IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

B.A.L., by and through his guardian and next friend, JOHN STEPHENSON, Plaintiff, vs. LARAMIE COUNTY SCHOOL DISTRICT NO. 1; CHAD DELBRIDGE in his official and individual capacity; and JOHN LYTTLE in his official and individual capacity. Defendants.	Case No. 2:16-CV-00091

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS

THIS MATTER comes before the Court on the Defendants' Motions to Dismiss filed September 19, 2016. (ECF Nos. 55, 57 & 59). The Court held a hearing on October 21, 2016. Defendants seek to dismiss the Title IX and § 1983 claims against Laramie County School District No. 1, Chad Delbridge in an official capacity, and John Lyttle in an official capacity. (ECF No. 59). Defendants also seek to dismiss the claims against Chad Delbridge and John Lyttle in their individual capacities. (ECF Nos. 57 & 55). Having considered the motions, responses, arguments, and relevant pleadings, the Court **GRANTS** in part and **DENIES** in part Defendants' Motions to Dismiss.

I. FACTUAL BACKGROUND

As derived from the First Amended Complaint "FAC" [ECF No. 52] this case arises from the sexual abuse of a minor student, B.A.L., by his former teacher, Anna Andersen from 2011 to 2014. The amended complaint asserts Defendants Laramie County School District No. 1 ("the District"), Lyttle, and Delbridge, were aware Andersen was violating B.A.L.'s constitutional rights, but failed to further investigate or otherwise take action to protect B.A.L.

The amended complaint alleges that in 2011, Andersen was B.A.L.'s sixth grade teacher at Freedom Elementary School within the District. During this time, Andersen groomed B.A.L. for a sexual relationship. When B.A.L. advanced to seventh grade at the middle school the following year, Andersen began a sexual relationship with B.A.L. Andersen was 52 years old and B.A.L. was 12 years old at the time. B.A.L. would visit Andersen at the elementary school daily after school, under the guise of tutoring.

Andersen would give B.A.L. rides from school, in violation of school policy. The two exchanged thousands of text messages. Andersen allegedly threatened to commit suicide if B.A.L. ended the relationship, and claimed to be pregnant on multiple occasions, but later told B.A.L. she suffered miscarriages. As a result of this conduct B.A.L. suffered emotional trauma, causing his removal from school on multiple occasions and caused his performance to suffer.

The amended complaint asserts Defendant Lyttle, the Assistant Superintendent of Human Resources at the time, and Defendant Delbridge, the Principal of Freedom Elementary, became aware of the inappropriate relationship between B.A.L. and

Andersen in the fall of 2012. Multiple teachers and staff had expressed concern to Defendant Delbridge regarding the time spent between B.A.L. and Andersen after school and on weekends. Teachers and staff told Defendant Delbridge that Andersen often gave B.A.L. rides after school in violation of the school's policy. Defendant Delbridge met with Andersen in October of 2012 and again in November of 2012, informing Andersen she could not give B.A.L. rides home or spend time with him at the school on weekends. Defendant Delbridge did not contact B.A.L.'s guardian about these matters.

On December 7, 2012, Defendant Delbridge witnessed Andersen in the school parking lot with a passenger he believed to be B.A.L. Delbridge followed Andersen's vehicle. Upon noticing she was being followed, Andersen went over a hill, pulled over, stopped, and then drove off. Upon reaching the point where Andersen stopped, Defendant Delbridge saw B.A.L. standing on the side of the road and inquired why he was there. Defendant Delbridge then returned to the school and called law enforcement to go pick up B.A.L. Delbridge did not report the incident to B.A.L.'s guardian. Three days later, December 10, 2012, Defendant Delbridge met with Andersen to speak about B.A.L., but again did not contact B.A.L.'s guardian.

In July of 2013, B.A.L. was hospitalized. Andersen visited B.A.L. in the hospital, where hospital staff witnessed the two engage in sexual conduct via a live video feed. Staff reported the incident to the police.

Six months later, in February of 2014, Defendant Delbridge again spoke to Andersen about her relationship with B.A.L. Delbridge also spoke with Defendant Lyttle, the Assistant Superintendent at the time, about Andersen and B.A.L.'s relationship and

Delbridge's banning B.A.L. from Freedom Elementary. In response, Lyttle told Delbridge it was his decision to make.

