IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

A.P., Plaintiff, v. FAYETTE COUNTY SCHOOL DISTRICT; DR. JOSEPH BARROW, JR.; DR. DAN LANE; DR. CURTIS ARMOUR, JR.; and DR. BRANDI JOHNSON, Defendants.	CIVIL ACTION FILE NO. 3:19-cv-109-TCB

O R D E R

I. Background

Plaintiff A.P. is a former student in Defendant Fayette County School District's Fayette County High School. Defendant Dr. Joseph Barrow is the school district's retired superintendent. Defendant Dr. Dan Lane is the former principal of, and Defendants Dr. Curtis Armour

and Dr. Brandi Johnson are former assistant principals at, the high school.

A.P. contends that Defendants violated her rights by the discipline they imposed on her for engaging in oral sex at school. Specifically, she contends that the oral sex was forced on her by another student rather than being consensual and argues that Defendants were deliberately indifferent to her report of alleged sexual harassment.

In August 2017, A.P. was starting her second year at Fayette County High School. J.B. was starting his sophomore year. The two students had become acquainted and occasionally talked, texted, and video chatted.

On August 23, the two students had exchanged text messages; they planned to, agreed to, and ultimately did meet after school. Hallway video footage shows the two students in an area outside the school gym. They hugged and kissed within the first five minutes. They remained in the same area for approximately fifty-three minutes. At times, they were on camera, but at other times, they were just outside camera view. During this time, A.P. walked from the off-camera area

toward the hallway, looked down the hallway, then walked back to the off-camera area several times. In this time period, numerous different students passed through the area, as did a teacher whom A.P. knew (who greeted A.P. and J.B.).

After being in the area for approximately thirty minutes, A.P. held J.P.'s hand or wrist. After forty-four minutes, the two let in three other students from the outer doors and the five appeared to visit for a few seconds. A.P. testifies that she believes the oral sex occurred at a period between fifty-one and fifty-three minutes into this video when the students were off camera. She contends that J.B. choked her twice in this period. At the end, the two students picked up their belongings and left the area.

About thirty seconds later, another camera showed A.P. and J.B. at the bottom of a set of stairs, near doors leading outside the school. They remained in that area for approximately twelve minutes, where they appeared to talk, sometimes right beside each other. During those twelve minutes, a student walked by them. About halfway through this time, J.B. sat down beside A.P. and they appear to talk for several

minutes. Eleven minutes into the video, the students hugged for several seconds. Less than a minute later, they stood up with their belongings and hugged again. J.B. began walking backwards away from A.P., and she grabbed his sleeve or arm. A few seconds later, she held out her right arm, which she testifies was to hug him a third time.

That evening, A.P. did not tell anyone what happened with J.B. That night, she texted him, but he did not respond. The next morning, she texted him again and he replied for her to stop texting him. A series of texts between the two followed in which J.B. acted dismissive of the encounter and of A.P. She was at school during the exchange and became upset, started crying, and went to see Aminah Mitchell, a teacher whom she trusted—the same teacher who passed and greeted the students the previous afternoon. A.P. told Mitchell that J.B. made her do things she did not want to do and put his hand around her neck. She also showed Mitchell the text messages from J.B.

Mitchell spoke to a counselor, Jazzmon Parham, reporting to Mr. Parham what A.P. had told her. Parham then spoke with Armour, initially believing that A.P. may have been forced to engage in the oral

sex. Armour directed Parham to have A.P. speak with a female counselor. Parham left instructions for A.P. to speak with counselor Jen Travis. Parham then went to get J.B., put him in a conference room, and went to Travis's office.

At this time, Travis had begun speaking with A.P. Although A.P. initially was reluctant to talk, she eventually told Travis and Parham that she did something she did not want to do. Ultimately, she indicated what she had done, but nothing she said led Travis to believe that her actions were forced. Parham asked her if J.B. made her do something she didn't want to do or if she did something she wouldn't normally do because she liked him. A.P. responded that she liked J.B. and did something she would not normally do. At this point, Parham believed that A.P.'s actions were consensual. That afternoon, Parham and Travis updated Maddox on the situation, and Maddox reported the information to Armour.

The next morning, Armour spoke to Johnson about the situation. The information Maddox had provided him led Armour to believe that a consensual sexual incident had occurred.

Armour and Johnson spoke with A.P., who initially refused to discuss the situation with them. Because of her refusal, they placed her in the in-school suspension area (where students normally are kept during an investigation) while they spoke with J.B. J.B. indicated that the encounter was consensual. Armour and Johnson then viewed the video. They then reported the incident to Lane, including what they saw in the video.

