UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:19-cv-20204-UU

JANE DOE,

v.

THE SCHOOL BOARD OF MIAMI-DADE COUNTY, et al.,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court upon the Motion to Dismiss Plaintiff's Complaint and to Strike Claims for Punitive Damages filed by Defendants the School Board of Miami-Dade County (the "School Board") and Superintendent Carvalho ("Carvalho"). D.E. 12 (the "Motion").

THE COURT has considered the Motion, Plaintiff's Response thereto (D.E. 13) (the "Response"), Defendants' Reply in Support thereof (D.E. 14) (the "Reply"), and the pertinent portions of the record and is otherwise fully advised in the premises.

For the reasons explained below, the Motion is granted in part and denied in part.

BACKGROUND

The facts below come from the Complaint (D.E. 1) (the "Complaint") and are taken as true.

I. JANE DOE IS SUBJECTED TO SEXUAL ASSAULT AND OTHER FORMS OF SEXUAL HARASSMENT

Plaintiff Jane Doe[1] ("Jane" or "Plaintiff") was a 14-year old female student enrolled at Miami Carol City High School ("Carol City") in the fall of 2017. Compl. ¶ 1. From October 2017

[1] Though Plaintiff has not moved to proceed anonymously, the Court finds that anonymity is appropriate here. "Generally, parties to a lawsuit must identify themselves in their respective pleadings." *Doe v. Frank,*

through November 2017, Jane suffered multiple incidents of bullying behavior constituting sexual harassment, including sexual assault, at Carol City by other students. *Id.* ¶ 15. The incidents are described below.

A. October 17, 2017

First, on or about the morning of October 17, 2017, as Jane was walking out of the girl's bathroom, an older male student named A.C. asked Jane to go into the boys' bathroom with him. *Id.* ¶ 16. Assuming that he wanted to engage in sexual activity with her, Jane repeatedly said "no." *Id.*

B. October 24, 2017

During lunchtime at Carol City on or about October 24, 2017, A.C. renewed his request that Jane go into the bathroom with him. *Id.* ¶ 17. He then grabbed and pulled Jane into the boys'

951 F.3d 320, 322 (11th Cir. 1992). Federal Rule of Civil Procedure 10(a) requires a plaintiff to "include the names of all the parties" in her complaint. "This rule serves more than administrative convenience. It protects the public's legitimate interest in knowing all of the facts involved, including the identities of the parties." *Frank*, 951 F.3d at 322. A plaintiff seeking to contravene Rule 10(a) by suing under a fictitious name bears the burden of showing she has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings. *Id.* at 323. "The Eleventh Circuit has identified several factors for district courts to consider in determining whether a party should be permitted to proceed anonymously, including: (1) whether the party challenges government activity, (2) whether the party will be 'required to disclose information of the utmost intimacy,' (3) whether the party will be coerced into admitting illegal conduct or the intent to commit illegal conduct, thereby risking criminal prosecution, (4) whether the party is a minor, (5) whether the party will be exposed to physical violence should he or she proceed in their own name, and (6) whether proceeding anonymously 'pose[s] a unique threat of fundamental unfairness to the defendant.'" *Doe v. Swearingen*, No. 18-24145, 2019 WL 95548, at *2 (S.D. Fla. Jan. 3, 2019) (citing *Plaintiff B v. Francis*, 631 F.3d 1310, 1316 (11th Cir. 2011)). "Courts may consider other factors as well based on the particularities of each case, and no single factor is necessarily dispositive." *Id.* (citing *Frank*, 951 F.2d at 323). Here, Jane is a minor challenging municipal activity, and the subject matter involves information of the "utmost intimacy," including sexual assault. The Complaint also divulges Plaintiff's sensitive medical information. The Court does not find that Defendants would face any unique threat of fundamental unfairness by Plaintiff's proceeding anonymously. Accordingly, the Court hereby grants Plaintiff leave to proceed under the fictitious name "Jane Doe" throughout the course of this lawsuit.

bathroom, locked her into a stall with him, and sexually assaulted her by anal penetration. *Id.* After he assaulted her, he left her alone in the boys' bathroom. *Id.* Jane was hurt, shaken, and scared. *Id.*

Jane did not report the sexual assault by A.C. to anyone at her school at that time. *Id.* ¶ 18. She was embarrassed, confused, and feared that school officials would not believe her. *Id.*

C. October 27, 2017

On or about the afternoon of October 27, 2017, another older male student, J.C. stopped Jane in the hallway as she was leaving the girls' bathroom. *Id.* ¶ 19. J.C. asked Jane to have sex with him because he believed that Jane had had sex with A.C. *Id.* Jane was shocked and started walking away. *Id.* J.C. grabbed her tightly by the arm and forcibly pulled her into the adjacent boys' bathroom. *Id.*

J.C. assaulted Jane by forcing her to perform oral sex on him while she was choking, trembling, crying, and repeatedly saying "no." *Id.* ¶ 20. J.C. then left the bathroom; Jane left afterward, alone, humiliated and shaken. *Id.*

Jane did not report the sexual assault by J.C. to anyone at her school at that time. *Id.* ¶ 22. She was confused, hurt, humiliated, and did not think that school officials would believe her. *Id.* However, one of Jane's friends, C.S., noticed Jane crying at the school "pep rally" that day. *Id.* ¶ 21. C.S. asked Jane why she was crying, but Jane could not bring herself to tell him what had happened. *Id.*

D. November 6, 2017

On or about November 6, 2017, an older male student, E.H.—whom Jane had never previously met—asked her if she could meet him in the boys' bathroom after school. *Id.* ¶ 23. She

said "no." *Id.* That same afternoon, A.C. and J.C., Jane's first two attackers, also asked Jane if she would meet them in the boys' bathroom after school. *Id.* Again, she said "no." *Id.*

Later that day, E.H. followed Jane into the girls' bathroom. *Id.* ¶ 24. Jane stated that she did not want anything to do with him. *Id.* E.H. cornered her and demanded oral sex. *Id.* She refused. *Id.* E.H. then sexually assaulted her by forcibly penetrating her vaginally without a condom. *Id.* E.H. only stopped when another student, J.M., called him to come out. *Id.* E.H. stepped out, but then he returned to the bathroom and said to Jane, "Why would you do it with [A.C.] and [J.C.] and not do it with me?" *Id.* Jane repeatedly refused to engage with him and ultimately fought her way out of the bathroom. *Id.*

Afterwards, Jane walked home crying. *Id.* ¶ 25. During her walk home, she encountered three of her friends: C.S., C., and H.O. *Id.* Jane told these friends what had happened. *Id.* Her friends told her that if she did not tell her mother or the school, they would report it to the school the next day. *Id.* That night, Jane told her friend E.F. by phone what had happened, but Jane did not tell her mother because she felt scared and ashamed. *Id.*

II. THE EVENTS OF NOVEMBER 7, 2017

A. School Officials Are First Notified

On or about the morning of November 7, 2017, Jane's friends (E.F., C.S., and H.O.) encouraged Jane to come with them to report the sexual harassment to school officials, even though Jane was worried that they would not believe her. *Id.* ¶ 26. Jane did not initially join her friends; rather, that morning, the three friends (upon information and belief) reported Jane's sexual assaults to Principal Ja Marv Dunn and to a school security guard. *Id.* ¶ 29.

Meanwhile, Jane went to her first class, English. *Id.* ¶ 27. Despite her fears, before the class began that morning, Jane told her English teacher that three students had sexually attacked her on

separate occasions. *Id.* She identified the assailants to her teacher. *Id.* A.C., the first attacker, was a student in Jane's English class; when the class began, the teacher ensured that A.C. was not sitting near Jane. *Id.* Jane alleges upon information and belief that the English teacher did not take any additional action to address the matter or report what Jane told her to any school official. *Id.* ¶ 28.

While she was still in English class, but presumably following her friends' report to school administrators, Jane was called to the main office. *Id.* ¶ 30. Jane met with Assistant Principal Mimose Morgan-Rose, who asked Jane about her friends' report. *Id.* Jane began to describe the attacks, but several minutes into her description, Assistant Principal Morgan-Rose told Jane that she would "have to repeat the whole story again" to Officer Jules Etienne, a school resource officer[2] who had just arrived. *Id.* ¶ 31.

Neither Officer Etienne nor any other school official notified Jane's mother at that time about the allegations of multiple sexual assaults. *Id.* ¶ 33. Jane alleges that this failure to notify violated Florida Statutes § 1006.147(4)(i), which requires each school district to adopt and implement a policy containing "[a] procedure for providing immediate notification to the parents of a victim of bullying or harassment and the parents of the perpetrator of an act of bullying or harassment, as well as notification to all local agencies where criminal charges may be pursued against the perpetrator." *Id.* ¶ 33 & n.4.

