UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

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

DEFENDANT DR. HOLLY FERGUSON'S REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT HOLLY FERGUSON'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

SUMMARY

In light of Plaintiffs' response to Dr. Ferguson's motion to dismiss Plaintiffs' Second Amended Complaint, the Court need not order a Rule 7(a) Reply, because Dr. Ferguson is entitled to dismissal of all claims against her based on Plaintiffs' concessions and inadequate pleading.

Plaintiffs have conceded Dr. Ferguson's arguments seeking dismissal of nearly all of Plaintiffs' claims against Dr. Ferguson because Plaintiffs failed to address Dr. Ferguson's arguments, and Plaintiffs failed to meet their burden to defeat Dr. Ferguson's entitlement to qualified immunity.

Dr. Ferguson and Plaintiffs agree about one thing: "the question at the pleadings stage is whether the plaintiff has plausibly alleged" the elements of a claim. Dkt. 59, pp. 15-16 (emphasis removed). However, because Dr. Ferguson has asserted her entitlement to qualified immunity from Plaintiffs' claims, Plaintiffs were required to "'plead specific facts that both allow the court

to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity.'"[1] They did not do so.

In response to Dr. Ferguson's motion to dismiss Plaintiffs' Second Amended Complaint, Plaintiffs addressed only one claim, arguing that they plausibly alleged a claim for supervisor liability under 42 U.S.C. §1983 against Dr. Ferguson. Dkt. 59, 14-17, 19. They have not done so, nor have they identified well-pled allegations sufficient to defeat Dr. Ferguson's entitlement to qualified immunity. The Court should dismiss this claim because: (1) Plaintiffs propose a standard of review that the Supreme Court overturned long ago; (2) after the Supreme Court's decision in *Iqbal*,[2] a claim asserting supervisor liability under §1983 does not constitute a clearly established constitutional violation; (3) unreported circuit court cases postdating *Iqbal* cannot clearly establish the law for the purposes of qualified immunity analysis; and (4) even if a supervisor liability claim under *Taylor Independent School District*[3] remains actionable, Plaintiffs did not plausibly allege the elements of such a claim against Dr. Ferguson.

Plaintiffs did not meet their burden to defeat Dr. Ferguson's entitlement to qualified immunity. As the Supreme Court and the Fifth Circuit require plaintiffs to plead sufficiently to survive a motion to dismiss based on qualified immunity without **any** discovery, the Court should decline to order a Rule 7(a) Reply, recognize Dr. Ferguson's entitlement to qualified immunity, and dismiss all of Plaintiffs' claims against Dr. Ferguson.

[1] *Arnold v. Williams*, 979 F.3d 262, 266-67 (5th Cir. 2020) (quoting *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)).
[2] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
[3] *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (en banc)

ARGUMENT AND AUTHORITIES

A. Plaintiffs Conceded Nearly All of Dr. Ferguson's Arguments.

Plaintiffs offered no response to the following arguments that Dr. Ferguson made in her motion to dismiss: (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. 53, pp. 10-11);[4] (2) the Court should dismiss Plaintiffs' claims against Dr. Ferguson in her official capacity because these claims are redundant of Plaintiffs' claims against Prosper ISD (Dkt. 53, p. 12); (3) the Court should dismiss Plaintiffs' Title IX claims against Dr. Ferguson because Title IX does not authorize claims against individuals (Dkt. 53, pp. 12-13); (4) Dr. Ferguson is entitled to qualified immunity from Plaintiffs' claims seeking to hold Dr. Ferguson jointly and severally liable for Paniagua's alleged sexual abuse of the minor Plaintiffs because vicarious liability does not apply under §1983 (Dkt. 53, p. 13); (5) Dr. Ferguson is entitled to qualified immunity from Plaintiffs' claims under §1983 based on alleged violations of the Equal Protection Clause (Dkt. 53, pp. 18-20, 22-23); (6) Dr. Ferguson is entitled to qualified immunity from Plaintiffs' vague claims relating to alleged policies or practices (Dkt. 53, pp. 20-22); (7) Dr. Ferguson is entitled to qualified immunity from Plaintiffs' failure-to-train claim (Dkt. 53, pp. 23-25); (8) the Court should dismiss Plaintiffs' claim for punitive damages against Dr. Ferguson because it is not sufficiently pled (Dkt. 53, pp. 25-26); and (9) the Court should dismiss Plaintiffs' claims with prejudice because Plaintiffs have already re-pled, and Plaintiffs cannot cure the jurisdictional issues (Dkt. 53, pp. 26-27).

