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 REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT PROSPER INDEPENDENT SCHOOL DISTRICT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

SUMMARY

In their response to Prosper Independent School District's ("Prosper ISD" or the "District") motion to dismiss Plaintiffs' Amended Complaint (Dkt. 17), Plaintiffs rely exclusively on allegations from their Second Amended Complaint (Dkt. 27), which they filed without leave of the Court. Dkt. 28. Plaintiffs' Second Amended Complaint is subject to a pending motion to strike (Dkts. 33, 48), as Plaintiffs had already re-pled twice in this Court before filing their Second Amended Complaint. Dkts. 3, 13, 14. If the Court were to deny the motion to strike Plaintiffs' Second Amended Complaint, the District's motion to dismiss Plaintiffs' Amended Complaint would be moot, because the Second Amended Complaint would have superseded Plaintiffs' Amended Complaint.[1] If the Court were to grant the motion and strike Plaintiffs' Second Amended

[1] As the Court has not yet issued an order on Defendants' motion to strike Plaintiffs' Second Amended Complaint, the District is also filing, contemporaneously with this reply, a motion to dismiss Plaintiffs' Second Amended

Complaint, Plaintiffs have failed to identify any allegation before the Court to rebut the District's arguments for dismissal.

Plaintiffs have conceded many of Prosper ISD's arguments for dismissal because Plaintiffs failed to address these arguments or failed to offer any authorities in rebuttal of those arguments.

The Court should reject Plaintiffs' arguments relating to their negligence-based claims under the Texas Tort Claims Act ("TTCA") because they did not meet their burden to demonstrate a waiver of governmental immunity. Plaintiffs' arguments based on allegations and claims from their Second Amended Complaint are inapplicable to the instant motion.

The Court should reject Plaintiffs' arguments against dismissal of their remaining claims because Plaintiffs: (1) rely on a standard of review that the Supreme Court overturned long ago and; (2) fail to identify **any** allegations, much less any well-pled allegations, from their Amended Complaint sufficient to satisfy the applicable standard of review.

The Court should reject Plaintiffs' arguments concerning their municipal liability claims under 42 U.S.C. §1983 because: (1) Plaintiffs did not sufficiently plead a basis for municipal liability; (2) Plaintiffs did not sufficiently plead all elements of their claims; and (3) the Supreme Court foreclosed claims under §1983 for supervisory liability.

The Court should reject Plaintiffs' arguments concerning their Title IX claim because: (1) Plaintiffs rely exclusively on allegations from their Second Amended Complaint, which are not before the Court in this motion; and (2) Plaintiffs' arguments contradict binding precedent.

For all of these reasons, the Court should dismiss with prejudice Plaintiffs claims against Prosper ISD.

ARGUMENT AND AUTHORITIES

Complaint.

A. Plaintiffs Conceded Many of the District's Arguments.

Plaintiffs offered no response to the following arguments that the District made in its motion to dismiss Plaintiffs' Amended Complaint: (1) the Court lacks jurisdiction over the claims Jane Doe and John Doe purport to assert individually, because Jane Doe and John Doe lack standing to assert these claims (Dtk. 17, pp. 8-9);[2] (2) the Court lacks jurisdiction over Plaintiffs' claim for declaratory relief because Plaintiffs lack standing to pursue such relief (Dkt. 17, pp. 9-10); (3) the Court should dismiss Plaintiffs' claims for exemplary/punitive damages because such claims are not available against the District or under the TTCA (Dkt. 17, pp. 10-12); (4) the Court should dismiss Plaintiffs' claim for emotional distress damages under Title IX, because such damages are not recoverable (Dkt. 17, pp. 12-13); (5) the Court should dismiss Plaintiffs' failure-to-train claim, because Plaintiffs did not provide well-pled allegations addressing all elements of such a claim (Dkt. 17, pp. 17-19); (6) the Court should dismiss Plaintiffs' failure-to-supervise claim, because Plaintiffs did not provide well-pled allegations addressing all elements of such a claim (Dkt. 17, pp. 19-23); (7) the Court should dismiss Plaintiffs' purported "heightened risk" claim under Title IX because the Fifth Circuit has not recognized any such claim and because Plaintiffs did not provide well-pled allegations in support of any such claim (Dkt. 17, pp. 26-28). By failing to respond to these arguments, Plaintiffs conceded their validity.

