IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHWESTERN DIVISION

JESSICA NUGENT, individually and as Plaintiff Ad Litem on behalf of L.N., and MIKA NUGENT,	)	
Plaintiffs,	)	
v.	)	No. 13-5089-CV-SW-MJW
CARL JUNCTION R-1 SCHOOL DISTRICT, PHILLIP COOK, GARY REED, SCOTT SAWYER, TREVOR CHASE, BEN WITHERS, THERESA WILSON, and DAVID ROUGHTON,	)	
Defendants.	)	

ORDER

Pending before the Court is Defendants' Motion for Judgment on the Pleadings ("Defendants' Motion"), filed on February 26, 2014.[1] (Doc. 36). Individual Plaintiffs Jessica and Mika Nugent, and Jessica Nugent on behalf of individual Plaintiffs' decedent son, L.N., have brought this suit against the Carl Junction R-1 School District ("School District") and the following individually named school employees (collectively referred to as "individual Defendants"): School District Superintendent Phillip Cook, Carl Junction Junior High Principal Scott Sawyer, Carl Junction Junior High Assistant Principals Trevor Chase and Theresa Wilson, School District Compliance Officer Gary Reed, Carl Junction Junior High Counselor Ben Withers, and David Roughton who was a school bus driver employed by the School District. In Plaintiffs' Petition, originally filed in state court, they assert several state law negligence claims and federal claims under Title IX and § 1983, all stemming from L.N.'s suicide after being subjected to ongoing and severe bullying by other students, which predominantly occurred while riding the school bus.

In their motion, Defendants' assert that they are entitled to judgment as a matter of law on all claims brought by Plaintiffs Jessica and Mika Nugent, individually, and on behalf of L.N. except for the state negligence claims against individual Defendants. Plaintiffs filed suggestions

[1] With the consent of the parties, this case was assigned to the United States Magistrate Judge, pursuant to the provisions of 28 U.S.C. § 636(c).

in opposition (doc. 49) on March 31, 2014, arguing that they have properly pled actionable claims against all Defendants and requesting that the Court deny Defendants' Motion, to which Defendants filed reply suggestions on April 17, 2014 (doc. 53).

On August 28, 2014, during a telephone conference regarding discovery issues in this matter, the Court invited the parties to submit additional briefs in light of the Eighth Circuit decision in K.B. v. Michael Waddle, et al., No. 13-3000, 2014 U.S. App. LEXIS 15996 (filed on August 20, 2014). The Court permitted the additional briefs to address how this decision supports or is distinguishable from the parties' argument. The parties submitted their additional briefs on September 10, 2014. (Docs. 76 & 77). In response to an exhibit attached to Plaintiffs' additional brief that was not attached to their Petition, Defendants filed a motion to strike the exhibit (doc. 78), contending that the exhibit is outside the pleadings and inappropriate to be relied on in resolving their motion for judgment on the pleadings. When considering a motion for judgment on the pleadings, a court must generally ignore all materials outside the pleadings unless they are matters of public record, attached to the pleadings, or part of the record of the case. See Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999). Therefore, Defendants' motion to strike the expert report is granted. (Doc. 78).

Background

The facts in this case are tragic. The Petition states that in April 2012, during his seventh grade year at the School District's Carl Junction Junior High, L.N. "came out" as bisexual. According to the Petition, L.N.'s pronouncement as being bisexual was followed by ongoing and severe ridicule, harassment, torment and bullying by other students while at school and riding the school bus. This behavior that L.N. was subjected to by his fellow students, allegedly included instances of name-calling, physical threats, and the stealing or destroying of L.N.'s personal property.

Plaintiffs claim that both L.N. and his parents reported the ongoing bullying of L.N. to school officials on several occasions. On one occasion in the fall of 2013, the Petition states that Principal Sawyer rode the school bus for the purpose of monitoring the student's behavior. Plaintiffs claim that during this bus ride, a student other than L.N. told Sawyer to "clean my butt". Plaintiffs claim that Sawyer did not immediately discipline or rebuke the student for the statement. Furthermore, in December 2012, Plaintiffs allege that Sawyer told L.N.'s parents that protecting L.N. from this ongoing behavior was a "fight worth fighting," and that "as always,

we'll keep an eye out for L.N.". Plaintiffs claim that following this statement, Defendants did not keep an eye out for L.N. and the bullying continued. In March 2013, Plaintiffs allege that L.N.'s fellow students were regularly telling L.N. to hang himself and threatening to beat him up.

March 14, 2013, was the last day of classes before the students' spring break according to the Petition. At that time, Plaintiffs allege that L.N. was dropped off at his bus stop when a student yelled out the window to L.N. that he should do everyone a favor and hang himself. On March 16, 2013, L.N.'s parents found that L.N. had committed suicide by hanging himself in his bedroom. Plaintiffs' contention is that L.N.'s suicide was a result of Defendants' refusal to take appropriate steps in response or address the behavior, as well as Defendants' failure to protect L.N. from the behavior. Plaintiffs further contend that Sawyer acknowledged to L.N.'s parents that the behavior on the bus was bad or worse than it had ever been, yet did nothing to address it.

