IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MERRITT BICHEL, Plaintiff, v. KENNEDALE INDEPENDENT SCHOOL DISTRICT, *et al.*, Defendant.	§ § § § § § § § § §	Civil Action No. 4:23-cv-00804-BP (Consolidated with Civil Action No. 4:23-008866-BP)

DEFENDANTS' BRIEF IN SUPPORT OF THEIR RESPONSE TO PLAINTIFF'S MOTION FOR RELIEF FROM THE JUDGMENT AND TO AMEND THE COMPLAINT

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Defendants Kennedale Independent School District (Kennedale ISD or the District) and Dr. Stephanie Devlin (collectively Defendants) file this Brief in support of their Response to Plaintiff's Motion for Relief from the Judgment and to Amend the Complaint (Motion for Relief), and in support thereof, would respectfully show the Court as follows:

I. RELEVANT PROCEDURAL HISTORY

In seeking relief from the judgment and requesting leave to file an amended complaint, Plaintiff fails to address several pertinent issues for the Court's consideration. Plaintiff filed suit against Dr. Devlin on July 28, 2023, and against Kennedale ISD on August 2, 2023. After Defendants moved to dismiss Plaintiff's claims, the Court consolidated the cases and subsequently granted the District's and Dr. Devlin's respective Motions to Dismiss. (Dkt. 16; Dkt. 18). In doing so, the Court specifically afforded Plaintiff leave to amend. (Dkt. 18). Accordingly, Plaintiff filed her Second Amended Complaint on January 3, 2024. (Dkt. 19).

On January 17, 2024, Defendants again moved to dismiss Plaintiff's claims asserted in the Second Amended Complaint. (Dkt. 20). Plaintiff never responded to the Motion to Dismiss or took any other action in response thereto. And while Plaintiff acknowledges this wholesale failure, she does not provide the Court with any explanation as to why she failed to file a response to the Motion to Dismiss during the three months it remained pending before the Court.[1] In addition, Plaintiff fails to note for the Court that her father, as her next friend, requested presuit depositions under Texas Rule of Civil Procedure 202, which were granted and later conducted by Plaintiff's counsel on November 12, 2021. (Def. App. 1-11).

[1] Defendants note for the Court that Plaintiff's new counsel has designated the counsel who failed to respond to the Motion to Dismiss as local counsel for purposes of his request for *pro hac vice* admission. (Dkt. 28).

II. ARGUMENTS AND AUTHORITIES

A. Federal Rules of Civil Procedure 15(a) and 59(e).

The Fifth Circuit's analysis of a request for leave to amend after the entry of a final judgment is well-settled. To that end,

> [w]here judgment has been entered on the pleadings, a holding that the trial court should have permitted amendment necessarily implies that judgment on the pleadings was inappropriate and that therefore the motion to vacate should have been granted. Thus, the disposition of the plaintiff's motion to vacate under rule 59(e) should be governed by the same considerations controlling the exercise of discretion under rule 15(a).[2]

While leave to amend should be freely given, such a request must be tempered by the considerations identified by the Supreme Court, "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc."[3] And when such factors are considered here, it becomes clear that the Court does not abuse its discretion in denying Plaintiff's Motion for Relief.[4]

B. Plaintiff offers the Court no explanation on the alleged failure to plead her best case.

Plaintiff readily admits in her Motion for Relief that factual allegations exist that support her claims against Defendant that she failed to bring forward in her First Amended Complaint and Second Amended Complaint.[5] (Dkt. 25, ECF p.6). Plaintiffs' Motion for Relief then goes on to outline a litany of factual allegations relating to matters that occurred prior to Plaintiff filing suit. (Dkt. 25, ECF pp.7-8). Indeed, the allegations are matters within Plaintiff's personal knowledge (*e.g.*, Plaintiff sent an intimate photograph to a fellow student, Plaintiff attempted suicide, Plaintiff

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[2] *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003) (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 n.1 (5th Cir. 1981)).
[3] *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Hebert v. Dizney*, 295 Fed. App'x 717, 724-25 (5th Cir. 2008) .
[4] *Rosenzweig*, 332 F.3d at 864 (noting the application of the abuse of discretion standard on appeal).
[5] The District recognizes Plaintiff has filed one amended complaint to date. (Dkt. 3; Dkt. 19).

had to continue to sit next to the alleged harassers, and Plaintiff withdrew from school). (Dkt. 25, ECF pp.7-8).

