In the United States District Court
for the Eastern District of Texas
Tyler Division

P.S., a minor by and through his parents and next friends, Jarett and Minta Stephenson,	
Plaintiffs,	**Civil Action No. 6:21-CV-00427**
v.	
Brownsboro Independent School District,	Jury Demanded
Defendant.	

Brownsboro Independent School District's Second Motion to Dismiss

Brownsboro Independent School District[1] moves the Court to dismiss Plaintiffs Jarett and Minta Stephenson's[2] claims under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, *et seq.*, and 42 U.S.C. § 1983 because Plaintiffs have failed to state a claim upon which relief can be granted against BISD.

Based solely upon the controlling law measured against Plaintiffs' sensationalistic but ultimately clearly legally insufficient pleading allegations in Plaintiffs' first amended complaint,[3] BISD is entitled to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

[1] Defendant, Brownsboro Independent School District refers to itself as "BISD."

[2] Plaintiffs filed the instant lawsuit as parents and next friends of P.S., a minor.

[3] ECF No. 7-2.

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Nature and Stage of the Proceedings

On October 29, 2021, Plaintiffs filed suit against BISD, asserting claims under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, *et seq*., and 42 U.S.C. § 1983 for alleged violations of the Fourteenth Amendment.[4]

On December 17, 2021, BISD moved under Rule 12(b)(6) to dismiss Plaintiffs' lawsuit for Plaintiffs' failure to state a claim upon which relief can be granted.[5] When Plaintiffs did not respond timely, the Court ordered Plaintiffs do so.[6] Nonetheless, on January 17, 2022, Plaintiffs moved for leave to amend their complaint,[7] which Plaintiffs did by attaching their amended complaint to a second motion for leave on February 3, 2022.[8]

On March 16, 2022, the Court denied BISD's initial motion to dismiss as moot and ordered BISD to respond to Plaintiffs' amended complaint by March 23, 2022.[9] Because Plaintiffs' first amended still fails to state any plausible claim against BISD, BISD remains entitled to dismissal under Rule 12(b)(6).

[4] ECF No. 1.

[5] ECF No. 2.

[6] ECF No. 4.

[7] ECF No. 5.

[8] Plaintiffs' unopposed second motion for leave [ECF No. 7] is identified as Plaintiffs' "Amended Complaint" in the Court's electronic filing system, while Plaintiffs' actual amended complaint is attached as an exhibit [ECF No. 7-2].

[9] ECF No. 8.

Summary of the Grounds for Dismissal

Against BISD, Plaintiffs have attempted through only broad, vague, and impermissibly conclusory allegations to assert violations of Title IX and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, arising out of BISD's investigation of a single incident[10] where several senior students on the Brownsboro High School baseball team physically assaulted Plaintiffs' son, P.S., at the time a freshman.[11] In response to Plaintiffs' complaint and consistent with its own policies pertaining to student conduct, hazing, and harassment, as well as applicable state and federal law, BISD promptly investigated the incident and disciplined the students responsible.[12]

Dissatisfied BISD neither investigated nor reprimanded any *employee* as a result of the hazing incident, Plaintiffs assert several vague and purely conclusory theories suggesting BISD subjected P.S. to a sexually hostile educational environment which, without identifying any legal basis, Plaintiffs claim violates Title IX and the Fourteenth Amendment, even though Plaintiffs fail to allege facts demonstrating: (1) BISD had actual knowledge of P.S.'s harassment; (2) the harassment was based on P.S.'s sex; (3) the single instance of harassment was so

[10] While Plaintiffs vaguely allege prior instances of hazing involving upperclassmen and freshmen, including an incident involving P.S.'s teammate, L.S., P.S. was the target of upperclassmen hazing on only one occasion. *Id*., ¶ 62.

[11] *Id*., ¶¶ 24-29.

[12] *Id*., ¶¶ 66, 68-72.

severe, pervasive, and objectively offensive that it effectively barred P.S.'s access to an educational opportunity or benefit; and (4) that BISD was deliberately indifferent to P.S.'s complaint of student-on-student harassment. Further, the law does not support Plaintiffs' efforts to claim *respondeat superior* liability under section 1983. Accordingly, Plaintiffs have failed to allege any fact that would state a cognizable claim against BISD that actually exists in the law.

Issues Presented

1. Plaintiffs have failed to state a claim against BISD for sexual harassment or a sexually hostile educational environment under Title IX of the Education Amendments Act of 1972.

2. Plaintiffs have failed to state a claim against BISD under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

3. Plaintiffs have failed to state a claim against BISD under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

4. Plaintiffs have failed to state a claim against BISD for municipal liability under 42 U.S.C. § 1983.

Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, although the federal pleading requirements are reasonably low, they are real and the threshold for stating a claim for relief requires factual allegations regarding each material element necessary to sustain recovery under an actionable legal theory. *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (5th Cir. 1989). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. A court is not required to accept mere legal conclusions as true. *Id*. Instead, legal conclusions "must be supported by factual allegations." *Id*. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556).

