No. 60A20 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

ASHLEY DEMINSKI, as guardian ad litem on behalf of C.E.D., E.M.D., and K.A.D.,

Plaintiffs-Appellants,

v.

PITT COUNTY BOARD OF EDUCATION,

Defendant-Appellee,

and

THE STATE BOARD OF EDUCATION,

Defendant.

From Wake County

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PLAINTIFFS-APPELLANTS' NEW BRIEF

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Rules:

Statutes:

Other Authorities:

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INTRODUCTION

During Reconstruction, the people of North Carolina enshrined in our charter of government a promise: every child would have access to a sound basic education. *See* 1868 N.C. Const. art. I, § 27, art. IX. In this case, that promise was broken.

Ashley Deminski sent her three children to a local elementary school in Pitt County for the first steps in their formal education. But instead of a place of learning, that school turned out to be a place of terror. Inside the school, all three children were continuously abused by other students. The bullies intentionally disrupted the Deminskis during classroom instruction and tests. One student at the school would even pull his pants down and fondle his genitals in front of the Deminski children. The bullies also physically assaulted the Deminski children until they had trouble breathing and swallowing.

Ms. Deminski wasted no time in reporting this sexual, physical, and emotional abuse to the school. But the school did nothing about it. Rather than restore order, the school told Ms. Deminski that she would just have to put her faith in a "process" that would "take time," even as her children came home detailing to her the horrors of each passing day.

Despite the school's inaction, the Court of Appeals held that the Pitt County School Board (the "Board") had not denied the Deminskis access to a public education. The court ignored that, within the schoolhouse, the teachers

and administrators stand in place of the children's parents. That creates a special duty—coupled with the general duty to provide access to a public education—for the school to respond to abuse so extreme that it effectively denies the children access to their constitutionally guaranteed education. A local public school cannot be deliberately indifferent to the abuse that happens to children entrusted to its care. Indifference does not fulfill the promise made in our constitution.

ISSUES PRESENTED

1. The Court of Appeals exercised appellate jurisdiction over the Board's interlocutory appeal because of the Board's assertion of sovereign immunity before the trial court. This Court, however, has already held that county boards of education lack sovereign immunity from the type of direct constitutional claim alleged by the Deminskis. Did the Court of Appeals err by exercising appellate jurisdiction and reaching the merits of the Board's appeal?

2. The North Carolina Constitution guarantees that children will have access to a public education. Does a county board of education violate the state constitution by denying educational access unreasonably?

3. In this case, the Deminskis' school had actual notice that the Deminski children were facing sexual, physical, and emotional abuse by other students that made it impossible for them to learn—yet the school did nothing

about it. Did the school's deliberate indifference amount to an unreasonable denial of the right to access to a public education and therefore violate the state constitution?

STATEMENT OF THE CASE

Ashley Deminski, on behalf of her three minor children, C.E.D., E.M.D., and K.A.D., commenced this case by filing a complaint against the State Board of Education and the Pitt County Board of Education on 19 September 2017, in Wake County Superior Court. (R pp 3–10.) The complaint brought a direct claim under the state constitution, as well as a claim under the North Carolina School Violence Prevention Act. (R pp 7–9.)

The State Board and the Pitt County Board each moved to dismiss the complaint. (R p 20.) The Honorable Vince M. Rozier, Jr., entered an order dismissing the State Board. As to the Pitt County Board, the trial court dismissed the claim for a violation of the School Violence Prevention Act. (R p 20.) But the trial court denied the County Board's motion to dismiss the claim brought directly under the North Carolina Constitution. (R pp 20–21.)

The County Board then filed a notice of appeal from the partial denial of its motion to dismiss. (R p 22.) The Court of Appeals first held that it had appellate jurisdiction over the interlocutory appeal. *Deminski v. State Bd. of Educ.*, 837 S.E.2d 611, 614 (N.C. Ct. App. 2020). Next, a majority of the panel determined that the school did not violate the children's constitutional rights

by allowing the children to be repeatedly abused. *Id.* at 617. The majority lamented the "extremely disturbing" abuse that the school had tolerated but held that it was constrained by a prior Court of Appeals decision to reject the children's claims. *Id.* (citing *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 731 S.E.2d 245 (2012)).

Judge Zachary dissented. *Id.* at 618. She would have distinguished *Doe* and held that the complaint had pleaded a violation of the State Constitution. *Id.* at 619. Judge Zachary's dissent did not address whether the Court of Appeals had appellate jurisdiction.

On 11 February 2020, the Deminskis gave notice of appeal to this Court based on Judge Zachary's dissenting opinion. At the same time, the Deminskis petitioned for discretionary review of an additional issue: whether the Court of Appeals properly exercised appellate jurisdiction over the County Board's interlocutory appeal. On 3 June 2020, this Court allowed review of this issue.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction over this appeal because there was a dissent below in the Court of Appeals. N.C. Gen. Stat. § 7A-30(2). In addition to the issue set out in the dissenting opinion, N.C. R. App. P. 16(b), this Court also has jurisdiction over the question of appellate jurisdiction below because this Court has certified that additional issue for discretionary review, N.C. Gen. Stat. § 7A-31.

STATEMENT OF THE FACTS

Ashley Deminski is a mother of three children in this case. (R p 3.) Two of her children have been diagnosed with autism, and all three children attended Lakeforest Elementary School in Pitt County, North Carolina. (R pp 3–4.)

One of Ms. Deminski's children, C.E.D., was the initial victim of sexual and physical abuse by other students at the elementary school. (R pp 4–7.) For example:

- One student intentionally fondled his own genitals in C.E.D.'s presence, telling her that he wanted to "fuck [another student] from night to morning." (R pp 4–5.)
- The same student would pull down his pants in front of C.E.D., expose his penis, and simulate masturbation. (R p 5.) He would also try to get C.E.D. to touch his penis and would touch C.E.D. after touching his own genitals. (R p 5.)
- The same student interrupted C.E.D. during tests and repeatedly talked to C.E.D. during instructional time. (R p 5.)
- Another student, encouraged by this undisciplined misconduct, made a paper penis, stuck it in his pants, and tried to get C.E.D. to sit on his lap. (R pp 5–6.)

- Two other students made a habit out of physically abusing C.E.D. by hitting her spine and shoulders with so much force that she had trouble breathing and swallowing. (R p 4.)

Ms. Deminski's other two children were sexually, emotionally, and physically abused in similar ways. (R p 6.) All three children feared for their safety throughout the school day. (R p 6.)

The school staff and administrators knew about this abuse but ignored it. C.E.D. repeatedly reported the abuse to her teacher. (R p 6.) C.E.D. also reported the abuse to her mother, who in turn notified C.E.D.'s teacher, the assistant principal, and the principal. (R p 6.) Despite many meetings with school personnel, nothing changed. (R p 6.) School administrators told Ms. Deminski to wait on a "process" that "took time," but meanwhile the abuse continued and the school did nothing. (R p 6.) The school knew about this pattern of abusive conduct by these particular children for at least two years before the abuse occurred. (R p 7.)

The academic performance of each of the three children plummeted as a direct result of the tolerated abuse. (R p 7.) C.E.D. in particular has suffered severe psychological harm that requires ongoing psychiatric counseling. (R p 7.) The children were eventually allowed to transfer to a new school after complaining to the school about the abuse for months. (R p 6.)

Ms. Deminski filed a verified complaint on behalf of her children against the Pitt County Board of Education and the State Board of Education for denying her children their right—guaranteed by the state constitution—to access a sound basic education. (R pp 3, 7–8.) The children's opportunity to receive an education was denied by the school's deliberate indifference to severe sexual and physical abuse. The complaint also alleged a violation of North Carolina's School Violence Prevention Act. (R p 8.) Ms. Deminski sought both prospective injunctive relief against the defendants and monetary damages for the children's psychiatric care. (R p 9.)

The trial court refused to dismiss the Deminskis' direct constitutional claim, but the Court of Appeals reversed. Ashley Deminski and her children now appeal the Court of Appeals' reversal of the trial court's decision to let their state constitutional claims to go forward.

STANDARD OF REVIEW

This Court reviews de novo the denial of a motion to dismiss on grounds of sovereign immunity. *White v. Trew*, 366 N.C. 360, 362–63, 736 S.E.2d 166, 168 (2013). Likewise, this Court reviews de novo trial court orders that implicate constitutional rights. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

ARGUMENT

The decision of the Court of Appeals should be reversed.

First, the Court of Appeals lacked appellate jurisdiction over the Board's interlocutory appeal. The Board asserted sovereign immunity as the affected "substantial right" warranting an interlocutory appeal. But sovereign immunity is not a defense to a direct claim under the state constitution.

In the alternative, the Court of Appeals was wrong on the merits. Our state constitution not only guarantees the quality of a public education but also a child's right to *access* that education. The majority below failed to recognize that the best curriculum in the country is worthless unless a child can mentally and physically access that education. An unreasonable denial of educational access violates the state constitution.

For cases like this one—education denials because of student-on-student abuse—the constitutional right should be measured by a deliberate-indifference standard. The school had an affirmative duty to respond reasonably and control the abusive students. The school knew about the outrageous abuse that the Deminski children were suffering, but it did nothing for months. The school's failure to intervene denied the Deminski children's access to the fundamental right of access to a public education.

I. The Court of Appeals Lacked Jurisdiction over This Appeal.

This Court has announced a simple rule: If a plaintiff brings a direct claim under the state constitution, then governmental defendants have no immunity to the claim. It still may be true that the plaintiff has not asserted a

constitutional right that exists, but that is a merits question. That merits question is different than asking whether a defendant is immune from the cause of action altogether. The Court of Appeals erred by applying its own precedent that fused the merits and immunity inquiries instead of this Court's precedent that keeps these inquires separate.

This Court announced the availability of direct causes of action under our state constitution in *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). At the same time, this Court made clear that sovereign immunity can never obstruct direct constitutional claims: "[W]hen there is a clash between . . . constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292.

Then, in *Craig v. New Hanover County Board of Education*, this Court reversed the Court of Appeals for ignoring *Corum*. 363 N.C. 334, 340, 678 S.E.2d 351, 356 (2009). The facts in *Craig* were highly analogous to those here. A mentally disabled student sued his county board of education, alleging that it failed to protect him from sexual assault by another student at school. *Id.* at 335–37, 678 S.E.2d at 352–53. The student alleged theories of recovery under the common law as well as a direct claim under the state constitution. *Id.* at 335, 678 S.E.2d at 352. The Court of Appeals (correctly) held that the common law claims were barred by sovereign immunity. But it then (incorrectly)

reversed the trial court and granted summary judgment on the direct constitutional claim, reasoning that the theoretical existence of the common law claims made them an adequate alternative state-law remedy. *Id.* at 336, 678 S.E.2d at 353.

