IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PM 2:17

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

S.D., a minor, by and through
her parent and next friend.
J[redacted] D[redacted]

Plaintiff,

v.

Civil Action No. 19-C-173
Honorable Judge Kaufman

KANAWHA COUNTY BOARD
OF EDUCATION, a political subdivision,
GEORGE AULENBACKER, principal,
BRAD MARANO, assistant principal,
JOHN DOE and JANE DOE,

Defendants.

ORDER GRANTING MOTION TO DISMISS PUNITIVE DAMAGE CLAIMS WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court on Defendants' Kanawha County Board of Education (hereinafter, "KCBOE" or "the Board"), George Aulenbacher (hereinafter, "Defendant Aulenbacher"), and Brad Marano's (hereinafter, "Defendant Marano), (collectively "the Defendants") Motion to Dismiss. Having considered the written submissions of the parties, and the oral arguments of counsel on the record on June 12, 2019, the Court finds and concludes as follows:

I. FINDINGS OF FACT

Plaintiff contends that, on January 29, 2018, Plaintiff's daughter, S.D., "suffered from sexual assault and battery, harassment and intimidation while being unsupervised in the hallways of George Washington High School ("GWHS")." (Compl. at ¶ 13). According to the Complaint, M.P., another student at GWHS, touched S.D.'s backside in an unwanted sexual manner while S.D. was walking in the hallway. It is alleged that this constituted a "sexual assault and battery" against S.D. (Compl. at ¶ 13). After the alleged incident, S.D. reported the act to Defendant

Aulenbacher, the principal at GWHS. Thereafter, Defendant Marano, the vice principal at GWHS, suspended M.P. for two days. Sometime after the January 29, 2018, alleged incident, the Complaint contends that M.P. "publically humiliated [S.D.]" by "laughing and making a scene in the hallway in an attempt to scare, harass and intimidate [S.D.]." (Compl. at ¶ 19). The Complaint further states that "[n]o further action was taken against M.P." (Compl. at ¶ 21).

At all relevant times, Defendant Aulenbacher was the principal at GWHS and Defendant Marano was the vice principal at GWHS.

II. CONCLUSIONS OF LAW

Motions to dismiss under West Virginia Rule of Civil Procedure 12(b)(6) provide necessary relief in instances where a party requests relief that it cannot receive or attempts to enforce rights that it does not have. *See, e.g., State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). In resolving a Rule 12(b)(6) motion to dismiss, the Court ordinarily assumes the allegations stated in the complaint to be true, and construes that pleading in the light most favorable to the Plaintiff. *See, e.g., John W. Lodge Distr. Co. v. Texaco, Inc.*, 161 W. Va. 603, 604-05, 245 S.E.2d 157, 158 (1978). However, a plaintiff may not "fumble around searching for a meritorious claim" where the claim is not authorized by the laws of West Virginia. *Scott Runyan Pontiac-Buick*, 194 W. Va. at 776, 461 S.E.2d at 522.

A motion to dismiss under Rule 12(b)(6) should be granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Forshey*, 222 W.Va. at 750, 671 S.E.2d at 755 (quoting *Murphy v. Smallridge*, 196 W.Va. 35, 36, 468 S.E.2d 167 168 (1998) (additional citation omitted)). Accordingly, although a "plaintiff's burden in resisting a motion to dismiss is a relatively light one . . . he is required at a

minimum to set forth sufficient information to outline the elements of his claim. If he fails to do so, dismissal is proper." *Price v. Halstead*, 177 W.Va. 592, 594, 355 S.E.2d 380, 383 (1987) (citations omitted).

The Plaintiff concedes that punitive damages cannot be recovered from the KCBOE. This is correct because there is no ambiguity in the Legislature's pronouncement that political subdivisions are immune from punitive damages pursuant to West Virginia Code § 29-12A-7, the Governmental Tort Claims and Insurance Reform Act (the "Act"). Under the Act, an employee of a political subdivision is immune from liability unless the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. W. Va. Code § 29-12A-5(b).

