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.	§	**Jury Trial Demanded**
	§	
PROSPER INDEPENDENT SCHOOL DISTRICT, HOLLY FERGUSON, ANNAMARIE HAMRICK, AND ANNETTE PANIAGUA EX REL. THE ESTATE OF FRANK PANIAGUA,	§	
Defendants	§	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT HOLLY FERGUSON'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

TO THE HONORABLE DISTRICT COURT JUDGE:

Plaintiffs Jane and John Doe, individually and as next friends of Plaintiffs Janie Doe 1 and Janie Doe 2 respectfully submit this Response in Opposition to the Motion to Dismiss Plaintiffs' Second Amended Complaint [Dkt. No. 25] filed by Defendant Holly Ferguson ("Dr. Ferguson"), and in support would show the Court as follows:

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INTRODUCTION

This case arises because Defendant Frank Paniagua sexually molested eight- and six-year-old Plaintiffs Janie Doe 1 and Janie Doe 2 while he was driving their school bus as an employee of Prosper ISD. Paniagua was fired, arrested, and killed himself after Janie Doe 1 and Janie Doe 2 reported the abuse to their mother, who complained to Prosper ISD. But for ***months*** before that, Prosper ISD and its and Superintendent (Defendant Dr. Holly Ferguson) were in possession of evidence constituting actual notice of the abuse in the form of onboard video surveillance showing the abuse and did nothing to stop it. Prosper ISD and Dr. Ferguson were also in possession of GPS tracking information showing that Paniagua took the bus off-route, made unscheduled stops, and/or turned the GPS unit off to conceal his location—steps that he took in order to create opportunities to molest Janie Doe 1 and Janie Doe 2 while no other students on the bus. Prosper ISD administrators also repeatedly observed Paniagua keeping Janie Doe 1 on the bus for several minutes each. At the pleadings stage, these allegations are more than sufficient to state claims against Dr. Ferguson that Plaintiffs should have an opportunity to further investigate and develop in discovery.

In the alternative to dismissal, Dr. Ferguson moves pursuant to *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) for an order requiring Plaintiffs "to file a Rule 7(a) reply providing specific factual allegations in support of their claims against Dr. Ferguson …. specifically address[ing] why Dr. Ferguson should not be entitled to qualified immunity …." [*See* MTD, Dkt. No. 53, at p. 28]. By including this "alternative" request under *Schultea*, Dr. Ferguson is able to pack her Motion with more than three pages of unsworn factual allegations outside the scope of the Second Amended Complaint [*See* MTD, Dkt. No. 53, at pp. 5–8]. Simultaneously, Dr. Ferguson argues that the Court "may not allow any discovery to take place until Dr. Ferguson's assertion of

immunity is resolved" on the merits of her "*Schultea* defense" and all of the unsworn new facts alleged in support of it. [*See* MTD, Dkt. No. 53, at pp. 27–28]. That approach – which would have the Court enter a merits decision on the basis of unsworn (not to say un-cross-examined) factual allegations prior to any discovery – is obviously wrong. Notably, *Schultea* itself held that a trial court should permit the discovery necessary to test a qualified immunity defense before requiring a plaintiff to provide a more particularized Rule 7(a) response. *See Schultea*, 47 F.3d at 1434. Plaintiff therefore requests an opportunity respond to Dr. Ferguson's additional factual allegations under Federal Rule of Civil Procedure 7 and *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) by taking discovery into the disputed factual matters raised by Dr. Ferguson's motion.

FACTS

A. PANIAGUA USED PROSPER ISD BUSES AND THEIR INSTRUMENTALITIES TO SEXUALLY ABUSE JANIE DOE 1 AND JANIE DOE 2

For the 2021-2022 school year, Janie Doe 1 and Janie Doe 2 rode on Paniagua's bus in the mornings three to four times a week. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 17]. Paniagua's abuse of Janie Doe 1 and Janie Doe 2 started almost immediately into the school year in September 2021. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 19]. Each instance of abuse that occurred on the Prosper ISD school bus, on and off Prosper ISD property, was recorded and captured on bus surveillance that Defendant Prosper ISD and Dr. Ferguson had in their continuous possession, placing them on actual notice of the abuse. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 3, 4, 19].