This Court unanimously reversed the Court of Appeals for this error, recognizing that *Corum* had "clearly establish[ed] the principle that sovereign immunity could not operate to bar direct constitutional claims." *Id.* at 340, 678 S.E.2d at 356. Put another way, "[a]llowing sovereign immunity to defeat plaintiff's colorable constitutional claim here would defeat the purpose of the holding of *Corum*." *Id.* at 338, 678 S.E.2d at 354. Thus, the county board of education was not immune from the student's "direct colorable constitutional claims." *Id.* at 342, 678 S.E.2d at 357.

Corum and *Craig* should have disposed of the Board's interlocutory appeal in this case. The majority below acknowledged that there is no immunity defense to a direct constitutional claim, but it felt compelled by panel precedent to reach the merits anyway. *Deminski*, 837 S.E.2d at 614 ("Although the doctrine of governmental immunity will not operate to bar a constitutional claim, for the reasoning articulated in *Doe v. Charlotte-Mecklenburg Board of Education*, we conclude that Defendant's appeal is properly before this Court."); *see also id.* at 615 ("Accordingly, a colorable direct constitutional claim will survive

a Rule 12(b)(6) motion to dismiss, notwithstanding the doctrine of governmental immunity." (citing *Craig*, 363 N.C. at 340–41, 678 S.E.2d at 355–56)). There was no real discussion or analysis of sovereign immunity in the panel's opinion, even though immunity was the purported substantial right that warranted an interlocutory appeal.

As in *Craig*, the Board lacks any non-frivolous immunity defense against the Deminskis' constitutional claims. And because there was no proper immunity defense, the Board did not have the right to take an interlocutory appeal from the denial of its motion to dismiss. *Id.* at 337, 678 S.E.2d at 354. Once the rule from this Court's decision in *Craig* was applied to determine that the Board had no immunity defense, the purported substantial right evaporated and the rest of the appeal should have been dismissed.

Instead of stopping there, the panel detoured through *Doe v. Charlotte-Mecklenburg Board of Education*, 222 N.C. App. 359, 731 S.E.2d 245 (2012). *Doe* incorrectly intertwined the merits and immunity inquiries. In *Doe*, a student sued a county board of education, alleging that it violated the state constitution (and committed other common law torts) by failing to stop a teacher from sexually assaulting her. *Id.* at 361, 731 S.E.2d at 247. The board sought to dismiss both the constitutional and common law claims. *Id.* at 362, 731 S.E.2d at 247. The trial court dismissed the common law claims but, relying on *Craig*, refused to dismiss the direct constitutional claim. *Id.* at 361, 731

S.E.2d at 247–48. The board took an interlocutory appeal from the trial court's denial of its motion to dismiss the constitutional claim. *Id.* at 362, 731 S.E.2d at 248.

The Court of Appeals held that it had appellate jurisdiction because, if the constitutional right asserted by the student did not exist, then the government would be immune from suit. *Id.* at 364–65, 731 S.E.2d at 249. This holding was erroneous and contrary to this Court's precedent.

The Court of Appeals' entanglement of immunity and the existence of a cause of action both conflicts with *Craig* and serves no purpose. If a court determines that a certain constitutional right does not exist, it is not determining that it lacks jurisdiction because of sovereign immunity. Rather, it is determining that the claim fails on its merits. As the United States Supreme Court has repeatedly emphasized, "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. 678, 682 (1946); *accord Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) ("The question whether a cause of action exists is not a question of jurisdiction, and therefore can be assumed without being decided."); *see* 13D Charles A. Wright, *Federal Practice and Procedure* § 3564 (3d ed. Westlaw) ("Jurisdiction is not lost because the court ultimately concludes that the federal claim is without merit.").

This Court has made essentially the same point in its substantial-right jurisprudence. As then-Judge Ervin wrote in a dissenting opinion adopted by this Court, there is "no basis in our 'substantial right' jurisprudence for equating a litigant's ability to appeal from an interlocutory order with the litigant's ability to prevail on the merits in the event that such an appeal was to be entertained." *Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 236 N.C. App. 340, 362, 762 S.E.2d 666, 681 (2014) (Ervin, J., dissenting), *rev'd & dissenting opinion adopted*, 368 N.C. 91, 773 S.E.2d 55 (2015) (per curiam). A court's appellate jurisdiction over an interlocutory order and any error in the interlocutory order "constitute two completely different issues that have little or no relation to each other." *Id.*

Despite this "clear statement," various panels of the Court of Appeals have ignored *Sandhill*. Elizabeth B. Scherer and Matthew N. Leerberg, *North Carolina Appellate Practice and Procedure* § 3.03[6][a], at 3-35 & n.138 (2019). These other decisions are inconsistent with *Sandhill*. *Id.* at 3-35 to 3-36 & n.138 (noting that *Doe* is inconsistent with *Sandhill*). The rule in these cases contradicting *Sandhill* also creates practical problems. *Id.* at 3-36 n.139. For example, if the appeal is dismissed only by rejecting a claim on the merits, then the case should be remanded. Does the case then become appealable once a final judgment is entered, and, if so, how does the prior opinion, ostensibly

focused on appellate jurisdiction, affect further proceedings and appeals on the merits?

What's more, under *Doe*'s framework, the question of immunity is superfluous. *Doe* requires a trial court to go through these analytical steps:

> (1) Is the plaintiff bringing a direct claim under the state constitution?
>
> (2) If so, does the constitutional right asserted actually exist?
>
> (3) If so, then immunity does not bar the claim. If not, then immunity does bar the claim.

Step three is unnecessary. If the immunity determination is merely a function of the merits determination, then there is no need to ask about immunity at all.

The only justification *Doe* offered for grafting the immunity analysis on to the merits analysis was a policy preference for immediate appellate review of constitutional claims: "A failure to evaluate the validity of Plaintiff's constitutional claims would allow Plaintiff to simply re-label claims that would otherwise by barred on governmental immunity grounds as constitutional in nature, effectively circumventing the Board's right to rely on a governmental immunity bar." *Doe*, 222 N.C. App. at 365, 731 S.E.2d at 249.

But appellate courts purposefully *avoid* issuing opinions on hard constitutional questions unless it is necessary to do so. *E.g.*, *Union Carbide Corp. v.*

Davis, 253 N.C. 324, 327, 116 S.E.2d 792, 794 (1960) ("Courts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue."). *Doe* flips the canon of constitutional avoidance on its head. Under *Doe*, a governmental entity has the right to force appellate courts to immediately review every interlocutory order that fails to halt a direct constitutional claim. *See Craig*, 363 N.C. at 337, 678 S.E.2d at 354 ("As noted by the United States Supreme Court, such immunity is more than a mere affirmative defense, as it shields a defendant entirely from having to answer for its conduct at all in a civil suit for damages."). It does not matter whether the same assertion of immunity from the same constitutional claim has already been rejected by this Court—like this case, where *Craig* already rejected the immunity asserted by the Board. Instead, the governmental defendant will receive an automatic appeal to determine the scope of the constitutional right asserted at the start of *every case*. This holding undermines this Court's decision in *Craig* and forces every plaintiff who states a claim under the state constitution to accept a costly appeal before going forward with discovery.

Craig requires courts to treat governmental immunity and the existence of state constitutional rights as separate inquiries. The court below, following *Doe*, intertwined those inquiries. Because *Craig* already rejected the immunity

asserted by the Board here, the Court of Appeals lacked appellate jurisdiction and the Board's appeal should have been dismissed.

II. County School Boards Violate the State Constitution When They Unreasonably Interfere with a Child's Access to a Public Education.

Under the plain language of our state constitution, and the precedent of this Court, children have a right to access a public education. An unreasonable denial of access to a public education violates the state constitution.

Our constitution describes education as a privilege and a right of all North Carolinians: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. This right is generally a positive right—a social good that North Carolinians obligate themselves to provide through their government.[1] *Id.* art. IX, § 2(1) ("The General Assembly *shall provide* by taxation and otherwise for a general and uniform system of free public schools . . . ." (emphasis added)). As this Court has recognized, these constitutional provisions mean that the state must "guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997).

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[1] In this regard, our state constitution differs from the federal constitution, which "is a charter of negative rather than positive liberties." *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

But the natural corollary of this positive right is a limitation on government action that would deprive or otherwise interfere with this state-provided education. Even before the landmark *Leandro* decision, this Court had recognized that our constitution protects *access* to a public education. The "fundamental right" to access is protected by "due process" against governmental interference. *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980) (citing N.C. Const. art. I, § 19). And due process is a negative right that protects students from unreasonable deprivations of access to a public education.[2] *See id.* at 609, 264 S.E.2d at 114.

That due process protection limits the conduct of state and local governmental actors. Due process protects against deprivations of rights and privileges by anyone "clothed with the authority of the State," or anyone "who might be invested under the Constitution with the powers of the State." *Corum*, 330 N.C. 761 at 782–83, 413 S.E.2d at 290. Local school boards exercise the authority of the state. *See, e.g.*, N.C. Gen. Stat. §§ 115C-36, -47.

These limits on governmental power have been applied multiple times by this Court to halt local boards of education from denying access to public education. For example, in *Sneed*, the Greensboro City Board of Education had

[2] Due process is protected by our state constitution's law of the land clause. N.C. Const. art. I, § 19; *Tully v. City of Wilmington*, 370 N.C. 527, 538, 810 S.E.2d 208, 216 (2018).

imposed fees on students for instructional materials and recreational supplies, which were enforced by refusing to re-enroll families that failed to pay. *Sneed*, 299 N.C. at 611–12, 264 S.E.2d at 109–10. The board instituted a generalized policy of waiving those fees for indigent families. *Id.* at 618–19, 264 S.E.2d at 113–14. But the school did not allow families to apply for a waiver or even notify families that a fee waiver was possible. *Id.* at 619, 264 S.E.2d at 114.