The Plaintiff identified the following two facts in alleging that Defendants Aulenbacher and Marano's conduct rose to the level of malicious purpose, in bad faith, or in a wanton or reckless manner so that they are not immune under the Act:

> (1) Failing to remove M.P. from school and the presence of S.D. on multiple occasions. M.P. was only suspended for two days for the first sexual assault of S.D. then allowed to return to the school, where a second attempted sexual assault took place. M.P. was not even suspended by either Defendant after this incident because he was a vital member of the basketball team;
>
> (2) Both defendants repeatedly told S.D. and her parents that they had viewed the video of the first incident in the hallway at the school. Later, Defendant Aulenbacher sent a letter to the parents of S.D. claiming the camera did not show the incident.

(Pl.'s Resp. to Def.'s Partial Mot. to Dismiss and Supporting Mem. of Law at 4.)

Under the circumstances, the Court finds that Defendants Aulenbacher's and Marano's actions did not constitute actions done with malicious purpose, in bad faith, or in a wanton or reckless manner that would give rise to punitive damages. Thus, a punitive damage award against individual Defendants Aulenbacher and Marano cannot be allowed by this Court.

Accordingly, this Court **FINDS** that dismissal of Plaintiff's punitive damages claim against all of the Defendants is appropriate and further **ORDERS** that Plaintiff's punitive damages claim against all of the Defendants be, and hereby is, **DISMISSED.** The plaintiff's remaining claims are not impacted by this Order.

The Court instructs the Clerk of Court to send a copy of this Order to all counsel of record. The exceptions and objections of the Plaintiff are preserved.

ENTER this 21 day of June, 2019.

The Honorable **Judge Kaufman**

PRESENTED BY:

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AGREED AS TO FORM:

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA SS
I CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT. 24
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS ____.
CLERK
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Defendants.

Civil Action No. 19-C-173
Honorable Judge Ballard

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants' Kanawha County Board of Education (hereinafter, "KCBOE" or "the Board"), George Aulenbacher (hereinafter, "Defendant Aulenbacher"), and Brad Marano's (hereinafter, "Defendant Marano"), (collectively "the Defendants") *Motion for Summary Judgment and Memorandum of Law in Support*. On September 20, 2021, this Court heard arguments on the Defendants' *Motion*. Having considered the briefs and the evidentiary record in this matter, the Court finds and concludes as follows:

FINDINGS OF FACT

1. Plaintiff contends that, on January 29, 2018, Plaintiff's daughter, S.D., "suffered from sexual assault and battery, harassment and intimidation while being unsupervised in the hallways of George Washington High School ("GWHS")." (Compl. at ¶ 13).

2. Plaintiff alleges M.P., another student at GWHS, came from behind S.D. in the school hallways and placed his hand on the Plaintiff's buttocks, thigh, and vagina in an unwanted sexual manner while S.D. was walking in the hallway and held it in a physical manner for

approximately ten seconds without S.D.'s consent. It is alleged that this constituted a "sexual assault and battery" against S.D. (Compl. at ¶ 13).

3. Plaintiff reported the incident to the principal, Defendant Aulenbacher. (Aulenbacher Dep. 5:3-7).

4. Plaintiff admitted to Defendant Aulenbacher that she did not want M.P. to be disciplined and, instead, simply wanted to inform someone about what occurred. (*Id.* at 5:10-13).

5. Defendant Aulenbacheer and Plaintiff informed the assistant principal, Defendant Marano, about the incident. (*Id.* at 8:10-18).

6. Defendant Marano expressed concern over M.P.'s actions and told Plaintiff, "[S.D.], nobody should touch you in any way or hit you or anything. No matter if you want to do anything about it or not, come with me; we're going to do something about it." (Marano Dep. at 6:10-14).

7. Defendant Marano suspended M.P. for two days for an "indecent act on a student." (Id. at 8:6-13).

8. Defendant Marano notified both M.P. and Plaintiff's parents about what occurred. Plaintiff's mother picked S.D. up from school and Plaintiff stayed at home the remainder of the day. (S.D. Dep. 53:15-24).

9. Sometime after the January 29, 2018, alleged incident, the Complaint contends that M.P "publicly humiliated [S.D.]" by "laughing and making a scene in the hallway in an attempt to scare, harass and intimidate [S.D.]." (Compl. at ¶ 19).

