

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JANE DOE,

Plaintiff,

vs.

SCOTTSBLUFF PUBLIC SCHOOLS
DISTRICT NO. 32 et al.,

Defendants.

4:17-CV-5010

MEMORANDUM AND ORDER

From 2007-2011, "Jane Doe" was a student, and competitive golfer, at Scottsbluff High School.¹ [Filing 23 at 3](#). In the fall of her freshman year, Doe's high school golf coach, Michael Klein, began sexually abusing her.² [Filing 23 at 13](#). That abuse allegedly continued on a weekly basis for the next three years. [Filing 23 at 13](#). In particular, the complaint alleges that Klein used his position as Doe's coach to perpetuate his abuse—abusing Doe at practice facilities, on school grounds, and on school-sanctioned golf trips. [Filing 23 at 15-16](#).

Doe has sued the Scottsbluff School District for its part in allegedly failing to protect and prevent further abuse. Those claims are premised on Title IX, [20 U.S.C. § 1681 et seq.](#); and [42 U.S.C. § 1983](#).³ The School District has moved to dismiss Doe's Title IX and § 1983 claims—styled as "Counts 1

¹ Scottsbluff High School is part of Scottsbluff Public Schools District No. 32. [Filing 23 at 3](#).

² Klein pled no contest to first-degree sexual assault against Jane Doe and another minor child and is currently serving a twenty-four to thirty-two year sentence. [Filing 23 at 2](#).

³ The plaintiff has also asserted state tort claims against Klein and the Scottsbluff Country Club. *See* [filing 23 at 18-23](#). Those claims are not at issue in this order.

and 2" of her complaint. [Filing 25](#). For the reasons discussed below, that motion will be granted in part, and denied in part, as set forth below.

STANDARD OF REVIEW

A complaint must set forth a short and plain statement of the claim showing that the pleader is entitled to relief. [Fed. R. Civ. P. 8\(a\)\(2\)](#). This standard does not require detailed factual allegations, but it demands more than an unadorned accusation. [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009). The complaint need not contain detailed factual allegations, but must provide more than labels and conclusions; and a formulaic recitation of the elements of a cause of action will not suffice. [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555 (2007). For the purposes of a motion to dismiss a court must take all of the factual allegations in the complaint as true, but is not bound to accept as true a legal conclusion couched as a factual allegation. *Id.*

And to survive a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a complaint must also contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. [Iqbal](#), 556 U.S. at 678. 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.* Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not shown—that the pleader is entitled to relief. *Id.* at 679.

Determining whether a complaint states a plausible claim for relief will require the reviewing court to draw on its judicial experience and common sense. *Id.* The facts alleged must raise a reasonable expectation that discovery will reveal evidence to substantiate the necessary elements of the plaintiff's claim. See [Twombly](#), 550 U.S. at 545. The court must assume the truth of the plaintiff's factual allegations, and a well-pleaded complaint may

proceed, even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely. *Id.* at 556.

DISCUSSION

I. TITLE IX CLAIM

As briefly noted above, the School District has moved to dismiss Doe's Title IX claim. Title IX generally provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Supreme Court has found an implied private right of action for individuals whose Title IX rights have been violated, and held that this may support a claim for money damages. See *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992); *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

A school may incur liability under Title IX, if it is (1) deliberately indifferent (2) to known acts of discrimination (3) that occur under its control. *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 782 (8th Cir. 2001). More specifically, an educational institution may be liable under Title IX for a teacher's sexual harassment of a student. *Cox v. Sugg*, 484 F.3d 1062, 1066 (8th Cir. 2007). Such liability cannot stand, however, unless an appropriate person "has actual knowledge of discrimination . . . and fails adequately to respond." *P.H. v. Sch. Dist. of Kan. City, Mo.*, 265 F.3d 653, 661 (8th Cir. 2001).

The School District raises two arguments to support why, in its view, the Title IX claim must be dismissed. First, it claims the amended complaint fails to allege any, much less sufficient, facts to support an inference that the school district had "actual knowledge" of any harassment or sexual abuse. See *filing 26 at 4*. Second, the School District claims Doe's amended complaint

fails to allege facts that, even if true, suggest the School District was "deliberately indifferent" to Doe's sexual abuse. See [filing 26 at 15](#).