This Court held that the board's practices violated the educational and due-process provisions of the state constitution because the school board's policy meant that students "must first risk the stigma of being picked out from their peers on the basis of their economic status and then somehow 'referred' to the principal." *Id.* Due process requires more than "a procedure which accords a fundamental right only to the already informed, or which engenders unnecessary obstacles to the right's fulfillment." *Id.*

This Court recently considered the interplay between due process and the constitutional education provisions in a school discipline case. *King ex rel. Harvey-Barrow v. Beaufort Cty. Bd. of Educ.*, 364 N.C. 368, 704 S.E.2d 259 (2010). In *King*, a local school board suspended a student from her school for a year for fighting and then denied her access to an alternative education. *Id.* at 371, 704 S.E.2d at 261. The student sued, alleging in part that the county school board violated her rights under the state constitution by failing to give a reason for the denial of an alternative education. *Id.*

This Court held that the county board violated the state constitution by failing to "provide a reason for refusing alternative education." *Id.* This right to a reason arises from the education provisions of the state constitution. *Id.* at 372, 704 S.E.2d at 261 (relying on N.C. Const. art. I, § 15, art. IX, § 2, and *Sneed*). The Court issued three opinions in *King*. The dispute separating the opinions centered on what level of scrutiny to apply in a school discipline case: strict, intermediate, or rational basis. *Id.* at 377–78, 704 S.E.2d at 265 (Martin, J., for the majority) (requiring intermediate scrutiny); *id.* at 379–80, 704 S.E.2d at 266 (Timmons-Goodson, J., with Hudson, J., concurring in part and dissenting in part) (seeking strict scrutiny); *id.* at 392–93, 704 S.E.2d at 274 (Newby, J., dissenting) (seeking rational-basis review). But no justice in *King* questioned whether the right to access a public education existed and was implicated.

This case resembles *King* and other school discipline cases in that the Deminskis have been denied their right to access a public education. But, unlike *King*, there is no need to ask about levels of scrutiny. There can never be "an important or significant reason," or even a rational basis, for a school to knowingly tolerate the sexual, emotional, or physical abuse of a student entrusted to its care. *See id.* at 377, 704 S.E.2d at 265. Put another way, to allow a school to deny educational access by tolerating abuse is always unreasonable. *See id.* at 378, 704 S.E.2d at 265.

That type of unreasonable denial of access is what happened here. The Deminskis alleged that the Board interfered with the children's access to a sound basic education because the Board knowingly allowed the children to be sexually, emotionally, and physically abused by other students. (R pp 4–7.) The abuse included the disruption of instructional time. (R p 5.) Even though the Deminskis reported the abuse to the school, and some of it occurred in the presence of teachers, the school let it continue, unabated. (R pp 6–7.) The Board's deliberate indifference denied the Deminski children access to a sound basic education as evidenced by the effects on the children: the academic performance of each child plummeted. (R p 7.)

Below, the Court of Appeals misapplied the law because it narrowed the constitution's education provisions to the *nature* of the education provided by the state. The focus, instead, should have been on whether the local school interfered with the Deminski children's *access* to a public education.

The majority focused on *Leandro* and the quality of the education that the state must provide to all students. *Deminski*, 837 S.E.2d at 615-16. It explained that, under *Leandro*, the "right to education [is] strictly confined to the intellectual function of academics." *Id.* at 616. Continuing, the majority explained that "neither this Court nor our Supreme Court had extended that right 'beyond matters that directly relate to the nature, extent, and quality of

the educational opportunities made available to students in the public school system.'" *Id.* (quoting *Doe*, 222 N.C. App. at 370, 731 S.E.2d at 252–53).

That holding was incorrect because it ignored that the state constitution protects not only the substance of a public education, but also a child's opportunity to *access* that education. Contrary to the majority, *Sneed* and *King* teach that our constitution protects, as an initial matter, the right held by North Carolina's children to access a public education, and further protects the "nature, extent, and quality" of that public education. *Leandro* itself acknowledged that *Sneed* was a case about "access," while *Leandro* was a case about the "qualitative standard" for the education guaranteed by the constitution. *Leandro*, 346 N.C. at 346, 488 S.E.2d at 254. The state constitution not only commands the state to provide a minimum curriculum but also limits all government actors from interfering with *access* to that education.

To the extent that the majority below recognized any constitutional right to *access* a sound basic education, it failed to treat that right as fundamental. The majority stated that "the right guaranteed to students under the North Carolina Constitution is the opportunity to receive a *Leandro*-compliant education, and that right is satisfied so long as such an education has, in fact, been afforded." *Deminski*, 837 S.E.2d at 616. But, as the dissent explained, the Deminski children were not "afforded" a public education in any meaningful sense. Access to a public education can be denied when the school creates or

knowingly allows a harmful educational environment: "[T]he instructional environment may be so disordered, tumultuous, or even violent that the student is denied the opportunity to receive a sound basic education." *Id.* at 619 (Zachary, J., dissenting).

A quality curriculum is ultimately meaningless if a student is denied access to it. Consider a school that ensures its teacher is giving instruction for a curriculum that meets the qualitative requirements of *Leandro*. If the school also locks one of its students in a closet—preventing her from seeing or hearing that proper instruction—it hardly matters what the "nature, extent, and quality" of the curriculum is. Due process will not tolerate actions or procedures that subject "a fundamental right" to "unnecessary obstacles to the right's fulfillment." *Sneed*, 299 N.C. at 619, 264 S.E.2d at 114.

The Deminski children are in the same position. By tolerating severe abuse that interrupted educational access, the Board threw the children into an emotional closest. Elementary school children lack access to an education of any quality if they are constantly subjected to physical, sexual, and emotional abuse. And the denial of that access is attributable to the Board because the Board knew about the abuse and could have stopped it, but didn't.[3]

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[3] To be clear, the County Board alone is the necessary and sufficient defendant in this case. The dissenting opinion below suggested that the State Board of Education is a necessary party, based on this Court's recent decision in *Silver v. Halifax County Board of Commissioners*, 371 N.C. 855, 821 S.E.2d 755

For these reasons, the state constitution prohibits local schools from unreasonably denying or interfering with a student's access to a public education. The Court of Appeals erred by limiting the state constitution's protections to the nature of a public school curriculum, leaving students without recourse if access to that curriculum is denied.

III. The Board Violated the State Constitution by Its Deliberate Indifference to the Peer Harassment of the Deminski Children.

The state constitution protects against denials of access to a public education, though not every denial is necessarily a constitutional violation, nor is every impact on educational access considered through the same lens. The reason for and nature of the denial matters. Different types of denials may be measured by different standards.

This case presents just one type of education denial: severe student-on-student abuse. And the way to measure whether this particular category of

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(2018). *See Deminski*, 837 S.E.2d at 620 (Zachary, J., dissenting). But this Court and other panels of the Court of Appeals have always acknowledged that a county board of education is an appropriate defendant when a local school has interfered with or otherwise denied access to a public education. *See, e.g.*, *King*, 364 N.C. 368, 704 S.E.2d 259; *Sneed*, 299 N.C. 609, 264 S.E.2d 106; *J.S.W. v. Lee Cty. Bd. of Educ.*, 167 N.C. App. 101, 604 S.E.2d 336 (2004); *In re Jackson*, 84 N.C. App. 167, 168, 352 S.E.2d 449, 451 (1987). The State Board is "ultimate[ly] responsible" for the "finances of local education," *Silver*, 371 N.C. at 866–67, 821 S.E.2d at 763, but local boards are responsible for their disciplining of students and other access denials, *id.* at 867 n.6, 821 S.E.2d at 763 n.6.

denial of educational access amounts to a constitutional violation is the deliberate-indifference standard.

Here, the Deminski children were exposed to such extreme sexual, physical, and emotional abuse by other students that their own access to an education was effectively denied. The Board knew about the abuse from other students that it had a duty to control, but it did nothing about it. That deliberate indifference violated the state constitution.

A. A public school violates a student's right to access an education when it is deliberately indifferent to severe and pervasive peer harassment.

In *Craig*, this Court assumed that the plaintiff had alleged a colorable "constitutional injury" when he alleged that his school had failed to protect him from a single instance of sexual assault by another student. *Craig*, 63 N.C. at 335–36, 678 S.E.2d at 352–53. But *Craig* was focused on sovereign immunity and whether there was a potential constitutional right at issue. The *Craig* Court did not address whether the defendant had actually violated the state constitution, nor did it propose any standard for determining whether access to a public education had been unconstitutionally denied.

As applied in federal courts, and as appropriate here, the deliberate-indifference standard requires three elements before a school becomes responsible for denying access to educational benefits in cases of student-on-student abuse. First, the abuse must be "so severe, pervasive, and objectively offensive

that it effectively bars the victim's access to an education[] . . . ." *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). Second, the school must have "actual notice of that harassment." *Id.* at 661. Third, the school's "response to the harassment or lack thereof [must be] clearly unreasonable in light of the known circumstances." *Id.* at 648.

The standard that is most consistently used by other courts comes from the United States Supreme Court's decision in *Davis*. There, the Court held that a school could be liable under Title IX for student-on-student sexual harassment that effectively denies a child access to an education, so long as the school knew about the abuse and failed to respond reasonably. *Id.* at 633, 653–54. Though *Davis* dealt with sexual harassment, its standard has become widely accepted in other peer harassment cases, including those involving disabilities, *S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cty.*, 819 F.3d 69, 76 (4th Cir. 2016) (applying the Rehabilitation Act), and race, *Sch. Bd. of City of Richmond*, 560 F. App'x 199, 203–04 (4th Cir. 2014) (applying Title VI); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665–66 (2d Cir. 2012) (same). Even outside federal law, state courts have also found the deliberate-indifference standard appropriate for ensuring access to education free of harassment. *E.g.*, *Donovan v. Poway Unified Sch. Dist.*, 84 Cal. Rptr. 3d 285, 313 (Cal. Ct. App. 2008); *see also Davis*, 526 U.S. at 644 (collecting cases and explaining that

"state courts routinely uphold claims alleging that schools have been negligent in failing to protect their students from the torts of their peers").

The deliberate-indifference standard is likewise appropriate to evaluate the abuse that the Deminskis suffered at the hands of the other students within the Board's control. The standard's three elements tether it to the state constitution's guarantee of educational access.

1. Severe, pervasive, and objectively offensive harassment that denies educational access

The deliberate-indifference standard first asks whether children have faced harassment or abuse that effectively denies them access to a public education. This first element of the deliberate-indifference standard fits seamlessly with *Sneed*'s requirement that schools not block students' access to education, *Sneed*, 299 N.C. at 618, 264 S.E.2d at 113, and *Craig*'s recognition that such a denial can occur through peer harassment when a school does not intervene, *Craig*, 63 N.C. at 335–36, 678 S.E.2d at 352–53.

Under *Davis*, "[t]he most obvious example of student-on-student . . . harassment capable of triggering a[n actionable] claim . . . involve[s] the overt, physical deprivation of access to school resources." *Davis*, 526 U.S. at 651. But purely "physical exclusion" is not the only way to deny access. *Id.* When children are imperiled by sexual, emotional, and physical abuse, that also prevents them from accessing an education, despite their physical presence at school.