Armour and Johnson then spoke to the students again. Each student separately admitted that the oral sex had occurred. Although A.P. testifies that she asked them if they saw J.B. choke her, Armour's understanding was that A.P. did not indicate in the conversation that the encounter was not consensual.[1]

Armour and Johnson then reported back to Lane that the students had admitted to oral sex. Lane reviewed the video and, based on that and the reports from Armour and Johnson, agreed that it was a

[1] A.P. testifies that in response to her question, Johnson stated, "yeah but it looked like you liked it or wanted it." [98] at 230–34.

consensual act. Lane received approval for his proposed discipline of ten days out-of-school suspension and referral to a disciplinary tribunal.

A.P. received a hearing under the Georgia Student Disciplinary Tribunal Act, O.C.G.A. § 20-2-750, et seq., in which she was provided notice of the charges against her and the evidence supporting the charges was presented. A.P. was represented by counsel, and Lane presented the school's case. In preparation, Lane spoke to the witnesses again. Parham testified that A.P. gave J.B. oral sex because she liked him. Mitchell testified at the hearing that A.P. had told her that J.B. would put his hand around her neck when she tried to move away from him. A.P. testified that J.B. grabbed her by the throat and that she had repeatedly told him no. The tribunal members (three educators not affiliated with the school) also saw the video.

The tribunal found A.P. guilty of engaging in a sexual act at school and voted to expel her through the end of the school year with permission to enroll in the district's alternative school.[2] A.P. appealed

[2] J.B.'s family waived the tribunal and accepted the same discipline of expulsion with the option to enroll in the alternative school.

the tribunal's decision to the board of education, who voted to uphold the decision. She then appealed to the State Board of Education, which also upheld the decision.

A.P. asserts claims for violation of Title IX of the Civil Rights Act, 20 U.S.C. § 1681, against the school district (Counts I and II) and violation of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983 against the school district, Barrow, and Lane (Counts III, IV, and V).[3]

Defendants have filed a motion [89] for summary judgment on all of A.P.'s claims.

II. Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). There is a "genuine" dispute as to a material fact if "the evidence is such that a reasonable jury could

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[3] In responding to Defendants' motion for summary judgment, A.P. withdraws her state-law claims (Counts VI-VII), states that she is not bringing any claims against Barrow individually, and clarifies that she is not bringing a substantive due process claim.

return a verdict for the nonmoving party." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In making this determination, however, "a court may not weigh conflicting evidence or make credibility determinations of its own." *Id.* Instead, the court must "view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.*

"The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the nonmoving party would have the burden of proof at trial, there are two ways for the moving party to satisfy this initial burden. *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437–38 (11th Cir. 1991). The first is to produce "affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." *Id.* at 1438 (citing *Celotex Corp.*, 477 U.S. at 331). The second is to show that "there is an absence of evidence to support the nonmoving party's case." *Id.* (quoting *Celotex Corp.*, 477 U.S. at 325).

If the moving party satisfies its burden by either method, the burden shifts to the nonmoving party to show that a genuine issue remains for trial. *Id.* At this point, the nonmoving party must "'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593–94 (11th Cir. 1995) (quoting *Celotex Corp.*, 477 U.S. at 324).

III. Discussion

A. Title IX

Title IX provides an implied cause of action for monetary damages against federally funded educational institutions that discriminate against students on the basis of sex or that fail to protect students from intentional discrimination, including sexual harassment. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992). However, to hold a school district liable for a Title IX violation, the plaintiff must establish that the school district had actual notice of the sexual harassment, to which it responded with deliberate indifference. *Davis v. Monroe Cnty.*

Bd. of Educ., 526 U.S. 629 (1999). Deliberate indifference occurs "only where the [school district's] response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id.* at 648.

Thus, to recover under Title IX for student-on-student harassment, A.P. must establish

> (1) the defendant is a Title IX funding recipient; (2) an "appropriate person" had actual knowledge of the discrimination or harassment the plaintiff alleges occurred; (3) the funding recipient acted with deliberate indifference to known acts of harassment in its programs or activities; and (4) the discrimination is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit. "

Doe v. Bibb Cnty. Sch. Dist., 688 F. App'x 791, 795 (11th Cir. 2017) (quoting *Davis*, 526 U.S. at 633).

Defendants contend that A.P.'s Title IX claims fail because (1) collateral estoppel precludes her contention that the oral sex was forced; (2) the evidence does not demonstrate that the school district had notice of prior sexual harassment by J.B. against other students; (3) A.P. was not subjected to severe, pervasive, and objectively offensive sexual harassment; and (4) the school district did not act with deliberate indifference.

