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 PROSPER INDEPENDENT SCHOOL DISTRICT'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT AND BRIEF

NOW COMES Defendant Prosper Independent School District ("Prosper ISD," or the "District"), and, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), files this, its Motion to Dismiss the claims brought against it in Plaintiffs' Second Amended Complaint.[1] In support thereof, the District respectfully shows as follows:

SUMMARY

Plaintiffs assert a variety of claims against the District based on the alleged conduct of a former employee, Frank Paniagua, who drove a school bus on which the minor Plaintiffs sometimes rode.[2] After being arrested in connection with his conduct toward Janie Doe 1 and 2, Paniagua attempted suicide. In June of 2022, Paniagua died.

[1] Prosper ISD files this motion subject to its Motion to Strike Plaintiffs' Second Amended Complaint. Dkt. 33.
[2] The District 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. The District prohibits and strongly opposes Paniagua's alleged conduct toward the minor Plaintiffs. Should this lawsuit progress to a stage at which the District will be able to introduce evidence, the District expects to demonstrate that Prosper ISD personnel responded swiftly and reasonably when they first received a complaint about Paniagua.

Plaintiffs allege that Paniagua sexually assaulted the minor Plaintiffs when they rode to school on a bus he drove. When the girls made an outcry to their mother, and she made a complaint to Prosper ISD personnel, District officials took swift action that yielded Paniagua's termination and arrest within days of Jane Doe's complaint. Plaintiffs do not allege that Paniagua harmed the minor Plaintiffs after Jane Doe's complaint. Instead, Plaintiffs fault Prosper ISD for not reviewing video or other data concerning Paniagua's bus before District personnel had any reason to suspect Paniagua of wrongdoing.

Plaintiffs have not stated any cognizable claims against the District. The Court should dismiss Plaintiffs' claims against Prosper ISD because: (1) the District is entitled to governmental immunity from Plaintiffs' tort claims: (2) Jane and John Doe lack standing to assert individual claim under Title IX and 42 U.S.C. §1983; (3) Plaintiffs lack standing to pursue declaratory relief in this lawsuit; (4) punitive or exemplary damages are not available under the Texas Tort Claims Act ("TTCA") or Title IX and are not available against the District under §1983; (5) emotional distress damages are not available under Title IX; and (6) Plaintiffs have failed to state a claim upon which relief can be granted under 42 U.S.C. §1983 or Title IX.

The Court should dismiss Plaintiffs' claims against the District with prejudice because Plaintiffs cannot cure their pleading deficiencies and/or because Plaintiffs have already been given multiple opportunities to plead their best case.

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STATEMENT OF ISSUES

This motion presents the following issues for the Court:

1. Whether the Court lacks jurisdiction over Plaintiffs' claims against the District for breach of fiduciary duty, fraud by non-disclosure, negligence, and gross negligence because Plaintiffs have not established a waiver of the District's governmental immunity from these claims.

2. 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.

3. Whether the Court lacks jurisdiction over Plaintiffs' request for declaratory relief because Plaintiffs lack standing to pursue such relief.

4. Whether the Court should dismiss Plaintiffs' claims for punitive or exemplary damages because such damages are not available against the District.

5. Whether the Court should dismiss Plaintiffs' claims for emotional distress damages under Title IX because such damages are not available under Title IX.

6. Whether the Court should dismiss Plaintiffs' claims under 42 U.S.C. §1983 because Plaintiffs have failed to state a claim upon which relief can be granted.

7. Whether the Court should dismiss Plaintiffs' claims under Title IX because Plaintiffs have failed to state a claim upon which relief can be granted.

8. 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.

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.[3] Plaintiffs allege that Paniagua drove off-route and made unscheduled stops during which he sexually abused Janie Doe 1 and 2 and that Paniagua 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, after receiving Jane Doe's report, 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 Janie Doe 1 and 2 attended forensic interviews. Dkt. 27, ¶28.

[3] Plaintiffs' Second Amended Complaint repeats paragraph numbers. Defendant refers here to ¶21 at PageID 287.

Plaintiffs allege that, on or around May 11, 2022, Paniagua was arrested for sexual assault, that he 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,[4] 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 [PageID 288]. Plaintiffs admit that Prosper ISD police personnel reviewed footage from Paniagua's bus after receiving Jane Doe's May 7, 2022 report 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

[4] Dkt. 13, ¶23; Dkt. 14, ¶23.

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 the District under 42 U.S.C. §1983 alleging violations of Janie Doe 1 and 2's rights under the Due Process and Equal Protection clauses, as well as alleged failures to train and to supervise. Dkt. 27, ¶¶48-52. Plaintiffs assert claims against the District under 20 U.S.C. §1681 *et seq*. (Title IX), based on allegations about Paniagua's abuse of the minor Plaintiffs. Dkt. 27, ¶¶54-61. Plaintiffs assert tort claims for breach of fiduciary duty, fraud by nondisclosure, negligence, and gross negligence based on Paniagua's alleged assaults of the minor Plaintiffs. Dkt. 27, ¶¶70-82.

Plaintiffs seek recovery for: alleged deprivations of their rights to attend school and participate in school-related activities, such as riding a school bus; emotional distress; attorneys' fees; expert fees; and exemplary damages. Dkt. 27, ¶¶84-88, Prayer, ¶¶(c)-(e). Plaintiffs also seek declaratory relief. Dkt. 27, ¶89; Prayer, ¶(b).

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). When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the Court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits.

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 motion to dismiss, a plaintiff 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). 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).

The Court need only accept as true the "well pleaded" facts in a plaintiff's complaint—that is, those which 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). In fact, 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 U.S. Dist. LEXIS 121242, *12, n.2 (N.D. Tex. Aug. 5, 2013) (citing *Twombly*, 550 U.S. at 553-554).

To avoid dismissal, a plaintiff must allege all the elements of a claim. *Tuchman*, 14 F.3d at 1067. The court should dismiss a complaint if it lacks an allegation regarding one of the required elements of a cause of action. *See 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)).

B. The Court Lacks Jurisdiction Over Plaintiffs' Tort Claims Because the District's Governmental Immunity Has Not Been Waived.

Plaintiffs assert claims against the District alleging breach of fiduciary duty, fraud, negligence, and gross negligence in connection with Paniagua's conduct toward the minor Plaintiffs. Dkt. 27, ¶¶70-82. Because Prosper ISD is a governmental entity, Plaintiffs must demonstrate a waiver of governmental immunity to establish this Court's jurisdiction over their claims. *Alamo Forensic Servs., LLC v. Bexar County*, 861 Fed. App'x 564, 568 (5th Cir. 2021) ("Unless the party suing the governmental entity meets its burden of establishing that governmental immunity is waived, the trial court lacks jurisdiction to consider the claim.") (citing *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012)). Plaintiffs cannot do so with respect to their tort claims, because these claims do not fall within the limited waiver of governmental immunity provided by the Texas Tort Claims Act ("TTCA"). TEX. CIV. PRAC. & REM. CODE §§101.021, 101.051, 101.057.