Plaintiffs failed to offer any authority or argument in opposition to the District's briefing: (1) explaining that the TTCA does not waive governmental immunity for intentional torts, so the Court lacks jurisdiction over Plaintiffs' claims for assault, false imprisonment, invasion of privacy, intentional infliction of emotional distress, breach of fiduciary duty, and fraud (Dkt. 17, pp. 5-6); and (2) asking the Court to dismiss Plaintiffs' claims with prejudice (Dkt. 17, pp. 28-29). Plaintiffs

[2] Defendant refers to the page numbers at the bottom of its motion to dismiss Plaintiffs' Amended Complaint.

have not met their burdens in response to the District's motion to dismiss, and the Court should dismiss these claims with prejudice. Dkt. 17, pp. 3-5.

B. Plaintiffs Did Not Establish This Court's Jurisdiction Over Their Tort Claims Alleging Negligence.

Plaintiffs bear the burden of demonstrating a waiver of governmental immunity for their tort claims alleging negligence. Dkt. 17, pp. 4-7. The Court should reject Plaintiffs' arguments that they sufficiently alleged a waiver of immunity under the TTCA by alleging that Paniagua used the bus to commit assaults on the minor Plaintiffs (Dkt. 28, pp. 21-22) because these arguments refer only to allegations and claims which are not before the Court in Plaintiffs' Amended Complaint. Plaintiffs did not even attempt to demonstrate a waiver of governmental immunity with respect to the negligence-based tort claims in their Amended Complaint or with respect to their allegations in support of these claims in their Amended Complaint.

Plaintiffs' reliance on *Young v. Dimmitt*, 787 S.W.2d 50 (Tex. 1990) (per curiam) is unavailing because: (1) this case addresses claims that Plaintiffs did not assert in their Amended Complaint; and (2) the Texas Supreme Court subsequently clarified its holding in *Young*, explaining that even distinct claims for negligent supervision or training were subject to the requirement that they fall within the TTCA's waiver of governmental immunity.[3] Plaintiffs' briefing disregards extensive authorities that stand for the proposition that a governmental employee does not "use" a motor vehicle within the meaning of the TTCA's immunity waiver when the vehicle is the location of an assault, even if the employee drove the vehicle off-route, stopped the vehicle, and manipulated seatbelts in connection with the assault.[4]

[3] *State Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 581 (Tex. 2001).
[4] *Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922, 927 (Tex. 2015); *Limon v. City of Balcones Heights*, 485 F. Supp.2d 751, 753 (W.D. Tex. 2007); *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

Plaintiffs did not establish a waiver of governmental immunity for the negligence-based tort claims in their Amended Complaint. The Court lacks jurisdiction over these claims and must dismiss them with prejudice.

C. Plaintiffs Rely on an Improper Standard and a Meritless Argument.

Plaintiffs mistakenly claim that the question before this Court "is whether Prosper ISD has shown that it is '*certain* that the plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief.'" Dkt. 28, p. 2 (emphasis Plaintiffs').[5] The Supreme Court long ago overturned this standard, holding instead that a plaintiff must meet the plausibility standard, under which the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint that pleads facts which are "'merely consistent with' a defendant's liability" is insufficient to defeat a motion to dismiss for failure to state a claim. *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Complaints which offer only legal conclusions, a formulaic recitation of the elements of a claim, or "'naked assertions' devoid of 'further factual enhancement'" do not suffice. *Id*. (quoting *Twombly*, 550 U.S. at 555, 557) (cleaned up).

Plaintiffs failed to identify any well-pled allegations in their Amended Complaint sufficient to defeat the District's motion to dismiss, as Plaintiffs relied exclusively on allegations from their Second Amended Complaint, a document which is not before the Court in connection with the

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).

[5] Quoting *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir. 1998) and citing *Doe v. Beaumont Indep. Sch. Dist.*, No. 1:21-CV-00132, 2022 U.S. Dist. LEXIS 125296 at *17 (E.D. Tex. July 14, 2022); *see also* Dkt. 28, pp. 12, 15.

