UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JANE AND JOHN DOE, INDIVIDUALLY AND AS NEXT FRIENDS OF JANIE DOE 1 AND JANIE DOE 2, MINOR CHILDREN,	§	
Plaintiffs	§	**CIVIL ACTION NO. 4:22-cv-00814**
vs.	§	**Judge Mazzant**
PROSPER INDEPENDENT SCHOOL DISTRICT, HOLLY FERGUSON, AND ANNETTE PANIAGUA EX REL. THE ESTATE OF FRANK PANIAGUA	§	
Defendants	§	

DEFENDANT DR. HOLLY FERGUSON'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT AND BRIEF

NOW COMES Defendant Holly Ferguson ("Dr. Ferguson"), and, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), files this, her Motion to Dismiss the claims brought against her in Plaintiffs' Second Amended Complaint.[1] Alternatively, pursuant to *Schultea v. Wood*, 47 F.3d 1427, 1430 (5th Cir. 1995) (en banc), Plaintiffs should be required to file a Rule 7(a) reply. In support thereof, Dr. Ferguson respectfully shows as follows:

SUMMARY

This case involves allegations of sexual abuse by a former employee of Prosper Independent School District (the "District" or "Prosper ISD"), Frank Paniagua, who drove a school bus on which the minor Plaintiffs sometimes rode.[2] Before the minor Plaintiffs made an outcry on Saturday, May 7, 2022, nobody at Prosper ISD knew that Paniagua was harming the girls. When

[1] Dr. Ferguson files this motion subject to her Motion to Strike Plaintiffs' Second Amended Complaint. Dkt. 33.
[2] Dr. Ferguson recognizes that, in deciding a motion to dismiss under Rule 12(b)(6), the Court must accept as true all well-pled allegations in the complaint. In reality, many of Plaintiffs' allegations are untrue. Should this lawsuit progress to a stage at which Dr. Ferguson will be able to introduce evidence, she expects to demonstrate that she and other Prosper ISD personnel responded swiftly and reasonably when they first received a complaint about Paniagua.

their mother, Jane Doe, reported her concerns about Paniagua during the evening of Saturday, May 7, 2022, Prosper ISD personnel responded rapidly and contributed to a law enforcement response that resulted in Paniagua's arrest within days. Plaintiffs do not claim that Paniagua had any further contact with the minor Plaintiffs after Jane Doe reported her concerns to District personnel.[3] Plaintiffs admit that, upon receiving this report, the District terminated Paniagua. Dkt. 27, ¶21.[4]

After being arrested in connection with his conduct toward Janie Doe 1 and 2, Paniagua attempted suicide. In June of 2022, Paniagua died.

The Court should dismiss Plaintiffs' claims against Dr. Ferguson, the Superintendent of Prosper ISD. Plaintiffs Jane and John Doe lack standing to assert claims individually against Dr. Ferguson. Plaintiffs' claims against Dr. Ferguson in her official capacity are redundant of Plaintiffs' claims against Prosper ISD. Plaintiffs' Title IX claims against Dr. Ferguson fail because Title IX does not authorize claims against individuals. Plaintiffs' claims against Dr. Ferguson in her individual capacity fail under a qualified immunity analysis. Finally, Plaintiffs have not sufficiently pled a claim for punitive damages against Dr. Ferguson.

The Court should dismiss Plaintiffs' claims with prejudice because Plaintiffs cannot cure their pleading deficiencies and/or because Plaintiffs have already been given multiple opportunities to plead their best case. Alternatively, the Court should order Plaintiffs to file a Rule 7(a) reply tailored to Dr. Ferguson's assertion of qualified immunity. The Court should stay discovery in this matter pending resolution of Dr. Ferguson's assertion of qualified immunity.

[3] Indeed, after receiving Jane Doe's report, Prosper ISD did not let Paniagua drive a school bus again. District administrators placed Paniagua on administrative leave during the morning of Monday, May 9, 2022 and terminated his employment on Tuesday, May 10, 2022. *Infra* at 6; *see also* Dkt. 27, ¶21[PageID 289].

[4] Plaintiffs' Second Amended Complaint repeats paragraph numbers. Defendant refers here to ¶21 at PageID 289.

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STATEMENT OF ISSUES

This motion presents the following issues for the Court:

1. Whether the Court lacks jurisdiction over the claims Jane Doe and John Doe assert individually for alleged violations of Title IX and of Janie Doe 1 and 2's constitutional rights because Jane Doe and John Doe lack standing to recover individually for such alleged violations.

2. Whether the Court should dismiss Plaintiffs' claims against Dr. Ferguson in her official capacity because such claims are redundant of Plaintiffs' claims against Prosper ISD.

3. Whether the Court should dismiss Plaintiffs' claims against Dr. Ferguson under Title IX because Title IX does not authorize claims against individuals.

4. Whether Plaintiffs failed to defeat Dr. Ferguson's entitlement to qualified immunity because Plaintiffs failed to plead sufficiently:

   a. to establish the elements of claims for violations of Janie Doe 1 and/or Janie Doe 2's constitutional rights; and/or

   b. to demonstrate that Dr. Ferguson violated Janie Doe 1 and/or Janie Doe 2's clearly established constitutional rights, considered at an appropriate level of specificity.

5. Whether the Supreme Court has foreclosed supervisor liability claims under §1983.

6. Whether the Court should dismiss Plaintiffs' §1983 Due Process claims because Plaintiffs have failed to establish the elements of such claims against Dr. Ferguson.

7. Whether the Court should dismiss Plaintiffs' §1983 Equal Protection claims because Plaintiffs have failed to establish the elements of such claims against Dr. Ferguson.

8. Whether the Court should dismiss Plaintiffs'§1983 claim alleging failure to supervise because Plaintiff have failed to adequately allege the elements of such a claim.

9. Whether the Court should dismiss Plaintiffs' §1983 claim alleging failure to train because

Plaintiff have failed to adequately allege the elements of such a claim.

10. Whether the Court should dismiss Plaintiffs' claims for punitive damages brought against Dr. Ferguson because Plaintiffs have not offered well-pled allegations sufficient to support such damages against her.

11. Whether the Court should dismiss Plaintiffs' claims with prejudice because Plaintiffs cannot cure their pleading deficiencies and/or because Plaintiffs have already been given multiple opportunities to replead.

12. Whether discovery should be stayed pending disposition of Dr. Ferguson's assertion of qualified immunity.

13. Whether Plaintiffs should be required to file a Rule 7(a) *Schultea* reply to Dr. Ferguson's detailed assertion of qualified immunity, stating with particularity how Dr. Ferguson allegedly acted outside the protections of qualified immunity in this case.

BACKGROUND

A. Plaintiffs' Allegations.

Plaintiffs allege that Janie Doe 1 and 2 rode a bus to school three to four mornings per week during the 2021-22 school year. Dkt. 27, ¶17. Plaintiffs allege that, for much of the school year, the bus driver, Frank Paniagua, sexually abused Janie Doe 1 and 2 on the school bus, and that Paniagua's actions were captured on the bus video surveillance. Dkt. 27, ¶¶17-21 [PageID287]. Plaintiffs allege that Paniagua drove off-route, made unscheduled stops during which he sexually abused Janie Doe 1 and 2, and manipulated the GPS and mobile device application on his bus to conceal his location at these times. Dkt. 27, ¶¶17, 20 [PageID 286], 23, 25. Plaintiffs also allege that Paniagua sexually abused Janie Doe 1 and 2 when he dropped the girls off at their campus. Dkt. 27, ¶¶20, 21 [PageID 286-87]. Plaintiffs allege that unidentified

teachers or administrators at the girls' campus observed that Janie Doe 1 was the last child to deboard from Paniagua's bus, and that Paniagua explained to these unidentified teachers or administrators that Janie Doe 1 was helping him clean the bus by picking up the trash. Dkt. 27, ¶21 [PageID 287].