On March 19, 2014, Andersen was charged and arrested on multiple counts of sexual assault of a minor, B.A.L. She pled nolo contendre to Second Degree Sexual Abuse of a Minor and on August 27, 2015, was sentenced to eight to twelve years at the Wyoming Women's Center.

The FAC contains six counts. (ECF No. 52). Count I asserts the District violated Title IX if the Educational Amendments of 1972 by: (1) failing to investigate reports of the inappropriate relationship between B.A.L. and Andersen; (2) failing to remedy a hostile environment; (3) failing to take appropriate action due to District's preconceptions and stereotypes regarding inappropriate relationships involving a female authority figure and a young male victim; (4) failing to afford a young male the same protection as a young female; and (5) acting with deliberate indifference towards B.A.L. Counts II through VI are § 1983 claims, asserting various Defendants, in different capacities, violated B.A.L.'s constitutional rights. Count II asserts Defendant Delbridge, in an individual capacity, violated B.A.L.'s equal protection rights under the Fourteenth Amendment. Count III asserts Defendant Lyttle, in an individual capacity, violated B.A.L.'s equal protection rights under the Fourteenth Amendment. Count IV asserts the District, Principal Delbridge, and Superintendent Lyttle in their official capacities violated B.A.L.'s equal protection rights under the Fourteenth Amendment. Count V asserts Defendants Delbridge and Lyttle, in an individual capacity, violated B.A.L.'s substantive due process rights under the danger creation theory. Count VI alleges the District, Principal

Delbridge, and Superintendent Lyttle, in their official capacities, violated B.A.L.'s substantive due process under the danger creation theory.

Defendants now move to dismiss the FAC, claiming it fails to state a plausible claim upon which relief may be granted.

II. PROCEDURAL BACKGROUND

This Court granted the parties' stipulation to dismiss the entry of default against Anna Andersen, in an individual and official capacity, on August 4, 2016 and gave the Plaintiff until August 19, 2016 to file a FAC. The FAC was filed on August 19, 2016. (ECF No. 52). On September 19, 2016 each Defendant filed their motion to dismiss. (ECF Nos. 55, 57 & 59). Plaintiff responded in a timely manner and on October 21, 2016, the Court heard arguments on the pending motions.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal when a plaintiff's complaint fails to state a claim upon which relief can be granted. In reviewing a motion to dismiss under Rule 12(b)(6), this Court must accept as true "all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). In order to survive a motion to dismiss, a complaint must contain "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). In determining the plausibility of a claim, this Court looks to the elements of the particular cause of action, mindful that Rule 12(b)(6) does not require plaintiff to set forth

a prima facie case for each element. *See George v. Urban Settlement Servs.*, 833 F.3d 1242, 1247 (10th Cir. 2016).

The "plausibility standard" is not a probability requirement, but requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "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 *Twombly* standard may have greater bite in the context of a § 1983 claim against individual government actors, because they typically include complex claims against multiple defendants." *Id.* "It is particularly important in such circumstances that the complaint make clear who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." *Id.* (quoting *Robbins v. Oklahoma*, 519 F.3d, 1242, 1250 (10th Cir. 2008).

IV. ANALYSIS

Plaintiff's claims are based upon the Education Amendments of 1972 ("Title IX") and the Fourteenth Amendment of the Constitution pursuant to 42 U.S.C. §§ 1983 and 1988; therefore, this Court must apply federal law in this matter.

A. Motion to Dismiss Plaintiff's First Amended Complaint with Respect to Title IX and § 1983 Claims against the District and School Officials. (ECF No. 59)

Count I of Plaintiff's FAC alleges the District violated Title IX of the Educational Amendments of 1972. (ECF No. 52, at 12). Count IV alleges equal protection violations against the Defendants in their official capacities. (ECF No. 52, at 19). In Count VI, the

Plaintiff alleges a substantive due process claim against the Defendants in their official capacities. (ECF No. 52, at 24).

