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-	)	Case No. CIV-18-0271-F
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; Defendants.	)	

ORDER

Defendants' motion to dismiss is before the court. Doc. no. 7. Plaintiff has responded, objecting to the motion. Doc. no. 11. Defendants have filed a reply brief. Doc. no. 12.

Summary of the Complaint

The complaint (doc. no. 1) alleges the following claims.

-- A claim against Washington Public Schools (the school district) for violation of Title IX of the Education Amendments of 1972, § 901(a), as amended, 20 U.S.C. § 1681(a) (Count One).

-- Official and individual capacity claims against Superintendent A. J. Brewer (Brewer), and Principal and Athletic Director Stuart McPherson (McPherson)

alleged under 42 U.S.C. § 1983 for violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Count Two).

-- A claim against the school district alleged under 42 U.S.C. § 1983 for violation of the Equal Protection Clause (Count Three).

The complaint is lengthy and detailed. It alleges several sexual assaults on plaintiff, by plaintiff's male peers at Washington Middle School, occurring within an approximately 18-month period. These alleged assaults included digital penetration, by male students, of the plaintiff's rectum. In addition, the complaint alleges daily verbal harassment and bullying of the plaintiff, including threats of physical harm and death made to plaintiff by plaintiff's peers. The complaint alleges that the conduct in question occurred within Washington Middle School and went unchecked by officials who failed to take meaningful action to stop it, derailing plaintiff's education (causing plaintiff to be held back a year, among other things), and traumatizing plaintiff. The complaint alleges facts intended to show that defendants were aware of the conduct in question; that school officials had a custom or practice of ignoring or minimizing male-on-male sexual assault which they, for example, treated as "horseplay"; and that defendants treated male-on-male assaults differently from the manner in which they would have treated equivalent assaults on female students.

Summary of the Motion to Dismiss

The motion challenges the claims alleged against the district (the Title IX claim and the § 1983 claim) under Rule 12(b)(6), Fed. R. Civ. P.

The motion does not challenge the individual capacity claims alleged against Brewer and McPherson under § 1983; however, the motion seeks dismissal of the official capacity claims alleged against these defendants. Defendants argue the official capacity claims duplicate the § 1983 claim against the district. Accordingly,

this aspect of the motion will be considered under Rule 12(f), Fed. R. Civ. P., which permits a court to strike redundant material from a pleading.

The motion seeks dismissal of this action as a whole under Rule 10(a), Fed. R. Civ. P., and 17(a), Fed. R. Civ. P. At the time they filed the motion, defendants contended the complaint did not adequately identify the real parties in interest because plaintiff did not name all parties and, instead, used pseudonyms, use of which should be left to the discretion of the court. After the motion was filed, plaintiff filed an unopposed motion to proceed using pseudonyms, which the court granted. Doc. no. 10. Accordingly, the portion of the motion which seeks dismissal under Rules 10(a) and 17(a) will be denied as moot.

The motion refers to Rule 12(b)(1), Fed. R. Civ. P., and addresses standards applicable under that rule. Defendants may believe that their Rule 10(a) and Rule 17(a) arguments implicate the jurisdiction of this court, but their motion does not say that, defendants do not explain why the court lacks jurisdiction, and the court knows of no reason why it would lack jurisdiction. To the extent that defendants intended to move for dismissal under Rule 12(b)(1), that aspect of the motion will be denied for failure to present developed argument.

Standards

Rule 12(b)(6). The inquiry under Rule 12(b)(6) is whether the complaint contains enough facts to state a claim for relief that is plausible on its face. Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir., 2007), quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007). To survive a motion to dismiss, a plaintiff must nudge his claims across the line from conceivable to plausible. *Id*. The mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims. Ridge at Red Hawk, 493 F.3d at 1177.

In conducting its review, the court assumes the truth of the plaintiff's well-pleaded factual allegations and views them in the light most favorable to the plaintiff. *Id*. 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, 664 (2009). When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Id*. The court will disregard mere "labels and conclusions" and "[t]hreadbare recitals of the elements of a cause of action" to determine if what remains meets the standard of plausibility. Twombly, 550 U.S. at 555; Iqbal, 556 U.S. at 678.

Rule 12(f). This rule provides that "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

The Title IX Claim Against the District

As stated in Murrell v. School Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1245-46 (10th Cir. 1999):

> Title IX provides in relevant part, " '[n]o person ... 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.' " *Id.* at 1669 (quoting 20 U.S.C. §1681(a) (1994)). Title IX is enforceable through an implied private right of action for which money damages are available.
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> …
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> In order to confine Title IX liability to those cases in which the school district itself acted improperly, *Davis* [*v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661, 1669 (1999)] imposes liability only if the district

> remains deliberately indifferent to acts of harassment of which it has actual knowledge. *Id.* at 1672.