Plaintiffs allege that, on Saturday, May 7, 2022, Janie Doe 1 and 2 told their mother, Jane Doe, that sometimes Paniagua touches them. Dkt. 27, ¶26 [PageID 291]. Plaintiffs claim that Jane Doe left voicemails and sent emails to the District's transportation and police departments, and that her call was returned. Dkt. 27, ¶27 [PageID 291].

Plaintiffs acknowledge that, upon receiving Jane Doe's report about Paniagua, Prosper ISD investigated Paniagua and fired him. Dkt. 27, ¶¶5, 21 [PageID288-89]. Plaintiffs allege that during the morning of Monday, May 9, 2022, Prosper ISD police pulled surveillance video from Paniagua's bus, reviewed it, and sent it to the Prosper Police Department. Plaintiffs allege that, the following day, Jane Doe met with personnel from Child Protective Services and from the Children's Advocacy Center of Collin County, and that Janie Doe 1 and 2 attended forensic interviews. Dkt. 27, ¶28. Plaintiffs allege that, on or around May 11, 2022, Paniagua was arrested for sexual assault. Plaintiffs allege that Paniagua subsequently attempted suicide at the jail and that he died on June 10, 2022. Dkt. 27, ¶29.

Plaintiffs allege that the District's bus rider handbook states that cameras are recording at all times. Dkt. 27, ¶20 [PageID 287-88]. Although Plaintiffs previously contended that the video footage from Paniagua's bus was never reviewed,[5] Plaintiffs now contend that, "regardless of whether the Defendants bothered to look at the videos," Defendants' mere possession of these videos placed them on actual notice of Paniagua's conduct toward Janie Doe 1 and 2. Dkt. 27, ¶21

[5] Dkt. 13, ¶23; Dkt. 14, ¶23.

[PageID 288]. Plaintiffs admit that Prosper ISD police personnel reviewed footage from Paniagua's bus after receiving Jane Doe's May 7, 2022 complaint and that Prosper ISD fired Paniagua based on the video evidence. Dkt. 27, ¶21 [PageID 288-89], ¶28.

Plaintiffs allege that Dr. Ferguson "gave Jane Doe only a scant courtesy call and insinuated that Jane Doe stay silent so as to not attract media attention to her family or to Prosper ISD staff." Dkt. 27, ¶5. Plaintiffs allege that, after Paniagua's arrest, no counseling services were offered to the students who rode on Paniagua's bus. Dkt. 27, ¶¶5, 34.

Plaintiffs vaguely allege that, during February of 2020, the former director of transportation for the District and Dr. Ferguson, who now serves as the District's Superintendent, received a complaint from an unidentified parent concerning a different, unidentified bus driver's allegedly "inappropriate behavior" toward that parent's young daughter. Plaintiffs claim that this driver was reassigned to a new route and that no investigation was undertaken. Dkt. 27, ¶33.

Plaintiffs allege that, before the events leading to this lawsuit, Prosper ISD contracted with the Collin County Sheriff's Office child abuse investigation unit to assist the District's police department with investigations into child abuse or neglect. Dkt. 27, ¶30. Plaintiffs vaguely allege that an incident in 2012 "led to the uncovering of serious deficiencies in the District's policies and procedures regarding abuse reporting" and that, as a consequence, "the Sheriff's Office and its child abuse investigation unit gave trainings to the District." Dkt. 27, ¶31. Plaintiffs also allege that, at an unidentified time, an individual who was once a prosecutor and is now a county district judge, offered to give sexual abuse reporting trainings to the District. Dkt. 27, ¶32.

B. Plaintiffs' Causes of Action.

Plaintiffs assert claims against Dr. Ferguson in her individual and official capacities under 42 U.S.C. §1983 for alleged violation of Janie Doe 1 and 2's rights under the Fifth and Fourteenth

Amendments, alleging violations of the Due Process and Equal Protection clauses, as well as alleged failures to train and to supervise. Dkt. 27, ¶¶46-48, 50-53. Plaintiffs also purport to assert a claim against Dr. Ferguson in her official capacity under Title IX. Dkt. 27, ¶¶54-61. Plaintiffs seek recovery from Dr. Ferguson for pain and suffering and emotional trauma and suffering; attorneys' fees; expert fees; and punitive damages. Dkt. 27, ¶¶53, 83-86, 88, Prayer, ¶¶(c)-(e).

C. Dr. Ferguson's *Schultea* Defense

Dr. Ferguson hereby asserts her entitlement to qualified immunity from Plaintiffs' claims, as she did not violate Plaintiffs' clearly established constitutional rights. In support of this contention, Dr. Ferguson makes the following representations specifically allowed by *Schultea*, 47 F.3d at 1433 ("A defendant has an incentive to plead his defense with some particularity because it has the practical effect of requiring particularity in the reply.").

Dr. Ferguson became Superintendent of Prosper ISD on July 31, 2020. During the 2019-20 school year, Dr. Ferguson served as Associate Superintendent of Prosper ISD. In that role, she had no supervisory relationship with District bus drivers, including the unidentified bus driver to whom Plaintiffs vaguely refer in their Second Amended Complaint. Dkt. 27, ¶33.[6]

Prior to Saturday, May 7, 2022, when Jane Doe made a complaint about Defendant Paniagua, Dr. Ferugson had not received and was not aware of any Prosper ISD employee ever receiving any complaint about Paniagua's conduct with students. At 7:27 p.m. on Saturday, May 7, 2022, Jane Doe emailed the Prosper ISD Police Chief about an urgent situation regarding Paniagua, claiming, for the first time, that Janie Doe 1 and Janie Doe 2 indicated inappropriate touching and other inappropriate behavior from Paniagua. After receiving Jane Doe's complaint, Prosper ISD never permitted Paniagua to drive a school bus again.

[6] Prosper ISD ceased transporting children for the 2019–20 school year on March 7, 2020, due to Spring Break and the COVID-19 pandemic.

During the evening of Saturday, May 7, 2022, the Prosper ISD police officer who was on duty called Jane Doe to obtain more information and then shared the information he learned from Jane Doe with Prosper ISD administrators. These administrators decided to place Paniagua on administrative leave to prevent him from having further contact with students.

On Sunday, May 8, 2022, the Prosper ISD police officer who spoke with Jane Doe reported Jane Doe's complaint about Paniagua to the Department of Family and Protective Services ("CPS") and to the Collin County Child Advocacy Center ("CAC") and the Collin County Child Crimes Rural Task Force.

During the weekend of May 7-8, 2022, Prosper ISD administrators contacted Paniagua and directed him to report to administration instead of driving his morning routes on Monday, May 9, 2022. On the morning of Monday, May 9, 2022, Paniagua reported to administration and received his formal written administrative leave letter signed by Dr. Ferguson. This letter forbade Paniagua from attending school-sponsored or school-related activities.

Also on Monday, May 9, 2022, Prosper ISD police personnel reviewed videos from Paniagua's bus route on which Janie Doe 1 and Janie Doe 2 rode. Prosper ISD personnel provided information about these videos to investigators from the CAC, CPS, and the Collin County Child Crimes Rural Task Force and provided copies of these videos to investigators from the CAC.

On Tuesday, May 10, 2022, District administrators terminated Paniagua's employment.

During the morning of Wednesday, May 11, 2022, Dr. Ferguson called Jane Doe and spoke with her for more than twenty minutes. Dr. Ferguson offered Jane Doe and her family any support the school district could provide for as long as Janie Doe 1 and Janie Doe 2 attend school in Prosper ISD. Dr. Ferguson specifically offered support from the Prosper ISD counseling department, police department, and communications department. Jane Doe indicated that she thought they had

good support through the CAC and were good at this time. Dr. Ferguson did not ask Jane Doe to stay silent. Dr. Ferguson told Jane Doe that she would speak to Janie Doe 1 and 2's Principal about the situation so that Jane Doe would not have to do so.

