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 PROSPER INDEPENDENT SCHOOL DISTRICT'S MOTION TO DISMISS PLAINTIFFS' 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 [*see* Dkt. No. 54] filed by Defendant Prosper Independent School District ("Prosper ISD" or the "District"), 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, its Superintendent (Defendant Dr. Holly Ferguson), and its former Director of Transportation (Defendant Annamarie Hamrick) 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, Hamrick, 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 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 morning after the other students had gotten off, times when Paniagua was molesting Janie Doe 1 under Prosper ISD's nose. At the pleadings stage, these allegations are more than sufficient to state claims against Prosper ISD and Dr. Ferguson that Plaintiffs should have an opportunity to further investigate and develop in discovery.

Relying almost entirely on decisions affirming ***summary judgments***, Prosper ISD asks the Court to dismiss practically the entire lawsuit, with prejudice, before Plaintiffs have had an opportunity to conduct any discovery to investigate and develop evidence in support of their claims. The case law Prosper ISD cites does not support the premature and drastic relief it requests. Rather, the decisions it cites merely found (on the particular facts of those cases) that there was insufficient ***evidence*** to support the plaintiff's claims. In this case, Plaintiffs have had no

opportunity to develop evidence at all, and the legal analysis at the dismissal stage is fundamentally different. The question before this Court is not whether there is evidence supports Plaintiffs' claims; it is whether "it appears certain that the plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief." *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir. 1998) (reversing dismissal of Title IX claim where "Plaintiffs ha[d] not had occasion to put forth evidence in support of their Title IX claim" and "must be given an opportunity to do so."); *see also Doe v. Beaumont Indep. Sch. Dist.*, --- F. Supp. 3d ----, 2022 WL 2783047, at *7 (E.D. Tex. July 14, 2022) (denying dismissal of Section 1983 and Title IX claims in case of teacher-on-student sexual abuse). Given what Plaintiffs ***do*** know and ***have*** alleged, this Court cannot possibly conclude at this early stage that Plaintiffs are certain to fail to prove their claims once provided an opportunity to take discovery. Since that is the relevant inquiry, Prosper ISD's motion must be denied.[1]

This is not an exaggeration: ***all but two*** of the published Fifth Circuit decisions that Prosper ISD cites in support of its motion to dismiss Plaintiffs' Section 1983 claims was an appeal after summary judgment or trial. *See Doe v. Edgewood Indep. Sch. Dist.,* 964 F.3d 351 (5th Cir. 2020) (summary judgment); *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 413 (5th Cir. 2015)

[1] Prosper ISD 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)).

(summary judgment); *Zarnow v. City of Wichita Falls Tex*., 614 F.3d 161, 169 (5th Cir. 2010) (summary judgment); *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 850–52 (5th Cir. 2009) (summary judgment); *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009) (summary judgment and jury trial); *Brumfield v. Hollins*, 551 F.3d 322, 329 (5th Cir. 2008) (jury trial); *Bolton v. City of Dallas*, 541 F.3d 545, 549 (5th Cir. 2008) (summary judgment); *Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir. 2001) (summary judgment); *Piotrowski v. City of Houston,* 237 F.3d 567 (5th Cir. 2001) (jury trial); *Smith v. Brenoettsyk*, 158 F.3d 908, 911–12 (5th Cir. 1998) (summary judgment); *Snyder v. Trepagnier,* 142 F.3d 791 (5th Cir. 1998) (jury trial); *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993) (jury trial); *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984) (en banc) (summary judgment). That leaves *Gentilello v. Rege,* 627 F.3d 540 (5th Cir. 2010), where the Fifth Circuit affirmed judgment on the pleadings for the defendant because it determined that plaintiff's chair positions at a university medical school did not constitute a constitutionally protected property interest for purposes of a 1983 claim, and *Tuchman v. BSC Comms. Corp.*, 14 F.3d 1061 (5th Cir. 2001), a securities fraud case—not exactly on point.