Murrell, 186 F.3d at 1245-46.

"A district is deliberately indifferent to acts of student-on-student harassment 'only where the response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.'" Rost ex rel. K.C. v. Steamboat Springs RE-2 School Dist., 511 F.3d 1114, 1121 (10th Cir. 2008). Rost is a Title IX case, here quoting Davis, 526 U.S. at 648.

Defendants make two arguments for dismissal of the Title IX claim. First, they argue that the district's alleged responses to the assaults and harassment described in the complaint do not constitute deliberate indifference. Second, they argue that even if the complaint alleges deliberate indifference, no allegations show that deliberate indifference caused plaintiff to undergo harassment or made him vulnerable to it.

The court rejects both arguments. The complaint alleges numerous events which, read and considered together, plausibly allege deliberate indifference on the part of the district, and which plausibly allege that deliberate indifference caused plaintiff to undergo harassment or made him vulnerable to it. The court could cite dozens of allegations which lend support to these conclusions, but no purpose would be served by reiterating a 32-page complaint. As an example of a case which made it to trial and involved similar allegations in support of a Title IX claim, *see*, Mathis v. Wayne Cty. Bd. of Educ., 496 Fed. Appx. 513 (6th Cir. 2012) (unpublished, affirming judgment under Title IX).[1]

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[1]While Mathis did not involve a motion to dismiss, its facts are similar to those alleged here. Plaintiffs alleged the school board acted with deliberate indifference to sexual harassment arising from incidents in a locker room involving middle school boys and their teammates. In one

To the extent that the motion asks the court to dismiss the Title IX claim, the motion will be denied.

The Section 1983 Claim Against the District

As defendants concede, a school district may be liable for violations of federal rights under 42 U.S.C. § 1983 pursuant to the municipal liability framework which has been established by the courts. Doc. no. 7, p. 20 of 25. Thus, the district may be liable under § 1983 where the district's discriminatory actions are representative of an official policy or custom, or are taken by an official with final policymaking authority. Murrell v. School Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1249 (10th Cir. 1999), citing Randle v. City of Aurora, 69 F.3d 441, 446-50 (10th Cir. 1995). In addition, the district may be liable if its failure to train its employees evidences a deliberate indifference to the rights of its students. *See*, City of Canton, Ohio v. Harris, 489 U.S. 378, 387 (1989) (failure to train can be the basis for liability under § 1983).[2]

Defendants contend the complaint fails to adequately allege that any policymaker took any unconstitutional action or approved any unconstitutional conduct, and that there are no allegations to show that unconstitutional conduct occurred pursuant to a decision made by a policymaker. Doc. no. 7, p. 22 of 25. For these arguments, defendants rely on their view that, under Oklahoma law, only the board of education is a policymaker for the district, so that a superintendent (or a

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incident, members of the team anally penetrated one of the plaintiffs with a marker. School officials temporarily suspended the perpetrators, but the jury found that the board had acted with deliberate indifference to the sexual harassment. The Court of Appeals upheld the judgment, explaining that "the jury could have reasonably viewed the evidence of the marker incident not just as horseplay gone awry, but rather as a serious incident of sexual assault, which requires a punishment more severe than an eleven-day suspension from WMS and a month-long suspension from the basketball team." 496 Fed. Appx. at 516.

[2] The motion does not challenge plaintiff's failure to train theory of liability, referred to in ¶¶ 137-138 of the complaint. A failure to train theory of liability does not depend upon official policy or custom, nor does it depend upon actions by an official with final policymaking authority.

principal or an athletic director) cannot have policymaking authority. Thus, defendants contend that although the complaint includes allegations about decisions and comments by Brewer or McPherson, neither of these individuals may qualify as policymaker who took or approved unconstitutional action.

For their contention that only the board of education is a policymaker for the district, defendants cite Ind. Sch. Dist. No. 8 of Seiling v. Swanson, 553 P.2d 496 (Okla. 1976), and Curtis v. Oklahoma City Public Schools, 147 F.3d 1200 (10th Cir. 1998). Neither case controls here. Swanson involved student suspensions for violation of the haircut code. Swanson did not address policymaking authority for purposes of §1983, nor did it address the potential policymaking authority of a school superintendent or others. Curtis is a wrongful discharge case. In J.M. ex rel. Morris v. Hilldale Independent School Dist. No. 1-29, 397 Fed. Appx. 445, 456-57 (10th Cir. 2010), an unpublished decision which involved § 1983 and Title IX claims, the Court of Appeals concluded that Curtis did not control. Morris noted that Curtis did not discuss the final policymaking authority of the superintendent, who, in Morris, was authorized under the written school policy to implement the sexual harassment policy. Morris (unpublished) (affirming verdicts). *And see*, Najera v. Ind. School Dist. of Stroud No. 1-54 of Lincoln, Cty., 2015 WL 4310552 at *5 (W.D. Okla. July 14, 2015) (denying motion for summary judgment where there was evidence that the superintendent was charged with implementing sexual harassment policy).

