IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CHILD DOE, by his parents and next friends, JOHN and JANE DOE,	)	
Plaintiffs,	)	
-vs-	)	
WASHINGTON PUBLIC SCHOOLS; A. J. BREWER, Superintendent, in his official and individual capacities; and STUART McPHERSON, Principal and Athletic Director, Washington Middle School, in his official and individual capacities,	)	**CIV-18-271-F**
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

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Defendants, Independent School District No. 05 of McClain County, Oklahoma, a/k/a Washington Public Schools, ("District")[1], A.J. Brewer ("Brewer"), and Stuart McPherson ("McPherson"), hereby move for dismissal of Plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(1) as this Court lacks jurisdiction over the case as filed, and for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

INTRODUCTION

Plaintiffs, John and Jane Doe, bring this action as the parents and next friend of Child Doe, a 14-year-old male. Plaintiffs allege that on December 4, 2015, approximately two weeks after Child Doe began attending District's Middle School in the sixth grade, Child Doe was physically assaulted by a "large football player" referred to in the Complaint as "Student #1." [Doc. No. 1, Complaint, ¶¶ 30-33.] Plaintiffs allege the incident of December 4, 2015, was witnessed by an "athletic coach," [Doc. No. 1, ¶ 34], but they do not allege that any school administrator was informed of the incident.

Plaintiffs further claim that about two and one-half months later, on February 18, 2016, Child Doe was sexually assaulted during a class period by a "Student #2," who is also alleged to be a football player. [Doc. No. 1, ¶ 36.] Plaintiffs claim that Student #1 restrained Child Doe while Student #2 shoved his fingers in Child Doe's rectum, and a third football player "Student #3" stood by laughing. *Id.* According to Plaintiffs, the

[1]Defendant District is incorrectly named as Washington Public Schools in Plaintiffs' Complaint. Pursuant to Oklahoma law, the proper name under which the District is to be sued is "Independent School District No. 05 of McClain County, Oklahoma." *See* 70 O.S. § 5-105.

incident of February 18, 2016, was witnessed by 30 to 40 other students. Plaintiffs allege they reported the incident of February 18, 2016, to McPherson that day. [Doc. No. 1, ¶ 37.]

Plaintiffs allege that none of three students sent a letter of apology to the Doe family as allegedly promised by McPherson. [Doc. No. 1, ¶¶ 40, 42.] They allege, on information and belief, that Student #2 was suspended "for a short period of time" because of the incident of February 18, 2016, and that neither Student #1 nor Student #3 was disciplined. [Doc. No. 1, ¶¶ 43-44.]

Plaintiffs allege that for the remainder of his sixth-grade year, 2015-2016, Child Doe was "verbally harassed" "[n]early every day" for reasons related to the incident of February 18, 2016. [Doc. No. 1, ¶¶ 45-48.] They do not allege any further report to Brewer, McPherson or any other District administrator until May 10, 2016, when they say that McPherson was informed by John Doe that another student had told Child Doe that the three students who were involved in sexually assaulting Child Doe (presumably Students #1, #2, and #3, although not referred to as such in the Complaint) were going to "jump" and assault Child Doe. [Doc. No. 1, ¶¶ 48-49.] Plaintiffs do not allege that Child Doe was assaulted by the three students.[2]

Plaintiffs next allege that on June 20, 2016, Student #2 sent Child Doe a text message as follows: "F**k you, I am going to kill you." [Doc. No. 1, ¶ 50.] They allege that John Doe reported Student #2's text message to McPherson, and that John Doe

informed McPherson that Student Doe had been experiencing constant bullying. [Doc. No. 1, ¶ 51.] Plaintiffs allege that McPherson did not respond to the report of May 10, 2016, nor to the report of June 20, 2016.

Child Doe returned to school at the District for the 2016-2017 school year, in the seventh grade. [Doc. No. 1, ¶ 55.] Plaintiffs allege the harassment of Child Doe escalated. *Id.* Plaintiffs allege that in December of 2016 or January of 2017, while Child Doe was changing clothes in a locker room for basketball practice, Student #4 shoved his fingers in Child Doe's rectum. [Doc. No. 1, ¶ 56.] They claim that at the same time, Child Doe also witnessed another student being similarly assaulted by another student. [Doc. No. 1, ¶ 57.]

Plaintiffs also allege that some time in "early spring of 2017," Child Doe was sexually assaulted by Student #5 in another locker during baseball season. [Doc. No. 1, ¶ 58.] They allege that on or about April 21, 2017, Student #1 threatened to harm Child Doe for saying "good morning" to Student #1's girlfriend. [Doc. No. 1, ¶ 61.]