Thus, schools are liable for failing to stop abuse "that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied" equal access" to an education. *Id.*

This standard is satisfied in cases of sexual or physical abuse. *See, e.g.*, *Davis*, 526 U.S. at 633–34 (sexual battery); *Hill v. Cundiff*, 797 F.3d 948, 961–63, 972 (11th Cir. 2015) (rape); *Woods v. Chapel Hill-Carrboro City Sch. Bd. of Educ.*, No. 1:19CV1018, 2020 WL 3065253, at *1 (M.D.N.C. June 9, 2020) [Add. 1] (years of sexual and physical abuse). In *Davis*, for instance, the mother of a fifth-grade girl alleged a string of sexual harassment incidents by another student that both she and her daughter reported to the school for five months. *Id.* at 633–34, 653. These incidents included "attempt[ing] to touch [the victim's] breasts and genital area[,] . . . ma[king] vulgar statements[,] . . . [and] rub[ing] his body against [the victim] in the school hallway in . . . a sexually suggestive manner." *Id.* Under these circumstances, the Supreme Court found that the victim was effectively denied access to an education. *Id.* at 653–54.

To be sure, not every bullying incident will satisfy the standard. As the Supreme Court stressed, "simple acts of teasing and name-calling among school children" are not enough because "children may regularly interact in a manner that would be unacceptable among adults." *Id.* at 651–52. Thus, the

inquiry always rests on whether the harassment has reached a level that effectively denies a plaintiff access to a sound basic education. *See, e.g.*, *Jennings v. UNC*, 482 F.3d 686, 700 (4th Cir. 2007). When a child is forced to decide between enduring sexual harassment or not participating in an educational opportunity, access is denied. *See id.*

The North Carolina Constitution's guarantee of a sound basic education would be meaningless if schools could tolerate abuse so severe that it effectively locks children out of the classroom. Thus, schools must take reasonable steps to stop student-on-student abuse that prevents equal access to educational opportunities. *See Woods*, 2020 WL 3065253, at *5 ("[T]he alleged abuse clearly affected [the plaintiff's] ability to function in the classroom. . . . 'Common sense' tells us that the education of any child in [plaintiff's] position would be severely compromised by the alleged harassment.").

2. Actual notice

The next step in applying the deliberate-indifference standard is assessing the school's knowledge of the harassment. *See Davis*, 526 U.S. at 648 ("[Schools] may be liable for their deliberate indifference to *known* acts of peer sexual harassment . . . ." (emphasis added)). Actual notice ensures that harassment by third parties under a school's control is fairly attributed to the school. *Id.* at 642–44. At a minimum, a school is responsible for halting abuse

that it knows about, when the abusers are students under the school's control. *See id.* at 641–44.

A plaintiff meets this element when "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice" of the harassment. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998). While showing that an official "with supervisory power over the offending [student]" had actual notice will usually be sufficient, the standard is flexible enough to allow for notice to any appropriate individual associated with the school.[4] *Id.* at 274. Relevant here, informing a teacher and school administrator about abuse satisfies the notice requirement. *See Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000).

Some states have held that a school is liable even if it had *no* notice of harassment. *See, e.g.*, *Washington v. Pierce*, 895 A.2d 173, 186 (Vt. 2005). It may also be appropriate for a court to use a constructive- or inquiry-notice standard in particular circumstances. *See L.W. v. Toms River Regional Schools Board of Education*, 189 N.J. 381, 407 (N.J. 2007) (permitting liability "when the school district knew *or should have known* of the harassment" (emphasis added)); Restatement (Second) of Torts § 320 (Am. Law Inst. 1965) (imposing

[4] And how the school receives notice is immaterial. *See Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 540 (M.D.N.C. 2001), *vacated in part on other grounds*, 50 F. App'x 643 (4th Cir. 2002).

duty on schools to protect their students from the conduct of their other students when they "know[] or should know of the necessity and opportunity for exercising such control"). That lesser standard may be more appropriate in some situations. If a child is disabled or nonverbal, the school may have a heightened duty to watch for signs of abuse or harassment that impact educational performance. *See* Restatement, *supra*, § 320 cmt. d (imposing duty on teacher "to exercise reasonable vigilance to ascertain the need of giving" protection to students in his care).

Because these issues are not presented in this case, it may be appropriate for this Court to reserve ruling on whether notice is required at all, or what kind of notice is required in all circumstances. Under any standard, however, actual notice is sufficient.[5]

[5] A separate question is a school's liability for teacher-student harassment, and the notice that would be required for such claims. Student-teacher presents difficult questions of agency law that are irrelevant in peer-harassment cases like this one. *See Gebser*, 524 U.S. at 292–93 (majority opinion; requiring actual notice for teacher-student harassment); *id.* at 298–301 (Stevens, J., dissenting) (relying on agency principles and rejecting an actual-notice standard).

3. An unreasonable response

To establish the final element of the deliberate-indifference standard, a student must allege that the school's response to the known harassment is unreasonable. *See Davis*, 526 U.S. at 648.[6] A response is unreasonable—and unconstitutional—if the "response causes students to undergo harassment or makes them more vulnerable to it." *Hill*, 797 F.3d at 973.

What constitutes a reasonable response is an objective question based on the circumstances. For example, in *Woods*, the child's school allegedly covered up his sexual assault, without protecting him from his assailant; that was an unreasonable response because the child was left vulnerable to continued harassment. *Woods*, 2020 WL 3065253, at *6. Doing nothing is not a reasonable response to known severe harassment or abuse. *See, e.g.*, *Davis*, 526 U.S. at 653–54; *Jennings*, 482 F.3d at 700–01; *Woods*, 2020 WL 3065253, at *6.

Assessing the school's response is a fact-intensive inquiry. For instance, the standard considers the time that elapses between notice of the harassment and the school's response. Cases have allowed deliberate-indifference claims to proceed based on months-long delays. *E.g.*, *Davis*, 526 U.S. at 653 (five-month delay).

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[6] *Davis* adopted a "clearly unreasonable" standard, *id.* at 648–49, but nothing in our state constitution or the common law requires this amorphous standard. Instead, courts should apply a simple reasonableness standard, which is already commonplace in American law.

Imposing on schools this affirmative duty—to take objectively reasonable action to stop severe abuse—is justified because a special relationship exists between schools and the children entrusted to their care. *Id.* at 646 (recognizing the "custodial and tutelary" relationship that schools have with the children in their care); *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 330, 626 S.E.2d 263, 269 (2006) (explaining elements of a special relationship that creates a duty to act at common law); Restatement, *supra*, § 320 & cmts. a–d ("One who is required by law to take . . . the custody of another under circumstances such as . . . to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other.").

After all, the reason that a child *could* be subjected to harassment at school in the first place is because the state compels parents to send their children to school. N.C. Gen. Stat. § 115C-378. Since the state is compelling the relationship between the school and the children, the school stands *in loco parentis*. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) ("When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them."); *Craig ex rel. Craig v. Buncombe Cty. Bd. of Educ.*, 80 N.C. App. 683, 686, 343 S.E.2d 222, 224 (1986) ("[T]he power of school authorities to regulate students' conduct while at school is much greater than the State's

authority to regulate the conduct of adults."); Restatement, *supra*, § 320 cmt. d ("So too, a schoolmaster who knows that a group of older boys are in the habit of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur."). Because the school is putting itself in the place of parents, it has a duty to protect the children in its care as a parent would. That relationship sparks the school's duty to take affirmative steps to restore a child's access to education and halt the abuse.

* * *

In sum, holding schools accountable for their failure to reasonably address the severe abuse of students entrusted to their care ensures that children can access their constitutionally guaranteed education. While North Carolina constitutional interpretation is not governed by federal decisions, this Court has recognized that federal law can prove instructive in analogous situations. *See Blankenship v. Bartlett*, 363 N.C. 518, 524, 681 S.E.2d 759, 764 (2009) (explaining that federal law provided a "framework under which plaintiffs' [state constitutional] claims should be decided"). In this case, federal law provides a proven framework for North Carolina courts to determine when a school's deliberate indifference constitutionally deprives a student of access to a public education.

B. The Deminskis sufficiently alleged that the Board was deliberately indifferent to the severe and pervasive harassment the children suffered.

The Deminskis' verified complaint sufficiently pleaded every element of the deliberate-indifference standard.

"In considering a motion to dismiss under Rule 12(b)(6), the Court must decide whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (cleaned up). A complaint sufficiently states a claims "if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 266, 827 S.E.2d 458, 465 (2019). A complaint should not be dismissed "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Id.* (quoting *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970)).

Under this standard, the Deminskis sufficiently alleged that the Board was deliberately indifferent to severe and pervasive harassment that denied the Deminski children access to an education.

Severe abuse. The Deminskis sufficiently alleged that the abuse the children suffered was so severe and pervasive that it effectively denied them access to a sound basic education. The complaint alleges that C.E.D., E.M.D.,

and K.A.D. were elementary-aged children in the care of the Board and that, during their time at school, they were subjected to sexual, emotional, and physical abuse by other students under the control of the Board. (R pp 4–8.) The abusers repeatedly attacked C.E.D. until she struggled to breathe and swallow. (R p 4.) Two other elementary students sexually harassed C.E.D., subjecting her to sexual vulgarity, genital exposure, and repulsive sexual touching. (R pp 4–6.) When one of these abusers started spending more class time with E.M.D. and K.A.D., he subjected them to similar conduct, including sexual harassment, constant verbal interruptions laced with vulgarity, and physical violence. (R p 6.)

Considered together, these facts allege a denial of access to education. Even the Court of Appeals found the abuse allegations in the verified complaint to be "extremely disturbing." *Deminski*, 837 S.E.2d at 617. The sexual harassment alleged by the Deminski children is at least as outrageous as the abuse in *Davis*. Not only does common sense suggest that the abuse obstructed the Deminski children's access to an education, but they specifically alleged that their academic performance plummeted because of the abuse. (R p 7.)

Actual notice. The Deminskis also alleged that the Board had actual notice that the children were suffering severe and pervasive peer abuse. They alleged that school personnel witnessed the harassment as it occurred on

school property and during school hours. (R p 7.) Ms. Deminski and her children also reported the abuse to the children's teachers, the assistant principal, and the principal. (R p 6.) These are "official[s] of the school district who at a minimum ha[ve] authority to institute corrective measures." *Gebser*, 524 U.S. at 277; *Vance*, 231 F.3d at 259 (finding that the school had actual notice when plaintiff informed teachers and the principal of severe harassment). These facts allege that the Board had actual notice of the children's abuse. [7]

Unreasonable response. Lastly, the school failed to respond reasonably to the abuse happening right in front of it.