Jane alleges on information and belief that Officer Etienne was not trained and/or authorized by School Board policy or procedures to question alleged victims of child sexual abuse

[2] School resource officers, sometimes called school police officers, are employees of the School Board and are commissioned by Carvalho. *Id.* ¶ 31 n.3. They have duties in accordance with School Board Policy No. 8480. *Id.*

or rape. *Id.* ¶ 32. Nevertheless, Assistant Principal Rose-Morgan left Jane alone in her office with Officer Etienne, permitting him—an adult male whom Jane did not know—to interrogate Jane about the sexual assaults without Jane's mother or anyone else present. *Id.* ¶ 34.

Jane was in the assistant principal's office alone with Officer Etienne from approximately 7:30 A.M. until approximately 10:40 A.M. being questioned about the details of the assaults. *Id.* ¶ 35. Though deeply humiliated and shaken, Jane tried to stay calm while writing a statement of the attacks as requested by Officer Etienne (the "Statement"). *Id.* The Statement included details describing the bullying behavior that constituted sexual harassment, including the multiple sexual assaults. *Id.* ¶ 36.

After Jane told Officer Etienne that the Statement was complete, Officer Etienne repeatedly asked her why she was in the bathroom during each of the three sexual assaults, suggesting that Jane was in some way responsible. *Id.* ¶ 37. She told him that in each instance she did not want to be in the bathroom. *Id.* Officer Etienne stated that he did not understand what she was saying and that he could not help her if she did not explain why she was in the bathroom with her assailants. *Id.* ¶ 38.

At approximately 10:40 A.M., Officer Etienne concluded the interview. *Id.* ¶ 39. He told Jane that they "had to" keep her separated from A.C., J.C., and E.H. at school. *Id.* Jane told him that A.C. was in her third class that day. *Id.* Despite her notifying Officer Etienne at that time, Jane in fact was forced to endure sitting through that class that day with A.C. present. *Id.* ¶ 45. Thus, Officer Etienne's promise to keep Jane away from her attacker rang hollow. *See id.*

B. Jane Speaks with School Counselors, Who Fail to Advise Her of Her Rights Under Title IX and Fail to Contact Jane's Mother

After their meeting, Officer Etienne sent Jane to speak with a school counselor, who checked Jane's grades and student conduct records. *Id.* ¶ 39. The counselor also advised Jane of the possibility that she had been exposed to sexually transmitted infections. *Id.* However, neither the counselor nor any other school official (including the English teacher and Officer Etienne) provided any information to Jane about her rights under Title IX. *Id.* ¶ 40. Neither the counselor nor any other school official told Jane how to contact the School District's Title IX coordinator, how to file a report with law enforcement agencies, or how to obtain academic accommodations and support services to ensure her equal access to educational opportunities and benefits despite the traumatic events she'd experienced. *Id.*

Additionally, while Officer Etienne had told Jane that the school would "ha[ve] to" separate her from A.C., J.C., and E.H., neither he nor the counselor, nor any other school official, informed Jane how changes would be made to her school environment or what changes would be made to anyone's class schedule to ensure that she was safe and protected in school. *Id.* Jane alleges that this failure violates Florida Statutes § 1006.13[3] and the Miami-Dade County Public Schools Code of Student Conduct. *Id.*

At the time she spoke with the school counselor, still no school official had attempted to contact Jane's mother, Mary Doe. *Id.* ¶ 41. The school counselor then gave Jane a pass to return to her regularly scheduled classes that day. *Id.* ¶ 42. Jane had missed most of her first (English) and second (Math) classes that day due to the questioning by Officer Etienne. *Id.*

[3] Florida Statutes § 1006.13 is titled "Policy of zero tolerance for crime and victimization" and requires district school boards to adopt and implement various policies and procedures to protect students and staff from conduct that poses a serious threat to school safety.

Upon leaving the school counselor's office, Jane wend to find her Math teacher to explain why she had missed class that day. *Id.* ¶ 43. She found her Math teacher at lunch with a second school counselor. *Id.* Jane explained to her Math teacher and the second school counselor why she had missed class and notified them about the sexual assaults. *Id.* Neither the Math teacher nor the second counselor asked whether Jane's mother had been contacted nor took any action to inform Jane of her Title IX rights. *Id.* ¶ 44.

C. Jane is Pressured into Revising Her Statement

Later that same day, when Jane was in her fourth class of the day, a security guard unexpectedly arrived to escort Jane back to the main office. *Id.* ¶ 46. When she arrived in the main office, Officer Etienne and two different school officials—Assistant Principal Rhonda Gaines and Vice Principal Andy Harrison—were present. *Id.* Jane also saw two of her assailants in the main office. *Id.* She did not want to look at or talk to them as she passed by. *Id.*

At this time, still, no school official had contacted Jane's mother about the reported assaults. *Id.* ¶ 47.

Inside Assistant Principal Morgan-Rose's office, Officer Etienne immediately sought to coerce Jane into changing her Statement. *Id.* ¶ 49. He told her that she needed to add to the Statement that she had "participated in all of this." *Id.* He said, "If you say you were not forced, then all of this will just go away and you won't have to worry about it anymore. Your mother will know but we won't have to look more into it." *Id.* Jane was upset, alone, exhausted, and most of all, wanted Officer Etienne's questioning to stop. *Id.* ¶ 50. She was also concerned about burdening her mother, who was caring for a new baby. *Id.*

Without an opportunity to obtain adult or parental advice, and without knowledge of the ramifications, Jane agreed to add to the Statement that she was a "willing participant to all of this."

Id. ¶ 51. Officer Etienne was not satisfied with this language, saying that he did not like the way she wrote it because it did not sound like it was her "own words." *Id.* As a result, Jane added to her Statement: "I wasn't really forced to do this." (the "Amended Statement"). *Id.*

D. Officer Etienne and Assistant Principal Gaines Perpetuate the Falsehood in the Amended Statement and Punish Jane

Officer Etienne took the Amended Statement and escorted Jane to another room to wait for Assistant Principal Gaines. *Id.* ¶ 52. Jane saw that Assistant Principal Gaines was meeting with two of Jane's assailants. *Id.* ¶ 53. After her assailants left, Assistant Principal Gaines told Jane to come into her office. *Id.* Without interviewing Jane at all, Assistant Principal Gaines told Jane that her statement was the same as those of her three assailants. *Id.* Assistant Principal Gaines then told Jane that she was suspended along with her assailants because they had all engaged in "sexual misconduct." *Id.* Jane was shocked and confused. *Id.*

Assistant Principal Gaines did not attempt to learn or understand Jane's "side of the story" or determine for herself whether Jane had been bullied or victimized in any way. *Id.* ¶ 54. And again, Assistant Principal Gaines did not provide any information to Jane about her rights under Title IX. *Id.*

Only after Assistant Principal Gaines had decided that Jane should be suspended did she tell Jane to call her mother and tell her to come to the school. *Id.* ¶ 55. Assistant Principal Gaines also insisted that she would be the one to inform Jane's mother what had happened and told Jane not to tell her first. *Id.*

At approximately 2:47 p.m. that day, after Jane's mother was contacted and while Jane waited in the main office for her mother to arrive, Jane texted her mother to say that she had been told to say that she was not forced to have sexual relations. *Id.* ¶ 56. In her text messages, Jane also

told her mother that she felt like she had done something wrong even though she knew she hadn't. *Id.*

Upon her mother's arrival, Jane, her mother, Officer Etienne, and Assistant Principal Gaines had a meeting, during which Assistant Principal Gaines asked Jane if she had "finally admitted" that she was not forced to do the sex acts because of "the video." *Id.* ¶ 57. Jane became alarmed, started crying, and asked, "What video?" *Id.* ¶ 58. Officer Etienne said, "I deleted it." *Id.* Jane was asked to leave the room while Assistant Principal Gaines and Officer Etienne continued speaking with Jane's mother in private. *Id.* Assistant Principal Gaines told Jane's mother that there was a video that contained evidence of consensual sexual activity, and that this video was why Jane had come forward to report what had happened. *Id.* ¶ 59. This was a lie. *Id.* In fact, the Miami-Dade County State Attorney's investigation—which took place months later—did not uncover any evidence of any video. *Id.* ¶ 59 n.6.

Assistant Principal Gaines told Jane and her mother that Jane would be suspended at an off-campus facility due to consensual sexual misconduct. *Id.* ¶ 60. Jane alleges upon information and belief that her attackers were also disciplined for "consensual sexual misconduct," but were not disciplined for their bullying constituting sexual harassment, including sexual assaults, of Jane. *Id.* ¶ 61.[4] Jane also alleges upon information and belief that she and her attackers were assigned to the same off-campus facility for their suspension based on the supposedly consensual sexual misconduct. *Id.* ¶ 62.

[4] Jane again alleges that this failure to discipline violates Florida Statutes § 1006.147 and School Board Policy 5517.01. *Id.* ¶ 61.

