No. 60A20 TENTH 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.	)	From Wake County No. 17-CV-15159 COA 18-988
PITT COUNTY BOARD OF EDUCATION, Defendant-Appellee,	)	
and	)	
THE STATE BOARD OF EDUCATION, Defendant.	)	

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DEFENDANT-APPELLEE'S NEW BRIEF

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INTRODUCTION

The question presented in this appeal is whether public school students state a claim against a local board of education under Article I, § 15, and Article IX, § 2, of the North Carolina Constitution for denial of "the right to a 'sound basic education'" when they are subject to

harassment and bullying by other students. (R pp 7-8 ¶¶ 31-32) This is an issue of first impression for this Court. The Pitt County Board of Education urges the Court to adopt the sound reasoning of the Court of Appeals' majority in this case, and of prior panels of the Court of Appeals, and affirm the decision below.

STATEMENT OF FACTS

The minor plaintiffs C.E.D., E.M.D., and K.A.D. were students at Lakeforest Elementary School in Pitt County, North Carolina, at the start of the 2016-2017 school year. (R pp 3-4, ¶¶ 1-3, 10-11) Plaintiff Ashley Deminksi is their mother. (R p 3, ¶ 4) The Pitt County Board of Education is a government entity with "general control and supervision of all matters pertaining to the public schools" in Pitt County. (R pp 3-4, ¶ 6); *see also* N.C. Gen. Stat. § 115C-36 (2017).

The Complaint alleges that, during the fall semester of the 2016-2017 school year, one of Ms. Deminski's children (C.E.D.) was variously physically bullied or sexually harassed by four fellow students. (R pp 4-6, ¶¶ 11-15) Her other two children (E.M.D. and K.A.D.), both of whom are autistic, were subject to similar mistreatment by one of those same four students. (R p 6, ¶ 21) School personnel were aware of one student's prior

pattern of misconduct past school years, but they did not "insulate" the minor plaintiffs from it. (R p 7, ¶ 24) The bullying and harassing conduct occurred on school premises, during school hours, and in the presence of school personnel. (R p 7, ¶¶ 25-27)

As a result of the "chaotic school environment" at Lakeforest, the children's academic performance "fell." (R p 7, ¶ 28) The Complaint alleges merely that the minor plaintiffs suffered unspecified "adverse educational consequences." *Id.* The Complaint contains no factual allegations about the resources or curriculum provided in the children's school or the educational goals and standards adopted by the Board. Nor does the Complaint contain any allegations regarding the minor plaintiffs' knowledge of core areas such as math, science, history and civics, their academic or vocational skills and abilities, or their performance on classroom or standardized achievement tests – either before or after the alleged bullying and harassment.

After approximately two months[1], the Board granted Ms. Deminski's request to transfer her children to a different school. (R p 6, ¶ 23) The Complaint is silent as to the children's experience at their new school.

ARGUMENT

I. PLAINTIFFS MAY NOT AVOID THE EFFECT OF THE BOARD'S GOVERNMENTAL IMMUNITY BY SIMPLY LABELLING A TORT ACTION AS A CONSTITUTIONAL CLAIM.

Plaintiffs first contend that the Court of Appeals lacked jurisdiction to even consider the Board's appeal, arguing that no defense of immunity may be asserted where a plaintiff brings a direct claim under the State constitution, and therefore, that interlocutory review was improper. On the contrary, the Court of Appeals necessarily examined whether any constitutional claim existed in this case in order to avoid nullification of the Board's well-established right to immunity from suit. It was appropriate for the court to consider the Board's appeal because the trial court's ruling affected a substantial right of the Board.

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[1] The alleged bullying and harassment occurred "[d]uring the Fall Semester of the 2016-2017 academic year." (R p 4, ¶ 11) Under the public school calendar law, the opening date of school for students "shall be no earlier than the Monday closest to August 26." N.C. Gen. Stat. § 115C-84.2(d) (2019). Plaintiffs' transfer request was granted on 28 October 2016. (R p 6, ¶ 23)

Whether an interlocutory order affects a substantial right and is immediately appealable is determined on a case-by-case basis. *See, e.g.*, *N.C. Dep't. of Transp. v. Rowe*, 351 N.C.172, 175, 521 S.E.2d 707, 709 (1999) (quoting *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)). An interlocutory order is immediately appealable pursuant to G.S. 1-277(a) and G.S. 7A-27(b)(3) if it "deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991) (citing *Waters*, 294 N.C. at 207, 240 S.E.2d at 343). "Essentially a two-part test has developed – the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

The doctrine of governmental immunity, which relieves local governments from tort liability, is long standing and well established as a "substantial right" that may be lost in the absence of immediate appellate review. *See, e.g.*, *Robinson v. Smith*, 219 N.C. App. 518, 519, 724 S.E.2d 629, 630 (2012) (holding that "denial of dispositive motions . .

. that are grounded on governmental immunity affect a substantial right and are immediately appealable"); *Webb ex rel. Bumgarner v. Nicholson*, 178 N.C. App. 362, 363, 634 S.E.2d 545, 546 (2006) (holding that "an interlocutory order raising issues of sovereign immunity affects a substantial right and warrants immediate appellate review"); *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (recognizing that the court "has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review").

Indeed, this Court has recognized that governmental immunity "is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (emphasis and alteration in original) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)). It is well-established that "[a] county or city board of education is a governmental agency, and therefore may not be liable in a tort action except insofar as it has duly waived its immunity from tort liability pursuant to statutory authority." *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 22-23, 348

S.E.2d 524, 526 (1986); *see also Fields v. Durham City Bd. of Ed.*, 251 N.C. 699, 111 S.E.2d 910 (1960) (applying predecessor statute). However, in this case, in an apparent effort to avoid the Board's defense of governmental immunity by artful pleading, Plaintiffs did not assert any claim sounding in tort or negligence, but instead pursued a claim directly under the North Carolina Constitution.[2]

In *Craig v. New Hanover County Board of Education*, this Court agreed with the plaintiff that "his common law negligence claim is not an adequate remedy at state law because the doctrine of governmental immunity prevails against it" and that therefore "he should be allowed to bring claims directly under our State Constitution that will not be susceptible to an immunity defense." 363 N.C. at 338, 678 S.E.2d at 354. Indeed, the Court repeated its admonition from *Corum* that "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights." *Id.* at 339, 678 S.E.2d at 355

[2] The trial court dismissed Plaintiffs' only other asserted claim, under the School Violence Protection Act, G.S. 115C-407.15 *et seq.*, and that dismissal was not appealed.

(quoting *Corum v. University of North Carolina*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291-92 (1992)).

However, the narrow question decided in *Craig* was whether a negligence claim barred by governmental immunity provided an adequate remedy at state law, and the Court held it did not. *Id.* at 335, 678 S.E.2d at 352. This Court was not faced with the question – and expressly did not decide – whether a claim arose directly under the State constitution's education clauses based on the alleged failure of school employees to prevent harm inflicted by a third party. *Id.* at 340, 678 S.E.2d at 355 ("This holding does not predetermine the likelihood that plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case.").

Subsequently, the Court of Appeals did directly address this precise issue, stating: "*Craig* does not control the substantive issue before us in this case, resulting in the necessity for us to independently determine whether Plaintiff has stated a claim for which relief can be granted under some constitutionally-based legal theory." *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 368, 731 S.E.2d 245, 251 (2012) (alterations and quotations in original omitted). After a careful analysis

of this Court's precedents, discussed further below, the Court of Appeals concluded that the plaintiff Jane Doe "failed to state claims arising under various provisions of the North Carolina Constitution for which relief may be granted." *Id.* at 372, 731 S.E.2d at 254. Plaintiffs' claims in this case are "essentially the same" as those raised in *Doe. See Deminski v. State Bd. of Educ.*, ___ N.C. App. ___, 837 S.E.2d 611, 617 (2020).

However, prior to reaching the substantive question in *Doe*, the Court of Appeals had to first determine whether "the trial court's refusal to dismiss Plaintiff's constitutional claims affected the Board's substantial right to governmental immunity." *Doe*, 222 N.C. App. at 362, 731 S.E.2d at 248.

> [W]e cannot determine the extent to which the Board is entitled to appeal the trial court's order on an interlocutory basis without addressing the merits of its challenge to the trial court's determination that Plaintiff stated a claim for relief under the constitutional provisions upon which she relies. The mere fact that Plaintiff has asserted that certain of her claims are "constitutional" in nature does not automatically mean that she has stated one or more valid constitutional claims.

Id. at 364-65, 731 S.E.2d at 249. The court's reasoning in *Doe* was not an improper "entanglement of immunity and the existence of a cause of action" as Plaintiffs assert, but rather a crucial examination that was

appropriate to determine whether a school board's well-established right to immunity from suit had been nullified by the trial court's refusal to dismiss. The Court of Appeals correctly admonished that a plaintiff may not "simply re-label claims that would otherwise be barred on governmental immunity grounds as constitutional in nature, effectively circumventing the Board's right to rely on a governmental immunity bar." *Id.*

Plaintiffs' heavy reliance on *Sandhills Amusement v. Sheriff of Onslow County*, 236 N.C. App. 340, 762 S.E. 2d 666 (2014), *rev'd sub nom. Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91, 773 S.E.2d 55 (2015), does not aid their cause; in fact, it plainly supports the Court of Appeals' decision here. In *Sandhills*, all three members of the Court of Appeals panel agreed that the trial court's interlocutory denial of the Sheriff's motion to dismiss was immediately appealable. *Id.* at 341, 762 S.E.2d at 669; *see also id.* at 370, 762 S.E.2d at 686 (Ervin, J. dissenting) ("I agree with my colleagues that we have jurisdiction over Defendant's challenge to the denial of his dismissal motion[.]"). The basis for the dissenting judge's disagreement with his colleagues in *Sandhills* concerned the scope and appealability of a preliminary injunction issued by the trial

court following denial of the motion to dismiss. *Id.* There was no disagreement with the foundational decision that the Court of Appeals had jurisdiction to review the denial of the motion to dismiss based on sovereign immunity because it affected a substantial right.

The Court of Appeals in this case correctly applied the test for determining jurisdiction over interlocutory appeals and the reasoning of *Doe* to conclude that it had jurisdiction over the Board's appeal.

II. PLAINTIFFS DO NOT STATE A CLAIM AGAINST THE PITT COUNTY BOARD OF EDUCATION ARISING UNDER THE NORTH CAROLINA CONSTITUTION.

A. Under the Plain Language of the State Constitution, Providing the Opportunity to Obtain a Sound Basic Education is a Constitutional Obligation of the State, Not Local Boards of Education.

In the landmark decision *Leandro v. State*, this Court concluded that N.C. Const. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.") and N.C. Const. art. IX, § 2 ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students.") combine to create a minimum qualitative standard for

education that must be made available to all North Carolina students. 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (*Leandro I*). The Court described that qualitative standard as "an opportunity to receive a sound basic education in our public schools," which it defined as an education that will provide students with at least:

> (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 347, 488 S.E.2d at 255.

In defining the constitutional standard, the Court made clear that it was the duty of the State, through the General Assembly, to carry out this mandate.

> Because we conclude that *the General Assembly, under Article IX, Section 2(1), has the duty of providing the children of every school district with access to a sound basic education*, we also conclude that it has inherent power to do those things reasonably related to meeting that constitutionally

> prescribed duty. This power would include the power to create a supplemental state funding program which has as its purpose the provision of additional state funds to poor districts so that they can provide their students access to a sound basic education. However, a funding system that distributed state funds to the districts in an arbitrary and capricious manner unrelated to such educational objectives simply would not be a valid exercise of that constitutional authority and could result in a denial of equal protection or due process.

Id. at 353, 488 S.E.2d at 258 (emphasis added). Justice Orr wrote separately to express his disagreement with the portion of the majority opinion that held that alleged disparities in educational opportunities did not violate the State constitution, but he concurred with the majority regarding the State's duty to ensure the minimum qualitative standard embodied by the education clauses. *Id.* at 358-64, 488 S.E.2d at 261-265 (Orr, J. dissenting). "It must be noted that *in both of these constitutional provisions, the burden and responsibility is placed upon the state and the General Assembly. Nowhere is the constitutional responsibility for public education placed on local governments.*" *Id.* at 358-59, 488 S.E.2d at 261-62 (emphasis added). Further, Justice Orr noted that while the State may assign local governments specific duties to implement the educational program, the responsibility for providing a sound basic education remains always with the State. *Id.* at 364, 488 S.E.2d at 265 ("The state's

ultimate responsibility for education under the Constitution cannot be delegated. The specific duties implementing the responsibility are assignable, but the responsibility *per se* is not.").

Subsequently, this Court revisited the question in *Hoke County Board of Education v. State*, 358 N.C. 605, 610, 599 S.E.2d 365, 373 (2004) (*Leandro II*). This time Justice Orr, writing for a unanimous court, made explicit that the State is responsible for carrying out the constitutional mandate to provide the opportunity for a sound basic education.

> As a consequence of the LEA's limited authority, *the trial court concluded that the State bore ultimate responsibility for the actions and/or inactions of the local school board, and that it was the State that must act to correct those actions and/or inactions of the school board that fail to provide a Leandro-conforming educational opportunity to students.*
>
> In the State's view, any holding that renders the State, and by the State we mean the legislative and executive branches which are constitutionally responsible for public education, accountable for local school board decisions somehow serves to undermine the authority of such school boards. This Court, however, fails to see any such cause and effect. By holding the State accountable for the failings of local school boards, the trial court did not limit either: (1) the State's authority to create and empower local school boards through legislative or administrative enactments, or (2) the extent of any powers granted to such local school boards by the State. Thus, the power of the State to create local agencies to administer educational functions is unaffected by the trial court's ruling,

> and any powers bestowed on such agencies are similarly unaffected. *In short, the trial court's ruling simply placed responsibility for the school board's actions on the entity – the State – that created the school board and that authorized the school board to act on the State's behalf.* In our view, such a conclusion bears no effect whatsoever on the local school board's ability to continue in administering those functions it currently oversees or to be given broader and/or more independent authority. As a consequence, we hold that the State's argument concerning a diminished role for local school boards as a result of the trial court's ruling is without merit.