1) *Paniagua used Prosper ISD school bus seatbelts as pretext to sexually abuse Janie Doe 1 and Janie Doe 2.*

Each morning after picking up Janie Doe 1 and Janie Doe 2, and before picking up other students, Paniagua would take the bus off-route and make an unscheduled stop, where he would pretend to adjust Janie Doe 1 and Janie Doe 2's seatbelts as a pretext for reach under their shirts

and shorts to fondle their bare breasts, vaginas, and anuses. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 17, 19–20]. These actions were captured on the bus's on-board video surveillance, which was in the continuous possession, custody, and control of Prosper ISD and Dr. Ferguson. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 3, 4, 17, 19–20]. Paniagua's actions in taking the bus off-route and making unscheduled stops were also reflected in GPS tracking data that was in the continuous possession, custody, and control of Prosper ISD and Dr. Ferguson. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 4, 17, 19–20].

2) *School bus surveillance videos put Prosper ISD and Dr. Ferguson on actual notice of the abuse.*

Paniagua's abuse of Janie Doe 1 was even more extensive and brazen. After Janie Doe 2 deboarded the bus at school, Paniagua would turn his attention to Janie Doe 1, where he systematically ensured she was the last student off the bus. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 3, 21]. Then, Paniagua would assault Janie Doe 1 at the back of the bus for several minutes; this occurred ***every morning*** she rode Paniagua's bus to school. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 3, 21]. The Prosper ISD administrators who attended the morning drop offs observed this troubling behavior and asked Paniagua about it, which he attempted to explain away as her helping him clean the bus by "picking up trash." [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 3, 21].

Prosper ISD's own written policies require video surveillance on its school buses "at all times." [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 20]. In fact, the camera(s) on-board Paniagua's school bus ***did*** capture Paniagua in the act of physically sexually assaulting Janie Doe 1 and Janie Doe 2 on an almost daily basis. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 21]. These video recordings were in the actual possession of Prosper ISD and Dr. Ferguson for months before they took any action to protect Janie Doe 1 and Janie Doe 2. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 19-21]. In particular, these videos were in the actual possession, custody, and control of Prosper ISD

administrators including, but not limited to, Transportation Director Hamrick and Superintendent Dr. Ferguson, and actually showed Paniagua molesting Janie Doe 1 and Janie Doe 2. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 21]. Based upon the District's surveillance policy, the Defendants' actual possession of the videos, and the fact that the videos showed the assaults, Plaintiffs believe and contend that Defendants, including Dr. Ferguson, were actually and subjectively aware of Paniagua's abuse of Janie Doe 1 and Janie Doe 2 but failed to act in response. But regardless of whether the Defendants bothered to look at the videos, the videos were in Defendants continuous possession throughout the months of Paniagua's abuse and placed the Defendants, including Dr. Ferguson, on ***actual*** notice of the abuse of Janie Doe 1 and Janie Doe 2. In response, Defendants did nothing until Jane and John Doe reported their daughters' abuse.

3) ***Prosper ISD and Dr. Ferguson had notice that Paniagua was taking school buses off route, making unscheduled stops, and turning GPS functionality off, which he used to facilitate his abuse of Janie Doe 1 and Janie Doe 2.***

Paniagua's bus was equipped with GPS functionality that provided "real-time location" tracking of a school bus on the mobile application entitled *Here Comes the Bus*®. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 22]. Upon information and belief, Paniagua manipulated the GPS tracking information on his assigned bus(es) and/or through the *Here Comes the Bus*® application to turn GPS data on and off when driving his bus off route to abuse children, including Janie Doe 1 and Janie Doe 2, while concealing his location. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 23].

Janie Doe 1 and Janie Doe 2 were also often the first students Paniagua would pick up in the morning. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 25]. According to their forensic interviews after their outcries, Paniagua would stop the bus or take the bus off route to molest Janie Doe 1 and Janie Doe 2 after picking them up and before picking up other students. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 25–26]. These unscheduled and/or off route stops were, at least on some

occasions, shown in the GPS tracking information for the bus. As with the surveillance videos, the GPS information that was in the continuous possession, custody, and control of Defendants, including Dr. Ferguson. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 25–26].