The Deminskis alleged that the children's abuse went unaddressed by the school for months. (R p 7.) When the school did finally respond, it gave one of the primary perpetrators *more* opportunities to abuse E.M.D. and K.A.D. (R p 6.) The abuse only ended, after months of delay, when Ms. Deminski forced the Board to allow her children to transfer schools. (R pp 6–7.) By that point, the children had lost months of their education, and one of the children continues to suffer severe psychological harm from the school's inaction. (R pp 6–7.)

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[7] Below, the majority stated that the verified complaint alleged "that school personnel were aware *or should have been aware* of the abuse." *Deminski*, 837 S.E.2d at 617 (emphasis added). The complaint, however, explicitly alleged actual notice. (R pp 6–8.)

Thus, the Court of Appeals was wrong to order the dismissal of the Deminskis' direct constitutional claim. The complaint sufficiently alleges an inadequate response by the Board given its actual knowledge of the outrageous abuse the children under its care were suffering.

CONCLUSION

Like the majority below acknowledged, the facts of this case are extremely disturbing. But this Court has the opportunity to provide a remedy for the outrageous abuse that the elementary school tolerated. Deliberate indifference is an appropriate standard to determine whether a public school has violated the state constitution. The Deminskis have sufficiently alleged in their verified complaint every element of that standard. The decision of the Court of Appeals should be reversed and this case remanded for further proceedings.

This the 5th day of August, 2020.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed and served this day by depositing a copy with the United States Postal Service, first-class mail, postage prepaid, and addressed as follows:

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This the 5th day of August, 2020.

/s/ Troy D. Shelton
Troy D. Shelton

No. 60A20 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

ASHLEY DEMINSKI, as guardian ad litem on behalf of C.E.D., E.M.D., and K.A.D.,

Plaintiff-Appellant,

v.

PITT COUNTY BOARD OF EDUCATION,

Defendant-Appellee,

and

THE STATE BOARD OF EDUCATION,

Defendant.

From Wake County

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CONTENTS OF ADDENDUM

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2020 WL 3065253
Only the Westlaw citation is currently available.
United States District
Court, M.D. North Carolina.

Alicia WOODS, as Guardian Ad Litem for R.W., a minor child, and individually, Plaintiff,
v.
CHAPEL HILL-CARRBORO CITY SCHOOLS BOARD OF EDUCATION; Nancy Kueffer, in her individual and official capacity; Cheryl Carnahan, in her individual and official capacity; Elizabeth Clary, in her individual and official capacity; and Ronnie Jackson, in her individual and official capacity, Defendants.

1:19CV1018
|
Signed 06/09/2020

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MEMORANDUM OPINION AND ORDER

LORETTA C. BIGGS, District Judge.

***1** Plaintiff Alicia Woods brings this action on behalf of herself and her minor son, R.W., against the Chapel Hill-Carrboro City Schools Board of Education (the "Board") and several school administrators (the "Individual Defendants"). (ECF No. 1.) The complaint alleges that R.W. was repeatedly sexually abused by older students on school premises, and that, although they were aware of this abuse, Defendants "failed to promptly and appropriately investigate and respond." (*See id.* ¶¶ 1, 39.) Before the Court are the Defendants' motions to dismiss. (ECF Nos. 16; 19.) For the reasons that follow, the motions will be granted in part and denied in part.

I. BACKGROUND

R.W. is a minor child with substantial behavioral difficulties. (*See, e.g.*, ECF No. 1 ¶¶ 2, 22–23.) He attended Estes Hills Elementary School in the Chapel Hill-Carrboro City School District at all times relevant to this case. (*Id.* ¶¶ 6–7.) The allegations of the complaint, accepted as true and viewed in the light most favorable to Plaintiff, show the following:

R.W. lost control of his behavior one day in the Spring of 2011. (*Id.* ¶ 34.) After his teacher Lucy Hayes ("Hayes") removed him to a "timeout room" to calm down, he began to cry. (*Id.*) Through "tears and rapid breathing," R.W. told Hayes that he was "upset about kids showing their private parts." (*Id.*) While Hayes could not understand much of what R.W. was saying—he was crying throughout their conversation—it was "apparent" to her that he had experienced "inappropriate and unwanted sexual conduct." (*See id.*)

Realizing that "the behavior R.W. was describing warranted immediate action," Hayes took R.W. to the principal's office. (*Id.* ¶ 35.) The principal, Defendant Cheryl Carnahan ("Carnahan"), was unavailable at the time. (*Id.*) However, the assistant principal, Defendant Elizabeth Clary ("Clary") agreed to speak with R.W. in her stead. (*Id.*) Clary assured Hayes that she would finish the sensitive discussion Hayes had started with R.W. and arrange for him to be taken home afterwards. (*Id.*)

As the day went on, however, Hayes began to doubt whether the "situation" with R.W. was being "taken seriously." (*Id.* ¶ 36.) She asked another teacher, Caroline Carlson ("Carlson"), if she would join her in speaking with Carnahan about R.W.'s disclosure. (*See id.*) Carlson agreed, and the next morning accompanied Hayes to a meeting with Carnahan and Defendant Ronnie Jackson, a guidance counselor at the school. (*See id.* ¶¶ 36–37.) At the meeting, Hayes and Carlson proposed that the school interview students that may have been engaged in the conduct described by R.W., notify those students' parents, and contact the Department of Social Services. (*Id.* ¶ 37.) However, Carnahan insisted that the situation was already "being

handled" appropriately and instructed the teachers to "stay out of it." (*See id.*)

Approximately a year after these events, in April 2012, Taylor Mazor ("Mazor") was hired to work with the high-needs students at Estes Hill as a mental health clinician. (*Id.* ¶ 22.) Not long into her tenure, Mazor began to suspect that R.W. and another student —identified in the complaint as "Student X"—were displaying symptoms of post-traumatic stress disorder stemming from past sexual abuse. (*Id.* ¶ 23.) Her suspicions were confirmed when, sometime in the Spring of 2013, Student X confided that he, R.W., and a third classmate had been repeatedly sexually abused by two older students—in the school's cafeteria, bathrooms, and hallways; on the playground at recess; and on the school bus—from 2009 to 2011. (*See id.*) Mazor spoke with R.W. shortly thereafter and asked whether he, too, had been sexually abused. (*Id.* ¶ 25.) In response, R.W. provided an account of recurrent abuse "consistent with Student X's account." (*See id.*)

***2** After learning of the alleged abuse, Mazor notified R.W.'s current teacher, the school's social worker, and Carnahan's successor at Estes Hills, Principal Andrew Ware ("Ware"). (*Id.* ¶¶ 27–28.) Ware, in turn, alerted the District Office, which sent two representatives to meet with Mazor. (*Id.* at 28.) The representatives acknowledged to Mazor that they were aware of "the incidents" involving R.W. and Student X, but told her not to investigate further, as "the situation had been resolved before her time." (*Id.*)

The "resolution" referenced purportedly had three components. First, around the time of Hayes's initial report of suspected abuse, the administration removed the student thought to be the primary abuser from the school bus (though it is unclear for how long). (*Id.* ¶ 38.) Monitors were also placed on the bus "for a short period of time." (*Id.*) Second, the District Office sent notification letters to the parents and guardians of the students involved. (*Id.* ¶ 28.) Third, the District Office sought assistance in handling the matter from the Orange County Rape Crisis Center ("OCRCC" or the "Center"). (*Id.*) The representatives told Mazor that OCRCC had provided individual assessments and somewhere between one and three counseling sessions to each boy claiming abuse. (*Id.*; ECF No. 2-1 at 3.)

Mazor was clearly skeptical of this supposed "resolution," since she took it upon herself to investigate whether the actions described above were in fact taken. (*See* ECF No. 2-1 at 3.) She confirmed that the school had placed monitors on and removed a suspected student from the school bus around the time the alleged abuse was occurring. (ECF No. 1 ¶ 28.) However, when she independently reached out to OCRCC, she learned that the Center "had not provided any services to R.W. or Student X" aside from a puppet show—generic in nature, and given to the students' entire class—on the topic of unsafe touching. (*See id.* ¶¶ 28, 38.)

After her meeting with the representatives, Defendant Nancy Kueffer ("Kueffer"), a program director at Estes Hills, had warned Mazor that Student X and R.W. were "manipulative" and "not to be believed." (*Id.* ¶ 29.) Nevertheless, Mazor made the decision to meet privately with Plaintiff after a May 8, 2013 parent–teacher conference to discuss the topic of abuse. (*Id.* ¶ 30.)

That was the first time Plaintiff was informed that her son may have been sexually abused at school. (*Id.*) Contrary to what the District Office's representatives had told Mazor, Plaintiff never received a letter or notification about R.W.'s conversations with teachers and administrators.[1] (*Id.* ¶ 30.) Moreover, "no students were interviewed" about the alleged sexual abuse, and aside from temporarily removing the suspected primary abuser from the school bus, "[t]he perpetrators were never evaluated, treated, confronted, or disciplined for their involvement in the sexual abuse of R.W., Student X, or any other student." (*Id.* ¶ 38.)

According to Plaintiff, this inaction allowed "the sexual abuse of R.W. [to] continue[ ] for at least many months after the school was made aware of the same." (*Id.*) She filed this suit for damages on October 2, 2019. (*Id.* at 22.)

II. LEGAL STANDARDS

***3** Defendants move to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). (ECF Nos. 16 at 1; 19 at 1.) Under Rule 12(b)(1), a party may seek dismissal based on the court's lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)

(1). A motion under Rule 12(b)(1) raises the question of "whether [the plaintiff] has a right to be in the district court at all and whether the court has the power to hear and dispose of [the] claim." *Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012). The burden of proving subject-matter jurisdiction rests with the plaintiff, and the district court may "consider evidence by affidavit ... without converting the proceeding to one for summary judgment." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

Rule 12(b)(2) provides that an action may be dismissed for lack of personal jurisdiction. *See* Fed. R. Civ. P. 12(b)(2). On a personal jurisdiction challenge, the plaintiff bears the burden of ultimately proving personal jurisdiction by a preponderance of the evidence. *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 (4th Cir. 2003). Where, as here, a court decides a pretrial personal jurisdiction question without conducting an evidentiary hearing—"reviewing only the parties' motion papers, affidavits attached to the motion, supporting legal memoranda, and the allegations in the complaint"—a plaintiff "need only make a prima facie showing of personal jurisdiction" to withstand dismissal. *Grayson v. Anderson*, 816 F.3d 262, 268 (4th Cir. 2016). "[A] plaintiff makes a prima facie showing of personal jurisdiction by presenting facts that, if true, would support jurisdiction over the defendant." *See Universal Leather, LLC v. Koro AR, S.A.*, 773 F.3d 553, 561 (4th Cir. 2014) (citing *Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d 857, 862 (9th Cir. 2003)). Allegations in the complaint are taken as true, though "only if they are not controverted by evidence from the defendant." *Vision Motor Cars, Inc. v. Valor Motor Co.*, 981 F. Supp. 2d 464, 468 (M.D.N.C. 2013). If both sides present evidence, "factual conflicts must be resolved in favor of the party asserting jurisdiction for the limited purpose of determining whether a prima facie showing has been made." *Id.*

Finally, a motion to dismiss filed pursuant to Rule 12(b)(6) "challenges the legal sufficiency of a complaint." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). To survive dismissal, 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 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing a claim's plausibility, a court must draw all reasonable inferences in the plaintiff's favor. *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 539 (4th Cir. 2013). However, "mere conclusory and speculative allegations" are insufficient, *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013), and a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments," *Vitol*, 708 F.3d at 548 (quoting *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 338 (4th Cir. 2006)).

