UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-60667-CIV-DIMITROULEAS

MICHAEL SAPHIR, by and through
his legal guardians, ALBERT SAPHIR
and BARBARA SAPHIR,

Magistrate Judge Snow

Plaintiff,
vs.

SCHOOL BOARD OF BROWARD COUNTY
FLORIDA,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendant, School Board of Broward County's (the "School Board" or "Defendant"), Motion for Summary Judgment (the "Motion") [DE 24], filed herein on December 23, 2016. The Court has carefully considered the Motion [DE 24], Plaintiffs' Michael Saphir, Albert Saphir, and Barbara Saphir's (collectively, "Plaintiffs") Response [DE 27], Defendant's Reply [DE 28], and is otherwise fully advised in the premises.

I. BACKGROUND

Defendant has provided various factual assertions that are supported by the record. *See* [DE 25] at ¶¶ 4, 25, 26, 28, 42, 48, 49, and 78. In some instances, Plaintiffs have either failed to contest Defendant's assertions or contested Defendant's assertions by citing to record evidence that elaborates on a point Plaintiffs would like to make but does not refute the fact put forth by Defendant. The Court will deem all of the uncontested—or insufficiently contested—factual assertions to be admitted. *See* S.D. Fla. L.R. 56.1(b); Fed. R. Civ. P. 56(c), (e). The Court will now set forth the relevant facts.

The parties to this action are Plaintiffs Albert Saphir and Barbara Saphir who bring this action on behalf of their son Michael Saphir ("Michael"), (collectively, "Plaintiffs"), and Defendant the School Board of Broward County, Florida ("School Board"). Plaintiffs brought this action pursuant to Title IX, Education Amendments of 1972, 20 U.S.C. § 1681 et. seq., as well as claims for negligence and negligent hiring, retention and/or supervision. *See* [DE 7].

Michael is a "mentally disabled adult, who at all pertinent times was a minor" who attended a high school in Broward County. [DE 7 ¶ 3]. Michael is "intellectually disabled," and has "social communication difficulties, secondary to Auditory Processing Disorder," and has "an academic and social developmental level that lagged his chronological age by several years." [DE 7 ¶ 6]. On April 5, 2012, Michael attended the JROTC Ball (the "Ball"), "a school-sponsored dinner dance" for JROTC students and their parents. [DE 7 ¶ 8]. Mr. and Mrs. Saphir attended the ball with Michael. [DE 25 ¶ 22]. During the Ball, Michael was allegedly sexually harassed and molested by Nubia Lorenz ("Lorenz"), a 52-year-old school district employee who worked as a teacher's aide at Michael's school. [DE 7 ¶ 8, DE 25 ¶ 17]. According to Plaintiffs, Lorenz was walking "hand in hand" with Michael, was walking with Michal with their arms around each other, and was "apparently intoxicated and physically "all over" Michael refusing to let go of him even when his parents made repeated demands for her to do so. [DE 7 ¶ 14]. In addition, Lorenz reportedly insisted on sitting at a table with Michael, despite his parents' objections, where she sat next to Michael, and positioned her hand (clasped in his) on Michael's lap. *Id.* Plaintiffs also state that Lorenz was rubbing her face against Michael's face and while dancing with Michael, she slapped his behind. *Id.* When Mr. and Mrs. Saphir's verbal admonishment of Lorenz's conduct did not dissuade her, another parent seated at the table, Mark Sadek, asked Sgt. Major Cruz, an ROTC

teacher at the Ball, to help. [DE 25 ¶ 31]. Acadia Cruz, Sgt. Major Cruz's wife who was also employed by the school, asked Lorenz to leave and escorted her out of the ballroom; Lorenz returned and to spoke to Michael, asking if anyone had seen her purse, before she sat down at another table for the rest of the evening. [DE 26-1 at 49]. Mr. and Mrs. Saphir and their son Michael left the Ball early. *Id.*

On April 9, 2012, Albert Saphir sent an email (the "April 2012 Email") to Lonny Shapiro, the ESE Director explaining the events that took place at the Ball. *Id.* In the email, Albert Saphir asked (1) that Lorenz not "have any interaction with Michael and it should be made clear to her that her behavior was completely out of line,: (2) that "Michael get appropriate counselling . . . on how to deal with situations such as these," including "what is acceptable, what is not," and (3) that Michael's "teachers and other staff members he often interact with [be alerted] of this incident[.]" *Id.*; [DE 25 ¶ 36]. Shapiro sent the Email to Assistant Principal Nelson, Shapiro's supervisor. [DE 25 ¶ 41]. As part of his investigation, Nelson spoke with Principal Neely, Assistant Principal Kassandra Fried, Sergeant Major Cruz, Acadia Cruz, Albert Saphir, and Nubia Lorenz. [DE 25 ¶ 42].