The same is true for ***all but one*** of the published Fifth Circuit decisions that Prosper ISD cites in support of dismissal of Plaintiffs' Title IX claims. *See Edgewood Indep. Sch. Dist.,* 964 F.3d 351 (5th Cir. 2020) (summary judgment); *I.F. v. Lewisville Indep. Sch. Dist.,* 915 F.3d 360 (5th Cir. 2019) (summary judgment); *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156 (5th Cir. 2011) (summary judgment); *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.,* 220 F.3d 380 (5th Cir. 2000) (summary judgment); *Rosa H. v. San Elizario Indep. Sch. Dist.,* 106 F.3d 648 (5th Cir. 1997) (summary judgment). This time, the (partial) outlier is *Doe v. Dallas Indep. Sch. Dist.,* 153 F.3d 211, 220 n.8 (5th Cir. 1998), where the Court of Appeals affirmed

summary judgment on the plaintiffs' Section 1983 claims but ***reversed*** the trial court's dismissal of the plaintiffs' Title IX claim, holding that ***"Plaintiffs have not had occasion to put forth evidence in support of their Title IX claim, and they must be given an opportunity to do so."***

Whatever the Court makes of these decisions, none of them support dismissal at the pleadings stage. Notably, Plaintiffs pointed out the lack of precedent supporting dismissal in their Response to Prosper ISD's original Motion to Dismiss [Dkt. No. 28], yet despite having more than a month to retool its motion, Prosper ISD's second Motion to Dismiss contains ***no*** new or additional precedent supporting dismissal of this case at the pleadings stage. If anything, Prosper ISD's cited precedents simply show that in the dozens of cases Defendant relies on, district courts in the Fifth Circuit have allowed Section 1983 and Title IX claims to proceed to discovery.

That should be the outcome in this case, too. As explained below, Plaintiffs have pled facts sufficient to state claims under Section 1983, Title IX, and the Texas Tort Claims Act ("TTCA") under liberal Rule 8 pleading standard (which controls) and have pled sufficient facts to give rise to plausible claims for relief that Plaintiffs are entitled to develop in discovery. That outcome is especially appropriate in this case, since Prosper ISD does not even argue for dismissal of Plaintiff's Section 1983 claim against Defendant Paniagua (the abuser) individually, and Plaintiffs will be free to conduct discovery on that claim that may well lead to evidence providing even more support for the claims against Prosper ISD and the other Defendants. Certainly, Prosper ISD should not be granted a ***prejudicial*** dismissal when the discovery that Plaintiffs are going to take anyway may establish facts proving Prosper ISD's liability.

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 Defendants had in their continuous possession, placing them on actual notice of the abuse. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 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 Defendants' continuous possession, custody, and control. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 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 Defendants' continuous possession, custody, and control. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 4, 17, 19–20].

2) *School bus surveillance videos put Prosper ISD 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 for months before it took any action to protect Janie Doe 1 and Janie Doe 2. 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. 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 were actually and subjectively aware of Paniagua's abuse of Janie Doe 1 and 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 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 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 that was in the continuous possession, custody, and control of Defendants. [*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, Dr. Ferguson, and Hamrick 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 former Director of Transportation, 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

A. 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." *Dallas ISD*, 153 F.3d at 215; *Beaumont ISD*, 2022 WL 2783047, at *7. 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)).

B. PLAINTIFFS HAVE STATED A SECTION 1983 CLAIM AGAIST PANIAGUA IN HIS INDIVIDUAL CAPACITY

Prosper ISD does not contend that Plaintiffs have failed to state a Section 1983 claim against Paniagua in his individual capacity. Nor could it. Section 1983 provides Plaintiffs with a clear right of recovery against Paniagua individually for his deprivation of Janie Doe 1 and Janie Doe 2's constitutional right to bodily integrity.

"To establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 168 (1985). Plaintiffs have pled more than sufficient facts to satisfy both elements, *i.e.*, that Paniagua (1) acted under color of state law; and (2) deprived Janie Doe 1 and Janie Doe 2 of their constitutionally protected right to bodily integrity.