Superintendent Brewer is identified in the complaint as a policymaker responsible for enforcing the district's policies prohibiting harassment, intimidation and bullying, including sexual bullying.[3] In addition, the complaint alleges a basis

[3]*See, e.g.,* doc. no. 1, ¶¶ 25-29 addressing: Oklahoma's School Safety and Anti-Bullying Act; the requirement that public schools adopt policy; Washington Public School's adoption of the Act's definition of "bullying"; superintendent's responsibility for enforcing these policies.

for knowledge on the part of Superintendent Brewer (and Principal McPherson), of the assaults and harassment in question. For example, the complaint alleges a pattern of conduct including: multiple anal penetrations of the plaintiff over an 18-month period; plaintiff's witnessing of another student being sexually assaulted in the same way; and constant harassment of the plaintiff. Recurring events may give rise to the inference that a policymaker had knowledge of the events, and may also support a "failure to train" theory of liability. Also relevant to the district's awareness of alleged events, the complaint alleges conversations in which Brewer and McPherson referred to a sexual assault on plaintiff as normal "horseplay" and "hazing" among boys; the complaint alleges that McPherson asked plaintiff's father, "What do you want me to do, hold his hand?"; and the complaint alleges the school resource officer informed plaintiff's father that the school was investigating the incidents as "accidental" touches.

To the extent that the motion asks the court to dismiss the § 1983 claim against the district, the motion will be denied.

The Official Capacity Claims
Against Brewer and McPherson

Defendants ask the court to dismiss the official capacity claims alleged against Brewer and McPherson under § 1983. Defendants argue that such claims are, in effect, claims against the district which duplicate the §1983 claim against the district. Plaintiff responds by arguing that because the district is immune to punitive damages, the official capacity claims against Brewer and McPherson are not redundant. In support, plaintiff cites Youren v. Tintic School Dist., 343 F.3d 1296 (10th Cir. 2003), for the following statement: "The fact that municipalities are immune from punitive damages does not, however, mean that individual officials sued in their official capacity are likewise immune." *Id.* at 1307.

The above-quoted statement in Youren is highly suspect because Supreme Court authority establishes that an official capacity suit is, in all respects other than name, to be treated as a suit against the entity. Kentucky v. Graham, 473 U.S. 159, 166 (1985). For that reason, the statement in Youren has been roundly criticized by various district courts, some of which have refused to apply it,[4] and some of which have applied it in the short-run while stating that they will address the issue again at a later stage if necessary.[5]

In Cross Continent Development v. Town of Akron, Colo., 548 Fed. Appx. 524 (10th Cir. 2013), the Court of Appeals noted its agreement with the individual defendant in that case, McGuire, who argued that Youren was "an anomalous outlier." *Id.* at 531. McQuire argued that the district court should not have allowed the jury to consider punitive damages against him. Cross Continent observed that McGuire had made no effort to distinguish Youren or to suggest a limitation in its holding, but that he had, instead, simply urged that Youren was "an anomalous outlier." *Id.* The Court of Appeals then stated that the issue was moot in that case, and that "we must adhere to prior rulings of our court in the absence of our court's issuance of an en banc decision overruling the prior panel decision." *Id.* Cross Continent went on: "We feel compelled, however, to note our agreement with McGuire's characterization of Youren as an anomalous outlier." *Id.* The Court of Appeals explained that under Supreme Court rulings, the conclusion that individuals sued in their official capacities should be immune from punitive damages "seems

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[4] *See*, *e.g.*, Trevillion v. Glanz, 2012 WL 4893220 at **6-7 (N. D. Okla., Oct. 15, 2012); Riggs. v. City of Owensville, 2010 WL 2681384 at **2-3 (E. D. Mo., July 2, 2010).

[5] *See*, *e.g.*, Revilla v. Glanz, 7 F. Supp. 3d 1207, 1218-19 (N. D. Okla. 2014); Estep v. City of Del City, ex rel. Del City Police Dept., 2018 WL 1598674 at *4 (W. D. Okla. March 30, 2018); Kerns v. Ind. Sch. Dist. No. 31 of Ottawa Cty, 984 F. Supp. 2d 1144, 1155 (N.D. Okla. 2013).

inescapable." *Id.*[6] Cross Continent stated, "Indeed, the force of this reasoning has led courts within our own circuit to ignore Youren when dismissing punitive damages claims in official-capacity § 1983 suits." *Id.*

In short, the Tenth Circuit has indicated that although Youren has not been overruled, the language upon which plaintiff relies is almost certainly wrong. This court agrees with that assessment. Furthermore, in this case, there is nothing to be gained from another round of briefing on this issue at a later stage. Accordingly, while this court is not free to ignore the language in Youren, it is free to explain why, based on differences between the two cases, the suspect language need not govern here.