III. DISCUSSION

Plaintiff brings several claims against the Defendants: Count I of the complaint alleges that the Board subjected R.W. to a hostile educational environment in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) ("Title IX"). (ECF No. 1 ¶¶ 40–54.) Count II contains a § 1983 claim against all Defendants, alleging violations of the Equal Protection Clause of the Fourteenth Amendment. (*Id.* ¶¶ 55–64.) Counts III through VII allege various state law claims sounding in negligence and the infliction of emotional distress. (*Id.* ¶¶ 65–92.) Count VIII, the final claim in the complaint, asserts that the Defendants violated certain rights secured by the North Carolina Constitution. (*Id.* ¶¶ 93–99.) The Defendants move to dismiss all claims.

A. Title IX

***4** The Court begins with Plaintiff's Title IX claim against the Board. Title IX provides, in relevant part, that "[n]o person ... shall, on the basis of sex ... be subjected to discrimination under any education program or activity receiving Federal financial assistance."[2] 20 U.S.C. § 1681(a). In *Davis v. Monroe County Board of Education*, the Supreme Court clarified that sexual harassment falls within the "discrimination" that Title IX prohibits. *See* 526 U.S. 629, 649–50 (1999). However, covered institutions may be held liable for student-on-student sexual harassment—as is alleged here—"only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id.* at 650.

Thus, "*Davis* sets the bar high for deliberate indifference." *S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cty.*, 819 F.3d 69, 76 (4th Cir. 2016). "[A] school may not be held liable under Title IX ... for what its students do, but only for what is effectively an official decision by the school not to remedy student-on-student harassment." *Id.* at 76–77. To that end, schools are afforded "a great deal of 'flexibility' in disciplining students who sexually harass other[s]." *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 686 (4th Cir. 2018) (quoting *Davis*, 526 U.S. at 648). Further, because administrators are entitled to "substantial deference" in how they choose to address student-on-student harassment, *S.B.*, 819 F.3d at 77, schools are "not normally liable for failing to cede to a harassment victim's specific remedial demands," *Feminist Majority*, 911 F.3d at 686.

This deference is not absolute, however. A school still violates Title IX "when [its] response—or lack thereof—to known student-on-student sexual harassment is 'clearly unreasonable' " in light of the circumstances. *Id.* (quoting *Davis*, 526 U.S. at 648). For instance, deliberate indifference may be shown "where [a] school 'dragged its feet' before implementing 'little more than half-hearted measures' " to curb known harassment. *See S.B.*, 819 at 77 (quoting *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669–70 (2d Cir. 2012) ("Responses that are not reasonably calculated to end harassment are inadequate.")).

In line with *Davis* and its progeny, the Fourth Circuit has recognized that, in order to advance a Title IX sexual harassment claim, a plaintiff must plausibly allege four elements: (1) that she was a student at an educational institution receiving federal funds; (2) that she was subjected to harassment based on her sex; (3) that the harassment was sufficiently severe or pervasive to create a hostile or abusive educational environment; and (4) that there is a basis for imputing liability to the institution. *See Feminist Majority*, 911 F.3d at 686 (citing *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007)). For present purposes, the Board concedes that the first and second elements are satisfied, but contends that the third and fourth elements have not been adequately alleged. (*See* ECF Nos. 17 at 12–14; 27 at 2–5.)

i. Plaintiff has adequately alleged harassment that was sufficiently severe or pervasive.

The Board first argues that Plaintiff has failed to allege sufficient facts to satisfy the third element of her Title IX claim—harassment that was severe or pervasive enough to create a hostile educational environment. (ECF No. 17 at 12.) Whether student-on-student abuse rises to the level of actionable harassment "depends on a constellation of surrounding circumstances, expectations, and relationships." *See Davis*, 526 U.S. at 651 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)). The list of considerations includes, but is not limited to: the ages of the harassers and victims; whether the alleged harassment was frequent, humiliating, or physically threatening; and whether the conduct occurred within "a general atmosphere of hostility." *See Jennings*, 482 F.3d at 696. However, lest a claim become untethered from Title IX's language and purpose, the key inquiry must always be whether the harassment rises to a level that is "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *See Davis*, 526 U.S. at 652.

***5** Having reviewed the complaint and accompanying affidavits,[3] the Court finds that Plaintiff has plausibly alleged that R.W. suffered sexual harassment that was sufficiently pervasive and severe to satisfy the third element of her Title IX claim. As detailed above, the complaint alleges that R.W. and two other boys endured frequent sexual abuse at the hands of two older students over the course of several years. (ECF No. 1 ¶¶ 23–25.) The alleged conduct—"repeated sexual touching and manipulation of the children's genitalia and anuses"—occurred throughout the school grounds and on the bus. (*Id.* ¶¶ 23–24.) Further, as Hayes and Mazor relay in their affidavits, the older students would sometimes use a code word ("hot dog") to "trigger distress in the victims," even in the presence of teachers. (*See* ECF Nos. 2-1 at 2; 2-2 ¶ 4.) When the boys heard that term, they "would become hysterical, volatile, tearful, and terrified." (ECF No. 2-1 at 2.)

Even accounting for R.W.'s preexisting behavioral challenges, the alleged abuse clearly affected his

ability to function in the classroom. Estes Hills became "a place of fear, rage, and punishment" for R.W., rather than "a safe place ... to learn and grow." (*Id.*) "Common sense" tells us that the education of *any* child in R.W.'s position would be severely compromised by the alleged harassment. *See Jennings*, 482 F.3d at 696 (quoting *Oncale*, 523 U.S. at 81–82). However, there is no need to speculate. According to Mazor, teachers routinely mistook R.W.'s abuse-related PTSD symptoms for ordinary trouble-making, leading to "constant disciplinary issues, ... physical restraint, removal from learning opportunities, suspensions[,] and continued isolation from [his] peers," (ECF No. 2-1 at 2), thus denying him "the equal access to education that Title IX is designed to protect," *Davis*, 526 U.S. at 652.

The Board unpersuasively argues that the complaint's lack of certain factual allegations—for instance, that R.W.'s grades declined, or that he had excessive absences from school—means that Plaintiff cannot "evince a deprivation of educational opportunities." (*See* ECF No. 17 at 10, 13.) However, as discussed above (and as the Board itself acknowledges, (*see id.* at 11)), the question of whether sexual harassment is sufficiently severe or pervasive must be answered in light of all the circumstances. *See Jennings*, 482 F.3d at 699–700 (finding that a student sufficiently alleged a deprivation of educational opportunity, despite the fact that her grades improved during the relevant period). Taken as true, the allegations in the complaint and accompanying affidavits depict harassment that was "sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity," *Feminist Majority*, 911 F.3d at 686, even absent allegations that R.W.'s grades suffered, or that he routinely missed school.

ii. Plaintiff has adequately alleged deliberate indifference.

Next, the Board argues that Plaintiff's Title IX claim is "untenable for its failure to adequately allege deliberate indifference," the only available basis on which to impute liability for student-on-student abuse to an educational institution. (ECF No. 17 at 13.) The complaint alleges that, after learning of R.W.'s initial disclosure from Hayes, administrators (1) removed the student believed to be R.W.'s primary abuser from the school bus; (2) placed staff on the bus as monitors for some time; and (3) arranged for OCRCC to give a puppet show to R.W.'s class on the topic of unsafe touching. (*See* ECF No. 1 ¶¶ 28, 38.) The Board contends that these "corrective efforts to address the allegations of abuse against R.W." show that it was not deliberately indifferent to the alleged harassment. (ECF No. 27 at 5.)

***6** As noted above, educators "are entitled to substantial deference when they calibrate a disciplinary response to student-on-student ... harassment." *S.B.*, 819 F.3d at 77. However, a school does not automatically become immune to Title IX liability whenever it takes some corrective action; rather, the responsive steps must be "reasonably calculated to end the harassment." *See Feminist Majority*, 911 F.3d at 689 (citing *Zeno*, 702 F.3d at 669). Evidence may later emerge showing that the school's remedial actions were within the range of reasonable responses. At this early stage, however, the Court finds that Plaintiff has plausibly alleged that the school's response was "clearly unreasonable," such that it "cause[d]" R.W. to undergo further harassment or, at the very least, remain "liable or vulnerable to it." *Davis*, 526 U.S. at 645, 648.

According to the complaint, older students continued to abuse R.W. "for at least many months" after Hayes brought the matter to the administration's attention. (ECF No. 1 ¶ 38.) While the decision was made to supervise and remove one student from R.W.'s school bus, there is no indication that the school attempted to monitor the many other locations where harassment allegedly occurred—the cafeteria, bathrooms, hallways, and playground. (*See id.* ¶ 23.) According to Plaintiff, "no students were interviewed" about the alleged abuse, and "[t]he perpetrators were never evaluated, treated, confronted[,] or disciplined." (*Id.* ¶ 38.) Further, portions of the complaint suggest that members of the school's administration were actively "trying to sweep what was occurring under the rug," (*id.* ¶ 37), were disinclined to take R.W.'s allegations seriously, (*id.* ¶¶ 29, 36), and, when given the chance, misrepresented the strength of their response to their own concerned staff, (*id.* ¶ 28). In essence, the allegations show

a brief sequence of half-hearted measures, during and after which R.W. was further harassed. The most unsettling aspect of this lackluster response, if true, is that Plaintiff wasn't even notified that her elementary-aged son had told a teacher that he was being sexually abused. (*Id.* ¶ 30.) Surely a response which fails to inform parents that their children may have been abused is "clearly unreasonable" under the circumstances.

In light of these allegations, the Court concludes that it is plausible that administrators were aware of severe and pervasive student-on-student sexual abuse, but responded with deliberate indifference. *See Davis*, 526 U.S. at 633. Accordingly, Plaintiff's Title IX claim against the Board may advance.