By failing to respond to these arguments, Plaintiffs have conceded their validity. Additionally, by failing to respond to Dr. Ferguson's assertion of qualified immunity with respect

[4] Defendant refers to the page numbers at the bottom of her motion to dismiss.

to these claims, Plaintiffs failed to meet their burden to defeat Dr. Ferguson's entitlement to qualified immunity.[5] The Court should, therefore, dismiss these claims.

B. <u>The Court Cannot Order Discovery at This Point in the Lawsuit.</u>

Plaintiffs assert that they should have the opportunity to further investigate and develop their claims against Dr. Ferguson in discovery. Dkt. 59, p. 6. Plaintiffs rely on *Schultea v. Wood*, 47 F3d 1427 (5th Cir. 1995) for the proposition that they may conduct discovery in order to attempt to defeat a motion to dismiss asserting qualified immunity. Dkt. 59, pp. 6, 14, 18-19. This is incorrect. As the Fifth Circuit recently explained, while a defendant's assertion of immunity is pending, courts cannot allow **any** discovery to take place. *Carswell v. Camp*, 54 F.4th 307, 311 (5th Cir. 2022).[6] Indeed, no discovery is needed, as the Court can and should grant Dr. Ferguson's motion to dismiss based on Plaintiffs' inadequate pleadings.[7]

Plaintiffs have not offered well-pled allegations sufficient to defeat Dr. Ferguson's entitlement to qualified immunity from their claims. In fact, with the exception of their supervisor liability/bodily integrity claim, Plaintiffs have not even attempted to defeat Dr. Ferguson's assertion of qualified immunity. Dkt. 59. Plaintiffs are not entitled to discovery in order to respond to Dr. Ferguson's motion to dismiss their Second Amended Complaint.

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[5] *Arnold*, 979 F.3d at 266-67; *Scott v. Harris*, 550 U.S. 372, 377 (2007).

[6] *See also, e.g.*, *Iqbal*, 556 U.S. at 684-686 (recognizing "serious and legitimate reasons" for the basic thrust of qualified immunity—to free government officials from the concerns of litigation, including disruptive discovery, and noting that permitting discovery to proceed as to other defendants would prejudice defendants who have asserted qualified immunity); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) for the proposition that discovery should not be allowed until the threshold question of qualified immunity is resolved); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."); *Morris v. Cross*, 476 F. App'x 783, 785 (5th Cir. 2012) ("Because the defendants raised qualified immunity, [plaintiff] was not entitled to proceed with discovery.").

[7] Contrary to Plaintiffs' contention, with respect to the only claim for which Plaintiffs offered substantive briefing, this is in fact "a case where the question of qualified immunity depend[s] upon a pure question of law, such as whether or not the plaintiff has pled violation of a clearly established constitutional right." Dkt. 59, p. 19. Plaintiffs have not pled a violation of a clearly established constitutional right by Dr. Ferguson. Dkt. 53, pp. 13-18, 23-25; *infra* at 5-9. Furthermore, Dr. Ferguson is entitled to qualified immunity and to dismissal of Plaintiffs' claims against her based on Plaintiffs' inadequate allegations, not based on her assertions in her *Schultea* defense. Dkt. 53; *infra* at 5-9.

C. Plaintiffs Have Not Met Their Burden to Defeat Dr. Ferguson's Entitlement to Qualified Immunity from Plaintiffs' Bodily Integrity Claim.

Dr. Ferguson is entitled to dismissal of Plaintiffs' claim asserting supervisor liability based on alleged violations of the minor Plaintiffs' due process rights to bodily integrity because: (1) Plaintiffs rely on a motion to dismiss standard of review that was overturned long ago; (2) a Supreme Court case that postdates the Fifth Circuit opinion on which Plaintiffs rely (*Iqbal*) brings into question the continuing viability of supervisor liability under §1983, so Plaintiffs have not identified a constitutional right which was clearly established at the relevant time; (3) unreported circuit court cases that were issued after *Iqbal* cannot clearly establish the law, especially to the extent that they are controlled by *Iqbal*; and (4) even if supervisor liability claims survive *Iqbal*, Plaintiffs did not identify well-pled allegations from their Second Amended Complaint sufficient to support the elements of such a claim. Dkt. 59, pp. 14-17, 19. Dr. Ferguson is entitled to qualified immunity, and the Court should dismiss this claim.