Assistant Principal Jeffrey Nelson assured Mr. Saphir that Lorenz would be reassigned and would not be around Michael or any children. [DE 27-1 ¶ 86]. However, on April 11, 2012, Albert Saphir received a call from Assistant Principal Nelson stating that Lorenz will not be fired but that Michael will get counseling and Lorenz will never be around Michael. [DE 26-14 at 2].

Plaintiffs claim that Dr. Finfer and Dr. Sugarman, teachers at Michael's school, accused Michael of lying about what happened at the Ball; these accusations of lying were made to Mr. and Mrs. Saphir, to Michael, and in front of other students. [DE 27-1 ¶ 87].

Michael saw Lorenz around the school's campus after the Ball; the Court is unable to determine how frequently Michael saw Lorenz because the evidence is inconsistent, but the undisputed evidence shows that after the Ball, Lorenz never spoke to Michael and there was no physical contact.

On January 17, 2014, Michael was precluded from participating in Physical Education class because Lorenz was present. [DE 26-1 at 55]. Instead of removing Lorenz from the class, Michael was told to leave by a teacher, Dr. Finfer. *Id.* Mr. Saphir wrote an email to Shapiro complaining about the incident and how Michael should not miss out on instructional time; Saphir also reminded Shapiro that Lorenz should not be near Michael. *Id.* Shapiro responded saying "We have the situation worked out moving forward. Michael will still get to participate. [Lorenz] will not be there during that time. Sorry for the confusion." [DE 26-1 at 57].

On January 21, 2014, Dr. Finfer reportedly accused Michael of taking a female classmate with a disability into the boy's restroom with him. [DE 26-1 at 56]. Upon investigation, the school learned that the female student walked into the restroom of her own volition, and Michael was cleared of any wrongdoing. However, Plaintiffs allege this accusation was in retaliation for complaining about Finfer's actions in removing Michael from PE class.

On March 22, 2014, more than 20 months after the Ball, Michael disclosed additional information that led the School Board to conduct a formal investigation through its police department. [1] [DE 25 ¶¶ 68-76]; [DE 26-1 at 61-62]. Specifically, Michael told his private

1 The Court notes that allegations of molestation did not come to light until nearly two years after school officials were provided with actual notice of Albert and Barbara Saphir's complaint about Lorenz's behavior at the Ball. This distinction is important for purposes of liability under Title IX because the reasonableness of the school's actions can only be judged by the knowledge they had. Without judging credibility or weighing evidence, the Court notes that Michael's recollection of what occurred at the Ball

psychologist that Lorenz touched his penis at the Ball. *Id.* Lorenz was placed on administrative leave during the investigation, and she ultimately resigned after refusing to give a statement to investigators. *Id.*

Plaintiffs initiated this action on March 30, 2016. [DE 1] The operative complaint is the Amended Complaint [DE 7]. On December 23, 2016, Defendant filed the instant Motion [DE 24], seeking summary judgment on Plaintiffs' Title IX and negligence claims.

II. STANDARD OF REVIEW

Under Rule 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears "the stringent burden of establishing the absence of a genuine issue of material fact." *Suave v. Lamberti*, 597 F. Supp. 2d 1312, 1315 (S.D. Fla. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

"A fact is material for the purposes of summary judgment only if it might affect the outcome of the suit under the governing law." *Kerr v. McDonald's Corp.*, 427 F.3d 947, 951 (11th Cir. 2005) (internal quotations omitted). Furthermore, "[a]n issue [of material fact] is not 'genuine' if it is unsupported by the evidence or is created by evidence that is 'merely colorable' or 'not significantly probative.'" *Flamingo S. Beach I Condo. Ass'n, Inc. v. Selective Ins. Co. of Southeast*, 492 F. App'x 16, 26 (11th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986)). "A mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment; there must be evidence from which a jury could reasonably find for the non-moving party." *Id.* at 26-27 (citing *Anderson*, 477

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has evolved over time. During his deposition, four years after the Ball, Michael's description of what occurred has drastically changed from the description provided to school officials in 2012 and 2014.