i. Count I–Title IX Claims against Laramie County School District No. 1

Plaintiff alleges the District's conduct impaired B.A.L.'s access to educational opportunities under Title IX. A school district is liable under Title IX only for its own misconduct, including its administrators. To impose Title IX liability, a school district official, with authority to institute corrective measures, must have actual notice of abuse and show deliberate indifference to discrimination upon such notice. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). There must be circumstances sufficient to show a substantial risk of harassment or abuse to a student. *Gebser*, 524 at 291. School officials may receive actual knowledge, such as reports of sexually suggestive communications, uncorroborated complaints of inappropriate physical conduct with a student, or rumors of an employee's sexual conduct with students. *Doe v. Defendant A*, No. 12-cv-392, 2012 WL 6694070, at *6 (N.D. Okla. Dec. 21, 2012). Actual knowledge need not rise to the level of a "clearly credible report of sexual abuse from the plaintiff student." *Escue v. N. Oklahoma Coll.*, 450 F.3d 1146, 1153 (10th Cir. 2006).

Defendants contend Principal Delbridge, Assistant Superintendent Lyttle, and the District did not have actual notice of sexual abuse against B.A.L. because reports about Andersen did not involve instances of physical contact or prohibited conduct under Title IX. However, the arguments that reports must constitute prohibited activity under Title IX is the minority approach and not one currently accepted by the Tenth Circuit.

Compare J.M. ex rel. Morris v. Hilldale Indep. Sch. Dist. No. 1-29, 397 Fed. App'x. 445, at *4 (10th Cir. 2010) [hereinafter *Hilldale*]; *with Doe v. Green*, 298 F.Supp.2d 1025, 1034, n. 2 (D. Nev. 2004). The FAC alleges school officials who could remedy such misconduct, including Principal Delbridge, were aware of numerous reports and complaints of suspicious behavior over a two year period by staff and that Andersen was giving B.A.L. rides home. (ECF No. 52, at ¶ 23). Plaintiff also contends Principal Delbridge observed Andersen and B.A.L. in a vehicle together, was aware both were spotted together at school events, and confronted Andersen about the need to end this conduct on four different occasions. (ECF No. 52, at ¶¶ 24–34). Viewing these allegations in the light most favorable to the non-moving party, the Court finds the FAC contains sufficient factual allegations to support that District officials, who could remedy the alleged misconduct, had actual knowledge that Anderson presented a substantial risk of abuse to B.A.L. *See Hilldale, supra* at 4–5.

Deliberate indifference exists where the response "to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999). The Supreme Court has also recognized it's appropriate for a district court to consider what is unreasonable at the motion to dismiss or summary judgment stage. *Davis*, 526 at 649. Deliberate indifference is conduct that is "clearly unreasonable in light of the known circumstances" and which causes the victim of harassment to remain subject to that harassment or at least vulnerable to it. *Escue*, 450 F.3d at 1154–55. The FAC alleges that following Principal Delbridge's December 2012 conversation with Andersen, "B.A.L. continued to return to Freedom Elementary School,

and Andersen continued to sexually and emotionally assault B.A.L. on hundreds of occasions" despite Delbridge's ban on B.A.L. from visiting the elementary school. (ECF No. 52, ¶ 30). Delbridge also never notified B.A.L.'s guardians of the situation. *Id.* The Tenth Circuit, in *Hilldale*, examined the adequacy of a response by administrators to known misconduct which not only considered an administrator's assessment of a complaint but also the adequacy of the response including meeting with the alleged victims parents, meeting with the alleged perpetrator, and conducting a follow up investigation. *Hilldale*, 397 Fed. App'x. at *8; *see also Gordon ex rel. Gordon v. Ottumwa Cmty. Sch. Dist.*, 115 F.Supp.2d 1077 (S.D. Iowa 2000). Given the allegations in the FAC and the response taken by Principal Delbridge, the Court finds, with respect to Count I, the alleged facts create a scenario where it's plausible the District acted with deliberate indifference towards B.A.L. because of its failure to notify the victim's guardians on several different occasions and/or perform an investigation despite the ongoing issues and incidents. Accordingly, the motion to dismiss with respect to Count I must be denied.

ii. Count IV–Equal Protection Claims against the District and Administrators in their Official Capacities.