III. JANE'S MEDICAL TREATMENT AND ABSENCE FROM SCHOOL

November 7, 2017—the day she notified school officials about the bullying and assaults—was the last date that Jane attended school at Carol City. *Id.* ¶ 76. Having suffered severe harassment without receiving any accommodations from school officials, Jane's mental and physical distress kept her from returning to the school. *Id.*

On or about November 9, 2017, two school resource officers (not Officer Etienne) came to Jane's home, interviewed Jane and her mother, and informed them that one or more of Jane's attackers may have exposed her to the human immunodeficiency virus (HIV) and/or gonorrhea. *Id.* ¶ 79. Jane was advised to go immediately to a Jackson Memorial Hospital's rape treatment center to get tested and treated for HIV exposure.[5] *Id.* By this time, it had been several days since the last of the assaults occurred on November 6th. *Id.* ¶ 79 n.14.

Jane immediately sought treatment that evening at Jackson Memorial Hospital, escorted by the school resource officers. *Id.* ¶ 80. Later that night, an employee of Jackson Memorial Hospital who had interviewed Jane earlier that evening called Jane's mother to tell her that the Hospital believed Jane had been sexually assaulted. *Id.* ¶ 81. They also told Jane's mother that they were referring Jane for intervention at the Kristi House Child Advocacy Center, a not-for-profit treatment center for child victims of sexual abuse. *Id.* However, the school resource officers who were present at the Hospital that night did not refer the case for investigation by a law enforcement agency, allegedly in violation of Florida Statutes § 1006.147.

Jane remained at home, absent from school, for the remainder of the semester and halfway through the next quarter until on or about February 23, 2018—more than three months after she

[5] Jane received periodic medical care and testing to determine whether she was infected with HIV for approximately one year following November 9, 2017. *Id.* ¶ 83.

first reported her sexual harassment and multiple sexual assaults. *Id.* ¶ 84. From November 9 through approximately December 21, 2017, no school official inquired about Jane's condition or emotional, physical, or educational needs, despite her chronic absence and their awareness of the allegations immediately preceding her absence. *Id.* ¶ 85. On or about December 21, 2017, Assistant Principal Gaines called Jane's mother to tell her that Jane was deemed truant from school. *Id.* ¶ 87. She offered no assistance to the family. *Id.*

Additionally, it was more than three months after Jane's reporting until school district employees finally helped Jane transfer to another school, following Jane's mother's repeated requests for a transfer. *Id.* ¶ 84. On or about January 16, 2018, Jane's mother went to Carol City to try to sign Jane up for homeschool or transfer her to another school because Jane did not feel safe at Carol City. *Id.* ¶ 88. Assistant Principal Gaines tried to convince Jane's mother to send Jane back to Carol City but provided no plan to protect Jane if she returned there. *Id.* Accordingly, Jane's mother did not believe Jane would be safe there and continued to ask for a transfer. *Id.*

On or about that same day, Jane's mother spoke to a Carol City counselor who said she would send the transfer request form to the School District Regional Office for approval. *Id.* ¶ 89. However, no one ever followed up with Jane's mother about the transfer request. *Id.* In late January 2018, with the assistance of Jane's therapist from Kristi House, Jane's mother went to the Regional Office again to try to get Jane transferred to a new school. *Id.* ¶ 91. Again, no one at the School District Regional Office helped her. *Id.* Meanwhile, Jane continued to miss school. *Id.* Eventually, on February 23, 2018, Jane's mother and an attorney for the School Board met with the School District Regional Superintendent, who finally assisted with Jane's transfer and transportation to a public school in a different neighborhood from her home. *Id.* ¶ 101.

IV. JANE'S MOTHER RECEIVES THE ORIGINAL STATEMENT AND SEEKS MEDIA ASSISTANCE, FINALLY PROMPTING FURTHER SCHOOL BOARD ACTION

On or around January 16, 2018, Assistant Principal Gaines gave Jane's mother, at her request, a copy of Jane's original Statement to Officer Etienne. *Id.* ¶ 90. The original Statement did not include the language that Jane was pressured into adding to the Amended Statement. *Id.* Jane's mother subsequently contacted several press outlets and attorneys to get help. *Id.* ¶ 92. Channel 7 WSVN responded to Jane's mother and agreed to investigate the circumstances of the case. *Id.* ¶ 93. Upon information and belief, on or about January 31, 2018, a Channel 7 representative contacted the School Board, Carvalho[6] and/or a School District employee for comment about a story they would broadcast about the sexual assaults. *Id.* ¶ 94. The Complaint is silent as to whether any comment was provided. However, also on or about January 31, 2018, Assistant Principal Gaines finally reached out to Jane's mother by telephone to find out why Jane was absent from school and to say that she would help Jane make up her school assignments. *Id.* ¶ 95.[7]

In early February 2018, Channel 7 broadcast a story about the harassment Jane had experienced. *Id.* ¶ 97. Jane alleges upon information and belief that it was not until February 14, 2018—more than three months after notifying the school official and school district employees about the harassment (including assaults)—that the School Board belatedly referred Jane's case to

[6] At all relevant times, Carvalho was the Superintendent of the School District and charged with the administration and management of all District schools, and with the supervision of instruction, as the secretary and executive officer of the School Board. *Id.* ¶ 12.

[7] On February 1, 2018, Assistant Principal Gaines emailed Jane's mother with a link to a website that ostensibly contained Jane's World History assignments, but no other assignments. *Id.* ¶ 96. Neither Assistant Principal Gaines nor any other school official or district administrator provided instructions on how to access the assignments. *Id.* Further, Jane's mother did not own a computer. *Id.* This was the full extent of the school's efforts to bring Jane up to speed on her missing coursework. *See id.*

the State Attorney's office for criminal investigation. *Id.* ¶ 98. Jane alleges this delay violated Florida Statutes §§ 1006.13 and 1006.147. *Id.*

When the School Board finally reported Jane's case for criminal investigation, rather than referring the case to the Sexual Battery/Child Sexual Abuse Unit, the School Board inappropriately referred Jane's case to the Juvenile Unit of the State Attorney's Office. *Id.* ¶ 99. As a result, Jane was interrogated by prosecutors who typically investigate juvenile offenses in non-sexual crimes. *Id.*

V. JANE FILES AN INTERNAL AFFAIRS REPORT REGARDING OFFICER ETIENNE AND THE SCHOOL BOARD REFUSES TO EXPUNGE JANE'S RECORD

On or about February 22, 2018, Jane and her mother began an administrative process to expunge the record of Jane's suspension on the basis that the assaults were not consensual and that the School Board's investigation of the sexual harassment, including sexual assaults, was inadequate and improperly conducted. *Id.* ¶ 100. Separately, on or about March 2, 2018, Jane filed a complaint with the Miami-Dade County School Police's internal affairs department regarding Officer Etienne's intimidating and coercive conduct on November 7th. *Id.* ¶ 102. The School Board refused to grant Jane's repeated requests for expungement of the suspension from her record, stating that it could not expunge the record until the criminal investigation and the Miami-Dade School Police's internal investigation of Officer Etienne was completed. *Id.* ¶ 103. The Complaint is silent as to whether these investigations are still ongoing. The Complaint also is silent as to whether the suspension subsequently has been expunged from her record.

VI. ADDITIONAL ACTS AND OMISSIONS IDENTIFIED IN THE COMPLAINT

Jane alleges that the Defendants have a custom of failing to adequately train employees to recognize, prevent, and address sexual harassment, including sexual assault; this custom allegedly

resulted in the deprivation of Jane's constitutional, statutory, and common-law rights. *Id.* ¶ 5. As to the School Board, the custom includes a failure to adequately train School District employees, including the particularly identified school officials in the Complaint, on:

- The identity of the School District's Title IX coordinator;
- Their duty under both Title IX and School Board policies to notify the Title IX coordinator of all student-on-student harassment;
- Their duty to adequately, reliably, and impartially investigate all reports of sexual harassment independently of law enforcement agencies;
- How to conduct adequate, reliable, and impartial investigations; and
- How to provide effective academic accommodations and support services to student victims of sexual harassment.

Id. ¶ 121. The need for such training and risks of failure to do so, according to Jane, are obvious. *Id.* ¶ 122. Additionally, Jane alleges that the School Board was on actual notice of high incidence of student-on-student sexual harassment in the District. *See id.* The custom of the failure to train was evidenced by the various actions of the particularly identified school officials. *See id.* ¶¶ 123, 141.

In addition to the above-described acts and omissions of the particularly identified school officials,[8] Jane further alleges that the School Board itself:

- Failed to refer the allegations of harassment (including abuse) to the School District Civil Rights Compliance Office;
- Failed to refer Jane for counseling[9];

[8] The negligence and negligence *per se* claims against both Defendants seek to impose liability "by and through the actions and nonactions of employees and agents of the School District" as well as the School Board itself. *See id.* ¶ 134; *see also id.* ¶ 144.