B. THE DISTRICT'S PREEXISTING HISTORY OF COVERING UP SEXUAL ABUSE ALLEGATIONS

1) *The Collin County Sherriff's Office and a former Chief Felony Prosecutor gave child abuse and neglect reporting trainings to the District because of its low mandatory reporting numbers.*

Prior to the events made the basis of this lawsuit, the District contracted with the Collin County Sherriff's Office's child abuse investigation unit to assist the District's police department with investigations into child abuse or neglect. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 30].

Once such investigation of child sex abuse within the District was dubbed "Team Snapback." [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 31]. In 2012, the District received strong pushback from the Prosper community following child sexual abuse allegations involving five Prosper High students who referred to themselves as "Team Snapback." [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 31]. This incident led to the uncovering of serious deficiencies in the District's policies and procedures regarding abuse reporting, along with many other instances of disorganized and botched mandatory reporting requirements. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 31]. Accordingly, the Sherriff's Office and its child abuse investigation unit gave trainings to the District. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 31]. Such topics that were discussed including reiteration of the mandatory reporting requirements and explaining why the District should not interview students but rather wait for law enforcement to get students in front of a forensic interviewer who is trained to conduct a non-biased, non-leading interview. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 31]. Upon information and belief, the District has received this training on more than one occasion. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 31].

Furthermore, Crystal Levonius (a former Chief Felony Prosecutor of the Crimes Against Children Division of the Collin County District Attorney's Office and current Denton County District Judge) offered to give sexual abuse reporting trainings to the District. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 32]. Specifically, and upon information and belief, Judge Levonius offered such trainings because the District's reporting numbers were suspiciously low, and Judge Levonius was concerned that this was because the District did not have appropriate policies in place for spotting warning signs and red flags for potential child sexual abuse and grooming. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 32]. ***Judge Levonius expressed concerns to the District regarding their policies and procedures (or lack thereof) regarding sexual abuse trainings and reporting***. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 32].

2) ***The District and Dr. Ferguson received at least one parent complaint regarding a bus driver's inappropriate behavior in February 2020 yet failed to take appropriate action.***

Prior to the events made the basis of this lawsuit, Dr. Ferguson and Hamrick, Prosper ISD's Superintendent and former Director of Transportation, respectively, received a parent complaint concerning a bus driver's inappropriate behavior toward his young daughter. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 33]. When the driver's grooming tactics were brought to the parent's attention on or around February 13, 2020, the parent promptly informed Dr. Ferguson and Hamrick. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 33]. The driver was simply reassigned to a new route, and no further action or investigation was undertaken. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 33]. This action is evidence of a "pass the trash" policy evincing Defendants' conscious indifference to the constitutional rights of its students, including Janie Doe 1 and Janie Doe 2. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 33].

C. THE DISTRICT'S POST-DISCOVERY RESPONSE WAS TO COVER UP THE ALLEGATIONS

1) *The District and Dr. Ferguson failed to inform other parents of the allegations against Paniagua and his subsequent arrest.*

Following Paniagua's confession and arrest, no counseling services were offered to Plaintiffs or any of the other children on Paniagua's regular or substitute bus routes. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 5, 34]. Indeed, many Prosper ISD parents were left in the dark about the allegations described herein and only learned of the allegations and Paniagua's arrest upon the filing of this lawsuit. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 5, 34]. Shockingly, after the filing of this lawsuit, one parent has stated she only learned of "Mr. Frank's" arrest when her child informed her that "Mr. Frank" was in jail. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 5, 34].

Since the filing of this lawsuit, multiple parents have come forward with concerns that their children may have also been victims of Paniagua. Specifically, many parents have recounted instances where their child's bus route tracking information would appear to go off route and/or be turned off for large periods of time before arriving late. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 35]. These late drop-offs were met with canned excuses from Paniagua, often blaming traffic, train crossing holdups, or new and longer routes where he simply "got lost." [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 35]. Furthermore, at least one additional set of parents has raised concerns about their young daughter's behavior following Paniagua's substitution as a bus driver for her bus in the 2020-2021 school year. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 35]. However, due to the district's lack of transparency regarding the allegations made the basis of this lawsuit and delay in informing parents of any child who may have been in contact with Paniagua, this child's forensic interview did not prove to be fruitful, as simply too much time had passed. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 35].