During the evening of May 11, 2022, Jane Doe emailed Dr. Ferguson thanking her for her call that morning. Specifically, Jane Doe stated:

> Thank you again for your call this morning. When we spoke, you mentioned that the girls' teachers would be notified, which I understand the importance of. I would, however, like to minimize the number of people that know in order to protect their anonymity….

Dr. Ferguson replied to Jane Doe's email later that evening. Dr. Ferguson said she would make sure that Janie Doe 1 and 2's Principal addresses the anonymity with the girls' teachers. Dr. Ferguson asked Jane Doe to please let her know if there was anything else she could do.

On May 25, 2022, Jane Doe emailed the girls' Principal to ask that the Principal not notify the girls' future teachers about Paniagua's abuse. Jane Doe said, "[t]here is no reason for multiple staff and teachers to be involved in this very sensitive and private matter." The Principal called Jane Doe and agreed to abide by her wishes.

Prosper ISD teachers and administrators receive annual training on recognizing and reporting child abuse, including sexual abuse. Prosper ISD has always had policies in place requiring its teachers and administrators to report suspected child abuse, including sexual abuse. District bus drivers receive in-service training on sexual abuse before the school year begins.

During the 2021-22 school year, Prosper ISD bus drivers drove more than 100 routes each school day. District transportation department workers reviewed video from bus routes if they received a report of a problem on that route. Otherwise, as part of the evaluation process for bus drivers during the 2021-22 school year, during a 4-6 week period in the winter or early spring,

District transportation personnel randomly pulled and reviewed 3-5 videos for each bus driver. Dr. Ferguson did not review bus videos.

Dr. Ferguson never received any communications from Crystal Levonius concerning any matter related to the District. Dr. Ferguson did not instruct Annamarie Hamrick or any District bus drivers to keep quiet and not speak about Paniagua or the allegations in this lawsuit.

ARGUMENT AND AUTHORITIES

A. The Standard for a Motion to Dismiss.

1. Federal Rule of Civil Procedure 12(b)(1).

A court must dismiss a claim for which it lacks jurisdiction. FED. R. CIV. P. 12(b)(1). A claim should be dismissed for lack of subject-matter jurisdiction "when the court does not have statutory or constitutional power to adjudicate the case." *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012) (citation omitted). When a Rule 12(b)(1) motion is filed together with other Rule 12 motions, the Rule 12(b)(1) challenge should be first considered. *Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011) (citing *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001)). The party asserting jurisdiction bears the burden of proof for a motion under Rule 12(b)(1). *Ramming*, 281 F.3d at 161.

2. Federal Rule of Civil Procedure 12(b)(6).

To survive a FED. R. CIV. P. 12(b)(6) motion to dismiss, Plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A formulaic recitation of the elements of a cause of action will not suffice. *Id.*; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In deciding a motion under Rule 12(b)(6), the court does not, "presume true a number of categories of statements, including legal conclusions; mere labels; threadbare recitals of the elements of a cause of action; conclusory statements; and naked

assertions devoid of further factual enhancement." *Harmon v. City of Arlington*, 16 F.4th 1159, 1162-63 (5th Cir. 2021) (citing *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc)).

The Court need only accept as true the "well pleaded" facts in a complaint; to be "well pleaded," a complaint must state specific facts to support the claim, not merely conclusions and unwarranted factual deductions. *Tuchman v. DSC Comms. Corp*., 14 F.3d 1061, 1067 (5th Cir. 1994); *Fee v. Herndon*, 900 F.2d 804, 807 (5th Cir. 1990). A court is not bound to accept legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The Court should "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010). A conclusory allegation is one which lacks any factual support. *Hawkins v. AT&T*, No. 3:12-CV-1173-L, 2013 WL 4505154, *5, fn. 2 (N.D. Tex. Aug. 5, 2013) (citing *Twombly*, 550 U.S. at 553–554).

The Court should dismiss a complaint if it lacks an allegation regarding one of the required elements of a cause of action. *Keane v. Fox TV Stations, Inc.*, 297 F. Supp. 2d 921, 925 (S.D. Tex. 2004) (citing *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995)).

3. The Plaintiffs' Burden to Defeat Qualified Immunity.

"Although nominally an affirmative defense, the plaintiff has the burden to negate the assertion of qualified immunity once properly raised." *Collier v. Montgomery*, 569 F.3d 214, 217-18 (5th Cir. 2009). Qualified immunity "adds a wrinkle" to §1983 pleadings. *Arnold v. Williams*, 979 F.3d 262, 266-67 (5th Cir. 2020). "'A plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity.'" *Id*. (quoting *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)). To defeat qualified immunity, a plaintiff must show: (1) that the official violated a statutory or constitutional right; and (2) that the right was clearly established at the time of the challenged conduct, in the

specific context of the case. *Scott v. Harris*, 550 U.S. 372, 377 (2007); *Morgan*, 659 F.3d at 371; *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008). Courts have discretion in deciding which prong to address first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

B. The Court Lacks Jurisdiction Over Jane Doe and John Doe's Individual Claims Because They Lack Standing.

"Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims." *Stockman v. FEC*, 138 F.3d 144, 151 (5th Cir. 1998). The court "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). Accordingly, "before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990).

To establish standing under Article III, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). "The injury must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992).

Plaintiffs Jane and John Doe purport to assert claims individually and as next friends to their minor children, Janie Doe 1 and Janie Doe 2, against Dr. Ferguson. Dkt. 27, ¶¶7, 53.

To the extent that John Doe and Jane Doe seek recovery for themselves under Title IX, they lack standing to pursue such claims. *A.W. v. Humble Indep. Sch. Dist.*, 25 F. Supp. 3d 973, 985 (S.D. Tex. 2014) ("Plaintiffs' argument that [the parent] is able to assert individual claims

under Title IX is foreclosed by the Fifth Circuit's holding in *Rowinsky v. Bryan I.S.D.*, 80 F.3d 1006, 1010 n.4 (5th Cir.), *cert. denied*, 519 U.S. 861, 117 S. Ct. 165, 136 L. Ed. 2d 108 (1996), that 'nothing in the statutory language provides [a parent] with a personal claim under title IX.'"); *see also, e.g., Guerrero v. Brownsville Indep. Sch. Dist.*, No. 1:18-cv-182, 2020 U.S. Dist. LEXIS 90838, *24-25 (S.D. Tex. May 5, 2020); *Moreno v. McAllen Indep. Sch. Dist.*, No. 7:15-CV-162, 2016 U.S. Dist. LEXIS 44108, *25-26, n.103 (S.D. Tex. Mar. 31, 2016).

To the extent that John Doe and Jane Doe seek recovery for themselves under §1983, they lack standing to pursue such claims in the instant lawsuit, in which they expressly base their claims on allegations that the Defendants violated Janie Doe 1 and 2's constitutional rights, not their own constitutional rights. Dkt. 27, ¶¶48, 53(a-b). Parents lack standing to bring individual claims under §1983 based upon alleged deprivations of a child's constitutional rights. *Martinez v. Maverick County*, 507 Fed. App'x 446, 448 n.1 (5th Cir. 2013) (family members of the injured plaintiff "failed to establish standing by not putting forth facts implicating a right of recovery separate from the alleged violations of [the injured plaintiff's] personal rights") (citing *Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986)).[7]

John Doe and Jane Doe lack standing to pursue individual claims under Title IX and §1983. The Court lacks jurisdiction and must dismiss with prejudice Jane Doe and John Doe's individual claims against Dr. Ferguson.[8]

[7] *See also, e.g., Gregory v. McKennon*, 430 Fed. App'x 306, 310 (5th Cir. 2011) (plaintiff lacked standing to pursue a §1983 claim based on violations of others' rights, citing *Lujan*, 504 U.S. at 560 n.1 for the proposition that a plaintiff lacks Article III standing where the alleged injury does not affect the plaintiff in a personal and individual way); *Barker v. Halliburton Co.*, 645 F.3d 297, 300 (5th Cir. 2011) ("A third party may not assert a civil rights claim based on the civil rights violations of another individual."); *Covarrubias v. Wallace*, 907 F. Supp. 2d 808, 813 (E.D. Tex. 2012) (plaintiff "cannot raise claims regarding alleged violations of other persons' rights"); *Martinez v. Rojo*, No. 1:17-CV-00102-BU, 2020 U.S. Dist. LEXIS 87614, *4 (N.D. Tex. May 19, 2020); *Trice v. Pearland Ind. Sch. Dist.*, No. 3:19-CV-00286, 2020 U.S. Dist. LEXIS 58291, *8 (S.D. Tex. Mar. 16, 2020).