Standard of Review

In reviewing a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, the Court must accept as true all facts alleged by the non-moving party in its pleadings and grant all reasonable inferences arising therefrom in that party's favor. Potthoff v. Morin, 245 F.3d 710, 715 (8th Cir. 2001). A complaint must plead sufficient facts to 'state a claim for relief that is plausible on its face' such that the court can reasonably infer the defendant's liability for the alleged misconduct. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). While detailed factual allegations are not required, a complaint is insufficient to survive such a motion where it contains only "labels and conclusions or a formulaic recitation of the elements of a cause of action". Iqbal, 556 U.S. at 678. Judgment on the pleadings is appropriate where the moving party clearly establishes that there are no material issues of fact remaining to be resolved and that the party is entitled to judgment as a matter of law. Mills v. City of Grand Forks, 614 F.3d 495, 498 (8th Cir. 2010) (internal citations omitted).

Analysis

1. Plaintiffs Jessica and Mika Nugent as individual Plaintiffs

Defendants argue that Plaintiffs Jessica and Mika Nugent, as individual plaintiffs, fail to plead independent causes of action for negligence, as well as under Title IX and § 1983. Plaintiffs do not address this argument in either of their submissions opposing Defendants' Motion.

For an actionable negligence claim, "there must exist a duty on the part of the defendant to protect the plaintiff from the injury of which he complains". Dix v. Motor Market, Inc., 540 S.W.2d 927, 932 (Mo. Ct. App. 1976). While Plaintiffs' petition asserts that Defendants had a duty to L.N. (doc. 1-1 at 19-20, para. 39, 42, & 49-54), nowhere do Plaintiffs allege that any of the Defendants had a duty to L.N.'s parents.[2] Because Plaintiffs do not allege that Defendants had a duty to individual Plaintiffs Jessica and Mika Nugent, they have failed to state an independent cause of action for negligence.

Under Title IX, "a protected person has a private cause of action for damages for [prohibited sexual harassment]". Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1020 (. The statute, in pertinent part provides that:

> No 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. "On its face, the statute applies only to students and participants in educational programs." Bosley, 904 F. Supp. at 1020. Plaintiffs' petition does not assert that either Jessica or Mika Nugent, individually, is a protected person for the purposes of pleading a Title IX claim. As such, they do not state an independent cause of action under 20 U.S.C. § 1681. See Seiwert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942, 956-57 (S.D. Ind. 2007) ("Because there are no educational opportunities or activities that the parents are excluded from, they have no claim.").

Defendants assert that Plaintiffs Jessica and Mika Nugent, as individuals, lack standing to pursue a § 1983 claim against Defendants based upon an alleged constitutional violation suffered by their son, L.N.. Defendants further argue that Plaintiffs do not allege that either Plaintiffs Jessica or Mika Nugent suffered a violation of their own constitutionally protected rights.

Standing to bring a claim under § 1983 requires "a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability." Lance v. Coffman, 549 U.S. 437, 439 (2007) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992)).

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[2] Plaintiffs' Petition also asserts that Defendants had a duty to students, and to L.N.'s peers. (Doc. 1-1 at 19, para. 42) ("Defendants breached their duty to properly supervise L.N. and his peers") (Doc. 1-1 at 20, para. 49-54) ("[Individual defendants] had a duty . . . to protect students, including L.N."). To the extent the Petition asserts a duty to School District students other than L.N. and L.N.'s peers, such claims are outside the scope of this action as other students and L.N.'s peers are not party to this action. These assertions, however, cannot be construed as alleging that Defendants have a duty to L.N.'s parents.

Plaintiffs argue that their "pleadings have properly established a constitutional right that defendants have deprived [L.N.] of under the state-created danger theory", however, the plaintiffs' filings are silent on the issue of the parents' standing. (Doc. 48 at 23).

The Court can reasonably infer from the Plaintiffs' Petition that Plaintiffs are contending that the alleged constitutional violation suffered by L.N. caused by the defendants' conduct, incidentally injured the individual Plaintiffs' parent-child relationship.[3] Both the Supreme Court and the Eighth Circuit have "recognized a liberty interest which parents and children have in each other's companionship." Helleloid v. Indep. Sch. Dist. No. 361, 149 F. Supp. 2d 863, 871 (8th Cir. 2001) (citing Harpole v. Arkansas Dep't of Human Services, 820 F.2d 923, 927 (8th Cir. 1987) (questioned on other grounds)). The Eighth Circuit requires parents who bring a §1983 claim based on the constitutional violation suffered by their children to demonstrate that the state actor's conduct intentionally interfered with the parent-child relationship. Helleloid, 149 F. Supp. 2d at 874; see Reasonover v. St. Louis County, Mo., 47 F.3d 569, 585 (8th Cir. 2006) (plaintiff must show an intent to interfere with the familial relationship).

