D.C. 29/2-24; David C. 10-11, 12-15, 57-58; Ex. 27; C. 281-82; B. 252-53; **two** Assistant Superintendents (Carbone and Brush), Ex. 27; C. 281-82; St. 253-54; **one** Board member (Greer), Ex. 27; at least **five** teachers (Schumaci, Charchan, Nathe, King, and others), D.C. 11/24-13/15, 20/11-20, 56/22-57/7, 92-95, including one (Ms. King) during whose class a student repeatedly made anti-Semitic taunts *right in front of her*, *id.* 92-94; and **the Superintendent** of the entire School District (Steinberg), Ex. 27; C. 281-82; St. 253-54. D.C. and his father reported to Boyle that D.C. was called "'F'ing Jew' on the bus," D.C. 29/2-24; David C. 10-11, "had been the butt of *many* Jewish jokes," *id.* 11, and anti-Semitic harassment by "*a lot of kids*" over an entire "year" with "Jewish jokes" and "slurs," 13/7-15, as part of a "*systemic*" problem, *id.* 13/2-6. Boyle's response: nothing. Boyle ignored D.C. completely, D.C. 29/10-18, and ignored the systemic problem completely, David C. 57/24-58/13; B. 309/7-10. Now defendants ignore Mr. Cohen's systemic complaints, too, as if the record didn't exist. Def. Br. 15-16, 28; *cf.* David C. 10-13.

Mr. Cohen also wrote *five* administrators that D.C. spent an entire *year* "in fear" of students "on his bus who pushed him around while chanting 'White Power' and telling him that he should have died in the Holocaust." Ex. 27. Defendants ignored that, too: both in 2011, C. 285/15-17, 286/4-7, 289/15-18; B. 253/17-22; David C. 61/4-14, and now, Def. Br. 15-16.

Even had D.C. and his father never complained once about any anti-Semitic harassment, the District and its administrators were on actual notice of the pervasive anti-Semitic graffiti to which D.C. and other Jewish students were subjected *all over* Crispell and PBHS. D.C. 11

(“impossible . . . to miss”), 15/25-16/3 (“You have to actually actively avoid them”); W.H. 169, 204/8-17, 114, 165-67, 192-93; Ex. 10 ¶ 9; T.E. 268/8-19 (“very obvious swastikas”), 278/25 (“everywhere”); Ex. 7; C. 59/24-80; Ex. 6. To claim to a jury—notwithstanding all of the photographs, school records, and testimony of everyone except themselves—that they never saw anti-Semitic graffiti, would be surprising. W.H. 169 (“absolutely ridiculous”). To seek *summary judgment* based on this record is startling.

Before and during D.C.’s years in the District, the District and its administrators were also on actual notice of pervasive anti-Semitic harassment of Jewish students from other sources, including A.R., D.R. and Mr. Rosen. Pl. Counter 56.1 #6-7. Though defendants suffer from the myopic view that every one of dozens (even hundreds) of anti-Semitic acts is “isolated” or “individual,” the pattern of anti-Semitic harassment was the same for all Jewish students: T.E., O.C., D.C., A.R., and D.R.—and the District knew it. *See, e.g.*, J.R. 82 (to assistant principal Peters: “This is not an isolated incident, it’s happening to *both* of my kids, it seems to be happening *almost on a daily basis* and you got to do something about it. . . . He was like what do you expect me to do?”); David C. 21-22 (Winter: “I will deal with it on an *individual* basis”; Mr. Cohen: “you have got a much broader problem and you cannot deal with it individually.”); *id.* 13/2-6 (Boyle: “it would be handled on an individual basis”; Mr. Cohen: “I said that this isn’t an individual thing, this is systemic.”); Ex. 1 at 6 (addressing incidents “only in isolation” is deliberate indifference).

