PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1545

REGINA WEBSTER,

Plaintiff - Appellant,

v.

CHESTERFIELD COUNTY SCHOOL BOARD, d/b/a Chesterfield County Public Schools,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:20-cv-00344-HEH)

Argued: March 8, 2022 Decided: June 28, 2022

Before GREGORY, Chief Judge, THACKER, and HARRIS, Circuit Judges.

Affirmed by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Thacker and Judge Harris joined.

ARGUED: Richard F. Hawkins, III, THE HAWKINS LAW FIRM, PC, Richmond, Virginia, for Appellant. Emily Claire Russell, COUNTY ATTORNEY'S OFFICE FOR THE COUNTY OF CHESTERFIELD, Chesterfield, Virginia, for Appellee. **ON BRIEF:** Jeffrey L. Mincks, COUNTY ATTORNEY'S OFFICE FOR THE COUNTY OF CHESTERFIELD, Chesterfield, Virginia, for Appellee.

GREGORY, Chief Judge:

This appeal arises out of an employee's allegations of sexual harassment by one of her special education students. It brings to light the difficult balance that schools must find between ensuring that *all* students have access to a public school education while simultaneously maintaining a nonhostile work environment for all employees—the impact of which is felt by special education educators serving at the intersection of these two rights. Regina Webster ("Webster") appeals the district court's entry of summary judgment in favor of her current employer, Chesterfield County School Board ("School Board"), on a claim of a sexually hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq*.[1] Because the record does not support a prima facie case for hostile work environment sexual harassment, we affirm.

I.

The School Board has employed Webster as an Instructional Assistant in Special Education at Providence Elementary since 2006. As an instructional assistant, Webster works with "special education students to implement behavior management programs and improve social, vocational, and community skills." J.A. 402. In 2018, the Principal of Providence Elementary, Dr. Sharon Rucker ("Dr. Rucker"), transferred Webster from a class where she instructed emotionally disturbed ("ED") children to Ms. Kesha Ellerbee's

[1] Webster initially brought a second claim under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. *See Webster v. Chesterfield Cnty. Sch. Bd.*, 534 F. Supp. 3d 537, n.1 (E.D. Va. 2021). The district court dismissed this claim with prejudice, and it is not before us on appeal. *Id.*; Appellant's Br. at 1 n.2.

("Ellerbee") class, where Webster worked with children with moderate intellectual disabilities. J.A. 416. Webster alleges that one of her students sexually harassed her between fall 2018 through mid-March 2019. This student, S.M., was an eight-year-old boy diagnosed with Down's Syndrome and Attention Deficit Hyperactivity Disorder ("ADHD"). J.A. 39.[2]

As alleged by Webster, S.M. sexually harassed her on an "almost daily basis." J.A. 11. Specifically, S.M. touched her "by putting his hands up her dress and touching her private parts." *Id.* Webster first responded by scolding him and telling Ellerbee, "He needs to be told not to do that!" *Id.* This behavior did not cease, however, but continued as S.M. would, or would attempt, to put "his hands up [her] dress or skirt" and often "touch[ed] [her] front private parts" or "grab[ed her] front private crotch area and her bottom over the outside of her clothes." *Id.* According to Webster, this conduct extended beyond the classroom doors and also occurred when she would accompany S.M. to his general education courses. "[A]lmost every time," Webster alleged, S.M. would "reach up [her] dress" specifically. *Id.* This conduct began in September 2018 and Webster decided to stop wearing dresses to work in November 2018. S.M.'s "groping, grabbing, and touching of [her] private areas on the outside of her clothing [however] continued even after [she] stopped wearing dresses." J.A. 11–12.

[2] One of S.M.'s doctors noted that S.M.'s "mental and emotional capacity is delayed by multiple years." J.A. 39. S.M.'s Individualized Education Program also detailed that he has "significantly impaired intellectual functioning" and "significantly impaired adaptive behavior" that are both "two or more standard deviations below the mean." J.A. 134; *see also* J.A. 136–146, 148–78.