1. Prosper ISD is Immune From Intentional Torts.

As a governmental entity, Prosper ISD is immune from suit for intentional torts, such as breach of fiduciary duty and fraud. TEX. CIV. PRAC. & REM. CODE §101.057; *Quinn v. Guerrero*, 863 F.3d 353, 363 (5th Cir. 2017).[5] For this reason, the Court must dismiss with prejudice Plaintiffs' claims for breach of fiduciary duty and fraud. Dkt. 27, ¶¶70-72, 73-76.

2. Prosper ISD is Immune From Plaintiffs' Other Tort Claims.

A school district is immune from all tort claims not involving the operation or use of a motor vehicle. TEX. CIV. PRAC. & REM. CODE §§101.021, 101.051; *Umoren v. Plano Indep. Sch.*

[5] *See also, e.g., Saenz v. City of El Paso*, 637 Fed. App'x 828, 830 (5th Cir. 2016); *Thomas v. Texas*, 294 F. Supp. 3d 576, 591-92 (N.D. Tex. 2018); *Devereaux v. City of Denton*, No. 4:12-CV-73, 2012 U.S. Dist. LEXIS 166778, *11 (E.D. Tex. Sep. 24, 2012); *Dwyer v. City of Corinth*, No. 4:09-CV-198, 2009 U.S. Dist. LEXIS 107441, *25 (E.D. Tex. Oct. 23, 2009).

Dist., 457 Fed. App'x 422, 425 (5th Cir. 2012).[6] The Texas Legislature provided only a limited waiver of immunity in the TTCA, and courts strictly construe the vehicle-use requirement. *Ryder Integrated Logistics, Inc. v. Fayette County,* 453 S.W.3d 922, 927 (Tex. 2015).

To fall within this waiver of governmental immunity, a government employee must have been actively operating the vehicle at the time of the incident, and the vehicle must have been used as a vehicle, not as a waiting area or holding cell. *Id*. "[T]he tortious act alleged must relate to the defendant's operation of the vehicle rather than to some other aspect of the defendant's conduct." *Id*. at 928. A governmental employee may commit assault in a governmental vehicle, "and that assault may constitute a tort, but it is not tortious use of a vehicle." *Id*. "Where the vehicle itself 'is only the setting' for the defendant's wrongful conduct, any resulting harm will not give rise to a claim for which immunity is waived" by the TTCA. *Id*. (quoting *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 52 (Tex. 1992)).[7]

For example, in *Limon v. City of Balcones Heights*, 485 F. Supp.2d 751, 753 (W.D. Tex. 2007), a police officer had been convicted of raping the plaintiff in his patrol car while on duty. The court rejected the argument that, because the police officer was transporting Limon as a prisoner at the time of the rape, the injury arose "from the operation of uses of a motor-driven vehicle." *Id*. at 756. The court found no waiver of immunity because: (1) the police officer's conduct was an intentional tort; and (2) the motor-vehicle must actually cause the injury, not merely '"furnish the condition that makes the injury possible.'" *Id*. (quoting *Bossley*, 968 S.W.2d

[6] *See also, e.g., Doe v. Dallas Indep. Sch. Dist.*, 194 F. Supp. 3d 551, 567 (N.D. Tex. 2016) (*citing Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655–56 (Tex. 2008)); *Clark v. La Marque Indep. Sch. Dist.*, 184 F. Supp. 2d 606, 615 (S.D. Tex. 2002), *aff'd*, 54 Fed. App'x 412 (5th Cir. 2002).

[7] *See also, e.g., DART v. Whitley*, 104 S.W.3d 540, 543 (Tex. 2003) (quoting *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998) for the proposition that "the operation or use of a motor vehicle 'does not cause injury if it does no more than furnish the condition that makes the injury possible.'"); *Herring v. Dallas County Sch.*, No. 3-99CV1538-P, 2000 U.S. Dist. LEXIS 4588, *7 (N.D. Tex. Apr. 11, 2000) (no waiver of immunity under the TTCA when student claimed injury due to the bus driver smoking while driving the school bus).

at 343). The TTCA does not waive governmental immunity for injuries from assaults that occur in a government vehicle. *Id*.[8]

Plaintiffs allege that Paniagua drove his bus off-route and made unscheduled stops during which he sexually abused Janie Doe 1 and 2 on the school bus under the pretext of adjusting their seatbelts. Dkt. 27, ¶¶2-3, 17, 19-21 [PageID 287]. Thus, Plaintiffs allege that Paniagua injured Janie Doe 1 and 2 by means of his alleged assaults, not by the manner in which he drove the school bus. The bus was only the setting for Paniagua's alleged assaults, and Paniagua's operation or use of the bus only furnished the condition that made the alleged injuries possible. Plaintiffs have, therefore, not demonstrated a waiver of the District's immunity from their tort claims. The bus did not injure Plaintiffs—this was not a car accident. As in *Limon*, *Woodberry*, *Hernandez*, and *Watson*, the vehicle was only the setting for the alleged sexual assaults. Consequently, Plaintiffs have not demonstrated a waiver of the District's governmental immunity. *Supra* at 6-8 and n.7.

For these reasons, the Court lacks jurisdiction and must dismiss with prejudice Plaintiffs' remaining tort claims against Prosper ISD. Dkt. 27, ¶¶77-82.

C. The Court Lacks Jurisdiction Over John Doe and Jane Doe's Claims for Individual Relief Under Title IX and 42 U.S.C. §1983.

John Doe and Jane Doe purport to assert claims individually and as next friends to Janie Doe 1 and 2. Dkt. 27, p. 1; ¶¶7, 53(c).

[8] *See also*, *e.g.*, *Woodberry v. DART*, No. 3:14-CV-03980-L, 2017 U.S. Dist. LEXIS 30813, *5-6, 21-22 (N.D. Tex. 2017) (finding no waiver of immunity when plaintiff alleged that, on multiple occasions, a bus driver stopped the bus, walked back to her seat, and raped her); *Hernandez v. City of Lubbock*, 253 S.W.3d 750, 753, 760 (Tex. App.—Amarillo 2007, no pet.) (no waiver of immunity when a police officer sexually assaulted the plaintiff in the back of his patrol car because the car merely furnished a condition that made the assault possible); *Ryder Integrated Logistics*, 453 S.W.3d at 928 (a police officer's assault in his cruiser is not tortious use of a vehicle; where the vehicle is only the setting for the wrongful conduct, "any resulting harm will not give rise to a claim for which immunity is waived under [the TTCA]); *Watson v. Bexar County*, No. SA-CV-646-RF, 2004 U.S. Dist. LEXIS 10842, *9-11 (W.D. Tex. 2004) (no waiver of immunity when police officer assaulted plaintiff in the back of his patrol car).