[9] Jane suggests that a school official should have referred Jane to the Child Advocacy Center operated by Kristi House, a non-profit organization which provides counseling to child sexual abuse victims in Miami-

- Failed to keep Jane's perpetrators away from her in school, causing Jane to feel unsafe in school and not return;
- Failed to provide instruction or instructional materials for Jane while she was absent for more than three months following the assaults;
- Failed to contact Jane's mother to determine the reason for Jane's pattern of absences following the final assault;
- Failed to refer Jane's case to a child study team to determine remedies for her pattern of nonattendance in school following the final assault; and
- Failed to provide opportunities for Jane to make up the assigned work she missed to avoid an academic penalty.

Id. ¶ 114.

Jane also alleges that the School Board itself retaliated against Jane for reporting the allegations of sexual harassment (including multiple sexual assaults) by:

- Suspending her from school after she reported the sexual assaults;
- Failing to refer her complaint for investigation by the School District Office of Civil Rights Compliance or for immediate criminal investigation;
- Treating her like a perpetrator, not a victim;
- Failing to tell Jane or her mother of their rights under state law, School Board policy, and Title IX;
- Failing to refer Jane for medical treatment at a rape treatment center within a reasonable timeframe;
- Failing to protect Jane from further harassment by the perpetrators;
- Failing to contact Jane and provide her with instruction or other accommodations when she was absent for more than three months of school;
- Failing to transfer her to another school with a safer environment away from the perpetrators where she could finish her education; and

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Dade County and which partners with the State Attorney's Office Sexual Battery/Child Abuse Unit. *See id.* ¶ 70.

- Otherwise failing to comply with its responsibilities as mandated by Title IX.

Id. ¶ 118.

VII. JANE'S CLAIMS OF HARM

Jane alleges that she had been a diligent student prior to the sexual harassment, but that the the harassment (including the attacks) and subsequent events caused her physical and emotional distress as well as academic harm. *Id.* ¶ 104. She became afraid to return to school and to walk around her neighborhood for fear of seeing the attackers and their friends. *Id.* For more than three months, from November 8, 2017, through about February 26, 2018, Jane remained home—often alone—receiving "F" grades on her assignments and ultimately failing every single class during a grading period. *Id.* Defendants made no attempt to bring her back to school to continue her education, affirmatively refused to help Jane make up her graded assignments, and failed to provide any avenues for alternative instruction such as tutoring. *Id.* ¶¶ 104–06.

Jane alleges that she still has a full academic quarter of failing grades on her high school transcript. *Id.* ¶ 3. And the record of her suspension—along with the failing grades from that academic quarter—have disqualified Jane from consideration from certain educational opportunities and impeded her ability to achieve her future academic goals. *Id.* Jane also alleges that these events have caused damage to her reputation and standing in the community and exposed her to the risk of additional bullying in the form of sexual harassment. *Id.*

VIII. SUMMARY OF CLAIMS

In her Complaint, Plaintiff brings three causes of action against the School Board alone: (1) Violation of Title IX – Deliberate Indifference to Sexual Harassment [Count I]; (2) Violation of Title IX – Retaliation [Count II]; and (3) Violation of the Right to Equal Protection, Brought Under 42 U.S.C. § 1983 – Failure to Train [Count III]. Plaintiff also brings three causes of action

against both the School Board and Carvalho: (1) negligence "by and through the actions and nonactions of employees and agents of the School District and Defendant School Board" (Compl. ¶ 134) [Count IV]; (2) negligent failure to train [Count V]; and (3) negligence *per se* [Count VI].[10] She seeks injunctive relief,[11] compensatory and punitive damages, interest, costs, and attorneys' fees. *See* Compl. ¶ 7, "wherefore" clause following ¶ 153.

Both Defendants have moved to dismiss the Complaint in its entirety with prejudice. Alternatively, should any of the claims proceed, Defendants have moved to strike the claims for punitive damages. Plaintiff stipulates to striking the punitive damages request as to her § 1983 and state claims but has not voluntarily dropped her request for punitive damages for the alleged Title IX violations. Resp. at 20 & n.18.

The Motion is now ripe for disposition.

LEGAL STANDARD

To state a claim, Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." On a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, the court takes the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Edwards v. Prime Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010). The Court does not view each fact

[10] The Complaint also includes a claim for intentional infliction of emotional distress against both Defendants [Count VII]. Plaintiff provided notice that she voluntarily drops that claim against these Defendants, but she reserves all rights to amend her complaint to bring such claims against the individual school officials identified in the Complaint (Principal Dunn, Assistant Principal Gaines, Assistant Principal Morgan Rose, and Officer Etienne) if discovery supports such a claim. *See* Resp. at 14 & n.15; *see also* Joint Planning & Scheduling Report, D.E. 28, at ¶ 4.

[11] The Complaint is silent as to what the requested injunctive relief would be.

in isolation, however, but considers the complaint in its entirety. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Conclusory allegations will not suffice to state a claim; the complaint must allege sufficient facts to state a plausible claim to relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* Determining whether a complaint states a plausible claim for relief is a context-specific undertaking that requires the court to draw upon its judicial experience and common sense. *Id.* at 679.

ANALYSIS

I. THE COMPLAINT IS NOT A SHOTGUN PLEADING

Defendants first contend that the Complaint should be dismissed as a shotgun pleading. Mot. at 5–6.[12] The Court disagrees. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." And though Rule 10(b) requires a pleader to state her claims in numbered paragraphs, "each limited as far as practicable to a single set of circumstances," that Rule sets forth "a flexible standard that turns on whether pleading multiple claims in one count advances or hinders the interests of clarity." *Cont'l 332 Fund, LLC v. Albertelli*, 317 F. Supp. 3d 1124, 1139 (M.D. Fla. 2018) (citing Fed. R. Civ. P.

[12] Citations to court filings refer to the page numbers assigned by CM/ECF at the top of the page, not the page numbers assigned by the parties at the bottom of the page.

10(b)). "[N]otice is the touchstone of the Eleventh Circuit's shotgun pleading framework." *Id.* at 1138; *see also Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1325 (11th Cir. 2015) (count is not a shotgun pleading, even if it is "not a model of efficiency or specificity," so long as it "adequately put[s] [defendants] on notice of the specific claims against them and the factual allegations that support those claims"). The key inquiry is whether the "failure to more precisely parcel out and identify the facts relevant to each claim materially increase[s] the burden of understanding the factual allegations underlying each count." *Weiland*, 792 F.3d at 1324.

With respect to this Complaint, there is no increased burden. Defendants' Motion proves that each Defendant has little difficulty knowing what they were alleged to have done (or not done) and why they are allegedly liable for doing (or not doing) it. *Cf. id.* Likewise, the Court can and does understand the claims that are stated in the Complaint. *Cf. id.* The Complaint is sufficiently clear and is not due to be dismissed as a shotgun pleading.

II. TITLE IX CLAIMS AGAINST THE SCHOOL BOARD

"'[S]exual harassment' is 'discrimination' in the school context under Title IX….[and] student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). As the Eleventh Circuit has explained, a plaintiff seeking recovery for a Title IX violation based on student-on-student harassment must prove five elements: (1) the defendant must be a Title IX funding recipient; (2) an "appropriate person" must have actual knowledge of the alleged discrimination or harassment; (3) the discrimination or harassment—of which the funding recipient had actual knowledge under element two—must be "severe, pervasive, and objectively offensive"; (4) the funding recipient acted with "deliberate indifference to known acts of harassment in its programs or activities"; and (5) the discrimination "effectively barred the victim's

access to an educational opportunity or benefit." *Hill v. Cundiff*, 797 F.3d 948, 970 (11th Cir. 2015); *see also Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1293, 1297–98 (11th Cir. 2007) (quoting *Davis*, 526 U.S. at 633; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)) (describing the above-test as a four-element test, with the fourth element having two subparts: (a) severity, persuasiveness & objective offensiveness and (b) effectively barring access).

The School Board moves to dismiss the Title IX claims on the grounds Plaintiff has not satisfied the second, fourth, and fifth elements. Mot. at 6–12. The Court takes each argument in turn.

A. Appropriate Person with Actual Knowledge of Discrimination or Harassment

In *Gesber*, the Supreme Court expressly rejected an interpretation of Title IX that would impose school district liability based on theories of imputed liability (*i.e.*, *respondeat superior* or vicarious liability) and constructive notice. *See* 524 U.S. at 280–90. Instead, "a Title IX plaintiff must prove the funding recipient had actual knowledge that the student-on-student sexual harassment was severe, pervasive, and objectively offense." *Hill*, 797 F.3d at 969. The person with actual knowledge must be an "appropriate person" within the funding recipient's system, meaning that the person must be an official of the recipient entity who "at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf." *Gebser*, 524 U.S. at 290. The school official must be "high enough up the chain-of-command that his acts constitute an official decision by the school district itself not to remedy the misconduct." *Floyd v. Waiters*, 171 F.3d 1264, 1264 (11th Cir. 1999).