The School District's first argument is easily disposed of, so the Court will begin there. Generally speaking, the School District claims that its knowledge, if any, surrounding Klein's inappropriate relationship with Doe was based solely on "rumors" and "vague complaints" of misconduct. See [filing 36 at 4](#). So, because Doe fails to allege that any school officials "witnessed Klein's alleged acts of sexual harassment against Doe or that any individual reported to the School District a complaint sufficient to actually notify the School District that Doe was subjected to sexual abuse or harassment[.]" the School District urges dismissal as a matter of law. [Filing 26 at 5](#).

But the School District's argument does not correctly or fully state the applicable standard for Title IX claims, and, to some degree, it misconstrues the facts pled in the amended complaint. To state a claim for harassment under Title IX, the plaintiff must allege facts showing that an appropriate school official had actual knowledge of discrimination in the school's programs. [Roe v. St. Louis Univ.](#), 746 F.3d 874, 822 (8th Cir. 2014). This is not a negligence standard, and liability cannot lie for what the school should have known. [Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.](#), 526 U.S. 629, 644, 650 (1999). And in the context of teacher-student harassment, courts have generally held that the school must have "actual knowledge of a substantial risk of abuse to students." [Id.](#) Stated another way, lone reports of inappropriate comments, or a allegations of favoritism by a teacher or coach without any indication or suspicion of sexual misconduct, are insufficient to state a claim for relief. [Gebser v. Lago Vista Indep. Sch. Dist.](#), 524 U.S. 274, 291 (1998)

But "the actual notice standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student." *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1154 (10th Cir. 2006) (internal quotations omitted). In other words, the standard does not, as the School District contends, require "conclusive proof of sexual abuse." *Filing 26 at 5*. Instead, a school is deemed to have actual knowledge when the appropriate person knows of information that "alerts" or "signals" actual sexual conduct or a substantial risk of abuse to students based on the complaints received. See *Doe v. Flaherty*, 623 F.3d 577, 585 (8th Cir. 2010); see also *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 361 (3d Cir. 2005); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000); *Gordon ex rel. Gordon v. Ottumwa Cmty. Sch. Dist.*, 115 F. Supp. 2d 1077, 1082 (S.D. Iowa 2000).

Here, it may plausibly be inferred that the reports received by the School District "alerted" or "signaled" actual sexual conduct by Klein or, at a very minimum, that Klein posed a substantial risk of abuse to students—particularly, Doe. See *filing 23 at 9-11*. For example, the complaint alleges that in early 2008, a parent notified the Scottsbluff High School Principal and the School District's athletic director that Klein and Jane Doe had slept alone in the same hotel room on an out-of-town golf trip. *Filing 23 at 8*. Doe alleges that around the same time, the Superintendent was informed that Klein had been terminated from his position at the Scottsbluff Country Club following complaints of a sexual relationship with Doe. See *filing 23 at 10-11*. In early 2010, one of Doe's teammates also reported that Klein was often observed within an "intimate distance" of Doe, and complained of Klein's inappropriate conduct towards Doe. *Filing 23 at 9*. Later in 2010, it was, again, reported to both the Superintendent and Athletic Director that there was an

inappropriate relationship between Klein and Doe. In particular, one parent—a Nebraska State Trooper—claimed that Klein was seen "touching up on Jane Doe" and "scatter[ed] when someone came into the room." [Filing 23 at 9](#). And that same parent expressed concern that Klein and Doe had an inappropriate "sexual relationship" and suggested that Klein was a "sexual predator." *See* [filing 23 at 9](#).

So, contrary to the School District's assertions, the amended complaint does not include "vague, broad-brush allegations" surrounding Klein's conduct, *see* [filing 26 at 1](#); rather, it contains specific instances where the suspected abuse was reported to the School District. [Filing 23 at 7-9](#). And the Court finds it difficult to imagine a scenario where a parent reporting the presence of Doe, a fifteen year-old girl, and Klein, a man in his fifties, sleeping in the same hotel room, observations of Klein "touching up" on Doe, and multiple complaints that Klein and Doe had a "inappropriate" or "sexual relationship," if true, would signal anything other than harassment and abuse.⁴ *Flaherty*, 623 F.3d at 585. That is enough to satisfy the actual knowledge requirement, at least at this early stage of the proceedings, and the School District's motion will be denied on those grounds.