First, the Fifth Circuit has held that a public school employee who takes advantage of his official position to sexually molest a schoolchild acts under color of state law. *See Doe v. Taylor ISD*, 15 F.3d 443, 451–52 & n.4 (5th Cir. 1994). The question is whether a "real nexus exists between the activity out of which the violation occurs and the [employee's] duties and obligations" as an employee of the school. *Id.*; *see also Doe v. Snap, Inc.*, 2022 WL 2528615 (S.D. Tex. July 7, 2022) (refusing to dismiss individual capacity 1983 claim against teacher who sent student sexual text messages during class, even though physical contact occurred off school grounds). Here, Plaintiffs have alleged that Paniagua exploited his position as a school bus driver for Prosper ISD to sexually molest Janie Doe 1 and Janie Doe 2, including by (1) physically sexually assaulting Janie Doe 1 and Janie Doe 2 while they were riding the school bus; (2) using the school bus seatbelts as pretext to sexually assault Janie Doe 1 and Janie Doe 2; and (3) taking the school bus

off route in order to assault Janie Doe 1 and Janie Doe 2. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 3, 17–26]. These allegations establish that Paniagua acted under color of state law by taking "full advantage" of his position as bus driver for Prosper ISD to sexually assault Janie Doe 1 and Janie Doe 2.

Second, the Fifth Circuit has also held that "[i]t is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment." *Taylor ISD*, 15 F.3d at 451–52. Plaintiffs' allegations that Paniagua repeatedly sexually assaulted them while they were riding the school bus as students of Prosper ISD are plainly sufficient to satisfy this second element of Plaintiffs' Section 1983 claim.

Finally, while Prosper ISD has moved to dismiss the "tort claims" pled against Paniagua pursuant to the election of remedies provisions of the TTCA, [*see* Motion to Dismiss, Dkt. No. 54, at pp. 6–8], it has not argued that the TTCA requires dismissal of the Section 1983 claim against Paniagua. Nor would any such argument have merit, as the Texas state and federal courts have alike held that the election of remedies provisions of the TTCA do not apply to federal statutory claims and do not limit a plaintiff's right to plead federal statutory claims. *See Tex. Dep't of Aging & Disability Servs. v. Cannon*, 453 S.W.3d 411, 417–18 (Tex. 2015); *Chavez v. Alvaredo*, 550 F. Supp. 3d 439, 450–51 (S.D. Tex. 2021).

For these reasons, Plaintiffs have pled an actionable claim against Paniagua under 42 U.S.C. § 1983.

C. PLAINTIFFS HAVE STATED A SECTION 1983 CLAIM AGAINST PROSPER ISD AND ITS AGENTS, HAMRICK AND FERGUSON

Although municipalities cannot be held vicariously liable under Section 1983, "[a] municipality, with its broad obligation to supervise all of its employees, is liable under § 1983 if

it supervises its employees in a manner that manifests deliberate indifference to the constitutional rights of citizens." *Taylor ISD*, 15 F.3d at 453. The same general standard governs the liability of individual municipal employees with supervisory responsibility over an individual who violates a citizen's constitutional rights. *See id.* To state claim against for municipal liability under Section 1983, a plaintiff must allege (1) an official policy or custom; and (2) a violation of constitutional rights whose "moving force" is the municipal policy or custom. *Monell v. NY Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).[2] At the dismissal stage, the question is whether the plaintiff may ultimately be able to prove any set of facts that would satisfy these elements, and "[t]he Fifth Circuit has consistently instructed district courts to leave it to juries to decide whether a 'statutorily authorized policymaker ha[s] promulgated an unconstitutional policy.'" *Beaumont ISD*, 2022 WL 2783047, at *15 (quoting *Groden v. City of Dallas, Tex.*, 826 F.3d 280, 285 (5th Cir. 2016)).