> Determining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "shown" – "that the pleader is entitled to relief."

Id. (quoting Fed. R. Civ. P. 8(a)(2)) (internal citation omitted). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Md. Manor Assocs. v. City of Houston*, 816 F. Supp. 2d 394, 402 (S.D. Tex. 2011) (citing, *Iqbal*, 556 U.S. at 678). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*.

"When plaintiffs 'have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.'" *Twombly*, 550 U.S. at 570, *accord Iqbal*, 556 U.S. at 680. Important here is the well-settled rule that conclusory allegations or legal conclusions masquerading as factual allegations will not suffice to avoid dismissal. *Fernandez-Montes v. Allied Pilots' Association*, 987 F.2d 278, 284 (5th Cir. 1993). If, based on the facts pleaded and judicially noticed, a successful affirmative defense appears, then dismissal under Rule 12(b)(6) is proper. *Kansa Reinsurance Co., Ltd. v. Cong. Mortgage Corp. of Tex.*, 20 F.3d 1362, 1366 (5th Cir. 1994).

Argument & Authorities

1. Plaintiffs have failed to state a claim under Title IX.

"Title IX prohibits sex discrimination by recipients of federal education funding," *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) and provides, in pertinent part, that, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

1.1. Plaintiffs have failed to allege "post-report" sexual harassment claim.

A school district that receives federal funds may be liable for student-on-student harassment if the district: (1) had actual knowledge of the harassment; (2) the harasser was under the district's control; (3) the harassment was based on the victim's sex; (4) the harassment was "so severe, pervasive, and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit;" and (5) the district was deliberately indifferent to the harassment. *See I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 368 (5th Cir. 2019) (citations omitted). "A plaintiff's failure to plead one of these elements is fatal to the claim." *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 689 (5th Cir. 2017).

Further, while a private right of action may lie in student-on-student harassment cases, liability may not be imposed upon a school board for the actions of the student perpetrators, but instead must be based upon the actions of the school

board in response to reported harassment. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652-54 (1999). Stated differently, "if a school district does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment" by "causing students to undergo harassment or making them liable or vulnerable to it." *Wilson v. Beaumont Indep. Sch. Dist. & Thom Amons*, 144 F. Supp. 2d 690, 693 (E.D. Tex. 2001) (Cobb, J. presiding) (cleaned up).

1.1.1. Plaintiffs have failed to allege facts showing BISD's actual knowledge.

It is well-established that Title IX liability cannot be based on principles of *respondeat superio*r or constructive notice. *See Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 659 (5th Cir. 1997). Rather, "[i]t is a district's own misconduct—not the actions of its students, rank-and-file employees, or other third parties—that exposes it to liability under Title IX." *Doe v. Edgewood Indep. Sch. Dist.*, 964 F.3d 351, 359 (5th Cir. 2020). "[I]t is not enough that any employee knew of the harassment; it must be someone authorized to rectify it." *Id.* (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)).

Plaintiff's post-reporting claim fails from the outset because Plaintiffs do not identify any BISD employee or official *with supervisory power* who had actual knowledge of the single instance of P.S.'s harassment. Instead, Plaintiffs allege only the baseball coaches "knew about the sexually hostile educational environment [on

the baseball team]."[13] The coaches' knowledge of P.S.'s harassment, however, is insufficient to establish BISD's knowledge, let alone *actual* knowledge.

Fatally, the Fifth Circuit has "long held" that the "**the bulk of employees**" including, most notably, "***coaches* … are not generally 'appropriate individuals' for purposes of notice under Title IX**." *Edgewood I.S.D.*, 964 F.3d at 361 n.39 (emphasis added) (citing *Rosa H.*, 106 F.3d at 660); *see also, e.g., King v. Conroe Indep. Sch. Dist.*, 289 Fed. Appx. 1, 3 n.5 (5th Cir. 2007) (per curiam). To be sure, "extending 'appropriate persons' under Title IX to include any individual who is authorized and/or instructed to take any action to halt abuse … would result in nearly every district employee being covered by the analysis." *Edgewood, I.S.D.*, 964 F.3d at 361. "[T]his result is incompatible with Title IX's existing liability framework." *Id*.

Plaintiffs' attempt to impute the coaching staff's supposed knowledge of P.S.'s harassment to BISD is further belied by Plaintiffs' pleading admissions which demonstrate that "[s]everal BISD Administrators" including BISD's assistant superintendent, and BHS's principal, athletic director, and transportation director investigated P.S.'s harassment *after* Plaintiffs complained to the school district. In other words, upon receiving actual and direct notice of P.S.'s harassment, BISD investigated the Plaintiffs' complaint and disciplined the students involved.[14]

[13] ECF No. 7-2, ¶¶ 78-79.

[14] *Id.*, ¶¶ 68, 70-72.