As characterized in the Petition, it is clear that the target of the alleged offending conduct was L.N. Here, it is alleged that Defendants' unconstitutional conduct encouraged and increased L.N.'s vulnerability to the harassment and bullying by his fellow students. While L.N.'s parents have certainly suffered from the loss of their son, Plaintiffs have not alleged that Defendants' conduct was directed toward the specific purpose of terminating L.N.'s relationship with his parents. The Court declines to extend substantive due process protection to parent standing on the grounds of an alleged constitutional violation suffered by their minor child. See Shaw v. Stroud, 13 F.3d 791 (8th Cir. 1994) (citing to the Eighth Circuit as a court that has refused to extend substantive due process protection to a claim arising out of deprivation of the love and support of a family member); see K.A.W. et al. v. Hickman Mills Consolidated School District No. 1, et al., 05-CV-0435-SOW (W.D.Mo. Oct. 31, 2005) (declining to recognize parental standing on a derivate § 1983 claim upon the basis of their minor child's unconstitutional injury);

[3] As it relates to the injury suffered by Plaintiffs Jessica and Mika Nugent, as individuals, Plaintiffs' petition states that "[b]ecause of the untimely death of L.N., Plaintiffs have been, and in the future will be, deprived of services, support, maintenance, guidance, companionship, comfort . . ." (Doc. 1-1 at paras. 45, 59, 71, 82, 97, 113, 141, and 154). All other references to injury in the petition refer to injury as suffered by L.N. as well as other students and "people similarly situated". (See Doc. 1-1 at para. 143).

see Nance v. Sammis, 07-CV-0119-BSM (E.D.Ark. Feb. 5, 2009) (discussing the Eighth Circuit's position that where parent brings an individual claim based on constitutional violation suffered by her child, such parent must demonstrate an intent to interfere with her right to familial association); see also, Russ v. Watts, 414 F.3d 783, 788-89 (7th Cir. 2005) ("The Supreme Court has recognized violations of the due process liberty interest in the parent-child relationship only where the state took action specifically aimed at interfering with that relationship . . . [explaining that] 'historically, the guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.'") (internal citation omitted). Plaintiffs do not cite to any authority to support recognizing parent-standing in this case.

Therefore, dismissal of all claims asserted by Plaintiffs Jessica and Mika Nugent, as individuals, and not on behalf of L.N., is proper. The Court's analysis will proceed in addressing Counts I-IX of Plaintiffs' Petition only as to claims asserted by Plaintiff Jessica Nugent on behalf of L.N. as Plaintiff Ad Litem (hereinafter "Plaintiffs").

2. Negligence and Sovereign Immunity

Defendants argue that Plaintiffs' negligence claims as set forth in Counts I-III of the Petition asserted against the School District and individual Defendants in their official capacities are barred by the doctrine of sovereign immunity.[4] Plaintiffs contend that the School District has waived sovereign immunity to the extent that they have purchased insurance, which is a question of fact. Defendants' response to this position is that because Plaintiffs did not actually plead that the School District waived sovereign immunity, their failure to do so is fatal to their negligence claims.

It is not disputed that personal capacity claims against individual Defendants in Counts I and II are not at issue. In response to Defendants' argument that the individual Defendants in their official capacities enjoy the same immunity as the School District that employs them, Plaintiffs cite to no authority to the contrary but instead maintain that their claims cannot be dismissed because the Defendants are sued in both their individual and official capacities.

Therefore, Counts I and II brought by Plaintiffs against individual Defendants in their official capacities are dismissed as duplicative of these claims against the School District. The

[4] Plaintiffs' negligence *per se* claim in Count III is addressed in its entirety in a separate section below.

Court now turns to the question of whether to dismiss Counts I and II as against the School District for Plaintiffs' failure to specifically plead facts demonstrating that the School District waived its sovereign immunity.

A public school district is a state public entity that may claim sovereign immunity in tort actions under Missouri law. See Patterson v. Meramec Valley R-III Sch. Dist., 864 S.W.2d 14, 15 (Mo. Ct. App. 1993); Mo. Rev. Stat. § 537.600. Plaintiffs' position, as raised in their response to Defendants' Motion, is that their negligence claims penetrate the School District's immunity to the extent that the School District has purchased insurance covering tort claims. Plaintiffs do not contend that their claims fall under any other exception to the general rule that the School District is immune from tort. To fall under the insurance exception to sovereign immunity, as alleged here, a plaintiff must demonstrate the existence of insurance that covers his claim. See Epps v. City of Pine Lawn, 353 F.3d 588, 594 (8th Cir. 2003). A plaintiff must specifically plead facts that demonstrate his claim is within the insurance exception to sovereign immunity. See Id. at 594.

In its exercise of supplemental jurisdiction over these state negligence claims, the Court is mindful of Missouri's liberal rules for amending petitions. The Court therefore grants leave to Plaintiffs to amend their Petition to specifically plead their negligence claims in Counts I and II consistent with Missouri law. Failure to do so will subject the claims to dismissal.