1. Plaintiffs Identify an Obsolete Standard of Review.

Plaintiffs mistakenly claim that a case "'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.'" Dkt. 59, p. 13.[8] 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." *Iqbal*, 556 U.S. at 678. A complaint that pleads facts which are "'merely consistent with' a defendant's liability" is insufficient to defeat a motion

[8] 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). Plaintiffs' reliance on authorities listed in Dkt. 59, n.1 is unavailing. Although the Fifth Circuit has occasionally parroted pre-*Iqbal* language with respect to the applicable standard of review, the court did not apply the 'no set of facts' standard to any motion to dismiss for failure to state a claim in these cases.

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).

Additionally, because Dr. Ferguson has asserted qualified immunity in response to this claim, she is entitled to dismissal unless Plaintiffs pled specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity. *Supra* at 1-2. To defeat Dr. Ferguson's qualified immunity defense, Plaintiffs needed to identify well-pled allegations to support a finding that Dr. Ferguson violated a constitutional right and that the contours of that right were clearly established at the time of the challenged conduct, in the specific context of the case. Dkt. 53, pp. 9-10 (citing *Scott*, 550 U.S. at 377; *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc); *Brumfiled v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008)).

2. <u>It is Not Clearly Established That Supervisor Liability is a Viable Claim Under §1983.</u>

It was not clearly established, during the 2021-22 school year, that a supervisor could be liable under §1983 for a subordinate's violation of a person's due process right to bodily integrity. In light of *Iqbal*, Plaintiffs' reliance upon *Taylor Indep. Sch. Dist.*, 15 F.3d at 450-58 is unavailing. Dkt. 59, pp. 14-15, 19.

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

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.

Plaintiffs' reliance on two unpublished Fifth Circuit opinions which were issued after *Iqbal* (Dkt. 59, p. 15, n.2) is unavailing because: (1) other circuit courts of appeals have expressed uncertainty as to the viability of supervisor liability claims after *Iqbal*;[9] and (2) unreported circuit court opinions cannot clearly establish the law for the purpose of qualified immunity analysis.[10] Even assuming, *arguendo*, that Plaintiffs' claims against Dr. Ferguson based on her role as a supervisor are not entirely barred by *Iqbal*, it is not clearly established that Dr. Ferguson's alleged conduct could give rise to her personal liability under a theory of supervisor liability. As a result, Dr. Ferguson is entitled to qualified immunity from these claims. *E.g.*, *Scott*, 550 U.S. at 377; *Morgan*, 659 F.3d at 371.

3. <u>Even If Supervisor Liability Claims Are Valid Under §1983, Plaintiffs Failed to Identify Well-Pled Allegations Sufficient to Defeat Dr. Ferguson's Entitlement to Qualified Immunity From This Claim.</u>

Plaintiffs' argument in support of their supervisor liability claim is inadequate to defeat Dr. Ferguson's entitlement to qualified immunity. Although Plaintiffs admit that they do not know

[9] *E.g.*, *Reynolds v. Barrett*, 685 F.3d 193, 205 n.14 (2nd Cir. 2012); *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 n.8 (3rd Cir. 2010); *Dodds v. Richardson*, 614 F.3d 1185, 1194-1202 (10th Cir. 2010).

[10] The Fifth Circuit recognizes that "unpublished opinions 'do not establish any binding law for the circuit,' so 'they cannot be the source of clearly established law for the qualified immunity analysis.'" *Henderson v. Harris County, Tex.*, 51 F.4th 125, 133 (5th Cir. 2022) (quoting *Marks v. Hudson*, 933 F.3d 481, 486 (5th Cir. 2019) and citing *Salazar v. Molina*, 37 F.4th 278, 286 (5th Cir. 2022) (same)).

whether Dr. Ferguson ever reviewed any bus surveillance video or GPS information relating to Paniagua's bus (Dkt. 59, p. 16), Plaintiffs argue that "even if no one ever looked at the videos," their allegation that the District possessed these materials is "a sufficient basis to plausibly allege actual notice and deliberate indifference." Dkt. 59, p. 17. This argument is foreclosed by Supreme Court precedent holding that allegations are insufficient to defeat a motion to dismiss for failure to state a claim if they: (1) are merely consistent with a defendant's liability; or (2) are naked assertions devoid of further factual enhancement.[11] This argument is also foreclosed by the case on which Plaintiffs rely, *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. Plaintiffs identify no well-pled allegations that Dr. Ferguson **learned of** any such facts or pattern of behavior.[12] Plaintiffs have, therefore, not sufficiently pled a constitutional violation, and Dr. Ferguson is entitled to qualified immunity from this claim.