Webster informed Ellerbee of S.M.'s conduct. Although Ellerbee recorded the incidents in her notes, or "point sheets,"[3] where she detailed each student's daily behavior, Webster claims Ellerbee was generally dismissive of her concerns and "tried to defend it by saying that it was just [S.M.'s] personality." J.A. 12; *see* J.A. 479. Webster also complained of S.M.'s conduct to Dr. Rucker and Assistant Principal Peter Johnson ("Johnson"). As relief, Webster requested to be transferred back to her previous ED classroom. Dr. Rucker denied those requests. *See* J.A. 418, 494, 589. On November 14, however, Ellerbee sent Webster an email informing her that another educator would exchange roles with Webster and instead work with S.M. J.A. 528. Webster did not appear to welcome this change and responded that she was sorry Ellerbee felt as though she could not manage her assigned group of students. Explaining that she had "struggled with the past events from last year," Webster maintained that she was doing her best but that the students "treat all of us the same way." *Id.* She then shared her plan to contact human resources to seek additional options and apologized that it was "not working with [her] in the room." *Id.* Webster then forwarded this email to Dr. Rucker and Johnson with a message explaining that she was being "moved to work with the bigger kids" because Ellerbee did not believe she could "handle" her current group. J.A. 527. She also commented that change was difficult for her and while she "loved [her] job in the ED room," this new room was a "big struggle." *Id.* Dr. Rucker insisted on

[3] Other than Webster's own statements, the record does not reflect the type of daily harassment alleged but does describe specific incidents of inappropriate touching. For example, the point sheets noted: (1) on September 6, S.M. lifted Webster's dress and a teacher's shirt; (2) on September 25, S.M. lifted a student's and a teacher's shirt; (3) on October 2, S.M. attempted to lift a student's shirt; (4) and on October 4, S.M. grabbed a female student "inappropriately." *See* J.A. 216, 218, 333, 339.

meeting with Webster, but she declined the offers, stating that she felt "no need to meet" because "it wouldn't fix the problem." J.A. 531. Later, in her complaint, Webster characterized Ellerbee's decision to separate her from S.M. as a "brief reprieve" that she experienced before being "forced to continue accompanying [S.M.]" and, thus, subjected to "his harassing behavior" once more. J.A. 13. Her separation from S.M. was only temporary because Webster claims that her replacement "refused to continue to accompany [S.M.], her non-assigned student" after two weeks and Webster was reassigned to work with S.M. *Id.*

On January 30, 2019, Webster requested to return to her previous classroom and Dr. Rucker responded that while that was not currently a possibility, staffing would be assessed at the end of the year. J.A. 57–58. Around that time, Webster also began filing injury reports and documenting bruises that she incurred from "some of the harassing instances." J.A. 496. She did not, however, report the daily incidents of S.M.'s inappropriate touching because Webster contends that her Chesterfield Education Association representative did not instruct her to do so.[4]

Webster's final allegation of sexual harassment by S.M. occurred on March 13, 2019. While in a general education computer class, S.M. attempted to put his fingers in an electrical outlet, prompting Webster to move and block him. S.M. reacted by "grabbing [her] crotch area over and over and trying to twist his fingers in [her] vagina." J.A. 496. When Webster tried to stop him, "S.M. began grabbing [her] bottom and grabbing [her] from front to back." *Id.* After informing Ellerbee of the incident, both Webster and a

[4] According to Dr. Rucker, she provided Webster with information on how to seek worker's compensation for her injuries on March 1, 2019. J.A. 418.

witnessing teacher emailed Dr. Rucker. J.A. 397–98. Following this incident, Dr. Rucker: (1) altered Webster's bus assignment to ensure she did not ride the bus with S.M.; (2) shifted Webster's schedule so she no longer accompanied S.M. alone; and (3) increased monitoring to reduce Webster's time spent alone with S.M. J.A. 513.[5] Later that spring, Dr. Rucker also proposed transferring Webster to a new classroom. *See* J.A. 64. Acknowledging that these measures terminated her exposure to S.M.'s conduct, Webster's hostile work environment claim spans from September 2018 through March 13, 2019. *See* Appellant's Reply Br. at 20–21.