B. Section 1983 Equal Protection

All Defendants move to dismiss Plaintiff's § 1983 claim for "violations of rights secured by the Equal Protection Clause of the Fourteenth Amendment." (ECF No. 1 ¶¶ 55–64.) Though there may be significant overlap between the two, the Supreme Court has held that a plaintiff is not precluded from bringing a § 1983 equal protection claim for sex discrimination alongside a Title IX claim in a case involving student-on-student sexual harassment. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009). The "standards establishing liability" under Title IX and § 1983 are "similar, but not 'wholly congruent.' " *Feminist Majority*, 911 F.3d at 700 (quoting *Fitzgerald*, 555 U.S. at 257). A plaintiff can establish the Title IX liability of a defendant school board "by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference." *See Fitzgerald*, 555 U.S. at 257–58. However, "[b]ecause there is no theory of *respondeat superior* for constitutional torts," a plaintiff must plead that harassment resulted from conduct directly attributable to a specific defendant—whether individual educator or municipal entity—in order to maintain her § 1983 claim against them. *See id.*; *Feminist Majority*, 911 F.3d at 703 (quoting *T.E. v. Grindle*, 599 F.3d 583, 588 (7th Cir. 2010)).

i. Plaintiff has stated an equal protection claim against the Board.

***7** To properly state a § 1983 claim against the Board, Plaintiff must allege that R.W.'s abuse resulted from "a municipal custom, policy, or practice." *Fitzgerald*, 555 U.S. at 257–58. Members of the Board needn't have "personally participated in or expressly authorized" harassment. *See Avery v. Cty. of Burke*, 660 F.2d 111, 114 (4th Cir. 1981). Rather, official policy or custom can be established by demonstrating the Board's "tacit authorization of or deliberate indifference to constitutional injuries." *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983).

Drawing all reasonable inferences in Plaintiff's favor, the Court concludes that Plaintiff has plausibly alleged that the Board acted with deliberate indifference to known, ongoing harassment at Estes Hills, and that R.W.'s abuse was prolonged as a result. *See Feminist Majority*, 911 F.3d at 703 (acknowledging the "substantial similarity" between the standards for deliberate indifference claims under Title IX and § 1983). According to the complaint, Carnahan communicated Hayes's initial report to the Board's central office shortly after it was made. (ECF No. 1 ¶ 37.) Thereafter, the administration took remedial measures that were "clearly unreasonable" under the circumstances. *See supra* at III.A.ii. However, based on Mazor's interactions with District Office representatives, we can infer that the administration's chosen approach received at least tacit authorization. (*See* ECF No. 1 ¶ 28.) Put another way, the complaint alleges that the Board was aware that students were being sexually abused, had the authority to direct a remedy that was not "clearly unreasonable," yet chose not to do so. (*See id.* ¶¶ 43–44, 46.) Those allegations are sufficient to support Plaintiff's § 1983 claim against the Board. *See Miller v. Union Cty. Pub. Sch.*, No. 3:16-cv-00666-FDW-DCK, 2017 WL 3923977, at *5–6 (W.D.N.C. Sept. 7, 2017) (denying defendant school board's motion to dismiss equal protection claim when student alleged that officials knew she had suffered "multiple incidents of harassment" by another student but "declined to investigate or impose remedial action").

ii. Plaintiff has stated an equal protection claim against the Individual Defendants.

In addition to the governing school board, a plaintiff can bring an equal protection claim for deliberate indifference to known student-on-student sexual abuse against individual administrators. To state such a claim in the Fourth Circuit, the plaintiff must plausibly allege that: (1) the victim was subjected to sexual harassment by his peers; (2) that administrators responded "with deliberate indifference, i.e. in a manner clearly unreasonable in light of the known circumstances"; and (3) that the administrators' responses were "motivated by a discriminatory intent." *See Feminist Majority*, 911 F.3d at 702–03.

Here, the first element is easily satisfied; as the above discussion makes clear, the complaint contains substantial allegations that R.W. was regularly abused by his schoolmates. The allegations supporting the second element—whether each of the Individual Defendants responded to known harassment with deliberate indifference—are thinner:

- Defendant Carnahan, the principal at Estes Hills, allegedly told Hayes to "stay out of it" when Hayes came to her with R.W.'s disclosure, and insisted that things were "being handled," (ECF No. 1 ¶ 37);
- Defendant Clary, an assistant principle at the school, allegedly spoke with R.W. on the day of his initial disclosure, but did not contact Plaintiff thereafter, (*id.* ¶¶ 30, 35, 38);

***8** • Defendant Jackson, the school's guidance counselor, allegedly dismissed the idea that the school should contact the Department of Social Services, suggesting instead that an OCRCC puppet show would be an appropriate remedy, (*see* ECF No. 2-2 ¶ 10); and

- Defendant Kueffer, the director of the systems-level programs, allegedly "scoffed at [Mazor's] concerns" about the boys' allegations, called them "manipulative," and "implied that they were liars," (ECF No. 2-1 at 3).

While these allegations, on their own, would likely be insufficient to support an inference that the Individual Defendants were deliberately indifferent to student-on-student abuse, the broader complaint—which alleges that no victims were interviewed, no parents were notified, and no perpetrators were seriously evaluated or disciplined—tips the balance in favor of plausibility. The Individual Defendants were all aware of R.W.'s allegations, and, despite their roles at Estes Hills, failed to act in ways "reasonably calculated to end the harassment." *See Feminist Majority*, 911 F.3d at 689 (citing *Zeno*, 702 F.3d at 669). Finally, the Court finds that the third element—discriminatory intent—is also adequately pleaded as to each of the Individual Defendants. In *Feminist Majority*, the Fourth Circuit held that a complaint "sufficient[ly] ... stated the intent element of [an] equal protection claim" when it alleged that a university president "sought to downplay ... harassment" and "made no effort to stop [it]." *See id.* at 703. Plaintiff has likewise alleged that the Individual Defendants were either openly skeptical of, or inclined to minimize, R.W.'s disclosure and did little to stop the alleged harassment—a sufficient basis from which to infer discriminatory intent. *See Grindle*, 599 F.3d at 589 (concluding that jury could properly infer discriminatory intent from principal's downplaying of and failure to stop harassment).

In short, the Court concludes that Plaintiff has plausibly stated a § 1983 equal protection claim against each of the Individual Defendants. Before moving on, however, there are two other issues to address. First is the question of whether the Individual Defendants are entitled to qualified immunity. In their opening brief, the Individual Defendants lay out the familiar two-part qualified immunity standard: that government actors are immune from suit unless "(1) the allegations, if true, substantiate a violation of a federal statutory or constitutional right, and (2) the right was 'clearly established' " at the time of the alleged misconduct. (ECF No. 20 at 20 (quoting *Doe v. Durham Pub. Sch. Bd. of Educ.*, No. 1:17cv773, 2019 WL 331143, at *18 (M.D.N.C. Jan. 25, 2019)). However, they devote all of their attention to the first question—whether a constitutional violation has been adequately alleged—and say nothing of the second—whether the violated right was clearly established. Furthermore, while Plaintiff argues in her response brief that the right in question *was* clearly established at the time of

the alleged violations, (*see* ECF No. 22 at 18–19), the Individual Defendants do not respond to this argument at all in their reply, (*see* ECF No. 28). Thus, for the time being, the Court rejects the Individual Defendants' contention that they are entitled to qualified immunity. *See Henry v. Purnell*, 501 F.3d 374, 378 (4th Cir. 2007) (explaining that, with respect to qualified immunity, "[t]he defendant bears the burden of proof on the second question").

***9** As for the second issue: Plaintiff has sued each of the Individual Defendants in both their individual and official capacities. (ECF No. 1 at 1.) It is generally recognized that official capacity suits "represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Accordingly, when a plaintiff asserts a claim directly against a school board, the same claim brought against school administrators in their official capacities is redundant. *See Doe*, 2019 WL 331143, at *20 (citing *Talley v. City of Charlotte*, No. 3:14-cv-00683-MOC-DCK, 2016 WL 8679235, at *13 (W.D.N.C. July 22, 2016)). Here, the § 1983 claims against the Individual Defendants in their official capacities are wholly duplicative of those against the Board; therefore, they will be dismissed.

C. State Law Claims

The Court now turns to Plaintiff's various state law claims,[4] which Defendants assert are barred, in whole or in part, by governmental and public official immunity. (*See* ECF Nos. 17 at 16; 20 at 11.) In North Carolina, local governments are shielded from certain lawsuits by the doctrine of governmental immunity. Under the doctrine, a school board is ordinarily immune from suit for injuries caused by its employees in the course of doing their jobs. *See, e.g.*, *Seipp v. Wake Cty. Bd. of Educ.*, 510 S.E.2d 193, 194 (N.C. Ct. App. 1999). By statute, a school board can waive its governmental immunity by purchasing liability insurance. *See* N.C. Gen. Stat. § 115C-42. However, waiver only extends as far as the terms of the applicable insurance policies themselves—unless the alleged injury is actually covered, governmental immunity has not been waived. *See Beatty v. Charlotte–Mecklenburg Bd. of Educ.*, 394 S.E.2d 242, 244 (N.C. Ct. App. 1990).

As it relates to this case, the Board had three insurance policies in place during the relevant time period. (*See* ECF Nos. 17-1 through 17-6; 27-1 ¶¶ 4–5.) By their express terms, however, the policies exclude coverage for torts arising out of abuse or molestation, whether on school grounds or on the bus. (*See* ECF Nos. 17-1 at 125, 139; 17-2 at 130, 144; 17-3 at 217, 247; 17-4 at 229, 261; 17-5 at 30, 46; 17-6 at 31, 48.) Because all of Plaintiff's state law claims stem from the Board's alleged failure to prevent ongoing sexual abuse, they fall outside of the purchased coverage. Thus, the Board is entitled to governmental immunity, and Plaintiff's state law claims against it must be dismissed. *See Biggs v. Edgecombe Cty. Pub. Sch. Bd. of Educ.*, No. 4:16-CV-271-D, 2018 WL 4471742, at *9 (E.D.N.C. Sept. 18, 2018) (holding that school board was entitled to governmental immunity where the applicable policy excluded claims arising out of sexual misconduct). The same is true for any state law claims directed at the Individual Defendants in their official capacities. *See, e.g.*, *Mullis v. Sechrest*, 495 S.E.2d 721, 723, 725 (N.C. 1998) (holding that a teacher sued in his official capacity is entitled to governmental immunity to the same extent as the school board that employs him).