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.'").[9]

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, 50-52, 53(a-b). *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)).[10]

John Doe and Jane Doe lack standing to pursue individual claims under Title IX and §1983. The Court lacks jurisdiction and must dismiss such claims with prejudice.[11]

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[9] *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).

[10] *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 v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992) 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").

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

D. The Court Lacks Jurisdiction Over Plaintiffs' Requests for Declaratory Relief.

Plaintiffs seek a declaratory judgment that the minor Plaintiffs "are substantially likely to suffer injury in the future." Dkt. 27, ¶89; Prayer, ¶(b). The Court lacks jurisdiction over this request because Plaintiffs lack standing to obtain this relief.

Plaintiffs identify Paniagua as the individual who allegedly assaulted the girls. *E.g.*, Dkt. 27, ¶¶2, 17, 19-21 [PageID 287]. Plaintiffs acknowledge that District personnel terminated Paniagua upon receiving Jane Doe's report about Paniagua's conduct and that Paniagua died several months ago. Dkt. 27, ¶¶21 [PageID 289], 29. Plaintiffs lack standing to obtain declaratory relief because they do not allege facts to show that a substantial likelihood exists that they will suffer injury in the future, and the declaration they seek would not redress any alleged injury. *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003) (to establish standing to recover declaratory relief, "a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future") (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *see also, e.g., Lujan*, 504 U.S. at 560-61 (1992) (redressability requirement for standing); *Hall v. Smith*, 497 Fed. App'x 366, 374 (5th Cir. 2012) (no jurisdiction when plaintiff failed to allege facts showing any likelihood that she will suffer injury in the future that the declaratory relief she sought would redress). Therefore, the Court should dismiss Plaintiffs' request for declaratory relief.

E. The Court Should Dismiss Plaintiffs' Claim for Exemplary Damages.

1. Exemplary Damages Are Not Available Under the TTCA.

The TTCA does not waive governmental immunity for Plaintiffs' tort claims. *Supra* at 6-8. However, even if immunity were waived, exemplary damages are not available under the TTCA. TEX. CIV. PRAC. & REM. CODE §101.024 ("This chapter does not authorize exemplary damages."); *see also, e.g.*, *Dwyer*, 2009 U.S. Dist. LEXIS 107441 at *28.

2. Title IX Does Not Authorize Recovery of Exemplary Damages.

In *Gebser*, the Supreme Court explained that, because Title IX was modeled after Title VI of the Civil Rights Act of 1964, the "two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 286 (1998). The Supreme Court subsequently considered whether Title VI permits recovery of punitive damages. *Barnes v. Gorman*, 536 U.S. 181, 187-88 (2002). Relying heavily on its reasoning in *Gebser*, the Court concluded that punitive damages are not available under Title VI. *Id*. The Court explained that "'Title IX's contractual nature has implications for our construction of the scope of available remedies.'" *Id*. at 187 (quoting *Gebser*, 524 U.S. at 287). A governmental entity which receives federal funding under Title IX is subject to potential liability only for remedies traditionally available in suits for breach of contract, but punitive damages are generally not available for breaches of contract. *Id*.

The reasoning in *Barnes* also applies to claims for punitive damages under Title IX. *Mercer v. Duke Univ.*, 50 Fed. App'x 643, 644 (4th Cir. 2002) ("the Supreme Court's conclusion in *Barnes* that punitive damages are not available under Title VI compels the conclusion that punitive damages are not available for private actions brought to enforce Title IX").[12]

3. Section 1983 Does Not Authorize Recovery of Exemplary Damages.

Punitive damages cannot be recovered from governmental entities under §1983. *Skyy v.*

[12] *See also, e.g.*, *Knighton v. Univ. of Tex. at Arlington*, No. 4:18-cv-00792-P-BP, 2021 U.S. Dist. LEXIS 108027, *19 (N.D. Tex. May 24, 2021) (no punitive damages under Title IX); *Doe v. Baylor Univ*., No. 6:16-CV-173-RP, 2020 U.S. Dist. LEXIS 56953, *21-24 (W.D. Tex. Apr. 1, 2020) (same); *Doe v. Katy Indep. Sch. Dist.*, 427 F. Supp.3d 870, 882 (S.D. Tex. 2019) (as to Title IX claims, "[p]unitive damages are unavailable as a matter of law"); *Ruvalcaba v. Angleton Indep. Sch. Dist.*, No. 3:18-CV-00243, 2019 U.S. Dist. LEXIS 114602, *8 (S.D. Tex. June 6, 2019) ("punitive damages are unavailable against educational institutions under Title IX"); *Ayala v. Omogbehin*, No. H-16-2503, 2016 U.S. Dist. LEXIS 175600, *11 (S.D. Tex. Dec. 20, 2016) ("punitive damages are not recoverable under Title IX") (citing *Gebser*, 524 U.S. at 286; *Mercer*, 50 Fed. App'x at 644).

City of Arlington, 712 F. App'x 396, 401 (5th Cir. 2017) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-71 (1981).[13]

The Court should dismiss Plaintiffs' claim for punitive/exemplary damages because such damages are not recoverable against the District under any of Plaintiffs' claims.

F. The Court Should Dismiss Plaintiffs' Claims for Emotional Distress Damages Under Title IX.

Applying the same reasoning it used in *Barnes*, the Supreme Court recently held that damages for emotional distress are not available in lawsuits brought under federal antidiscrimination statutes passed pursing to the Spending Clause, including Title IX. *Cummings v. Premier Rehab Keller, P.L.L.C.*, ___ U.S. ___, 142 S. Ct. 1562, 1569-76 (2022).[14] The Court should, therefore, dismiss Plaintiffs' claims for emotional distress damages under Title IX.

G. The Court Should Dismiss Plaintiffs' Claims Under 42 U.S.C. §1983.

Although their Second Amended Complaint is not a model of clarity, Plaintiffs appear to assert claims against the District under §1983 for alleged violations of Janie Doe 1 and 2's Due Process bodily integrity and Equal Protection rights under the Fourteenth Amendment based on Paniagua's alleged conduct, and claims for failure to train and failure to supervise. Dkt. 27, ¶¶46-53. The Court should dismiss these claims because Plaintiffs have not sufficiently pled a basis for municipal liability, and because Plaintiffs failed to plead plausible claims.