After exhausting her remedies with the United States Equal Employment Opportunity Commission, Webster filed suit alleging that she was subjected to a sexually hostile work environment in violation of Title VII. *See* J.A. 8–18. Describing this case as "delicate," the district court underscored the difficulty of Webster's claim as it demonstrates the daily challenges special education teachers face. *Webster v. Chesterfield Cnty. Sch. Bd.*, 534 F. Supp. 3d 537, 546 (E.D. Va. 2021). The district court held oral argument and the School Board introduced expert testimony. Two of the School Board's experts were professionals working in the special education field who explained that S.M.'s behavior was common for a child his age with his disabilities. *Id.* at 541. Expert testimony demonstrated that S.M. was incapable of distinguishing between sexes and that a reasonable instructional assistant would not view S.M.'s conduct as sexual harassment. *See id.* at 546–49. The district court found

[5] Dr. Rucker explained this action in a letter addressed to Webster where she also stated that a Title IX investigation had been opened, labeling the report as "founded as a Title IX violation." J.A. 513.

that Webster's failure to rebut this testimony, as well as her almost exclusive reliance upon her own statements, was detrimental to her prima facie case. Because Webster could only satisfy one of the four elements required to establish a hostile work environment claim, the district court granted the School Board's Motion for Summary Judgment on April 20, 2021. *Id.* at 551, 546. This timely appeal followed.

II.

The question before us on appeal is whether the district court erred in dismissing Webster's hostile work environment claim on summary judgment. "We review de novo a district court's award of summary judgment, viewing the facts in the light most favorable to the nonmoving party." *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 276 (4th Cir. 2015) (en banc). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The nonmoving party must demonstrate that a genuine issue of material fact exists "by offering sufficient proof in the form of admissible evidence" instead of "relying solely on the allegations of her pleadings." *Guessous v. Fairview Property Invs., LLC*, 828 F.3d 208, 216 (4th Cir. 2016) (internal quotation marks omitted); *see Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984).

To start, we note that all children have the right to obtain a free public education. 20 U.S.C. § 1412(a)(1)(A); Va. Code Ann. § 22.1–214(A). At the same time, employees have the right to a nonhostile work environment. To establish a prima facie case for hostile work environment sexual harassment under Title VII, the plaintiff must prove the relevant

conduct was: (1) unwelcome; (2) based on the plaintiff's sex; (3) sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) imputable to the employer. *Roberts v. Glenn Industrial Group, Inc.*, 998 F.3d 111, 117 (4th Cir. 2021).

While it is undisputed that Webster established the first element by demonstrating that she viewed the conduct at issue as unwelcome,[6] the parties disagree as to the remaining three elements. *See* Appellant's Br. at 14–15; Appellee's Br. at 19; J.A. 593. We address each of the three contested elements in turn.

A.

We begin with the first element at issue and determine whether Webster demonstrated that the offending conduct was based on sex. She may do this by establishing that such conduct would not have occurred *but for* her sex. *See Hoyle v. Freightliner, LLC*, 650 F.3d 321, 331 (4th Cir. 2011) (citation and internal quotation marks omitted). While the conduct need not be "motivated by sexual desire" or sexual intent to satisfy this element, it does need to have been conducted "in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). The critical question is therefore "whether members of one sex are exposed to

[6] In her complaint, Webster described "emotional pain and suffering" as well as embarrassment. J.A. 17. This is sufficient to show the conduct was unwelcome and thus satisfy the first element. *See EEOC v. Central Wholesalers, Inc.*, 573 F.3d 167, 175 (4th Cir. 2009). The School Board does not contest the district court's finding that Webster met this element and only responds to Webster's arguments concerning the remaining three elements. Appellee's Br. at 19.

disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.*

Webster does not contest that S.M. could not distinguish between sexes and agrees that he could not form sexual intent. *See* J.A. 401–03, 462–63; Appellee's Br. at 26–27; Oral Argument at 1:53–2:00, 2:35–45, *Webster v. Chesterfield Cnty. Sch. Bd.* (4th Cir. Mar. 8, 2021) (No. 21-1545), https://www.ca4.uscourts.gov/OAarchive/mp3/21-1545-20220308.mp3. The School Board submitted affidavits from two expert witnesses who individually explained that S.M.'s behavior was driven by his disabilities. *See* J.A. 401–04, 462–63, 532–535. According to the 2018-19 Providence Elementary School Coordinator of Special Education, Laura Jackson ("Jackson"),

> [S.M.'s] hyperactivity and conduct problems *fell within the clinically significant range*, and concerns were raised regarding [S.M.'s] anger control, developmental social disorders and emotional self-control. S.M. was described as having a tendency to become irritable, upset, or frustrated quickly, and has *difficulty controlling and maintaining his behavior* and mood. [S.M.] was described further as being disruptive, intrusive, or threatening and having a tendency toward defiance and aggression.

J.A. 402–03 (emphases added); *see* J.A. 401. Given his disabilities, Jackson stated that "[S.M.] was *incapable* in the 2018-19 school year *of distinguishing between the male and female gender*" and that he "had neither the capacity, nor the ability, during the 2018-19 school year to a) harass anyone *because of gender* or b) understand that his behavior could be sexual." J.A. 403 (emphases added). Therefore, Jackson concluded that "[a]ny teacher or [instructional assistant] during the 2018-19 school year knew/or should have expected that [S.M.] would grab body parts, including 'sexual areas.'" *Id.*

The experts further explained how an experienced instructional assistant would interpret S.M.'s behavior. According to child psychologist Heather Applegate, Ph.D., who worked as a school and clinical psychologist,

> Any special education Instructional Assistant ("IA") should have known, and should have expected, that [S.M.] might grab various parts of a person's body (including "sexual" areas), or lift shirts solely in order to get attention, as a distraction, or to get someone to "back off." This is part of the understanding of the special education profession and is not specific to any one school district.

J.A. 462. She also drew conclusions based upon Webster's twelve years of experience working in special education.

> It is *not reasonable for a special education IA to conclude that a young child with Down's Syndrome and ADHD*, who responds negatively to instructions or commands by grabbing and squeezing body parts, *is engaged in sexually harassing behavior*. The student is merely trying to escape the instruction or command . . . This is what any objectively reasonable special education IA would conclude based on [S.M.'s] behavior and his disabilities. His behavior had *nothing* to do with Ms. Webster's gender.

Id. (emphases added).

Webster does not argue that the district court erred in concluding that S.M. could not form sexual intent, but rather, her argument is that the district court's intent-focused analysis imposed a higher than required burden to show that S.M.'s conduct, whether intentional or not, was based on sex. In her view, the record demonstrates that S.M. tended to target female staff members, as opposed to male staff members, by inappropriately touching them. As support, Webster relies primarily on her own affidavit where she described putting herself "between [a male student], to keep [S.M.] from touching [the male student]" and thus experienced "the brunt of the touching" but ultimately concluded

"[t]hat although [S.M.] inappropriately touched both male and female students, he much more frequently inappropriately [touched] female adults, such as his teachers and aides, often grabbing their breasts or buttocks areas." J.A. 490, 496. She also points to Ellerbee's statements to show that S.M.'s female teacher also experienced inappropriate touching because S.M. had previously placed his hands on her chest. J.A. 505–07. Ellerbee also stated that S.M. was the first of her students to be accused of sexual harassment and that she was unaware of any incidents involving S.M. and an adult male staff member. According to Webster, S.M.'s conduct was *because of sex* because her and Ellerbee's statements, when read together, show both that S.M. targeted female staff members and that his conduct was "beyond the pale" of what could be expected. Appellant's Reply Br. at 8 (citing J.A. 561); *see* J.A. 503–05, 508–09. But when read within the larger context of her complete affidavit, Ellerbee also explained that S.M. touched her chest "to get a response out of [her]" and that he was "not the only student who has done that"—she "had other students with intellectual disabilities who have done that before." J.A. 507. Ellerbee's statements, as informed by her experience working in special education, are a logical extension of the experts' testimony which maintained that a reasonable teacher would not have viewed S.M.'s conduct as sexual harassment.