That leaves the School District's alternative argument: that even if the it did have actual notice of the harassment, it was not "deliberately indifferent" to the allegations of abuse. [Filing 26 at 9](#). To avoid "deliberate indifference" liability, a school must respond to known harassment in a manner that is not clearly unreasonable under the known circumstances. *Davis*, 526 U.S. at 649. And although deliberate indifference is not a mere

⁴ The Court acknowledges that more detail may ultimately be required to weigh the credibility of these reports and assess the extent of the School District's knowledge. But whether Doe can eventually produce such evidence is not dispositive at this stage.

reasonableness standard, *Id.* at 649, that does not mean that any response by school officials, no matter how minimal, will absolve the school of liability. *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 260-61 (6th Cir. 2000).

The School District argues that it did not "turn a blind eye and do nothing" when the suspicions of an inappropriate sexual relationship were reported. [Filing 26 at 11](#). To the contrary, the School District claims that after it received the 2010 complaint reporting that Klein was seen "touching up on Jane Doe," [filing 23 at 9](#), the School District conducted an appropriate investigation into Klein's conduct. [Filing 26 at 9](#). The Court is not persuaded.

To begin with, the School District's argument is too narrow—it focuses on the School District's response to *one* report of sexual abuse, but ignores Doe's allegations that it failed to investigate at least three prior reports of sexual misconduct. [Filing 23 at 7-9](#). And even assuming the School District's investigation was conducted at an appropriate time, the Court is not convinced that, as a matter of law, the extent and breadth of the School District's investigation was not "clearly unreasonable in light of the known circumstances." See *Davis*, 526 U.S. at 649.

Here, Doe's complaint contains sufficient allegations to support an inference that the School District's response was "clearly unreasonable" under the circumstances. Indeed, despite the seriousness of the allegations, the amended complaint alleges that the School District's response was to ask one person, Klein himself, about his interactions and relationship with Doe. [Filing 23 at 12](#). At no time during its investigation did the School District question Doe, her parents, or her teammates about the reported instances of abuse. See [filing 23 at 12](#). Nor did the School District report the claims to law enforcement, or at any time, take disciplinary action against Klein. [Filing 23 at 12](#); see *T.Y. v. Shawnee Mission Sch. Dist. USD 512, et al.*, No. 17-2589,

2018 WL 2722501, at *8 (D. Kan. June 6, 2018) (finding that the failure to report allegations of sexual assault is "clearly unreasonable" under the circumstances).

Simply put, the amended complaint contains allegations that the School District had reason to believe Klein was sexually abusing Doe, yet took essentially no action to prevent further abuse. Those allegations, if true, state a claim for relief. See, e.g., *T.Y.*, 2018 WL 2722501, at *8; *P.W. v. Fairport Cent. Sch. Dist.*, 927 F. Supp. 2d 76, 85-86 (W.D.N.Y. 2013); *Garcia v. Navasota Indep. Sch. Dist.*, No. H-09-3892, 2010 WL 518759, at *1-2 (S.D. Tex. Feb. 2, 2010); *Bruning ex rel. Bruning v. Carroll Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 916 (N.D. Iowa 2007); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1169-70 (N.D. Cal. 2000). So, the School District's motion will be denied on those grounds.

II. § 1983 CLAIMS

The School District has also moved to dismiss Doe's § 1983 claims. Generally speaking, Doe's amended complaint implicates two theories of relief under § 1983. First, Doe alleges that the school district had a custom of failing to receive, investigate, and act on complaints of violations of constitutional rights—*i.e.* Doe's failure-to-act claim. And second, Doe claims that the School District failed to adequately train its employees, amounting to a deliberate indifference of its students well-being—*i.e.*, Doe's failure-to-train-claim. The School District urges dismissal arguing that the amended complaint states a claim neither for failure to act nor failure to train under § 1983. See [filing 26 at 12-19](#).