[8] For the same reasons, the Court lacks jurisdiction over any claims concerning individuals other than Janie Doe 1 and 2, because Jane Doe and John Doe lack standing to assert any such claims. The Court should, therefore, disregard Plaintiffs' allegations which relate to District personnel's purported conduct toward other parents or students and

C. The Court Should Dismiss Plaintiffs' Official Capacity Claims Against Dr. Ferguson.

Suing a governmental official in her official capacity is merely another way of pleading an action against the entity of which that officer is an agent. *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985); *Brandon v. Holt*, 469 U.S. 464, 471 (1985). Courts dismiss redundant claims when they are asserted against both an individual in his or her official capacity and the entity for which the official works. *E.g., Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001) (upholding the dismissal of claims against officers in their official capacity which were duplicative of the claims against the governmental entities); *Eltalawy v. Lubbock Indep. Sch. Dist.*, 816 Fed. App'x 958, 962-63 (5th Cir. 2020) (dismissing official capacity claims against a school employee as redundant to claims against the school district, citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)).[9]

Plaintiffs now purport to assert claims under §1983 and Title IX against both Prosper ISD and Dr. Ferguson in her official capacity. Dkt. 27, PageID297, 301. The Court should dismiss the claims against Dr. Ferguson because they are redundant of Plaintiffs' claims against Prosper ISD.

D. Title IX Does Not Authorize Claims Against Individuals.

Additionally, the Court should dismiss Plaintiffs' Title IX claim against Dr. Ferguson because Title IX does not authorize claims against individuals. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009) ("Title IX reaches institutions and programs that receive federal funds…but it has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals"); *Plummer v. Univ. of Houston*, 860 F.3d 767, 777 n.12 (5th Cir. 2017) ("Liability under Title IX does not extend to school officials, teachers and other

Plaintiffs' vague allegations about purported communications from other parents after this lawsuit was filed. Dkt. 27, ¶¶5, 24, 34, 35.

[9] *See also, e.g., Clark v. LaMarque Indep. Sch. Dist*., 54 Fed. App'x 412 (5th Cir. 2002); *Flores v. Cameron County, Tex.*, 92 F.3d 258, 261 (5th Cir. 1996) (dismissing claims against county judge in his official capacity as redundant of claims against the county).

individuals.") (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640-43 (1999)); *Wilkerson v. Univ. of N. Tex.*, 223 F. Supp. 3d 592, 608 (E.D. Tex. 2016), *reversed on other grounds*, 878 F.3d 147, 151 (5th Cir. 2017) ("Title IX does not allow suit against individuals."); *A.W. v. Humble Indep. Sch. Dist.*, 25 F. Supp. 3d 973, 986 (S.D. Tex. 2014).[10]

E. Plaintiffs Have Not Defeated Dr. Ferguson's Entitlement to Qualified Immunity.

The Court should dismiss Plaintiffs' claims against Dr. Ferguson because Plaintiffs have not pled sufficiently to defeat Dr. Ferguson's entitlement to qualified immunity. Plaintiffs' allegations do not demonstrate that Dr. Ferguson violated the minor Plaintiffs' constitutional rights that were clearly established in the specific context presented in this lawsuit.

1. Dr. Ferguson is Entitled to Qualified Immunity From Plaintiffs' Joint and Several Liability Claims Based on Paniagua's Alleged Sexual Abuse.

a) The Supreme Court Foreclosed Supervisor Liability Claims Under §1983.

Plaintiffs seek to hold Dr. Ferguson jointly and severally liable for Paniagua's alleged sexual abuse of the minor Plaintiffs. Dkt. 27, ¶¶48-49. However, supervisory officials may not be held vicariously liable for the actions of their subordinates under §1983. *Iqbal*, 556 U.S. at 677 ("[e]ach Government official…is only liable for his or her own misconduct"); *Taylor Indep. Sch. Dist.*, 15 F.3d at 452; *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002) (§1983 does not create supervisory or *respondeat superior* liability).

In *Iqbal*, the Supreme Court expressly rejected the argument that a supervisor can be liable under §1983 for knowledge of and acquiescence in their subordinate's discriminatory conduct. 556 U.S. at 677. The Fifth Circuit's prior holdings concerning supervisor liability generally

[10] Even if Title IX authorized claims against individuals, Dr. Ferguson would be entitled to dismissal of this claim because Plaintiffs have not adequately pled a claim under Title IX, for the reasons explained in Prosper ISD's Motion to Dismiss Plaintiffs' Second Amended Complaint, filed contemporaneously herewith.

require plaintiffs to show that the supervisor: (1) had knowledge of discriminatory conduct or knowledge of a substantial risk of serious harm; and (2) responded with deliberate indifference. *Infra* at 15, 19, 23-24. It is difficult to square these elements of supervisor liability with the Supreme Court's rejection of liability under §1983 based on a supervisor's knowledge of and acquiescence in a subordinate's unconstitutional conduct. Indeed, even the dissent in *Iqbal* understood the decision to eliminate supervisor liability entirely. *Iqbal*, 556 U.S. at 692-93.

Although the Fifth Circuit has not decided whether supervisor liability claims survive *Iqbal*,[11] other circuit courts of appeals have expressed uncertainty as to the viability of supervisor liability claims after *Iqbal*. *E.g.*, *Reynolds v. Barrett*, 685 F.3d 193, 205 n.14 (2nd Cir. 2012); *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 n.8 (3rd Cir. 2010); *Dodds v. Richardson*, 614 F.3d 1185, 1194-1202 (10th Cir. 2010). Even assuming, *arguendo*, that, Plaintiffs' claims alleging liability against Dr. Ferguson based on her role as a supervisor are not entirely barred by *Iqbal*, those claims do not allege a clearly established constitutional violation. As a result, Dr. Ferguson is entitled to qualified immunity from these claims. *Supra* at 9-10.

b) Plaintiffs' Due Process/Bodily Integrity Claim.

Even if supervisor liability claims survive *Iqbal*, Dr. Ferguson is entitled to qualified immunity from Plaintiffs' substantive Due Process/bodily integrity claim because Plaintiffs have not sufficiently alleged the elements of such a claim. Plaintiff have not, therefore, demonstrated that Dr. Ferguson engaged in a constitutional violation which was clearly established.

Although the Fifth Circuit has recognized that schoolchildren have a liberty interest in their bodily integrity which is protected by the Due Process Clause, and that physical sexual abuse by a

[11] *E.g.*, *Pena v. Givens*, 637 Fed. App'x 775, 785 (5th Cir. 2015) (per curiam) (declining to address the issue because it was unnecessary to disposition of the appeal); *Hernandez v. Horn*, 410 Fed. App'x 819 (5th Cir. 2011) (per curiam) (declining to address the issue because it was raised for the first time on appeal).

school employee violates this right,[12] Plaintiffs' allegations concerning Paniagua's alleged sexual abuse of the minor Plaintiffs are not sufficient to state a claim upon which relief can be granted against Dr. Ferguson.