Leandro II, 358 N.C. at 635-36, 599 S.E.2d at 389 (emphasis added).

To the extent there remained any doubt that the State, and not local government entities, bore the sole constitutional responsibility to provide a sound basic education following *Leandro I* and *II*, the question was definitively answered by this Court in *Silver v. Halifax County Board of Commissioners*, 371 N.C. 855, 821 S.E.2d 755 (2018). In *Silver*, the plaintiffs brought an action against the county board of commissioners, alleging that it violated the plaintiffs' fundamental constitutional right to receive the sound basic education guaranteed by the North Carolina Constitution. *Id.* at 860, 821 S.E.2d. at 759.

Analogizing county boards of commissioners to local school boards, this Court echoed its holding in *Leandro II*, stating that:

> The interrelationship between the State and local school boards discussed in *Leandro II* is comparable to that between

> the State and a county board of commissioners and is useful to our analysis in this case.
> . . .
>
> Like local school boards, counties and their respective boards of county commissioners also are "creatures of the General Assembly and serve as agents and instrumentalities of State government."
> . . .
>
> If, according to *Leandro II*, the General Assembly may not delegate or shift some of its responsibility to provide an opportunity for a sound basic education to a local school board, an agency of the State, then it follows that the General Assembly also may not pass this same responsibility on to a county board of commissioners, also an agency of the State. The trial court's order at issue in *Leandro II* found "that the State bore *ultimate responsibility* for the actions and/or inactions of the local school board, and that it was the State that must act to correct those actions and/or inactions of the school board that fail to provide a *Leandro*-conforming educational opportunity," and we upheld this determination.

Id. at 866-67, 821 S.E.2d. at 763 (internal citations omitted, emphasis in original). Ultimately, this Court unanimously concluded that while "[t]he allegations in plaintiffs' complaint, if true, are precisely the type of harm *Leandro I* and its progeny are intended to address," the complaint must be dismissed because "the duty to remedy these harms rests with the State, and the State alone." *Id.* at 869, 821 S.E.2d. at 764. *Cf. also N. Carolina Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 791, 786 S.E.2d 255, 265 (2016) (recognizing that "Article I, Section 15 of our constitution

. . . establishes the duty of the State to guard and maintain the people's right to the privilege of education"); *Hart v. State*, 368 N.C. 122, 139, 774 S.E.2d 281, 293 (2015) (recognizing "the responsibility *Leandro* places on the State to deliver a sound basic education").

In addition, this Court expressly distinguished its earlier holding in *King ex rel. Harvey-Barrow v. Beaufort County Board of Education*, 364 N.C. 368, 704 S.E.2d 259 (2010), stating that case did not stand for the "broad proposition" that "a local entity may be responsible for providing a sound basic education to students." *Silver*, 371 N.C. at 867, 821 S.E.2d at 763 n.6. Instead,

> *King* clearly expressed that there is no fundamental right to an alternative education. The State, in its discretion and outside the *Leandro* mandate that requires it to provide every child an opportunity for a sound basic education, has chosen to provide for the continued schooling of children who have misbehaved and been removed from the schoolhouse. *King* was *not concerned with the local board of education providing a sound basic education to its students* but rather with how the statutorily created right to receive an alternative education was to be preserved.

Id. (emphasis added, internal citations omitted).

The Court need go no further and can decide that the North Carolina Constitution does not provide Plaintiffs with a direct cause of action against the Board, based on its own consistent and overwhelming

authority that the State, and the State alone, is responsible for ensuring students are not denied an opportunity to obtain a sound basic education.[3]

B. The State Constitutional Right to the Opportunity to Receive a Sound Basic Education is a Qualitative Right Limited to Those Matters Directly Related to the Academic Program Available to Students.

This Court has never extended the educational rights guaranteed by N.C. Const. art. I, § 15, and N.C. Const. art. IX, § 1, "beyond matters that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system." *Doe*, 222 N.C. App. at 370, 731 S.E.2d at 252-53. The Court of Appeals has faithfully adhered to the direction of this Court, set forth in *Leandro* and its progeny, by maintaining this focus on the Constitution's mandate to ensure a minimum qualitative standard for education.

Doe v. Charlotte-Mecklenburg Board of Education involved a student who alleged that she had been sexually abused by her band teacher. 222 N.C. App. at 361, 731 S.E.2d at 247. Asserting her rights

[3] Plaintiffs did not appeal the trial court's dismissal of the State Board of Education, the only proper defendant to this action under *Leandro*.

under the North Carolina Constitution, the plaintiff alleged that "the Board's negligent acts and omissions violated her 'right to an education that [was] free from harm' and 'psychological abuse'" and "'deprived' her of 'her liberty, interest and privilege in an education free from abuse or psychological harm.'" *Id.* (alteration in original). Rejecting such a cause of action, the Court of Appeals concluded:

> Although the serious wrongfulness inherent in the actions in which [the defendant] allegedly engaged should not be minimized in any way, we are unable to see how the allegations set out in Plaintiff's complaint state a claim for violating these constitutional provisions. Put another way, *we are unable to discern from either the language of the relevant constitutional provisions or the reported decisions construing these provisions that North Carolina public school students have a state constitutional right to recover damages from local boards of education for injuries sustained as the result of a negligent failure to remain aware of and supervise the conduct of public school employees*.

Id. at 370-71, 731 S.E.2d at 252-53 (emphasis added).

The Court of Appeals again addressed the existence of such a constitutional claim in *Mack v. Board of Education of the Public Schools of Robeson County*, which involved allegations that a student was physically attacked and injured by another student. 228 N.C. App. 282, 748 S.E.2d 774 (2013) (unpublished). Again, the Court of Appeals rejected the plaintiff's claim under Article I, § 15, of the North Carolina

Constitution for denial of the "opportunity for an education free from psychological abuse and harm," finding "no constitutional right for plaintiffs to recover from defendant for injuries sustained from a negligent failure to remain aware of and supervise the conduct of other public school students." *Id.* at 2013 WL 3379683, *3.

In both of these cases, the factual allegations are strikingly similar to those asserted by Ms. Deminski and her children: the plaintiffs alleged that a student was subjected to physical harm or sexual abuse at the hands of an employee or another student and that the school failed to prevent such abuse. In both cases, the plaintiffs pointed to the articles of the North Carolina Constitution containing educational guarantees. And in both cases, the Court of Appeals rejected any interpretation of the North Carolina Constitution's right to the opportunity to obtain a sound basic education that would "encompass claims arising from abuse of a student, even on school premises."[4] *Deminski*, 837 S.E.2d at 616.

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[4] Federal courts have likewise consistently recognized that no North Carolina court has held the State constitution to provide a plaintiff with a direct constitutional claim arising from allegations of sexual assault or harassment by teachers or other students. *See Fothergill v. Jones Cty. Bd. of Educ.*, 841 F. Supp. 2d 915, 919 (E.D.N.C. 2012) (dismissing claim under article I, section 15 of N.C. Constitution based on sexual "exploitation, assault and abuse" of student by teacher, and holding that "allowing a constitutional recovery on the basis of alleged sexual abuse would be an as-yet-unrecognized extension of the *Leandro* doctrine"); *Frye v. Brunswick Cty. Bd.*

These Court of Appeals' decisions, including in the instant case, are all based on an understanding of N.C. Const. art. I, § 15, and N.C. Const. art. IX, § 1, derived from this Court's interpretation in *Leandro I* and *II*, that the State constitution mandates a qualitative standard of basic educational opportunity for *all* children in North Carolina. *Leandro*, 346 N.C. at 351, 488 S.E.2d at 257 (requiring "that all children have the opportunity for a sound basic education, but [not] that equal educational opportunities be afforded students in all of the school districts of the state"); *Leandro II*, 358 N.C. at 620, 599 S.E.2d at 379 ("We read *Leandro* and our state Constitution, as argued by plaintiffs, as according the right at issue to all children of North Carolina, regardless of their respective ages or needs."). The State's obligation under the constitution is to provide a "a *system* of public education adequate to the needs of a great and progressive people." *Leandro*, 346 N.C. at 346, 488 S.E.2d at 254

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of Educ., 612 F. Supp. 2d 694, 707-08 (E.D.N.C. 2009) (in case involving sexual harassment of student by employee, dismissing claim under article I, section 15 of N.C. Constitution because "no North Carolina appellate court has yet recognized a private right of action for damages under the North Carolina Constitution against a local board of education for the denial of the privilege of education"); *J.W. v. Johnston Cty. Bd. of Educ.*, No. 5:11-CV-707-D, 2012 WL 4425439, *16 (E.D.N.C. Sept. 24, 2012) (dismissing claims under article I, sections 15 and 19, and article IX, section 1 of N.C. Constitution based on sexual assault of student by another student).

(quoting *Board of Educ. v. Board of Comm'rs of Granville Cty.*, 174 N.C. 469, 93 S.E. 1001, 1002 (1917) (emphasis added)). Plaintiffs would stretch and contort this principle to recognize a tort-like constitutional claim based on the failure to adequately or effectively educate an *individual* child. Nothing in the history of the North Carolina Constitution's education clauses suggests that such a claim was intended.[5] "Where the construction of a constitutional provision is at issue, as here, it is incumbent upon this Court to interpret the organic law in accordance with the intent of its framers and the citizens who adopted it." *Sneed v. Greensboro City Bd. of Ed.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980).

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[5] *See, e.g.,* John V. Orth, The North Carolina State Constitution with History and Commentary at 51-52 (1993). ("Like many other sections in Article I, the Declaration of Rights, [section 15] states a general proposition that is given concrete realization elsewhere in the constitution. The people's right to education correlates with the state's duty 'to guard and maintain that right.'" The details are spelled out in Article IX, wholly devoted to the subject. Added to the declaration of rights in 1868, the right to education was intended to mark a new and more positive role for state government. Not a restriction on what the state may do, it requires a commitment to social betterment."); N.C. Journal of the Constitutional Convention of 1868 at 486-87 ("This Constitution provides for a University *and for free public schools for all the children of the State*. All may see the difference between the success in life of the educated and uneducated man, yet as often as not, the uneducated man has been gifted with the greater degree of intellectual power; the cause of his ill success is that it has not been developed. We propose to 'level upwards,' to give to every child, as far as the State can, an opportunity to develop to the fullest extent, all his intellectual gifts." (emphasis in original)).

According to Plaintiffs, however, the Court of Appeals erred by focusing on the qualitative standard defined in *Leandro I* and *II*. Relying on *Sneed v. Greensboro City Board of Education*, 299 N.C. 609, 264 S.E.2d 106 (1980), Plaintiffs contend that the court should have instead considered whether the Board "interfered with the Deminski children's *access* to a public education." (Pl. Br. at 17) In *Sneed*, this Court considered whether a schedule of school fees violated the substantive educational guarantee of "free public schools" in the State constitution, holding that it did not. *Sneed*, 299 N.C. at 617, 264 S.E.2d at 113. However, the Court then turned to consideration of whether the school board's "fee waiver" policy unconstitutionally penalized students who were unable to pay the required fees. *Id.* at 618, 264 S.E.2d at 113. In concluding that the local board's policy did not "fairly guarantee[] to low income and indigent students their constitutional right of equal access to the educational opportunities available at their schools," this Court relied on principles of due process. *Id.* at 619, 264 S.E.2d at 114. "It is clear . . . that equal access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of *procedural due process*." *Id.* at 618, 264 S.E.2d at

113 (citing *inter alia* N.C. Const. art. I, § 19) (emphasis added). Thus Plaintiffs argue that due process, as articulated in *Sneed*, protects the Deminski children from the Board's unreasonable deprivation of their access to a public education. The fallacy in this argument is evident.

As an initial matter, Plaintiffs' due process argument must be rejected because they did not include any due process claim in the Complaint, instead relying solely on an alleged denial of the right to a sound basic education under N.C. Const. art. I, § 15, and N.C. Const. art. IX, § 1. (R p 7, ¶ 31; *see generally* R pp 3-10) Plaintiffs' reliance on *Sneed* before this Court is misplaced and fatally tardy.

> Our courts have long held that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." This "swapping horses" argument historically has applied to circumstances in which the arguments on appeal were grounded on separate and distinct legal theories than those relied upon at the trial court

State v. Cheeks, ___ N.C. App. ___, 833 S.E.2d 660, 673 (2019), *appeal dismissed, review allowed*, 374 N.C. 268, 839 S.E.2d 339 (2020). *See also Weil v. Herring*, 207 N.C. 6, 175 S.E. 836, 837 (1934) (same). "[P]rinciples of fairness to both parties do not permit one party to use the appellate system to advance a new or different argument than it employed at trial

simply because that party did not properly prepare or was unable to think of the argument below." *Rolan v. N.C. Dep't of Agric. & Consumer Servs.*, 233 N.C. App. 371, 381, 756 S.E.2d 788, 795 (2014). While Plaintiffs arguably could have included in their Complaint a claim for alleged violation of their substantive or procedural due process rights, they did not do so and cannot cure that omission now.

In addition to *Sneed*, Plaintiffs also cite *King ex rel. Harvey-Barrow v. Beaufort County Board of Education*, in support of their contention that interference with or denial of *access* to public education creates a constitutional violation. The plaintiff in *King* was a student who received a long-term suspension without being offered an opportunity for alternative education, which she contended violated her constitutional right to a sound basic education. 364 N.C. at 371, 704 S.E.2d at 261. This Court held that there is no *constitutional* right to alternative education for students who violate lawful student rules, but that because there exists a comprehensive *statutory* scheme granting a right to receive alternative education when feasible and appropriate, local school boards must articulate a reason when they exclude suspended students from alternative education. *Id.* at 371-72, 704 S.E.2d at 261-62. While this

Court did not explicitly consider a due process argument in *King*, it relied on the decision in *Sneed*, which did. Further, as noted above, this Court has since recognized the limited holding in *King*, stating that it "was not concerned with the local board of education providing a sound basic education to its students but rather with how the statutorily created right to receive an alternative education was to be preserved." *Silver*, 371 N.C. at 867, 821 S.E.2d at 763 n. 6.