Plaintiff argues that Principal Dunn and Assistant Principals Morgan-Rose and Gaines are the "appropriate persons" identified in the Complaint. Resp. at 6 & n.4.[13] Viewing the allegations in the light most favorable to Plaintiff, as the Court must, these individuals plausibly had the authority to address the harassment and institute corrective measures on Plaintiff's behalf. *See Gebser*, 524 U.S. at 290; *see also Hill*, 797 F.3d at 971 (concluding that principal and assistant principals possessed disciplinary authority, but teacher's aide did not).

Now, to the "actual knowledge" element. The School Board first argues that Plaintiff has not adequately alleged actual knowledge of harassment because "Plaintiff's Complaint concedes Plaintiff *admitted* she was a 'willing participant' in the sexual conduct…." Mot. at 7 (emphasis added). This reading of the Complaint finds no support in the actual allegations. Instead, viewing the allegations in the light most favorable to Plaintiff, the Complaint reflects Plaintiff's contention that she was wrongly coerced by Officer Etienne into amending her statement, not that she "admitted" to consent. In fact, the Complaint's allegations support a plausible inference that the Principal and Assistant Principals actually knew of—or at least were willfully blind[14] to—

[13] Plaintiff does not contend that Officer Etienne is an "appropriate person" within the meaning of Title IX. *Cf. Floyd v. Waiters*, 133 F.3d 786, 793 & n.15 (11th Cir. 1998) (holding that school board lacked actual knowledge of security guard's sexual assault, noting that the guard was "at least three levels removed from the superintendent of schools position"), *vacated by* 525 U.S. 802 (1998), *reinstated in* 171 F.3d 1264 (11th Cir. 1999).

[14] The Eleventh Circuit apparently has not squarely addressed the question of whether willful blindness can satisfy the Title IX "actual knowledge" element. However, case law from other jurisdictions suggests that it may. *See, e.g.*, *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1225 & n.4 (7th Cir. 1997) (where principal had been informed that cafeteria worker and student were planning to skip school/work together the day before they did and had heard the worker and student had been on a "date," but failed to act on that information, there was sufficient evidence that he had knowledge of sexual harassment); *T.C. ex rel. S.C. v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, Nos. 3:17-cv-01098, 2018 WL 3348728, at *6 (M.D. Tenn. July 9, 2018) ("A school cannot turn a blind eye to student-to-student behavior or conduct sub-par investigations and claim that the harassment was unknown."); *Spinka v. H.*, No. 14-cv-583, 2016 WL 1294593, at *3 (S.D. Ill. Mar. 31, 2016) (noting that "school administrators certainly cannot escape liability through willful blindness"). Such an interpretation does not conflict with *Gesber*; that case rejected

Plaintiff's unwillingness to participate in the sexual conduct, but that they hoped to be relieved of the "burden of having to conduct a full investigation of Jane's claims and take proper disciplinary and rehabilitative actions." *See* Compl. ¶ 113(b); *see also* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). If, in truth, Officer Etienne was a rogue actor—coercing Plaintiff to change her statement without the knowledge of the school board officials—such that no person with disciplinary authority had actual knowledge of Plaintiff's lack of consent to engage in sexual activity with her attackers, that truth can be exposed through discovery. And the Court cannot conclude at this stage that the Principal and Assistant Principals were not obligated to do more to investigate the nature of the encounters.

The School Board next complains that the Complaint does not specifically allege "*which appropriate school official(s)*" had actual notice of "*which facts* constituting sexual assault by her peers and *on which date(s).*"[15] Mot. at 7 (emphasis in original). Such specificity is not compelled by Federal Rule of Civil Procedure 8(a)(2), which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Indeed, because Plaintiff's friends, not her,

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constructive notice and vicarious liability under Title IX, but a willful blindness standard would be more than mere negligence and would be tantamount to actual notice. This outcome is also consistent with the "deliberate indifference" standard under § 1983. *See, e.g.*, *Harry A. v. Duncan*, 351 F. Supp. 2d 1060, 1074 (D. Mont. 2005) (summary judgment must be granted absent proof of "knowledge or willful blindness to an obvious risk to the female students' constitutional rights"), *aff'd* 234 F. App'x 463 (9th Cir. 2007); *Young v. Austin Indep. Sch. Dist.*, 885 F. Supp. 972, 976–77 (W.D. Tex. 1995) (describing one of the elements of deliberate indifference as "the defendant had actual knowledge of, or was willfully blind to, the elevated risk" and collecting circuit court cases); *see also* Brief of Amici Curiae of TASB Legal Assistance Fund, *Gebser v. Lago Vista Indep. Sch. Dist.*, No. 96-1866, 1998 WL 63164, at *9–12 (U.S. Feb. 13, 1998) (advocating that actual knowledge under Title IX should function "just as the deliberate indifference standard has in Section 1983 actions" and would require proof not only of neglect, but of conscious disregard).

[15] Plaintiff concedes that school officials' actual knowledge arose "[b]eginning November 7, 2017." Compl. ¶ 112. Thus, the School Board's emphasis that "[t]here is no allegation that any of the male students had ever bothered Plaintiff before the incidents" and "there is no allegation that Plaintiff made reports of sexual harassment or assault…before the incidents," Mot. at 8, misses the mark.

initially reported the assaults to Principal Dunn, *see* Compl. ¶ 29, it makes some sense that Plaintiff would not allege what specific facts those friends relayed. Likewise, the Complaint supports an inference that either Principal Dunn or the friends relayed that same information to Assistant Principal Morgan-Rose, who then called Jane into her office and asked Jane about the friends' report. *Id.* ¶ 30. And though the Complaint is silent as to how Assistant Principal Gaines learned of the alleged sexual encounters, the allegations permit a plausible inference that Assistant Principal Gaines actually knew that Plaintiff did not consent to those encounters, yet disregarded that fact. *See, e.g.*, *id.* ¶¶ 46 (when Jane was brought to the main office for a second time, both Officer Etienne and Assistant Principal Gaines were present); *id.* ¶¶ 48–52 (Officer Etienne next took Jane aside and coerced her to write the Amended Statement); *id.* ¶¶ 57–59 (during meeting with Jane, Jane's mother, and Officer Etienne, Assistant Principal Gaines "lied" about the existence of a video containing evidence of consensual sexual activity). Again, the specifics can be ferreted out through discovery. For now, Rule 8's notice pleading requirements have been met.

In sum, Plaintiff has sufficiently alleged facts to satisfy the second prong of the Title IX test.

B. Deliberate Indifference to Known Acts of Harassment

The deliberate indifference prong requires Plaintiff to show that the School Board "subjected" her to harassment—that is, "caused" her "to undergo" harassment or made her vulnerable to it. *See Davis*, 526 U.S. at 644–45 (construing the language of 20 U.S.C. § 1681(a)). A plaintiff can state a viable Title IX claim by alleging that the funding recipient's deliberate indifference with respect to *past* acts of harassment made her vulnerable to potential *future* harassment, without requiring an allegation of subsequent actual sexual harassment. *Farmer v.*

Kansas State Univ., 918 F.3d 1094, 1104 (10th Cir. 2019). "A Title IX plaintiff's alleged fear of encountering her attacker must be objectively reasonable." *Id.* at 1105.

Here, the Complaint includes a litany of failures and missteps by School Board employees. These actions and inactions support a plausible claim that the School Board was deliberately indifferent to Plaintiff's known harassment, including the sexual assaults. Notably, Plaintiff alleged that one such failure was the failure to accommodate her fear of encountering her attackers, such as by making sure they were in separate classes. The failure to protect Plaintiff by, say, giving her a new class schedule or enabling her speedy transfer to a new district arguably made her vulnerable to potential future harassment by her attackers. *Cf. id.* at 1104–05 (claim sufficiently pled where plaintiffs alleged that fear of running into their student-rapists caused them, among other things, to struggle in school, lose a scholarship, withdraw from student activities, and avoid going anywhere on campus unaccompanied).

The School Board argues that the Complaint supports only an inference that "school administration and/or school police made a wrong judgment call about the nature of the events that occurred at school," not that they were deliberately indifferent. Mot. at 9. The Court disagrees. As explained above, the allegations support a plausible inference that the school employees buried their heads in the sand, failed to conduct reasonable investigations into Jane's side of the story, and accepted the Amended Statement to avoid having to take difficult and time-consuming remedial action.

This is analogous to *Davis*, where incidents of sexual harassment were reported to a teacher and then the principal, but no disciplinary action was taken. *See* 526 U.S. at 633–35. The Supreme Court in *Davis* held that those allegations stated a valid Title IX claim. *Id.* at 654–54. So too here.

Plaintiff has sufficiently alleged that the School Board's shoddy investigation was tantamount to no investigation at all and rose to the level of deliberate indifference.[16] *Cf. Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 64–65 (D. Me. 1999) (denying summary judgment and concluding that jury could find investigation clearly unreasonable where principal confronted alleged sexual harasser but did not conduct an investigation that involved speaking with any students).