1. Municipal Liability Under §1983.

Municipalities cannot be held liable under §1983 based on a *respondeat superior* theory.

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[13] *See also, e.g., Gil Ramirez Grp. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 412 (5th Cir. 2015); *Stern v. Hinds County*, 436 Fed. App'x 381, 382 (5th Cir. 2011); *Quinn v. Guerrero*, No. 4:09-CV-166, 2016 U.S. Dist. LEXIS 115590, *39-40 (E.D. Tex. Aug. 9, 2016), *recommendation adopted*, 2016 U.S. Dist. LEXIS 115273 (E.D. Tex., Aug. 26, 2016)

[14] *See also Bonnewitz v. Baylor Univ.*, No. 6:21-cv-00491-ADA-DTG, 2022 U.S. Dist. LEXIS 122572, *11 (W.D. Tex. July 12, 2022) ("Damages for emotional distress are not recoverable for violations of anti-discrimination statutes, including Title IX.") (citing *Cummings*, 142 S.Ct. at 1572).

Doe v. Edgewood Indep. Sch. Dist., 964 F.3d 351, 365 (5th Cir. 2020).[15] To impose municipal liability under §1983, Plaintiffs must show a policymaker, an official policy or custom, and a violation of constitutional rights whose moving force is the policy or custom. *Monell v. N.Y Dep't of Soc. Servs*., 436 U.S. 658, 694 (1978); *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)). In Texas, the board of trustees, not a superintendent or other official, is a school district's policymaker. *Edgewood*, 964 F.3d at 365; *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993) ("Texas law is clear that final policymaking authority in an independent school district…rests with the district's board of trustees."); TEX. EDUC. CODE §11.151.

Alternatively, a plaintiff may establish municipal liability through proof that a constitutional deprivation was caused by a custom that is so widespread as to have the force of law. *Piotrowski*, 237 F.3d at 579. A custom capable of supporting municipal liability under §1983 requires evidence of persistent, often repeated, constant violations, not merely isolated incidents. *Id*. at 581; *Zarnow v. City of Wichita Falls Tex*., 614 F.3d 161, 169 (5th Cir. 2010) (a custom "consists of actions that have occurred for so long and with such frequency that the course of conduct demonstrates the governing body's knowledge and acceptance of the conduct"); *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 850-52 (5th Cir. 2009) (27 similar incidents over a period of four years was not sufficient to establish a custom). A custom requires similarity and specificity; prior incidents must point to the specific violation in question. *Peterson*, 588 F.3d at 851.

If a plaintiff does not specifically identify, in a non-conclusory manner, the policy or custom which allegedly was the moving force behind a constitutional violation, he does not "raise

[15] Thus, the Court should dismiss Plaintiffs' claims under §1983 inasmuch as they seek to hold the District jointly and severally liable for Paniagua's conduct toward Janie Doe 1 and 2.

a right to relief above the speculative level," and dismissal is appropriate. *Twombly*, 550 U.S. at 555.[16]

2. Plaintiffs Have Not Sufficiently Alleged an Official Policy.

Plaintiffs offer no well-pled allegations concerning the District's policymaker, its Board of Trustees, nor do they specifically identify, in a non-conclusory manner, any policy that the District's Board of Trustees officially adopted or promulgated. Dkt. 27, ¶¶46-53. Instead, Plaintiffs merely: (1) make two fleeting references to "the District (acting through its school board as policymaker)"; and (2) make vague and contradictory allegations about Prosper ISD "ostensibly" having policies, the alleged content of which Plaintiffs do not identify, about bus surveillance and GPS tracking. Dkt. 27, ¶¶50-52. These allegations do not support municipal liability under §1983 because they are conclusory as to any purported conduct by the Board of Trustees, and they do not identify the content of the alleged policies. *Supra* at 5, 13.[17]

Beyond these inadequate allegations, Plaintiffs plead that "Prosper ISD officials (including Dr. Ferguson and Hamrick), who were policy makers for Prosper ISD…deprived Janie Doe 1 and Janie Doe 2 of the rights, privileges, and immunities secured by the Constitution and laws of the United States" and that such officials "failed to fashion properly or to execute faithfully adequate

[16] *See also, e.g., Bennett v. Slidell*, 728 F.2d 762, 767 (5th Cir. 1984) (to establish municipal liability under §1983, the complainant must identify the policy and show that his injury was incurred because of the execution of that policy); *Piotrowski*, 237 F.3d at 579-80 (same); *Bolton v. City of Dallas*, 541 F.3d 545, 549 (5th Cir. 2008) ("When a governmental official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality.") (citation omitted).

[17] Additionally, Plaintiffs do not sufficiently allege that any District policy was the moving force of a violation of the minor Plaintiffs' constitutional rights. "'Moving force' causation is more than 'but for' causation." *Edgewood Indep. Sch. Dist.*, 964 F.3d at 365-66. Instead, Plaintiffs must show that the final policymaker had the requisite degree of culpability and that its policies were the actual cause of the constitutional violation. *Id*. Here, Paniagua's alleged sexual abuse was the actual cause of the constitutional violation, not District employees' failure to review bus videos or GPS data, or District employees' alleged response to a complaint about a different bus driver. As was the case in *Edgewood Indep. Sch. Dist.*, Plaintiffs have failed to demonstrate a basis for municipal liability. For the same reasons, Plaintiffs' allegations concerning a purported custom related to reviewing bus videos or GPS data do not establish a custom sufficient to support municipal liability.

policies" on a number of topics. Dkt. 27, ¶51; ¶52 (basing their claims on allegations about the conduct of "[s]aid officials, including Dr. Ferguson"). These allegations are insufficient to support municipal liability under §1983, as neither the superintendent nor other unidentified "officials" are policymakers for the District. *Supra* at 13.

3. Plaintiffs Have Not Sufficiently Alleged a Custom or Practice.

Plaintiffs vaguely allege that unidentified officials "allowed the development and adherence to customs and/or practices" relating to: complaints or information about grooming or sexually inappropriate behavior by bus drivers or other staff; hiring and assignment of educators, bus drivers, and other staff; and insufficient investigations and responses to sexually inappropriate behavior between bus drivers or other staff and students. Dkt. 27, ¶51. These allegations do not state a claim upon which relief can be granted because they are vague, conclusory, unsupported by any well-pled factual allegations, and inadequate as a matter of law. *Supra* at 5, 12-14.