Both *Sneed* and *King* are also utterly distinguishable from the facts alleged by Plaintiffs. In each of those cases, it was the schools' own conduct that led to the exclusion from or denial of access to an educational program: in *Sneed* it was the school board's imposition of fees without an adequate waiver policy, while in *King* it was the school administrators' denial of access to alternative education without a valid reason. In this case, however, Plaintiffs' denial-of-access claim arises from the conduct of other students – harassment and bullying that led to a "chaotic school environment" – and the "indifference" of the Board or school administrators and alleged failure to protect the Deminski children. (R p 7, ¶¶ 27-28)

This Court should not expand the contours of the *education* clauses of the North Carolina Constitution to impose a constitutional duty upon a local school board to protect an individual student from harm caused by the physical or verbal abuse by a third party.

C. Determining that Allegations of Bullying and Harassment State a Constitutional Claim for Relief, Based on the Right to the Opportunity to Receive a Sound Basic Education, Would Create the Judicial Entanglement that *Leandro* Warned Against.

In *Leandro I*, this Court expressed concern about the functional manageability of a ruling that entailed consideration of constitutional rights on a district-by-district basis. The Court noted that if substantial equality among districts were a constitutional right, "[t]he result would be a steady stream of litigation which would constantly interfere with the running of the schools of the state and unnecessarily deplete their human and fiscal resources as well as the resources of the courts." *Leandro I*, 346 N.C. at 350, 488 S.E.2d at 257. "Substantial problems have been experienced in those states in which the courts have held that the state constitution guaranteed the right to a sound basic education. We believe that even greater problems of protracted litigation resulting in unworkable remedies would occur if we were to recognize the purported

right to equal educational opportunities in *every one* of the state's districts." *Id.* at 350-51, 488 S.E.2d at 257 (emphasis added; internal citations omitted).

Plaintiffs themselves acknowledge that "not every denial [of access to public education] is necessarily a constitutional violation, nor is every impact on educational access considered through the same lens." (Pl. Br. at 23) Yet they ask this Court to expand the *Leandro* right to the opportunity for a sound basic education not only district-by-district, but classroom-by-classroom and even student-by-student. Plaintiffs would have this Court immeasurably broaden the scope of the educational guarantee articulated in the *Leandro I* and *II* decisions and require courts to become enmeshed in determining for each student what amounts to a constitutionally appropriate and adequate education.

Indeed, in *Leandro II*, the Court recognized the difficulty of establishing the root cause of any individual student's failure to obtain a sound basic education and even cautioned that "the failure to obtain such an education is not the ultimate issue in dispute." 358 N.C. at 625, 599 S.E.2d at 383, n. 11.

> In order to prevail, plaintiffs must show more than a failure on the part of Hoke County students to obtain a sound basic

> education. The failure to obtain such an education may be due to any number of reasons beyond the defendant State's control, not the least of which may be the student's lack of individual effort and a failure on the part of parents and other caregivers to meet their responsibilities. Thus, in order to show Hoke County students are being wrongfully denied their rightful opportunity for a sound basic education, plaintiffs must show that their failure to obtain such an education was due to the State's failure to provide them with the opportunity to obtain one.

Id.

North Carolina's courts, like courts across the country, have been loath to recognize a cause of action that is dependent upon the judicial branch making determinations of educational effectiveness. As this Court stated over seventy years ago, "[i]f the opinion of court or jury is to be substituted for the judgment and discretion of the board at the will of a disaffected pupil, the government of our schools will be seriously impaired, and the position of school boards in dealing with such cases will be most precarious." *Coggins v. Bd. of Educ. of City of Durham*, 223 N.C. 763, 769, 28 S.E.2d 527, 531 (1944). Courts have squarely rejected claims that would require them to step into the shoes of educators and determine what was or was not appropriate or adequate conduct in an educational setting, commonly referred to as "educational malpractice." *See, e.g.*, *Arnold v. Univ. of N. Carolina at Chapel Hill*, 253 N.C. App.

238, 798 S.E.2d 442, 443 (2017) (stating that educational malpractice claims are not recognized under North Carolina law and collecting cases); *Thomas v. Olshausen*, No. 3:07-CV-130-MU, 2008 WL 2468738, at *2 (W.D.N.C. June 16, 2008) (holding "no cognizable claim for educational malpractice under North Carolina law"), *aff'd*, 305 Fed. Appx. 55 (4th Cir. 2008); *Sellers by Sellers v. Sch. Bd. of the City of Manassas, Va.*, 960 F. Supp. 1006, 1012-13 (E.D. Va. 1997) (holding that it would be inappropriate for federal court to recognize educational malpractice claim where state court had refused to do so), *aff'd sub nom. Sellers by Sellers v. Sch. Bd. of City of Mannassas, Va.*, 141 F.3d 524 (4th Cir. 1998); *Hunter v. Bd. of Educ. of Montgomery Cty.*, 292 Md. 481, 484, 439 A.2d 582, 583 (1982) (noting that "so-called 'educational malpractice' claims have been unanimously rejected by those few jurisdictions considering the topic"); *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 444, 391 N.E.2d 1352, 1354 (1979) (rejecting educational malpractice claim as "a matter of public policy"); *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 824-25, 131 Cal. Rptr. 854, 860-61 (1976) (examining and rejecting any "'duty of care' in persons and agencies who administer the academic phases of the public educational process").

There is no basis for Plaintiffs' quest to expand the holding of *Leandro* to encompass judicial determination of whether the omissions of a classroom teacher or school principal denied an individual student the constitutional right to the opportunity to obtain a sound basic education.

III. PLAINTIFFS' COMPLAINT IS DEFECTIVE ON ITS FACE AND DOES NOT STATE A DIRECT *CORUM* CLAIM BECAUSE ALTERNATE REMEDIES ARE AVAILABLE ON THE FACTS ALLEGED.

Plaintiffs' plea to this Court to recognize two new, direct constitutional claims against public schools (interference with access to public education and deliberate indifference to peer harassment) should be rejected for reasons outlined by this Court in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992).

> When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, however, the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power. *In re Alamance County Court Facilities*, 329 N.C. 84, 100-01, 405 S.E.2d 125, 133 (1991) (discussing and applying inherent powers of the judiciary). Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government in appearance and in fact by seeking the least intrusive remedy available and necessary to right the wrong. *Id.*

Corum, 330 N.C. at 784, 413 S.E.2d at 291.

Both limitations are present here. To assert a direct constitutional claim against a school board, "a plaintiff must allege that no adequate state remedy exists to provide relief for the injury." *Copper ex rel. Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010). In *Copper*, this Court rejected a student's procedural due process claim under the State constitution, because the plaintiff "always had the statutory right to appeal" his discipline under G.S. 115C-45(c), and therefore "an adequate state remedy exists to redress this alleged constitutional injury." *Id.* at 788-89, 688 S.E.2d at 429. The same statute was available to Plaintiffs in this case to appeal any final administrative decision of a school employee that violated "a specified federal law, State law, State Board of Education policy, State rule, or local board policy." N.C. Gen. Stat. § 115C-45(c)(2) (2019).

Among other things, Plaintiffs' Complaint asserts that "school personnel exhibited deliberate indifference in such a manner as to violate" the School Violence Prevention Act and that Plaintiffs were unable to obtain relief even after "repeatedly notif[ying] the teacher, Assistant Principal, and Principal in efforts to resolve the situation." (R R p 8, ¶ 41; p 6, ¶ 17) Yet the Complaint contains no allegation that

Plaintiffs availed themselves of the appeal right under G.S. 115C-45(c) to challenge the school's inaction or violation of a North Carolina law.[6] As in *Copper*, Plaintiffs' Complaint "contains no allegations suggesting that the student[s were] somehow barred from the doors of either the courthouse or the Board. Nor does the complaint allege that [they] exhausted [their] administrative remedies, or even that it would have been futile to attempt to appeal . . . to the Board. Thus, under [the Court's] holdings in both *Corum* and *Craig*, an adequate remedy exists at state law to redress the alleged injury, and this direct constitutional claim is barred." *Copper*, 363 N.C. at 789, 688 S.E.2d at 429.

Further, as the Court observed in *Corum*, it ought not accept invitations for the "extraordinary exercise of its inherent constitutional power to fashion a common law remedy for violation of a particular constitutional provision" when the exercise of that power would encroach on the powers of the legislative and executive branches of state

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[6] Plaintiffs' brief obliquely recognizes yet another available remedy, by offering the "deliberate indifference" standard borrowed wholesale from federal Title IX jurisprudence. *See, e.g., Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (concluding that Title IX provided private right of action for "severe, pervasive, and objectively offensive" student-on-student sexual harassment that "effectively bars victim's access to educational opportunity or benefit"). Yet Plaintiffs did not bring a Title IX claim, and instead ask this Court to stretch the educational clauses of the North Carolina Constitution to create a Title IX facsimile.

government.[7] General Statute 115C-45 is an important part of the legislature's plan to fulfill its duty to guard and maintain the right to the privilege of education, and thereby protect the right of every child to an opportunity to obtain a sound basic education. That statute embodies three concepts vital to the fulfillment of the State's essential duty.

First, it recognizes that parents and students must have a means to raise perceived failures on the part local school officials to comply with state educational laws and policies. *See, e.g.*, *Rone ex rel. Roseboro v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, 220 N.C. App. 401, 402, 725

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[7] The federal counterpart to a *Corum* claim is a *Bivens* claim. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), where the U.S. Supreme Court recognized an implied claim for damages against federal officers for violation of the Fourth Amendment. In recent years, *Bivens* actions have become "disfavored" precisely because, as this Court recognized in *Corum*, implying the existence of such claims tends to usurp the power of the legislative and executive branches of government. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). As most recently explained in *Ziglar v. Abbasi*:

> When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts?
>
> The answer most often will be Congress. When an issue "'involves a host of considerations that must be weighed and appraised,'" it should be committed to "'those who write the laws'" rather than "'those who interpret them.'" In most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if "'the public interest would be served'" by imposing a "'new substantive legal liability.'" As a result, the Court has urged "caution" before "extending *Bivens* remedies into any new context."

137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017) (internal citations omitted).

S.E.2d 422, 423 (2012) (recognizing that G.S 115C-45(c) provides method for review of student's assignment to alternative learning center); *Hentz v. Asheville City Bd. of Educ.*, 189 N.C. App. 520, 521, 658 S.E.2d 520, 521 (2008) (concluding that G.S 115C-45(c) provided plaintiff with right to have superintendent's decision revoking discretionary admission to school reviewed). Second, it recognizes that local educators, by training and experience, are the persons best qualified to address and resolve problems with the educational opportunities of individual students. Third, it recognizes that local educators are more qualified to resolve individual educational problems than the courts and must be given the first opportunity to resolve them.

This Court's decision in *Leandro I* ends with the following observation:

> In conclusion, we reemphasize our recognition of the fact that the administration of the public schools of the state is best left to the legislative and executive branches of government. Therefore, the courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education. Only a clear showing to the contrary will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as to the

> determination of what course of action will lead to a sound basic education.

346 N.C. at 357, 488 S.E.2d at 261.

Acceptance of Plaintiffs' plea to recognize new, direct constitutional claims against local boards of education would require the Court to abandon these wise limits on the exercise of its inherent powers. The invitation to do so should be rejected.

CONCLUSION

For the foregoing reasons, the Pitt County Board of Education asks this Court to affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED, this 5th day of October 2020.

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United States District Court, E.D. North Carolina, Western Division.

J.W., by and through his parent and guardian, and Brenda Newsome, Plaintiffs,
v.
The JOHNSTON COUNTY BOARD OF EDUCATION, Ed Croom, in his individual and official capacities, and Jennifer Moore, in her individual and official capacities, Defendants.

No. 5:11–CV–707–D.
|
Sept. 24, 2012.

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ORDER

JAMES C. DEVER III, Chief Judge.

***1** Former special education teacher Brenda Newsome and her former student, J.W., ("plaintiffs") have sued the Johnston County Board of Education, Board Superintendent Ed Croom, and principal Jennifer Moore ("defendants"). Plaintiffs' amended complaint contains a variety of federal and state claims concerning Newsome's employment and J.W.'s educational environment. Defendants moved to dismiss portions of the amended complaint under Rule 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure. As explained below, the court grants in part and denies in part the motion to dismiss.

I.

At all relevant times, J.W. was a minor child with Down Syndrome who attended Selma Middle School ("the School") in Johnston County, North Carolina. Am. Compl. [D.E. 17] ¶ 1. The Johnston County Board of Education (the "Board") operates the School. *Id* . ¶ 3. Jennifer Moore ("Moore") was the Principal of the School. *Id.* ¶ 4. Ed Croom ("Croom") was the Superintendent for the Board. *Id.* ¶ 5.

Brenda Newsome ("Newsome") worked full-time at the School as a special education teacher from August 2004 until June 15, 2009. *Id.* ¶¶ 2, 10. While employed at the School, Newsome exceeded professional standards and, until the incidents alleged in this action, received positive employment evaluations. *See id.* ¶¶ 11–12. In her last year at the School, Newsome was J.W.'s teacher. *See id.* ¶¶ 2, 10, 15.

Before the start of the 2008–2009 school year, the Board consolidated the School's two special education classes into a single class. *Id.* ¶ 13. As a result, the teacher-to-student ratio for the single special education class allegedly fell below applicable state and federal guidelines. *See id.* ¶¶ 14, 17–18. Newsome was concerned that the new ratio would impede the learning of students with intensive needs, and she shared her concerns with the parents of the students in her special education class. *See id.* ¶ 19. Newsome criticized the ratio and also encouraged parents to lobby the Board and other relevant public officials to improve the ratio. *See id.* ¶¶ 20–21. Croom and Moore instructed Newsome to stop criticizing the ratio and reprimanded Newsome for her advocacy work. *Id.* ¶ 22; *see* Pls.' Mem. Opp'n Mot. Dismiss [D.E. 22] 3.