Jane also has sufficiently alleged that, rather than being credited as a victim, she was treated a perpetrator and punished—including being forced to attend the same off-campus facility for suspension as her attackers—and that even after her suspension, the school refused to provide any assurance that she would be separated from her attackers while still receiving adequate education. *See Murrell v. School Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247–48 (10th Cir. 1999) (plaintiff stated a claim where she alleged that she was the victim of non-consensual sexual conduct and yet school authorities suspended plaintiff without appropriately disciplining the assailant); *Matthews v. Nwankwo*, 36 F. Supp. 3d 718, 726 (N.D. Miss. 2014) (denying summary judgment and noting that "an unjustified delay of less than a month in separating a harasser from his victim may be evidence of deliberate indifference"). Thus, she felt forced to stay home rather than expose herself to future harassment at Carol City.

[16] The Court finds the case of *Doe v. Bibb Cty. Sch. Dist.*, 126 F. Supp. 3d 1366 (M.D. Ga. 2015), *aff'd* 688 F. App'x 791 (11th Cir. 2017), distinguishable at this stage of the proceeding. There, the parties agreed that campus police department's original investigation "was adequate and thorough," but the plaintiffs argued that the transfer of the investigation to county police was unreasonable and intended to "subvert" the campus police's own investigation. *See* 688 F. App'x at 797–98. On summary judgment, the district court concluded, and the Eleventh Circuit affirmed, that there was no evidence that the school district "sought a different result or that it reasonably believed the [county police's] investigation would provide a different conclusion." *Id.* at 798; *see also* 126 F. Supp. 3d at 1378–79. That holding turned on a lack of evidence, not insufficient pleading. Here, Plaintiff has sufficiently pled the requisite intent and inaction to establish a "clearly unreasonable" response to known harassment. The School Board may renew its claim of no actual intent or inaction at the summary judgment stage, if the evidence supports such a claim. But at this stage, the Court is bound to take the allegations in the Complaint as true.

Likewise, the months-long delay in referring the case to the Miami-Dade State Attorney's Office plausibly was so unreasonable as to amount to deliberate indifference. *Cf. Doe v. Forest Hills Sch. Dist.*, No. 1:13-cv-428, 2015 WL 9906260, at *10, 12 (W.D. Mich. Mar. 31, 2015) (denying summary judgment on Title IX claim and noting that "[d]eliberate indifference has been found in cases where school officials are slow to act or investigate"). All of these and the other various inactions identified in the Complaint, taken *in toto*, satisfy the fourth Title IX prong at the pleading stage.

C. Effective Deprivation of Educational Opportunity or Benefit

Finally, the School Board argues that Plaintiff has not adequately alleged that any action or inaction by the School Board effectively barred from equal access to educational opportunities or benefits. This prong requires a plaintiff to show that that the harassment she suffered was "severe enough to have a 'systemic' effect of denying the victim equal access to an educational program or activity." *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003). This means that "gender discrimination must be more widespread than a single instance of one-on-one peer harassment and that the effects of the harassment touch the whole or entirety of an educational program or activity." *Id.*

"Examples given by the [Supreme] Court" of behavior that had the "systemic effect of denying [plaintiffs] equal access to education" include "circumstances where male students physically threatened female students daily, thereby successfully preventing them from using a computer lab or athletic field." *Id.* at 1288–89 (citing *Davis*, 526 U.S. at 650–51). "A demonstration of physical exclusion, however, is not the sole means by which a plaintiff can demonstrate deprivation of an educational opportunity." *Id.* at 1289. Rather, a plaintiff can satisfy

this element by showing that the behavior so undermined and detracted from the victim's educational experience, that the student has effectively been denied access to an institution's resources and opportunities. *Id.*

In *Hawkins*, the Eleventh Circuit, reviewing the summary judgment record below, concluded that the alleged harassment did not result in a "concrete, negative effect on either the ability to receive an education or the enjoyment of equal access to educational programs or opportunities. None of the girls suffered a decline in grades and none of their teachers observed any change in their demeanor or classroom participation." *Id.* By contrast, the Fifth Circuit has noted that the requisite "concrete, negative effect" on a victim's education can be shown to defeat summary judgment with evidence that a student was "forc[ed]…to change his or her study habits or to move to another district" or that the student's grades are lowered. *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 410 (5th Cir. 2015) (footnotes omitted).

Here, it bears emphasizing that the case is at the pleading stage. While the harassment Plaintiff faced may not have occurred on a daily basis, *cf. Davis*, 526 U.S. at 650–51, the severity and offensiveness of the multiple rapes, if true, cannot seriously be doubted. As to the concrete, negative effects that this harassment caused, Plaintiff has alleged that she suffered a steep decline in grades and in fact was unable to participate in class at all; instead, she was in a Catch-22 where she (1) felt unsafe returning to school (due to her attackers' presence) and (2) was not transferred to another school because school officials would not assist with the transfer process. *Cf. Price ex rel. O.P. v. Scranton Sch. Dist.*, No. 11-0095, 2012 WL 37090, at *6 (M.D. Pa. Jan. 6, 2012) ("The Amended Complaint also contains sufficient facts to objectively establish that the harassment denied O.P. equal access to the school's resources and opportunities. The behavior of her

classmates caused O.P. to leave class, suffer a drop in her grades, withdraw from her position on the school yearbook, and decide to leave the School District altogether. (*Id.* ¶ 223). From these facts, a reasonable person could conclude that the daily harassment created a hostile educational environment.").

While it is true that Plaintiff alleges that she did eventually transfer during the same school year, it is also true that Plaintiff alleges she was forced to miss three months[17] of schooling and that, as a result, she received failing grades which have never been corrected or expunged. Given these allegations, the Court cannot conclude as a matter of law that Plaintiff was not deprived of educational access or equal opportunities.

D. Retaliation

The School Board did not separately address the Title IX retaliation elements[18] in its Motion. Instead, the School Board argues for the first time in its Reply that the same alleged facts cannot support both a deliberate indifference claim and a retaliation claim. *See* Reply at 6. This argument is waived and the Court will not address it at this stage, as Plaintiff has not been afforded the opportunity to respond. *See, e.g.*, *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 682–83 (11th Cir. 2014) ("After Allstate pointed out in its response brief that the Sapuppos had waived

[17] Plaintiff seems to suggest that school officials should have volunteered the transfer option without Jane's mother requesting it. *Compare* Compl. ¶ 84 ("Only after more than three months did School District employees finally help her to transfer to another school, following her mother's repeated requests for a transfer.") *with id.* ¶¶ 88 ("On or about January 16, 2018, Jane's mother went to Carol City to try to sign Jane up for homeschool or transfer her to another school because Jane did not feel safe at Carol City."), 101 ("On February 23, 2018, Jane's mother…met with the School District Regional Superintendent who finally assisted with Jane's transfer…."). The Court takes this suggestion as true for the time being.

[18] To prevail on a retaliation claim, a plaintiff "must show that (1) [s]he reported the harassment; (2) [s]he suffered an adverse action; and (3) there is a causal connection between the two." *Saphir by and through Saphir v. Broward Cty. Public Schs.*, 744 F. App'x 634, 639 (11th Cir. 2018) (citing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005)).

any issue concerning the district court's alternative holdings, they did make some arguments and cite some authorities in their reply brief about those holdings. Those arguments come too late."); *Bruhl v. PricewaterhouseCoopers Int'l, Ltd.*, No. 03-23044, 2006 WL 8431886, at *3 n.7 (S.D. Fla. Apr. 3, 2006) (declining to consider argument regarding pleading with particularity under 9(b) because defendant raised the argument for the first time in reply memorandum).

III. SECTION 1983 CLAIM AGAINST THE SCHOOL BOARD

Section 1983 creates a private right of action against persons who, under color of law, subject a plaintiff to a deprivation of federally-protected rights. 42 U.S.C. § 1983. To state a Section 1983 claim, a plaintiff must allege that the defendant acted under color of state law and that the defendant's actions deprived the plaintiff of a federal right. *See West v. Atkins*, 487 U.S. 42, 48 (1988) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978)). And to state a claim against a school board (as a unit of local government)[19] for a constitutional violation, a plaintiff must allege that the school board has a policy or custom which was the moving force behind the alleged deprivation of her constitutional rights. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989); *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998); *see also Hill v. Cundiff*, 797 F.3d 948, 977 (11th Cir. 2015) (evidence must show the deprivation of the constitutional right is a "plainly obvious consequence" of municipal action).