Plaintiffs' only specific allegation that any District employee received a complaint about Paniagua is that, on Saturday, May 7, 2022, after learning from her daughters that "sometimes [Paniagua] touches them," Jane Doe contacted the District's transportation and police departments. Dkt. 27, ¶¶26-27 [PageID 291].[18] Plaintiffs do not allege that anybody at the District had ever previously received a complaint about Paniagua, much less that District personnel had received and ignored complaints about Paniagua engaging in sexually inappropriate behavior with students

[18] Plaintiffs allege that, on the morning of Monday, May 9, 2022, District police personnel reviewed the surveillance video from Paniagua's bus and sent it to the Prosper Police Department. Dkt. 27, ¶28. Plaintiffs further allege that Janie Doe 1 and 2 had forensic interviews the following day and that, on or around Wednesday, May 11, 2022, Paniagua was arrested. Dkt. 27, ¶¶28-29. Plaintiffs acknowledge that that, after Janie Doe 1 and 2 made an outcry, Prosper ISD investigated Paniagua and fired him. Dkt. 27, ¶¶5, 21 [PageID288-89].

Should this lawsuit progress to a stage in which the District is able to present evidence, the District anticipates that the evidence will show that, upon learning of Jane Doe's complaint about Paniagua during the evening of Saturday, May 7, 2022, District personnel took swift action designed to prevent Paniagua from having any further contact with any District students, including Janie Doe 1 and 2. Plaintiffs do not allege that Paniagua had any contact with Janie Doe 1 and 2 after Jane Doe's May 7, 2022 complaint.

for so long that their course of conduct demonstrated the District's Board of Trustee's knowledge and acceptance of the conduct. *Supra* at 13 (citing *Zarnow*, 614 F.3d at 169).

Plaintiffs' vague allegation that a different, unidentified, parent previously complained to two District employees about a different bus driver's "inappropriate behavior" toward his young daughter (Dkt. 27, ¶33) does not establish municipal liability for Plaintiffs' claims. First, this is not a well-pled allegation of a prior complaint of sexual abuse or even of sexually-related conduct. Plaintiffs' characterization of the complaint as being about "grooming tactics" is conclusory, because it is not supported by factual allegations, and the Court should not accept it as true. *Tuchman*, 14 F.3d at 1067; *Gentilello*, 627 F.3d at 544. Additionally, an allegation of one, isolated, prior incident does not establish a custom or practice sufficient to support municipal liability. *Piotrowski*, 237 F.3d at 579, 581; *Zarnow*, 614 F.3d at169; *Peterson*, 588 F.3d at 850-52.

Plaintiffs do not allege that any educators or "other staff" members engaged in any inappropriate grooming or sexual behavior toward students, so they failed to show a custom or practice related to educators or "other staff." *Cf*. Dkt. 27, ¶¶1-4, 17-37; Dkt. 27 ¶¶51 (a), (c-e).

Plaintiffs have failed to state a claim upon which relief can be granted with respect to their claims against the District for alleged violations of Janie Doe 1 and 2's due process and equal protection rights because Plaintiffs failed to allege a sufficient basis for municipal liability under §1983. The Court should, therefore, dismiss these claims.

H. The Court Should Dismiss Plaintiffs' Claims for Failure to Train.

The Court should dismiss Plaintiffs' failure to train claim (Dkt. 27 ¶¶52(a-b)) because Plaintiffs have not pled sufficient facts to state a claim to relief that is plausible on its face, and because they have not alleged all the elements of a claim for failure to train. *Supra* at 5.

1. The Elements of a Claim For Failure to Train.

"A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Only when a failure to train reflects a deliberate or conscious choice by a governmental entity can a governmental entity be liable under §1983 for such a failure. *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009). To prevail on a failure to train theory a plaintiff must show that: 1) the municipality's training policy procedures were inadequate; 2) the municipality was deliberately indifferent in adopting its training policy; and 3) the inadequate training policy directly caused the violations in question. *Zarnow*, 614 F.3d at 170. Plaintiffs must allege with specificity how a particular training program is defective. *Id.*

2. Deliberate Indifference in Adopting a Training Policy.

Plaintiffs bear the burden of establishing deliberate indifference, which is a stringent standard denoting a high degree of culpability by the governmental entity. *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998); *Goodman*, 571 F.3d at 395. The municipal policymaker must have disregarded a known or obvious consequence of its action. *Connick*, 563 U.S. at 61. When municipal policymakers are on notice that a particular omission in their training program causes governmental employees to violate citizens' constitutional rights, the municipality may be deemed deliberately indifferent if the policymakers choose to retain that program. *Id.* A pattern of similar constitutional violations by untrained employees is ordinarily necessary to show deliberate indifference. *Connick*, 563 U.S. at 62. Without notice that training is deficient *in a particular respect*, policymakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights. *Id.*

3. Plaintiffs Have Not Stated a Claim For Failure to Train.

Plaintiffs failed to state a claim for any failure to train because: (1) they do not allege with specificity how the District's training was defective; (2) they do not allege that the Board of Trustees was deliberately indifferent in adopting its training policy; and 3) they did not offer well-pled allegations to establish that the District's allegedly inadequate training policy directly caused the constitutional violations in question. *Zarnow*, 614 F.3d at 170.

Plaintiffs' claim fails as to the first element because they offer only conclusory assertions about the District's superintendent and unidentified officials having allegedly failed to train teachers, staff, and officials concerning recognizing, investigating, and reporting sexually inappropriate behavior. Dkt. 27 ¶¶52(a-b). Plaintiffs do not specify how such training was allegedly defective. Plaintiffs do not sufficiently allege the deliberate indifference element of this claim because they did not allege that the Board of Trustees was on notice that that a specific training policy was defective and that the Board nevertheless made a deliberate choice to retain the inadequate training policy. To the contrary, Plaintiffs made no well-pled allegations about any notice by the Board. Dkt. 27 ¶¶52(a-b).[19] Plaintiffs failed to establish the third element of this claim because they offer only vague and conclusory allegations that alleged failures in training violated Janie Doe 1 and 2's rights under the Fifth and Fourteenth Amendments. Dkt. 27 ¶¶53(a-b). These allegations are insufficient to state a plausible claim for relief. *Supra* at 5.

The Court should dismiss this claim because Plaintiffs did not offer allegations to support all of its elements. *Supra* at 5 (citing *Tuchman*, 14 F.3d at 1067; *Blackburn*, 42 F.3d at 931).

[19] Additionally, Plaintiffs allege 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' 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 the District.

I. The Court Should Dismiss Plaintiffs' Claim For Failure to Supervise.

Plaintiffs claim that the District failed to adequately supervise: (1) its teachers and/or staff "concerning their interaction with students and signs of sexually inappropriate behavior by bus drivers or other staff"; (2) District bus surveillance; and (3) Paniagua. Dkt. 27, ¶¶52 (a, c, d). The Court should dismiss Plaintiffs' failure to supervise claim because the Supreme Court foreclosed such claims, Plaintiffs did not plead sufficient facts to state a claim to relief that is plausible on its face, and Plaintiffs' have not alleged all the elements of any failure to supervise claim.