All the above notice went to administrators, whose knowledge (all parties agree) is imputed to the District. Though the Court need not reach the issue, D.C.’s repeated notice to teachers (about swastikas, anti-Semitic comments, etc.), D.C. 11/24-13/15, 20/11-20, 56/22-57/7, 92-95, is also imputed to the District. In this District, teachers “ha[ve] authority to institute corrective measures on the district’s behalf.” *Gebser v. Lago Vista Ind. School Dist.*, 524 US

274, 277 (1998).²⁴ Teachers had essentially unlimited “discretion” whether and how to give discipline. B. 124/18-125/5; C. 153/21-154/3 (could “handle that on the spot”), 153/2-14 (“teachers are the first line of discipline,” in order to “chang[e] [student] behavior”); Ex. 69 (DEF4241: teachers can give detention). Defendants even claim teachers “promptly addressed” D.C.’s complaints. Def. Br. 15. Ms. King, for example, exercised her “discretion” with respect to repeat anti-Semitic bully “two feet” from her in math class by saying: “stop it.” D.C. 93-94. The bully and Ms. King also spoke about how the bully could “kick [D.C.’s] ass.” *Id.* 94. (The anti-Semitic harassment in Ms. King’s class, like so much else, is missing from defendants’ brief.) According to defendants, the bus drivers, cafeteria monitors and security guards who had notice, Facts § II(C), should also bind the District, because “[p]ersonnel at *all* levels are responsible for taking corrective action to prevent bullying behavior of which they have been made aware . . . and/or reporting such behavior to their immediate supervisor.” Sneed Ex. R (DEF519, last par.).

Defendants are as indifferent to the record as they were to D.C. himself. A reasonable jury could conclude they had notice, did virtually nothing in response, D.C. 29/10-18; David C. 57/24-58/13, 61/4-14; B. 253/17-22, 309/7-10; C. 285/15-17, 286/4-7, 289/15-18; and are liable.

V. DEFENDANTS’ RESPONSE: DELIBERATE INDIFFERENCE

A district is deliberately indifferent where its action or inaction is “clearly unreasonable in light of the known circumstances.” *Zeno*, 702 F.3d at 666 (citing cases) (emphasis added).

“A failure to respond, . . . a response that ‘only follows after a lengthy and unjustified delay’, . . .

²⁴ “[A] school official who has the authority to halt known abuse . . . would meet this definition.” *Murrell v School Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247 (10th Cir 1999). “[I]f they exercised control over the harasser and the context in which the harassment occurred [and] . . . the victim is complaining about a fellow student’s action ‘during school hours and on school grounds,’ teachers may well possess the requisite control necessary to take corrective action to end the discrimination.” *Id.* at 1248 (quoting *Davis Next Friend LaShonda D. v Monroe County Bd. of Educ.*, 526 US 629, 646 (1999)). Once defendants receive actual notice, they are liable for deliberate indifference to incidents arising after the point in time when they received notice. *TC v Val. Cent. School Dist.*, 777 F. Supp. 2d 577, 596 (S.D.N.Y. 2011) (“School District had actual notice of the harassment as of October 28 . . . Therefore, there can be liability for incidents after October 28”).

and a response that ‘amount[s] to deliberate indifference to discrimination’ . . . have all been found inadequate.” *Id.* (collecting cases, emphasis added).

The District fares much worse than the school district in *Zeno*. There, “the District . . . immediately *suspended* nearly *every* student who was identified as harassing Anthony.” *Id.* at 668 (emphasis added). Here, the District rarely suspended anyone. Even worse, in many or most cases involving T.E., O.C., and D.C., it imposed no discipline at all. Pl. Counter 56.1 #9.

In *Zeno*, “five circumstances should have informed the District’s continued response to student harassment of Anthony.” *Id.* at 669. All five apply here. “First, it knew that disciplining Anthony’s harassers—through suspensions or otherwise—did not deter others from engaging Anthony in serious and offensive racial conduct. (During his sophomore year alone, Anthony was subject to eight separate incidents of harassment.)” *Id.* That is unquestionably the case here: unrelenting anti-Semitic harassment for all the plaintiffs persisted over many years, and for each plaintiff, far exceeded “eight separate incidents” in a given year. *See, e.g.*, Facts § II(B)(ii), *supra* (dozens of incidents involving T.E. & O.C.); O.C. 217/10-218/4 (still in 9th grade: “every day I will hear ‘Jew’ in the hallway,” “Holocaust jokes, people calling other people Jew”); D.C. 42 (“[D]ay in and day out in all of my years at Pine Bush High School, I was harassed, alienated, ostracized”). Steinberg himself admitted the District’s response “did not deter others,” 702 F.3d at 669: “it wasn’t that it was three children . . . it was different children.” St. 276.