District's motion. Dkt. 28. In deciding the District's motion to dismiss Plaintiffs' Amended Complaint, the Court should disregard allegations from Plaintiffs' Second Amended Complaint.

Additionally, Plaintiffs' arguments concerning the District's reliance on cases which arose in the summary judgment context is unavailing (Dkt. 28, pp. 2-4, 18) because the District used those cases to explain the elements for which Plaintiffs needed to provide well-pled allegations in order to defeat a motion to dismiss for failure to state a claim. Dkt. 17. That those cases arose in the summary judgment context is irrelevant to the question of whether Plaintiffs sufficiently pled claims against the District in the instant lawsuit.

D. Plaintiffs Have Not Sufficiently Pled Municipal Liability Under §1983.

Plaintiffs offer no rebuttal to the District's authorities establishing that: (1) 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; and (2) the policymaker for an independent school district is its Board of Trustees. *Cf.* Dkt. 17, pp.13-14; Dkt. 28, p. 15. Nevertheless, Plaintiffs identify no allegation in their Amended Complaint that relates in any way to Prosper ISD's Board of Trustees. Therefore, Plaintiffs have not stated a claim upon which relief can be granted with respect to their claims for municipal liability under §1983.

Based exclusively on allegations from their Second Amended Complaint, which are not before this Court in connection with the instant motion, Plaintiffs argue that they have identified unconstitutional customs or practices. Dkt. 28, pp. 15-18. Plaintiffs do not dispute the District's contentions: (1) that vague allegations in their Amended Complaint are insufficient to state a claim for municipal liability under §1983; (2) that their Amended Complaint contains no allegations that any District employee, much less the District's Board of Trustees, ever received any complaint about Paniagua before Jane Doe made her May 7, 2022 report; and (3) that Plaintiffs' vague

allegation about a different parent complaining once about a different bus driver is insufficient to establish a custom or practice demonstrating knowledge and acquiescence by the District's Board of Trustees. *Cf*. Dkt. 17, pp. 15-17; Dkt. 28, pp. 15-18. Thus, Plaintiffs have not sufficiently alleged an unconstitutional custom or practice.

Plaintiffs do not address the elements of a failure-to-train claim or respond to the District's arguments and authorities showing that Plaintiffs failed to offer sufficient well-pled allegations to support such a claim. *Cf*. Dkt. 17, pp. 17-19; Dkt. 28, pp. 15-18. As Plaintiffs identified no well-pled allegations to support at least one an element of a failure-to-train claim (the manner in which the training was allegedly deficient, any notice that the Board of Trustees had that a training program was allegedly deficient, the allegedly deficient training program caused a constitutional deprivation to the Plaintiffs), the District is entitled to dismissal of this claim. Dkt. 17, p. 19.[6]

Finally, Plaintiffs' reliance on *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450-58 (5th Cir. 1994) (en banc), in support of a purported claim for supervisory liability under §1983 is unavailing because: (1) in *Iqbal*, the Supreme Court foreclosed such claims; and (2) even if such claims were viable, Plaintiffs identified no plausible, fact specific allegations that the Board learned of a pattern of abuse and looked the other way.

Fifteen years after the Fifth Circuit issued *Taylor Indep. Sch. Dist.*, the Supreme Court published its decision in *Iqbal*, 556 U.S. 662. In *Iqbal*, the Supreme Court expressly rejected the argument that a supervisor can be liable under §1983 for knowledge of and acquiescence in her subordinate's discriminatory conduct. *Id*. at 677. It is difficult to square this holding with the Fifth Circuit's previous finding that a supervisor can be liable for a subordinate's violation of a

[6] Citing *Zarnow v. City of Wichita Falls Tex*., 614 F.3d 161, 170 (5th Cir. 2010); *Tuchman v. DSC Comms. Corp*., 14 F.3d 1061, 1067 (5th Cir. 1994); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995).

student's constitutional right to bodily integrity based on a showing 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 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. Indeed, even the dissent in *Iqbal* understood the decision to eliminate supervisor liability entirely. *Iqbal*, 556 U.S. at 692-93.