During the 2008–2009 school year, Newsome taught her special education class of ten students with the help of a single teaching assistant. Am. Compl. ¶ 26. The teaching assistant was incompetent, and Board evaluators concluded that the teaching assistant failed to meet the requirements necessary for working with students with intensive needs. *See id.* ¶¶ 27–28. Despite being aware of the teaching assistant's incompetence, the Board, Croom, and Moore did not retrain, remove, or discipline the teaching assistant. *Id.* ¶¶ 29–30. Newsome also informed Croom and Moore that her classroom lacked the educational resources required for students with intensive needs. *See id.* ¶ 31. The Board, Croom, and Moore did not provide the requested resources. *See id.* ¶¶ 32–34. Rather, Croom and Moore asked Newsome to stop reporting the violations to them, to relevant public officials, and to the parents of the students. *Id.* ¶ 34.

***2** Newsome continued to communicate with the parents, however, and Moore and Croom formally disciplined her. *Id.* ¶ 35. Knowing that Newsome would become eligible for tenure at the end of the 2008–2009 school year, *see id.* ¶ 23, Moore and Croom also led Newsome to believe that she would be denied tenure and possibly lose her job unless she ceased advocating on behalf of her students. *See id.* ¶¶ 35, 37. As a result, Newsome ceased her advocacy. *Id.* ¶ 36.

During the 2008–2009 school year, Moore authorized a non-disabled student to assist with Newsome's special education class (the "student aide"). *Id.* ¶¶ 41–42. On or about April 2, 2009, J.W. left his classroom to use the restroom. *Id.* ¶ 42. A teacher noticed J.W.'s absence from his classroom and went looking for him. *Id.* ¶ 43. Upon entering the restroom, the teacher heard shuffling from one of the stalls and discovered the student aide alone with J.W. in the stall. *Id.* ¶ 43. J.W. appeared disheveled and frightened, and his shirt was untucked. *Id.* ¶ 44. On April 6, 2009, J.W. disclosed that the student aide had sexually assaulted him in the restroom. *Id.* ¶ 45.

Newsome and J.W.'s mother reported J.W.'s accusations of sexual assault to Moore and Croom, both orally and in writing. *Id.* ¶ 46. Newsome and J.W.'s mother also presented Moore and Croom with a professional, written opinion that forensic evidence corroborated J.W.'s sexual-abuse accusation. *Id.* ¶ 47. Moore assured Newsome and J.W.'s mother that she would report the incident and investigate the accusations against the student aide. *Id.* ¶ 48. Newsome repeatedly asked Moore and Croom for an update on the report and investigation. *Id.* ¶ 49. Moore and Croom misled Newsome into believing that they had filed a report and initiated an investigation. *Id.* ¶ 50. Moore instructed Newsome and J.W.'s mother to not report the incident. *Id.* ¶ 51. Moore and Croom did not report the incident or investigate the accusations. *Id.* ¶¶ 50, 53, 56.

Despite knowing about the incident, Moore and Croom continued to permit the student aide to work with intensive-needs students. *Id* . ¶¶ 54–55, 57. Newsome reported to Moore and Croom that teachers continued to find the student aide alone with intensive-needs students in the hallway and restrooms. *See id.* ¶ 60. Moreover, the student aide's return to the special education classroom caused J.W. emotional and psychological trauma that forced J.W. to miss several days of school and seek professional treatment. *Id.* ¶¶ 58–59.[1] In addition, Newsome informed Moore and Croom that another intensive-needs student accused the student aide of sexual assault and was suffering emotional and psychological trauma. *Id.* ¶¶ 61–62. Moore and Croom still did not intervene. *Id.* ¶¶ 60–61, 63. Rather, Moore and Croom gave the student aide an award for the student's volunteer work with the intensive-needs students. *Id.* ¶ 64.

***3** Newsome continued to report the accusations made by the intensive-needs students. *Id.* ¶ 65. Moore threatened to fire Newsome if she continued to report the accusations and to inquire about an investigation into J.W.'s accusations. *Id.* Newsome did not relent. *Id.* ¶ 66. As a result of Newsome's persistence and her earlier advocacy about the teacher-student ratio, Moore informed Newsome that Moore would recommend to the Board that it not renew Newsome's contract. *Id.* ¶ 67. The Board routinely adopted Moore's employment recommendations. *Id.* ¶¶ 68–69. Moore then threatened Newsome that if she did not resign voluntarily, she would never again teach intensive-needs students in North Carolina public schools. *Id.* ¶ 70.

Because of Moore's threats, Newsome initially did not ask the Board to renew her contract. *Id.* ¶ 71. Newsome changed her mind, however, and rescinded her resignation letter and notified Croom that she wanted to renew her contract and seek tenure. *Id.* ¶ 72. Croom refused to submit Newsome's contract to the Board for renewal. *Id.* ¶ 73. The Board, aware of Croom's decision and the reasons for it, approved Croom's decision to not renew Newsome's contract. *Id.* ¶ 74.

II.

On December 7, 2011, J.W., by and through his parent and guardian, and Newsome initiated this action against Croom and Moore, both in their individual and official capacities, and the Board. *See* Compl. [D.E. 1]. On February 6, 2012, defendants answered the complaint [D.E. 16] and moved to dismiss portions of the complaint [D.E. 14–15]. On March 1, 2012, plaintiffs filed an amended complaint. *See* Am. Compl.

In the amended complaint, plaintiffs assert the following claims:

(1) Moore and Croom, acting in their individual capacities, and the Board conspired to create a hostile educational environment for and discriminate against J.W. based on his gender and disability, in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq., Section 504 of the Rehabilitation Act of 1973 ("Section

504"), 29 U.S.C. § 794, Title DC of the Education Amendment of 1972 ("Title DC"), 20 U.S.C. §§ 16811688, and the Fourteenth Amendment of the United States Constitution. *See id.* ¶¶ 78–91.

(2) Moore and Croom, acting in their individual capacities, and the Board conspired to conceal evidence of J.W.'s sexual abuse because of his gender and disability, when they would not have done the same for a non-disabled child, in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 19 of Article I of the North Carolina Constitution. *See id.* ¶¶ 92–98.

(3) Moore and Croom, acting in their individual capacities, and the Board retaliated against Newsome for attempting to enforce the rights of the intensive-needs students, in violation of the ADA, Section 504, Title DC, the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400–1482, and the Fourteenth Amendment. *See id.* ¶¶ 99–108: *see also id.* ¶ 91.

***4** (4) Moore and Croom, acting in their individual capacities, and the Board retaliated against Newsome for voicing her concerns about the School's treatment of the intensive-needs students, in violation of the First Amendment. *See id.* ¶¶ 109–17.

(5) Moore and Croom, acting in their individual capacities, and the Board are liable as supervisors for being "deliberately indifferent to the constitutional rights of ... disabled children at [the School]" by failing to prevent the student aide from sexually assaulting intensive-needs students. *See id.* ¶¶ 118–25.

(6) Moore and Croom, acting in their individual capacities, and the Board, based on the conduct of its employees while acting within the scope of their employment, attempted to obstruct public justice in connection with the student aide's sexual assaults of intensive-needs students. *See id.* ¶¶ 126–30.

(7) Moore and Croom, acting in their individual capacities, and the Board, based on the conduct of its employees while acting within the scope of their employment, intended to cause, or were recklessly indifferent to causing, plaintiffs severe emotional distress. *See id.* ¶¶ 131–37.

(8) Moore and Croom, acting in their individual capacities, and the Board, based on the conduct of its employees while acting within the scope of their employment, breached a fiduciary duty to Newsome and J.W. *See id.* ¶¶ 138–46.

(9) The Board wrongfully discharged Newsome. *See id.* ¶¶ 147–53.

(10) Moore and Croom, acting in their individual capacities, and the Board were negligent in under-staffing the special education classroom, permitting a student aide to abuse the intensive-needs students, and not reporting the sexual abuse. *See id.* ¶¶ 154–59.

(11) Moore and Croom, acting in their individual capacities, and the Board, based on the conduct of its employees while acting within the scope of their employment, negligently caused plaintiffs severe emotional distress. *See id.* ¶¶ 160–63.

(12) The Board failed to adequately supervise subordinates. *See id.* ¶¶ 164–67.

(13) The Board, based on the conduct of its employees while acting within the scope of their employment, failed to protect J.W. from sexual assault and retaliated against Newsome for enforcement of J.W.'s federal rights, in violation of rights guaranteed by the North Carolina Constitution. *See id.* ¶ ¶ 168–73.

In total, plaintiffs assert five federal claims and seven state-law claims.

On March 15, 2012, defendants answered the amended complaint [D.E. 20] and moved to dismiss portions of the amended complaint under Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6) of the Federal Rules of Civil Procedure [D.E. 18–19]. On April 10, 2012, plaintiffs moved to appoint a guardian ad litem for J.W. [D.E. 21]. On April 11, 2012, plaintiffs responded in opposition to defendants' motion to dismiss [D.E. 22]. On April 26, 2012, defendants replied [D.E.]. On June 18, 2012, the court granted plaintiffs' motion to appoint a guardian ad litem [D.E. 24].

III.

***5** Defendants seek dismissal of several of plaintiffs' claims based on Rule 12(b)(6) of the Federal Rules of Civil Procedure for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6); *see* Defs.' Mot Dismiss 1. In analyzing a motion to dismiss under Rule 12(b)(6), a court must determine whether the complaint is legally and factually sufficient. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678–79 (2009); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555–

56 (2007); *Coleman v. Md. Ct. of Appeals,* 626 F.3d 187, 190 (4th Cir.2010), *aff'd,* 132 S.Ct. 1327 (2012); *Giarratano v. Johnson,* 521 F.3d 298, 302 (4th Cir.2008); *Goodman v. Praxair, Inc.,* 494 F.3d 458, 464 (4th Cir.2007) (en banc). A court need not accept a complaint's "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,* 591 F.3d 250, 255 (4th Cir.2009); *see Iqbal,* 556 U.S. at 678–79. Similarly, a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Giarratano,* 521 F.3d at 302 (quotation omitted); *see Iqbal,* 556 U.S. at 678–79.

Defendants also seek dismissal of all of plaintiffs' state-law claims based on governmental immunity. *See* Defs.' Mot. Dismiss 2. Although the governmental immunity defense presents a question of jurisdiction, North Carolina courts have yet to resolve whether governmental immunity challenges personal jurisdiction or subject-matter jurisdiction. *See Frye v. Brunswick Cnty. Bd. of Educ.,* 612 F.Supp.2d 694, 700–01 (E.D.N.C.2009) (cataloging cases); *M Series Rebuild, LLC v. Town of Mount Pleasant,* 730 S.E .2d 254, 257 & n. 1 (N.C.Ct.App.2012) ("[W]hether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina."). Because defendants seek dismissal under both Rule 12(b)(1) and Rule 12(b)(2), the court analyzes the motion under both governing standards. *See Frye,* 612 F.Supp.2d at 701.

Under Rule 12(b)(1), the plaintiff has the burden of proving subject-matter jurisdiction. *Richmond, Fredericksburg & Potomac R .R. v. United States,* 945 F.2d 765, 768 (4th Cir.1991). A court may "regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Evans v. B.F. Perkins Co.,* 166 F.3d 642, 647 (4th Cir.1999) (quotation omitted). A district court should grant a Rule 12(b)(1) motion to dismiss "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* (quotation omitted). The pleadings are construed in the light most favorable to the nonmoving party. *See, e.g., Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir.1982).

Under Rule 12(b)(2), the plaintiff must prove by a preponderance of the evidence that the court can exercise personal jurisdiction. *See Combs v. Bakker,* 886 F.2d 673, 676 (4th Cir.1989). But when the court rules on a Rule 12(b)(2) motion without an evidentiary hearing, the plaintiff need only establish a prima facie case. *Id.* When determining whether the plaintiff has met this burden, courts resolve all factual disputes and draw all reasonable inferences in the light most favorable to the plaintiff. *Id.; see Mylan Labs., Inc. v. Akzo, N.V.,* 2 F.3d 56, 60 (4th Cir.1993).

A.

***6** Defendants seek to dismiss the claims made on behalf of J.W. because "his parent and guardian" has not been appointed to represent J.W. in this action. *See* Defs.' Mem. Supp. Mot. Dismiss 7–8. State law determines an individual's capacity to sue. *See* Fed.R.Civ.P. 17(b). J.W. is a minor, *see* Am. Compl. ¶ 1, and minors lack the capacity to sue in North Carolina. *See* N.C. R. Civ. P. 17(b). Although a parent may initiate an action in North Carolina on behalf of a minor, the parent can do so only with court approval. *See, e.g., Genesco, Inc. v. Cone Mills Corp.,* 604 F.2d 281, 28586 (4th Cir.1979).

On June 18, 2012, the court appointed Jenny Wiggins as J.W.'s guardian ad litem [D.E. 24]. Having been duly appointed, Jenny Wiggins may proceed with J.W.'s claims against defendants on J.W.'s behalf. Thus, the motion to dismiss the claims made on behalf of J.W. is denied.

B.

In claims one and three, J.W. and Newsome allege violations of the ADA, Section 504, Title DC, the IDEA,[2] and the Fourteenth Amendment. *See* Am. Compl. ¶¶ 78–91, 99–108. Defendants seek dismissal of several parts of claims one and three. *See* Defs.' Mem. Supp. Mot. Dismiss 8–11.

First, defendants argue that Moore and Croom cannot be liable under the ADA, Section 504, Title DC, and the IDEA because these statutes do not create individual liability. *See* Defs.' Mem. Supp. Mot. Dismiss 8–9. Defendants are correct *See, e.g., Baird ex rel. Baird v. Rose,* 192 F.3d 462, 472 (4th Cir.1999) ("[T]he ADA does not permit an action against individual defendants for retaliation...."); *Lucas v. Henrico Cnty. Sch. Bd.,* 822 F.Supp.2d 589, 613 (E.D.Va.2011) (ADA and Section 504); *B.I. v. Montgomery Cnty. Bd. of Educ.,* 750 F.Supp.2d 1280, 1283 (M.D.Ala .2010) (IDEA); *D.A. v. Hous. Indep. Sch. Dist.,* 716 F.Supp.2d 603, 611 (S.D.Tex.2009) (IDEA, ADA, and Section 504); *Bracey v. Buchanan,* 55 F.Supp.2d 416, 419 (E.D.Va.1999) (Title IX). Accordingly, the court dismisses claims one and three to the extent the

claims purport to seek relief from Moore and Croom in their individual capacities.