Still, Webster argues that a comparison of S.M.'s treatment of adult staff reveals that female staff members were exposed to harassment while male staff members were not. To be sure, the aim of summary judgment is not to determine the exact strength of a case and dispose of so-called weak cases, but instead to determine whether a rational jury *could* find in the plaintiff's favor such that the case should continue. *See Hoyle*, 650 F.3d at 334–35.

When the moving party has presented a properly supported motion for summary judgment, however, the nonmoving party has the burden to point to "significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In response to the School Board's expert testimony, Webster relies upon her own statements—not to refute the experts' findings as to S.M.'s inability to distinguish between sexes, but to advance her disparate treatment argument. But, for reasons we will discuss, her statements alone do not demonstrate disparate treatment. Neither do the point sheets describing Johnson's interactions with S.M. do so. Instead of reflecting how S.M. treated female staff, in comparison to male staff, the point sheets primarily show how S.M. interacted with female staff and other students. Webster, however, interprets the absence of inappropriate touching involving male staff as validation that S.M. targeted female staff. *See* Oral Argument at 2:36–4:18, *Webster v. Chesterfield Cnty. Sch. Bd.* (4th Cir. Mar. 8, 2021) (No. 21-1545), https://www.ca4.uscourts.gov/OAarchive/mp3/21-1545-20220308.mp3; *see also* Appellant's Br. at 7 ("[I]t is clear that the *only* adults who are referenced in those notes as having been inappropriately touched by [S.M.] are *females*." (emphases in original)).

The Eighth Circuit relied upon a similar argument in *Crist*, when it analyzed the alleged harasser's treatment of female staff as compared to their male counterparts and ultimately reversed the district court's grant of summary judgment. *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997). In *Crist*, the court considered whether a residential program for people with disabilities could be held liable for the alleged sexual harassment of three female employees by a male resident. *Id.* at 1110 ("[T]he thrust of appellants' lawsuit is Focus Homes' conduct in response to appellants' complaints about

[the resident's] physically aggressive behavior, not J.L.'s underlying conduct."). Unlike S.M. who was an eight-year-old boy when Webster accused him of sexual harassment, this resident was sixteen years old, over six feet tall, and weighed over two hundred pounds. *Id.* at 1108. The resident in *Crist* also had a history of being physically aggressive toward staff and other residents. *Id.* at 1108–11.[7] While the Eighth Circuit focused on the fourth element discussing liability, it still acknowledged that a reasonable jury *could* find that the conduct at issue was based on sex because female staff were disproportionately impacted. This comparison was supported by the downward shift in the frequency of incidents of abuse that occurred once male care providers began working at the facility. But unlike the male caregivers who worked alongside the plaintiffs in *Crist*, there were no male employees working alongside Webster here. Thus, while Webster relies upon her and Ellerbee's statements to conclude that S.M.'s conduct "was disproportionately geared more toward adult <u>*women*</u> than adult men," she disregards the latter part of her argument by failing to ever *compare* Webster's treatment to that of any similarly situated male. Appellant's Br. at 7 (emphasis in original).

Indeed, the only male employee identified here is Johnson. But Johnson was not regularly in the classroom, and of the more than 161 days covered by the point sheets

[7] We note that the conduct at issue in *Crist* differed from the conduct here, not only because of the physical differences between the alleged perpetrators, but also due to the sexual and violent nature of the alleged conduct itself. *See Crist*, at 1108 (detailing one reported incident where the resident "pushed [the named plaintiff] against a door, forced her right hand above her head, pulled open her jeans and her blouse, grabbed her left breast, and pushed his weight and erect penis against her stomach" before "continu[ing] to hit her and other staff members").