Plaintiffs' failure to assert any factual allegation demonstrating P.S. suffered any further hazing, bullying, or harassment after Plaintiffs complained and BISD investigated is dispositive of Plaintiffs' ***post***-reporting claim under Title IX

1.1.2. Plaintiffs have failed to allege facts supporting a finding that P.S.'s harassment was based on sex.

Although "[s]ame-sex sexual harassment is actionable under title IX," *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998), "[t]he offensive behavior, however, must still be based on sex, per the words of title IX, and not merely tinged with offensive sexual connotations." *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011) (quotation omitted). Because "children may regularly interact in a manner that would be unacceptable among adults," proving sexual harassment in a student-on-student discrimination case is difficult. *Davis*, 526 U.S. at 651. "Damages are not available for simple acts of teasing and name-calling among school children … even where these comments target differences in gender." *Id.* at 652. The *only* question before the Court on this element is whether BISD's alleged "deliberate indifference[15] 'subjected' [P.S.] to post-report 'discrimination,' i.e., *sexual* harassment." *Compare John Doe I v. Huntington Indep. Sch. Dist.*, C.A. No. 9:19-CV-00133-ZJH, 2020 U.S. Dist. LEXIS 256936, *22 (E.D. Tex. Oct. 5, 2020) (Hawthorn, Mag. J.) (citing 20 U.S.C. § 1681(a); *Davis*, 526 U.S. at 640-42).

[15] *See* section 1.1.4., *infra*.

Here, Plaintiffs have failed to allege P.S. experienced any *post*-report hazing, bullying, abuse, discrimination, or sexual harassment *at all*. Instead, Plaintiffs allege P.S. "still loves baseball, but it is not the same,"[16] "P.S.is more private, and keeps to himself. His trust was violated,"[17] and "P.S. was, and remains, embarrassed and humiliated. He fears that he will forever be remembered for the wrong reasons."[18] That the single incident against P.S. caused P.S. to be "embarrassed and humiliated" does not support a claim of *any* post-report discrimination, let alone sexual harassment against BISD. *Compare, Sanches*, 647 F.3d at 165.[19] To the contrary, P.S., now a 17-year-old junior at BHS, remains "an excellent baseball player and has been a member of the team since he was a freshman."[20] "Because harassment on the basis of sex is the sine qua non of a Title IX sexual harassment case, and a failure to plead that element is fatal," *id*. at 166, Plaintiffs' claim for post-reporting sexual harassment fails as a matter of law.

1.1.3. Plaintiffs have failed to allege facts that P.S.'s harassment was "severe, pervasive, and objectively offensive."

Plaintiffs' post-reporting Title IX claim further fails because Plaintiffs have not demonstrated any ***post***-report conduct that was sufficiently severe, pervasive,

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[16] ECF No. 7-2, ¶ 93.

[17] *Id*., ¶ 94.

[18] *Id*., ¶ 96.

[19] "[A classmate] referred to Sanches only once as a 'ho' and did not even make the comment to her directly. That … by no means qualifies as harassment at all." *Sanches*, 647 F.3d at 165.

[20] ECF No. 7-2, ¶¶ 25, 31-32.

and objectively offensive to subject P.S. to a sexually hostile educational environment. "Whether conduct rises to the level of actionable [sexual] harassment," under Title IX, "'depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.'" *Sanches*, 647 F.3d at 167 (quoting *Davis*, 526 U.S. at 651). "The standard is not subjective; instead it is whether the harassment was severe, pervasive, and *objectively* unreasonable." *Id.* (emphasis in original).

Thus, courts evaluating a claim under Title IX "must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults." *Id*. (quotation omitted). "[T]o be actionable, the harassment must be more than the sort of teasing and bullying that generally takes place in schools." *Davis*, 526 U.S. at 652.

Again, Plaintiffs have failed to allege any incident of post-report harassment against P.S. To be sure, "[i]t makes no difference to [the Court's] analysis that [P.S.] was sincerely upset … . [The senior students'] conduct may have been inappropriate and immature and may have hurt [P.S.'s] feelings and embarrassed [him], but it was not severe, pervasive, and objectively unreasonable." *Compare Sanches*, 647 F.3d at 167 *with* ECF No. 1, ¶¶ 44-47. Indeed, "[w]hile [seniors G.W., N.S., and C.W.] may have committed the initial sexual assault[]

[against P.S.], the school is not vicariously liable for [the seniors'] actions." *Compare Huntington I.S.D.*, 2020 U.S. Dist. LEXIS 256936 at *22.

Even if the single pre-report incident against P.S. could somehow support a post-report claim under Title IX, the Supreme Court and Fifth Circuit have each "recognized that single instances of sexual harassment typically do not involve behavior 'serious enough to have the systemic effect of denying the victim equal access to an educational program or activity.'" *I. L. v. Hous. Indep. Sch. Dist.*, 776 Fed. Appx. 839, 843 (5th Cir. 2019) (quoting *Davis*, 526 U.S. at 652-53).