U.S. at 252). Accordingly, if the moving party shows "that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party" then "it is entitled to summary judgment unless the nonmoving party, in response, comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Rich v. Sec'y, Fla. Dept. of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013) (citation omitted).

III. DISCUSSION

A. Title IX

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In cases of intentional sexual discrimination, there is an implied right of action for money damages under Title IX, and a teacher's sexual harassment of a student constitutes actionable discrimination under Title IX. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75–76 (1992). In cases of sexual harassment of a student by a teacher, the analysis is governed by *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

In *Gebser*, the Supreme Court explained that not all sexual harassment by teachers is sufficient to impose liability on a school district because "Title IX is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation." *Id.* at 290 (internal citations omitted). Furthermore, school districts may not be held liable on a theory of respondeat superior or mere constructive notice; Title IX liability arises only where "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Id.* at 277, 285.

"Therefore, applying the Gebser framework to the summary judgment context requires three related inquiries." *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1254 (11th Cir. 2010). First, the plaintiff must be able to identify a Title IX "appropriate person" (a school official with "authority to take corrective measures in response to actual notice of sexual harassment"). *Id.* (citing *Floyd v. Waiters*, 171 F.3d 1264, 1264 (11th Cir.1999)). Second, "actual notice" means notice "sufficient to alert the school official of the possibility of the harassment". *Sch. Bd. Of Broward Cty., Fla.*, 604 F.3d at 1254 (citing *Gebser*, 524 U.S. at 291).Finally, the official with notice must exhibit deliberate indifference to the harassment. *Sch. Bd. Of Broward Cty., Fla.*, 604 F.3d at 1254 (internal citations omitted).

B. Sexual Harassment Claim

Defendant argues that it is entitled to summary judgment on the Title IX sexual harassment claim because Plaintiffs cannot satisfy the three inquiries of the *Gebser* framework. Defendant argue that: (1) Sergeant Major Cruz was not an "appropriate person" under Title IX; (2) the school officials, Nelson and Cruz, did not have "actual notice" when informed of only a single incident of sexual harassment; and (3) Nelson did not act with deliberate indifference. The Court addresses each argument in turn.

i. "Appropriate Person"

The school official with notice of the harassment must have "authority to take corrective measures in response to actual notice of sexual harassment"). *Sch. Bd. Of Broward Cty., Fla.*, 604 F.3d at 1254 (internal citations omitted). Furthermore, the official with notice of the harassment must be "high enough up the chain-of-command that his acts constitute an official decision by the school district itself not to remedy the misconduct." *Floyd v. Waiters*, 133 F.3d 786, 788, 793 & n.

15 (11th Cir.1998), *vacated by* 525 U.S. 802 (1998), *reinstated in* 171 F.3d 1264 (11th Cir.1999) (finding that a school security guard was not an "appropriate person"). *See Sch. Bd. of Broward Cty., Fla.,* 604 F.3d at 1257 (holding that school principal "equipped with many . . . means of deterring or stopping sexual harassment of students, such as admonishing the teacher, conducting a thorough preliminary investigation, swiftly reporting the abuse, and monitoring the teacher's behavior" was an "appropriate person" under Title IX). *See Hill v. Cundiff*, 797 F.3d 948, 971 (11th Cir. 2015) (finding that the principal and assistant principal were the only "appropriate persons" and a teacher's aide was not high enough on the chain-of-command at the school for her acts to constitute "an official decision by the school district itself not to remedy the misconduct.").