1. The Supreme Court Foreclosed Supervisor Liability Claims Under §1983.

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 supervisory liability generally 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 19-20. 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.

2. The Elements of a Claim for Failure to Supervise.

Based on Fifth Circuit cases which either predated or failed to acknowledge *Iqbal*, the Fifth Circuit has held that a plaintiff asserting a failure to supervise must show that: 1) the supervisor failed to supervise the subordinate official; 2) a causal link exists between the failure to supervise and the violation of the plaintiff's rights; and 3) the failure to supervise amounts to deliberate

indifference. *Goodman*, 571 F.3d at 395.[20] "Where a plaintiff fails to establish deliberate indifference, the court need not address the other two prongs of supervisor liability." *Id.*

Deliberate indifference is a stringent standard, and, to establish deliberate indifference, Plaintiffs must show that the District's Board disregarded a known or obvious consequence of its action. *Snyder*, 142 F.3d at 796; *Goodman*, 571 F.3d at 395; *Connick*, 563 U.S. at 61. Proof of widespread, repeated instances of the lack of supervision causing a violation of constitutional rights is normally required before such lack of supervision constitutes deliberate indifference. *Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir. 2001).[21]

A failure to supervise claim fails when the plaintiff does not identify the supervisor who allegedly failed to supervise a subordinate. *Doe v. Abbott Indep. Sch. Dist.*, No. 6:18-CV-00226-ADA-JCM, 2019 U.S. Dist. LEXIS 233384, *13 (W.D. Tex. Jan. 9, 2019) (citing *Gentilello* 627 F.3d at at 544); *Dyer v. City of Mesquite*, No. 3:15-CV-2638-B, 2016 WL 2346740, *5 (N.D. Tex. May 3, 2016).[22]

3. Plaintiffs Have Not Stated a Claim For Failure to Supervise.

Plaintiffs failed to offer well-pled allegations sufficient to establish the elements of any claim against the District for failure to supervise. Dkt. 27, ¶¶52 (a, c, d), 53.

Although "'municipal liability under §1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by [municipal] policymakers,'"[23] Plaintiffs offered no well-pled allegations concerning the District's

[20] *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.
[21] *See also, e.g., Brumfield v. Hollins*, 551 F.3d 322, 329 (5th Cir. 2008) ("A plaintiff must demonstrate at least a pattern of similar violations arising from…supervising that is so clearly inadequate as to be obviously likely to result in a constitutional violation.") (quotations omitted).
[22] Plaintiffs have insufficiently pled a failure to supervise claim with respect to the unidentified "officials" whose supervision was allegedly inadequate, and the Court should dismiss this claim. Dkt. 27, ¶52.
[23] *Goodman*, 571 F.3d at 396 (quoting *City of Canton v. Harris*, 489 U.S. 378, 389 (1989)).

policymaker, its Board of Trustees, much less any allegations showing that the Board acted with deliberate indifference as to supervision of its teachers, staff, bus surveillance, or Paniagua. Plaintiffs provided no allegations to show that the Board of Trustees was aware of any prior instance in which a lack of supervision caused a violation of a student's constitutional rights.

Plaintiffs' allegations about Paniagua's conduct toward the minor Plaintiffs[24] are insufficient to support a finding that the Board of Trustees was deliberately indifferent regarding supervision because Plaintiffs do not allege: (1) that the Board of Trustees was aware of Paniagua's alleged conduct toward Janie Doe 1 and 2; or (2) that Paniagua violated Janie Doe 1 and 2's constitutional rights after their mother made her May 7, 2022 complaint about Paniagua.

Plaintiffs' vague and conclusory allegation about an unidentified parent purportedly making a complaint about "inappropriate behavior" by another bus driver[25] is also insufficient to demonstrate that the Board of Trustees was aware of widespread, repeated instances of the lack of supervision causing a violation of constitutional rights because, at most, this is an allegation of an isolated event. Additionally, Plaintiffs do not allege: (1) that the Board of Trustees was aware of the unidentified parent's complaint; (2) that the unidentified bus driver ever violated a student's constitutional rights; or (3) that a causal link exists between any failure to supervise the unidentified bus driver and any violation of any student's constitutional rights.

For these reasons, Plaintiffs have not sufficiently alleged the deliberate indifference element of a failure to supervise claim against the District, and the Court need not address the other two elements of this claim. *Goodman*, 571 F.3d at 395; *Brumfield*, 551 F.3d at 329.

Plaintiffs' Second Amended Complaint also does not offer well-pled allegations showing

[24] Dkt. 27, ¶¶1-4,17-21 [PageID 287], 25.
[25] Dkt. 27, ¶33.

that any failure to supervise caused violations of Janie Doe 1 and 2's constitutional rights. Instead, Plaintiffs offer only vague and conclusory allegations that alleged failures in supervision resulted in violations of Janie Doe 1 and 2's rights under the Fifth and Fourteenth Amendments. Dkt. 27 ¶¶53(a-b). These allegations are insufficient to state a plausible claim for relief for failure to supervise. *Supra* at 5, 19-20.

The Court should dismiss Plaintiffs' claim against the District for failure to supervise because Plaintiffs' live complaint lacks allegations regarding required elements of the claim, and Plaintiffs failed to state a plausible claim for relief. *Supra* at 5, 20-21.

J. The Court Should Dismiss Plaintiffs' Title IX Claim Asserted on Behalf of Janie Doe 1 and 2.

1. Liability Standard Under Title IX.

Title IX prohibits entities which receive federal funding from intentionally discriminating on the basis of sex in any education program or activity. 20 U.S.C. §1681(a); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280 (1998). School districts can be liable under Title IX "only for *intentional* sex discrimination." *Edgewood Indep. Sch. Dist.*, 964 F.3d at 358 (emphasis in original).

A plaintiff asserting a Title IX claim based on allegations of sexual abuse by a school employee must provide well-pled allegations that an "appropriate person" within the school district had actual knowledge of the employee's misconduct and responded with deliberate indifference—that is, responded in a manner that was clearly unreasonable in light of the known circumstances. *Gebser*, 524 U.S. at 290-91; *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000). These are stringent requirements. *Edgewood Indep. Sch. Dist.*, 964 F.3d at 358 ("it is not easy to prove an intentional violation of Title IX").