According to Plaintiffs, about five days later, on April 26, 2017, John Doe called Brewer and told him that Child Doe had been bullied from the time he started at the school [Doc. No. 1, ¶¶ 63-64.] Plaintiffs acknowledge that as of this date, Child Doe had not told his parents about the two locker room incidents alleged in paragraphs 56 and 58 of their Complaint. *Id.* They allege a subsequent telephone call with Brewer and McPherson on May 1, 2107. [Doc. No. 1, ¶¶ 65-67.]

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[2] Upon information, May 11, 2016, was the last day of the 2015-2016 school year at District.

During the telephone call of May 1, 2017, McPherson indicated he wanted to ask Child Doe more questions, and John Doe refused to allow McPherson to do so unless John Doe could be present. [Doc. No. 1, ¶ 67.] Plaintiff John Doe went to the school, and Child Doe was brought to Brewer's office to meet with his father, Brewer and McPherson. [Doc. No. 1, ¶¶ 68-69.] According to Plaintiffs, during the meeting John Doe and Child Doe shared various information, including the threat from Student #1, (apparently from April 21, 2017) [Doc. No. 1, ¶¶ 61,71], and that Child Doe was "frequently" bullied because of the sexual assault which had occurred in the music room during sixth grade. [Doc. No. 1, ¶72.]

During the meeting of May 1,2017, Child Doe told Brewer and McPherson of the two alleged locker room sexual assaults by Students #4 and #5 which Child Doe said had occurred, the first in December of 2016 or January of 2017, and another in "early spring" of 2017. [Doc. No. 1, ¶¶ 56-58, 74.] Plaintiffs allege that Brewer told Child Doe and his father that the locker room incidents would be investigated. [Doc. No. 1, ¶ 81.] Plaintiffs acknowledge being contacted by the District School Resource Officer who they understood was investigating the allegations. [Doc. No. 1, ¶¶ 82-83.] Plaintiffs allege that on May 9, 2017, Brewer informed them the allegations could not be verified, and that there was "nothing the school district could do." [Doc. No. 1, ¶ 84.]

Plaintiffs state that in May of 2017 they were contacted by the (Town of) Washington Police Department and asked to file a report about the "abuse," which Plaintiffs allege they did. [Doc. No. 1, ¶ 96.]

Plaintiffs allege they requested to hold Child Doe back to repeat the seventh-grade year, and that McPherson approved the request. [Doc. No. 1, ¶ 87.] Plaintiffs admit that Child Doe has not experienced a sexual assault during 2017-2018 school year. [Doc. No. 1, ¶ 89.] While Plaintiffs allege that Child Doe has continued to experience verbal harassment "with less frequency," [Doc. No. 1, ¶ 89], the Complaint is silent as to reports of bullying, harassment or sexual assault of Child Doe to Brewer, McPherson or any District administrator since May 1, 2017.

ARGUMENTS AND AUTHORITIES

Standard of Review

A motion pursuant to Rule 12(b)(6) assumes that the court is authorized to resolve the dispute and tests whether there is a legal dispute to resolve. The function of a Rule 12(b)(6) motion is to test the law of a claim, not the facts which support it. *Niece v. Sears, Roebuck and Company*, 293 F.Supp. 792, 794 (N.D. Okla. 1968).

In deciding a motion to dismiss for failure to state a claim, the allegations of the complaint must be viewed in the light most favorable to the plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). Pleadings that are no more than legal conclusions are not entitled to the assumption of truth; while legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 1950 (2009). A complaint need not contain detailed factual allegations; however, a plaintiff's obligation requires more than labels and conclusions, and a mere recitation of the elements of a cause of action will not be

sufficient. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct 1955, 167 L.Ed.2d 929 (2007). A plaintiff must allege sufficient facts to "nudge [ ] their claims across the line from conceivable to plausible." *Id.* at 570.

One of the purposes of the plausibility requirement is "to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success" and "to inform the defendants of the actual grounds of the claim against them." *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008). The "degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context" which ultimately depends on the type of case. *Robbins*, 519 F.3d at 1248.

Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Casteneda v. INS*, 23 F.3d 1576, 1580 (10th Cir.1994). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking". *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir.1974). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Id.*

PROPOSITION I: PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER 20 U.S.C. § 1681 *et seq.* (TITLE IX).