Additionally, and as Plaintiffs admit, BISD promptly investigated Plaintiffs' complaint and disciplined the students responsible, and, importantly, no similar incident has occurred since BISD learned of the hazing incident. To determine otherwise, on these allegations, would be contrary to Congress's decision to limit Title IX "to cases having a ***systemic*** effect on educational programs or activities." *Davis*, 526 U.S. at 653 (emphasis added). Since BISD promptly responded to and investigated the single incident of hazing against P.S. and, in doing so, has prevented any similar occurrence, Plaintiffs' own pleading admissions belie Plaintiffs' Title IX claim. *Compare, id.*

1.1.4. Plaintiffs have failed to allege facts showing BISD was "deliberately indifferent."

Plaintiffs' Title IX post-reporting claim further fails because Plaintiffs have not alleged any fact demonstrating BISD was "deliberately indifferent" to the

harassment P.S. experienced. "Deliberate indifference is an extremely high standard to meet." *I.F.*, 915 F.3d at 368 (quotation omitted). "Because deliberate indifference is a lesser form of intent rather than a heightened degree of negligence, neither negligent nor merely unreasonable responses are enough." *Id*. at 369 (quotation and citation omitted). Rather, a school district's "response to the harassment or lack thereof [must be] clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648.[21]

Stated differently, "Title IX does not require flawless investigations or perfect solutions," *Sanches*, 647 F.3d at 170, nor does Title IX "require school districts to purge themselves of harassment, take specific disciplinary actions, **nor comply with parents' remedial demands**." *I.F.*, 915 F.3d at 369 (emphasis added) (citing *Davis*, 526 U.S. at 648). Even a school district's "failure to comply with [its own] regulations … does not establish the requisite … deliberate indifference." *Sanches*, 647 F.3d at 169. Indeed, controlling Fifth Circuit "precedent makes it clear that negligent delays, botched investigations of complaints due to the ineptitude of investigators, or responses that most reasonable persons could have improved upon do not equate to deliberate indifference." *I.F.*, 915 F.3d at 369.[22]

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[21] "In an appropriate case, there is no reason why courts … on a motion to dismiss … could not identify a response as not 'clearly unreasonable' as a matter of law." *Davis*, 526 U.S. at 649.

[22] *See also, e.g., Estate of Lance*, 743 F.3d 982, 997 (5th Cir. 2014); *Doe ex rel. Doe v. Dall. Indep. Sch. Dist.*, 220 F.3d 380, 388-89 (5th Cir. 2000); *Leffall v. Dall. Indep. Sch. Dist.*, 28 F.3d 521, 531-32 (5th Cir. 1994) (collecting cases).

Rather, "school districts are afforded flexibility in responding to unacceptable behavior and may tailor their responses to the circumstances," *Estate of Lance*, 743 F.3d at 1000, and "must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Davis*, 526 U.S. at 649. "Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference." *I.F.* 915 F.3d at 369 (quotation omitted).

"Given this flexibility, 'courts should refrain from second-guessing the disciplinary decisions made by school administrators.'" *Id.* (quoting *Davis*, 526 U.S. at 648). In other words, "[t]he Fifth Circuit is clear that it is not a district court's duty to question a school's response." *Harvey v. Carthage Indep. Sch. Dist.*, No. 2:18-CV-00164-JRG, 2019 U.S. Dist. LEXIS 36261, *11 (E.D. Tex. Mar. 6, 2019) (Gilstrap, J. presiding) (citing *I.F.*, 915 F.3d at 369).

Despite the *fact* that BISD investigated the single incident of student-on-student harassment made the basis of Plaintiffs' claims and disciplined the students responsible,[23] Plaintiffs complain the outcome of BISD's investigation including, most notably, BISD's decision to neither investigate nor reprimand BISD's staff, constitutes a deliberately indifferent response to P.S.'s alleged harassment.[24] Under both the facts and the law, Plaintiffs are incorrect.

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[23] Indeed, Plaintiffs concede, "[a]fter watching the video [of the hazing incident], [BHS Principal] [Brent] Cooper ***increased*** punishment of the seniors" ECF No. 7-2, ¶ 71 (emphasis added).

[24] *Id.*, ¶¶ 78-91.

Again, Plaintiffs' complaint pertaining to the outcome of BISD's investigation is immaterial since "[s]chools are not required to … accede to a parent's remedial demands." *Sanches*, 647 F.3d at 167-68. Rather, as this Court, Judge Gilstrap presiding, has held, "a school district's response to the harassment or lack thereof must be clearly unreasonable in light of known circumstances, such that ***the district's actions subjects the victim to further discrimination***." *Harvey*, 2019 U.S. Dist. LEXIS 36261, *11 (emphasis added) (quoting *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 520 (5th Cir.), *vacated on other grounds*, 599 Fed. Appx. 534 (5th Cir. 2013).