In a case which pre-dated *Iqbal*, the Fifth Circuit held that a supervisory school official could be held personally liable for the sexual abuse of a student by a subordinate only if the plaintiff establishes that: (1) the supervisor learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; (2) the supervisor demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and (3) such failure caused a constitutional injury to the student. *Taylor Indep. Sch. Dist.*, 15 F.3d at 454.[13] Plaintiffs failed to offer well-pled allegations in support of these elements, so the Court should dismiss this claim. *Supra* at 8-9.

First, Plaintiffs do not allege that anybody at Prosper ISD learned of Paniagua's alleged abuse of Janie Doe 1 and 2 until May 7, 2022, when Jane Doe complained about Paniagua to the Prosper ISD police and transportation departments. Dkt. 27, ¶¶26-27. Plaintiffs do not allege that Dr. Ferguson learned of any complaint or concern about Paniagua before Jane Doe's May 7, 2022 complaint. Instead, Plaintiffs merely allege that, on one occasion during a prior school year, a different, unidentified parent allegedly complained that a different bus driver on a different bus route allegedly engaged in "inappropriate behavior" toward a young girl. Dkt. 27, ¶33. As this allegation does not involve Paniagua, it cannot establish that Dr. Ferguson "learned of facts or a

[12] *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450-51 (5th Cir. 1994) (en banc).
[13] The Supreme Court's subsequent rejection of §1983 liability based on a supervisor's knowledge of and acquiescence to a subordinate's discriminatory conduct brings into question the continued viability of these elements. *Supra* at 13-14.

pattern of inappropriate sexual behavior by [Paniagua] pointing plainly toward the conclusion that [Paniagua] was sexually abusing the [minor Plaintiffs]." *Taylor Indep. Sch. Dist.*, 15 F.3d at 454.[14]

Plaintiffs now plead that, regardless of whether Dr. Ferguson ever viewed the video recordings of Paniagua's bus routes, Dr. Ferguson allegedly had "**actual** notice" of Paniagua's sexual abuse of the minor Plaintiffs merely because these videos were allegedly in Defendants' possession. Dkt. 27, ¶21 [PageID288] (emphasis in original). This allegation is not sufficient to show that Dr. Ferguson **learned** of Paniagua's alleged abuse of Janie Doe 1 and 2 prior to Jane Doe's May 7, 2022 report, because: (1) it is an invalid legal conclusion which the Court should not accept as true;[15] and (2) given the monumental amount of data in Defendants' possession as a necessary consequence of operating a school district serving more than 19,000 students,[16] it would be an unwarranted inference to assume that the Superintendent ever reviewed any video from Paniagua's bus prior to learning of Jane Doe's complaint about Paniagua.[17] Plaintiffs' complaint lacks allegations sufficient to establish the first element of a Due Process/bodily integrity claim against Dr. Ferguson, and the Court should dismiss this claim. *Supra* at 8-9.

Plaintiffs also cannot establish the second element of this claim—that Dr. Ferguson demonstrated deliberate indifference toward the constitutional rights of Janie Doe 1 and 2 by failing to take action that was obviously necessary to prevent or stop Paniagua's alleged abuse. *Taylor Indep. Sch. Dist.*, 15 F.3d at 454. The "deliberate indifference" standard is a "stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious

[14] Plaintiffs' allegations concerning the alleged complaint in February of 2020 about a different bus driver do not demonstrate that Dr. Ferguson held a supervisory role with respect to this unidentified bus driver. To the contrary, Dr. Ferguson held no supervisory authority over any bus driver during the 2019-20 school year. *Supra* at 5.
[15] *Supra* at 8-9 (citing *Harmon*, 16 F.4th at 1162-63; *Gentilello*, 627 F.3d at 544).
[16] https://www.usnews.com/education/k12/texas/districts/prosper-isd-105242#:~:text=Prosper%20Independent%20School%20District%20contains%2019%20schools%20and%2019%2C138%20students, last visited on December 16, 2022.
[17] The Court should not accept unwarranted factual inferences as true. *Gentilello*, 627 F.3d at 544.

consequence of his action." *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 410 (1997). The relevant inquiry is not the ultimate efficacy of the actions that were taken, nor the number of steps that were taken. *Taylor Indep. Sch. Dist.*, 15 F.3d at 458 (superintendent was not deliberately indifferent even though his actions were ineffective); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 531-32 (5th Cir. 1994). Instead, all that is required are good faith measures, any measures, designed to avert the anticipated harm. *Hare v. City of Corinth*, 74 F.3d 633, 649 (5th Cir. 1996); *Lefall*, 28 F.3d at 531-32 (the single act of school official's hiring of security guards for dance where student was fatally shot conclusively established that the official did not act with deliberate indifference, even though the official had actual knowledge that violence was likely at dance).

Plaintiffs failed to offer well-pled allegations of deliberate indifference. The Court should disregard Plaintiffs' bald assertions that Dr. Ferguson acted with conscious or deliberate indifference,[18] because these contentions are no more than invalid legal conclusions or conclusory allegations which the Court should not accept as true.[19] Instead, Plaintiffs' more specific allegations negate any finding of deliberate indifference. Plaintiffs acknowledge that, after Janie Doe 1 and 2 made an outcry on Saturday, May 7, 2022: (1) Prosper ISD investigated Paniagua; (2) Dr. Ferguson called Jane Doe; (3) Prosper ISD police pulled the surveillance video from Paniagua's bus and reviewed it before sending the footage to the Prosper Police Department on

[18] Dkt. 27, ¶¶50-51.

[19] *Gentilello*, 627 F.3d at 544. Plaintiffs' confusing allegations about bus video surveillance and/or bus GPS tracking (¶50) are also insufficient to establish deliberate indifference because: (1) Plaintiffs do not identify any policy requiring District personnel to review all bus surveillance videos or GPS tracking information; (2) Plaintiffs have not offered well-pled allegations that Dr. Ferguson reviewed video or GPS tracking information from Paniagua's bus; and (3) an official cannot be deliberately indifferent unless she has actual, not constructive, knowledge of facts from which the inference could be drawn that a substantial risk of serious harm exists, and she actually draws that inference. *Infra* at 24 (citing *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009)). Plaintiffs' allegation of "**actual** notice" (Dkt. 27, ¶21 [PageID 288]) is, at most, an allegation that Defendants should have known about Paniagua's conduct prior to Jane Doe's complaint, not that they did know about Paniagua's conduct. Indeed, Plaintiffs admit as much by contending that review of the bus videos and GPS information "**would have given** the District meaningful notice and an opportunity to end his behavior." Dkt. 27, ¶50 (emphasis added).

May 9, 2022; (4) the District fired Paniagua; and (5) Paniagua was arrested on May 11, 2022. Dkt. 27, ¶¶5, 21 [PageID 288-89], 26-27 [PageID 291], 28-29. Thus, Plaintiffs' allegations demonstrate a remarkably swift and effective response in which a Saturday report yielded a Wednesday arrest on felony charges. This is a far cry from deliberate indifference.

Finally, Plaintiffs' allegations fail to establish that any action or failure to act by Dr. Ferguson caused a constitutional injury to the minor Plaintiffs. *Taylor Indep. Sch. Dist.*, 15 F.3d at 454. Plaintiffs do not allege that Paniagua engaged in any abuse after Janie Doe 1 and 2 made their outcry and Jane Doe made her complaint on Saturday, May 7, 2022. Plaintiffs offer no well-pled allegations that Dr. Ferguson knew of wrongdoing by Paniagua before that time. Dkt. 27. Instead, Plaintiffs acknowledge that Prosper ISD police personnel assisted with a criminal investigation that led to Paniagua's arrest within days of Jane Doe's complaint. Dkt. 27, ¶¶5, 21 [PageID 288-89], 26-27 [PageID 291], 28-29.[20] Plaintiffs also acknowledge that the District fired Paniagua upon receiving Jane Doe's report about Paniagua. Dkt. 27, ¶21 [PageID 288-89] Plaintiffs' allegations do not, therefore, establish the third element of a Due Process/bodily integrity claim against Dr. Ferguson. *Taylor Indep. Sch. Dist.*, 15 F.3d at 454.