"[A] plaintiff's burden to allege an unconstitutional policy, practice, or custom is not onerous." *Beaumont ISD*, 2022 WL 2783047, at *11. Here, even before discovery, Plaintiffs have plausibly alleged that Defendant Prosper ISD had several unconstitutional customs and practices sufficient to state actionable Section 1983 claims for failure to train and supervise. Among other things, Plaintiffs have alleged:

[2] Prosper ISD also argues that Plaintiffs must identify a "policymaker" and cites several cases for the proposition "the board of trustees, not a superintendent or some other official, is a school district's policymaker." [*See* Motion to Dismiss, Dkt. No. 54, at p. 13]. Prosper ISD also repeatedly argues that Plaintiffs have failed to state a claim because they have not alleged that the Board of Trustees itself had actual knowledge of the abuse and failed to take action. [*See* Reply in Support of MTD, at p. 8]. But case law clearly establishes that a Section 1983 action based upon employee-on-student sexual abuse may be maintained on a failure to supervise or failure to train theory against the relevant school district and responsible supervisory employees. *See Taylor ISD*, 15 F.3d at 453; *Beaumont ISD*, 2022 WL 2783047, at *14. And, the Fifth Circuit has expressly rejected a rule that would require a school district's Board of Trustees to itself know of sexual abuse or harassment for a plaintiff to state an actionable claim. *See Rosa H.*, 106 F.3d at 1226.

- Prosper ISD failed to train staff to observe and report, and otherwise ignored, signs of grooming and abuse on school premises, including Paniagua's observed actions in singling Janie Doe 1 out from among other students to remain behind alone on the bus each morning and his taking the bus off route, making unscheduled stops, and turning the on-board GPS device off;
- Prosper ISD routinely ignored and failed to act upon video surveillance evidence, and/or failed to review or even spot check such surveillance, that was in their continuous possession and provided them with actual notice of the Paniagua's physical sexual abuse of Janie Doe 1 and Janie Doe 2;
- Prosper ISD routinely failed to supervise its bus drivers in the performance of their work duties, including by ignoring the video surveillance and GPS evidence already discussed, and failed to discipline its drivers in response to parent complaints of inappropriate "grooming" behaviors, instead re-assigning drivers to new routes.

[*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 46–53].

Case law in this circuit also establishes that a "head in the sand" policy of "willful blindness" is sufficient to satisfy the "moving force" element of a 1983 violation. *Beaumont ISD*, 2022 WL 2783047, at *12. Plaintiffs' allegations that Defendants were on actual notice of the abuse of Janie Doe 1 and Janie Doe 2 because of the video surveillance evidence that they either reviewed and failed to act upon or failed to review alone are sufficient to establish this element at the pleading stage. Plaintiffs' additional allegations that Prosper ISD had actual notice of (and ignored) GPS information showing Paniagua taking the bus off route, making unscheduled stops, and disabling the GPS unit; its allegations that Prosper ISD administrators observed and ignored

repeated instances of Paniagua singling Janie Doe 1 out for "alone time" on the bus after other students departed; and its allegation Prosper ISD ignored at least one prior complaint of grooming behavior by a bus driver are surely enough to clear the plausibility threshold at the pleading stage, before any discovery has been taken.

Defendant's core argument in support of dismissal of Plaintiffs' Section 1983 claims—as with Plaintiffs' Title IX claims—is that Plaintiffs have failed to plausibly allege "deliberate indifference" because they have failed to allege that Defendants had actual notice (or actually knew) of Paniagua's abuse of Janie Doe 1 and Janie Doe 2. [*See* Motion to Dismiss, Dkt. No. 54, at pp. 17–20, 23–24]. 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 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]. Of more particular relevance to this case, Plaintiffs have alleged—and Prosper ISD appears to concede—that Defendants 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. At this stage of the case, where Plaintiffs have been unable to take any discovery, Plaintiffs do not know whether anyone from Prosper ISD 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]. But even if no one ever looked at the videos, Prosper ISD's ***possession*** of the video evidence alone is a sufficient basis to plausibly allege actual notice and deliberate indifference. Indeed, Plaintiffs are unaware of any other area of law where a party can 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).[3] The "deliberate indifference" standard that Prosper ISD 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. This is exactly the kind of "head in the sand" defense that is insufficient to support dismissal at the pleadings stage. *Beaumont ISD*, 2022 WL 2783047, at *12.