2) ***The District and Dr. Ferguson instructed District personnel to keep quiet and not speak on the allegations.***

Upon information and belief, following Paniagua's arrest the District and Dr. Ferguson instructed Hamrick (the former director of transportation) and other district bus drivers to keep quiet and not speak on the allegations, leading to either Hamrick's resignation or termination for failing to abide by this demand. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 5, 36]. Hamrick was recently replaced as Director of Transportation by Chaunte' Saunders. Additionally, this prompted many other bus drivers to "walk out," leading to the District's recent bus driver shortage. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 5, 36].

3) ***The District and Dr. Ferguson changed leadership email addresses and directed computer storage offsite.***

Upon information and belief, since the commencement of this lawsuit, Dr. Ferguson and the District have taken drastic measures to further cover up the allegations and prevent information from being discovered. Specifically, upon information and belief, the District and Dr. Ferguson have changed Dr. Ferguson's Prosper ISD email address information and instructed all district employees to use this new, unlisted email address. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 5, 37]. Furthermore, upon information and belief, the District and Dr. Ferguson have directed all district computer storage offsite at an undisclosed location in further attempts to obstruct access to information related to this lawsuit. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 5, 37].

4) ***The District Hired its Defense Counsel in this Matter to Conduct an "Independent" Investigation for the District's Board of Trustees.***

Finally, the "independent" investigation is being handled by FANNING HARPER MARTINSON BRANDT & KUTCHIN, P.C., ***the District's defense counsel in this matter***. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 5, 38]. Prosper ISD board members have already publicly expressed concerns over this assignment, specifically stating that they "do not feel that the same firm handling the

lawsuit can objectively handle an investigation for the Board of Trustees." [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 5, 38].

ARGUMENT

D. LEGAL STANDARD

"A case or a portion thereof may not be dismissed for failure to state a claim unless it appears certain that the plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief." *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir. 1998); *Doe v. Beaumont Indep. Sch. Dist.*, --- F. Supp. 3d ----, 2022 WL 2783047, at *7 (E.D. Tex. July 14, 2022). [1] When reviewing a motion to dismiss, the court must "assume that the facts the complaint alleges are true and view those facts in the light most favorable to the plaintiff." *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 582 (5th Cir. 2020) (reversing trial court's dismissal of Title IX claim). At the pleadings stage, "the issue 'is not whether a plaintiff will ultimately prevail but whether he is entitled to offer evidence to support his claims.'" *Id.* (quoting *Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d F.3d 1395, 1401 (5th Cir. 1996)).

[1] Defendant argues that "[t]he Supreme Court long ago overturned this standard," replacing it with the "plausibility standard" of *Iqbal* and *Twombly*. [*See* Reply in Support of MTD, Dkt. No. 56, at 5 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) & *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). But the Fifth Circuit continues to apply the "any set of facts" test to motions to dismiss under Rules 12(b)(1) and 12(b)(6), and appears to regard it as harmonious with *Iqbal* and *Twombly*. *See*, *e.g.*, *Scott v. U.S. Bank Nat'l Assoc.*, 16 F.4th 1204, 1209 (5th Cir. 2021) ("'A claim will not be dismissed unless the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief.'" (quoting *Alexander v. Verizon Wireless Servs., LLC*, 875 F.3d 243, 249 (5th Cir. 2017)); *Di Angelo Pubs., Inc. v. Kelley*, 9 F.4th 256, 260 (5th Cir. 2021) ("Generally, we affirm dismissal under 12(b)(1) only if 'it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle Plaintiff to relief.'" (quoting *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 734 (5th Cir. 2020)). This Court applied the same test, and denied dismissal, in a recent teacher-on-student sex abuse case cited throughout this brief. *See Beaumont Indep. Sch. Dist.*, --- F. Supp. 3d ----, 2022 WL 2783047, at *7.