“Second, [in *Zeno*] the harassment directed at [plaintiff] grew increasingly severe. Of the eight incidents that occurred during his sophomore year, two were violent, three were threats on his life, and two resulted in Orders of Protection against the students involved.” 702 F.3d at 669. From 5th-7th grade, T.E. experienced anti-Semitism of increasing frequency and severity, from, *inter alia*, a swastika on a slide (5th grade) to students calling her “crispy” and saying that she should have been burned in the Holocaust (7th grade), to in her last three days in 8th grade,

Hitler salutes during the math midterm, a Holocaust “joke” in health class, and a physical assault with a coin in the hallway. T.E. 109, 213, 216-17, 220-28. O.C. was physically assaulted on a school trip, O.C. 14-18, held down while students “tried to shove a quarter down [her] throat” in recess, *id.* 63, and terrorized by swastikas and “die Jew” on her desks, lockers, and a yearbook. *See, e.g.*, O.C. 43, 45-46, 84, 89. D.C. was repeatedly threatened, D.C. 28 (“they knew where I lived”), the target of coin throwing, *id.* 34, slapped, *id.* 69-70, spat upon, *id.* 78, punched, *id.* 33, and assaulted in unspeakably cruel ways, *id.* 81.

“Third, the disciplinary action had little effect, if any, on the taunting and other hallway harassment, which persisted until Anthony left SMHS, three-and-a-half years after he arrived.” 702 F.3d at 669. This is beyond dispute for all three plaintiffs. Facts §§ I(C), II(A-C). “Fourth, the District knew that the harassment predominantly targeted Anthony’s race and color.” *Id.* Plainly the District knew the harassment here predominantly targeted plaintiffs because they were Jewish. “And fifth, as early as November 2005, the Dutchess County HRC and N.A.A.C.P. offered the District both a free shadow, to accompany Anthony during the school day, and a free racial sensitivity training series.” *Id.* Here, Mr. Cohen recommended a series of measures to Steinberg and others, based on the dramatically different response by SUNY President Richards to a *single* noose incident, Ex. 28, but Steinberg did “not one thing I asked for, not one thing of [sic] that list.” David C. 56/15-23. “A jury [will be] entitled to compare the alternatives offered by” President Richards “with the District’s programs when it evaluate[s] the adequacy of the District’s ultimate response.” *Zeno*, 702 F.3d at 670.

All five *Zeno* factors plainly apply here, but this only scratches the surface. A jury could reasonably find defendants deliberately indifferent for at least 29 additional reasons:

6. Defendants failed to address rampant anti-Semitic graffiti all over Crispell and PBHS, for years. Facts § III(A).
7. Defendants never expelled anyone “for any anti-Semitic conduct, harassment or bullying.” C. 143; W. 432.