In the first cause of action of the Complaint (Count I), Plaintiffs allege that District violated Child Doe's rights under 20 U.S.C. § 1681 *et seq.*, also known as Title IX. [Doc.

No. 1, ¶¶ 105-125.] Specifically, Plaintiffs allege that District, through Brewer and McPherson, had actual knowledge of sexual assaults of Child Doe, that Brewer and McPherson had the authority to investigate and take corrective action to end or prevent sexual assaults and harassment, and that District, through Brewer and McPherson, were deliberately indifferent to the reports of sexual assault and harassment, as well as what Plaintiffs allege was a "sexually hostile education environment." *Id.*

Title IX provides that "[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). The law is clearly established that, under Title IX, a private cause of action for monetary damages may exist against a school district which is a recipient of federal funds in certain circumstances of teacher-on-student and student-on-student sexual harassment. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S. Ct. 1989, 1997, 141 L. Ed. 2d 277 (1998); *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ*., 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999).

In order to state a claim for relief under Title IX, Plaintiff must allege that District (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school. *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1246 (10th Cir. 1999), *citing*, *Davis Next Friend LaShonda D.*, 119 S. Ct. at 1671-72.

"In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not clearly unreasonable as a matter of law." *Davis Next Friend LaShonda D.*, 526 U.S. at 649. The facts as plead here do not rise to the level of deliberate indifference, and Plaintiffs have failed to state a claim for relief under Title IX.

A. Deliberate Indifference

A Title IX plaintiff must establish that the school district was deliberately indifferent to the alleged sexual harassment. To avoid liability, institutions subject to Title IX must respond to known sexual harassment in a manner that is not clearly unreasonable. *Davis Next Friend LaShonda D.*, 526 U.S. at 648. However, "courts should refrain from second guessing the disciplinary decisions made by school administrators." *Id*., citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342-343 n. 9, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

Deliberate indifference is a "stringent standard of fault" which requires more than a showing of simple or heightened negligence. Rather, a plaintiff must show that a defendant acted with "conscious disregard" for the plaintiff's rights. *Bd. Of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 407-410, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). Thus, even though a plaintiff may establish that a school district did not follow its own policy or that certain investigatory steps were not taken, such facts do not establish deliberate indifference, but merely negligence. *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1122 (10th Cir. 2008). Moreover, it is

not clearly unreasonable for a school district not to discipline persons accused of sexual harassment depending on the circumstances. *Id.* at 1123. No particular response is required, but the school district "must respond and must do so reasonably in light of the known circumstances." *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 260–61 (6th Cir. 2000) cited with approval by *J.M. ex rel. Morris v. Hilldale Indep. Sch. Dist. No. 1-29*, 397 F. App'x 445, 454 (10th Cir. 2010).

In *Rost*, supra, the plaintiff complained that the school district had not disciplined the male students involved in the alleged assaults. 511 F.3 at 1123. In response, the court stated that:

> Finally, it was not clearly unreasonable that the district did not discipline the boys involved. Ms. Rost seems to argue that the district should have expelled the four boys so that K.C. could return to school. However, the Supreme Court has noted that schools need not expel every student accused of sexual harassment to protect themselves from liability, and "victims of peer harassment [do not] have a Title IX right to make particular remedial demands." *Davis*, 526 U.S. at 648, 119 S.Ct. 1661. The standard is not that schools must "remedy" peer harassment, but that they "must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Id.* at 648–49, 119 S.Ct. 1661.

Id.

Even if a Title IX plaintiff does show deliberate indifference, a school district may not be liable in damages "unless its deliberate indifference 'subject[s]' its students to harassment." *Davis Next Friend LaShonda D.*, 526 U.S. at 630 (citations omitted). "That is, the deliberate indifference must, at a minimum, cause the student to undergo harassment or make them liable or vulnerable to it." *Simpson v. Univ. of Colorado*

Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007), *citing, Davis Next Friend LaShonda D.*, 526 U.S. at 644-45.

In one case wherein the Tenth Circuit considered the deliberate indifference standard, a school was found not deliberately indifferent when, immediately after the student reported sexual harassment by her professor, it transferred the student from the professor's class, accepted her grade from that point in time as a final grade, and ended its relationship with the professor at the end of the semester. *Escue v. N. OK Coll.*, 450 F.3d 1146, 1155 (10th Cir. 2006). These actions ended the harassment of the student by the professor and were not clearly unreasonable given the known circumstances. *Id.* at 1156.