The same standards govern pleadings in a case against a government official, like Dr. Ferguson, who may assert a defense of qualified immunity. In the first instance, "a plaintiff suing a public official" need only file "a short and plain statement of his complaint" under Rule 8. *Schultea*, 47 F.3d at 1434. After that, a trial court has discretion to require the plaintiff to "file a reply tailored to an answer pleading the defense of qualified immunity," and may limit the discovery permitted prior to such a reply to "the necessary discovery to the defense of qualified immunity." *Id.* A trial court may not, however, require a plaintiff to meet the heightened pleading standard of Rule 9(b) or dismiss a claim without first affording a plaintiff a fair opportunity to respond to any new factual matters the official may raise in support of its immunity defense, including by taking discovery. *See id.*; *Arnold v. Williams*, 979 F.3d 262, 269 (5th Cir. 2020) (noting "§ 1983 claims implicating qualified immunity are not subject to a heightened pleading standard.").

E. PLAINTIFFS HAVE STATED A SECTION 1983 CLAIM AGAINST DR. FERGUSON

Plaintiffs have separately responded to Defendant Prosper ISD's motion to dismiss their 1983 claims against the District. Dr. Ferguson repeats many of the same arguments but couched in the framework of qualified immunity. The Fifth Circuit addressed how this analysis must proceed in its decision in *Doe v. Taylor Independent School District*, 15 F.3d 443, 450-58 (5th Cir. 1994).

The first step in the Court's qualified immunity analysis is straightforward: "to determine whether the Constitution, through the Fourteenth Amendment's substantive due process component, protects school-age children attending public schools from sexual abuse inflicted by a school employee." *Id.* at 450. *Taylor ISD.* answered this question in the affirmative, holding that a schoolchild's Fourteenth Amendment right to bodily integrity includes the right to be free from

physical sexual abuse, and that this right is violated when public school employees, like Paniagua, sexually molest schoolchildren like Janie Doe 1 and Janie Doe 2. *See id.* at 450–52. *Taylor ISD* also holds that this constitutional right was "clearly established," for purposes of qualified immunity analysis, by 1987 at the latest. *See id.* at 455.

The second step is to determine whether a supervisory public school official, like Dr. Ferguson, has violated a duty owed to the plaintiff schoolchild in a way that would give rise to liability under Section 1983. Once again, *Taylor ISD* establishes the relevant test:

> A supervisory school official can be held personally liable for a subordinate's violation of an elementary or secondary school student's constitutional right to bodily integrity in physical sexual abuse cases if the plaintiff establishes that:
>
> (1) the defendant 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; and
>
> (2) the defendant demonstrated deliberate indifference to the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
>
> (3) such failure caused a constitutional injury to the student.

Id. at 455.[2] Of significance here, *Taylor ISD* (like most of the cases cited by Dr. Ferguson) was a summary judgment case. *Id.* at 450. Accordingly, while *Taylor ISD* establishes the elements of supervisory liability for sexual abuse by school employees, the question at the pleadings stage is

[2] Dr. Ferguson argues that the Supreme Court abolished supervisory liability under Section 1983 in *Iqbal*. [*See* MTD, Dkt. No. 53, at pp. 13–14]. But the Fifth Circuit has continued to recognize supervisory liability under Section 1983 since *Iqbal* and, more specifically, has continued to apply the *Taylor ISD* test for supervisory liability in cases of teacher-on-student sexual abuse. *See Terry v. Kinney*, 669 Fed. Appx. 200, 201 (5th Cir. 2016) (mem. op.) (finding that plaintiff adequately alleged supervisory liability in teacher-on-student sex abuse case and affirming district court's refusal to dismiss); *Guillory v. Thomas*, 355 Fed. Appx. 837 (5th Cir. 2009) (affirming denial of qualified immunity for supervisory officials in teacher-in-student sex abuse case decided post-*Iqbal*).

whether the plaintiff has plausibly ***alleged*** the three factors listed in *Taylor ISD*, not whether the plaintiff has proven them before discovery.