Additionally, Plaintiffs identified no plausible, fact specific allegations that the Board learned of a pattern of abuse and failed to take action. The Court should reject Plaintiffs' argument (which arises solely from allegations in their Second Amended Complaint), that the District's mere possession of bus surveillance video or GPS information relating to Paniagua's bus is "a sufficient basis to plausibly allege actual notice and deliberate indifference." Dkt. 28, p. 17. This argument is foreclosed not only by the pleading standard from *Iqbal* and *Twombly*,[7] but it is also foreclosed by *Taylor Indep. Sch. Dist.*, which requires the supervisor to have **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. *Taylor Indep. Sch. Dist.*, 15 F.3d at 454. Given the massive amount of information in the District's possession, it is not plausible that an any administrator, much less the District's Board, learned of any such facts or pattern of behavior merely because bus videos and GPS information were allegedly in the District's possession.[8]

[7] *Iqbal*, 556 U.S. 678; *Twombly*, 550 U.S. at 555, 557.
[8] This is particularly true given the District's swift response to Jane Doe's report about Paniagua, which Plaintiffs admit led to Paniagua's termination and arrest. Dkt. 14, ¶18-21; Dkt. 28, p. 1.

E. Plaintiffs Have Not Sufficiently Pled a Claim Under Title IX.

In support of their deliberate indifference claim under Title IX, Plaintiffs rely solely on allegations from their Second Amended Complaint, which are not before this Court in connection with the instant motion, arguing that two administrators' alleged mere possession of certain materials relating to Paniagua's bus gave them actual notice that Paniagua was sexually abusing the minor Plaintiffs before Jane Doe made her May 7, 2022 report to District personnel. Dkt. 28, pp. 18-20. The Court should disregard these allegations and arguments because they do not pertain to the instant motion and because they do not demonstrate actual knowledge under Title IX.

Plaintiffs' argument based on the District's alleged possession of bus videos and GPS information 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 v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998) ("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); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 106, 652-53 (5th Cir. 1997); *M.E. v. Alvin Indep. Sch. Dist.*, 840 Fed. App'x 773, 775 (5th Cir. 2020).

The Court should also reject Plaintiffs' argument that the District's response to Jane Doe's May 7, 2022 report states a claim for deliberate indifference under Title IX (Dkt. 28, p. 20) because this argument: (1) is based exclusively on allegations from Plaintiffs' Second Amended Complaint, which is not before the Court in connection with this motion; and (2) violates binding precedent concerning deliberate indifference in the Title IX context.

Plaintiffs admit that, upon receiving Jane Doe's complaint, District personnel: (1) reviewed video from Paniagua's bus; (2) provided information and/or copies of this video to outside law enforcement personnel who were investigating Paniagua; and (3) terminated Paniagua's employment. Plaintiffs also acknowledge that, within days of Jane Doe's report, Paniagua was arrested. Dkt. 14, ¶18-21; Dkt. 28, p. 1. The threshold for demonstrating deliberate indifference is a high one,[9] and Plaintiffs' allegations and representations demonstrate that the District's response to Jane Doe's report was not clearly unreasonable in light of the known circumstances. Dkt. 17, pp. 24-26. Plaintiffs' argument amounts to the contention that the District could have taken additional steps in response to Jane Doe's report. As a matter of law, contentions that a school district could have taken additional steps do not constitute deliberate indifference.[10]

Plaintiffs have not identified **any** well-pled allegations in the Amended Complaint, much less sufficient well-pled allegations to support all the elements of a Title IX claim against the District. The Court should, therefore, dismiss this claim.

CONCLUSION

For all of these reasons, the Court should grant the District's motion to dismiss Plaintiffs' Amended Complaint and dismiss with prejudice all of Plaintiffs' claims against Prosper ISD.

Respectfully submitted,

/s/ *Thomas P. Brandt*
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[9] *E.g., I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 369 (5th Cir. 2019); *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167 (5th Cir. 2011); *Doe ex rel. Doe v. Dall. Indep. Sch. Dist.*, 220 F.3d 380, 387-89 (5th Cir. 2000); *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998); *I.L. v. Houston Indep. Sch. Dist.*, 776 Fed. App'x 839, 842 (5th Cir. 2019).
[10] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999); *I.F.*, 915 F.3d at 369; *Sanches*, 647 F.3d at 167; *Dallas Indep. Sch. Dist*., 153 F.3d at 219.

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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