Plaintiff alleges the Defendants violated B.A.L.'s right to equal protection of the law. The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall...deny to any person within its jurisdiction the equal protection of the laws." Denials of equal protection by a municipal entity or any other person acting under color of state law are actionable under 42 U.S.C. § 1983. The Tenth Circuit recognizes that

sexual harassment by a state actor can constitute a violation of the Equal Protection Clause. *See Rost v. K.C. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1124 (10th Cir. 2008). The District can be liable under § 1983 for acts of its employees only if an official custom or policy caused a violation of the plaintiff's constitutional rights. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 692 (1978).

A school district's liability for sexual harassment under the Equal Protection Clause is analyzed under a municipal liability framework. *Monell*, 436 U.S. at 692. A claim of municipal liability for sexual harassment requires that the discriminatory conduct be representative of an official policy or custom of the institution or is an action taken by an official with final policymaking authority. In the absence of an official policy, a municipality may still be liable for the widespread and persistent practice of sexual harassment which constitutes a custom. *Id.* at 1124–25. In order to prove a custom or practice of failure to receive, investigate, or act on complaints of constitutional violations, a plaintiff must prove: (1) a continuing, widespread, and persistent pattern of misconduct by the state; (2) deliberate indifference to or tacit authorization of conduct by policymaking officials after notice of the conduct; and (3) a resulting injury to plaintiff. *Id.* at 1125.

Defendants contend the FAC fails to allege that the District had an official policy, practice, custom, or decision of a final policymaker that is discriminatory in nature. Further, the Defendants argue the FAC fails to establish the alleged conduct in question was representative of an official policy of the District. (ECF No. 60, at 16–17). The FAC

alleges that Defendants Delbridge and Lyttle affirmatively acted to allow Andersen to begin and continue a relationship with B.A.L. in violation of the Wyoming Professional Conduct Guide and District policies. (ECF No. 52, ¶¶ 111–114). However, under Wyoming law, the Laramie County School District is considered the final policymaking authority and the Plaintiff has failed to state a claim which demonstrates the conduct in question is representative of an official policy or that a policymaking official, the Board, acted indifferently to known allegations of the sexual abuse by Andersen.

The party alleging discrimination under the Fourteenth Amendment also has the burden of proving that the state's conduct was motivated by a discriminatory purpose. *See Whitus v. Georgia*, 385 U.S. 545, 550 (1967). The FAC claims the Plaintiff's harm was the result of "Andersen's discrimination" but otherwise fails to provide specific factual support that the District acted with a discriminatory purpose. (ECF No. 52, ¶ 57). The Plaintiff also alleges that Assistant Superintendent Lyttle and Principal Delbridge are final policymakers subject to equal protection claims. (ECF No. 52, at ¶ ¶ 111–112). They are not. The identity of final policymakers whose conduct can create municipal liability is a question of state law. *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 736–38 (1989). "Under Wyoming law, the Board of Trustees is vested with the authority to make personnel decisions." *Milligan-Hitt v. Bd. of Trustees Sheridan Cnty. Sch. Dist.*, 523 F.3d 1219, 1227 (10th Cir. 2008). The statute governing school trustees gives the Board the power to "discharge any employee subject to the provisions of any applicable law governing the procedure for terminating the employment of school district employees."

WYO. STAT. 21-3-111(a)(vii). Wyoming law also recognizes that the Trustees determine the duties of:

> Principals who shall assume the administrative responsibility and instructional leadership of any schools to which they are assigned in accordance with policies adopted by the board of trustees, provided that in the school to which the principal is assigned, such recommendation shall be given only after periodic evaluation of the teacher's classroom performance.

WYO. STAT. 21-3-111(a)(vi)(B). Because Wyoming law recognizes the Board of Trustees as the final policymaker Plaintiff fails to allege B.A.L.'s harm resulted from an official action, custom, or policy of the School Board. Therefore, this Court must grant Defendant's motion to dismiss with respect to Count IV as the FAC fails to set forth a plausible claim for relief.

iii. Count VI–Substantive Due Process Claim against the District and Administrators in their Official Capacities.