The Court should dismiss Plaintiffs' Due Process/bodily integrity claim against Dr. Ferguson because Plaintiffs have not offered well-pled allegations in support of all of the elements of such a claim. *Supra* at 8-9; *Taylor Indep. Sch. Dist.*, 15 F.3d at 454. As Plaintiffs have not pled a constitutional violation, Dr. Ferguson is entitled to qualified immunity. *Supra* at 9-10.

c) Plaintiffs' Equal Protection Claim.

Dr. Ferguson is entitled to qualified immunity from Plaintiffs' Equal Protection claim

[20] Additionally, Dr. Ferguson signed a letter placing Paniagua on administrative leave and forbidding him from attending school-sponsored or school-related activities. Paniagua received this letter in the morning on Monday, May 9, 2022. *Supra* at 6.

asserting joint and several liability because Plaintiffs have not sufficiently alleged: (1) a constitutional violation by Dr. Ferguson; or (2) conduct by Dr. Ferguson that violated clearly established law, defined with appropriate specificity.

Plaintiffs seek to hold Dr. Ferguson jointly and severally liable for Paniagua's alleged violations of the minor Plaintiffs' rights under the Equal Protection Clause. Dkt. 27, ¶¶48-49. However, supervisory officials may not be held vicariously liable for the actions of their subordinates under §1983. *Supra* at 13. Additionally, the en banc Fifth Circuit expressly rejects Equal Protection claims predicated on an employee's sexual abuse of a student when, as in the case at bar, plaintiffs do not identify any potential damages that would be more extensive than the damages the plaintiff could recover based on a substantive Due Process/bodily integrity claim. *Taylor Indep. Sch. Dist.*, 15 F.3d at 458.

Finally, even if an Equal Protection claim against Dr. Ferguson were cognizable under these circumstances, she would be entitled to qualified immunity from such a claim because, for the reasons explained above,[21] Plaintiffs have not sufficiently pled that: (1) Dr. Ferguson learned of facts or a pattern of inappropriate sexual behavior by Paniagua pointing plainly toward the conclusion that Paniagua was sexually abusing the minor Plaintiffs; (2) Dr. Ferguson demonstrated deliberate indifference toward the constitutional rights of the minor Plaintiffs by failing to take action that was obviously necessary to prevent or stop Paniagua's abuse; and (3) such failure caused a constitutional injury to the minor Plaintiffs. *Taylor Indep. Sch. Dist.*, 15 F.3d at 454; *see also id*. at 458 (a superintendent who was not liable for a substantive Due Process/bodily integrity claim based on an employee's sexual abuse of a student would, for the same reasons, not be liable for an Equal Protection violation).

[21] *Supra* at 15-18.

The Court should dismiss Plaintiffs' Equal Protection claim against Dr. Ferguson based on Paniagua's alleged abuse of the minor Plaintiffs because: (1) it is not clearly established that such a claim exists under the circumstances of this lawsuit; and (2) even if such a claim did exist, Plaintiffs have not offered well-pled allegations in support of all of the elements of a claim against a supervisor. *Supra* at 8-9; *Taylor Indep. Sch. Dist.*, 15 F.3d at 454, 458; *supra* at 15-18.

2. Dr. Ferguson is Entitled to Qualified Immunity from Plaintiffs' Vague Claims Relating to Alleged Policies or Practices

Although their Second Amended Complaint is not a model of clarity, Plaintiffs also appear to allege that Dr. Ferguson violated the minor Plaintiffs' Due Process and/or Equal Protection rights by allegedly failing "to fashion properly or to execute faithfully adequate policies to recognize, investigate, record, prevent and report sexually inappropriate behavior by educators." Dkt. 27, ¶51; *see also* Dkt. 27, ¶53(a-b). This allegation is insufficient to state a claim upon which relief can be granted against Dr. Ferguson or to defeat Dr. Ferguson's entitlement to qualified immunity because: (1) Plaintiffs offer no allegations that educators at Prosper ISD have ever engaged in sexually inappropriate behavior;[22] (2) Dr. Ferguson is not the District's policymaker;[23] (3) this allegation amounts, at most, to an allegation of negligence, which does not support liability under §1983;[24] (4) Plaintiffs offer no allegations that any such policy caused a deprivation of Janie Doe 1 and 2's constitutional rights; and (5) it was not clearly established at the time of Paniagua's alleged abuse that a superintendent would violate students' constitutional rights by allegedly failing "to fashion properly or to execute faithfully adequate policies to recognize, investigate, record, prevent and report sexually inappropriate behavior by educators." Dkt. 27, ¶51.

[22] Paniagua was a bus driver, not an educator.
[23] The Board of Trustees is the policymaker for independent school districts in Texas. *Doe v. Edgewood Indep. Sch. Dist.*, 964 F.3d 351, 365 (5th Cir. 2020); *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993).
[24] *E.g.*, *Andrews v. Belt*, 274 Fed. App'x 359, 360 (5th Cir. 2008) (citing *Daniels v. Williams*, 474 U.S. 327, 332-36 (1986)). To the contrary, liability for failure to promulgate a policy requires a showing that the defendant acted with deliberate indifference. *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011).

Plaintiffs also make the vague and conclusory allegation that Dr. Ferguson "allowed the development and adherence to customs and/or practices the [sic] lead to injuries suffered by Plaintiffs," including alleged failures involving complaints, investigations, hiring, and assignment of school personnel relating to sexually inappropriate behavior. Dkt. 27, ¶51 (a-e). These allegations are also insufficient to defeat Dr. Ferguson's entitlement to qualified immunity.

Plaintiffs explicitly allege that Janie Doe 1 and 2 suffered abuse by Paniagua. Dkt. 27, ¶¶1-2, 18-19, 20 [PageID 286], 21 [PageID 287], 42, 44. However, Plaintiffs offer no well-pled allegations that, prior to Jane Doe's report on Saturday, May 7, 2022, Dr. Ferguson, or anybody at Prosper ISD, knew that Paniagua had ever engaged in sexually inappropriate conduct. Dkt. 27. Plaintiffs' allegations demonstrate that Prosper ISD personnel took swift and effective action upon receiving Jane Doe's complaint. *Supra* at 3-4, 17-18. Any alleged inadequacies with respect to any previous complaints about any other District employee would not, therefore, be related to Dr. Ferguson's conduct in connection with Paniagua's behavior toward Janie Doe 1 and 2.

Plaintiffs' vague reference to hiring, maintaining, or assigning bus drivers (Dkt. 27, ¶51(c)) also fails to defeat Dr. Ferguson's qualified immunity, as Plaintiffs offer no allegations that anybody ever previously accused Paniagua of engaging in sexually inappropriate behavior.

Plaintiffs' only other allegation concerning purportedly wrongful conduct by District staff is a vague allegation that another parent, in a prior year, complained about a different bus driver engaging in "inappropriate behavior." Dkt. 27, ¶33. The Court should not credit Plaintiffs' conclusory characterization of this alleged complaint being about "grooming." *Harmon*, 16 F.4th at 1162-63; *Tuchman*, 14 F.3d at 1067. Additionally, even if it were true, it is unclear how a reassignment of a different bus driver to a different route in a prior year could have caused a violation of Janie Doe 1 and 2's constitutional rights. Finally, even a supervisor who is a

policymaker (unlike Dr. Ferguson) cannot be held liable for implementing an unconstitutional policy based only on evidence of one prior failure of the system. *Thompkins v. Belt*, 828 F.2d 298, 305 (5th Cir. 1987).