3. Plaintiffs fail to state a claim for Negligence Per Se

Plaintiffs' negligence per se claim against all defendants in Count III is based on Defendants' failure to report the bullying of L.N.. Plaintiffs allege that the acts committed against L.N. would be considered assault in the third degree if committed by an adult, so that the failure to report such acts violated the Missouri Safe School Act (the "Act"). Mo. Rev. Stat. § 167.117. In Defendants' Motion, they argue that reporting statutes, such as this one do not statutorily create a private cause of action and that therefore, Count III should be dismissed.

Defendants also contend that even if the Court found a private right of action in RSMo. § 167.117, the statute applies only to teachers and principals. Plaintiffs do not address this argument in their briefs nor do they cite to any authority to demonstrate that their negligence *per se* claim can proceed as against Defendants who are not teachers or principals. Therefore, this claim is dismissed to the extent that it is alleged as against the School District and as against individual Defendants who are not teachers or principals, namely: Phillip Cook, Gary Reed, Ben

Withers, and David Roughton. The Court continues its discussion under this section regarding Plaintiffs' claim against individual Defendants Scott Sawyer, Trevor Chase and Theresa Wilson.

Before an act can be said to be negligent, "there must exist a duty on the part of the Defendant to protect the plaintiff from the injury of which he complains". Dix v. Motor Market, Inc., 540 S.W.2d 927, 932 (Mo. Ct. App. 1976) (also cited to above). Under the public duty rule, public employees are not liable to injured parties for negligence arising out of duties owed to the general public. Jamierson v. Dale, 670 S.W.2d 195, 196 (Mo. Ct. App. 1984). As disputed by the parties in their briefs, the issue here is whether RSMo. § 167.117 creates a duty to individuals, or a duty to the general public. Plaintiffs contend that the statute is "specifically designed to protect students like [L.N.]". (Doc. 48 at 12). Defendants argue that case law analyzing Missouri law on this issue supports that the statute only creates a public duty.

Under the Act, principals and teachers are required to report any incident which constitutes "first, second or third degree assault, sexual assault, or deviate sexual assault against a [student] or school employee, while on school property". Mo. Rev. Stat. § 167.117.1. It is significant that the statute provides a criminal penalty—willful neglect or refusal to report pursuant to the statute subjects a teacher or principal to a misdemeanor charge. Mo. Rev. Stat. §§ 167.117(5), 162.091. The statute further provides a limit on civil liability in that school administrators will not be held liable for negligent reporting so long as they had a "good faith" basis for reporting. Mo. Rev. Stat. § 167.117.4.

Instructive to this Court, Missouri state courts have stated that "[t]he creation of a private right of action by implication is not favored and the general trend under Missouri law is away from judicial inferences that a violation of a statute is personally actionable." Bradley v. Ray, 904 S.W.2d 302, 313 (Mo. Ct. App. 1995). Even if the Court accepts that L.N. is a member of the class to be protected by the Act, mere membership alone is insufficient as a basis upon which to imply a private cause of action. Id. at 313 (citing Johnson v. Kraft Gen. Foods, 885 S.W.2d 334, 336 (Mo. 1994) (en banc)). Because the statute creates other means of enforcement, notwithstanding L.N.'s membership to the class to be protected by the statute, the Court will not imply a private cause of action absent a "clear implication of legislative intent" to do so. Johnson, 885 S.W.2d at 336.

In Letlow v. Evans, a district court of the Western District of Missouri dismissed plaintiffs' negligence *per se* claim against defendants the school district, the superintendent, and

school principal, brought under Missouri's child abuse reporting statute. 857 F.Supp. 676, 667 (W.D. Mo. 1994). The Court in Letlow found that while it had not been expressly addressed by a Missouri state court, the reporting statute did not create a private cause of action, which was supported by Missouri courts both state and federal. Id. 678. The Court reasoned that without a clear expression from the state legislature, "it is inappropriate for a court, particularly a federal court, to create a large and new field of state tort liability beyond what existed at common law." Id. (citing Nelson v. Freeman, 537 F.Supp. 602, 610 (W.D. Mo. 1982)). Notably, the Court went on to state that "the vast majority of courts to face this issue across the country have found that reporting statutes such as the one at issue here, do not create a private right of action." Id.

The Court agrees with the Defendants' position that the legislature did not intend to create a duty to individuals in addition to a duty to the general public. See K.A.W., supra, at p. 15 (W.D. Mo. Oct. 31, 2005) (where parents and their child sue school officials arising out of an alleged sexual assault of the child by fellow students while at school, this Court found that RSMo. § 167.117 "clearly [does] not provide a private cause of action and Missouri does not favor creating such rights"). The purpose of the Act in providing safe schools creates a duty to the public at large, and consequently the statute does not support a private cause of action in favor of individuals. Plaintiffs have failed to demonstrate a clear legislative intention to provide for a private cause of action under RSMo. § 167.117. Accordingly, because the Court finds that a private cause of action cannot be implied under § 167.117 of the Act, the alleged breach of the Act does not amount to negligence *per se*. Therefore, dismissal of Plaintiffs' negligence per se claim is proper.