The Court should also reject Plaintiffs' argument that, because they alleged that Dr. Ferguson merely had possession of bus videos and GPS information relating to Paniagua's bus, Dr. Ferguson had actual notice of the content of such information. Dkt. 59, pp. 16-17. Plaintiffs' reliance on a case which pre-dated *Taylor Indep. Sch. Dist*. and which involved a wholly different concern (receipt of an EEOC right-to-sue letter for the purpose of the applicable limitations period) is unavailing. It would be unreasonable for the Court to infer that a superintendent of a school

[11] *Iqbal*, 556 U.S. 678; *Twombly*, 550 U.S. at 555, 557.

[12] Additionally, Plaintiffs' allegations and arguments about "Defendants" generally, and not Dr. Ferguson specifically, are insufficient to state a claim against Dr. Ferguson under §1983 because individual liability under §1983 requires a showing of individual causation. *E.g., Martinez v. City of N. Richland Hills*, 846 Fed. App'x 238, 243-44 (5th Cir. 2021); *Jones v. Hosemann*, 812 Fed. App'x 235, 239 (5th Cir. 2020) ("It is not enough for a plaintiff to simply allege that something unconstitutional happened to him. The plaintiff must plead that each defendant individually engaged in actions that caused the unconstitutional harm.").

district which serves more than 19,000 students[13] has "learned of" matters which may or may not have been contained or reflected in some of the massive amounts of information within the school district's possession.[14] The Court would not infer that Dr. Ferguson has actual notice of the marks a fifth grade student received on her most recent math test, even though Dr. Ferguson certainly has possession of that information. For the same reason, it would be unreasonable for the Court to infer that Dr. Ferguson learned anything about Paniagua's treatment of the minor Plaintiffs merely because Plaintiffs alleged that she possessed bus video and GPS information.[15] Even if supervisor liability claims were viable under §1983, Plaintiffs have not offered well-pled allegations in support of all elements of such a claim, so Dr. Ferguson is entitled to qualified immunity from Plaintiffs' claim, and the Court should dismiss this claim. Dkt. 53, p. 9.

D. <u>The Court Should Dismiss Plaintiffs' Claims Against Dr. Ferguson With Prejudice.</u>

Plaintiffs failed to offer any authority in opposition to Dr. Ferguson's briefing asking the Court to dismiss Plaintiffs' claims against her with prejudice. Dkt. 53, pp. 26-27. Indeed, Plaintiffs did not ask the Court to provide them with a fifth opportunity to plead their claims, nor did they give any indication that they would be able to cure their pleading deficiencies. Dkt. 59. For these reasons, the Court should dismiss all of Plaintiffs' claims against Dr. Ferguson with prejudice.

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[13] https://www.usnews.com/education/k12/texas/districts/prosper-isd-105242#:~:text=Prosper%20Independent%20School%20District%20contains%2019%20schools%20and%2019%2C138%20students, last visited on December 16, 2022.

[14] Plaintiffs' hypothetical example of an administrator failing to open a letter addressed to the superintendent which expressly and only contained detailed allegations of teacher-on-student sexual abuse is easily distinguishable from Plaintiffs' allegations in the case at bar, in which Plaintiffs contend that a superintendent of a large school district is charged with actual knowledge of the content of any and all information in the school district's possession. This contention could hardly be more unreasonable.

[15] The Court should not accept as true such unwarranted factual inferences. *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010).

CONCLUSION

Plaintiffs conceded the validity of Dr. Ferguson's arguments seeking dismissal with prejudice of all claims except for Plaintiffs' supervisor liability claim based on allegations that Paniagua violated the minor Plaintiffs' constitutional right to bodily integrity. Plaintiffs failed to meet their burden to defeat Dr. Ferguson's entitlement to qualified immunity with respect to this claim and all of Plaintiffs' claims against Dr. Ferguson. The Court should, therefore, recognize Dr. Ferguson's entitlement to qualified immunity from all of Plaintiffs' claims and dismiss with prejudice Plaintiffs' claims based on lack of jurisdiction or Plaintiffs' failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 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