Despite being in possession of these factual allegations, Plaintiff did not bring the allegations to the Court's attention until after she failed to respond to the Motion to Dismiss and after the Court dismissed Plaintiff's Second Amended Complaint and entered a final judgment. This failure is particularly egregious given that Plaintiff deposed the Kennedale ISD employees referenced in her newly alleged facts—her Guidance Counselor (Dawn Ramriez), her Band Director (Erol Oktay), and her Academic Dean (Jared Smith). (Def. App. 1-11). Plaintiff, however, provides the Court without absolutely no explanation or justification for withholding these factual allegations until after the Court dismissed her claims and entered a final judgment. This alone supports the denial of Plaintiff's Motion for Relief.[6]

To that end, Plaintiff's failure to plead her best case despite being in possession of factual allegations that she asserts defeats Defendants' Motion to Dismiss is analogous to the matters presented to the Fifth Circuit in *Rosenzweig* and *Hebert*. In *Rosenzweig*, the Fifth Circuit found the district court did not abuse its discretion in denying leave to amend, noting that the plaintiffs did not exercise diligence in bringing matters before the district court because they failed to bring forth factual allegations that were available prior to the district court dismissing their claims.[7] Likewise, Plaintiff failed to exercise diligence here. More specifically, Plaintiff deposed her Guidance Counselor, her Band Director, and her Academic Dean in November 2021. (Def. App. 1-11). She filed her lawsuit in August 2023. Plaintiff failed to respond to the District's Motion to Dismiss her Second Amended Complaint, which was filed in January 2024. Plaintiff then waited

[6] *See id.* at 865; *Hebert*, 295 F. App'x at 725.
[7] *Rosenzweig*, 332 F.3d 854 ("Plaintiffs concede they have not raised any facts which were not available previous to the district court's opinion. In this regard, plaintiffs did not exercise diligence.").

until after the Court's order of dismissal and final judgment to essentially declare in May 2024, "but wait, there's more" without any accompanying explanation for the delay.[8]

A similar situation presented itself in *Hebert* where the Fifth Circuit found the plaintiffs "d[id] not argue that their proposed amendment 'raised any facts which were not available previous to the district court's opinion.'"[9] Likewise, Plaintiff does not argue the new factual allegations were not available; instead, they concede her prior complaints "did not include all the facts pertinent to her claims." (Dkt. 25, ECF p.6). In addition to being in possession of the factual allegations and conducting presuit depositions, the Court afforded Plaintiff an opportunity to amend her complaint. Under the facts presented here, the Court should continue to find that Plaintiff has had more than a fair opportunity to put forth her best case and her failure to do so results in dismissal of her claims.[10] The Court should deny Plaintiff's Motion for Relief accordingly.[11]

C. Plaintiff's request to replead her Title IX claim is disingenuous at best.

In its Motion to Dismiss Plaintiff's First Amended Complaint, Kennedale ISD moved to dismiss Plaintiff's student-on-student harassment claim. (Dkt. 9-10). Therein, the District placed Plaintiff on notice of the deficiencies of this claim, noting

> as it currently stands, the Court cannot even determine the identity of the alleged harassers, whether the harassment is actionable (*i.e.*, severe, pervasive, and objectively offensive) given that Plaintiff provided no details of the alleged harassment, how long the harassment occurred, whether the harassment continued after she made a report, or who had actual knowledge of the alleged conduct."

[8] While Plaintiff asserts she filed the Motion for Relief "promptly," waiting the entirety of the 28 days under the Federal Rules of Civil Procedure to bring factual allegations to the Court's attention—facts that have been within Plaintiff's purview for over four years—is hardly prompt.
[9] *Hebert*, 295 Fed. App'x at 725 (quoting *Rosenzweig*, 332 F.3d 854).
[10] *See id.*
[11] Plaintiff takes issue with the Court not granting Plaintiff "leave to amend *sua sponte*," but fails to articulate why the Court's belief that Plaintiff pleaded her best case was misplaced given Plaintiff's failure to respond to the Motion to Dismiss or otherwise request an opportunity to replead in response to the Motion to Dismiss. (Dkt. 25, ECF p.9). It follows that Plaintiff has no basis to bemoan only being allowed "*one* prior chance" to amend. (Dkt. 25, ECF p.19).

(Dkt. 10, ECF p.8). In response, Plaintiff disavowed any student-on-student harassment claim against the District. (Dkt. 12, ¶90). Plaintiff now refers to this disavowal as "confusion" and states the Court failed to give her notice of the deficiencies. (Dkt. 25, ECF pp.9, 19-20).

Plaintiff's assertion in this regard is the exact type of bad faith and/or dilatory motive that warrants the denial of Plaintiff's Motion for Relief. Indeed, Plaintiff is using her disavowal of a student-on-student harassment claim as a proverbial sword and shield in an effort to obtain leave to file her Third Amended Complaint. Plaintiff received notice of the deficiencies of her Title IX student-on-student harassment claim. Plaintiff disavowed asserting a Title IX student-on-student harassment claim. The Court did not address Plaintiff's Title IX student-on-student harassment claim accordingly. And now Plaintiff asserts the Court's failure to do so warrants her requested relief. The Court should not allow the filing of pleadings in federal district court to devolve into such gamesmanship.