summarizing S.M.'s daily activities, very few entries even mention him. *See* J.A. 252 ("[S.M.] was walked around the school/hallways w/Mr. Johnson but the behaviors continued."); J.A. 255 ("[Johnson] was called to the classroom to talk with him."); J.A. 284 ("He had to stay w/Mr. Johnson for awhile this morning."); J.A. 285 (S.M. needed "support from the office w/Mr. Johnson. He was able to come back, but needed more support."); J.A. 287 ("He had to be supported by Mr. Johnson."). Johnson's brief interactions as an Assistant Principal of an elementary school thus cannot be compared with Webster's daily supervision as an instructional assistant assigned to small groups of students. *See Lightner v. City of Wilmington, N.C.*, 545 F.3d 260, 265 (4th Cir. 2008) (finding that comparator evidence failed because the two employees were not comparable due to the difference in their positions).

Pointing to S.M.'s specific actions, Webster insists that the nature of S.M.'s touching *alone* shows that his conduct was based on sex. But we determine whether conduct is because of sex by looking to the behavior, considering the underlying circumstances and the setting in which it occurred, and determining whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80. Applying that framework to the facts before us, we find that S.M.'s conduct fell within the range of behaviors which, as explained by experts, were unsurprising for a child of his age with Down's Syndrome and ADHD. *See* J.A. 402–03. We recognize that the female-dominated special education staff at Providence Elementary School presented Webster with additional challenges when attempting to meet this element through comparator evidence.

Nonetheless, Webster cannot primarily rely upon her own statements to argue that S.M.'s conduct surpassed what could be expected of an eight-year-old child with his disabilities after two special education experts testified that it did not—instead, she is required by law to demonstrate it. *See also Nat'l Enters., Inc. v. Barnes*, 201 F.3d 331, 335 (4th Cir. 2000) (finding that a self-serving affidavit was not enough to overcome summary judgment absent evidence directly supporting the plaintiffs' position). Because she failed to do so, we cannot find that S.M.'s conduct was because of sex.

B.

Even if Webster established that S.M. targeted her because of sex, she would still be unable to meet the third required element—that is, show that S.M.'s conduct rose to the level of severe or pervasive. To determine whether conduct qualifies as severe or pervasive, we look to the totality of the circumstances and consider: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Mosby-Grant v. City of Hagerstown*, 630 F.3d 326, 335 (4th Cir. 2010) (internal quotation marks omitted). "Our circuit has likewise recognized that plaintiffs must clear a high bar in order to satisfy the severe or pervasive test" and "[t]he task then on summary judgment is to identify situations that a reasonable jury might find to be so out of the ordinary" that it qualifies as severe or pervasive. *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315–16 (4th Cir. 2008). This element presents a two-part challenge as a plaintiff must meet both the subjective and objective prong. *EEOC v. Central Wholesalers, Inc.*, 573 F.3d 167, 175 (4th Cir. 2009). Concerning the subjective

prong, courts need not look any further than "the testimony of the complaining witnesses." *EEOC v. R&R Ventures*, 244 F.3d 334, 339 (4th Cir. 2001). To satisfy the objective prong, however, a plaintiff must show that "'a reasonable person in the plaintiff's position' would have found the environment objectively hostile or abusive." *Sunbelt Rentals, Inc.*, 521 F.3d at 315 (quoting *Oncale*, 523 U.S. at 81–82).

In Webster's view, the district court mistakenly focused on the objective prong of the evaluation and accorded her affidavit zero weight to find that she failed to meet the objective prong. But by continuing to rely on her own statements, Webster conflates the objective and subjective prongs of the severe or pervasive analysis. Pointing to her affidavit where she represented that S.M. harassed her "on a constant—almost daily—basis" between September 2018 and late March 2019, Webster maintains that the physical nature and frequency of the incidents shows that the conduct was severe or pervasive. J.A. 11, 493. And when measured to determine whether the conduct was *subjectively* severe or pervasive—Webster is correct. The record undoubtedly reflects how S.M.'s conduct impacted Webster as she described feeling humiliated, embarrassed, and crying at work on numerous occasions. J.A. 16, 50, 491. But when Webster's statements are used to measure whether the conduct was *objectively* severe or pervasive—Webster's argument fails. Without any expert testimony to rebut the School Board's evidence that S.M.'s behavior was consistent with the behavior of a child his age and with his disabilities, Webster fails to cite to anything in the record suggesting that a reasonable person in her position—an experienced instructional assistant working in special education—would find S.M.'s

conduct to be severe or pervasive. Absent such evidence, we cannot find that Webster satisfied this element's objective prong.[8]

C.