As alleged here, between February 18, 2016, and May 1, 2017, Plaintiffs made four (4) reports to McPherson or Brewer that Child Doe had been sexual assaulted or threatened, as follows:

1. The February 18, 2016, report that Child Doe was sexually assaulted by Student #2 in the music room, while being restrained by Student #2, and that Student #3 stood by laughing. [Doc. No. 1, ¶¶ 36-44.];

2. That on or about May 10, 2016, John Doe informed McPherson that another student had told Child Doe that the three students who has sexually assaulted Child Doe (presumably referring to Students #1, #2 and #3) were going to "jump" Child Doe and beat him up. [Doc. No. 1, ¶ 48.];

3. That on or after June 20, 2016, John Doe informed McPherson that Student #2 had sent a threatening text message to Child Doe, and John Doe reported the threat to McPherson and informed McPherson that Child Doe had experienced constant bullying. [Doc. No. 1, ¶¶ 50-51.];

4. On May 1, 2017, following a telephone call of April 26, 2017, John Doe and Child Doe informed Brewer and McPherson that Child Doe had been sexually assaulted by Student #4 in a locker room in December of 2016 or in January of 2017, and in "early spring" of 2017 in another locker room by Student #5. [Doc. No. 1, ¶¶ 56-58, 68-78.]

Plaintiffs acknowledge there were no sexual assaults of Child Doe after the "early spring" 2017 locker room incident allegedly involving Student #5. Likewise, the Complaint contains no allegation of sexual assault, harassment or bullying of Child Doe after the report that he and John Doe made to Brewer and McPherson on May 1, 2017.

i. District's Response to the February 18, 2016 report.

Plaintiffs complain about McPherson's response to the report of February 18, 2016, about the fact that the Doe family did not receive a letter of apology from any of the three students, about the fact that Student #1 and Student #3 were not disciplined and the fact that Student #2 was only suspended for a "short period of time." [Doc. No. 1, Complaint, ¶¶ 39-44.]. There is nothing in the facts alleged here that reflect that District was "deliberately indifferent." Instead, Plaintiffs admit the report was investigated and Student #2 was disciplined. "Where a Title IX or equal-protection defendant responds to

reports of student-on-student sexual harassment, but simply does not do enough to stop the problem, the conduct is viewed as negligence, rather than deliberate indifference, and not actionable under Title IX." *Schaefer v. Las Cruces Public School Dist.*, 716 F. Supp. 2d 1052, 1069 (D. New Mexico 2010).

ii. <u>The Reports of May and June of 2016</u>.

Plaintiffs allege that about three months after the February 2016 report, on or about May 10, 2016, another student told Child Doe that the three students who were involved in the February 2016 incident were going to assault Child Doe, and that John Doe reported this information to McPherson who took no action. [Doc. No. 1, ¶ 48.]. They also allege that June 20, 2016, Student #2 sent Child Doe a threatening text message in which he threatened to kill Child Doe, that John Doe reported this to McPherson who, Plaintiffs allege, took no action. [Doc. No. 1, Complaint, ¶¶ 50-51.].

Upon information and believe, District's 2015-2016 school year ended on May 11, 2016. Thus, even accepting as true Plaintiffs' allegation that McPherson was informed of the May and June 2016 reports, there was essentially no time in the school year for McPherson to have acted. More importantly, as alleged, Plaintiffs' next report to the District was almost a year later, in late April of 2017. Thus, even if District failed to respond to the reports from May and June of 2016, there is nothing as alleged which reflects that Child Doe was subjected to continued harassment by Students #1, #2 and #3 after June of 2016.

iii. The Reports of April 26 and May 1, 2017

Plaintiffs allege that in late April of 2017, approximately ten months after the previous report in late June of 2016 (involving Student #2), Child Doe was threatened by Student #1. [Doc. No. 1, ¶ 61.] Plaintiffs allege Child Doe reported this threat to his father, who in turn contacted Brewer on April 26, 2017. Plaintiffs allege John Doe informed Brewer of the February 2016 sexual assault, and "the harassment and threats that Child Doe had been experiencing since then." [Doc. No. 1, ¶ 64.]