D. Plaintiff's Third Amended Complaint does not plead a viable Title IX claim.

In asserting Plaintiff's Second Amended Complaint cures the prior deficiencies, Plaintiff focuses on the nature of the alleged harassment and the District's response.[12] Plaintiff's arguments in this regard, however, are unavailing. Plaintiff first notes that the alleged "harassment involved more than just slurs" as one student, who was 18 years old, shared an intimate photograph of Plaintiff. (Dkt. 25, ECF p.12). Plaintiff already pleaded substantially the same facts in her Second Amended Complaint. (Dkt. 19, ¶13). Plaintiff also already detailed for the Court the number of alleged harassers involved, identifying five students by their initials. (Dkt. 19, ¶12).

Plaintiff further asserts she has now pleaded she quit jazz band, which, in her estimation, establishes the impact the alleged harassment had on her. (Dkt. 25, ECF pp.12-13). Plaintiff then

[12] *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999); *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011).

states that such an allegation was not needed to overcome the District's Motion to Dismiss. (Dkt. 25, ECF p.13). Essentially, Plaintiff asserts the harassment had a concrete, negative effect on her education, which suffices to establish a plausible Title IX claim at this stage in the proceedings. Plaintiff, however, previously pleaded how the alleged harassment impacted her, noting for the Court, *inter alia*, that she "struggled to focus on her school work." (Dkt. 19, ¶¶12, 14). Plaintiff's additional factual allegations do not further this argument.

The same holds true for Plaintiff's assertions regarding deliberate indifference. Plaintiff first asserts Title IX requires Kennedale ISD "to end sexual harassment." (Dkt. 25, ECF p.14). Plaintiff does not direct the Court to any Fifth Circuit precedent supporting this contention because this is not the standard in the Fifth Circuit. Indeed, school districts "need not 'remedy the harassment;'" instead, in the Fifth Circuit, "[d]eliberate indifference under Title IX means that the school's response or lack of response was 'clearly unreasonable in light of the known circumstances'" and "[n]either 'negligence nor mere unreasonableness is enough.'"[13] The Court already has determined Plaintiff's factual allegations to not establish deliberate indifference. (Dkt. 22, pp.16-18). Nothing in Plaintiff's Motion for Relief alters the Court's analysis or conclusion.

More to the point, Plaintiff Third Amended Complaint still fails to create a plausible claim that Kennedale ISD was deliberately indifferent to Plaintiff's reports of alleged harassment. Despite twice admitting Kennedale ISD engaged in a "protracted investigation" relating to Plaintiff's allegations, Plaintiff now attempts to distance herself from this admission. (Dkt. 3, ¶9; Dkt. 19, ¶15). In addition, she provides the Court with no concrete details regarding whether the harassment continued after she reported it to the District, incidentally changing the timeline for her report to the end of December 2020, despite twice stating it was February 2, 2021. (Dkt. 3,

[13] *I.L. v. Houston Indep. Sch. Dist.*, 776 Fed. App'x 839, 842 (5th Cir. 2019) (quoting *Sanches*, 647 F.3d at 167-68)).

¶16; Dkt. 19, ¶¶12, 23). And if the alleged harassment did continue, she failed to provide the Court with any details of how she reported the continued harassment and how Kennedale ISD failed to respond. The Court should deny Plaintiff's Motion for Relief accordingly.

E. The Court need not entertain the moving target that is Plaintiff's constitutional claim against Stephanie Devlin.

Plaintiff's Original Petition asserted Dr. Devlin "violated Plaintiff's constitutional right to an education by failing to comply with Title IX." (Dkt. 1-8, ¶6.2). The Court dismissed this claim and, in doing so, also dismissed Plaintiff's equal protection claim against Kennedale ISD, therein noting the requirements for Plaintiff to assert a viable claim under the Equal Protection Clause. (Dkt. 18, p.7). While it is not apparent from Plaintiff's Second Amended Complaint that she subsequently filed an equal protection claim against the District, it is apparent is that Plaintiff did not assert an equal protection claim against Dr. Devlin.[14] Instead, Plaintiff's Second Amended Complaint reiterates the assertions made in the First Amended Complaint—Dr. Devlin "violated Plaintiff's constitutional right to an education by failing to comply with Title IX." (Dkt. 19, ¶¶3, 43, 51).