Indeed, Plaintiffs' new allegations contradict their vague allegations regarding supposed policies or customs concerning child abuse. Plaintiffs contend that, before the events which led to this lawsuit, District personnel: (1) contracted with experts from an outside law enforcement agency to assist with investigations into child abuse; and (2) repeatedly received trainings from these experts relating to mandatory reporting and not interfering with proper law enforcement investigation of child abuse reports. Dkt. 27, ¶¶30-31.

Plaintiffs' vague allegations relating to alleged policies or customs are insufficient to defeat Dr. Ferguson's entitlement to qualified immunity because Plaintiffs have not sufficiently pled a constitutional violation. *Supra* at 9-10.

3. Dr. Ferguson is Entitled to Qualified Immunity From Any Other Equal Protection Claim.

To the extent that Plaintiffs assert any other claim alleging violation of Janie Doe 1 and 2's Equal Protection rights, Dr. Ferguson is entitled to qualified immunity because Plaintiffs have not sufficiently alleged: (1) a constitutional violation by Dr. Ferguson; or (2) conduct by Dr. Ferguson that violated clearly established law, defined with appropriate specificity.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). To make out an Equal Protection claim, a plaintiff must prove "the existence of purposeful discrimination" motivating the state action which caused the complained-of injury. *Johnson v. Rodriguez*, 110

F.3d 299, 306-07 (5th Cir. 1997). "Discriminatory purpose in an equal protection context implies that the decisionmaker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group." *Woods v. Edwards*, 51 F.3d 577, 580 (5th Cir. 1995) (citing *U.S. v. Galloway*, 951 F.2d 64, 65 (5th Cir. 1992)).

Although Plaintiffs vaguely allege that Janie Doe 1 and 2 suffered violations of their Equal Protection rights,[25] Plaintiffs have not alleged that Dr. Ferguson treated similarly situated persons differently based on a protected classification or engaged in purposeful discrimination against any person. Accordingly, Plaintiffs' Equal Protection claim fails as a matter of law and should be dismissed. *Supra* at 8-9. Because Plaintiffs have not sufficiently pled a constitutional violation, Dr. Ferguson is entitled to qualified immunity from any Equal Protection claim. *Supra* at 9-10.

4. Dr. Ferguson is Entitled to Qualified Immunity From Plaintiffs' Failure to Supervise and Failure to Train Claims.

In light of the Supreme Court's rejection in *Iqbal* of supervisor liability under §1983, Dr. Ferguson is entitled to qualified immunity from Plaintiffs' failure to supervise claim because Plaintiffs did not plead a clearly established constitutional violation. *Supra* at 9-10. Dr. Ferguson is also entitled to qualified immunity from Plaintiffs' failure to supervise and failure to train claims because Plaintiffs have not sufficiently pled a clearly established constitutional violation under the elements of these claims that arise from pre-*Iqbal* case law.

Based on Fifth Circuit cases which either predated or failed to acknowledge *Iqbal*, the Fifth Circuit has held that a supervisor may be liable for failure to supervise or train if: "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure

[25] Dkt. 27, ¶53(a-b).

to train or supervise amounts to deliberate indifference." *Goodman*, 571 F.3d at 395.[26] Additionally, for liability to arise based on inadequate training or supervision, Plaintiffs must allege with specificity how a particular training program is defective and how the supervision was inadequate. *Goodman*, 571 F.3d at 395; *Boggs v. Krum Indep. Sch. Dist.*, No. 4:17-CV-583, 2018 U.S. Dist. LEXIS 92800, *16 (E.D. Tex. June 1, 2018).

To act with deliberate indifference, a government official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Goodman*, 571 F.3d at 395 (citation omitted). To establish deliberate indifference, Plaintiffs "'must demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in a constitutional violation.'" *Id*. (quoting *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003)); *Boggs*, 2018 U.S. Dist. LEXIS 92800 at *15 ("Claims of inadequate supervision and claims of inadequate training both generally require that the plaintiff demonstrate a pattern.") (citation omitted); *see also id*. at *16 (dismissing failure to train and failure to supervise claims because plaintiff had not sufficiently pled a pattern of behavior). If Plaintiffs fail to establish deliberate indifference, the Court need not address the other prongs of liability for failure to train or to supervise. *Goodman*, 571 F.3d at 395.

Plaintiffs' claims fail as to the first element because they offer only conclusory assertions that Dr. Ferguson allegedly failed to train and supervise District teachers, staff, and bus drivers. Dkt. 27 ¶¶52(a-d). Plaintiffs do not specify how a particular District training program was allegedly defective[27] and how the supervision was allegedly inadequate. Plaintiffs failed to offer

[26] *Goodman* relied on *Smith v. Brenoettsky*, 158 F.3d 908, 911-12 (5th Cir. 1998) for these elements and did not acknowledge *Iqbal*, which the Supreme Court issued three weeks earlier.

[27] Plaintiffs now vaguely plead that, ten years earlier, an incident involving five high school students "led to the uncovering of serious deficiencies in the District's policies and procedures regarding abuse reporting." Dkt. 27, ¶31. Plaintiffs do not allege that Dr. Ferguson was then serving as the Superintendent, and indeed, she was not. *Supra* at 5. Plaintiffs plead that, at that time, personnel from the Collin County Sheriff's Office's child abuse investigation unit gave trainings to the District on mandatory reporting requirements and why the District should not interview students

well-pled allegations demonstrating that any failure to train or supervise caused a deprivation of the minor Plaintiffs' constitutional rights, merely alleging in a conclusory manner that "[a]s a direct and proximate result of said acts and/or omissions, Plaintiffs have suffered" violations of their Due Process and Equal Protection rights. Dkt. 27, ¶53. Finally, Plaintiffs have not sufficiently pled deliberate indifference because: (1) they offer no well-pled allegations to demonstrate a pattern of prior violations due to inadequate training or supervision;[28] and (2) Plaintiffs offer only vague and conclusory allegations that alleged failures in training and supervision violated Janie Doe 1 and 2's constitutional rights. Dkt. 27 ¶¶53(a-b). These allegations are insufficient to state a plausible claim for relief. *Supra* at 8-9 (citing *Harmon*, 16 F.4th at 1162-63; *Tuchman*, 14 F.3d at 1067; *Gentilello*, 627 F.3d at 544); *supra* at 24 (citing *Goodman*, 571 F.3d at 395; *Boggs*, 2018 U.S. Dist. LEXIS 92800, at *15-16); *see also Terry v. Le Blanc*, 479 Fed. App'x 644, 646 (5th Cir. 2012) (per curiam) (noting that conclusory allegations of deliberate indifference do not state a claim of a deprivation of constitutional rights).

Plaintiffs have failed to offer well-pled allegations sufficient to demonstrate a constitutional violation for failure to train or failure to supervise. Dr. Ferguson is, therefore, entitled to qualified immunity, and the Court should dismiss these claims.

F. The Court Should Dismiss Plaintiffs' Claim for Punitive Damages.

In order to obtain punitive damages in connection with their §1983 claims, Plaintiffs must establish that Dr. Ferguson violated the minor Plaintiffs' constitutional rights[29] and that Dr.

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but let trained forensic interviewers do so. Plaintiffs believe that the District has received this training on more than one occasion. Dkt. 27, ¶31. Plaintiffs' specific allegations relating to Jane Doe's May 7, 2022 complaint about Paniagua show that District personnel followed such alleged training, as, upon receiving Jane Doe's complaint: (1) District personnel reviewed bus surveillance video from Paniagua's bus and then provided it to law enforcement; and (2) the next day a specially trained forensic interviewer interviewed Janie Doe 1 and 2. Dkt. 27, ¶¶26-27 [PageID 291], ¶28. Plaintiffs' new allegations do not support a failure to train claim against Dr. Ferguson.