The parties dispute whether collateral estoppel applies for several reasons, including disagreeing over whether the issue before this Court is the same as that decided by the tribunal under which A.P received a hearing under the Georgia Student Disciplinary Tribunal Act. However, even if collateral estoppel did not apply, A.P.'s claims fail for multiple reasons.

First, A.P. does not provide evidence that the school district had notice of prior sexual harassment by J.B. His disciplinary record shows that his prior misconduct incidents did not involve sexual harassment—the conduct was not "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650. The only alleged sexual harassment by J.B. is that he forced A.P. to have oral sex. And, as discussed below, the administrators' response to A.P.'s situation was reasonable.

Five staff members spoke with A.P. about the interaction. Two assistant principals and the principal viewed the video and concluded that A.P. violated the code of conduct, as did the district's assistant

superintendent of operations. The school provided A.P. with a disciplinary tribunal hearing where she had counsel, the opportunity to present arguments, and the ability to cross-examine witnesses. The tribunal members heard the arguments and viewed the video, and ultimately concluded that A.P. engaged in consensual oral sex at school in violation of the code of conduct.

Although A.P. argues that there is a dispute of fact as to what she told the administrators,[4] three administrators viewed the video evidence before they charged her with violating the code of conduct. The tribunal members also viewed the video and concluded that it demonstrated that A.P. engaged in consensual oral sex at school. As Defendants argue, it is reasonable to interpret A.P.'s actions and behavior in the last twelve minutes of the video as demonstrating that J.B. had not just sexually assaulted her a few minutes earlier. This, combined with the fact that the two students texted later that night and

[4] A.P. argues that her statements sufficed to notify various administrators or staff members that her actions were forced. However, it appears from the record that many of her statements were to the effect that she did something she did not want to do. Such a statement is more ambiguous than A.P. suggests.

that A.P. did not appear upset until the next day at school after receiving J.B.'s dismissive texts, demonstrates that Defendants' decision was not deliberately indifferent.

To the extent A.P. contends that Defendants reached an *incorrect* conclusion, that is not the applicable standard.[5] Rather, a response taken in good faith, even if not ultimately effective, is not deliberate indifference. *See Conway v. Forsyth Cnty. Sch. Dist.*, No. 2:06-cv-31-WCO, 2007 WL 9710581, at *7 (N.D. Ga. Sept. 12, 2007) (citing *Sauls v. Pierce Cnty. Sch. Dist.*, 399 F.3d 1279, 1285 (11th Cir. 2005)). A school district is not deliberately indifferent to a complaint of sexual harassment or sexual assault simply for an investigation reaching a conclusion that is ultimately incorrect or that the plaintiff disputes. *See, e.g.*, *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1250–52, 1260–61 (11th Cir. 2010).

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[5] This case is a far cry from *Stinson as next friend of K.R. v. Maye*, 824 F. App'x 849 (11th Cir. 2020), on which A.P. relies. In that case, the administration relied only on the police determination and no one at the school conducted an investigation.

A.P.'s argument that the school district violated Title IX by failing to provide her a form to fill out a sexual harassment complaint has no merit. *See Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 291–92 (1998).

And although she contends that Defendants failed to address her Title IX retaliation claim, they contend in their brief that the decision to punish her for her misconduct cannot be a basis for retaliation. The evidence shows that A.P. was punished based on the tribunal's decision that she engaged in consensual oral sex at school, not because she reported a sexual assault.[6]

Defendants will be granted summary judgment on A.P.'s Title IX claims.

B. Equal Protection

A.P. also asserts a claim under § 1983 in which she contends that the school district failed to train its employees on Title IX. She argues that Lane did not contact Title IX coordinator Mike Sanders in his

[6] This is supported by the fact that J.B. received the same punishment as A.P.

capacity as coordinator and failed to disclose that she said she was choked.

Section 1983 creates no substantive rights. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). Rather, it provides a vehicle through which an individual may seek redress when his federally protected rights have been violated by an individual acting under color of state law. *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994).

To state a claim for relief under § 1983, a plaintiff must satisfy two elements. First, she must allege that an act or omission deprived her of a right, privilege, or immunity secured by the U.S. Constitution. *Hale v. Tallapoosa Cnty.*, 50 F.3d 1579, 1582 (11th Cir. 1995). Second, she must allege that the act or omission was committed by a state actor or a person acting under color of state law. *Id.*

A municipality cannot be held vicariously liable under § 1983 for the conduct of its employees unless the plaintiff can show a "municipal 'policy' or 'custom' that caused the plaintiff's injury." *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 403 (1997) (quoting *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978)). "The

plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Id.* at 404.