Further, despite alleging that, "[p]rior to P.S.' attendance at BISD high school, BISD's baseball hazing 'tradition' existed for several years with the coaches' knowledge,"[25] Plaintiffs fail to allege any fact showing any such hazing continued after BISD's investigation.[26] Indeed, even if the Court accepts as true Plaintiffs' allegations pertaining to hazing allegedly inflicted upon other students or former students, those allegations are conclusory and insufficient to overcome a motion to dismiss under Rule 12(b)(6). *See Ruvalcaba v. Angleton Indep. Sch. Dist.*, ___ F. App'x ___, 2022 U.S. App. LEXIS 3213, *12 (5th Cir. 2022) (per curiam) (citing *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 361 (5th Cir. 2004)).

[25] *Id.*, ¶ 9.

[26] *See id., passim*.

Thus, while "Title IX d[oes] not require that the school district must have effectively ended all interaction between the two students to prevent conclusively any further harassment,'" *I.L.*, 776 F. App'x at 844 (quotation omitted), Plaintiffs' pleading admissions demonstrate BISD's investigation did just that. Accordingly, Plaintiffs have failed to allege facts supporting their claim for student-on-student sexual harassment under Title IX.

1.2. Plaintiffs' "heightened risk" claim fails as a matter of law.

In addition to their wholly unsupported and insupportable post-reporting claim, Plaintiffs also assert a Title IX claim based on BISD's alleged failures which "made P.S. more vulnerable to the sexually harassing hazing incident he ultimately experienced."[27]

Nonetheless, "**[n]either the Supreme Court nor the Fifth Circuit has explicitly recognized the heightened risk claim**." *Huntington I.S.D.*, 2020 U.S. Dist. LEXIS 256936 at *11 (emphasis added). Indeed, the Fifth Circuit held recently that it has "never recognized or adopted a Title IX theory of liability based on a general 'heightened risk' of sex discrimination, and … decline[d] to do so." *Poloceno v. Dall. Indep. Sch. Dist.*, 826 Fed. Appx. 359, 363 (5th Cir. 2020). Even if such a claim existed, Plaintiffs have failed to allege facts supporting any "heightened risk."

[27] ECF No. 7-2, ¶ 106-07

"Heightened risk claims are still governed by Title IX. As such, the inquiry revolves around the official policy or custom of the educational institution." *Huntington I.S.D.*, 2020 U.S. Dist. LEXIS 256936 at *13 (citing *Doe 1 v. Baylor*, 240 F. Supp. 3d 646, 661 (W.D. Tex. 2017)). "If a recipient truly has an 'official policy or custom' of permitting sexual assault, surely the recipient can be held liable without the plaintiff having to point to ignorance by any one administrator." *Id*. (citing *Bd. Cty. Comm'rs Bryan Cty. v. Brown*, 520 U.S. 397, 403-04 (1997).

Here, "the question is whether [Plaintiffs] ha[ve] adequately pled that [B]ISD had an official policy or custom which created a heightened risk that [P.S.] would be ***sexually assaulted***." *Compare id*. at *14 (emphasis added). Plaintiffs have not. Rather, like the plaintiff in *Huntington I.S.D.*, Plaintiffs have done nothing more that allege BISD "supposedly tolerated a culture of hazing," but not an official policy or custom of ignoring sexual assault. *Compare id*.[28] To be sure, other than the February 2020 incident, Plaintiffs fail to allege when or to whom any previous student had reported any sexual assault or sexual harassment. Instead, Plaintiffs' complaint includes vague allegations about sexual assault or sexual harassment between former students, discussions between former and current students, and an identical incident that occurred close in time as the incident about which Plaintiffs complained to BISD.[29]

[28] *See id*, ¶¶ 38-39, 41, 43-45.

[29] *Id*., ¶¶ 40, 42, 55.

In other words, Plaintiffs' complaint "is missing facts tending to show that [B]ISD ignored reports of sexual assault or harassment within the athletics department," and "[w]ithout more concrete assertions that [B]ISD tolerated a culture of sexual assault, [Plaintiffs] fail[] to state a heightened risk claim under Title IX." *Compare Huntington I.S.D.* at *15.

2. Plaintiffs have failed to allege facts which state a plausible claim under 42 U.S.C. § 1983.

In addition to their claims under Title IX, Plaintiffs assert claims under 42 U.S.C. § 1983 for alleged violations of P.S.'s constitutional rights of due process and equal protection under the Fourteenth Amendment, but Plaintiffs' vague theories against BISD are simply not plausible. Thus, while Plaintiffs "complain[] [they] are entitled to relief[,] … [Plaintiffs'] complaint does not show it." *Shaw v. Villanueva*, 918 F.3d 14, 415 (5th Cir. 2019).

It is well-established that "Section 1983 is not itself a source of substantive rights, but rather merely provides a method for vindicating federal rights elsewhere conferred." *Brown v. Bd. of Trs. Sealy Indep. Sch. Dist.*, 871 F. Supp. 2d 581, 596 (S.D. Tex. 2012) (Ellison, J. presiding) (internal quotations omitted).[30] To state a claim under section 1983, Plaintiffs must (1) allege **actual conduct** constituting a violation of a right secured by the Constitution or laws of the United States and (2)

[30] Citing *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

demonstrate the alleged deprivation was committed by a person acting under color of state law. *See James v. Tex. Collin County*, 535 F.3d 365, 373 (5th Cir. 2008).