An "appropriate person" in this context means someone who, at a minimum, has authority

to institute corrective measures on the school district's behalf. *Gebser*, 524 U.S. at 277; *Edgewood Indep. Sch. Dist.*, 964 F.3d at 359-62 (a school police officer is not an "appropriate person" with respect to knowledge of a teacher's sexual abuse of a student). "[T]o be an 'appropriate person' under Title IX, the official must have authority to both repudiate th[e] conduct *and* eliminate the hostile environment." *Edgewood Indep. Sch. Dist.*, 964 F.3d at 360 (citation omitted) (emphasis in original). The Fifth Circuit has "long held that, generally, the 'bulk of employees' are not covered for purposes of a district's 'notice' under Title IX." *Id*. (citation omitted).

The actual knowledge requirement "cannot be satisfied by showing that the school district should have known there was a substantial risk of abuse." *M.E. v. Alvin Indep. Sch. Dist.*, 840 Fed. App'x 773, 775 (5th Cir. 2020); *see also Gebser*, 524 U.S. at 285 ("it would frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, i.e., without actual notice to a school district official") (citation omitted).

Deliberate indifference is a high standard which is difficult to meet. *E.g., I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 369 (5th Cir. 2019) ("negligent delays, botched investigations of complaints due to the ineptitude of investigators, or responses that most reasonable persons could have improved upon do not equate to deliberate indifference") (citation omitted); *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167 (5th Cir. 2011) ("For a school to be liable under title [sic] IX, its response, or lack thereof, to the harassment must be 'clearly unreasonable in light of the known circumstances.' That is a high bar, and neither negligence nor mere unreasonableness is enough.") (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999)); *Dallas Indep. Sch. Dist.*, 220 F.3d at 384, 387-89 (no deliberate indifference when a school official failed to monitor a teacher who had been accused of sexually abusing an

elementary school student).[26]

2. Plaintiffs Have Not Sufficiently Pled a Claim for Deliberate Indifference Under Title IX.

Plaintiffs' Second Amended Complaint does not state a claim upon which relief can be granted, because Plaintiffs do not offer well-pled allegations that any appropriate person in the District had actual knowledge of sexual abuse by Paniagua and responded in a way that was clearly unreasonable in light of the known circumstances.

Plaintiffs have not sufficiently alleged that anybody at the District had actual knowledge of sexual abuse by Paniagua prior to May 7, 2022, when Jane Doe contacted District personnel with her report about her daughters' outcry. Dkt. 27, ¶27 [PageID 291]. Instead, Plaintiffs now allege that the District's mere possession of video surveillance and GPS information[27] regarding Paniagua's bus gave Defendants actual notice of Paniagua's conduct, regardless of whether anyone at the District ever reviewed the videos or the GPS information. Dkt. 27, ¶¶3, 4, 19, 21 [PageID 288-89], 25, 26 [PageID 290], 58, 60. This is no more than an allegation of constructive notice. The Supreme Court long ago rejected the argument that constructive notice is sufficient to establish Title IX liability in a private lawsuit, and the Fifth Circuit has soundly rejected liability based on the argument that school personnel should have known about discriminatory conduct. *Gebser*, 524 U.S. at 285; *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 106, 652-53 (5th Cir. 1997); *M.E.*, 840 Fed. App'x at775 (5th Cir. 2020).[28]

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[26] *See also, e.g., Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998) ("The deliberate indifference standard is a high one. Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference."); *I.L. v. Houston Indep. Sch. Dist.*, 776 Fed. App'x 839, 842 (5th Cir. 2019).

[27] Plaintiffs allege that Paniagua manipulated the GPS tracking information on his bus to conceal his location when he allegedly went off-route to abuse Janie Doe 1 and 2. Dkt. 27, ¶23.

[28] Additionally, the Court should not accept unwarranted factual inferences as true. *Gentilello*, 627 F.3d at 544. Given the monumental amount of data in Defendants' possession as a necessary consequence of operating a school district serving more than 19,000 students, it would be an unwarranted inference to assume that Defendants ever reviewed any video or GPS information from Paniagua's bus prior to learning of Jane Doe's complaint about Paniagua. https://www.usnews.com/education/k12/texas/districts/prosper-isd-

Plaintiffs' allegations concerning unidentified teachers or administrators at Janie Doe 1 and 2's school allegedly noticing that Janie Doe 1 and 2 remained on the bus longer than other students[29] are also insufficient because they do not demonstrate actual knowledge of sexual abuse by an appropriate person. Indeed, Plaintiffs also allege that Paniagua provided a legitimate explanation for keeping Janie Doe 1 on the bus. Dkt. 27, ¶21 [PageID287]. Plaintiffs merely assert that these teachers or administrators *should have known* that Paniagua was abusing the minor Plaintiffs, but this does not amount to actual knowledge sufficient to support liability under Title IX. *M.E.*, 840 Fed. App'x at 775 (citing *Rosa H.*, 106 F.3d at 652-53); *see also Gebser*, 524 U.S. at 285. Further, Plaintiffs do not contend that unidentified teachers or administrators at an elementary campus had authority to take corrective action against a bus driver. Thus, Plaintiffs have not alleged that the teachers or administrators are "appropriate persons." *Gebser*, 524 U.S. at 277; *Edgewood Indep. Sch. Dist.*, 964 F.3d at 359-62.[30]

Plaintiffs' allegations relating to Jane Doe's May 7, 2022 communications with District personnel also fail to state a claim on which relief can be granted under Title IX, because Plaintiffs' allegations demonstrate that District personnel responded to Jane Doe's complaint in a manner that was not clearly unreasonable in light of the known circumstances.[31] *Gebser*, 524 U.S. at 290-91; *Davis*, 526 U.S. at 648; *Sanches*, 647 F.3d at 167. Plaintiffs do not allege that Janie Doe 1 and 2 ever encountered Paniagua after Jane Doe complained about him on May 7, 2022. Instead,

ss105242#:~:text=Prosper%20Independent%20School%20District%20contains%2019%20schools%20and%2019%2C138%20students, last visited on December 16, 2022.

[29] Dkt. 27, ¶¶3, 4, 18, 21 [PageID 287].

[30] Plaintiffs' conclusory allegation that they *believe* that these teachers or administrators reported Paniagua's behavior in keeping the minor Plaintiffs on the bus after other students to their superiors (Dkt. 27, ¶21 [PageID287]) also does not establish actual knowledge by an appropriate person, as Plaintiffs do not identify these superiors or offer any allegations about the superiors' authority to take corrective action against a bus driver.

[31] Should this case proceed to a stage at which the District can introduce evidence, the District anticipates that the evidence will show that the District quickly took additional actions designed to address Jane Doe's complaint and to prevent Paniagua from have any contact with students, including placing Paniagua on administrative leave, such that he never drove a bus again, and forbidding Paniagua from attending school-related activities.