The Fourteenth Amendment's Due Process Clause provides "no State shall...deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. In general, state actors may be held liable under § 1983 only for their own affirmative acts that violate a plaintiff's due process rights and not for third parties' acts. *See Robbins v. Oklahoma*, 519 F.3d at 1251. The two exceptions to this rule include the special-relationship doctrine and the danger creation theory. *See Christensen v. City of Tulsa*, 332 F.3d 1270, 1280 (10th Cir. 2003); *and Robbins*, 518 F.3d at 1251. In the FAC, the Plaintiff advances the danger creation theory against the District, and Defendants Delbridge and Lyttle in their official capacities. (ECF No. 52, at 24–26).

Under the danger creation theory, state officials can be liable for the acts of third parties where those officials created the danger that caused the harm. *Marino v. Mayger*, 118 Fed. App'x. 393, 401 (10th Cir. 2004).

> To make out a proper danger creation claim, a plaintiff must demonstrate that (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.

Christiansen v. City of Tulsa, 332 F.3d 1270, 1281 (10th Cir. 2003). The Tenth Circuit has noted the danger creation theory is a "narrow exception" that applies only when a state actor affirmatively acts to create, or increase plaintiff's vulnerability to private violence. *Moore v. Guthrie*, 438 F.3d 1036, 1042 (10th Cir. 2006). Additionally, the danger creation theory "does not apply when the injury occurs due to the action of another state actor." *Moore*, 438 F.3d at 1042.

Defendants argue the Plaintiffs have not met the two preconditions of the danger creation theory requiring: (1) an act of private violence; and (2) affirmative conduct on the part of the state in placing the plaintiff in danger. (ECF No. 60, at 22). Defendants also contend the Plaintiff has failed to make factual allegations to meet the six-part test to establish a prima facie danger creation case. As it relates to Principal Delbridge, Plaintiff correctly argues that the allegations in the FAC satisfy the danger creation preconditions at the motion to dismiss stage. (ECF No. 63, at 19–20). First, Andersen's conduct was an act of private violence. (ECF No. 52, at ¶ 118). An inappropriate relationship between a teacher and student constitutes "private" activity which gives rise to liability for an

administrator under the danger creation theory. *See Hilldale,* 397 Fed. App'x 445, at *13 (10th Cir. 2010)(citing *B.T. v. Davis*, 557 F.Supp.2d 1262, 1281, n. 4 (D.N.M. 2007)). Second, Plaintiff's FAC pleads sufficient facts to plausibly demonstrate that Delbridge, in an official capacity, was engaged in alleged conduct that put B.A.L. in danger. Specifically, Principal Delbridge met with Andersen (on numerous occasions) to discuss complaints about her relationship with B.A.L., followed Andersen out of suspicion she was providing rides to B.A.L., decided not to investigate these matters further, and failed to notify B.A.L.'s guardian of any concerns. (ECF No. 63, at 20).

The Court finds, however, the Plaintiff failed to sufficiently allege a due process claim against Assistant Superintendent Lyttle. The FAC, while combining a number of factual allegations against both Defendants Delbridge and Lyttle, makes clear that the Assistant Superintendent, while arguably on notice of the relationship, was not engaged in affirmative conduct that placed B.A.L. directly at risk. The FAC itself, upon learning of the situation, notes that Lyttle told Defendant Delbridge that it was the Principal's decision how to respond to the situation between Anderson and B.A.L. (ECF No. 52, at ¶ 35). The FAC also does not make clear how the allegations against Lyttle show the risk against B.A.L. was obvious to the Assistant Superintendent or that Lyttle acted recklessly in disregarding that risk if it was known.

At the motion to dismiss stage, Plaintiff's FAC pleads sufficient facts that plausibly satisfy the six elements of the danger creation theory as it relates to Principal Delbridge. Defendant Delbridge, acting in an official capacity, was aware of complaints about Andersen, observed suspicious ("creepy") behavior, and failed to inform law enforcement