2.1. Plaintiffs have failed to allege facts implicating P.S.'s due process rights.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive a person of life, liberty or property without due process of law." U.S. Const. amend. XIV. Thus, to state a "Fourteenth Amendment due process claim under § 1983, a plaintiff must first identify a protected life, liberty or property interest and then prove that governmental action resulted in a deprivation of that interest." *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (quotation omitted).

Broadly, Plaintiffs contend that BISD "acted under color of state law when it permitted [P.S.] to be subjected to the wrongs and injuries" Plaintiffs allege in their complaint, i.e., the single instance physical abuse several senior students inflicted on P.S.[31] Importantly, however, the state's "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," unless the "very limited" special-relationship exception applies. *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849 (5th Cir. 2012) (en banc) (quoting *DeShaney v. Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189, 197 (1989)).

[31] ECF No. 7-2, ¶ 99.

"The situations in which the state assumes a duty of care sufficient to create a special relationship are strictly enumerated and the restrictions of each situation are identical." *Id*. at 859. The relationship exists "when the state incarcerates a prisoner," "involuntarily commits someone to an institution," or places a child in foster care. *Id*. at 856 (citations omitted).

It is well-settled that "a public school does not have a special relationship with a student that would require the school to protect the student from harm at the hands of a private actor." *Columbia-Brazoria I.S.D.*, 855 F.3d at 688 (quoting *Covington*, 675 F.3d at 857), *accord Fletcher v. Lewisville Indep. Sch. Dist.*, No. 4:14-CV-359, 2016 U.S. Dist. LEXIS 47113, *8 (E.D. Tex. Mar. 9, 2016) (Bush, Mag. J. presiding). "Public schools do not take students into custody and hold them there against their will in the same way that a state takes prisoners, involuntarily committed mental health patients, and foster children into its custody." *Covington*, 675 F.3d at 857-58. The "parents remain the primary source for the basic needs of their children." *Id*. at 859 (quotation omitted).

Here, Plaintiffs have not alleged and cannot allege facts supporting the existence of any special relationship between BISD and P.S. Accordingly, BISD has no constitutional duty to protect P.S. from the senior baseball players' abuse,

see Covington, 675 F.3d at 863, and, thus, Plaintiffs have failed to state a due process claim under section 1983.[32]

Nonetheless, Plaintiffs assert that BISD violated P.S.'s "well-established right to bodily integrity" under the Fourteenth Amendment.[33] While BISD does not dispute that P.S. generally has a Fourteenth Amendment right to bodily integrity, that right is not implicated here. Rather, the Fifth Circuit, sitting *en banc*, has "found that this right [to 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.'" *Covington*, 675 F.3d at 855 n.3 (emphasis in original) (quoting *Doe v. Taylor Independent School District*, 15 F.3d 443 (5th Cir. 1994) (en banc)). Because it is undisputed and indisputable that private actors—the senior students identified as G.W., N.S. and C.W.—physically assaulted P.S., P.S.'s right of bodily integrity is not implicated whatsoever.

Even if, *arguendo*, Plaintiffs have pled any allegation implicating P.S.'s due process rights, the three separate theories of liability Plaintiffs assert—(1) state-created danger; (2) failure to supervise; and (3) failure to train—fail as a matter of law.[34]

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[32] *See, e.g.*, *Estate of Lance*, 743 F.3d at 1001; *Doe v. San Antonio Indep. Sch. Dist.*, 197 F. App'x 296, 298-301 (5th Cir. 2006); *Teague v. Tex. City Indep. Sch. Dist.*, 185 F. App'x 355, 357 (5th Cir. 2006); *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 199, 202-03 (5th Cir. 1994); *Leffall*, 28 F.3d at 529 (collecting cases).

[33] ECF No. 7-2, ¶ 100.

[34] *Id*, ¶¶ 101-03.

2.1.1. The state-created danger theory of liability does not exist and, even so, Plaintiffs have failed to allege a plausible claim for such a theory.

The Fifth Circuit, sitting *en banc* in *Covington*, held "**we have never explicitly adopted the state-created danger theory**," and "decline[d] to use this en banc opportunity to adopt the state-created danger theory." 675 F.3d at 864, 865 (emphasis added). In the decade since, the Fifth Circuit has "consistently confirmed" that it has not adopted the "state-created danger" theory of liability and, although the Fifth Circuit has "outlined the contours of the state-created danger theory in numerous cases, [it] ha[s] never adopted that theory **even where the question of the theory's viability has been squarely presented**." *Cancino v. Cameron Cty.*, 794 Fed. Appx. 414, 416 (5th Cir. 2019) (per curiam) (emphasis added) (quotation omitted). *See also, e.g., Estate of Lance*, 743 F.3d at 1001-02; *Whitley v. Hanna*, 726 F.3d 631, 639 n.5 (5th Cir. 2013); *Colomo v. San Angelo Indep. Sch. Dist*., 501 F. App'x 314 (5th Cir. 2012); *Fletcher v. Lewisville Indep. Sch. Dist.*, C.A. No. 4:14-CV-359, 2016 U.S. Dist. LEXIS 47113, *10-11 (E.D. Tex. Mar. 9 2016) (Bush, Mag. J. presiding) (collecting cases). Accordingly, Plaintiffs' state-created danger theory of liability simply does not exist.