Plaintiffs acknowledge that, on the morning of the next business day after Jane Doe's complaint, Prosper ISD police personnel pulled the surveillance video from Paniagua's bus, reviewed it, and sent it to the Prosper Police Department. Dkt. 27, ¶28. Plaintiffs further acknowledge that the minor Plaintiffs attended forensic interviews the following day, and that, on or about the next day, Paniagua was arrested. Dkt. 27, ¶¶28-29. Thus, Plaintiffs recognize that District personnel took swift action that contributed to Paniagua's prompt arrest. Additionally, Plaintiffs acknowledge that, upon receiving Jane Doe's report about Paniagua, Prosper ISD investigated Paniagua and fired him. Dkt. 27, ¶¶5, 21 [PageID288-89]. These allegations are sufficient to demonstrate that the District was not deliberately indifferent and to defeat liability under Title IX. *Gebser*, 524 U.S. at 290-91; *Davis*, 526 U.S. at 648; *Sanches*, 647 F.3d at 167. Allegations that the District could have taken additional steps in its response to Jane Doe's report do not support a finding of deliberate indifference. *I.L.*, 776 Fed. App'x at 842.

3. Plaintiffs' "Heightened Risk" Claim is Unavailing.

Plaintiffs purport to assert a "heightened risk claim" under Title IX. Dkt. 27, ¶¶54-61.

The Fifth Circuit has never recognized or adopted a Title IX theory of liability based on a "heightened risk" of sex discrimination, and it expressly declined to do so when presented with a claim based on a school employee's conduct toward a student. *Poloceno v. Dall. Indep. Sch. Dist.*, 826 Fed. App'x 359, 363 (5th Cir. 2020). Although some judges in Texas have employed a "heightened risk" theory of recovery under Title IX, they have done so only when the educational institution had knowledge of widespread student-on-student sexual harassment or assault claims. *E.g.*, *Doe v. Huntington Indep. Sch. Dist.*, No. 9:19-CV-00133-ZJH, 2020 U.S. Dist. LEXIS 256936, *14-15 (E.D. Tex. Oct. 5, 2020); *Doe v. Baylor Univ.*, 336 F. Supp. 3d 763, 782-83 (W.D. Tex. 2018). Other judges in Texas have expressed uncertainty as to the viability of a "heightened

risk" claim under Title IX, but have noted that, if such a claim exists, it would only apply where the defendant has actual knowledge of widespread, systemic problems and an official policy of responding with deliberate indifference, thereby creating a heightened risk of sexual assault. *E.g.*, *Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, No. H-18-2850, 2020 U.S. Dist. LEXIS 217596, *18 n.69, 26-27 (S.D. Tex. Nov. 20, 2020).

The Court should dismiss Plaintiffs' purported "heightened risk" claim because, even if such a claim were viable and cognizable beyond the context of student-on-student sexual harassment or assault,[32] Plaintiffs have not offered well-pled allegations sufficient to demonstrate that, prior to the 2021-22 school year (when the minor Plaintiffs sometimes rode on Paniagua's bus), the District's Board of Trustees had knowledge of widespread, systemic problems of sexual assault and an official policy of responding with deliberate indifference, thereby creating a heightened risk that Paniagua would sexually assault Janie Doe 1 and 2.

Plaintiffs base their "heightened risk" claim on the District's possession of bus surveillance video and GPS information, vague allegations about a different parent's alleged prior report of "inappropriate behavior" toward a student, and teachers' observations regarding the minor Plaintiffs deboarding the bus after other students. Dkt. 27, ¶59; *see also* Dkt. 27, ¶33.

Plaintiffs offered no well-pled allegations demonstrating that Defendants' mere possession of bus video and GPS information relating to Paniagua's bus provided any District personnel with actual knowledge of Paniagua's conduct, much less that the mere possession of these materials provided the District's Board of Trustees with actual knowledge of widespread, systemic problems of sexual assault. *Supra* at 24-27.

[32] *Poloceno*, 826 Fed. App'x at 363.

Plaintiffs' allegations concerning teacher observations of Janie Doe 1 and 2 deboarding Paniagua's bus after other students, and of Paniagua providing a legitimate explanation for this situation, also do not demonstrate that anyone at the District, much less the Board of Trustees, had actual knowledge of widespread, systemic problems of sexual assault. *Supra* at 24-27.

Finally, Plaintiffs' vague allegation concerning a purported complaint by a different parent about a different bus driver (Dkt. 27, ¶33) is also insufficient to support a claim under any "heightened risk" theory, because: (1) this allegation does not relate to sexual abuse; (2) Plaintiffs' characterization of the other parent's alleged complaint as being about "grooming" is conclusory;[33] and (3) an isolated complaint about "inappropriate behavior" does not demonstrate widespread, systemic problems or a policy of responding in any particular manner, much less one that creates a heightened risk that a different bus driver would sexually assault students. *Huntington Indep. Sch. Dist.*, 2020 U.S. Dist. LEXIS 256936; *Baylor Univ.*, 336 F. Supp. 3d at 782-83; *Cypress-Fairbanks Indep. Sch. Dist.*, 2020 U.S. Dist. LEXIS 217596 at *18 n.69.

Plaintiffs have failed to offer well-pled facts to establish liability under Title IX. The Court should, therefore, dismiss Plaintiffs' Title IX claims.

K. The Court Should Dismiss Plaintiffs' Claims With Prejudice

The Court has discretion to dismiss Plaintiffs' claims with prejudice based on: (1) their failure to cure pleading deficiencies by amending their complaint; or (2) their inability to cure pleading defects. *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. 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"); *Dallas Indep. Sch. Dist.*, 194 F.

[33] Therefore, the court should not treat this allegation as true. *Supra* at 5.

Supp. 3d at 568; *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 10-28. The Court should dismiss Plaintiffs' claims with prejudice.

WHEREFORE, PREMISES CONSIDERED, Defendant Prosper Independent School District prays that Court the grant this motion to dismiss Plaintiffs' claims against the District 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), and that all of Plaintiffs' causes of action against the Prosper Independent School District be dismissed, with prejudice to the refiling of same; 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 itself to be justly entitled.

Respectfully submitted,

/s/ *Thomas P. Brandt*

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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

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	§	

ORDER GRANTING DEFENDANT PROSPER INDEPENDENT SCHOOL DISTRICT'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Before this Court is Defendant Prosper Independent School District's ("Defendant") Motion to Dismiss Plaintiffs' Second Amended Complaint and Brief. Having considered the Motion and all briefing on the matter, the Court is of the opinion that Defendant's Motion should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint is hereby GRANTED. All of Plaintiffs' claims against Defendant Prosper Independent School District are dismissed with prejudice.

SO ORDERED.