8. Defendants never gave a single superintendent's suspension "for anti-Semitic conduct, harassment or bullying." C. 137/16-19, 140, 136; St. 173; B. 162.
9. Defendants never held a single superintendent's hearing for anti-Semitic harassment. *Id.*
10. Defendants repeatedly imposed minimal or no discipline for egregious incidents of anti-Semitic harassment. Facts §§ II, III(B); Pl. Counter 56.1 #9.
11. Defendants almost never required anti-Semitic bullies to undergo sensitivity training, do any particular homework, or apologize to the victim. C. 313-14, 334; W. 306/22-307/4, 404/11-15.
12. Defendants' investigation of anti-Semitic harassment was commonly minimal or non-existent. Facts §§ II, III(B).
13. Defendants never even *discussed* anti-Semitism in the District in over 500 meetings involving administrators and Board members. Facts § III(C).
14. There were no "anti-bullying efforts in Pine Bush schools specifically addressing anti-Semitism in the schools before June 2011," St. 234/21-235/3, or since, B. 47/19-23.
15. No "district employee ever sent a letter to parents or students about anti-Semitic conduct in any Pine Bush school." C. 86/9-13; St. 264/22-265/3.
16. No one met with parents as a group to discuss anti-Semitism in the District. F. 235; W. 431/14-432/8.
17. Administrators and teachers were simply not trained "about anti-Semitic bullying issues." W. 172/7-14; F. 236, 301/19-302/6.
18. No one set goals to reduce anti-Semitic incidents in school. W. 431/4-7; B. 327/14-19; F. 235/8-236/2, 216/7-217/15.
19. Defendants had and have no "minimum discipline" for "bullying" or for "anti-Semitic harassment." C. 335/16-23; W. 241/5-13, 433/20-25; B. 115.
20. The Code of Conduct treats harassment and bullying less seriously than, *inter alia*, tardiness and leaving the building. Facts § III(D).
21. Anti-Semitic and bias-related harassment is not considered a "major" offense under the Teacher Handbook. Ex. 69 (DEF #4240); C. 89/20-23.
22. Defendants do not require teachers/staff to document anti-Semitic harassment or bias-related incidents, Facts § III(F), and have no idea "how many times teachers and staff . . . saw incidents of anti-Semitic harassment and bullying." C. 154/4-10; *id.* 169/24-170/2.
23. Defendants never attempted "to track anti-Semitic incidents" or "bias-related incidents in any school," even if documented. C. 346/20-347/3; W. 420/19-421/8.
24. The District created a disciplinary code chart with local codes for every disciplinary incident under the sun, except harassment, bias-related incidents, and bullying. Ex. 51 (code chart); C. 244/14-245/22; F. 227-28.
25. Defendants never attempted to compile statistics on bias-related or anti-Semitic incidents in school. C. 253/19-24; St. 344.
26. Defendants keep destroying records of complaints of anti-Semitic harassment. F. 237/8-14, 275/16-277/3; P. 110-15; T.E. 159; Maazel Decl. ¶ 2.
27. Defendants systematically violated their obligations under New York law to report bullying in the District. Facts § III(F); Exs. 72-74.
28. Defendants systematically violated their obligations under New York law to report bias-related incidents in the District. Facts § III(F). "[T]he district [n]ever reported a bias-related incident in New York State." C. 231/24-232/2.

29. Defendants systematically violated their obligations under federal law to report bias-related harassment. Exs. 70-71.
30. Defendants provided no services or counseling to plaintiffs, as victims of anti-Semitic harassment. Facts § III(H).
31. The District's so-called Title VI compliance officer is the very model of deliberate indifference, for at least 11 reasons set forth in Facts § III(G). After failing in this role, she was promoted to Superintendent.
32. If Principal Boyle is to be believed, Boyle Aff., three assistant principals in a row (Peters, Winter, Mummery) rarely reported to him rampant, reported, and almost entirely substantiated anti-Semitic harassment in his own school. Boyle never told Peters or Winter to inform him of anti-Semitic incidents. B. 294/4-7.
33. Instead of firing Winter after a year of utter indifference, incompetence, callousness, apathy, and hostility to T.E., O.C., their parents, and dozens of anti-Semitic incidents, Facts § II(B)(ii), Steinberg and the District *promoted* Winter, to PBES principal, W. 23; B. 55-56.
34. District administrators' responses to plaintiffs' reports of anti-Semitic harassment in the District were boorish, S.E. 57 ("big deal"); insensitive, O.C. 68 ("why did you find offense to this"); outrageous, S.E. 109-110 ("when I had this issue . . . I moved."); apathetic, S.E.117-119, 39 ("hard to stop something that's inbred"); Ex. 30; St. 307-09 ("expectations for changing inbred prejudice . . . unrealistic"); dismissive, D.C. 29/10-18; threatening, Ex. 30; St. 310-11 (don't send emails), and openly hostile, T.E. 102/21-103/8 ("just looking for trouble" and "causing our own problems").

As to the Equal Protection claims (Fisch's deliberate indifference towards T.E., Winter/Steinberg's indifference towards T.E./O.C.): **Fisch** had a "no tolerance" policy towards cupcake stealing, but a "no . . . consequences" policy for taunting Jewish students with swastikas, F. 63/24-64/5, 143/12-16, 219-23, 224/14-22; T.E. 37-38; Ex. 33; S.E. 80/17, 82/20-22; left a swastika on a slide used every day by hundreds of children for a year, notwithstanding repeated complaints by T.E./S.E., Ex. 17; F. 179/5-18, 161/17-162/11, 196, never investigated or disciplined anyone, F. 162/12-23, then joked about it, Ex. 16; told T.E. in 5th grade that swastikas in planners were no 'big deal', S.E. 57/17-24; failed to address anti-Semitism in his one bullying assembly, F. 296/21-297/21; failed to address anti-Semitism in twenty years of weekly bulletins, F. 215, 216/7-217/15; Ex. 45; or to take any other systemic steps to address anti-Semitism in school, F.147/2-8, 194/3-6, 304/23-25; and failed in all the other ways set forth *supra*.