Like Prosper ISD itself, Defendant Dr. Ferguson's core argument in support of dismissal is that Plaintiffs have failed to plausibly allege "deliberate indifference" because they have failed to allege that Dr. Ferguson had actual notice, or actually knew, of Paniagua's abuse of Janie Doe 1 and Janie Doe 2. As a threshold matter, such conditions of mind may be alleged in general terms under Rule 9, *see* Fed. R. Civ. P. 9(b), and Plaintiffs have alleged that Defendants, including Dr. Ferguson, had actual notice and actual knowledge of Plaintiffs' abuse yet failed to take any action to protect Janie Doe 1 and Janie Doe 2. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 3, 21, 33]. Of more particular relevance to this case, Plaintiffs have alleged that Defendants, including Dr. Ferguson specifically, were in continuous possession of video surveillance evidence actually showing Paniagua's abuse of Janie Doe 1 and Janie Doe 2 and completely failed to act on this information. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 4, 17, 19–21]. Plaintiffs have also alleged that Defendants, including Dr. Ferguson specifically, were in possession of bus-tracking GPS data showing that Paniagua was taking the bus off route, or disabling the GPS device, at times when Janie Doe 1 and Janie Doe 2 would have been the only students on the bus, yet did nothing to investigate these facts either. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 4, 17, 19–21]. At this stage of the case, where Plaintiffs have been unable to take any discovery, Plaintiffs do not know whether anyone from Prosper ISD, including Dr. Ferguson, actually ***looked*** at the videos before Jane Doe reported the abuse, but Plaintiffs have a good faith basis for alleging that they did look at it given the District's surveillance policy, the existence of this evidence, and Defendants' continuous

possession of it. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 21].[3] But even if no one ever looked at the videos, Prosper ISD's and Dr. Ferguson's ***possession*** of the video evidence alone is a sufficient basis to plausibly allege actual notice and deliberate indifference. Plaintiffs are unaware of any other area of law where a party is able to disclaim actual notice while being in possession of the information constituting actual notice. To the contrary, courts (including the Fifth Circuit) routinely hold that a party's actual receipt or possession of information places the party on actual notice of the information whether the party bothers to look at it or not. *See*, *e.g.*, *Espinoza v. Mo. Pac. R. Co.*, 754 F.2d 1247, 1249 (5th Cir. 1985) (party had actual notice of EEOC right-to-sue letter upon receipt, not later when party actually read the letter). The "deliberate indifference" standard that Dr. Ferguson argues for here would require dismissal without discovery even if, for example, a plaintiff alleged that a school superintendent actually received a letter containing detailed allegations of teacher-on-student sexual abuse, along with photographs proving the abuse, but never bothered to open the envelope. Surely the law does not allow a supervisory school employee like Dr. Ferguson to avoid liability for undisputed violations of a student's clearly established constitutional rights simply by claiming that she ignored proof of student sexual abuse in her actual possession. Needless to say, none of the cases that Dr. Ferguson cites support such a proposition.

[3] Given that Dr. Ferguson felt free to pack her Motion with more than three pages of (unsworn) factual allegations outside the scope of the Second Amended Complaint, the Motion notably fails to directly dispute Plaintiff's allegations that Dr. Ferguson had actual notice of these videos and their contents. Apart from a generic claim that Dr. Ferguson "did not review bus videos" as a matter of practice [*See* MTD, Dkt. No. 53, at p. 8], the Motion merely asserts that "it would be an unwarranted inference to assume that the Superintendent ever reviewed any video from Paniagua's bus prior to learning of Jane Doe's complaint about Paniagua," [*See* MTD, Dkt. No. 53, at p. 16].

F. THE COURT SHOULD PERMIT DISCOVERY INTO THE MERITS OF DR. FERGUSON'S QUALIFIED IMMUNITY DEFENSE

As an alternative to outright dismissal, Dr. Ferguson moves pursuant to *Schultea*, 47 F.3d 1427, for an order requiring Plaintiffs "to file a Rule 7(a) reply providing specific factual allegations in support of their claims against Dr. Ferguson …. specifically address[ing] why Dr. Ferguson should not be entitled to qualified immunity …." [*See* MTD, Dkt. No. 53, at p. 28].