4. Plaintiffs' Title IX claim against the School District in Count IV will be determined on the facts

In Count IV, Plaintiffs allege that Defendants violated L.N.'s rights under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681, by knowingly failing to properly respond to the harassment L.N. was subjected to and by failing to train school employees in recognizing and responding to such harassment. Plaintiffs allege that the harassment L.N. was subjected to constituted prohibited sexual harassment as defined in 20 U.S.C. § 1681. Defendants' argue that Plaintiffs' claim should fail as a matter of law in that "Title IX does not protect against claims of harassment or discrimination based on sexual orientation or perceived sexual orientation." (Doc. 37 at 22).

As a threshold issue, Defendants contend that if the Court finds that Plaintiffs have successfully pled an actionable Title IX claim, the claim can only survive as against the School District. In response, Plaintiffs maintain that their Title IX claim cannot be dismissed because "individual Defendants have been sued in both their individual and official capacities." (Doc. 48 at 17). Title IX provides "[n]o person . . . 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 United States Supreme Court has implied a private right of action under Title IX where a funding recipient such as the School District can be liable for damages arising from its own misconduct. Franklin v. Gwinnet County Public Schools, 503 U.S. 60, 65 (1992) (citing Cannon v. University of Chicago, 441 U.S. 667 (1979)). A claim against the individual Defendants in their official capacity is duplicative of a claim against the School District. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989) ("a suit against a state official in his or her official capacity . . . is no different from a suit against the State itself."). Plaintiffs concede this point in their suggestions in opposition. (Doc. 48 at 17). Plaintiff cites no authority to demonstrate that a claim under Title IX can be established as against individual Defendants, as they are not programs receiving federal assistance. A claim under Title IX can only be established as against the School District, and therefore, Count IV as against individual Defendants in both their individual and official capacities fails to state a claim upon which relief can be granted.

As against the School District, Count IV survives if when taking the facts alleged in the most favorable view toward Plaintiffs, they have sufficiently pled actionable harassment under Title IX of a student by his fellow classmates. The School District "may be liable for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority." Davis v. Monroe County Board of Education, 526 U.S. 629, 646-47 (1999). To be an actionable Title IX claim, the student-on-student harassment must be on the "basis of sex". 20 U.S.C. § 1681.

As focused on in the parties' briefs, the question here is whether or not the alleged harassment in this case was sufficiently pled as on the 'basis of sex'.

Importantly, in analyzing the requirement to prove a sex-based motive for alleged harassment under Title IX, federal courts examine Title VII precedent. Wolfe v. Fayetteville,

Ark. Sch. Dist., 648 F.3d 860, 866 (8th Cir. 2011). Actionable Title IX claims can include harassment motivated by a victim's failure to conform to gender stereotypes. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251-52 (1989) (Title VII context) (superseded by statute on other grounds); see Schmedding v. Tnemec Co., 187 F.3d 862, 864 (8th Cir. 1999) (Title VII context). However, an actionable Title IX claim does not include harassment motivated by sexual orientation. See Schmedding, 187 F.3d at 863; see Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (harassment based on sexual orientation is not cognizable under Title VII); compare Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77 (1998) (same-sex harassment by heterosexual males against heterosexual males can be actionable under Title VII if it is shown that the conduct was motivated by sexual desire, that there is an inference of hostility toward the victim's sex, or that the victim received less favorable treatment than those of the other sex).

In Schmedding, the Eighth Circuit examined the issue of whether including allegations of homosexual name-calling and the spreading of rumors about plaintiff's perceived sexual preference converted an actionable sex-based harassment claim to a claim based on sexual orientation, which is not actionable. 187 F.3d at 864. The Eighth Circuit reversed and remanded a decision by the district court dismissing plaintiff's Title VII claim because the complaint alleged that he was subjected to harassment on the basis of perceived sexual orientation rather than sex. Id. at 864. The Eighth Circuit in Schmedding ultimately concluded that plaintiff be allowed to proceed with the case. Id. at 865. The Court reasoned that while Plaintiff's complaint included confusing language—phrases such as "taunting [plaintiff] of being homosexual" and that rumors were spread to do with plaintiff's "perceived sexual preference"—plaintiff expressed a willingness to amend his complaint to remove this language and maintained that the remaining complaint would still state a cause of action for sex-based harassment. Id. at 865. The Eighth Circuit's determination that there was sufficient facts to state a Title VII sex-based harassment claim focused on the following allegations:

> [Plaintiff] was: patted on the buttocks; asked to perform sexual acts; given derogatory notes referring to his anatomy; called names such as "homo" and "jerk off"; and was subject to the exhibition of sexually inappropriate behavior by others including unbuttoning of clothing, scratching of crotches and buttocks; and humping the door frame to [plaintiff's] office.

Id.