[28] Plaintiffs' vague allegations about a purported incident ten years earlier are insufficient to establish a pattern of violations or deliberate indifference by Dr. Ferguson. *Supra*, n.27.

[29] *See, e.g.*, *Williams v. Kaufman County*, 352 F.3d 994, 1015 (5th Cir. 2003); *La. ACORN Fair Hous. v. LeBlanc*, 211

Ferguson acted with reckless or callous indifference to the minor Plaintiffs' federally protected rights or was motivated by evil intent. *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Heaney v. Roberts*, 846 F.3d 795, 803 (5th Cir. 2017). Plaintiffs must demonstrate that Dr. Ferguson acted with subjective recklessness or callous indifference. *Kohler v. Johnson*, 396 Fed. App'x 158, 162 (5th Cir. 2010) (citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999)); *Williams*, 352 F.3d at 1015. This is a difficult standard to meet.[30]

Plaintiffs have not offered sufficient well-pled allegations to establish that Dr. Ferguson violated Janie Doe 1 and 2's constitutional rights. *Supra* at 13-25. Additionally, Dr. Ferguson's alleged conduct does not demonstrate evil motive or intent and does not rise to the level of reckless or callous indifference to the minor Plaintiffs' constitutional rights. Dr. Ferguson is merely alleged to have called Jane Doe after Prosper ISD investigated Paniagua and allegedly "insinuated that Jane Doe stay silent so as to not attract media attention to her family or to Prosper ISD staff." Dkt. 27, ¶5. Even if this allegation were true,[31] it would not demonstrate evil motive or callous indifference, but rather concern for the family's privacy and the well-being of District employees.

The Court should dismiss Plaintiffs' claim for punitive damages against Dr. Ferguson.

G. The Court Should Dismiss Plaintiffs' Claims With Prejudice

The Court has discretion to dismiss Plaintiffs' claims with prejudice based on their failure to cure pleading deficiencies by amending their complaint or based on their inability to cure pleading defects. *See, e.g.*, *Redmond v. Graham*, No. 4:21-mc-00004, 2022 U.S. Dist. LEXIS 139719, *23 (E.D. Tex. Aug. 5, 2022) (citing *Jones v. Greninger*, 188 F.3d 322, 327 (5th Cir. F.3d 298, 303 (5th Cir. 2000).

[30] For example, a plaintiff established defendants' subjective recklessness and callous indifference by showing that the defendants knowingly perpetuated an unconstitutional prison policy in violation of a court order. *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994).

[31] Dr. Ferguson denies having asked Jane Doe to remain silent.

1999) for the proposition that "where a court finds that the plaintiff has alleged his or her best case, dismissal with prejudice without an opportunity to amend is appropriate"); *Doe v. Dallas Indep. Sch. Dist.*, 194 F. Supp. 3d 551, 568 (N.D. Tex. 2016); *Benjamin v. City of Watauga, Tex.*, 841 F. Supp. 2d 1010, 1017–18 (N.D. Tex. 2012). The Court has already given Plaintiffs the opportunity to replead to comply with the pleading standards in federal court. Dkt. 5. Plaintiffs have already made multiple efforts to plead their best case. Dkts. 3, 13, 14, 27. Plaintiffs should not be given a **fifth** bite at the apple. Plaintiffs cannot cure their pleading deficiencies with respect to the claims for which the Court lacks jurisdiction. As to their other claims, Plaintiffs have failed to state claims on which relief may be granted despite already repleading multiple times. *Supra* at 12-26. For these reasons, the Court should dismiss Plaintiffs' claims with prejudice.

H. The Court Must Stay Discovery

While a defendant's assertion of immunity is pending, courts cannot allow **any** discovery to take place. *Carswell v. Camp*, 54 F. 4th 307, 2022 U.S. App. LEXIS 33072, *10 (5th Cir. Nov. 30, 2022); *Iqbal*, 556 U.S. at 684-686 (recognizing "serious and legitimate reasons" for the basic thrust of qualified immunity—to free government officials from the concerns of litigation, including disruptive discovery, and noting that permitting discovery to proceed as to other defendants would prejudice defendants who have asserted qualified immunity); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) for the proposition that discovery should not be allowed until the threshold question of qualified immunity is resolved); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.").[32] The Court may not allow any discovery

[32] *See also, e.g., Jackson v. City of Hearne*, 959 F.3d 194, 202 (5th Cir. 2020); *Vander Zee v. Reno*, 73 F.3d 1365, 1368-69 (5th Cir. 1996); *Allen v. Hays*, 812 Fed. App'x 185, 194 (5th Cir. 2020); *Morris v. Cross*, 476 F. App'x 783,

to take place until Dr. Ferguson's assertion of immunity is resolved.

I. Dr. Ferguson's *Schultea* Motion

Claims against public officials under §1983 must be stated with particularity in order to overcome the defense of qualified immunity. *Schultea*, 47 F.3d at1430. The Court "may properly order that a party make a Rule 7(a) Reply in response to the opposing party's assertion of a qualified immunity defense." *Boggs*, 2018 U.S. Dist. LEXIS 92800 at *16.

> First, the district court must insist that a plaintiff suing a public official under § 1983 file a short and plain statement of his complaint, a statement that rests on more than conclusions alone. Second, the court may, in its discretion, insist that a plaintiff file a reply tailored to an answer pleading the defense of qualified immunity. *Vindicating the immunity doctrine will ordinarily require such a reply, and a district court's discretion not to do so is narrow indeed when greater detail might assist.*

Schultea, 47 F.3d at 1434 (emphasis added). "By definition, the reply must be tailored to the assertion of qualified immunity and fairly engage its allegations. A defendant has an incentive to plead his defense with some particularity because it has the practical effect of requiring particularity in the reply." *Id.* at 1433. Dr. Ferguson herein pleads her defense of qualified immunity with particularity. *Supra* at 5-8.

If the Court for any reason believes that greater detail is necessary to determine whether Dr. Ferguson is entitled to qualified immunity from Plaintiffs' claims, the Court should order Plaintiffs to file a Rule 7(a) reply providing specific factual allegations in support of their claims against Dr. Ferguson. The Rule 7(a) reply should specifically address why Dr. Ferguson should not be entitled to qualified immunity from Plaintiffs' claims, in light of Dr. Ferguson's detailed assertion of qualified immunity in this motion. *Supra* at 5-8.

785 (5th Cir. 2012) ("Because the defendants raised qualified immunity, [plaintiff] was not entitled to proceed with discovery.")

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendant Dr. Holly Ferguson prays that Court the grant this motion to dismiss Plaintiffs' claims against her for lack of jurisdiction, under Federal Rule of Civil Procedure 12(b)(1) and for failure to state claims upon which relief can be granted, under Federal Rule of Civil Procedure 12(b)(6), that the Court recognize that Dr. Ferguson is entitled to qualified immunity from Plaintiffs' claims, and that all of Plaintiffs' causes of action against Defendant Dr. Ferguson be dismissed, with prejudice to the refiling of same. In the alternative, Defendant Dr. Ferguson requests that this Court order Plaintiffs to file a Rule 7 reply specifically addressing why Defendant Dr. Ferguson should not be entitled to qualified immunity from Plaintiffs' claims. Defendant further prays that Plaintiffs take nothing by this suit; that all relief requested by Plaintiffs be denied; and that Defendant recover all costs of suit; as well as for such other and further relief, both general and special, at law or in equity, to which Defendant may show herself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 2023, I electronically filed the foregoing document with the Clerk of the Court through the ECF system and an email notice of the electronic filing was sent to all attorneys of record.

/s/ *Thomas P. Brandt*
THOMAS P. BRANDT