Even so, Plaintiffs have failed to allege facts supporting either element of what is no more than hypothetical claim based on a state-created danger. The *Covington* court held such a claim requires the plaintiff to allege: (1) the defendants used their authority to create a dangerous environment for the plaintiff; and (2) that

the defendants acted with deliberate indifference to the plight of the plaintiff. *See, e.g.*, *Covington*, 675 F.3d at 865. Importantly, "[i]t is not enough for the Plaintiffs to allege that [BISD] knew of a risk to a class of people that included [P.S.]." *Cancino*, 794 F. App'x. at 417. "Rather, to fall within the scope of the state-created danger theory … , the Plaintiffs must allege that [BISD] w[as] aware of the danger to [P.S. himself]." *Compare id*.

Here, Plaintiffs have failed to allege any that BISD—or any BISD employee—used its authority to create a dangerous environment. To the contrary, upon receiving Plaintiffs' complaint, BISD actively investigated the senior students' misconduct and, as Plaintiffs concede, stopped any further abuse.[35]

Plaintiffs have also failed to allege that *BISD* affirmatively placed P.S. in a situation that would not have otherwise existed, or that *BISD* took any affirmative action that made P.S. more likely to be assaulted or harassed. *See Estate of Lance*, 743 F.3d at 1002; *Rivera v. Hous. Indep. Sch. Dist*., 349 F.3d 244, 250 (5th Cir. 2003). Indeed, "there [i]s nothing to suggest that the School District affirmatively increased the chance" P.S. would experience hazing, abuse, or harassment. *Compare Estate of Lance*, 743 F.3d at 1003. Rather, Plaintiffs allege only "[t]he ***Coaching Staff*** … knew of the hazing but failed to stop it," and "[the Coaching Staff] took custody of P.S., placed him on bus with perpetrators and condoned the

[35] *See id., passim*.

assault."[36] As discussed *supra* in section 1.1.1., even if the coaching staff knew of any harassment, that allegation alone does not impute actual knowledge to BISD.

Further, the Fifth Circuit has specifically "cautioned against finding liability under the state-created danger theory based upon an ineffective policy or practice in cases where the plaintiff's injury is inflicted by a private actor." *Covington,* 675 F.3d at 866. Applied here, BISD's policies or customs cannot serve as a basis for Plaintiffs' due process claim because the policies or practices at issue deal with the conduct of non-state actors—i.e., the behavior between and among other school children—and any failure to enforce BISD's policies did not result in the violation of P.S.'s constitutional rights. *Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist.*, 863 F. Supp. 2d 632, 636 (S.D. Tex. 2012). Accordingly, even if the Fifth Circuit recognized the state-created danger exception, it does not apply to the instant lawsuit. *See Estate of Lance*, 743 F.3d at 1002.

2.1.2. Plaintiffs' failure to supervise and failure to train theories fail as a matter of law.

"In a § 1983 claim for failure to supervise or train, the plaintiff must show that: '(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference.'" *Goodman v. Harris Cty*., 571 F.3d 388, 395 (5th Cir. 2009) (quoting

[36] *Id*., ¶ 101 (emphasis added).

Smith v. Brenoettsy, 158 F.3d 908, 911-12 (5th Cir. 1998)). A successful failure to train claim also requires the plaintiff to "**allege with *specificity*** how a particular training program is defective." *Zarnow v. City of Wichita Falls*, Tex., 614 F.3d 161, 170 (5th Cir. 2010) (emphasis added).

Here, Plaintiffs contend BISD "had a number of written policies and procedures to protect P.S. from exploitation, abuse and sexual harassment, and assault from other students within the School District," and "[s]uch policies and procedures are intended to protect [P.S.'s] constitutional rights,"[37] but Plaintiffs fail to identify the ***specific*** policies and procedures purportedly at issue. Worse still, Plaintiffs' allegations as to their failure to supervise and train theories are wholly conclusory and do not explain how BISD's policies and procedures are defective at all. Instead, Plaintiffs conclusorily contend that BISD's "staff were ***obviously*** not supervised in how to assure such School Board Policies and Procedures were followed,"[38] and BISD's "staff were ***obviously*** not trained in how to assure such School Board Policies and Procedures were followed.[39] Plaintiffs' conclusory and altogether perfunctory allegations cannot support, let alone sustain a claim under section 1983, nor can Plaintiffs' allegations survive a motion to dismiss in light the pleading requirements set forth in *Iqbal* and *Twombly.*

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[37] *Id*., ¶¶ 102, 103.