Second, defendants argue that the applicable statute of limitations bars plaintiffs' claims under the ADA and Section 504. *See* Defs.' Mem. Supp. Mot. Dismiss 9–11. Because Congress has not adopted a specific statute of limitations for actions under the ADA and Section 504, the analogous state statute of limitations applies. *See A Soc'y Without a Name v. Virginia,* 655 F.3d 342, 347–48 (4th Cir.2011), *cert. denied,* 132 S. Ct 1960 (2012); *McCullough v. Branch Banking & Trust Co.,* 35 F.3d 127, 129 (4th Cir.1994); *Wolsky v. Med. Coll. of Hampton Rds.,* 1 F.3d 222, 223 (4th Cir.1993). North Carolina's most analogous statute to the ADA and Section 504 is the Persons with Disabilities Protection Act ("PDPA"), N.C. Gen. Stat ch. 168 A. *See McCullough,* 35 F.3d at 130, 132; *Green v. Café,* No. 4:04–CV–111–H(2), 2008 WL 7871053, at *5 (E.D.N.C. Nov. 5, 2008) (unpublished); *Stroud v. Harrison,* 131 N.C.App. 480, 486, 508 S.E.2d 527, 530 (1998). The PDPA provides a two-year statute of limitations for non-employment-related claims. *See* N.C. Gen. Stat § 168A–12. Accordingly, "[c]laims brought pursuant to Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act are both subject to the two-year statute of limitations set forth in North Carolina's Persons with Disabilities Protection Act" *Green,* 2008 WL 7871053, at *5.

***7** Although the limitations periods for claims brought under the ADA and Section 504 are borrowed from state law, the time for accrual of an action is a matter of federal law. *See A Soc'y Without a Name,* 655 F.3d at 348; *Cox v. Stanton,* 529 F.2d 47, 50 (4th Cir.1975). A claim accrues when the plaintiff knows or has reason to know of the injury forming the basis of an action. *See A Soc'y Without a Name,* 655 F.3d at 348; *Cox,* 529 F.2d at 50.

Plaintiffs contend that the court cannot address the statute of limitations issue before discovery. *See* Pls.' Mem. Opp'n Mot. Dismiss 13. "Where facts sufficient to rule on an affirmative defense—including the defense that the plaintiff's claim is time-barred—are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6)." *Pressley v. Tupperware Long Term Disability Plan,* 553 F.3d 334, 336 (4th Cir.2009) (quotations and alteration omitted); *see Goodman,* 494 F.3d at 464. Here, the factual allegations in the amended complaint establish that the incidents, and the accompanying injuries, occurred during the 2008–2009 school year. Moreover, the amended complaint makes clear that plaintiffs were aware of the incidents and injuries at the time they occurred. Given that the 2008–2009 school year ended in June 2009, *see* Am. Compl. ¶ 68, plaintiffs' claims under the ADA and Section 504 accrued not later than June 2009. Plaintiffs filed their original complaint on December 7, 2011, five months after the two-year statute of limitations had expired.

Nonetheless, plaintiffs argue that the statute of limitations does not bar J.W.'s claims because J.W. is a minor. *See* Pls.' Mem. Opp'n Mot. Dismiss 12–13. "When a state statute [of limitations] is borrowed, as here, the federal court will also borrow the state rules on tolling." *Shook ex rel Shook v. Gaston Cnty. Bd. of Educ.,* 882 F.2d 119, 121 (4th Cir.1989); *see Bd. of Regents v. Tomanio,* 446 U.S. 478, 483 (1980).[3] North Carolina has a special tolling provision that preserves actions until an individual is no longer a minor. *See* N.C. Gen.Stat. § 1–17(a); *Genesco,* 604 F.2d at 284. "The North Carolina courts, however, have developed an exception to this statute when the infant is represented by a guardian." *Genesco,* 604 F.2d at 284; *see Rowland v. Beauchamp,* 253 N.C. 231, 234–35, 116 S.E.2d 720, 722–23 (1960); *Johnson v. Pilot Life Ins. Co.,* 7 S.E.2d 475, 477–78 (N.C.1940). Thus, "the North Carolina statute of limitations runs against an infant when he has a legal guardian who is charged with the duty of bringing suit on his behalf." *Genesco,* 604 F.2d at 286. Accordingly, the applicable statute of limitations for J.W.'s claims began to run on June 18, 2012, the day the court appointed Jenny Wiggins to serve as his guardian ad litem. Thus, J.W.'s claims under the ADA and Section 504 are not time barred. *See Genesco,* 604 F.2d at 286. On the other hand, Newsome's claims under the ADA and Section 504 are time barred.

***8** In sum, the court dismisses claims one and three to the extent the claims seek to hold Moore and Croom liable in their individual capacities, and to the extent Newsome seeks relief under the ADA and Section 504. J.W. can proceed with his claims under the ADA, Section 504, Title DC, and the Fourteenth Amendment against the Board.[4] Newsome can proceed with her claims under Title IX, the IDEA,[5] and the Fourteenth Amendment against the Board.

C.

In claim two, J.W. alleges that Moore and Croom, acting in their individual capacities, and the Board conspired to conceal

evidence of J.W.'s sexual abuse because of his gender and disability, and thereby denied him equal protection under the law as guaranteed by the Equal Protection Clause of the Fourteenth Amendment and Article I, Section 19 of the North Carolina Constitution. *See* Am. Compl. ¶¶ 92–98. To state an equal protection claim, a plaintiff must allege "that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty,* 239 F.3d 648, 654 (4th Cir.2001); *see Williams v. Hansen,* 326 F.3d 569, 576 (4th Cir.2003). "[T]he Equal Protection Clause of Article I, [Section] 19 of the Constitution of North Carolina is functionally equivalent to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States." *White v. Pate,* 308 N.C. 759, 765, 304 S.E.2d 199, 203 (1983): *see Wang v. UNC–CH Sch. of Med.,* 716 S.E.2d 646, 656 n. 5 (N.C.Ct.App.2011). Accordingly, to state an equal protection claim under Article I, Section 19 of the North Carolina Constitution, plaintiffs must make the same factual allegations. *See, e.g., Bacon v. Lee,* 353 N.C. 696, 719–20, 549 S.E.2d 840, 856 (2001) (similarly situated); *Wang,* 716 S.E.2d at 658–59 (similarly situated); *Clayton v. Branson,* 170 N.C.App. 438, 457–58, 613 S.E.2d 259, 272–73 (2005) (similarly situated); *In re Battle,* 166 N.C.App. 240, 245, 601 S.E.2d 253, 255–56 (2004) (intentional or purposeful discrimination and similarly situated).

Plaintiffs allege that because of J.W.'s gender and disability, Moore and Groom conspired to conceal evidence of the student aide's abuse of J.W., and that Moore and Croom would have reported and investigated the allegations of abuse if the student aid had abused a non-disabled student. Am. Compl. ¶¶ 94–95. Defendants respond that plaintiffs have failed to plausibly allege that defendants treated J.W. differently than others similarly situated or that any unequal treatment was because of intentional discrimination. *See* Defs.' Mem. Supp. Mot. Dismiss 11–14.

To survive the motion to dismiss for failure to state a claim, plaintiffs must allege facts sufficient to establish a plausible basis for believing that defendants impermissibly discriminated against J.W. *See, e.g., Coleman,* 626 F.3d at 190–91; *Francis v.. Giacomelli,* 588 F.3d 186, 195–96 (4th Cir.2009); *Giarratano,* 521 F.3d at 302–04. To plausibly allege an equal protection violation, plaintiffs cannot rely on a conclusory allegation that defendants treated J.W. differently than persons similarly situated. Rather, they must allege facts sufficient to identify actual persons who were similarly situated but treated differently. *See, e.g., Harron v. Town of Franklin,* 660 F.3d 531, 537 (1st Cir.2011) ("At a minimum, in order to provide fair notice to the defendants and state facially plausible legal claims, Harron had to identify his putative comparators...." (quotations, citations, and alterations omitted)); *Kan. Penn Gaming, LLC v. Collins,* 656 F.3d 1210, 1219–20 (10th Cir.2011) (affirming dismissal of equal protection claims for failure to set out specific examples of similarly situated individuals and differing treatment); *Ruston v. Town Bd. for Town of Skaneateles,* 610 F.3d 55, 59 (2d Cir.2010) (affirming dismissal of equal protection claim when plaintiff failed to "allege specific examples" of persons similarly situated but treated differently); *Francis,* 588 F.3d at 195–96 (affirming dismissal of racial discrimination claim when plaintiffs alleged only that plaintiffs were black, defendants were white, and defendants have never engaged in similar conduct against white employees).

***9** The amended complaint fails to allege facts identifying similarly situated persons who defendants treated differently than J.W. Rather, plaintiffs allege merely that "[u]nder circumstances in which a non-disabled child was subjected to the same or similar abuse, [defendants] *would have* investigated, secured the evidence, and reported the abuse to law enforcement [.]" Am. Compl. ¶ 95 (emphasis added). Such allegations—which do not rise above speculation—fail to establish a plausible basis for believing defendants treated J.W. differently than persons similarly situated. *See, e.g., Coleman,* 626 F.3d at 191; *Francis,* 588 F.3d at 195–96. Thus, plaintiffs failed to state an equal protection claim.

In addition, plaintiffs' claim of gender discrimination fails because the amended complaint lacks factual allegations showing that it was plausible that Moore and Croom intentionally discriminated against J.W. because he was a male. The only suggestion in the amended complaint that Moore and Croom discriminated against J.W. due to his gender is plaintiffs' conclusory accusation that they did so. *See* Am. Compl. ¶ 94. Such a "bare assertion[ ] devoid of further factual enhancement" is insufficient to state a claim. *Nemet Chevrolet,* 591 F.3d at 255; *see Iqbal,* 556 U.S. at 678; *Kan. Penn Gamine,* 656 F.3d at 1219.

In sum, plaintiffs have failed to allege sufficient facts to state a claim under either the Equal Protection Clause of the Fourteenth Amendment or Article I, Section 19 of the North Carolina Constitution. Thus, the court dismisses claim two.

D.

Plaintiffs allege various state-law claims. *See* Am. Compl. ¶¶ 126–67. In claims six, seven, eight, ten, and eleven, plaintiffs allege state-law claims against Moore and Croom, in their individual capacities, and the Board. *See id.* ¶¶ 126–46, 154–63. In claims nine and twelve, plaintiffs allege state-law claims against only the Board. *See id.* ¶¶ 147–53, 164–67. Defendants argue that governmental immunity bars plaintiffs' state-law claims against the Board. *See* Defs.' Mem. Supp. Mot. Dismiss 14–21.

In North Carolina, "[a] county or city board of education is a governmental agency, and therefore may not be liable in a tort action except insofar as it has duly waived its immunity ... pursuant to statutory authority." *Overcash v. Statesville City Bd. of Educ.,* 83 N.C.App. 21, 22–23, 348 S.E.2d 524, 526 (1986) (collecting cases); *see Hallman v. Charlotte–Mecklenburg Bd. of Educ.,* 124 N.C.App. 435, 437, 477 S.E.2d 179, 180 (1996). North Carolina courts strictly construe statutes authorizing waiver of governmental immunity. *See, e.g., Hallman,* 124 N.C.App. at 438, 477 S.E.2d at 181. North Carolina General Statute section 115C–42 sets forth how a local board of education may waive its immunity by purchasing liability insurance. N.C. Gen.Stat. § 115C–42. Purchasing liability insurance is the exclusive means for a board to waive immunity. *See id.* § 115C–42; *Lucas v. Swain Cnty. Bd. of Educ.,* 154 N.C.App. 357, 361, 573 S.E.2d 538, 541 (2002). Furthermore, a board waives its immunity only to the extent of its liability insurance coverage, and the insurance contract must be purchased from a North Carolina-licensed or otherwise qualified insurance company. *See* N.C. Gen.Stat. § 115C–42.

***10** Plaintiffs allege that the Board has purchased liability insurance in accordance with section 115C–42 and therefore "has waived its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of the Board when acting within the scope of his authority or within the course of the agent or employee's employment." Am. Compl. ¶ 3. Defendants respond that the Board does not have liability insurance, but rather participates in the North Carolina School Boards Trust ("NCSBT"). *See* Defs .' Mem. Supp. Mot. Dismiss 1617. In support, defendants attached to their motion to dismiss the affidavit of Art Stanley, the Board's Chief Financial Officer, stating that the Board has no liability coverage outside of its participation in the NCSBT. *See* Stanley Aff. [D.E. 18–2] ¶ 4. According to defendants, the Board's participation in the NCSBT is memorialized in a Coverage Agreement, which defendants attached to the motion to dismiss. *See* [D.E. 18–1] 4–23.[6] According to the Coverage Agreement, the NCSBT is obligated to pay for up to $150,000 in damages resulting from certain claims against the Board. *See id.* 7.

A board's participation in the NCSBT does not waive governmental immunity because the NCSBT does not qualify as liability insurance under section 115C–42. *See, e.g., Craig ex rel. Craig v. New Hanover Bd. of Educ.,* 185 N.C.App. 651, 653–54, 648 S.E.2d 923, 925 (2007), *rev'd on other grounds by* 363 N.C. 334, 678 S.E.2d 351 (2009); *Lail ex rel. Jestes v. Cleveland Cnty. Bd. of Educ.,* 183 N.C.App. 554, 560–61, 645 S.E.2d 180, 185 (2007); *Willett v. Chatham Cnty. Bd. of Educ.,* 176 N.C.App. 268, 269, 625 S.E.2d 900, 901–02 (2006); *Ripellino v. N.C. Sch. Bds. Ass'n,* 158 N.C.App. 423, 428–29, 581 S.E.2d 88, 92–93 (2003); *Lucas,* 154 N.C.App. at 361–62, 573 S.E.2d at 540–41. Accordingly, the Board's participation in the NCSBT does not waive governmental immunity.