While here, the Petition asserts that the claim under Title IX is on the basis of sex, as well as on the basis of L.N.'s perceived sexual orientation, the Court finds that the allegations are at least as indicative of harassment based on sex as those asserted in Schmedding. Here, Plaintiffs allege that L.N. was: subject to name-calling including "faggot", "homo", "molestor"; told to "suck my dick" and "quit looking at my ass"; physically threatened to be beat up; subject to having personal property stolen and/or destroyed; and told to hang himself on multiple occasions. (Doc. 1-1 at para. 20, 21, 29, and 34). This treatment followed the incident in April 2012, when L.N. "came-out as bisexual". (Doc. 1-1 at para. 17). In their suggestions in opposition to Defendants' Motion, Plaintiffs contend that the repeated references to L.N.'s sexuality does not preclude him from proceeding with his claim to the extent that the harassment was based on L.N.'s failure to conform to traditional gender roles.

While the Court notes that the Petition is not particularly clear, when viewing the pleading in the most favorable light to Plaintiffs, the Court finds that Count IV is sufficiently pled as against the School District.[5] Consequently, Defendants' Motion is denied as to the Title IX claim against the School District because sufficient facts were alleged that the harassment was on the basis of sex. See Ashcroft v. Iqbal, 556 U.S. 662, (2009) (a complaint must plead sufficient facts to 'state a claim for relief that is plausible on its face' such that the court can reasonably infer the defendant's liability for the alleged misconduct) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

5. Plaintiffs fail to state a §1983 claim under the state-created danger theory

Plaintiffs' federal §1983 claims in Counts V-VIII are all premised on a state-created danger theory alleging that Defendants violated L.N.'s constitutional rights protected by substantive due process. Defendants contend that these claims fail as matter of law because Plaintiffs have not alleged a violation of a constitutionally protected right and even if they had, Plaintiffs have not pled that Defendants took affirmative action with the requisite mindset as required to successfully plead a claim of state-created danger liability. Plaintiffs argue that they

[5] The Petition includes confusing phrases, similar to that in Schmedding. Under Count IV, at paragraph 75, the conduct is described as being "based on [L.N.'s] perceived sexual orientation". However, under Count I, at paragraph 42(H), the conduct is alleged to constitute "sexual harassment and/or gender based harassment". The phrasing at paragraph 42(H) is adopted and incorporated into Count IV. Plaintiffs may remove the confusing language in their amended petition to make clear that their Title IX claim alleges harassment based on sex rather than harassment based on sexual orientation or perceived sexual orientation.

have sufficiently pled a constitutional violation as to L.N. as well as affirmative acts by Defendants.

The parties' arguments regarding the § 1983 claims raise the following questions to be addressed by the Court: (1) whether or not there was a violation of a constitutional right and (2) whether or not there was the requisite culpability under the state-created danger theory.

a. Whether or not there was a violation of a constitutional right

The Due Process Clause of the 14th Amendment acts as a limitation on the state's power and does not generally protect against private violence, as is involved here. See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989). It is not disputed that Plaintiffs' claims under Counts V-VIII are based on a theory of liability that is an exception to the no-duty-to-protect rule where state actors can be held liable for failing to protect against private violence, assuming the other elements of a §1983 claim are met. (See Plaintiffs' Supplemental Suggestions in Opposition, Doc. 77 at 3). To establish a substantive Due Process violation in this case, Defendants' must have had a duty to protect L.N. against bullying from his fellow students. A protective duty is owed if Defendants created the danger by affirmatively placing L.N. in a position of danger that he would otherwise not have been in. See Carlton v. Cleburne Cnty., Ark., 93 F.3d 505, 508-09 (8th Cir. 1996).

Plaintiffs argue that the holdings in two district court cases within the Eighth Circuit, Finch v. Texarkana Sch. Dist. No. 7 of Miller County and Braden v. Mountain Home Sch. Dist. in particular support that they should be able to proceed on these claims. 557 F. Supp. 2d 976 (W.D. Ark 2008); 903 F. Supp. 2d 729 (W.D. Ark. 2012).

Finch involved a substantive due process claim by a mother against a school district alleging that as a result of the school district's conduct, a mentally disabled student (plaintiff's son) was rendered vulnerable and subjected to a sexual assault by a fellow student. 557 F. Supp 2d at 980. In Finch, the district court denied defendant's motion for summary judgment, finding that plaintiff had carried her burden by demonstrating the existence of specific facts that created a genuine issue for trial. Id. at 982. In reaching this conclusion, the Court cited to specific facts; first, the school district's decision to remove the disabled student's previously appointed personal aide and second, the school district's review of the transfer file of the attacker. Id. at 978, 982. The attacker's transfer file indicated that he had engaged in an act of inappropriate physical touching at his previous school. Id.