[38] *Id*., ¶ 102 (emphasis added).

[39] *Id*., ¶ 103 (emphasis added).

2.2. Plaintiffs have failed to state a plausible equal protection claim under the Fourteenth Amendment.

It is well-established that "the limited right to state protection from private violence arises out of the substantive due process component of the Fourteenth Amendment, not equal protection or procedural due process." *Covington*, 675 F.3d at 853 n.2 (citing *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989)). As discussed *supra*, Plaintiffs' claims arise from physical abuse private actors—the senior students identified as G.W., N.S. and C.W.—inflicted on P.S. and not any physical abuse any BISD employee or official inflicted on P.S. Accordingly, Plaintiffs' allegations do not and indeed cannot state a claim under the Equal Protection Clause.

Moreover, "[a] violation of equal protection occurs only when the government treats someone differently than others similarly situated." *Ruvalcaba*, 2022 U.S. App. LEXIS 3213 at *8 (quoting *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988)). "But official action that does not appear to classify or distinguish between persons or groups—even if irrational—does not deny equal protection of the laws." *Id*. (cleaned up). Stated differently, a plaintiff "must allege … that he received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent." *Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir. 2001). Importantly, the Fifth Circuit has repeatedly and *recently* held the fact that "'school officials may not have

adequately responded to [a student's] complaints' does not itself 'rise[] to the level of an equal protection violation.'" *Ruvalcaba*, 2022 U.S. App. LEXIS 3213 at *9 (quoting Priester v. Lowndes Cty., 354 F.3d 414, 424 (5th Cir. 2004)).

As the Court is well-aware, Plaintiffs' complaints arise *exclusively* from their dissatisfaction with BISD's investigation of the single incident of hazing perpetrated against P.S. and not BISD's failure to investigate Plaintiffs' complaint. For this reason, Plaintiffs' equal protection claim fails as a matter of law.

2.3. Plaintiffs have failed to allege facts showing any BISD policy caused a violation of P.S.'s constitutional rights.

Plaintiffs also fail to state a claim against BISD because Plaintiffs have not alleged that an official BISD policy or custom was responsible for any alleged constitutional violations. Under section 1983, units of local government are responsible only for their own illegal acts. *See Connick v. Thompson*, 560 U.S. 51, 60 (2011). "[Section] 1983, like Title IX, does not impose liability on school districts for an employee's tort under a *respondeat superior* liability theory—but only for their own illegal acts." *Edgewood I.S.D.*, 964 F.3d at 365 (quotation omitted).[40] Thus, to state a claim against BISD for municipal liability under section 1983, Plaintiffs must identify (a) a policy maker, (b) an official policy or custom or widespread practice, and (c) a violation of constitutional rights whose "moving

[40] Accordingly, Plaintiffs' theory of *respondeat superior* liability [ECF No. 7-2, ¶¶ 110-12] fails as a matter of law. Similarly, since ratification is only chargeable to the municipality under 42 U.S.C.S. § 1983 in "extreme factual situations" not present in here, Plaintiffs' ratification theory also fails as a matter of law. *See, e.g., Webb v. Town of St. Joseph*, 925 F.3d 209, 217 n.48 (5th Cir. 2019).

force" is the policy or custom. *Rivera*, 349 F.3d at 247 (citing *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001)). A plaintiff cannot conclusorily allege a policy or a custom and its relationship to the underlying constitutional violation; instead the plaintiff must plead specific facts. *Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997).

Because Plaintiffs have failed to allege any facts supporting municipal liability against BISD under section 1983, let alone facts to support each element, the Court must dismiss Plaintiffs' claim for municipal liability. To be sure, Plaintiffs' municipal liability claim is belied by Plaintiffs' pleading admission that BISD, consistent with its own policies pertaining to student conduct, hazing, and harassment, as well as applicable state and federal law, promptly investigated the single incident of hazing against P.S. and disciplined the students responsible.

3. Plaintiffs are not entitled to punitive damages.

It is well-established that a plaintiff cannot recover punitive damages against a government, municipality, or government entity, such as BISD under or section 1983 Title IX. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (section 1983); *Minnis v. Bd. of Sup'rs of Louisiana State Univ. & Agric. & Mech. Coll.*, 972 F. Supp. 2d 878, 889 (M.D. La. 2013) (Title IX). Accordingly, Plaintiffs' claim for punitive damages should be dismissed.[41]

[41] ECF No. 7-2, ¶¶ 116-17.

Prayer

Because Plaintiffs have failed to plead facts supporting a plausible claim for relief, the Court should dismiss Plaintiffs' claims against Brownsboro Independent School District under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: March 23, 2022

Respectfully submitted,

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Certificate of Service

I hereby certify that on March 23, 2022, I electronically filed the foregoing document with using the CM/ECF system, and a copy of this filing has been forwarded to all counsel of record in accordance with the ECF local rules.

/s/ *Sean O'Neal Braun*
Sean O'Neal Braun