Notwithstanding our findings regarding the second and third elements, Webster's sexual harassment claim still fails as to the fourth and final element because the record does not show that S.M.'s conduct is imputable to the School Board. An employer may be held liable for a hostile work environment "if it knew or should have known about the harassment and failed to take effective action to stop it by responding with remedial action reasonably calculated to end the harassment." *Pryor v. United Air Lines, Inc.*, 791 F.3d

[8] Webster also cited to several circuit and district court cases involving allegations of sexual harassment by a person with certain developmental disabilities. The district court thoroughly discussed some of these cases and we agree with its conclusion that none of them aid Webster in establishing a prima facie case on these facts. *See Webster*, 534 F. Supp. 3d at 548–50. For example, Webster relies upon a Fifth Circuit case involving sexual harassment by an elderly person with dementia in which the court found the evidence sufficient to allow, but not require, a jury to find that the plaintiff was subjected to a hostile work environment. *See Gardner v. CLC of Pascagoula, LLC*, 915 F.3d 320, 323–24, 327 (5th Cir. 2019). Like *Crist*, the underlying facts distinguish *Gardner* from the case at bar because the alleged perpetrator in *Gardner* was an elderly resident who had a "long history of violent and sexual behavior" and "had a reputation for groping female employees and becoming physically aggressive when reprimanded." *Id.* at 323.

In addition, Webster also cites to a district court case where the plaintiff established the because of sex element and that Webster argues is similar. *See Mongelli v. Red Clay Consolidated Sch. Dist. Bd. of Educ.*, 491 F. Supp.2d 467 (D. Del. 2007). But the district court in *Mongelli* ultimately granted summary judgment on the hostile work environment claim and we cannot divorce its finding concerning the because of sex element from its extensive analysis regarding the severe or pervasive element. *Id.* at 480 (explaining that the student was criminally charged for the physical harassment at issue). Much like here, the district court in *Mongelli* found that the plaintiff failed to introduce evidence showing that a reasonable special education teacher would find the student's conduct unreasonable. *Id.* at 481.

488, 498 (4th Cir. 2015). But if an employer takes action that results in the "cessation of the complained of conduct, liability must cease as well." *Spicer v. Commonwealth of Va., Department of Corrections*, 66 F.3d 705, 711 (4th Cir. 1995); *see also EEOC v. Xerxes Corp.*, 639 F.3d 658, 669–70 (4th Cir. 2011).

The School Board responded to the March 13 incident by: (1) altering Webster's bus assignment to avoid S.M.; (2) changing Webster's schedule so she no longer accompanied S.M. alone; and (3) monitoring Webster's classroom to ensure that she was no longer alone with S.M. While Webster agrees that this effectively terminated her exposure to S.M.'s conduct, she maintains that the School Board failed to appropriately react between the fall of 2018 up until the March 13 incident. J.A. 8.

It is important to note that these elements cannot be evaluated in complete isolation from each other. Our discussion concerning the severe or pervasive element especially impacts our analysis here, because our finding that S.M.'s conduct was not objectively severe or pervasive helps explain why the School Board may not have taken prior action and why the School Board may not have been on notice at all. Nevertheless, it is unclear what remedies would have addressed Webster's concerns given her response to the steps that the School Board did take. For example, Webster interpreted the decision to separate her and S.M. as a sign that Ellerbee lacked faith in Webster's ability to "do the job" and discussed the change with the other educator involved, stating that "she does not want to switch students *either*." J.A. 527 (emphasis added). Then, when asked by Dr. Rucker to meet and discuss the situation, Webster declined because there was "no need to meet" as it "wouldn't fix the problem." J.A. 530. In a sworn declaration, Webster later reflected that