and B.A.L.'s guardians the minor was in a car with a woman in a position of authority. (ECF No. 52, at ¶¶ 24, 25 & 27–28). Plaintiff alleges B.A.L., a minor male student at Laramie County School District, falls within a definable group of those harmed. (ECF No. 52, at ¶¶ 19–20 & 115). Defendant Delbridge's failure to investigate the relationship and keep B.A.L. from visiting Andersen at Freedom Elementary School put B.A.L. at risk. (ECF No. 52, at ¶ 117). With respect to Principal Delbridge, the risk was obvious or known. (ECF No. 52, at ¶¶ 23–26 & 119). Delbridge's omission and failure to act was a conscious disregard for the risk posed to B.A.L. (ECF No. 52, at ¶ 107). And that the alleged conduct in the FAC shocks the conscience. *See Uhlrig v. Harder*, 64 F.3d 567, 573 (10th Cir. 1995) ("the standard for judging a substantive due process claim is whether the challenged government action would 'shock the conscience' of federal judges."); *see also* (ECF No. 52, at ¶ 108). Despite the allegations of an ongoing and persistent relationship between Anderson and B.A.L., complaints by co-workers and even meetings by Delbridge with Anderson about the inappropriate behavior, no action was taken to investigate or even address the situation.

The Court will deny the motion with respect to Defendant Delbridge keeping in mind the District is responsible for Principal Delbridge's conduct in his official capacity as discussed below. *See Infra IV.A.iv.* However, the Court will grant the motion to dismiss with respect to Defendant Lyttle.

iv. Claims against Chad Delbridge and John Lyttle in their Official Capacities to Maintain Punitive Damages.

Defendants argue the Court should dismiss the claims against Defendants Delbridge and Lyttle in their official capacities because the District is also named in the equal protection and substantive due process action. (ECF No. 60)(citing *Kentucky v. Graham*, 473 U.S. 159 (1985)). Plaintiff asked the Court to consider the Tenth Circuit's finding in *Youren v. Tintic School Dist.*, 343 F.3d 1296, 1309–10 (10th Cir. 2003) to maintain punitive damages against each administrator in their official capacities. Mot. to Dismiss Hr'g Tr. at 32.

"[A] municipality is immune from punitive damages under 42 U.S.C. § 1983." *City of Newport v. Fat Concerts, Inc.*, 453 U.S. 247, 271 (1981). This would preclude the Plaintiff from punitive awards against the District. However, Plaintiff argues, under *Youren*, the fact municipalities are immune from punitive damages doesn't mean individual officials sued in their official capacity are likewise immune. *See Revilla v. Glanz*, 7 F.Supp.3d 1207, 1218–19 (N.D. Okla. 2014). Plaintiff contends that *Youren* is still precedent in the Tenth Circuit, even if it has been called into question. That precedent states "[p]unitive damages are available in § 1983 actions [and] are to be awarded only when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Jolivet v. Deland*, 996 F.2d 573, 577 (10th Cir. 1992). In *Youren,* there was sufficient evidence to support punitive damages against a school superintendent in a § 1983 action.

The Court has already dismissed the claims against Defendant Lyttle in his official capacity. However, under *Youren*, viewing the alleged facts most favorable to the

Plaintiff there is a reasonable inference that Principal Delbridge, in an official capacity, acted with "reckless or callous indifference to the federally protected rights of others." Therefore, at this time, the Court will deny the motion to dismiss the substantive due process claim against Defendant Delbridge, in an official capacity and the District.

B. Motion to Dismiss Plaintiff's First Amended Complaint against Chad Delbridge in his individual capacity. (ECF No. 57)

Count II of Plaintiffs FAC alleges Defendant Chad Delbridge, in an individual capacity, violated B.A.L.'s constitutional right of equal protection under the Fourteenth Amendment. (ECF No 52, at 15–16). Plaintiff also makes a claim in Count V against Delbridge, in an individual capacity, that he violated B.A.L.'s substantive due process rights. (ECF No 52, at 21–24).

i. Count II–Equal Protection Claims against Chad Delbridge in his Individual Capacity.

Courts have struggled to sustain an equal protection claim against supervising school administrators for sexual abuse of students by a teacher. *See Doe v. Beaumont I.S.D.*, 8 F.Supp.2d 596, 613 (E.D. Tex. 1998). The Fifth Circuit explains that in such cases, the substantive due process claim of a student abused by a teacher supersedes any possible equal protection claim, absent an argument to the contrary. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 458 (5th Cir. 1994).