As noted, substantially ***all*** the published case law that Prosper ISD relies on to support its request for dismissal—with prejudice—are appeals from summary judgments or jury verdicts. Plainly, those cases do not support the proposition that the Plaintiffs in this case should be denied the same opportunity to develop evidence in support of their claims that the plaintiffs in all those other cases received. Accordingly, this Court should deny Prosper ISD's motion to dismiss Plaintiffs' 1983 claims.

[3] Prosper ISD is thus incorrect when it argues that Plaintiffs have pled only "constructive notice" based on Defendants' possession of the surveillance video. [*See* Reply in Support of MTD, Dkt. No. 56, at p. 9]. Not so. Plaintiffs have alleged (and Defendants appear to concede) that Prosper ISD, Ferguson, and Hamrick had **actual possession** of this evidence of Plaintiffs' abuse and, therefore, **actual notice**. Just as a party's actual possession of a jury summons or EEOC right to sue letter constitutes actual, and not merely constructive, notice of their contents, so did Defendants' actual possession of the surveillance evidence constitute actual notice of what the videos contained. *See Espinoza*, 754 F.2d at 1249 (5th Cir. 1985).

D. PLAINTIFFS HAVE STATED A TITLE IX CLAIM AGAINST PROSPER ISD AND ITS AGENTS, HAMRICK AND FERGUSON

To state a claim under Title IX for employee-on-student sexual abuse, a plaintiff must allege (1) actual notice to an appropriate person; and (2) deliberate indifference to an opportunity for voluntary compliance. *Beaumont ISD*, 2022 WL 2783047, at *16 (citing *Dallas ISD*, 153 F.3d at 220). Both elements involve fact questions ill-suited to preclusive resolution at the pleadings stage, *see id.*, which is surely why substantially all Prosper ISD's published Fifth Circuit precedent involved appeals from summary judgment. Indeed, the only Fifth Circuit Title IX case that Prosper ISD cites that addressed a motion to dismiss a Title IX claim ***reversed*** the trial court's decision granting dismissal because the plaintiffs had not yet had a fair chance to develop evidence in support of their claim. *Dallas ISD*, 153 F.3d at 220 & n.8. That decision is in accord with a number of trial court decisions denying motions to dismiss Title IX based upon school sex abuse at the pleadings stage on the basis that the fact-intensive elements of these claims are best decided on a fully developed evidentiary record. *See*, *e.g.*, *Beaumont ISD*, 2022 WL 2783047, at *16; *J.T. v. Uplift Educ.*, No. 3:20-CV-3443-D, 2022 WL 283022, at *1 (N.D. Tex. Jan. 31, 2022); *Alice L. v. Eanes Indep. Sch. Dist.*, No. A-06-CA-944-SS, 2007 WL 9710282, at *8–9 (W.D. Tex. Mar. 15, 2007).

At this stage of the proceedings, Plaintiffs have alleged sufficient facts to plausibly state a claim under Title IX that further discovery may enable them to prove. In particular, they have alleged that Prosper ISD, in the persons of its Superintendent and Transportation Manager, were on actual notice of Paniagua's sexual abuse of Janie Doe 1 and Janie Doe 2 as the result of information in their actual possession, including specifically the video surveillance and GPS data and the observations of Prosper ISD administrators who witnessed Paniagua keeping Janie Doe 1 behind on the bus each morning. [*See* 2d Am. Compl., Dkt. No. 27, at ¶ 18]. Plaintiffs have also

alleged that Defendants Hamrick and Ferguson were "appropriate persons" within the meaning of the Fifth Circuit's Title IX jurisprudence because they had supervisory authority over Paniagua and the ability to terminate his employment or recommend his termination. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 9–10]. Plaintiffs have also alleged—and Defendants seem to admit—that the Defendants took no action at all in response to the actual notice they had of Janie Doe 1 and Janie Doe 2's sexual abuse until Jane Doe complained directly. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 27–29]. At the pleading stage, allegations of this level of specificity are sufficient to state a Title IX claim on which further discovery may be taken. *See*, *e.g.*, *J.T.*, 2022 WL 283022, at *1 (plaintiff adequately pleaded actual notice and deliberate indifference where plaintiff alleged that sexually abusive teacher "maintained a tent or walled-off section of the classroom (which would have been obvious to anyone walking by the classroom, and which violated Uplift school policy) in which to take certain female students to demand sexual favors"); *Doe ex. rel. Doe v. Dallas Indep. Sch. Dist.*, 534 F. Supp. 3d 682, 689 (N.D. Tex. 2021) (plaintiff adequately pled actual notice where alleged sexual harasser "was regularly videotaped on school grounds").

