

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

JANE DOE, a Minor, by and through JANE  
DOE'S MOTHER, as Parent and Next of Kin,

Plaintiff,

v.

No. 15-cv-07588

THORNTON FRACTIONAL TOWNSHIP  
HIGH SCHOOL DISTRICT 215 and BOARD  
OF EDUCATION FOR THORNTON  
FRACTIONAL TOWNSHIP HIGH SCHOOL  
DISTRICT 215,

Defendants.

**DEFENDANTS' MOTION TO DISMISS**

Defendants, by and through their attorneys, Darcy L. Proctor, and Lucy B. Bednarek, with the law firm of Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., move this Court pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss plaintiff's Complaint. In support of this motion, defendants state as follows:

**I. Introduction**

1. The complaint alleges the minor plaintiff Jane Doe, a student at Thornton Fractional High School, was sexually assaulted by another student at the school's homecoming dance on September 27, 2014. The complaint alleges plaintiff was forced into a locker room by the other student and then sexually assaulted.

2. Counts I and II are brought under Title IX and contain identical allegations against Thornton Fractional Township School District 215 ("School District") and the Board of Education for Thornton Fractional Township High School District 215 ("Board of Education").

Count III alleges negligence against the School District, and what should be Count IV (but is titled as Count III again) is an identical negligence claim against the Board of Education.

## **II. Standard of Review**

3. A court may grant a motion to dismiss under Rule 12(b)(6) if a complaint lacks “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A facially plausible complaint must allege facts sufficient to “raise a right to relief above the speculative level.” *Id.* at 555. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-80 (2009). Here, plaintiff’s complaint should be dismissed for the following reasons:

## **III. Argument**

### **A. The Board of Education is not a proper party, and plaintiff’s claims against the Board of Education are duplicative.**

4. The Board of Education should be dismissed as a defendant because it is not a proper party in this lawsuit. In addition, even if it was a proper party, plaintiff’s claims against the Board of Education are duplicative of plaintiff’s claims against the School District.

5. Count II (Title IX) and Count IV (negligence) are against the Board of Education and include allegations identical to plaintiff’s claims against the School District in Count I (Title IX) and Count III (negligence). The Board of Education is the elected governing body of the School District. The School District operates the schools. 105 ILCS 5/10-1 et seq.

6. Title IX provides a basis for liability only where a school district or school official has “actual knowledge” of harassment or abuse and responds in a manner that amounts to deliberate indifference. *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998). The School District, which is the entity operating Thornton Fractional High School, is responsible for

the supervision of student activities at the school. As such, in this lawsuit, the School District, not the Board of Education, is the proper party. The Board of Education should be dismissed as a defendant and all counts against it dismissed.

7. In the alternative, the counts against Board of Education should be dismissed because they are duplicative of the counts against the School District. Two claims are duplicative if they contain the same factual allegations and the same injury. *Eckmann v. Diedrich*, 2001 WL 717489 (N.D.Ill. 2001). Further, because the Board of Education is the governing body of the School District, plaintiff is not entitled to separate relief against both the Board of Education and the School District.

**B. The complaint fails to state a claim under Title IX.**

8. Counts I and III allege a Title IX claim based on the alleged sexual assault of plaintiff by another student on September 27, 2014. In order to hold the School District liable under Title IX for the sexual assault of plaintiff by another student, plaintiff must be able to establish the following:

- a. A school official, with the duty to supervise the harasser and the power to take corrective action;
- b. Had actual knowledge of, and;
- c. Was deliberately indifferent to;
- d. Harassment that was so severe, pervasive and objectively offensive that it;
- e. Deprived the victim of access to the educational benefits or opportunities provided by the school.

*Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

9. Title IX confines the scope of prohibited conduct based on the school district's control over the harasser or abuser and the environment in which the harassment or abuse occurs.

*Id.* at 644. The harassment must take place in a context subject to the school district's control, such as during school hours or on school grounds. *Id.* at 646. Further, actual knowledge or notice means actual reports or observations of misconduct. The standard is not "knew or should have known." *Gabrielle v. Park Forest-Chicago Heights Sch. Dist.* 163, 315 F.3d 817, 823 (7<sup>th</sup> Cir. 2003).

10. Here, plaintiff alleges the School District was placed on actual notice on the date of the alleged sexual assault because plaintiff and another student informed teachers about what happened. (Compl. ¶14). These allegations are insufficient to state a claim under Title IX. There is no allegation in the complaint that the School District had actual knowledge of a risk that plaintiff could have been sexually assaulted by the alleged offender on September 27, 2014, or that the alleged offender had sexually assaulted plaintiff or any other person in the past.

11. For example, in *Gabrielle*, 315 F.3d at 823, the Seventh Circuit held the school district did not have actual notice of a classmate sexually harassing the plaintiff until October 21, 1998, when a teacher saw the other student act inappropriately toward the plaintiff. Later that day, another student reported further inappropriate conduct by the classmate. There was no evidence the school officials observed or that anyone reported sexual behavior by the other student towards the plaintiff, or anyone else, until October 21. *Id.* Similarly, here, the complaint fails to show the School District knew of any risk to plaintiff before September 27, 2014.

12. Further, there is no factual allegation in the complaint that shows the School District was deliberately indifferent to known acts of harassment or abuse. Plaintiff alleges that after September 27, 2014, plaintiff continued to attend the same class as the offender (despite also alleging her mother pulled her out of school), attended the same field trips and parties as the offender, and that the offender was seen in her vicinity. (Compl. ¶¶21-22). However, plaintiff

*does not* allege she suffered any further sexual assault or abuse by the offender because of this conduct or the offender's alleged physical proximity to plaintiff. Once school officials have actual notice of sexual abuse or harassment, a school district has a duty to act. But as long as the school's response is not "clearly unreasonable," it cannot have acted with the requisite deliberate indifference to incur Title IX liability. *Gabrielle*, 315 F.3d at 824, *quoting Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648-49 (1999). The complaint does not contain any allegation that there were any further complaints about the offender after September 27, 2014, or that the offender's alleged interactions with plaintiff after September 27 were sexually inappropriate or abusive. As such, there is no allegation showing the School District's response was clearly unreasonable.