Nevertheless, "[a] school board waives its governmental immunity when it procures excess liability insurance coverage through the [NCSBT] from a licensed commercial insurance carrier." *Jestes,* 183 N.C.App. at 561, 645 S.E.2d at 185; *see, e.g., Lucas,* 154 N .C.App. at 365, 573 S.E.2d at 543. The Board's Coverage Agreement with the NCSBT provides excess liability insurance coverage ("excess coverage"). *See* [D.E. 18–1] 7. The NCSBT secured excess coverage for the Board by entering into a Reinsurance Agreement with Selective Insurance Company of the Southeast ("Selective"). *See id.* 24–45. Pursuant to the Reinsurance Agreement, Selective promises to pay up to $850,000 to the Board for damages above $150,000. *See id.* 24–25, 40–41.

"When a school board waives its governmental immunity by securing excess insurance, such immunity is waived only to the extent that said board of education is covered by the [excess] insurance policy." *Jestes,* 183 N.C.App. at 561, 645 S.E.2d at 186; *see, e.g., Craig,* 185 N.C.App. at 654–55, 648 S.E.2d at 925–26; *Ripellino,* 158 N.C.App. at 428–29, 581 S.E.2d at 92–93; *see also* N.C. Gen.Stat. § 115C–42. Defendants argue that because the excess insurance excludes coverage for plaintiffs' state-law claims, the Board has not waived governmental immunity for the state-law claims. *See* Defs.' Mem. Supp. Mot. Dismiss 17–21. The Reinsurance Agreement states that the agreement "does [not] provide

protection for ... [a]ny 'Claim' to which coverage described in the 'Policy' does not apply." [D.E. 18–1] 25–26. Thus, under the Reinsurance Agreement, Selective does not provide coverage to the Board for legal claims that are not covered by the Board's Coverage Agreement with the NCSBT.[7]

***11** The Coverage Agreement enumerates several claims for which coverage does not apply. *See id.* 11–14. Exclusion 28 of the Coverage Agreement excluded claims "for intentional infliction of emotional distress or negligent infliction of emotional distress." *Id.* 14. Moreover, this exclusion explicitly states that the NCSBT "*nor any Excess Insurer* will have an obligation to pay damages" for claims of infliction of emotional distress. *Id.* (emphasis added). Accordingly, the Board does not have excess coverage for claims of intentional infliction of emotional distress and negligent infliction of emotional distress, and the Board has not waived governmental immunity for claims seven and eleven.

Under Exclusion 12, the Coverage Agreement also excludes from coverage claims "arising out of or in connection with, in whole or in part, ... dishonest, fraudulent, malicious, wanton, willful, intentional or criminal acts." *Id.* 12. Although Exclusion 12 then clarifies that coverage is afforded for claims "alleging negligent hiring, negligent training, negligent reporting, negligent investigation, negligent retention and/or negligent supervision arising out of or in connection with the conduct excluded under this exclusion," it also explicitly states that "Excess Insurance (if any) does not provide coverage in any amount for Claims to which this exclusion applies, including but not limited to claims for negligent hiring, negligent training, negligent reporting, negligent investigation, negligent retention and/or negligent supervision." *Id.* Accordingly, the Board does not have excess coverage for claims "arising out of or in connection with, in whole or in part, ... dishonest, fraudulent, malicious, wanton, willful, intentional or criminal acts," "including but not limited to claims for negligent hiring, negligent training, negligent reporting, negligent investigation, negligent retention and/or negligent supervision." *Id.*

Based on the explicit language of Exclusion 12, the Board does not have excess coverage for negligent supervision—i.e., plaintiffs' twelfth claim, *see* Am. Compl. ¶¶ 164–67—or for negligent hiring—i.e., the first part of plaintiffs' tenth claim, *see id.* ¶¶ 155, 158. In addition, based on Exclusion 12, the Board does not have excess coverage for obstruction of public justice—i.e., plaintiffs' sixth claim, *see id.* ¶¶ 126–30. Obstruction of justice is an intentional act. *See Blackburn v. Carbone,* 703 S.E.2d 788, 795 & n. 6 (N.C.Ct.App.2010) ("[A]ny action intentionally undertaken by the defendant for the purpose of obstructing, impeding, or hindering the plaintiff's ability to seek and obtain a legal remedy will suffice to support a claim for common law obstruction of justice."). Similarly, the Board does not have excess coverage for wrongful discharge—i.e., plaintiffs' ninth claim. *See* Am. Compl. ¶¶ 147–53. Wrongful discharge is an intentional act. *See, e.g., Garner v. Rentenbach Constructors Inc .,* 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999); *Kranz v. Hendrick Auto. Grp., Inc.,* 196 N.C.App. 160, 164, 674 S.E.2d 771,774 (2009).

***12** Pursuant to Exclusion 23, the Coverage Agreement also excludes from coverage claims

> arising out of or in connection with, in whole or in part, sexual acts, sexual molestation, sexual harassment, sexual assault, or sexual misconduct of any kind.... This exclusion includes allegations of negligent hiring, negligent supervision, negligent reporting, negligent investigation, negligent training and/or negligent retention of another person who is alleged to have engaged in sexual acts excluded herein.... This exclusion also includes allegations of a negligent act or failure to act in response to notice of wrongful conduct excluded herein.

[D.E. 18–1] 13. Accordingly, Exclusion23 precludes coverage for claims related to improper sexual conduct.[8] Thus, the Board does not have excess coverage for parts two and three of plaintiffs' tenth claim—negligence in supervising the student aide and reporting the accusations of sexual abuse, *see* Am. Compl. ¶¶ 156–58. These allegations relate to the student aide's improper sexual conduct. Likewise, the Board does not have excess coverage for plaintiffs' eighth claim for breach of fiduciary duty. In claim eight, plaintiffs allege that the Board (acting through its employees, Moore and Croom) breached its fiduciary duty to plaintiffs by misleading plaintiffs about reporting J.W.'s accusations of sexual abuse. *See id.* ¶ 142. Because plaintiffs' eighth claim "aris[es] out of" and is "in connection with" the student aide's improper sexual conduct, the Board does not have excess coverage for claim eight.

In sum, the Board's Coverage Agreement with the NCSBT is not liability coverage. Moreover, despite the Board having secured excess liability coverage, the excess coverage excludes plaintiffs' state-law claims. Accordingly, the Board

has not waived governmental immunity for claims six through twelve against the Board. Thus, the court dismisses these claims against the Board. Furthermore, to the extent plaintiffs allege state-law claims against Moore and Croom in their official capacities, Moore and Croom are immune to the same degree as the Board. *See, e.g., Mullis,* 347 N.C. at 554–55, 495 S.E.2d at 724–25.

E.

In claim six, plaintiffs allege that Moore and Croom, in their individual capacities, and the Board attempted to obstruct public justice in connection with the student aide's alleged sexual misconduct. *See* Am. Compl. ¶¶ 126–30. Defendants seek dismissal and argue that plaintiffs failed to state an obstruction of justice claim under North Carolina law. *See* Defs.' Mem. Supp. Mot. Dismiss 22–23.

"Obstruction of justice is a common law offense in North Carolina." *In re Kivett,* 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983). "[A]ny action intentionally undertaken by the defendant for the purpose of obstructing, impeding, or hindering the plaintiff's ability to seek and obtain a legal remedy will suffice to support a claim for common law obstruction of justice." *Blackburn.* 703 S.E.2d at 795; *see In re Kivett,* 309 N.C. at 670, 309 S.E.2d at 462.

***13** The amended complaint alleges that Moore and Croom offered assurances to Newsome and J.W.'s mother that Moore and Croom had reported the accusations and that an investigation was underway, but that Moore and Croom never actually filed a report or investigated the accusations. *See* Am. Compl. ¶¶ 48, 50, 53, 56. In addition, plaintiffs allege that Moore instructed Newsome and J.W.'s mother to not report the accusations, *id.* ¶ 51, and threatened to fire Newsome if she continued to inquire about an investigation into the accusations. *See id.* ¶ 65. Defendants respond that plaintiffs' amended complaint fails to state a claim for obstruction of public justice because plaintiffs do not allege that Moore or Croom destroyed evidence, prevented J.W.'s mother from reporting the accusations against the student aide, or otherwise impeded plaintiffs' attempt to seek legal redress. *See* Defs.' Mem. Supp. Mot. Dismiss 23.

"The common law offense of obstructing public justice may take a variety of forms." *In re Kivett,* 309 N.C. at 670, 309 S.E.2d at 462 (quotation omitted); *see, e.g., Henry v. Deen,* 310 N.C. 75, 88, 310 S.E.2d 326, 334–35 (1984) (deliberately destroying, altering, or falsifying medical documents); *In re Kivett,* 309 N.C. at 670, 309 S.E.2d at 462 (attempting to prevent convening of grand jury); *Burgess v. Busby,* 142 N.C.App. 393, 409, 544 S.E.2d 4, 13 (2001) (retaliation against jurors for verdict). Nevertheless, a claim for common law obstruction of public justice must allege conduct that interferes with "an official proceeding [that] is pending or about to be instituted." *State v. Eastman,* 113 N.C.App. 347, 353, 438 S.E.2d 460, 463 (1994) (quotation omitted); *see Broughton v. McClatchy Newspapers, Inc.,* 161 N.C.App. 20, 33, 588 S.E.2d 20, 30 (2003) ("[P]laintiff presented no evidence that her case ... was in some way judicially prevented, obstructed, impeded or hindered by the acts of defendants. There is no evidence as to the disposition of that action or any showing that [defendants' conduct] adversely impacted that case."); *see also McFadyen v. Duke Univ.,* 786 F.Supp.2d 887, 974–77 (M.D.N.C.2011); *State v. Wright,* 206 N.C.App. 239, 243–44, 696 S.E.2d 832, 835–36 (2010).

The amended complaint lacks any allegations that defendants' conduct interfered with a pending or potential official proceeding. Moreover, plaintiffs' timely initiation of this action precludes any inference that defendants' conduct interfered with plaintiffs' ability to seek justice in a court. Accordingly, plaintiffs have failed to allege a legally sufficient claim of obstruction of justice. Thus, the court dismisses claim six.

F.

In claim eight, plaintiffs allege that Moore and Croom, in their individual capacities, and the Board breached a fiduciary duty to both Newsome and J.W. *See* Am. Compl. ¶¶ 138–46. Defendants ask the court to dismiss claim eight because there is no fiduciary relationship between Newsome and defendants or between J.W. and defendants. *See* Defs.' Mem. Supp. Mot. Dismiss 23–25.

***14** "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp,* 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). A fiduciary relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory,* 160 S.E. 896, 906 (N.C.1931); *see, e.g., HAJMM Co. v. House of Raeford Farms, Inc.,* 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991). In particular, "domination and

influence ... [is] an essential component of any fiduciary relationship." *Dalton,* 353 N.C. at 652, 548 S.E.2d at 708 (quotation omitted); *see Abbitt,* 160 S.E. at 906; *see also Broussard v. Meineke Discount Muffler Shops, Inc.,* 155 F.3d 331, 348 (4th Cir.1998) ("Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the 'special circumstance' of a fiduciary relationship has arisen."). The existence of a fiduciary relationship often depends on the circumstances of each case. *HAJMM,* 328 N.C. at 588, 403 S.E.2d at 489. Nevertheless, North Carolina courts have refused to recognize fiduciary relationships in certain circumstances. *See, e.g., Dalton,* 353 N.C. at 651–52, 548 S.E.2d at 708 (no duty between employer and employee); *Strickland v. Lawrence,* 176 N.C.App. 656, 662–63, 627 S.E.2d 301, 305–06 (no duty between businesses negotiating at arms length); *Ryan v. Univ. of N.C. Hosps.,* 168 N.C.App. 729, 609 S.E.2d 498, 2005 WL 465554, at *4 (Mar. 1, 2005) (unpublished table decision) (no duty "between educator/supervisors and medical residents"); *Freese v. Smith,* 110 N.C.App. 28, 37, 428 S.E.2d 841, 847 (1993) ("As a general rule, shareholders do not owe a fiduciary duty to each other or to the corporation.").

North Carolina courts generally do not recognize fiduciary relationships between employers and employees. *Dalton,* 353 N.C. at 651–52, 548 S.E.2d at 708; *see, e.g., Speck v. N.C. Dairy Found ., Inc.,* 311 N.C. 679, 685–88, 319 S.E.2d 139, 143–45 (1984); *King v. Atl. Coast Line R.R.,* 72 S.E. 801, 808 (N.C.1911); *Shaver v. N.C. Monroe Constr. Co.,* 63 N.C.App. 605, 614, 306 S.E.2d 519, 525 (1983); *Hiatt v. Burlington Indus., Inc.,* 55 N.C.App. 523, 529, 286 S.E.2d 566, 569 (1982); *see also Breeden v. Richmond Cmty. Coll.,* 171 F.R.D. 189, 196 n. 6 (M.D.N.C.1997) (Defendant "did not violate a duty of the school to its teachers because the relationship does not impose such a fiduciary duty. Although [an influential Fourth Circuit case was] decided under Virginia law, there is no reason to think North Carolina law would call for a different result." (citation omitted)). Plaintiffs have not alleged any facts that suggest Newsome's employment relationship with defendants warrants an exception to this general rule. Accordingly, Newsome has not stated a claim for breach of fiduciary duty against the Board or Moore and Croom, in their individual capacities.

***15** Defendants also argue that the court should not recognize a fiduciary relationship between J.W. and defendants because no fiduciary relationship exists "in the academic setting." Defs.' Mem. Supp. Mot. Dismiss 24–25. In support, defendants rely on the North Carolina Court of Appeals' unpublished decision in *Ryan,* which rejected the existence of a fiduciary relationship between a medical student and his "educator/supervisors" at UNC Hospitals. *See* 2005 WL 465554, at *4. The *Ryan* court emphasized that in a hospital, educator/supervisors had "divided loyalties" between educating the medical residents and ensuring that patients receive quality care. *See id.* In addition, the *Ryan* court noted that "[o]ther jurisdictions have been reluctant to find fiduciary relationships in academic settings." *Id.* Defendants cite *Ryan* for the broad proposition that a fiduciary relationship cannot exist in any "academic setting." *See* Defs.' Mem. Supp. Mot. Dismiss 24.