Plaintiff alleges that she was deprived of her constitutional right to equal protection, guaranteed by the Fourteenth Amendment, by and through the School Board's deliberate indifference to sexual harassment. *Cf. Hill*, 797 F.3d at 976–77 (explaining framework for § 1983 equal protection claims based on the right to be free from sex discrimination, for municipality's

[19] *See Arnold v. Bd. of Educ. of Escambia Cty. Ala.*, 880 F.2d 305, 315 (11th Cir. 1989), *overruled on other grounds by Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

failure to adequately respond to sexual harassment). Plaintiff emphasizes that her claim does not suggest that the School Board should have prevented the assault; rather, the claim is grounded on the School Board's alleged failure to train employees how to deal with reports of alleged sexual harassment (including assault). *See* Resp. at 14. This is central to the framework of the Court's analysis: the claim is not that the School Board's failure to train employees on how to respond to sexual harassment reports caused Plaintiff to be sexually assaulted. Rather, the claim is that the School Board's failure to train employees on how to respond to sexual harassment reports caused Plaintiff to suffer post-reporting trauma and deprived her of access to educational opportunities, which harms amount to sex discrimination.

The School Board argues that Plaintiff has not pointed to a School Board policy or custom that was the moving force behind her constitutional deprivation, and that the deprivation was not a "plainly obvious consequence" of any alleged failure to train. *See generally* Mot. at 12–14.

A. Municipal Policy or Custom, Generally

A plaintiff has two methods by which to establish a municipal policy or custom: identify either (1) an officially promulgated policy or (2) an unofficial custom or practice shown through the repeated acts of a final policymaker for the municipality. *Grech v. Clayton Cty., Ga.*, 335 F.3d 1326, 1329-30 (11th Cir. 2003). Because a municipality rarely will have an officially-adopted policy of permitting a particular constitutional violation, most plaintiffs must show that the municipality has a custom or practice of permitting the violation and that the custom or practice is the "moving force" behind the constitutional violation. *Id.* at 1330.

A "custom" is "a practice that is so settled and permanent that it takes on the force of the law." *McDowell*, 392 F.3d at 1290 (quoting *Wayne v. Jarvis*, 197 F.3d 1098, 1105 (11th Cir.

1999)). A "custom" must be "so pervasive as to be the functional equivalent of a policy adopted by the final policymaker." *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir. 1994). Actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. *Id.* at 1345 (quoting *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986)).

B. Policy or Custom of Deliberate Indifference

A city may be found "deliberately indifferent" if the plaintiff presents "some evidence that the municipality knew of a need to train and/or supervise in a particular area," or otherwise prevent or correct the constitutional violations, "and the municipality made a deliberate choice not to take any action." *Lewis v. City of W. Palm Beach, Fla.*, 561 F.3d 1288, 1293 (11th Cir. 2009) (quoting *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998)).

For § 1983 deliberate indifference purposes, "[a] city may be put on notice in two ways. First, if the city is aware that a pattern of constitutional violations exists, and nevertheless fails to provide adequate training, it is considered to be deliberately indifferent." *Id.*; *see also Church*, 30 F.3d at 1343 (random acts or isolated incidents are generally insufficient to establish a "pervasive practice or custom"). Here, Plaintiff has generally alleged that the School Board was aware of various past incidents of sexual harassment—prior to the events relating to Jane— and that the School Board was previously made aware of the guidance documents regarding the need for schools to train employees on addressing peer sex-based harassment. *See* Compl. ¶ 122(a)–(c). However, Plaintiff has not alleged that the School Board was aware that its past mishandling of sexual harassment reports previously caused or increased the risk of ongoing or future sex discrimination after the reports were made. Thus, Jane has not identified a pattern of incidents

consistent with the particular constitutional deprivation on which she relies that would have put the School Board on notice of the need to train. *See Gold*, 151 F.3d at 1351.

"Alternatively, deliberate indifference may be proven without evidence of prior incidents, if the likelihood for constitutional violation is so high that the need for training would be obvious." *Lewis*, 561 F.3d at 1293. Presumably, Plaintiff hopes to invoke this theory of liability by citing to the "obvious need and risks" of not training employees on how to address sexual harassment. Compl. ¶ 122. But the narrow "single incident" liability hypothesized in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989)—and considered but not applied in Eleventh Circuit cases such as *Lewis* and *Gold*—has not, to the Court's knowledge, been applied in a case alleging a school's alleged failure to adequately respond to reported sexual harassment and assault. *Cf. Deborah O by and through Thomas O v. Lake Cent. Sch. Corp.*, 61 F.3d 905 (table), 1995 WL 431414, at *2–3 (7th Cir. 1995) (rejecting *Canton* single incident liability in claim of failing to recognize and report incidents of sexual harassment or abuse). Plaintiff has not stated a § 1983 claim for deliberate indifference against the School Board based only on the single incident involving the School Board's alleged mishandling of her reported sexual harassment.

For these reasons, Count III will be denied without prejudice but with leave to amend, in the event Plaintiff can allege facts identifying a pattern of post-reporting discrimination of which the School Board was aware, such that the School Board's continued disregard of the need to properly handle reports of sexual assaults (in the face of past known effects of improper handling) could rise to the level of a policy or custom of deliberate indifference.

IV. SUPERINTENDENT CARVALHO'S IMMUNITY UNDER FLORIDA STATUTES § 768.28

In the Motion, Carvalho asserted that he is entitled to dismissal on the ground of qualified immunity. Mot. at 18–20. But as Plaintiff correctly notes, Carvalho is not being sued under § 1983. Resp. at 19. He is only being sued for state law negligence. The proper framework, thus, is state law sovereign immunity—which Plaintiff briefed in her Response and Carvalho briefed in his Reply.[20]

The applicable immunity statute provides, in pertinent part:

> No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, **unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property**.

Fla. Stat. § 768.28(9)(a) (emphasis added). "The Florida Supreme Court has interpreted § 768.28(9)(a) to mean that when an individual state employee acts within the scope of his or her employment, it is the employing agency - not the individual - who is liable. On the other hand, when an individual employee acts outside the scope of his or her employment, or acts with bad faith or malicious purpose, it is the individual - not the employing agency - that is liable." *Envtl. Health Testing, LLC v. Lake Cty. Sch. Bd.*, No. 5:11-cv-121, 2011 WL 13295825, at *7 (M.D. Fla. Sept. 28, 2011) (citing *McGhee v. Volusia Cty.*, 679 So. 2d 729, 730, 733 (Fla. 1996)). "In any given situation either the agency can be held liable under Florida law, or the employee, but not both." *McGhee*, 679 So. 2d at 733.

[20] Carvalho agreed in his Reply that Florida's statutory immunity, and not federal qualified immunity, was the proper framework. Reply at 10 n.4.

Plaintiff has alleged no fact showing Carvalho's bad faith or malicious purpose. The most Plaintiff alleges is that (1) "if a School Official or School District employee referred Jane's pattern of absences to Defendant Carvalho's office, his office took no action on such referral(s)," Compl. ¶ 86(c), and (2) "[i]f Jane's pattern of absences was reported to Defendant Carvalho, his office did not take any action to assist her," *id.* ¶ 134(n). These allegations, if true, simply do not rise to the level of misconduct necessary to hold Carvalho liable in his individual capacity.

Accordingly, the claims against Carvalho are due to be dismissed. And while the Court doubts that Plaintiff can amend in good faith to allege more specific facts pertaining to Carvalho, she will be given an opportunity to do so. *Cf. Doe v. Sch. Bd. of Brevard Cty.*, No. 6:12-cv-921, 2013 WL 12361024, at *4 (M.D. Fla. Mar. 7, 2013) (dismissing without prejudice for failure to allege conduct to overcome statutory immunity but affording leave to amend).

V. NEGLIGENCE CLAIMS

Because Plaintiff has stated a Title IX claim, 28 U.S.C. § 1367(c)(3) is inapplicable at this time. The Court therefore examines whether Plaintiff has stated valid negligence claims in Counts IV through VI.

A. Negligence (Count IV)

In Count IV, Plaintiff alleges that the Defendants breached their duties of care that they owed to Jane in the inadequate manner in which they investigated the reports of sex assaults, bullying and sexual harassment; in how they mistreated Jane after she made the reports; and in how they neglected her education and recovery from the trauma thereafter. Compl. ¶ 134. Defendants argue that allegedly inadequate investigation and response to reported sexual abuse cannot support a claim for negligence unless there is further sexual abuse. The Court disagrees.

The Court sees no reason why negligent investigation and response could not proximately cause Plaintiff emotional and psychological harm, trauma, and educational injury.