Plaintiffs argue that Sergeant Major Cruz was notified of the alleged sexual harassment at the Ball and failed to take action to protect Michael from harassment, evidencing deliberate indifference. While Cruz had the authority to take corrective measures in that he could ask Lorenz to leave the Ball and refuse her re-entry, his position as a teacher and ROTC instructor, and "helper" at the Ball, does not qualify him as an official "high enough up the chain-of-command that his acts constitute an official decision by the school district itself not to remedy the misconduct." *See Floyd*, 171 F.3d at 1264. Therefore, Cruz is not an "appropriate person" under Title IX. However, it is unclear whether Plaintiffs assert that other school officials who handled the investigation are "appropriate persons" under Title IX, so the analysis does not end on this prong.

ii. "Actual Notice"

Defendant is entitled to summary judgment on its claim for summary judgment because after receiving actual notice of the alleged sexual harassment in the April 2012 Email, school officials took appropriate action to ensure that Lorenz had no further physical or verbal contact with

Michael.

The undisputed record establishes (1) that the School Board was not aware of any incident or allegation of sexual harassment involving Lorenz prior to April 5, 2012, and (2) Lorenz had no physical contact or verbal communications with Michael Saphir after the Ball on April 5, 2012. [DE 25 ¶¶ 14-15, 27, 52-53].

"Title IX is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation." *Gebser*, 524 U.S. at 290 (citing 20 U.S.C. § 1682). Therefore, school districts cannot be held liable on a theory of respondeat superior or even constructive notice. *Id.* at 275–76.

> Title IX's express means of enforcement requires *actual notice* . . . The presumable purpose is to avoid diverting education funding from beneficial uses where a recipient who is unaware of discrimination in its programs is willing to institute prompt corrective measures. Allowing recovery of damages based on principles of respondeat superior or *constructive notice* in cases of teacher-student sexual harassment would be at odds with that basic objective, as liability would attach even though the district had no actual knowledge of the teacher's conduct and no opportunity to take action to end the harassment. *Id.* (emphasis added).

Title IX liability only arises where a school district official "has authority to institute corrective measures on the district's behalf" and "has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Id.* at 290.

Plaintiffs' Title IX claim is based on a single incident of harassment; Plaintiffs attempt to characterize the interactions between Michael and Lorenz at the Ball as multiple incidents of sexual harassment, but this characterization is not supported by the law. Once an appropriate person at the school had actual notice of the harassment that occurred at the Ball (with the April 2012 Email), school officials investigated the incident and informed several staff members that Lorenz was not allowed to be around Michael. School officials took timely and reasonable

measures to ensure that Lorenz was not in contact with Michael. After the Ball, Lorenz did not have any verbal or physical contact with Michael.

The school district cannot be charged with failing to prevent the harassment because school officials had no reason to believe that Lorenz posed a risk of sexually harassing a student; Lorenz's background check was clear, and during her employment with the School Board from 1996 to 2015, Michael's was the only complaint against Lorenz for sexual harassment.

Furthermore, the fact that Michael saw Lorenz on campus from time to time and was once excluded from PE class does not rise to the level of deliberate indifference, nor does it breach the duty of care owed by the school to Michael.

iii. "Deliberate Indifference"

Defendant is entitled to summary judgment because no incidents of sexual harassment occurred after Shapiro and Nelson were placed on actual notice.[2] Defendant is also entitled to summary judgment because Shapiro's actions were not deliberately indifferent.

"Deliberate indifference is an exacting standard." *Doe*, 604 F.3d at 1259. School district officials will only be found deliberately indifferent when their "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648; *see KB*, 536 F. App'x at 963. Further, "a school's imperfect responses to harassment will not support Title IX liability." *Fitzgerald v. Barnstable School Comm.*, 504 F.3d 165, 173–75 (1st Cir.2007), *rev'd on other grounds*, 555 U.S. 246 (2009).

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2 In fact, after Sergeant Major Cruz directed the removal of Lorenz from Michael's table at the Ball, Lorenz returned only to ask for her purse and then spent the rest of the evening away from Michael. Therefore, even if Cruz was an "appropriate person" under Title IX, once he had actual knowledge of the harassment, his actions in removing Lorenz were effective as no other harassment occurred.