10. The second incident occurred 3 days later on February 1, 2018. (Pl.'s Compl. ¶ 19).

11. Plaintiff alleges that M.P. "flinched" in her direction while she was walking in the hallway and then laughed after the encounter. (S.D. Dep. 54:1-3).

12. Plaintiff alleges that she was so distraught, she went into the bathroom and cried in fear. Eventually, because she was fearful of retaliation from M.P., S.D. reported the second incident to Defendant Marano.

13. Defendants assert that Defendant Marano testified that Plaintiff told him that M.P. only looked at her and smiled. (Marano Dep. 11:16-19).

14. Plaintiff advised Defendant Marano that Plaintiff had called her mother and her mother was coming to pick her up. (*Id.* at 11:20-21).

15. Defendant Marano "walked immediately behind [S.D.] and followed her down to the parking lot, talked to the parents, and said, 'Hey, she's upset. [M.P.] is back today. She said he smiled at her.'" (*Id.* at 11:22-25).

16. Defendant Marano advised Plaintiff and her mother that he could not take disciplinary action against a student for looking at another student and smiling, but assured Plaintiff's mother that he would call M.P.'s parents. (*Id.* at 12:2-3).

17. Plaintiff's mother responded, "That's fine. I'll take her home for the rest of the day." (*Id.* at 12:4-5).

18. Defendant Marano did in fact call M.P.'s parents and instructed them to have M.P. stay away from Plaintiff. (*Id.* at 12:4-5).

19. Defendant Marano later helped Plaintiff obtain a temporary personal safety order ("Order") against M.P. (Pl.'s Compl. ¶ 24). Plaintiff alleges that she obtained the Order because she was extremely concerned for her safety.

20. After entry of the Order, Defendant Marano and GWHS resource officer and Charleston Police Officer Gary Daniels spoke with M.P. to explain that it required M.P. to "stay away" from Plaintiff and not contact her at school, outside of school, at work, via social media, or otherwise. (Marano Dep. at 13:7-14).

21. Defendants allege that following the second "flinching" incident, there were no additional issues between M.P. and Plaintiff, even though they continued to see each other almost every day at school. (S.D. Dep. 99-100).

22. Plaintiff was asked, "Now, going back to the — the original incident where he put his hand on your private area. Did you have any --- it doesn't sound like it, but I've got to ask the question — any type of injury, like a bruise or scratch or anything like that?" (S.D. Dep. 65:2-7). Plaintiff responded, "[n]o." (*Id.*). Plaintiff also admitted that she did not sustain a physical injury from the second incident because M.P. did not touch her at that time. (*Id.* at 65:8-13).

23. Defendants allege that the Plaintiff and her mother both conceded during their deposition testimony that the Defendants could not have prevented the unwanted touching incident from occurring. During her deposition, Plaintiff was asked, "Is there something that you think that the school should have done to prevent [M.P.] from touching your private area? Is there something that they could have done in terms of — you know. Or was that something that just kind of happened quickly in the hallway that really nobody could have prevented?" (S.D. Dep. 110:20-24, 111:1-2). Plaintiff responded, "I don't think that they can necessarily control the actions that students decide." (*Id.* at 111:3-4). Similarly, Ms. D[redacted] (Plaintiff's Mother) was asked, "And I'm just curious if you have any thoughts as to how the school could have potentially prevented [the unwanted touching] from happening." (D[redacted] Dep. 113:14-16). Ms. D[redacted] responded, "I don't think [the school] could have controlled someone's behavior." (*Id.* at 113:17 18).

24. Plaintiff alleges that the Kanawha County School Board has clear policies and procedure that describe the rules students must follow. In addition, GWHS has policies and procedures that conform to the Kanawha County School Board handbook while more clearly defining the punishments applicable to each offense.

25. Plaintiff alleges the Kanawha County School Board handbook has definitions for several different offenses that could have pertained to this situation; Indecent Act against a Student is not one of them.