A.P. can establish the school district's liability for a constitutional deprivation under § 1983 by identifying either "(1) an officially promulgated [district] policy, or (2) an unofficial custom or practice of the [district] shown through the repeated acts of a final policymaker for the [district]." *Grech v. Clayton Cnty.*, 335 F.3d 1326, 1329 (11th Cir. 2003) (internal citations omitted). "This 'official policy' requirement [is] intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.* at 1329 n.5 (alteration in original) (emphasis omitted) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986)).

A.P.'s § 1983 claims fail because she does not show an underlying deprivation of her constitutional rights, as discussed above. However, even if A.P. were able to show such a deprivation, her claims would fail because she does not show a policy or custom of the school district that

led to such a deprivation. To prove a policy or custom, generally the plaintiff must show "a persistent and wide-spread practice." *McDowell v. Brown*, 392 F.3d 1283, 1290 (11th Cir. 2004) (internal citation omitted). Usually, "random acts or isolated incidents" are insufficient to establish a policy or custom. *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986) (citing *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984)).

Inadequate training may serve as the basis for § 1983 liability "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). To establish deliberate indifference, a plaintiff "must present some evidence that the [governmental entity] knew of a need to train and/or supervise in a particular area and the [governmental entity] made a deliberate choice not to take any action." *Knight ex rel. Kerr v. Miami-Dade Cnty.*, 856 F.3d 795, 820 (11th Cir. 2017) (quoting *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998)).

"It is not enough to show that a situation will arise and that

taking the wrong course in that situation will result in injuries to citizens." *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 490 (11th Cir. 1997) (quoting *Walker v. City of N.Y.*, 974 F.2d 293, 299–300 (2d Cir. 1992)). "Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." *City of Canton*, 489 U.S. at 391; *accord Knight*, 856 F.3d at 820 ("[S]howing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability.") (alteration in original) (quoting *Connick v. Thompson*, 563 U.S. 51, 68 (2011)). A plaintiff must prove that the defendant was on "actual or constructive notice that a particular omission in [its] training plan causes [its] employees to violate citizens' constitutional rights . . . ." *Connick*, 563 U.S. at 61.

The deliberate indifference standard is "stringent" and requires proof that a municipal actor "disregarded a known or obvious consequence of his action." *Brown*, 520 U.S. at 410. For purposes of inadequate training, "[a] pattern of similar constitutional violations by

untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference." *Connick*, 563 U.S. at 62 (quoting *Brown*, 520 U.S. at 409). In this way, the defendant must be put on notice or have actual or constructive knowledge of the deficient training. *Id.*; *Depew*, 787 F.2d at 1499.

A.P. has provided no evidence that this was the case. And the evidence demonstrates that the school's staff is provided annual training on sexual harassment and that new assistant principals receive additional training on topics including sexual harassment at school. Title IX coordinator Mike Sanders went to additional training at conferences covering topics including Title IX and sexual harassment. A.P. has not shown that the school district knew or should have known that more, different, or better training was needed yet deliberately chose not to provide it.[7] *See Gold*, 151 F.3d at 1350.

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[7] To the extent the claim is based on A.P.'s contention that Lane was a final policymaker, Georgia law is clear that local boards of education are vested with final policymaking authority for school districts, and mere delegation—even if it existed in this case—does not suffice. Rather, delegation would require that the subordinate's discretionary decisions not be constrained by official policies or subject to review. *Scala v. City of Winter Park*, 116 F.3d 1396, 1399 (11th Cir. 1997).

The same is the case for the § 1983 equal protection claim against Lane individually. As discussed above, A.P. has not demonstrated that Lane acted with deliberate indifference to known sexual harassment.[8] At a minimum, Lane would be entitled to qualified immunity. This case is a far cry from *Hill v. Cundiff*, 797 F.3d 948 (11th Cir. 2015), on which A.P. relies, in which the only change made after the plaintiff's rape was to reduce sexual harassment training.

Defendants will be granted summary judgment on A.P.'s § 1983 claims.

IV. Conclusion

For the foregoing reasons, Defendants' motion [89] for summary judgment is granted. The Clerk is directed to close this case.

IT IS SO ORDERED this 28th day of June, 2021.

Timothy C. Batten, Sr.
Chief United States District Judge

[8] To the extent A.P. seeks to bring a claim against Barrow in his individual capacity, that would fail for the same reason.