The Tenth Circuit has held supervisors are not liable under § 1983 "unless there is an affirmative link between the constitutional deprivation and the supervisor's exercise of control or direction, his personal participation, or his failure to supervise." *Gerald v. Locksley*, 785 F.Supp.2d 1074, 1102 (D.N.M. 2011)(citing *Kiesling v. Troughton*, 107

F.3d 880, at *2 (10th Cir. 1997). In order to hold a supervisory employee liable in an individual capacity for conduct by a third party, a plaintiff must show "deliberate indifference to known sexual harassment." *Schaefer v. Las Cruces Sch. Dist.*, 716 F.Supp.2d 1052, 1063 (D.N.M.). To state a claim of "deliberate" discriminatory conduct, the plaintiff must "state facts sufficient to allege 'defendants actually knew of and acquiesced in' [the third-party's] behavior." *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1250 (10th Cir. 1999).

As discussed previously, a party alleging a § 1983 claim for discrimination under the Equal Protection Clause has the burden of proving that the conduct was motivated by discriminatory intent. *See B.T. v. Davis*, 557 F.Supp.2d 1262, 1274 (D.N.M. 2007)(citing *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194 (2003). While "[i]t is not necessary to demonstrate that the challenged action was taken solely for discriminatory purposes," the plaintiff must prove that a discriminatory purpose was a motivating factor." *Sauers v. Salt Lake Cnty.*, 1 F.3d 1122, 1130 (10th Cir. 1997). The FAC fails to state an Equal Protection claim against Defendant Delbridge because no factual allegations are made to suggest Delbridge acted with discriminatory intent towards B.A.L. With respect to Count II, the FAC only draws a conclusory legal allegation that B.A.L. was disproportionally burdened because he was a male student without explaining what, if any, discriminatory intent Delbridge had in showing "deliberate indifference" towards B.A.L. (ECF No. 52, at ¶ 71). Courts considering similar situations have declined to recognize an equal protection violation in the absence of any conduct, statements, or correspondence suggesting a Defendant had any

discriminatory animus towards a victim. *See B.T. v. Davis*, 557 F.Supp.2d 1262, 1277–78 (10th Cir. 2007). Therefore, the Court will grant the motion to dismiss Claim II as it relates to Defendant Delbridge in his individual capacity.

ii. Count V–Substantive Due Process Claim against Chad Delbridge in his Individual Capacity.

As previously noted, the danger creation theory is an exception to the rule that state actors are liable only for their own acts and not those of third parties. *See Supra IV.A.iii.* The Court has already concluded the Plaintiff has alleged sufficient facts in the FAC to make a plausible claim that Defendant Delbridge's actions violated B.A.L.'s constitutional rights and that the rights were clearly established at the time. *Id.* Therefore, at this point in the proceeding, the Court finds Defendant Delbridge is not entitled to qualified immunity with respect to Count V and will deny the motion to dismiss the substantive due process claim against Defendant Delbridge in an individual capacity. *See Infra IV.C.i.*

C. Motion to Dismiss Plaintiff's First Amended Complaint against John Lyttle in his individual capacity. (ECF No. 55)

Count III of Plaintiff's FAC alleges Defendant John Lyttle, in an individual capacity, violated B.A.L.'s constitutional right of equal protection under the Fourteenth Amendment. (ECF No 52, at 17–19). Plaintiff also makes a due process claim in Count V against Lyttle, in an individual capacity. (ECF No 52, at 21–24). Defendant asserts Lyttle is entitled to qualified immunity. (ECF No. 55, at ¶ 4).

i. Qualified Immunity Defense

Defendants have raised a qualified immunity defense with respect to claims against Defendants Delbridge and Lyttle in their individual capacities. (ECF No. 55 & 57).

Courts are encouraged to resolve purely legal questions raised by a qualified immunity defense at the earliest possible stage in litigation. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). When considering a qualified immunity defense in the context of FED. R. CIV. P. 12(b)(6), the Court's review is limited to the pleadings. *See Pearson v. Callahan*, 555 U.S. 223, 238–39 (2009). When a defendant asserts qualified immunity, the plaintiff must demonstrate: (i) that the defendant's actions violated his or her constitutional or statutory rights; and (ii) that the right was clearly established at the time of the alleged misconduct. *Saenz v. Lovington Mun. Sch. Dist.*, 105 F.Supp.3d 1271, 1296 (D.N.M. 2015)(citing *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009). In order for the law to be clearly established, "there must be a Supreme Court or other Tenth Circuit decision on point, or the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains." *Murrell v. Sch. Dist. No. 1 Denver, Colo.*, 186 F.3d 1238, 1251 (10th Cir. 1999).