John Doe and Child Doe subsequently met with McPherson and Brewer on May 1, 2017. It was in this meeting that Child Doe first reported to any school administrator that there had been two other sexual assaults, one by a Student #4 in a locker room in December of 2016 or in January of 2017, and another in "early spring" of 2017 in another locker room by Student #5. [Doc. No. 1, ¶¶ 56-58, 68-78.] Plaintiffs allege that Brewer told Child Doe and his father that the locker room incidents would be investigated. [Doc. No. 1, ¶ 81.] Plaintiffs acknowledge being contacted by the District School Resource Officer who they understood was investigating the allegations. [Doc. No. 1, ¶¶ 82-83.] Plaintiffs allege that on May 9, 2017, Brewer informed them the allegations could not be verified, and that there was "nothing the school district could do." [Doc. No. 1, ¶ 84.] Plaintiffs also state that in May of 2017 they were contacted by the (Town of) Washington Police Department and asked to file a report about the "abuse," which Plaintiffs allege they did. [Doc. No. 1, ¶ 96.]

Plaintiffs admit that the May 1, 2017, reports of the locker room assaults from the 2016-2017 school year were investigated. [Doc. No. 1, ¶¶ 81-85.] Further, the Complaint is silent as to any other report of bullying, harassment or sexual assault of Child Doe by Student #4 or Student #5 at any other time (before or after May 1, 2017) during Child Doe's enrollment at District other than as reported on May 1, 2017. Further, in the Complaint, Plaintiffs admit that Child Doe has not experienced any further harassment or assault at school since the report given to Brewer and McPherson in May of 2017.

Thus, even if District's actions in May of 2017 did constitute deliberate indifference, District's response to the harassment did not cause Child Doe to undergo further harassment at school or make him vulnerable to it. *Escue*, 450 F.3d at 1155, *citing, Davis Next Friend LaShonda D.*, 526 U.S. at 643, 648. As Plaintiffs have failed to plead any fact which would rise to the level of deliberate indifference, or to allege that District's deliberate indifference "subjected" Child Doe to further harm within the school setting, Plaintiffs' Title IX claim should be dismissed.

PROPOSITION II: PLAINTIFFS' HAVE FAILED TO ADEQUATELY ALLEGE ANY CUSTOM OR POLICY SUFFICIENT TO ESTABLISH AN EQUAL PROTECTION CLAIM AGAINST DEFENDANT DISTRICT.

Section 1983 provides that any person who, under color of state law, causes a deprivation of rights shall be liable to the party injured by such deprivation. 42 U.S.C.§ 1983. Section 1983, however, is not a source of substantive rights but merely provides a method for vindicating other federal rights conferred by the United States Constitution

and federal statutes. *Baker v. McCollan,* 443 U.S. 137, 144 n.3 (1979). The purpose of Section 1983 is to deter state actors from using their authority to deprive individuals of federally guaranteed rights. *Id.*

Local governmental entities such as District are "persons" who may be sued under Section 1983. *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993) relying on *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and *Collins v. City of Harker Heights,* 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). However, respondeat superior liability is not a valid theory for imposing Section 1983 liability on a governmental entity. *Sauers,* 1 F.3d at 1129.

A school district may be liable for violations of federal rights under Section 1983 utilizing the municipal liability framework established by the courts. This framework requires a plaintiff to establish that the school district's actions are either "representative of an official policy or custom" or "taken by an official with final policy-making authority." *Murrell,* supra at 1249; see also, *Rost,* supra at 1124. With respect to an official policy, in order to subject a school district to liability, the policy must be officially promulgated and adopted by the appropriate officers. *Moss v. Kopp,* 559 F.3d 1155, 1168–69 (10th Cir. 2009). In order to demonstrate that an official policy exists, the plaintiff must show that there is a policy statement, ordinance, regulation, or decision officially promulgated and adopted by the governmental entity leading to the constitutional violation. Absent an official policy, the governmental entity may be held liable only if the discriminatory practice is so well settled as to constitute a custom and

practice. *Murrell,* 186 F.3d at 1249.

In Oklahoma, the board of education of a school district is the final policy making authority for a public school district. 70 O.S. § 5-117. Neither a superintendent, school principal, or teacher has final policy-making authority for a school district. Rather, under Oklahoma law, only a board of education is empowered to adopt rules or policies regarding the learning environment and student safety. *Ind. Sch. Dist. No. 8 of Seiling v. Swanson,* 1976 OK 71, 553 P.2d 296. Under Oklahoma law, the duly-elected board of education is the final policy-making authority. *Curtis v. Oklahoma City Public Schools*, 147 F.3d 1200 (10th Cir. 1998).