Therefore, the Court is tasked with determining if school officials' actions were "clearly unreasonable" evidencing deliberate indifference, or just merely imperfect. The Court finds the school's actions were imperfect, but not clearly unreasonable. There are ways in which the school's investigation could have been improved, for example school officials could have interviewed Michael and Mark Sadek—two individuals with direct knowledge of what occurred at the Ball who were not interviewed. However, "courts have no roving writ to second-guess an educational institution's choices from within a universe of plausible investigative procedures." *Fitzgerald*, 504 F.3d at 175. Failure to interview Michael and Sadek does not rise to the level of deliberate indifference because school officials took action to ensure Lorenz did not have contact with Michael, and that action was successful in preventing any further sexual harassment. The school's actions in investigating the complaint of sexual harassment and implementing procedures to ensure Lorenz had no further contact with Michael were imperfect at times, but not clearly unreasonable. Most importantly, the procedures worked because after the Ball, Lorenz had no physical or verbal contact with Michael. While the Court is sympathetic to the stress and anxiety that Michael experienced from seeing Lorenz on campus, his reaction does not render their actions unreasonable.

C. Title IX Retaliation Claim

Defendant argues it is entitled to summary judgment on Plaintiff's Title IX retaliation claim for three reasons: (1) Michael did not engage in protected activity; (2) Michael did not suffer any adverse action; and (3) there is no causal connection between the complained-of conduct and the alleged protected activity.

Retaliation is not listed as a cause of action in Title IX itself, but the Supreme Court has

recognized that a claim for retaliation exists under Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). In the Eleventh Circuit, Titles VII and IX are construed in pari materia. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1170 n. 12 (11th Cir. 2003).

To establish a prima facie case of retaliation, Plaintiffs must show that "(1) [Michael] engaged in statutorily protected expression; (2) the Board took action that would have been materially adverse to a reasonable person; and (3) there was a causal link between the two events." *McCullough v. Bd. of Regents of the Univ. Sys. of Georgia*, 623 F. App'x 980, 982 (11th Cir. 2015) (citing *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir.2001)). To establish a causal connection in a retaliation case, "a plaintiff must show that the decision-makers were aware of the protected conduct, and that the protected activity and the adverse actions were not wholly unrelated." *Id.* (quoting *Shannon v. BellSouth Telecomms., Inc.*, 292 F.3d 712, 716 (11th Cir.2002) (quotation omitted)).

Plaintiffs allege that the School Board retaliated against him when: (1) School Board employees indicated that Michael was at fault for the actions of Lorenz at the Ball, or that he was lying about the events; and (2) when a teacher falsely accused him of sexually harassing a peer in an attempt to discredit him. [DE 7 at 34].

Defendant is entitled to summary judgment on the retaliation claim because there is no causal connection between the complaint about the Ball and the incident where Michael was accused of improper conduct more than 19 months later.

There is no record testimony to support that any school employee said Michael was at fault for Lorenz's actions. Furthermore, Mr. Saphir's testimony that teachers accused Michael of lying about the events that occurred at the Ball is insufficient to create a triable issue of fact in a claim for

retaliation. The teachers' expressed opinions about the truthfulness of the Saphir's allegations; they shared these opinions with Mr. and Mrs. Saphir, and Michael, potentially in the presence of other students, but, this occurred before the teachers had knowledge of the email complaining about Lorenz's conduct. Also, the teachers sharing their opinions about the truthfulness of Michael's allegations, would not be "materially adverse to a reasonable person." Therefore, Defendant is entitled to summary judgment on the claim for retaliation.

D. Negligence Claim

Defendant argues it is entitled to summary judgment on Plaintiff's negligence claim because the School Board did not breach the duty of care in holding the Ball. The Court agrees. Furthermore, the school reasonably took steps to prevent further harassment by Lorenz; after the Ball, there was no verbal or physical conduct between Lorenz and Michael. The school's actions were reasonable based on the information they had after the 2012 email and investigation. The school did not breach a duty of care, so Defendant is entitled to summary judgment on the claim for negligence.

E. Negligent Hiring Retention and Supervision Claims

Defendant argues it is entitled to summary judgment on Plaintiff's negligent hiring retention and supervision claims because the School Board was not on notice that Lorenz was unsuitable for employment before the alleged acts of sexual harassment occurred. For the reasons already articulated, the Court agrees that Defendant is entitled to summary judgment on the claim for negligent hiring, retention, and supervision.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion for Summary Judgment [DE 24] is **GRANTED**;

2. The Court will separately enter a final judgment.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 24th day of February, 2017.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished:

Counsel of Record