Braden involved a substantive due process claim bought by a parent against a school district and school district employees. 903 F. Supp. 2d at 732-34. In Braden, it was alleged that a student's "educational placement subjected him to the danger of being sexually abused". Id. at 733. In this case, the child's father advised the school district that his son had previously been enrolled in special education courses, had previously suffered sexual abuse, had emotional and behavior disorders, and was in danger of being bullied. Id. at 732-33. The school district made the determination, over objections by the child's father, to place his son in alternative learning classes along with older students rather than in special education classes for three consecutive semesters. Id. During the third semester of the child's enrollment at the school district and in the alternative learning environment, a transfer student entered the child's classroom. Id. at 733. The transfer student subjected the child to a pattern of inappropriate sexual behavior in the classroom, while in the presence of his teachers. Id. at 733-34. Later that same semester, after a meeting, it was determined that the child finish the year in home-based education. Id. The district court concluded that the defendants in this case failed to establish the absence of a genuine dispute of material fact regarding a claim under a state-created danger. Id. at 736-37.

The Court is not persuaded that any the alleged acts by Defendants here constituted the required active role in placing L.N. in a dangerous position that he otherwise would not have been in. In defense of their position that they have pled sufficient affirmative acts, Plaintiffs focus on the following facts stated in the Petition: Defendant Sawyer riding on the bus for one day and not immediately rebuking a student for the comment of "clean my butt" made toward Sawyer; busing students of all grades and ages together; Defendant Sawyer's statement to L.N.'s parents that they'll keep an eye out for L.N. and failing to do so; and Defendants generally indicating that they won't do anything, refusing to take steps to address the students' conduct and denying that the conduct existed. (Plaintiffs' Suggestions in Opposition, doc. 48 at 22); (Petition, doc. 1-1 at para. 92). Giving Plaintiff the benefit of all reasonable inferences in reviewing these allegations, the Court does not find that the acts alleged show Defendants to have assumed an active role in the danger L.N. was placed in, as compared to the acts alleged in Finch and Braden, supra.

The Court's determination is supported by the Eighth Circuit's recent decision, K.B. v. Waddle. 2014 U.S. App. LEXIS 15996. In Waddle, the Eighth Circuit affirmed a district court's dismissal of the federal constitutional claim brought under a state-created danger theory. Id. at

*11. In ruling a motion for judgment on the pleadings, and for summary judgment, the district court found that the plaintiff failed to establish a due process violation, and that therefore the public employees were entitled to qualified immunity and judgment as a matter of law on the federal claim. Id. at *4. In Waddle, public employees failed to take steps to prevent the sexual assault of K.B. by another juvenile at a public swimming pool despite allegedly having actual knowledge of a threat by that juvenile to commit the act against K.B. Id. at *2-3.

The parties were invited to submit additional limited briefing to address how Waddle either supports or is distinguishable for their positions in this case. In Plaintiffs' additional supplemental suggestions in opposition to Defendants' Motion (doc. 77), they distinguish Waddle from this case because unlike in Waddle, affirmative acts committed by the defendants are pled in their Petition. In support of their position, Plaintiff again directs the Court to its Petition at paragraph 92, which alleges the following:

A) Affirmatively indicating that they can't, or won't do anything about the ridicule, harassment, torment and bullying;
B) Affirmatively refusing to take any steps to address the ridicule, harassment, torment and bullying;
C) Affirmatively denying that the behavior complained of is bullying or harassment;
D) Witnessing bullying and harassment and affirmatively refusing to intervene, report it, and/or take any appropriate steps to address it;
E) Riding the bus for one day and affirmatively refusing to discipline or rebuke the student who told Defendant Sawyer to "clean my butt" in front of other students;
F) Affirmatively responding to reports of ridicule, harassment, torment and bullying by only speaking to the accused;
G) Affirmatively stating to L.N.'s parents that they would keep an eye out for him and then failing to do so;
H) Affirmatively refusing to comply with the School District's bullying and harassment policies; and
I) Affirmatively committing other acts and omissions as yet undiscovered by Plaintiffs."

(Doc. 1-1). When accepting these allegations as true despite labels and conclusions, there are no affirmative acts that suffice to give rise to liability under the state-created danger theory. The conduct by other students that L.N. was subjected to is unquestionably cruel. However, the Petition does not demonstrate that Defendants' took affirmative action that increased L.N's danger to, or made him more vulnerable to, the danger L.N. encountered.

b. Whether or not there was the requisite culpability for a state-created danger claim

The culpability threshold in state-created danger cases is high; the state conduct must be so brutal and offensive that it shocks the conscience. See Avalos v. City of Glenwood, 382 F.3d 792, 800 (8th Cir. 2004). Where "[t]he most that can be said of the [state actors] in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them", liability may not attach. DeShaney, 489 U.S. at 203. While acknowledging that the alleged conduct by L.N.'s fellow students is undoubtedly cruel, the Court is not persuaded that the conduct by Defendants' meets the culpability threshold as set forth in the case law.

Consequently, the Court cannot find that the § 1983 claims are facially plausible to allow reasonable inferences to be drawn that would satisfy the standard for a state-created danger theory of liability, and therefore, the claims must fail as a matter of law. Courts have consistently held that failure to protect from bullying and torment from fellow students does not violate Due Process. Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993) ((a student's due process right is not implicated when school officials fail to protect the student from the violent acts of another student) (citing DeShaney, 489 U.S. 189, 196 (1989)). As such, Defendants have established the absence of a genuine dispute of material fact and they are entitled to judgment in their favor on Counts V-VIII.