Winter and Steinberg's indifference towards T.E. and O.C. is beyond any reasonable dispute. Facts § II(B). **Winter** failed repeatedly to discipline anyone *at all* for substantiated anti-Semitic **slurs**, *e.g.*: (O.C. a "dirty disgusting Jew," W. 393/6-7; C. 318-19) (T.E. "should have been burned," C. 262/4-9, W. 84/5, C. 260-262; St. 223/16-224/6; W. 85/15, 451/12-452/452/4) ("crispy and should have been burned a long time ago," C. 327/3-7) ("O[C.] is a dirty Jew," Ex. 5 (DEF1090); W. 388/12-17; C. 322-23; St. 294-95) ("go back to picking up pennies off the street." T.E. 140/22-145; O.C. 36-37; Pl. 56.1 #124-26.); anti-Semitic **jokes** (drew picture on his stomach, told T.E. "it is a Hasidic Jew so lets shove pennies in his mouth," Ex. 25; T.E. 162-65; C. 265-69; 298-99); **white power chants** (Ex. 5 (DEF1093); W. 328-29, 380; Pl. 56.1 #18-21), physical **assaults** (O.C.: thrown penny and "f. Jew," Ex. 5 (DEF1081); W. 95/8, 382/17-25; C. 303), anti-Semitic **graffiti** (three days of swastikas on O.C.'s desk, finally with O.C. name and "Jew die," C. 307/5-13, 306/17-21; O.C. 47) ("fuck the Jews" in the boys' bathroom, W. 143/12-145/6, 424/11-426/7) (swastika on T.E.'s "music desk." Ex. 22; Ex. 5 (DEF3682); W. 142/4-8; C. 265; T.E. 167-70) ("stupid Jew" in or on a locker, Ex. 5 (DEF1090); C. 323/9-21) (swastika near O.C.'s picture in a yearbook, Ex. 37; O.C. 84-85. W. 393/12-397/18); and **threats** and **physical intimidation** (on bus, T.E. subjected to "white power and pro Hitler statements," "Mi. who is rather large pushed her in and sat with her," "Mi then said to C. that when T.E. is in 8th grade that she is going to get her ass kicked," Ex. 26; T.E. 152/3-153, 157/7-14; C. 278/8-10, W. 234/19-25). Winter threw up his hands at "inbred" anti-Semitism, S.E.117-119, 39; yet refused to acknowledge or address the systemic problem, David C. 21-22, 59/2-9; and finally told T.E./O.C. "to stop coming all the time and complaining" about anti-Semitic harassment, T.E. 102/21-103/8 (this after she reported "fuck the Jews" next to a "Star of David with Sh.M.'s name on it," Ex. 7 (bate #11); T.E. 243/9-11).

Steinberg told Ms. Eccleston to move out of the District, S.E. 109-110; provided no proposal at all to protect T.E./O.C. in Crispell, St. 275/22-25, 286/4-6 (“the best opportunity was to move the girls to Circleville”), yet refused to bus T.E./O.C. to Circleville, O.C. 73-78; T.E. 120-21, 177-79; B. 269/15-270/4; took no responsibility for dealing with “inbred prejudice,” Ex. 30; St. 307-09, 276, 277/13-25; never bothered to respond to Mr. Cohen or follow-through on any of his suggestions, David C. 60/24-61/14, 56/15-23; St. 279/15-20; never disciplined any of T.E./O.C.’s harassers for anything; never even *mentioned* anti-Semitism in the District in over 500 high-level meetings, Facts § III(C), except that this lawsuit might end up in the “paper,” B. 54/2-4; presided over a litany of deliberately indifferent practices and policies, Facts § III; repeatedly belittled anti-Semitic harassment, St. 141/14-20, 195/3-12, 185/13-16, 251/8-20, 259/23-261/5; and questioned why Jewish students are in Pine Bush at all, Ex. 56.