In *Ryan,* the North Carolina Court of Appeals "decline[d] to extend the concept of fiduciary relationships to the facts of the present case"—a medical resident working in a teaching hospital. 2005 WL 465554, at *4. Although this court does not read *Ryan* as broadly as defendants read it,[9] plaintiffs have not cited any North Carolina appellate opinions holding that a fiduciary relationship exists in the middle school setting between a school board, school board superintendent, or principal, and a middle school student. Because this court is analyzing North Carolina law under its supplemental jurisdiction, this court may not expand North Carolina law to create a fiduciary duty between school boards, school superintendents, and principals and middle school students. *See Time Warner Entm't–Advance/Newhouse P'ship v. Carteret–Craven Elec. Membership Corp.,* 506 F.3d 304, 314 (4th Cir.2007) (federal court sitting in diversity and construing state law should not create or expand state public policy); *Broussard,* 155 F.3d at 348 ("[A]s a federal court exercising concurrent jurisdiction ... we are most unwilling to extend North Carolina tort law farther than any North Carolina court has been willing to go."). If North Carolina is to expand public policy in this way, the North Carolina legislature or the Supreme Court of North Carolina must do so. Accordingly, J.W. has failed to state a claim for breach of fiduciary duty against the Board or Moore and Groom, in their individual capacities. In sum, the court dismisses claim eight against all defendants to the extent it alleges a claim for breach of fiduciary duty on behalf of Newsome or J.W.

G.

In claim nine, plaintiffs allege that the Board wrongfully discharged Newsome. *See* Am. Compl. ¶¶ 147–53. Defendants ask the court to dismiss claim nine because

plaintiffs' allegations fail to state a wrongful-discharge claim. *See* Deft.' Mem. Supp. Mot. Dismiss 25–26.

"The tort of wrongful discharge arises only in the context of employment at will." *Claggett v. Wake Forest Univ.,* 126 N.C.App. 602, 611, 486 S.E.2d 443, 448 (1997); *see, e.g., Wagoner v. Elkin City Schs.' Bd. of Educ.,* 113 N.C.App. 579, 588, 440 S.E.2d 119, 125 (1994). Plaintiffs allege that the Board employed Newsome pursuant to a teaching contract of definite duration and that the Board elected not to renew her teaching contract. *See* Am. Compl. ¶¶ 71–74. Accordingly, Newsome is not an at-will employee, and plaintiffs have failed to state a claim for the tort of wrongful discharge. *See, e.g., Claggett,* 126 N.C.App. at 611, 486 S.E.2d at 448.

***16** Alternatively, Newsome was an untenured teacher. *See* Am. Compl. ¶¶ 23, 35, 37, 67. In North Carolina, a school board "may refuse to renew the contract of any probationary teacher or to reemploy any teacher who is not under contract for any cause it deems sufficient" N.C. Gen.Stat. § 115C–325(m)(2). To the extent the Board refused to renew Newsome's contract for "arbitrary, capricious, discriminatory or for personal or political reasons," *id.,* Newsome had the option to appeal the non-renewal, *see id.* § 115C–325(n), and Newsome's failure to appeal the Board's decision bars her wrongful-discharge claim. *See, e.g., Antonellis v. Cumberland Cnty. Schs.' Bd. of Educ.,* 206 N.C.App. 329, 698 S.E.2d 556, 2010 WL 3001993, at *4 (Aug. 3, 2010) (unpublished table decision); *Gattis v. Scotland Cnty. Bd. of Educ.,* 173 N.C.App. 638, 640, 622 S.E.2d 630, 631 (2005). Accordingly, the court dismisses claim nine.

H.

In claim twelve, plaintiffs allege that the Board negligently supervised Moore, Croom, and the student aide. *See* Am. Compl. ¶¶ 164–67. Although claim twelve's heading suggests that the claim is also against Moore and Croom in their individual capacities, plaintiffs do not actually allege that Moore and Croom negligently supervised any subordinates. Rather, plaintiffs' allegations pertain only to the Board's knowledge and negligent conduct. *See id.* Thus, plaintiffs have not stated a negligent-supervision claim against Moore and Croom in their individual capacities. Because the Board has not waived governmental immunity for claims of negligent supervision, the court dismisses claim twelve.

I.

In claim thirteen, plaintiffs allege that the Board deprived J.W. and Newsome of certain rights under the North Carolina Constitution. *See* Am. Compl. ¶¶ 168–73. Defendants respond that plaintiffs cannot seek relief under the North Carolina Constitution. *See* Defs.' Mem. Supp. Mot. Dismiss 28–29.

As for J.W.'s constitutional claim, plaintiffs allege that defendants deprived J.W. of his right to "an education free from harm and psychological abuse," in violation of N.C. Const. art. I, §§ 15, 19, and art. IX, § 1. Am. Compl. ¶ 169–70. However, "[n]o North Carolina appellate court has yet recognized a private right of action for damages under the North Carolina Constitution against a local board of education for the denial of the privilege of education." *Frye,* 612 F.Supp.2d at 707. In fact, in a case involving analogous facts, the North Carolina Court of Appeals recently refused to recognize a plaintiff's constitutional claim that she was deprived of an education free from harm and psychological abuse. *See Doe v. Charlotte–Mecklenburg Bd. of Educ.,* 731 S.E.2d 245, 252–54 (N.C.Ct.App.2012). It is not the role of a federal district court to recognize new rights under a state constitution. *See Frye,* 612 F.Supp.2d at 707; *see also Time Warner Entm't–Advance/Newhouse P'ship,* 506 F.3d at 314–15. Accordingly, the court dismisses J.W.'s constitutional claim in claim thirteen.

***17** As for Newsome's constitutional claim, plaintiffs allege that defendants deprived Newsome of her right to be free from retaliation for advocating for intensive-needs students' federal rights. *See* Am. Compl. ¶¶ 169–70. In essence, Newsome is asserting her right to free speech, which is expressly guaranteed by N.C. Const. art. I, § 14. *Id.* ("Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained ...."); *see Corum v. Univ. of N.C.,* 330 N.C. 761, 782, 413 S.E.2d 276, 289–90 (1992).

In order to pursue her claim under the North Carolina Constitution, Newsome must demonstrate the absence of adequate state remedies. *See Corum,* 330 N.C. at 782, 413 S.E.2d at 289. "An adequate state remedy exists if, assuming the plaintiffs claim is successful, the remedy would compensate the plaintiff for the same injury alleged in the direct constitutional claim." *Estate of Fennell ex rel. Fennell v. Stephenson,* 137 N.C.App. 430, 437, 528 S.E.2d 911, 915–16 (2000) (emphasis omitted), *reversed*

in part on other grounds, 354 N.C. 327, 554 S.E.2d 629 (2001); *see Craig,* 363 N.C. at 339–40, 678 S.E.2d at 355–56. Here, Newsome had the option of appealing the Board's decision not to renew her teaching contract, and her failure to timely appeal does not render the statutory remedy inadequate. *See Copper ex rel. Copper v. Denlinger,* 363 N.C. 784, 789, 688 S.E.2d 426, 429 (2010); *see also Alt v. Parker,* 112 N.C.App. 307, 317–18, 435 S.E.2d 773, 779 (1993) (holding that plaintiffs' state law claim, even though unsuccessful, and the available administrative grievance procedure were adequate state remedies). Moreover, even though governmental immunity bars Newsome's state-law claims against the Board from being adequate remedies, *see Craig,* 363 N.C. at 339–40, 678 S.E.2d at 355, Newsome's state-law claims against Moore and Croom in their individual capacities are adequate state remedies. *See, e.g., Johnson v. Causey,* 207 N.C.App. 748, 701 S.E.2d 404, 2010 WL 4288511, at *10 (Nov. 2, 2010) (unpublished table decision); *Glenn–Robinson v. Acker,* 140 N.C.App. 606, 632, 538 S.E.2d 601, 619 (2000); *see also Rousselo v. Starling,* 128 N.C.App. 439, 448, 495 S.E.2d 725, 731 (1998) ("*Corum* did not hold that there had to be a remedy against the State of North Carolina in order to foreclose a direct constitutional claim."). Furthermore, Newsome may still pursue claims for negligent infliction of emotional distress and intentional infliction of emotional distress against Moore and Croom in their individual capacities. If successful, these claims would compensate her for injuries caused by defendants' alleged retaliation. Accordingly, Newsome has adequate state remedies to compensate for her alleged constitutional injury, and cannot assert her constitutional claim. Thus, the court dismisses claim thirteen.

J.

Finally, plaintiffs seek punitive damages. *See* Am. Compl. ¶ C. The Board cannot be liable for punitive damages. *See N.C. Motorcoach Ass'n v. Guilford Cnty. Bd. of Educ.,* 315 F.Supp.2d 784, 810 (M.D.N.C.2004); *Ripellino,* 158 N.C.App. at 431, 581 S.E.2d at 94. Thus, the court dismisses the claim for punitive damages against the Board.

IV.

***18** In sum, the court DENIES defendants' partial motion to dismiss the complaint [D.E. 14] as moot, and GRANTS in part and DENIES in part defendants' partial motion to dismiss the amended complaint [D.E. 18].

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 4425439

Footnotes

1 After the 2008–2009 school year, J.W. enrolled in a school outside of Johnston County. *Id.* ¶ 59.

2 Newsome seeks relief under the IDEA, *see* Am. Compl. ¶ 102, but J.W. does not. *See id.* ff 78–91. Although the amended complaint alleges that the teacher-student ratio in the special education classroom violated the IDEA, *see id.* ¶¶ 17, 39, J.W. does not seek relief under the IDEA. Even if the court were to construe the amended complaint to include such a claim, the IDEA claim fails because J.W. failed to allege that he has exhausted available administrative remedies. *See* 20 U.S.C. § 1415(1); *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.,* 303 F.3d 523, 536 (4th Cir.2002); *McGraw v. Bd. of Educ. of Montgomery Cnty.,* 952 F.Supp. 248, 25455 (D.Md.1997); *cf. Scruggs v. Campbell,* 630 F.2d 237, 239 (4th Cir.1980).

3 In *Shook,* the Fourth Circuit recognized that federal courts have declined to borrow state tolling provisions when the provisions were "contrary to a federal policy that representatives of educationally handicapped children promptly assert the child's educational rights." 882 F.2d at 121 n. 2; *see Bishop v. Children's Ctr. for Dev. Enrichment,* 618 F.3d 533, 53738 (6th Cir.2010). The *Shook* court concluded, however, that North Carolina's tolling provision was not contrary to federal policy because "the exercise of a state tolling provision in favor of the child should not deter the parents from bringing a suit at an earlier time." 882 F.2d at 121 n. 2.

4 To the extent plaintiffs allege claims against Moore and Croom in their official capacities, such claims duplicate plaintiffs' claims against the Board. *See, e.g., Mullis v. Sechrest,* 347 N.C. 548, 55455, 495 S.E.2d 721, 725 (1998); *Meyer v. Walls,* 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997). "[A] suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent." *Meyer,* 347 N.C. at 110, 489 S.E.2d at

887. Plaintiffs consent to dismissing their claims against Moore and Croom in their official capacities. *See* Pls. Mem. Opp'n Mot. Dismiss 17 n. 2. Thus, the court dismisses plaintiffs' claims against Moore and Croom in their official capacities.

5 In their reply brief, defendants contend that the IDEA does not create a cause of action for Newsome's retaliation claim. *See* Defs.' Reply Br. 2. Because defendants raised this argument for the first time in their reply, the court declines to consider it at this time. *See N.C. Alliance for Transp. Reform v. U.S. Dep't of Transp.,* 713 F.Supp.2d 491, 526–27 (M.D.N.C.2010).

6 Plaintiffs do not contest defendants' evidence regarding the Board's agreement with the NCSBT. Therefore, it is unnecessary to hold an evidentiary hearing or to otherwise postpone ruling on the issue of governmental immunity. *See Frye,* 612 F.Supp.2d at 701 n. 1.

7 The Reinsurance Agreement defines "Policies" as the "coverage agreements" that the NCSBT issued to its participating "Members." [D.E. 18–1] 34. A "Member" is a "school district ... that has agreed to participate in the [NCSBT's] errors and omissions/general liability fund." *Id.* 34. A schedule attached to the Reinsurance Agreement lists the Board as a "Member." *Id.* 40. A "Claim" is " '[l]itigation' in which damages are sought from the 'Member.' " *Id.* 33.

8 Exclusion 23 states "that this exclusion shall not apply to the extent coverage is provided under the Sexual Acts and Abuse Liability coverage provided under this Coverage Agreement." [D.E. 18–1] 13. The Coverage Agreement provides separate liability coverage of up to $250,000 for claims that fall under "Sexual Acts and Abuse Liability." *Id.* 7. The Sexual Acts and Abuse Liability coverage encompasses claims for "(1) negligent hiring, negligent supervision, negligent reporting, negligent investigation, negligent training and/or negligent retention of another person who is alleged to have engaged in sexual acts, sexual molestation, sexual harassment, sexual assault, sexual misconduct, improper relationship, or boundary violation *which resulted in Bodily Injury* ...; and/or (2) negligent acts or failure to act in response to notice of sexual acts, sexual molestation, sexual harassment, sexual assault, sexual misconduct, improper relationship or boundary violation *which resulted in Bodily Injury* ...." *Id.* 8 (emphasis added). "Bodily Injury" is defined as "physical injury, sickness, disease, including death resulting from any of these[,]" but does not include "emotional distress or any other type of mental injury or suffering" unless such emotional or mental suffering "arises out of that person's physical injury, sickness or disease." *Id.* 9. Plaintiffs do not allege any "Bodily Injury" in the amended complaint. Thus, the Sexual Acts and Abuse Liability coverage does not apply to plaintiffs' state-law claims.

9 The "other jurisdictions" cited in *Ryan* (South Carolina and Missouri) refused to recognize fiduciary relationships in the undergraduate and graduate academic settings. *See id.* (citing *Hendricks v. Clemson Univ.,* 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003) (undergraduate student); *Shapiro v. Butterfield,* 921 S.W.2d 649, 651 (Mo.Ct.App.1996) (graduate student)); *see also McFadyen,* 786 F.Supp.2d at 986–87 (no fiduciary relationship between university students and administrators).