Moreover, Plaintiffs have adequately pled a Title IX claim based on Defendants' conduct after Jane Doe reported the abuse and Paniagua was arrested, including but not limited to (1) asking Jane Doe to stay silent to not attract media attention; (2) failing to offering counseling services to Janie Doe 1, Janie Doe 2, or any other children who rode on Paniagua's bus; (3) instructing District employees, including bus drivers, to keep quiet and not speak on the allegations; (4) changing email addresses and directing District computer storage offsite to obstruct access to information related to this lawsuit; and (5) hiring the same defense firm who has appeared in this matter to conduct an "independent" investigation. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 5, 34–38]. Courts have recognized that a public school's conduct in reaction to discovery of an employee's sexual

abuse of a student can support deliberate indifference under a Title IX claim. *See, e.g., Doe by Watson v. Russell County School Board*, 292 F.Supp.3d 690 (W.D. Va. 2018) (precluding summary judgment as to whether public school board acted with deliberate indifference to an elementary public school custodian's confessed sexual abuse of a student by failing to offer counseling or other remedial measures to the student after the custodian's confession and arrest).

For these reasons, Plaintiffs have pled an actionable claim against Prosper ISD and its agents, Defendants Hamrick and Ferguson, under Title IX.

E. PLAINTIFFS HAVE STATED A TTCA CLAIM AGIANST PROSPER ISD

The TTCA waives sovereign immunity for or injuries "proximately caused by the wrongful act or omission or the negligence of an employee" if the injury "arises from the operation or use of a motor-driven vehicle." Tex. Civ. Prac. & Rem. Code § 101.021. Plaintiffs have stated an actionable claim against Prosper ISD under this provision.

Plaintiffs have alleged that Janie Doe 1 and Janie Doe 2 suffered injuries when Paniagua sexually abused them on the school bus and using instrumentalities of the school bus to facilitate the abuse. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 17–26]. In particular, Plaintiffs have alleged that Paniagua habitually used the school bus to make unscheduled stops when Janie Doe 1 and Janie Doe 2 were the only students on the bus in order to molest them when no other children were on the bus. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 16–17, 20, 22–26, 50]. Plaintiffs have also alleged that Paniagua used the school bus's seatbelts as a pretext to molest Janie Doe 1 and Janie Doe 2. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 16–17, 20, 26]. These allegations check all the boxes for liability under the plain text of Section 101.021(1)(A):

> A governmental unit in the state is liable for: (1) … personal injury [*i.e.*, infringement of the right of bodily integrity] … proximately caused by the wrongful act [*i.e.*, physical sexual abuse] … of an employee [*i.e.*, Paniagua] acting within the scop of employment [*i.e.*, driving the school bus], if: (A) the … personal injury …

> arises from the operation or use of a motor driven vehicle [*i.e.*, using the bus to isolate Janie Doe 1 and Janie Doe 2 for sexual molestation and using its seatbelts to molest them] ….

Tex. Civ. Prac. & Rem. Code § 101.021 (1)(A).

Notwithstanding the fact that Plaintiffs have alleged a waiver of immunity under the plain terms of the statute, Prosper ISD argues that there is no immunity waiver because "[t]he 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." [*See* Motion to Dismiss, Dkt. No. 54, at p. 8]. Not so. Plaintiffs have alleged that Paniagua ***used*** the bus to commit the assaults on Janie Doe 1 and Janie Doe 2 by (1) taking them off-route and making unscheduled stops in order to molest them when no other children were on the bus; (2) disabling the bus's GPS tracker to conceal when he was making diversions from his route or unscheduled stops; and (3) manipulating Janie Doe 1 and Janie Doe 2's seatbelts as a pretext for sexually molesting them. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 17–26]. These allegations go beyond merely identifying the bus as the "setting" for the assaults; they specify the ways in which Paniagua ***used*** the bus to commit the assaults.