26. Plaintiff alleges Defendants Aulenbacher and Marano could have found that M.P. committed sexual misconduct as described in 25.07.1.5.10 of the KCBE handbook, which is defined as "[a] student will not publicly and indecently expose themselves, display or transmit any drawing or photograph of a sexual nature, or commit an indecent act of a sexual nature on school property, on a school bus or at a school sponsored event."

27. Plaintiff alleges Defendants also could have found that M.P. committed sexual harassment against Plaintiff, which is described in 25.07.1.5.13 of the KCBE handbook as "sexually motivated physical conduct when such conduct creates an intimidating, hostile, or offensive educational environment."

28. Plaintiff alleges that Defendants further could have found that M.P. committed sexual violence against Plaintiff, which is "A physical act of aggression or force or the threat thereof which involves the touching of another's intimate parts, with intimate parts being described as the primary genital area, groin, inner thigh, buttocks or breast, as well as the clothing covering these areas."

29. Plaintiff alleges that sexual misconduct, sexual harassment, and sexual violence are all considered to be Level III violations. Level III violations are described in the 25.07.1.5 as being imminently dangerous, illegal, and/or aggressive behaviors. These violations are considered to be willfully committed and are known to be illegal and/or harmful to people or property.

30. Plaintiff alleges an "Indecent Act" towards a student is only a Level II violation, which is described as disruptive and potentially harmful behaviors; these behaviors are not considered to be malicious and are not intended to cause harm or danger to others.

31. Plaintiff alleges that while having knowledge of both the KCBE handbook and the GWHS handbook, Defendants only suspended M.P. for two days for an indecent act on a student, an offense that carries only a 1-3 day suspension. The punishment for sexual misconduct is suspension out of school for up to 10 days, and the punishment for sexual harassment is a mandatory minimum of 3 days suspension.

32. Plaintiff asserts that S.D. was so distraught from M.P.'s actions and the Defendants' inactions, that she sought psychological treatment.

33. At all relevant times, Defendant Aulenbacher was the principal at GWHS and Defendant Marano was the vice principal at GWHS.

APPLICABLE LAW

34. With respect to summary judgment, Rule 56 of the West Virginia Rules of Civil Procedure was "'designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,' if there essentially 'is no real dispute as to salient facts' or if it only involves a question of law." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995).

35. Summary judgment shall be granted where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(c).

36. For purposes of summary judgment, "a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party." Syl. Pt. 5, *Jividen v. L.*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

37. "The initial burden of production and persuasion is upon the party moving for a summary judgment." *Williams*, 194 W. Va. at 60, 459 S.E.2d at 337. If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there

is no genuine issue of material fact, the burden of production shifts to the nonmoving party." *Id.* The nonmoving party then has the burden of production and "must satisfy the burden of proof by offering more than a mere 'scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in the nonmoving party's favor." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). This evidence must not be mere conjecture and must contradict the showing of the moving party by pointing to specific facts demonstrating a "trialworthy" issue. *Williams*, 194 W. Va. at 60, 459 S.E.2d at 337.

CONCLUSIONS OF LAW

38. The Defendants now move this Court for summary judgment because there is no genuine issue of material fact.

39. Defendants first argue that the Plaintiff cannot recover from her claims of negligence because it is undisputed that she did not suffer an "ascertainable physical injury" as a result of the "unwanted touching."

40. The Plaintiff, in the Complaint, asserted the following causes of action: Count I – Negligent Conduct (Against the Kanawha County Board of Education); Count II – Negligence, Misfeasance, Nonfeasance, Carelessness and/or Recklessness (Against Defendant Aulenbacher); Count III – Negligence, Misfeasance, Nonfeasance, Carelessness and/or Recklessness (Against Defendant Marano); Count IV – Negligence, Misfeasance, Nonfeasance, Carelessness and/or Recklessness (Against Defendants John Doe and Jane Doe); and Count V – Vicarious Liability (Against the Kanawha County Board of Education). (*See* Compl.) The Plaintiff then asserts that the Plaintiff suffered severe and permanent personal injuries and damages, including: (a) Permanent psychological injuries; (b) Past and future medical/psychological bills; (c) Past and future pain, suffering and mental anguish; (d) Past and future loss of enjoyment of life; (e) Past and future humiliation, embarrassment, indignity and shame; (f) Diminished earning capacity and

future lost wages; and (g) Other general and special damages afforded under West Virginia law. (*See* Compl. at ¶ 63).