In *Moss,* the Tenth Circuit addressed the sufficiency of a complaint to state a Section 1983 claim against a county based on conduct by law enforcement officers. The court determined the complaint to be insufficient because it did not allege that a final policymaker took any unconstitutional action or approved the allegedly unconstitutional conduct at issue, or that the conduct occurred pursuant to a decision made by a policymaker. *See Moss*, 559 F.3d at 1169; See also, *Moquett v. Town of Rock Island*, 2015 WL 3952276 *4 (E.D. Okla. 2015) ("To merely state that a municipality has a policy or custom is not enough; a plaintiff must allege facts demonstrating the municipality's policy, such as examples of past situations where law enforcement officials have violated constitutional rights.") (internal citations and quotations omitted).

In the Complaint, Plaintiffs allege that McPherson and Brewers were final policy-makers for purposes of liability under section 1982. It is clearly established that

neither a superintendent, administrator, or athletic director have final-policy making authority under Oklahoma law, *Swanson*, 1976 OK 71, 553 P.2d 296; and that the final policy-making authority lies with the duly-elected board of education. *Curtis*, 147 F.3d at 1216. Further, as argued above, Plaintiffs have failed to show that either Districts' or the individual Defendants' actions actually caused any continued harassment. As in *Moss*, Plaintiffs have failed to allege that any final policy-maker took any unconstitutional action, approved the allegedly unconstitutional conduct at issue, or that the conduct occurred pursuant to a decision made by a policymaker. As such, Plaintiffs have failed to state a claim for the deprivation of a federal right as required by Section 1983, and their Equal Protection claim against District should be dismissed.

PROPOSITION III: THE CLAIMS AGAINST THE INDIVIDUALS IN THEIR OFFICIAL CAPACITIES SHOULD BE DISMISSED.

The United State Supreme Court has long recognized and held that a suit against a person in his or her official capacity is the same as a suit against the public entity. *Monell v. Dept. of Soc. Serv. of City of N .Y.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *See, Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 7 L.Ed.2d 114, 121 (1985). The Tenth Circuit has recognized this as well. *Griess v. Colorado*, 841 F.2d 1042, 1045 (10th Cir. 1988). Accordingly, any "official capacity" claims asserted against Brewer or McPherson should be dismissed as they are tantamount to a suit against the District, which is already named as a defendant.

PROPOSITION IV: PLAINTIFFS HAVE FAILED TO COMPLY WITH FED. R. CIV. P. 10(a) AND FED. R. CIV. P. 17(a).

Finally, Plaintiffs have failed to sufficiently identify the real parties in interest, or to otherwise seek leave to file this action under a pseudonym. The Federal Rules of Civil Procedure require that a complaint "name all the parties" in the caption and title. Similarly, Rule 17(a) provides that "[a]n action must be prosecuted in the name of the real party in interest." As explained by the Tenth Circuit, the "use of pseudonyms concealing plaintiffs' real name has no explicit sanction in the federal rules. Indeed it seems contrary to Fed. R. Civ. P. 10(a) . . . ." *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979). Even so, the practice has been allowed not only within the Tenth Circuit but even in the Supreme Court "only where there is an important pribacy interest to be recognized." *Id*.

Court proceedings are presumptively open to the public, and allowing suits to be instituted under a pseudonym shows a clear prejudice to the public. *M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir. 1998). This interest must be weighed against any claimed interest of the party seeking to file an anonymous lawsuit. *Id*. The decision of whether to allow a suit to proceed under a pseudonym should be left to the discretion of the trial court based upon a weighing of privacy issues against the public interest. *Id*. at 802.

Plaintiffs have filed their Complaint under a pseudonym without appropriate leave, thus lacking any decision on the balance of interests. As Plaintiffs' have failed to comply with the Federal Rules of Civil Procedure, Defendants request that the Complaint

be dismissed, or that the Court order that Plaintiffs seek leave to file their Complaint under seal or proceed under a pseudonym.

CONCLUSION

Defendants respectfully move this Court to dismiss Plaintiffs' Complaint in its entirety. Plaintiffs have failed to comply with the Federal Rules of Civil Procedure in appropriately designating the real parties in interest or otherwise seeking to file suit under a pseudonym. Further, Plaintiffs have failed to plead sufficient facts to state a claim against District under either Title IX or the Fourteenth Amendment's Equal Protection Clause. Finally, to the extent that Plaintiffs have named individual defendants within their official capacity, those claims should be dismissed as they are duplicative of the claims asserted against District.

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Certificate of Service

I hereby certify that on April 19, 2018, I filed the attached document with the Clerk of Court. Based on the records currently on file in this case, the Clerk of Court will transmit a Notice of Electronic Filing to those registered participants of the Electronic Case Filing System: Nathan D. Richter and Adele P. Kimmel.

S/Anthony T. Childers
Anthony T. Childers