Dr. Ferguson's motion attempts to set up this *Schultea* defense by halfheartedly disputing (or appearing to dispute; she does not outright deny) Plaintiff's allegation that she was on actual notice of Paniagua's abuse as a result of her possession of the school bus surveillance. In this regard, Dr. Ferguson claims:

> During the 2021-22 school year Prosper ISD drivers drove more than 100 routes each school day. District transportation department workers reviewed video from bus routes if they received a report of a problem on that route. Otherwise, as part of the evaluation process for bus drivers, during the 2021-22 school year, during a 4–6week period in the winter or early spring, District transportation personnel randomly pulled and reviewed 3-5 videos for each bus driver. Dr. Ferguson did not review bus videos.

[*See* MTD, Dkt. No. 53, at pp. 7–8]. The most salient thing about these allegations is what they do not say: Apart from the final sentence claiming that Dr. Ferguson "did not review bus videos," it seems, as a matter of practice, these allegations do not deny that Dr. Ferguson had actual possession of the surveillance videos or the right to review them. They do not deny that the videos actually show the abuse. They do not deny that the specific videos showing the abuse were ever reviewed. They do not even deny that Dr. Ferguson herself reviewed these specific videos. These conspicuous failures to meet, and refute, Plaintiffs' factual allegations are especially telling given that Dr. Ferguson updated her *Schultea* allegations after receiving Plaintiffs' Response to her original Motion to Dismiss pointing out the same deficiencies. [*See* Dkt. No. 25].

This Court should not grant Dr. Ferguson's *Schultea* motion (let alone dismiss the case) without permitting discovery into factual basis for the defense which, at present, is based on nothing but unsworn and disputed factual allegations in an attorney-signed pleading. Dr. Ferguson nevertheless simultaneously argues that this "Court cannot order discovery to enable Plaintiffs to respond to Dr. Ferguson's assertion of qualified immunity." [*See* MTD, Dkt. No. 53, at 3]. But *Schultea* itself holds otherwise, recognize that a trial court ***may*** permit "the necessary discovery to the defense of qualified immunity." *See* 47 F.3d at 1434. Notably, this is not a case where the question of qualified immunity depended upon a pure question of law, such as whether or not the plaintiff has pled violation of a clearly established constitutional right. A supervisor's conscious indifference to a subordinate's sexual abuse of a student constitutes a clearly established constitutional violation in this Circuit. *See Taylor Indep. Sch. Dist.*, 15 F.3d at 456. Instead, this is a case where Dr. Ferguson is demanding that Plaintiff respond, with particularity, to pages of unsworn "facts" without being able to take any discovery into such basic questions as whether anyone at Prosper ISD, including Dr. Ferguson, ever reviewed these particular videos. Or the bus's GPS data. Or received other complaints about Paniagua. Whatever the Court makes of Dr. Ferguson's "*Schultea* defense" and the largely non-responsive factual allegations she makes in support of it, it would fly in the face of basic litigation logic (not to mention *Schlutea* itself) to require Plaintiff to meet a fact-driven and factually-disputed qualified immunity defense without discovery. Accordingly, in the alternative to their request that the Court deny Dr. Ferguson's motion to dismiss, Plaintiffs request that the Court permit discovery into the subject matter necessary to test Dr. Ferguson's claim of qualified immunity, *Schultea* itself permits. *See* 47 F.3d at 1434.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant Dr. Ferguson's Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2023, a true and correct copy of the foregoing was served on all counsel of record.

/s/ Levi G. McCathern, II
Levi G. McCathern, II

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.	§	**Jury Trial Demanded**
	§	
PROSPER INDEPENDENT SCHOOL DISTRICT, HOLLY FERGUSON, ANNAMARIE HAMRICK, AND ANNETTE PANIAGUA EX REL. THE ESTATE OF FRANK PANIAGUA,	§	
Defendants	§	

ORDER DENYING DEFENDANT HOLLY FERGUSON'S MOTIONS TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

The Court, having considered Holly Ferguson's Motion to Dismiss Plaintiffs' Second Amended Complaint (the "Motion") and Plaintiffs' Response in Opposition, finds that the Motion should be **DENIED**.

IT IS SO ORDERED.