The state law claims against the Individual Defendants in their individual capacities require further analysis. Because individual capacity claims seek recovery from government officials or employees directly, governmental immunity does not apply. *See Meyer v. Walls*, 489 S.E.2d 880, 887 (N.C. 1997). However, pursuant to the separate and distinct doctrine of public official immunity, "a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto."[5] *Id.* at 888. Unlike governmental immunity, which is quite robust, the availability of public official immunity is curtailed by two important limitations. First, as the name implies, public official immunity is available only to public *officials*—it does not apply to claims against "mere employee[s]." *Id.* at 889. Second, the cloak of public official immunity can be pierced if a plaintiff can show that the defendant's conduct was "(1) corrupt; (2) malicious; (3) outside of and beyond the scope of [their] duties; (4) [taken] in bad faith; or (5) willful and deliberate."[6] *See Smith v. Jackson Cty. Bd. of Educ.*, 608 S.E.2d 399, 411 (N.C. Ct. App. 2005).

***10** Three of the Individual Defendants—Carnahan, Clary, and Kueffer—contend that they are entitled to public official immunity on all of Plaintiff's state law claims.[7] (*See* ECF No. 20 at 11–16.) In their roles as principal and assistant principal, respectively, Carnahan and Clary were clearly "public officials" under North Carolina law. *See Farrell v. Transylvania Cty. Bd. of Educ.*, 625 S.E.2d 128, 134 (N.C. Ct. App. 2006). Plaintiff does not argue otherwise. (ECF No. 22 at 8.) In contrast, the parties disagree as to whether Kueffer—the director of system level programs at Estes Hill—exercised sufficient supervisory authority and discretion to be properly deemed a public official. (*See* ECF Nos. 20 at 15; 22 at 8.)

The Court, however, need not resolve the question of Kueffer's status at this juncture, because Plaintiff has sufficiently alleged that *all* of the Individual Defendants—whether public official or mere employee—behaved in a malicious, willful, and deliberate manner. It is true that a "conclusory allegation that a public official acted willfully and wantonly" is insufficient to withstand dismissal. *See Meyer*, 489 S.E.2d at 890. However, as explained above, the allegations in the complaint provide a fact-rich, detailed account of the Individual Defendants' response to known sexual abuse. As Plaintiff highlights in her briefing, (*see* ECF No. 22 at 8–10) a number of the specific allegations in her complaint align with cases in which North Carolina courts have allowed public official immunity to be pierced. In *Martin v. Moreau*, for example, the North Carolina Court of Appeals found that allegations showing that a highway-patrol training officer was (1) aware that a cadet had suffered a severe injury, but (2) failed to provide aid within a reasonable timeframe were "sufficient to defeat the immunity defense" raised in a motion to dismiss. *See* 770 S.E.2d 390 (N.C. Ct. App. 2015). The same goes for the allegations here: Plaintiff has alleged that the Individual Defendants knew of a severe injury—sexual abuse—but failed to take reasonable remedial action. Likewise, in *Smith v. Jackson County Board of Education*, the Court of Appeals found that allegations that a defendant sheriff (1) knew that one of his deputies had previously assaulted a minor, but (2) nevertheless assigned him to work as a school resource officer were sufficient to stave off a public immunity defense at the pleadings stage. *See* 608 S.E.2d at 411. Again, the allegations here are not so far removed; the Individual Defendants knew that older students were abusing R.W. and others, but nevertheless allowed them to interact on a regular basis. The Court cannot, therefore, conclude that the Individual Defendants are entitled to public official immunity at this time.

In sum, governmental immunity bars Plaintiff's state law claims against the Board. Those brought against the Individual Defendants in their official capacities fail for the same reason. However, Plaintiff may advance her state law claims against the Individual Defendants in their individual capacities, as none are presently entitled to public official immunity.

D. North Carolina Constitution

Finally, all Defendants move to dismiss Plaintiff's claim for violations of rights allegedly guaranteed by Articles I and IX of the North Carolina Constitution. (*See* ECF Nos. 1 ¶¶ 93–99; 17 at 19–21; 20 at 22–23.) Article I contains the North Carolina Constitution's equal protection clause, which, similar to its federal counterpart, states that "[n]o person shall be denied the equal protection of the laws." N.C. Const. art. 1, § 19. Article IX provides for "a general and uniform system of free public schools, ... wherein equal opportunities shall be provided for all students." *Id.* art. IX, § 2.

***11** Despite the sweeping language of those provisions, they do not appear to create or secure a right to receive a public education in an environment free from harassment or abuse. *See, e.g.*, *Doe v. Charlotte–Mecklenburg Bd. of Educ.*, 731 S.E.2d 245, 252–54 (N.C. Ct. App. 2012) (declining to recognize student's claim that her "educational rights" under the North Carolina Constitution were violated by a school's failure to prevent alleged sexual abuse by a teacher); *see also Sauers v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, 179 F. Supp. 3d 544, 548, 558 (M.D.N.C. 2016) (rejecting student's claim that he was denied "equal access to participation in the public school system" under the North Carolina Constitution when teachers bullied him for having dyslexia); *J.W. v. Johnston Cty. Bd. of Educ.*, No. 5:11–CV–707–D, 2012 WL 4425439, at *16 (E.D.N.C. Sept. 24, 2012) (dismissing plaintiff's claim that he was deprived of a state constitutional right to "an education free from

harm and psychological abuse"). Plaintiff cites no cases which suggest otherwise.

Instead, Plaintiff urges this Court to recognize such a right based on the federal equal protection jurisprudence discussed above. However, it would be improper to do so. (*See* ECF No. 21 at 20); *Sauers*, 179 F. Supp. 3d at 559. The Supreme Court of North Carolina has, at times, looked to the meaning and construction of the Fourteenth Amendment's Equal Protection Clause when determining the scope of Article I, Section 19 of the North Carolina Constitution. *See, e.g.*, *White v. Pate*, 304 S.E.2d 199, 203–04 (N.C. 1983). However, the two clauses are not bound in lockstep. "[I]n the construction of [a] provision of the [North Carolina] Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the [U.S.] Constitution ... is, though highly persuasive, not binding" upon North Carolina courts. *Id.* at 203. Moreover, when sitting in diversity, this Court's role is to "rule upon state law as it exists," rather than "surmise or suggest its expansion." *See Burris Chem., Inc. v. USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993). Absent North Carolina caselaw holding otherwise, this Court will not presume that, like its federal counterpart, Article I, Section 19 of the North Carolina Constitution guarantees a right to be free from sexual harassment in a public educational setting. Accordingly, Plaintiff's state constitutional claim will be dismissed as to all Defendants.

IV. CONCLUSION

To summarize, the Court's key conclusions are as follows. As against the Board: Plaintiff has plausibly alleged both a Title IX claim and a § 1983 equal protection claim; however, her state law claims are barred by governmental immunity. As against the Individual Defendants: all official capacity claims will be dismissed as duplicative of those brought against the Board; however, Plaintiff's individual capacity § 1983 and state law claims may all advance. Last, Plaintiff has failed to state a valid claim under the North Carolina Constitution.

The Court therefore enters the following:

ORDER

IT IS THEREFORE ORDERED that the Motion to Dismiss filed by Defendant Chapel Hill-Carrboro City Schools Board of Education, (ECF No. 16), is GRANTED IN PART AND DENIED IN PART. The motion is GRANTED with respect to Plaintiff's claims brought pursuant to the laws and constitution of North Carolina. The motion is DENIED with respect to Plaintiff's claims brought pursuant to Title IX and § 1983.

***12** IT IS FURTHER ORDERED that the Motion to Dismiss filed by Defendants Cheryl Carnahan, Elizabeth Clary, Nancy Kueffer, and Ronnie Jackson, (ECF No. 19), is GRANTED IN PART AND DENIED IN PART. The motion is GRANTED with respect to all claims brought against these defendants in their official capacities, as well as Plaintiff's claim under the North Carolina Constitution brought against them in their individual capacities. The motion is DENIED with respect to Plaintiff's individual capacity § 1983 claim, as well as her remaining individual capacity state law claims.

All Citations

Slip Copy, 2020 WL 3065253

Footnotes

1 Mazor later asked one of the District Office representatives for a copy of the letter they supposedly sent to Plaintiff and the guardians of the other two boys. (*Id.* ¶ 31.) She was eventually provided with a letter that was mailed to the families of all students in the boys' classroom, stating that OCRCC "would be coming to put on a puppet show." (*Id.*) According to the complaint, that letter was "not unlike a general letter sent to parents/guardians of students before starting a sex-education curriculum." (*Id.*)

2 The Supreme Court has long held that victims of sex discrimination are entitled to pursue private causes of action under Title IX against federally-funded educational institutions. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979).

3 When resolving a motion to dismiss, the Court may consider documents that are "explicitly incorporated into the complaint by reference and those attached to the complaint as exhibits" without converting the motion into one for summary judgment. *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165–66 (4th Cir. 2016) (internal citations omitted). Here, Plaintiff has attached affidavits by Mazor and Hayes to her complaint, (*see* ECF Nos. 2-1; 2-2), which expressly incorporates them by reference, (*see* ECF No. 1 ¶¶ 32, 33). Accordingly, the Court may, and does, consider their affidavits. *See Lowe v. Fed. Deposit Ins. Corp.*, No. ELH-18-478, 2019 WL 2772450, at *6 (D. Md. July 2, 2019).

4 The complaint includes state law claims for gross and ordinary negligence, intentional and negligent infliction of emotional distress, the incurred expense of medical and counseling services, and the loss of service and companionship of a child. (*See* ECF No. 1 ¶¶ 65–92.) Plaintiff's claim alleging violations of the North Carolina Constitution will be addressed separately in the next subsection.

5 As Plaintiff correctly notes, public official immunity applies only to claims sounding in negligence; it therefore presents no bar to Count V of the complaint, which pleads intentional infliction of emotional distress. (*See* ECF Nos. 1 ¶¶ 82–86; 22 at 8 (citing *Hawkins v. State*, 453 S.E.2d 233, 242 (N.C. Ct. App. 1995).) The Individual Defendants do not address this point and effectively concede it.

6 As the North Carolina Court of Appeals has explained, "a public official sued individually is not liable for 'mere negligence' ... because such negligence *standing alone*, is insufficient to support the 'piercing' ... of the cloak of official immunity." *See Epps v. Duke Univ., Inc.*, 468 S.E.2d 846, 853 (N.C. Ct. App. 1996). However, "once stripped of the 'cloak' of office, the public official *qua* individual is ... liable just like any other private individual," even for simple negligence. *See id.* at 852–53.

7 The Individual Defendants make no argument that Jackson—a guidance counselor—is a public official deserving of immunity.