To review, Youren states: "The fact that municipalities are immune from punitive damages does not, however, mean that individual officials sued in their official capacity are likewise immune." Youren, 343 F.3d at 1307. In that part of the case, Youren finds there was sufficient evidence to support a jury question regarding an award of punitive damages against defendant Rowse, the school district superintendent. *Id.* at 1307-09. The problem was that during the trial, the district court had dismissed all of the punitive damages claims in a blanket order. *Id.* at 1307. Thus, despite sufficient evidence to get to the jury, the jury had no opportunity to award punitive damages against Rowse. As stated in Youren, "because there was sufficient evidence for a jury to consider the possibility of awarding punitive

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[6] Municipalities are immune to punitive damages sought under §1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). In § 1983 cases, principles of municipal liability apply to school districts. Brammer-Hoelter v. Twin Peaks Charter Academy, 602 F.3d 1175, 1188 (10th Cir. 2010). Thus, school districts, like municipalities, are not subject to punitive damages awards under § 1983. *See*, Youren, 343 F.3d 1296, 1307 ("Both 42 U.S.C. § 1983 and Utah law bar punitive damage awards against municipal agencies such as Tintic [School District].").

damages against Ms. Rowse, the district court erred in preventing the jury from considering the imposition of punitive damages on her." *Id.* at 1309. That ruling, and the court's remand, were intended to protect plaintiff's shot at a punitive damages award against Rowse.

That is not at all the situation here, procedurally or otherwise. In this action, Brewer and McPherson are sued under § 1983 in their official capacities and, importantly, in their individual capacities.[7] It is well established that individuals sued in their individual capacities may be liable for punitive damages under § 1983.[8] Thus, the concern which drove the Court of Appeals' decision in Youren -- protecting plaintiff's ability to pursue punitive damages against the individual defendant -- is not a concern which requires the official capacity claims to remain in this action. Here, the individual capacity claims protect plaintiff's ability to pursue punitive damages from Brewer and McPherson, if and when it is shown that the evidence will support such damages.

Moreover, the same logic compels the conclusion that the official capacity claims alleged in this case are redundant no matter how a court looks at Youren. If Youren is correct, so that the official capacity claims against Brewer and McPherson may be a basis for permitting punitive damages against these individual, then the official capacity claims are redundant of the individual capacity claims. If Youren is incorrect and official capacity claims are just another way to allege claims against

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[7] In Youren, defendant Rowse was sued only in her official capacity. 343 F.3d 1296, 1306. Thus, absent amendment, or absent an ability to pursue punitive damages against Rowse through the official capacity claim (as the Court of Appeals appears to have permitted plaintiff to do on remand), there was no means by which to seek punitive damages against Rowse.

[8] Individual defendants may be liable for punitive damages based on claims that they acted in their individual capacity in violating plaintiff's federal civil rights under § 1983. *See*, Smith v. Wade, 461 U.S. 30, 56 (1983) (jury may assess punitive damages in a § 1983 action, when defendant's conduct is motivated by evil motive or intent, or involves reckless or callous indifference to federal protected rights of others).

the district as to which no punitive damages are recoverable, then the official capacity claims are redundant of the § 1983 claim against the district.

In these circumstances, there is no reason to let the troublesome language in Youren dictate the result. The official capacity claims will be stricken under Rule 12(f) because they are redundant and because letting them remain in this case would cause jury confusion.

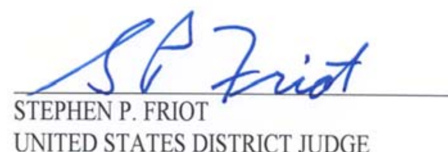
Conclusion

After careful consideration, defendants' motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**, as follows.

Defendants' motion is **GRANTED** to the extent that the official capacity claims alleged against Brewer and McPherson are **STRICKEN** under Rule 12(f), Fed. R. Civ. P.

In all other respects, the motion is **DENIED**, for the following reasons. To the extent the motion seeks dismissal of claims alleged against the district under Rule 12(b)(6), Fed. R. Civ., the motion is denied on its merits. To the extent the motion seeks dismissal of this action under Rules 10(a) and 17(a), Fed. R. Civ. P., the motion is denied as moot. To the extent the motion was intended to seek dismissal of any claims under Rule 12(b)(1), Fed. R. Civ. P., the motion is denied for lack of developed argument.

IT IS SO ORDERED this 11th day of June, 2018.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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