6. Individual Defendants are entitled to qualified immunity

The Court turns to the Defendants' position that even if Plaintiffs have succeeded in pleading their claims under the state-created danger theory, the claims fail as against the individual Defendants in their individual capacities because of the doctrine of qualified immunity. Whether public officials in their individual capacities are entitled to qualified immunity is an issue of law that involves a two-step inquiry. "To overcome the defense of qualified immunity the plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." Parrish v. Ball, 594 F.3d 993, 1001 (8th Cir. 2010) ((quoting Howard v. Kansas City Police Dep't, 570 F.3d 984, 988 (8th Cir. 2009) (internal quotations omitted)). The Court can address either inquiry, and need not address them in a particular order. Pearson v. Callahan, 555 U.S. 223, 236 (2009). Because the Court finds that the facts fail to demonstrate a violation of L.N.'s substantive due process rights, the individual Defendants in their individual capacities are entitled to qualified immunity. See Riehm v. Engelking, 538 F.3d 952, 962 (8th Cir. 2008) (the court need not inquire further if

plaintiffs have not established a violation of the constitution and state actors are entitled to qualified immunity); see, e.g., Waddle 2014 U.S. App. LEXIS 15996 at *4. Plaintiffs here have failed to meet their burden to properly plead a constitutional violation.

7. Plaintiffs' claim for punitive damages proceeds as to state law negligence claims only

Defendants contend that punitive damages are not available against the School District under Title IX or § 1983, and that the stand-alone claim for punitive damages in Count IX must be dismissed because such a claim is not recognized under Missouri law. In response, Plaintiffs states "Defendants do not challenge, nor could they, that punitive damages are allowed against the individual defendants on Plaintiffs' state-law negligence claims. As such, it would be improper to dismiss Plaintiffs' claims for punitive damages as they have a right to proceed on them." (Doc. 48 at 26). Plaintiffs' argument in response appears to concede the unavailability of punitive damages under all claims with the exception of their state law negligence claims. This is consistent with the Court's review of the applicable authority. Accordingly, Plaintiffs can proceed with their request for punitive damages on their negligence claims as against individual Defendants in Counts I and II only.

Conclusion

For the reasons set forth above, the remaining state law negligence claims against the School District and individual Defendants set out in Counts I and II as well as the Title IX claim set out in Count IV against the school district will be determined on the facts.

IT IS THEREFORE ORDERED that Defendants' Motion for Judgment on the Pleadings (doc. 36) is GRANTED in part and DENIED in part. It is further

ORDERED that judgment as a matter of law is entered in favor of Defendants on all claims brought on behalf of Plaintiffs Jessica and Mika Nugent, as individuals. Plaintiffs Jessica and Mika Nugent's claims in all counts are DISMISSED with prejudice for failure to state a claim upon which relief can be granted. It is further

ORDERED that Plaintiffs' negligence claims in Counts I and II as against the individual Defendants in their official capacities are DISMISSED with prejudice. Defendants' Motion for Judgment on the Pleadings with respect to the remaining claims in Counts I and II as against the School District and individuals Defendants in their individual capacities is DENIED without prejudice. It is further

ORDERED that judgment as a matter of law is entered in favor of Defendants on Count III brought by Plaintiffs on behalf of L.N.. Plaintiffs' negligence *per se* claim in Count III is DISMISSED with prejudice for failure to state a claim upon which relief can be granted. It is further

ORDERED that Plaintiffs' Title IX claim in Count IV as against the individual Defendants is DISMISSED with prejudice. Defendants' Motion for Judgment on the Pleadings with respect to Plaintiffs' Title IX claim in Count IV as against the School District is DENIED. It is further

ORDERED that judgment as a matter of law is entered in favor of Defendants on Counts V-VIII brought by Plaintiffs on behalf of L.N.. Plaintiffs' Counts V-VIII are DISMISSED with prejudice for failure to state a claim upon which relief can be granted. It is further

ORDERED that Plaintiffs' claim for punitive damages in Count IX as to their Title IX claim is DISMISSED with prejudice. Defendants' Motion for Judgment on the Pleadings with respect to the remaining negligence claims in Counts I and II as against Defendants is DENIED. It is further

ORDERED that Plaintiffs are granted until **Thursday, October 30, 2014** within which to file an amended complaint consistent with this Order. It is further

ORDERED that Defendants' Motion to Strike Expert Report of Sheri Bauman (doc. 78) is GRANTED. The Clerk is directed to remove the document attached as Exhibit 1 (doc. 77-1) to Plaintiffs' supplemental suggestions in opposition to Defendants' Motion for Judgment on the Pleadings.

SO ORDERED.

Dated this 30th day of September, 2014, at Jefferson City, Missouri.

/s/ Matt J. Whitworth
MATT J. WHITWORTH
United States Magistrate Judge