"no one at Providence ever offered [her] what [she] had been seeking since the very start of the harassment: a return to [her] former ED classroom." J.A. 498.[9] But "[t]here is no exhaustive list or particular combination of remedial measures or steps that an employer need employ to insulate itself from liability." *Xerxes Corp.*, 639 F.3d at 669–70 (internal quotation marks omitted) ("[I]t is possible that an action that proves to be ineffective in stopping the harassment may nevertheless be found reasonably calculated to prevent future harassment and therefore adequate as a matter of law.").

Like the district court, we too recognize the challenges that special education teachers like Webster may face when fulfilling their professional duties. *See Webster*, 534 F. Supp. 3d at 540, 551. As previously stated, the standard question when determining employer liability for third parties is whether the "employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment." *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 423 (4th Cir. 2014) (internal quotation marks omitted). Unlike in many Title VII actions where the employer's options to remedy a hostile work environment include firing an employee for sexual harassment, the School Board has a more limited set of remedies available given that they must balance maintaining a nonhostile work environment with ensuring that children have access to public education. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)

[9] Webster also explained that as a sixty-four-year-old who had worked at Providence for twelve years, she did not want to go from being a senior employee to being a new employee with the "most occupational vulnerability" at a new school. J.A. 498. The School Board, however, represented that it does not utilize an official seniority program. J.A. 553.

(describing available tangible employment actions as ones that "constitute[] a significant change in employment status" and include "hiring, firing, failing to promote, [or] reassignment"). This case exemplifies the difficulty of addressing a situation like Webster's, because while separating Webster and S.M. stopped him from touching her, S.M. was still touching other students. J.A. 64. But if S.M. was behaving as an eight-year-old with Down's Syndrome and ADHD would, then the school must maintain the nonhostile work environment while still respecting S.M.'s right to obtain an education—a right held by *all* children. For this reason, appropriate measures may vary.

In *Crist*, the Eighth Circuit underlined the importance of approaching the liability determination through fact-intensive analysis. *See* 122 F.3d at 1111–12. There, both the program's behavioral consultant and supervisor suggested various measures to address the alleged harasser's behavior and it was unclear whether their suggestions were implemented. Given the clear control that the employer had over the program, as well as the minimal steps it had taken to address the plaintiffs' extensive reports of violent assaults, the Eighth Circuit found that a reasonable jury could find the employer liable for an inadequate response. *Id.* at 1111–12. In contrast, however, the School Board here responded to Webster's complaints. While Ellerbee's decision to separate Webster from S.M. in November 2018 only lasted two weeks, Webster herself referred to it as a "brief reprieve." J.A. 13. But it was not initially clear that Webster even wished to be separated from S.M. as she had interpreted Ellerbee's decision as a lack of "faith in [her] working with the kids" or ability to "do the job." J.A. 527. When informing Dr. Rucker of Ellerbee's decision, Webster explained that she spoke with the educator Webster was to

exchange roles with and "she does not want to switch students either." *Id.* She also stated that she was "not sure what [Ellerbee was] talking about as for [Webster] being a target" because "[t]hose kids treat us all the same way so we are all targets." *Id.* And when asked to meet to discuss the situation, Webster declined.

The context-specific analysis that is needed to determine whether appropriate remedial action was taken in response to specific conduct explains why we cannot categorically foreclose the possibility that a student-teacher sexual harassment claim could be cognizable under Title VII. Whether a teacher has a hostile work environment claim stemming from student harassment will continue to depend on the whether the underlying facts meet the required elements under Title VII. This is a point with which both parties largely agree. *See* Appellant's Br. at 19–21; Appellee's Br. at 24–25. But we cannot, under these facts and in this context, hold that a reasonable jury could find S.M.'s conduct was based on sex, severe or pervasive, and imputable to the School Board.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.