Faced with this record, defendants assert one defense: they had anti-bullying programs. Not programs targeted at anti-Semitic harassment, not programs designed to deal with the Title VI and Equal Protection violations, not even programs targeted at bias-related harassment (a term none of the defendants seem to understand). W. 313/3 (“I don’t know how to term the bias thing.”). But a school district is liable when it fails to directly target *the discrimination*. *Zeno*, 702 F.3d at 670 (remedial actions were “little more than half-hearted measures” because its programs “did not focus on racial bias or prejudice”); *Patterson v. Hudson Area Schs.*, 551 F.3d 438, 450 n.10 (6th Cir. 2009) (court refused even to *consider* district’s evidence of general anti-harassment and bullying programs because they did not directly address peer sexual harassment). Though defendants stretch to list anything ever done remotely related to bullying, Pl. 56.1 #50-60, the fact remains: there were no “anti-bullying efforts in Pine Bush schools specifically addressing anti-Semitism in the schools before June 2011,” St. 234/21-235/3, *or* since June 2011, B. 47/19-23, and even *that* one assembly for one grade failed to address anti-Semitic harassment

in school, St. 264/6-13; Ex. 36. To put it charitably, the District “dragged its feet,” “should have done more, and its failure to do more ‘effectively caused’ further harassment.” *Zeno*, 702 F.3d at 669-70. The District’s alleged, non-targeted efforts concerning bullying are irrelevant, *id.* at 670, and should not be considered, *Patterson*, 551 F.3d at 450 n.10; *see also DiStiso*, 691 F.3d at 244-45 (failure to address *race-based nature* of the harassment raised “a material factual question as to the reasonable response element of the deliberate indifference claim”).

Compared even to the liable *Zeno* defendant, or to the hypothetical defendants in the OCR Letter, Ex. 1 at 4-6, this District failed miserably. On this record, a jury could reasonably find that the District was deliberately indifferent. *Zeno*, 702 F.3d at 669 (“Responses that are not reasonably calculated to end harassment are inadequate.”); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000) (“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.”); *Patterson*, 551 F.3d at 448 (“We cannot say that, as a matter of law, a school district is shielded from liability if that school district knows that its methods of response to harassment, though effective against an individual harasser, are ineffective against persistent harassment against a single student.”).²⁵

VI. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

“Since [1999] it has been clearly established law in this circuit that claims of intentional race discrimination can be based on the ‘deliberate indifference’ of school boards, administrators, and teachers to invidious ‘harassment, in the school environment, of a student by

²⁵ Defendants’ cases are inapposite. *HB v. Monroe Woodbury Cent. School Dist.*, 2012 WL 4477552, 15 (S.D.N.Y. 2012) (“only one reference to race-related name-calling”); *DT v. Somers Central School Dist.*, 348 Fed. Appx. 697, 700, 2009 WL 3316419, 2 (2d Cir. 2009) (one racial comment reported to one teacher); *Barmore v. Aidala*, 2006 WL 1978449, 1 (N.D.N.Y. 2006) (pre-*Zeno* and pre-*DiStiso*; no Title VI claims; far less compelling record of harassment and more compelling record of District’s response); *Preusser ex rel. E.P. v. Taconic Hills Cent. School Dist.*, 2013 WL 209470, 10 (N.D.N.Y. 2013) (“episodic teasing [5 instances] by one student that occurred over a three year period of time”); *Yap v. Oceanside Union Free School Dist.*, 303 F. Supp. 2d 284, 294-95 (E.D.N.Y. 2004) (decided long before *Zeno* and *DiStiso*, difficult to square with both, no Title VI claims at all).

other children.’” *DiStiso*, 691 F.3d at 240-41. By the clearly established standards set forth under *DiStiso* and Second Circuit case law since 1999, defendants are plainly liable.

VII. THE DISTRICT IS LIABLE UNDER *MONELL*

The District is liable for the Equal Protection claims (#6-10) both because (i) its final policymakers, Steinberg and the principals, are liable, and (ii) its policies and practices perpetuated deliberate indifference to anti-Semitic harassment that caused plaintiffs’ injuries.