(i) Failure to Act

To establish the custom of failure to receive, investigate, or act on complaints of constitutional violations, the plaintiff must prove (1) a continuing, widespread, persistent pattern of misconduct by the government employee; (2) deliberate indifference to or tacit authorization of the conduct by the policy-making officials after the officials have notice of the conduct; and (3) a resulting injury on the part of the plaintiff. *Jane Doe A. v. Special Sch. Dist.*, 901 F.2d 642, 646 (8th Cir. 1990).

According to the School District, Doe's complaint fails, as a matter of law, for at least two reasons. First, the School District contends that the amended complaint is completely devoid of allegations to support the existence of a "continuing, widespread, persistent pattern" of misconduct. [Filing 26 at 16](#). Second, the School District argues that nothing in the complaint supports an inference of deliberate indifference to the reports of abuse by those with actual policymaking authority." [Filing 26 at 17](#).

The School District's first argument touches on a broader argument underlying much of the parties' dispute—whether the School District was deliberately indifferent to the reports of abuse. But the Court has already evaluated that argument and determined that the complaint supports a finding that the School District was deliberately indifferent to reported claims of Klein's abuse.⁵

The School District's second argument fares no better. Generally speaking, the School District contends that the complaint fails to allege that the School District had a custom of failing to receive, investigate, and act

⁵ The deliberate indifference standards under § 1983 and Title IX are "substantially the same." See *Stiles ex rel. D.S. v. Grainger Cnty, Tenn.*, 819 F.3d 834, 852 (6th Cir. 2016); see also *Roe v. St. Louis Univ.*, 746 F.3d 874, 882 (8th Cir. 2014).

upon complaints of sexual misconduct or harassment. [Filing 26 at 13-20](#). In particular, the School District argues that its failure to investigate four reports of sexual misconduct cannot, as a matter of law, support the existence of a "widespread pattern" of unconstitutional behavior. *See* [filing 26 at 15](#). That contention is based, primarily, on the Eighth Circuit's decision in *Thelma D. By & Through Delores A. v. Bd. of Educ. of City of St. Louis*, 934 F.2d 929, 933 (8th Cir. 1991).

In *Thelma D.*, the Eighth Circuit determined that "five complaints scattered over sixteen years cannot, as a matter of law, be said to comprise a persistent and widespread pattern of unconstitutional misconduct." *Id.* at 933. Importantly, the court found that, when considering the time frame over which the incidents of abuse occurred, the reports of abuse were "relatively isolated" and thus, were insufficient to give rise to § 1983 liability. *Id.* But here, the alleged instances of sexual abuse were not isolated at all. Instead, the amended complaint contends that the School District received at least four reports, in less than three years, concerning Kline's relationship with Doe. [Filing 23 at 9-11](#). That is a much higher concentration of sexual abuse than was presented to the Court in *Thelma D.* And based on that distinction, the Court cannot say, as a matter of law, that the complaint necessarily fails to state a claim for relief.

Thelma D. is also distinguishable from the present case for a more fundamental reason—the court in that case dismissed it at summary judgment, not on a motion to dismiss. *Id.* at 775. And that difference is not insignificant. After all, courts have routinely allowed "failure to act" claims to proceed when the complaint alleges that a school district failed to investigate or respond to multiple allegations of abuse. *See, e.g., T.Y.*, [2018 WL 2722501](#), at *10; *Adams v. Ohio Univ.*, 300 F. Supp. 3d 983 (S.D. Ohio 2018); *Lewis v.*

Blue Springs Sch. Dist., No. 4:17-CV-538, 2017 WL 5011893, at *5 (W.D. Mo. Nov. 2, 2017). That's exactly what Doe pled here. See [filing 23 at 9-11](#). Thus, the School District's motion will be denied on those grounds.⁶

(ii) Failure to Train

The School District also seeks to dismiss Doe's claim that the School District failed to train its employees. To state a claim for failure to train or supervise, a plaintiff must allege that (1) the School District's training or supervisory practices were inadequate; (2) the School District was deliberately indifferent to the rights of others in adopting them, such that the failure reflects a deliberate or conscious choice by it; and (3) an alleged deficiency in the District's training or supervisory procedures actually caused the plaintiff's injury. *Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996).