After twice failing to overcome Dr. Devlin's entitlement to qualified immunity, Plaintiff has changed course and asserted an equal protection claim against her. (Dkt. 25, ECF p.9 n.2). While Plaintiff's attempt to assert this claim is futile given Dr. Devlin's entitlement to qualified immunity, the Court should also decline to entertain Plaintiff's Motion for Relief on these grounds because "busy district court need not allow itself to be imposed upon by the presentation of theories seriatim."[15] Indeed, while "[l]iberality in amendment is important to assure a party a fair opportunity to present his claims and defenses . . . 'equal attention should be given to the

[14] Even the Court's Memorandum Opinion and Order notes that Plaintiff "appears" to allege an equal protection claim, addressing the claim "[t]o the extent" it was asserted. (Dkt. 22, pp.4, 6).
[15] *Rosenzweig*, 332 F.3d at 865 (quoting *Freeman v. Cont'l Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967)).

proposition that there must be an end finally to a particular litigation.'"[16] And here, Plaintiff has not provided the Court with any justifiable reasons for resuscitating Plaintiff's claims.

F. Plaintiff's Third Amended Complaint does not divest Stephanie Devlin of her entitlement to qualified immunity.

In assessing a claim of qualified immunity, the Court must first decide (1) whether facts alleged or shown by plaintiff make out a violation of a constitutional right, and, if so, (2) whether that right was clearly established at the time of defendant's alleged misconduct.[17] Courts may "exercise their sound discretion in deciding which of the two prongs should be addressed first in light of circumstances in the particular case at hand."[18] Qualified immunity is a high standard for Plaintiff to overcome as "[e]ven if the official's conduct violated a constitutional right, he is entitled to qualified immunity if the conduct was objectively reasonable."[19] Here, Plaintiff's Motion for Relief effectively pleads away any ability to overcome Dr. Devlin's entitlement to qualified immunity to Plaintiff's equal protection claim.

Plaintiff's Motion for Relief begins by directing the Court to case law reflecting that a student has an equal protection claim under 42 U.S.C. § 1983 "when she pleads that a school official showed 'deliberate indifference' to student-on-student harassment." (Dkt. 25, ECF p.17). Glaringly absent from Plaintiff's string of case cites is any Fifth Circuit decision supporting Plaintiff's claim as pleaded. (Dkt. 25, ECF pp.17-18). While Plaintiff does note "[t]he Fifth Circuit has not held to the contrary," this absence of authority hardly gives rise to a clearly established right. More to the point, "a never-established right cannot be a clearly established one."[20] It follows that allowing Plaintiff leave to file her Third Amended Complaint is futile because failed to assert

[16] *Freeman*, 381 F.2d at 469.
[17] *Pearson v. Callahan*, 555 U.S. 223, 226 (2009) (citing *Saucier v. Katz,* 533 U.S. 194, 201(2001)).
[18] *Id.* at 226.
[19] *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993).
[20] *Fisher v. Moore*, 73 F.4th 367, 369 (5th Cir. 2023).

a clearly established right.[21] The Court should deny Plaintiff's Motion for Relief accordingly.

G. There are numerous substantial reasons to deny Plaintiff leave to amend.

As discussed herein, Plaintiff's Motion for Relief lacks merit. Plaintiff failed to respond to the District's Motion to Dismiss her Second Amended Complaint, yet expected the Court to grant her leave to amend *sua sponte*. Plaintiff readily admits she had knowledge of the factual allegations she now puts before the Court, but fails to explain why she waited until the eleventh hour to bring these facts to the Court's attention. Plaintiff disavowed any student-on-student harassment claim against Kennedale ISD, but now cries foul because the Court did not address the disavowed claim with specificity in its order dismissing Plaintiff's First Amended Complaint. And even setting all of these concerns aside, allowing Plaintiff leave to file her Third Amended Complaint is futile as she failed to state a claim against Kennedale ISD and failed to overcome Dr. Devlin's entitlement to qualified immunity.

WHEREFORE, PREMISES CONSIDERED, Kennedale ISD and Dr. Devlin pray that this Court deny Plaintiff's Motion for Relief from the Judgment and to Amend the Complaint and affirm the dismissal of Plaintiff's claims and the Court's entry of a final judgment. The District and Dr. Devlin pray for such other and further relief to which they may show themselves justly entitled, including attorneys' fees and court costs.

[21] Plaintiff's equal protection claim speaks in terms of "expos[ing]" Plaintiff to harassment and "fail[ing] to protect" Plaintiff from harassment. (Dkt. 25, ECF p.18; Dkt. 25-1, ¶41). To the extent Plaintiff is attempting to raise the state created danger and/or special relationship theories of liability to support her constitutional claim, the Fifth Circuit has firmly foreclosed this avenue of relief. *See id.* (The Fifth Circuit "has never adopted a state-created danger exception to the sweeping 'no duty to protect' rule"); *Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 857 (5th Cir. 2012) ("We reaffirm, then, decades of binding precedent: a public school does not have a *DeShaney* special relationship with its students requiring the school to ensure the students' safety from private actors.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 11, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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