It is clearly established that is it impermissible, as a violation of personal security, for school teachers and staff to sexually molest students. *See Wentz v. Park Cnty. Sch. Dist. No. 16*, No 91-8042, 968 F.2d 22, at *3 (10th Cir. 1992)(citing *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 882 F.2d 720, 726 (3d Cir. 1989), *cert denied*, 493 U.S. 1044 (1990)). Lower courts are permitted to exercise "sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the particular case at hand." *Pearson*, 555 U.S. at 241. "If the plaintiff

fails to carry either part of [the] two part burden, the defendant is entitled to qualified immunity." *Albright v. Rodriguez*, 51 F.3d 1531, 1535 (10th Cir. 1995).

Viewing the allegations in the light most favorable to the Plaintiff, the Court finds that Defendant Lyttle, in an individual capacity, is entitled to qualified immunity. In *Stoneking v. Bradford Area School District*, the Third Circuit reversed a district court's denial of summary judgment with regard to a plaintiff's claim against a superintendent noting that it could not "discern from the record any affirmative acts...on which [the plaintiff] can base a claim of toleration, condonation, or encouragement of sexual harassment by teachers which occurred in one of the various schools within his district. *B.T. v. Davis*, 557 F.Supp.2d 1262, 1285 (D.N.M. 2007)(citing *Stoneking*, 882 F.2d at 731). Similarly, the Plaintiff's FAC does not claim affirmative acts taken by Lyttle which demonstrate the Assistant Superintendent tolerated or condoned the relationship between B.A.L. and Andersen. Matter of fact, the FAC suggests Lyttle told Delbridge it was the responsibly of the Principal to take action against Andersen. (ECF No. 52, at ¶ 35). The Third Circuit, when considering immunity of a superintendent in a similar matter, noted that knowledge of some complaints may result to "insensitivity" but was not alone sufficient to constitute an affirmative act. *Stoneking*, at 731. The FAC alleges Lyttle was aware of concerns about B.A.L. but the Plaintiff fails to distinguish what, if any, affirmative acts Lyttle committed to violate B.A.L.'s constitutional rights. Therefore, the Court dismisses Counts III and IV against Defendant Lyttle in his individual capacity.

Defendants also seek qualified immunity for Principal Delbridge. (ECF No. 57). At this time, the Court finds Delbridge is not entitled to a qualified immunity because the Principal's alleged knowledge, actions, and omissions in responding to Andersen's relationship with B.A.L. create plausible allegations of fact that Delbridge's actions violated B.A.L.'s clearly established constitutional rights. *See also Supra IV.A.iii.*

V. CONCLUSION

The Court has considered the Defendants' motions to dismiss and responses in this matter and finds the FAC contains alleged facts to maintain a plausible claim with respect to Count I, Count VI as it relates to the District and Delbridge, and Count V with respect to Defendant Delbridge in an individual capacity. The Court will grant the motion to dismiss Count II, Count III, Count IV, and with respect to Count V dismiss the claims against Defendant Lyttle.

THEREFORE, IT IS HEREBY ORDERED Defendants' Motions to Dismiss Count III and Count V against Defendant Lyttle in an individual capacity [ECF No. 55] and all Counts against Defendant Lyttle in an official capacity [ECF No. 59] are granted. It is FURTHER ORDERED Defendants' Motion to Dismiss the claims against Defendant Delbridge in an individual capacity [ECF No. 57] is granted with respect to Count II and denied with respect to Count V. It is FURTHER ORDERED Defendant Laramie County School District's Motion to Dismiss [ECF No. 59] is denied with respect to Count I and VI but the Court grants the Motion to Dismiss with respect to Count IV against all Defendants.

Dated this 30th day of November, 2016.

Scott W. Skavdahl -16-CV-91
United States District Judge