Defendants' two cited cases, *State, Dept. of Health & Rehab. Servs. v. L.N. By and Through Negron*, 624 So. 2d 280 (Fla. 3d DCA 1993) and *Int'l Sec. Mgmt. Grp., Inc. v. Rolland*, --- So. 3d ---, 2018 WL 6818442 (Fla. 3d DCA 2018), are inapposite. *Negron* involved two adopted children's contention that the Florida Department of Health and Rehabilitative Services' negligent investigation and response to reported sexual abuse by their adoptive brother allowed them to be subjected to continued sexual abuse by the brother. 624 So. 2d at 281. The appellate court vacated the final judgment entered after jury verdict because there was no evidence of further sexual abuse after the report. *See id.* The case does not speak to whether a negligence claim based on a different kind of harm—other than actual continued sexual abuse—could stand. Likewise, *Rolland* stands only for the proposition that a directed verdict is appropriate on a negligent failure to investigate claim where "the record is silent" as to how the alleged failure to investigate "contributed in any way to [the plaintiff's] asserted injury." 2018 WL 6818442, at *11. It's a case about proof, not pleading. And to the extent Defendants argue that the Jane's allegations show that the investigation was adequate, Defendants fail to read the Complaint in the light most favorable to Plaintiff. Plaintiff has sufficiently stated a negligence claim in Count IV. However, for the reasons stated above, unless Plaintiff can allege more specific facts supporting a lack of immunity for Carvalho, Count IV will proceed against the School Board alone.

B. Negligent Failure to Train (Count V)

In Count V, Plaintiff alleges that Defendants breached their duty to properly train School Officials, including Principal Dunn, Assistant Principal Gaines, Assistant Principal Morgan-Rose,

Officer Etienne, and other School District employees, regarding, *inter alia*, how to recognize, prevent, and address bullying and sexual harassment, properly handling reports of sexual harassment and abuse, and informing victims of their rights under Title IX, Florida statutes, and School Board policies. *See* Compl. ¶ 141.

The School Board first argues that it is immune under Florida Statutes § 768.28 from a negligent failure to train suit. "Though sovereign immunity is waived in certain circumstances, Florida courts have found that the waiver does not apply when the challenged acts are 'discretionary' rather than merely 'operational.'" *Bussey-Morice v. Kennedy*, No. 6:11-cv-970, at *1–2 (M.D. Fla. Dec. 12, 2012) (citing, *inter alia*, *Lewis v. City of St. Petersburg*, 260 F.3d 1260 (11th Cir. 2001) and *Mercado v. City of Orlando*, 407 F.3d 1152 (11th Cir. 2005)). "An act is 'discretionary' when all of the following conditions have been met:

> (1) the action involves a basic governmental policy, program, or objective; (2) the action is essential to the realization or accomplishment of that policy, program, or objective; (3) the action require[s] the exercise of basic policy evaluation[s], judgment[s], and expertise on the part of the governmental agency involved; and (4) the governmental agency involved possess [es] the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision."

Lewis, 260 F.3d at 1264 (alterations in original) (citing *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985)). By contrast, an act is "operational" if it is "not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented." *Id.* at 1265; *see also Swofford v. Eslinger*, 686 F. Supp. 2d 1277, 1289–90 (M.D. Fla. 2009) (finding that a reasonable jury could conclude that county was negligent in the implementation of the training that it initially instituted in its discretionary capacity).

Here, Plaintiff has alleged that various policies and plans have been made to protect and care for students who report sexual harassment and abuse. Those policies and plans exist through Title IX, Florida statutes, School Board policies, and similar sources. At this stage, the allegations in the Complaint support a plausible inference that the policies and plans include training mandates which were not properly implemented. *See* Compl. ¶¶ 72–74, 121–23, 139, 141. As a result, the Court cannot conclude that sovereign immunity bars this claim in its entirety.

If, however, it is revealed upon summary judgment or at trial that no training policies exist, and/or that Plaintiff is in fact challenging the School Board's discretionary act of including or excluding certain material from its training, such a claim will be barred by sovereign immunity. *Cf. Lewis*, 260 F.3d at 1266–67 (sovereign immunity barred plaintiff's challenge to the reasonableness of basic policy decisions made by the City regarding how to train its officers and what subject matter to include in the training); *Mercado*, 407 F.3d at 1162 ("The determination of the content of a training program is a discretionary function for the city which is afforded sovereign immunity."); *see also Bussey-Morice*, 2012 WL 12899017, at *2 (denying motion to dismiss and determining that the court should go beyond the four corners of the complaint to determine if the city's acts pertaining to training should be deemed "discretionary" or "operational"). And, as with Count IV, unless Plaintiff can allege more specific facts supporting a lack of immunity for Carvalho, Count V will proceed against the School Board alone.

C. Negligence *Per Se* (Count VI)

Finally, Defendants challenge Plaintiff's negligence *per se* claim, arguing that the relevant statute, Florida Statutes § 39.201 ("Mandatory reports of child abuse, abandonment, or neglect…"), does not create a private right of action—even despite the waiver of sovereign

immunity in Florida Statutes § 768.28(9)(a). This challenge is well taken. Section 39.201 does not expressly create a civil cause of action. *Hatfield v. Sch. Dist. of Sarasota Cty., Fla.*, 2011 WL 13302419, at *3 (M.D. Fla. June 29, 2011). Nor does a violation of the statute create an implied cause of action for damages. *Id.* Thus, Plaintiff cannot assert a negligence claim that the Defendants breached a duty owed to her under Section 39.201. *Id.* The waiver of sovereign immunity in Section 768.28 is beside the point; if there is no underlying private right of action, then there is no claim for which the Defendants could have waived immunity. This claim is due to be dismissed as to both Defendants.

VI. MOTION TO STRIKE PUNITIVE DAMAGES CLAIM

The School Board has cited a multitude of cases holding that punitive damages are not available against a school district for violations of Title IX. *See* Mot. at 21 & cases cited therein[21]; Reply at 11 & cases cited therein.[22] Plaintiff offers no cases saying that punitive damages are available in Title IX cases; rather, she complains that the Eleventh Circuit has never addressed the question and that the Fourth Circuit in *Mercer* is the only circuit court decision directly addressing the topic. Resp. at 21. Nevertheless, the Court is persuaded by the cogent reasoning of the Fourth Circuit in *Mercer*, which recognized the principle that Title IX is modeled after Title VI and is interpreted and applied in the same manner and, accordingly, extended to Title IX the Supreme Court's determination in *Barnes v. Gorman*, 536 U.S. 181 (2002), that Title VI precludes punitive

[21] *Mercer v. Duke Univ.*, 50 F. App'x 643 (4th Cir. 2002); *Benacquista v. Spratt*, 217 F. Supp. 3d 588, 606–07 (N.D.N.Y. 2016); *Minnis v. Bd. of Supervisors of La. State Univ.*, 972 F. Supp. 2d 878, 889 (M.D. La. 2013); *Hooper v. North Carolina*, 379 F. Supp. 2d 804, 811 (M.D.N.C. 2005).

[22] *Sadeghian v. Univ. of S. Ala.*, No. 18-00009, 2018 WL 7106981, at *20 (S.D. Ala. Dec. 4, 2018), *report and recommendation adopted* 2019 WL 289818 (S.D. Ala. Jan. 22, 2019); *Biggs v. Edgecombe Cty. Pub. Sch. Bd. of Educ.*, No. 4:16-cv-271, 2018 WL 4471742, at *9 (E.D.N.C. Sept. 18, 2018); *Bullard v. DeKalb Cty. Sch. Dist.*, No. 1:05-cv-1608, 2006 WL 8432670, at *4 (N.D. Ga. Feb. 9, 2006); *Hooper*, 379 F. Supp. 2d at 811.

damages awards. 50 F. App'x at 644. In the absence of binding precedent to the contrary, the Court adopts *Mercer*'s reasoning as the Court's own. As a result, Plaintiff's prayer for punitive damages shall be stricken.

VII. CONCLUSION

For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss, D.E. 12, is GRANTED IN PART AND DENIED IN PART as follows:

1. Defendant Carvalho is DISMISSED WITHOUT PREJUDICE from this action. Plaintiff is granted LEAVE TO AMEND, if she can in good faith allege facts pertaining to Carvalho establishing the application of Florida Statutes § 768.28(9)(a).
2. The Motion to Dismiss is DENIED as to Count I.
3. The Motion to Dismiss is DENIED as to Count II.
4. Count III is DISMISSED WITHOUT PREJUDICE AND WITH LEAVE TO AMEND as prescribed above.
5. The Motion to Dismiss is DENIED as to Count IV against the School Board.
6. The Motion to Dismiss is DENIED as to Count V against the School Board.
7. Count VI is DISMISSED WITH PREJUDICE AND WITHOUT LEAVE TO AMEND.
8. Plaintiff's prayer for punitive damages is STRICKEN.
9. **Plaintiff must file an amended complaint on or before Tuesday, May 7, 2019. Failure to timely file an amended complaint will result in the dismissal of Counts III and VI and the dismissal of Defendant Carvalho with prejudice.**

10. If Plaintiff does not timely file an amended complaint, the School Board SHALL file its answer on or before **Wednesday, May 15, 2019.**

DONE AND ORDERED in chambers at Miami, Florida this 30th day of April, 2019.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

Copies provided:
Counsel of record via CM/ECF