The District is liable “when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” *Monell v. N.Y. City Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978); *TC v. Val. Cent. Sch. Dist.*, 777 F. Supp. 2d 577, 598 (S.D.N.Y. 2011). The District is liable for the action/inaction of a “decisionmaker [who] possesses final authority to establish municipal policy with respect to the action ordered.” *Pembaur v. City of Cincinnati*, 475 US 469, 481 (1986). Steinberg had “final authority” in the District: “I am the person that’s in charge.” St. 27. This authority included ensuring students are “free from harassment and bullying.” *Id.* 28. The District is liable for Steinberg’s deliberate indifference, set forth at length *supra*.

The District is also liable for the deliberate indifference of its principals, including Fisch and Boyle. “As a practical matter, principals are the highest ranking officials in the school and thus have policymaking authority in the day-to-day operations of the school.” *Marino v. Chester Union Free Sch. Dist.*, 859 F. Supp. 2d 566, 569 (S.D.N.Y. 2012) (citing *T.Z. v. City of N.Y.*, 635 F. Supp.2d 152, 179 (E.D.N.Y. 2009)); *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp.2d 319, 324 (E.D.N.Y. 2002); *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp.2d 263, 268 (N.D.N.Y. 2000). Where, as here, the “School Board delegated disciplinary matters to [the

principal's] discretion," Fisch and Boyle are "policymaker[s] under *Monell* for the purposes of § 1983 liability." *Marino*, 859 F. Supp. 2d at 569.

The District is also liable for its deliberately indifferent policies and practices. *Bd. of Cnty. Commrs. v. Brown*, 520 US 397, 404 (1997); *City of Canton, Ohio v. Harris*, 489 US 378, 389 (1989) ("failure to train . . . employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants" and is "properly thought of as a city 'policy or custom' that is actionable under § 1983."); *Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004). These District-wide policies and practices include, *inter alia*: no minimum discipline for anti-Semitic harassment, bias incidents, or bullying; treating anti-Semitic harassment less seriously than, *inter alia*, "tardiness," in the Code of Conduct; treating anti-Semitic and bias-related harassment as minor, not "major," offenses, Ex. 69 (DEF #4240); destroying disciplinary files of harassers before middle school, W. 54-55, 57/9; no "policy" or "training" requiring security to document, report, or address anti-Semitic graffiti in school, C. 56/15-57/2, 57/11-16, 65/20-66/2, 89/13-19; no "policy, procedure or guideline" requiring proper investigation of harassment in school, C. 342/18-23; no requirement for staff/teachers to report anti-Semitic or bias-related harassment at all, C. 153/21-154/3, 152/17-22, 176/11-16, 177/11-18; W. 171/22-172/3, 375/10-25; B. 124-25; a tracking system for virtually every type of disciplinary infraction *except* harassment and bias incidents, C. 252; a practice of violating VADIR, including a failure to report bias-related incidents, C. 231/24-232/2, or bullying incidents, Exs. 72-74, to New York State; a practice of violating federal reporting requirements, Ex. 52; and of course, a District-wide practice of failing to document, discuss, address, or combat *anti-Semitic* harassment on a systemic level in any way at any time, Facts § III.

“[B]ased on the pervasiveness of the harassment and the lack of response, the jury could reasonably [find] that [defendant’s] inaction and acquiescence to the harassment that [plaintiffs] suffered allowed the harassment to become the custom and practice, if not the policy, of the [entity defendant].” *Matusick v. Erie Cnty. Water Auth.*, No. 11-1234, 2014 WL 30694, at *25 (2d Cir. Jan. 6, 2014). A reasonable jury could find the District liable under *Monell*.

VIII. THE OFFICIAL CAPACITY DEFENDANTS

Defendants seek to dismiss the official capacity portions of Claims 6-10. Given that the District is plainly liable for all of these claims, plaintiffs do not press the *official* capacity claims.

IX. THE NEW YORK CIVIL RIGHTS CLAIMS SHOULD NOT BE DISMISSED

Defendants’ arguments for dismissing the NYCRL claims are derivative of their federal arguments. For the reasons set forth *supra*, the NYCRL claims should not be dismissed.

CONCLUSION

Defendants’ partial motion for summary judgment should be denied, and the Court should grant such other relief as is just and proper.

Dated: January 21, 2014
New York, New York

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