13. Rather, plaintiff only alleges the offender made over 15 telephone calls to plaintiff and threatened to shoot her in the head on unspecified dates. (Compl. ¶23). Yet, plaintiff does not allege these phone calls by the offender were made at school, during school hours, or on a school phone, or that the School District knew the phone calls were occurring at all or in time to take any corrective action. In other words, there is no factual allegation to show the School District had any control over these phone calls, or that the phone calls occurred in a context subject to the school district's control, such as during school hours or on school grounds.

14. Finally, although plaintiff alleges the School District did not call plaintiff's mother to inform her about what happened, and did not report the incident to DCFS, plaintiff admits she was evaluated at the hospital, the hospital reported the incident to DCS and that the Calumet City Police Department conducted an investigation.

15. In sum, plaintiff's complaint does not contain sufficient allegations to show the School District had actual notice of any risk that the offender would sexually assault plaintiff or

any other student before September 27, 2014. Plaintiff's complaint also does not contain sufficient allegations to show the School District's response to the report of the sexual assault was deliberately indifferent. As such, plaintiff's claims brought under Title IX should be dismissed for failure to state a cause of action.

**C. Plaintiff's claims in Counts II and IV should be dismissed.**

16. Counts II and IV are titled "negligence" and allege the School District failed to properly train and supervise the teachers in their duties as teachers, and failed to properly supervise the students. (Compl. ¶¶64-66).

17. As a public entity, the School District is immune from liability for any failure to train or supervise its teachers and students on school property under Section 3-108(a) of the Illinois Local Governmental and Governmental Employees Tort Immunity Act. 745 ILCS 10/3-108(a). Section 3-108 provides that "neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct." *Id.* Under Section 3-108(a), any claims against the School District sounding in negligence should be dismissed.

18. Although plaintiff uses "willful and wanton" language in Counts II and IV, the factual allegations do not rise to the level necessary to state a willful and wanton claim. To state a willful and wanton claim against a school district, a plaintiff must provide evidence of a course of action which shows an "actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210. Plaintiff allegations do not rise to this level.

19. As explained above, plaintiff alleges that after September 27, 2014, plaintiff continued to attend the same class as the offender, attended the same field trips and parties as the offender, and that the offender was seen in her vicinity. (Compl. ¶¶21-22). However, plaintiff does not allege she suffered any further sexual assault or abuse by the offender because of this conduct or the offender's alleged physical proximity to plaintiff. As such, these allegations do not state a claim for willful and wanton conduct. Willful and wanton conduct requires more than an allegation of inadvertence, incompetence, or failure to take precautions. *Knapp v. Hill*, 276 Ill.App.3d 376, 383 (1<sup>st</sup> Dist. 1995).

20. Further, even if this Court finds plaintiff sufficiently pled a claim for willful and wanton conduct, the School District is immune from liability for this alleged conduct under Section 2-201 of the Tort Immunity Act. Section 2-201 provides absolute immunity for negligence and willful and wanton conduct for discretionary decisions made by the School District. 745 ILCS 10/2-201. Discretionary immunity applies to decisions which require a governmental defendant to balance competing interests and to make a judgment call as to what solution would best serve each of those interests. *Harinek v. 161 North Clark St., Ltd.*, 181 Ill.2d 335 (1998).

21. Here, any decision made by the School District about how to train and supervise its teachers, or supervise its students falls under the discretionary immunity of Section 2-201. See *Moore v. Bd. of Educ. of the City of Chicago*, 300 F.Supp.2d 641 (N.D.Ill. 2004) (handling of student's complaint against a teacher was a discretionary policy decision; student was transferred to a different class in response to the complaint); *Albers v. Breen*, 346 Ill.App.3d 799 (4<sup>th</sup> Dist. 2004) (principal's decision about how to discipline students fell under Section 2-201); *D.M. v. Nat'l Sch. Bus. Serv.*, 305 Ill.App.3d 735 (2d Dist. 1999) (school district was immune under

Section 2-201 for its decision to assign the plaintiff student to the same bus route as a second student who had previously abused the plaintiff); *Reed v. City of Chicago*, 2002 WL 406983 (N.D.Ill. 2002) (city immune under Section 2-201 for its supervision and training of its employees, finding the acts of training and supervising employees “require discretion, balancing of interests and judgment calls”).

22. In sum, plaintiff’s claims in Counts II and IV should be dismissed because the School District is immune from liability for negligence under Section 3-108 of the Tort Immunity Act, plaintiff’s allegations do not rise to the level of willful and wanton conduct, or even if they do, the School District is immune under Section 2-201.

WHEREFORE, Defendants respectfully request that this Court dismiss plaintiff’s complaint in its entirety, or in the alternative, dismiss the Board of Education as a defendant and all counts against the Board of Education, and for all other relief this Court finds just and proper.

Respectfully submitted:

By: /s/ Lucy B. Bednarek  
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DISTRICT 215,

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**CERTIFICATE OF SERVICE**

The undersigned, one of the attorneys of record herein, hereby certifies that on December 7, 2015, the foregoing **DEFENDANTS' MOTION TO DISMISS** was electronically filed with the Clerk of the U.S. District Court using the CM/ECF System, which will send notification of such filing to the following:

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