41. "Until relatively recently, under West Virginia negligence law, there could be no recovery in tort for… emotional and mental trouble alone without ascertainable physical injuries arising therefrom." *Workman v. Kroger Ltd. P'ship I*, 2007 WL 2984698, at *3 (S.D. W. Va. Oct. 11, 2007) (quoting *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340, 36 S.E.2d 475 (1945)); *see also Johnson v. W. Va. Univ. Hosps., Inc.*, 186 W. Va. 648, 413 S.E.2d 889 (1991) ("As a general rule, absent physical injury, there is no allowable recovery for negligent infliction of emotional distress.")

42. The Supreme Court of Appeals of West Virginia first identified a limited exception in *Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992), where the Court held that a plaintiff could recover damages for emotional distress "after the plaintiff witnesses a person closely related to the plaintiff suffer critical injury or death as a result of the defendant's negligent conduct, even though such distress did not result in physical injury, if the serious emotional distress was reasonably foreseeable." Syl. Pt. 1, *id.* "West Virginia currently recognizes two types of negligent infliction of emotional distress: 1) emotional distress based upon the fear of contracting a disease, and 2) emotional distress based upon 'witnessing a person closely related to the plaintiff suffer critical injury or death.'" *Wood v. Harshbarger*, 2013 WL 5603243, at *9 (S.D. W. Va. Oct. 11, 2013) (citing *Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (1996); *Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157, 161 (1992)).

43. The West Virginia Supreme Court of Appeals found a much broader exception, stating that "[a]n individual may recover for the negligent infliction of emotional distress absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional

damages claim is not spurious." Syl. Pt. 2, *Ricottilli v. Summersville Mem'l Hosp.*, 188 W. Va. 674, 425 S.E.2d 629 (1992). The *Ricottilli* Court recognized:

> [w]here the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery. But cases will obviously be infrequent in which "mental disturbance," not so severe as to cause physical harm, will clearly be a serious wrong worthy of redress and sufficiently attested by the circumstances of the case.

Id. at 680, 425 S.E.2d 635 (quoting W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 54, at 362 (5th ed. 1984 & Supp.1988)).

44. During the first alleged incident, the Plaintiff was in the high school hallway when M.P. comes up from behind her and sexually grabs S.D's buttocks, thigh, and vagina from behind in a physical manner for approximately ten seconds without her consent. The Plaintiff alleges that M.P. also "publicly humiliated" by laughing and making a scene in the hallway in an attempt to scare, harass and intimidate S.D. On the second alleged incident, when M.P. returned to school from suspension, he allegedly attempted to bully and harass the Plaintiff in the hallway by flinching at her to intimidate S.D. The Plaintiff has further alleged that the Defendants herein failed to protect the Plaintiff by not taking action which caused the Plaintiff to suffer emotional damages. It is also asserted that S.D. has sought psychological treatment because of the incidents that occurred. Under the circumstances of the case at bar, the Court **FINDS** that the Plaintiff's negligence claims for emotional damages are not spurious, rather, the claims are to be real and serious claims for emotional damages. Thus, because the Plaintiff's claims for emotional and mental damages are not spurious, they do not require a showing of an "ascertainable physical injury" to recover from the Defendants. *See Ricottilli v. Summersville Mem'l Hosp.*, 188 W. Va. 674, 425 S.E.2d 629.

45. Therefore, this Court **CONCLUDES** that the Plaintiff's claims for negligence claims are not spurious, and thus **DENIES** summary judgment on those claims.

46. Secondly, Defendants argue that they did not breach any duty owed to the Plaintiff, and as such, the Plaintiff cannot prove that the Defendants breached a legal duty that caused her injury.