The parties' dispute turns, in large part, on whether the School District had "notice" that its procedures were inadequate. Notice can be implied when a "failure to train officers or employees is so likely to result in a violation of constitutional rights that the need for training was patently obvious." *Plamp v. Mitchell Sch. Dist. No 17-2*, 565 F.3d 450, 462 (8th Cir. 2009). And notice can also be established by showing that "a pattern of violations put the policymaking body on notice that the school's response to regularly occurring situations was insufficient to prevent the unconstitutional conduct." *Id.*

According to the School District, the amended complaint fails to "allege any facts that a policymaking authority for the School District had notice that its policies or procedures were inadequate. . . ." [Filing 36 at 16-17](#)

⁶ The School District also briefly suggests that Doe's complaint is insufficient because she does not allege that she was abused *after* the School District was allegedly put on notice. [Filing 26 at 17](#). But she clearly does. See [filing 23 at 9](#).

(emphasis omitted). In support of that argument, the School District claims that neither the School's Superintendent, Athletic Director, nor the Scottsbluff High School Principal, had final policymaking authority, and as such, the School District was not placed on notice that its response to regularly occurring situations was insufficient. [Filing 36 at 12, 17](#).

But stripped to its core, that argument is premised entirely on a factual dispute about who had *actual* policymaking authority. That is, did the Superintendent and Athletic Director have the authority, as Doe argues? Or was the School Board the sole body with actual policymaking authority, as the School District argues? [Filing 26 at 16-15](#). Either way, answering that question necessarily requires evidence of who may have authority to establish binding policy respecting particular matters and who may adjust that policy for the school in changing circumstances. And that is a factual dispute that the Court cannot, and will not, decide on a motion to dismiss. See [ABC Plastics, Inc.](#), 323 F.3d at 697 n.4. So, the School District's motion to dismiss will be denied.

III. PUNITIVE DAMAGES

Finally, the School District has moved to dismiss Doe's claim for punitive damages. Generally speaking, the School District argues that punitive damages are not available under [§ 1983](#) or Title IX. [Filing 36 at 17-18](#). Since filing her amended complaint, Jane Doe has "agree[d] to the dismissal of her claim for punitive damages against the School District under § 1983." [Filing 35 at 31](#) n. 12. So, the only remaining issue before the Court is whether punitive damages are available under Title IX.

As the School District correctly points out, neither the Supreme Court nor the Eighth Circuit has directly addressed the availability of punitive damages in Title IX actions against municipalities. But several other courts

have concluded that there can be no punitive damages claim against a school district under Title IX. *See, e.g., Doe 20 v. Bd. of Educ. of Cmty. Unit Sch. Dist. No. 5*, 680 F. Supp. 2d 957, 995 (C.D. Ill. 2010); *Doe v. Omaha Pub. Sch. Dist.*, No. 8:04-CV-295, 2005 WL 2347284, at *6 (D. Neb. Sept. 26, 2005); *Landon v. Oswego Unit School Dist. No. 308*, 143 F. Supp. 2d 1011 (N.D. Ill. 2001). The Court agrees. Indeed, the general rule is that no punitive damages are allowed unless expressly authorized by statute. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 261 n. 21, (1981). And Title IX does not expressly authorize punitive damages, nor do public policy concerns call for punitive damages: a municipality is already liable for compensatory damages to redress the illegal discrimination. *See Landon*, 143 F. Supp. 2d at 1014. Accordingly, Doe's claim for punitive damages will be dismissed.

IT IS ORDERED:

1. The School District's motion to dismiss ([filing 25](#)) is denied in part, and granted in part, as set forth above.
2. Doe's claim for punitive damages against the School District is dismissed.
3. Doe's motion to strike ([filing 38](#)) is denied as moot.

Dated this 15th day of June, 2018.

BY THE COURT:



John M. Gerrard
United States District Judge