Notably, the Texas courts have held that "use" of a motor vehicle is ***not*** limited to actually driving the vehicle, but includes the "use" of instrumentalities appurtenant to the vehicle, such as (1) a school bus's warning lights, *see*, *e.g. La Joya Indep. Sch. Dist. v. Gonzalez*, 532 S.W.3d 892, 903 (Tex. App.—Corpus Christi 2017) (pet. denied) (school bus driver's activation of warning lights on bus while stopped constituted "use" of motor vehicle within the meaning of TTCA); *Hitchcock v. Gavin*, 738 S.W.2d 34, 36 (Tex. App.—Dallas 1987, no writ) (same); or (2) the bus's horn, *see Austin Indep. Sch. Dist. v. Gutierrez*, 54 S.W.3d 860, 864 (Tex. App.—Austin 2001) (pet. denied). If "using" a school bus's warning lights or horn is an actionable "use" of a motor

vehicle under the TTCA, even when the bus is stopped, then so is "use" of the bus's seatbelts to reach under a child's shirt and shorts. Texas courts have also found that a school bus is "used" within the meaning of the act when the driver leaves a student at the wrong stop, after which the student is struck by another vehicle. *Contreras v. Lufkin Indep. Sch. Dist.*, 810 S.W.2d 23, 24 (Tex. App.—Beaumont 1991, writ denied). There is no principled reason why a school bus is not also "used" when the driver takes a child off-route or to an unscheduled stop to molest her.

Prosper ISD also points to the TTCA's intentional tort bar as grounds for dismissal of Plaintiffs' intentional tort claims against the District. [*See* Motion to Dismiss, Dkt. No. 54, at p. 6]. But Plaintiffs have also pled claims for negligence and gross negligence under the TTCA based upon Prosper ISD's negligent hiring and supervision of Paniagua. [*See* 2d Am. Compl., Dkt. No. 27, at ¶¶ 77–82]. The Texas Supreme Court has held that a governmental unit may be liable for negligent hiring and supervision of an employee who uses a motor vehicle to commit an intentional tort. *See Young v. City of Dimmit*, 787 S.W.2d 50 (Tex. 1990) (per curiam). That is exactly what Plaintiffs' have alleged here, and as such, they have stated viable negligence claims against Prosper ISD under the TTCA.[4]

[4] Prosper ISD contends that Plaintiffs' reliance on *Young* is misplaced because "the Texas Supreme Court subsequently clarified its holding in *Young*, explaining that even distinct claims for negligent supervision or training [a]re subject the requirement that they fall within the TTCA's waiver of governmental immunity." [*See* Reply in Support of Motion to Dismiss, Dkt. No. 56, at p. 4 (citing *Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 581 (Tex. 2001)]. To the contrary, *Petta* affirmed *Young*'s central holding that a municipality may be liable under the TTCA on a theory of negligent hiring or supervision based upon an employee's intentional conduct. *See* 44 S.W.3d at 581. *Petta* simply clarified that a municipality's negligent training and supervision does not constitute "use" of "tangible personal property" sufficient to create liability under that prong of the TTCA. *See id.* (citing Tex.Civ. Prac. & Rem. Code 101.021(2)). But this case does not involve a claim based on the use tangible personal property. Like *Young* and unlike *Petta*, this case involves a municipal employee's intentional wrongful use of a motor vehicle—a distinct basis for TTCA liability, *compare* Tex. Civ. Prac. & Rem. Code § 101.021(1) *with* § 101.021(2)—and Prosper ISD's negligence in hiring and supervising that individual.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant Prosper ISD'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 PROSPER INDEPENDENT SCHOOL DISTRICT'S MOTIONS TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

The Court, having considered Prosper Independent School District'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.