47. "In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken." Syl. Pt. 3, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000) (citations omitted). "[T]he plaintiff must show affirmatively the defendant's failure to perform a duty owed to the former proximately resulting in injury." *Moore v. Wood Cty. Bd. of Educ.*, 200 W. Va. 247, 251-52, 489 S.E.2d 1, 5-6 (1997) (quoting, in part, Syl. Pt. 1, *Keirn v. McLaughlin*, 121 W. Va. 30, 30, 1 S.E.2d 176, 177 (1939)). "Questions of negligence, due care, proximate case and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them." *Id.* at Syl. Pt. 5, 200 W. Va. at 248, 1 S.E.2d at 2 (quoting Syl. Pt. 5, *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 381, 135 S.E.2d 236, 238 (1964)).

48. As a general proposition, schools have a duty to exercise reasonable care in supervising students. *See, e.g., Moore*, 200 W. Va. at 252, 489 S.E.2d at 6. *See Taylor v. Cabell Huntington Hosp.*, 208 W. Va. 128, 134, 538 S.E.2d 719, 725 (2000).

49. The Defendants argue that West Virginia case law likewise recognizes that schools are not intended to be insurers of student safety. *See Glaspell v. Taylor Co. Bd. of Educ* 2014 WL 5546480 (W.Va. 2014). In *Glaspell*, the Supreme Court of Appeals of WV addressed a case where a student was allegedly injured by being choked at school. *Id.* at *2. The Court held that the Taylor County School Board "did not breach duty in failing to notice high school students engaging in a choking game on a ramp adjacent to the choral department, where there was no evidence that board

or its employees had actual knowledge or notice of the existence of the game, and it was not feasible for school employees to be able to see what every student is doing in the cafeteria and hallways at every moment throughout a school day, particularly at the high school level." *Id.* at *3.

50. Defendants also argue that nothing could have prevented M.P. from placing his hand on S.D.'s buttocks, thigh, and vagina in a sexual and physical manner from occurring in a crowded high school hallway. In addition, even if employees of the high school were standing next to the Plaintiff at the time, they could have done nothing to prevent the incident, because even intense and constant supervision could not have prevented the sudden and unexpected incidents.

51. However, the Plaintiff asserts that injuries sustained by the Plaintiff was caused by the failure of the Defendants to properly protect her from M.P. Defendants suspended M.P. for two days out of school suspension for an indecent act towards a student. This offense does not include any language about the act being of sexual nature, and only carries a maximum of two days suspension, as compared to the offenses of sexual misconduct and sexual harassment.

52. Plaintiffs further assert that on the same day that M.P. returned to school, there was another incident with Plaintiff, one severe enough that Plaintiff reported the second incident again to the Defendants. This incident involved M.P. "flinching" at Plaintiff at school in an attempt to scare her. After Plaintiff reported the incident, Defendants informed her that there was nothing they could do to safeguard her from this type of interaction. Plaintiff argues that the actions and omissions of the Defendants when mishandling M.P. grabbing S.D. buttocks, thigh, and vagina in a sexual and physical manner for about ten seconds in the school hallway led to further damages to the Plaintiff.

53. Following the first incident, unlike *Glaspell*, the Defendants had actual knowledge and were put on notice by S.D. of M.P.'s actions, and the Plaintiff contends that the Defendants

failed to do anything to prevent the second incident. Plaintiff further argues that because the Defendants failed to protect the Plaintiff following the first incident, the second incident enhanced her emotional and mental damages Thus, this Court **FINDS** that the Defendants had actual knowledge and notice of M.P.'s actions.

54. In addition, the Plaintiff contends that the Defendants mishandled both incidents which lead to further damages to the Plaintiff. Because there is a genuine dispute as to whether the Defendants breached their duty to the Plaintiff, this Court therefore **CONCLUDES** that there is a genuine issue of material fact as to whether Defendants breached a duty owed to the Plaintiff and whether the Plaintiff was further injured by the Defendants' response to the offenses committed by M.P. against the Plaintiff.

Accordingly, this Court hereby **DENIES** Defendants' *Motion for Summary Judgment*.

The Court instructs the Clerk of Court to send a copy of this *Order* to all counsel of record.

ENTERED this 16th day of December, 2021.

Kenneth D. Ballard, Judge