ADDENDUM 2

228 N.C.App. 282
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Court of Appeals of North Carolina.

Catherine MACK, individually, and Jacatherine McLaughlin, a minor child, by and through her Guardian Ad Litem, Catherine Mack, Plaintiffs

v.

The BOARD OF EDUCATION OF the PUBLIC SCHOOLS OF ROBESON COUNTY, Defendant.

No. COA13–51.
|
July 2, 2013.

***1** Appeal by plaintiffs from orders entered 8 August 2012 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 8 May 2013.

Attorneys and Law Firms

Perry Perry & Perry, P.A., by Maria T. Singleton, for plaintiff-appellants.

Hogue Hill, LLP, by Wayne A. Bullard, for defendant-appellee.

Opinion

CALABRIA, Judge.

Catherine Mack ("Mack"), individually, and Jacatherine McLaughlin ("McLaughlin"), a minor child, by and through her guardian *ad litem,* Mack (collectively "plaintiffs"), appeal from the trial court's orders dismissing plaintiffs' claims based on common law negligence and granting summary judgment in favor of The Board of Education of the Public Schools of Robeson County ("defendant") as to plaintiffs' constitutional claim. We affirm.

I. Background

On 4 March 2009, McLaughlin was a freshman and Cierra James ("James") was a senior at Red Springs High School ("RSHS") in Red Springs, North Carolina. James approached McLaughlin and initiated a verbal altercation with her. James then physically attacked McLaughlin with a box cutter. During the altercation, McLaughlin sustained injuries to her face, neck and scalp. Although none of the school personnel were present when the fight began, Brian McDonald ("McDonald"), a teacher and coach at RSHS, heard the commotion and responded almost immediately.

Daniel Ryberg, the principal at RSHS ("Principal Ryberg"), conducted an investigation of the altercation. Principal Ryberg determined that McLaughlin had been sending notes to James prior to the incident. McLaughlin was suspended for 10 days and did not appeal her suspension. She attended RSHS on a half-day schedule for the remainder of the school year.

James was suspended for the remainder of the school year. She also pled guilty to simple assault and pled no contest to possession of a weapon on educational property. James was sentenced to thirty days in the custody of the Sheriff of Robeson County. That sentence was suspended and she was placed on supervised probation for twelve months.

Plaintiffs filed a complaint and then an amended complaint against defendant in Robeson County Superior Court. Plaintiffs alleged defendant's negligence caused McLaughlin's injuries that required treatment in excess of $10,000.00 for past and future medical expenses. Plaintiffs also alleged that defendant violated her right to the opportunity for an education free from psychological abuse and harm.

Defendant filed a motion to dismiss the common law negligence claim on the basis of sovereign immunity and a motion for summary judgment on plaintiffs' constitutional claim. After a hearing, the trial court entered orders granting both of defendant's motions on 8 August 2012. Plaintiffs appeal.[1]

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones,* 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal,* 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)). A defendant may establish their right to summary judgment by " '(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.' " *Draughon v. Harnett County Bd. of Educ.,* 158 N.C.App. 208, 212, 580 S.E.2d 732, 735 (2003) (quoting *James v. Clark,* 118 N.C.App. 178, 181, 454 S.E.2d 826, 828 (1995)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Jones,* 362 N.C. at 573, 669 S.E.2d at 576 (internal quotations and citation omitted).

III. Constitutional Claim

***2** Plaintiffs argue that the trial court erred by granting defendant's motion for summary judgment on plaintiffs' constitutional claim. We disagree.

Article I, Section 15 of the North Carolina Constitution states that "[t]he 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. In the instant case, plaintiffs contend that they had a cognizable claim under this constitutional provision based upon our Supreme Court's holding in *Craig v. New Hanover Cty. Bd. of Educ.,* 363 N.C. 334, 678 S.E.2d 351 (2009). In *Craig,* the Court held that a local school board does not have sovereign immunity against claims brought by students under the North Carolina Constitution. *Id.* at 342, 678 S.E.2d 351, 678 S.E.2d at 357. However, the Court did not hold that the plaintiff in that case necessarily had a viable constitutional claim. *See id.* at 340, 678 S.E.2d at 355 ("This holding does not predetermine the likelihood that plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case."). Instead, the *Craig* Court "simply declined to consider the substantive viability of the state constitutional claims that the plaintiff attempted to assert pursuant to N.C. Const. art. I, § 15." *Doe v. Charlotte–Mecklenburg Bd. of Educ.,* —— N.C.App. ——, ——, 731 S.E.2d 245, 250–51 (2012). As this Court has previously explained, the Court in *Craig*

> simply held ... that the existence of common law claims that were barred by the doctrine of sovereign or governmental immunity did not operate to bar the plaintiff from attempting to assert any constitutional claims that he might have otherwise had against the defendant while expressly declining to address the extent to which his constitutional claims had substantive merit. *Fothergill v. Jones Cty. Bd. of Educ.,* 841 F.Supp.2d 915, 918 (E.D.N.C.2012) (holding that "the court in Craig expressly declined to rule on the merits of that constitutional claim...."); *Collum v. Charlotte–Mecklenburg Bd. of Educ.,* 2010 WL 702462, *2, 2010 U.S. Dist. LEXIS 15824, *7 (W.D.N.C. Feb.23, 2010) (holding that the Supreme Court in *Craig* "simply stated that the plaintiff in that case was not precluded from asserting the state constitutional claim, without reaching the merits of that claim").

Id. at ——, 678 S.E.2d 351, 731 S.E.2d at 251. Thus, while *Craig* permits plaintiffs to attempt to raise a constitutional claim, this Court must make an independent determination of the merits of that claim. *See id.*

Plaintiffs' constitutional claim in the instant case is essentially identical to the claim considered by this Court in *Doe* . In that case, the plaintiff alleged that an employee of the defendant's school board made sexual advances on her and induced her to engage in various types of sexual activity. *Id.* at ——, 731 S.E.2d at 247. The plaintiff brought claims against the defendant for negligent hiring and negligent supervision and retention, as well as a claim for the violation of her right to a sound basic education under Article I, Section 15 of the North Carolina Constitution. *Id.* In assessing this claim, this Court examined the scope of this constitutional right pursuant to our Supreme Court's decision in *Leandro v. State,* 346 N.C. 336, 488 S.E.2d 249 (1997). *Id.* at ——, 488 S.E.2d 249, 731 S.E.2d at 252–53. Under *Leandro,* the right to a sound basic education includes the following:

> ***3** (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the

> student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

346 N.C. at 347, 488 S.E.2d at 255. The *Doe* Court specifically noted that no decisions by our Courts have extended the scope of the right in N.C. Const. art. I, § 15 "beyond matters that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system." —— N.C.App. at ——, 731 S.E.2d at 252–53. As a result, this Court concluded that "public school students [do not] have a state constitutional right to recover damages from local boards of education for injuries sustained as the result of a negligent failure to remain aware of and supervise the conduct of public school employees." *Id.* at ——, 731 S.E.2d at 253.

In the instant case, plaintiffs also alleged a violation of McLaughlin's constitutional rights under N.C. Const. art. I, § 15, claiming that the injuries she sustained denied her the "opportunity for an education free from psychological abuse and harm." Just as the *Doe* Court found that the plaintiff had no constitutional right to recover damages for injuries sustained as the result of a negligent failure to remain aware of and supervise the conduct of public school employees, we find no constitutional right for plaintiffs to recover from defendant for injuries sustained from a negligent failure to remain aware of and supervise the conduct of other public school students. Plaintiffs presented no evidence of any actions by defendant which impacted the "nature, extent, and quality of the educational opportunities made available to students in the public school system," and thus, plaintiffs' constitutional claim fails as a matter of law. *See id.* Accordingly, the trial court correctly granted defendant's motion for summary judgment. This argument is overruled.

IV. Conclusion

Thus, for the reasons set forth above, we hold that the trial court properly granted defendant's motion for summary judgment. Plaintiffs failed to forecast evidence of a cognizable constitutional claim arising under N.C. Const. art. I, § 15. The trial court's order is affirmed.

Affirmed.

Judges STEELMAN and McCULLOUGH concur.
Report per Rule 30(e).

All Citations

228 N.C.App. 282, 748 S.E.2d 774 (Table), 2013 WL 3379683

Footnotes

1 Although plaintiffs filed a notice of appeal from the trial court's orders granting defendant's motion to dismiss and motion for summary judgment, their argument on appeal is limited to the trial court's summary judgment order.

ADDENDUM 3

2008 WL 2468738
Only the Westlaw citation is currently available.
United States District Court,
W.D. North Carolina.

Randy L. THOMAS, Plaintiff,
v.
Ynez OLSHAUSEN, Mary Ellen McDonald, Peter Gorman, Charlotte–Mecklenburg Police Department, Charlotte–Mecklenburg, State of North Carolina, Defendants.

No. 3:07CV130–MU.
|
June 16, 2008.

Attorneys and Law Firms

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Thomas J. Ziko, N.C. Department of Justice, Raleigh, NC, for State of North Carolina.

ORDER

GRAHAM C. MULLEN, Senior District Judge.

***1 THIS MATTER** is before this Court upon the "Motions to Dismiss" (Documents # 5, # 9, and # 11) filed by Ynez Olshausen, Peter Gorman, Charlotte–Mecklenburg, and the State of North Carolina (collectively "Defendants"). In each of the three motions to dismiss, Defendants contend that Plaintiff Thomas' ("Mr.Thomas") claim should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. BACKGROUND

The facts of this case have been recited at length in the previous orders by this Court, and therefore will be addressed only briefly here.

This action is the fifth filed in this Court, all stemming from the same underlying claims. *See Thomas v. Charlotte Mecklenburg Schools et al,* 3:06–cv–00238; *Thomas v. Helms Mulliss Wicker PLLC et al,* 3:07–cv–00052; *Thomas v. Hammond et al,* 3:07–cv–00200; *Thomas v. Mullen,* 3:07–cv–00231. This particular action arises from the allegations contained in 3:06–cv–238 and 3:07–CV–52.

Mr. Thomas' son is a student at Elizabeth Traditional Elementary School ("Elizabeth Traditional"). Compl. at 6. Defendant Ynez Olshausen is the principal of Elizabeth Traditional. *Id.* Defendant Peter Gorman is the superintendent of the Charlotte–Mecklenburg Board of Education. Compl. at 18. In this action, Mr. Thomas seeks to assert claims against Defendants in their individual and official capacities under 42 U.S.C. § 1983.

Many of Mr. Thomas' allegations arise from an incident at the school that resulted in his arrest. Compl. at 8–11. Following a series of confrontations between Mr. Thomas and school personnel, the undersigned counsel for the Board sent a letter on behalf of the Board to Mr. Thomas directing him not to visit the school without either first making an appointment or the event of an emergency regarding his son. *See* Compl. at 10. On December 1, 2006, Mr. Thomas visited the school and was involved in a series of confrontations with school personnel and the CMPD school resource officer. Compl. at 10. Mr. Thomas was ultimately arrested by a CMPD school resource officer for trespassing. Compl. at 10.

Mr. Thomas is seeking relief under 42 U.S.C. § 1983 and "Title 18 U.S.C."

II. DISCUSSION

In considering a defendant's motion to dismiss, the court accepts the plaintiff's allegations as true, *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984), and construes the complaint in the plaintiff's favor, *Duke v. Cleland,* 5 F.3d 1399, 1402 (11th Cir.1993). To survive a motion to dismiss, a complaint need not contain "detailed factual allegations," but must " 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Bell Atl. Corp. v. Twombly,* 127 S.Ct. 1955, 1974 (2007)(quoting *Conley v. Gibson,* 355U.S. 41, 47 (1957)). Ultimately, the complaint is required to contain "only enough facts to state a claim to relief

that is plausible on its face," *id.* at 1974. A motion to dismiss should be granted if the complaint itself fails to allege the elements for a cause of action or facts sufficient to support such elements. *Bass v. E.I. DuPont de Nemours & Co.,* 324 F.3d 761, 765 (4th Cir.), *cert. denied,* 540 U.S. 940 (2003). Moreover, "allegations must be stated in terms that are neither vague nor conclusory." *Estate Constr. Co. V. Miller & Smith holding Co.,* 14 F.3d 213, 220 (4th Cir.1994).

***2** Here, Mr. Thomas seeks to assert claims under 42 U.S.C. § 1983 and "Title 18 U.S.C.," neither of which provides him with a cognizable claim.

A. Plaintiff's Claims under 42 U.S.C. § 1983

In order to prevail under § 1983, a plaintiff must show that 1) defendant deprived him of a right or rights secured by the laws or constitution of the United States; and 2) the person depriving him of those rights was doing so under color of state law. *Mathis v. Parks,* 741 F.Supp. 567, 570 (E.D.N.C.1990).

Here, Mr. Thomas claims that his constitutional rights have been violated because he has been ordered to make an appointment to visit the school. However, the Fourth Circuit has held that a parent's constitutional rights are not infringed when a school district bans that parent from school property. *See Lovern v. Edwards,* 190 F.3d 648 (4th Cir.1999).

In addition, the other claims against Defendants essentially amount to a claim for educational malpractice. Insofar as the claims seek to allege that Defendants denied Thomas or his son access to more challenging educational programs, the claims should be dismissed as there is no cognizable claim for educational malpractice under North Carolina law.

B. Plaintiff's Claims under Title 18 U.S.C.

Finally, Title 18 U.S.C. is not a valid basis for an action by this Court. Title 18 U.S.C. pertains to "Crimes and Criminal Procedure" and fails to create any applicable civil cause of action.

III. CONCLUSION

Plaintiff has failed to assert any cognizable claim before this Court. Both this Court and the Fourth Circuit have refused to recognize the rights Mr. Thomas claims were violated by the Defendants under 42 U.S.C. § 1983.

Further, Title 18 is a criminal code, not a civil code, and the sections cited by Plaintiff provide no basis for a civil claim

Accordingly, the Defendants' Motions to Dismiss are hereby GRANTED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 2468738