IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

HUNTER NANCE, Individually and by and through his parents, DONNA NANCE and RODNEY NANCE,	)	
Plaintiffs,	)	
v.	)	1:17-cv-957
ROWAN-SALISBURY BOARD OF EDUCATION and (each individually and in their official capacity) LYNN P. MOODY, KELLY WITHERS, BRETT STIREWALT, MELISSA MORRIS, ALIYAH SLOOP, AMY WISE, FRANKLIN PRIMUS, LISA RANDOLPH, JONATHAN FARMER, AMIE WILLIAMS CAUDLE, JASON YOW BRANDON LINN,	)	
Defendants.	)	

MEMORANDUM ORDER

THOMAS D. SCHROEDER, Chief District Judge.

This civil action alleges discrimination by school officials against a high school student who was bullied based on his sexual orientation. Plaintiff Hunter Nance ("Hunter"), individually and by and through his parents, Donna and Rodney Nance, sues the Rowan-Salisbury Board of Education ("Board") and the following administrators and staff at South Rowan High School ("SRHS") in the Rowan-Salisbury School District ("RSSD") in their individual and official capacities: Lynn P. Moody, superintendent of RSSD; Kelly Withers, principal of SRHS; Amy Wise, Jonathan Farmer, and

Amie Williams Caudle, assistant principals at SRHS; Brett Stirewalt, Melissa Morris, Aliyah Sloop, and Franklin Primus, teachers at SRHS; Lisa Randolph, a guidance counselor at SRHS; Jason Yow, a coach at SRHS (collectively the "individual Defendants"); and Brandon Linn, a school resource officer. (Doc. 15.) The court granted in part and denied in part the Board and individual Defendants' motion to dismiss. (Docs. 37, 38.) Before the court is the Board's motion to dismiss the claim against it under Title IX of the Educational Amendments of 1972 ("Title IX"), 20 U.S.C. § 1981 (Doc. 39), Defendant Linn's motion for judgment on the pleadings (Doc. 33),[1] and the Plaintiffs' motion to file a third amended complaint (Doc. 45). All motions are fully briefed and are ready for consideration. (Docs. 34–36, 40, 45, 47, 49, 50.)[2] For the reasons set forth below, the Board's motion to

[1] Though labeled as a motion to dismiss, because Linn has filed an answer and relies on Federal Rule of Civil Procedure 12(c), it is a motion for judgment on the pleadings. (Doc. 33 at 1.)

[2] As to the Board's Title IX motion, Federal Rule of Civil Procedure 12(g)(2) ordinarily precludes successive Rule 12(b)(6) motions, unless the additional motion is provided for by Rule 12(h)(2) or (3), though courts "have interpreted the bar on successive Rule 12 motions 'permissively and have accepted subsequent motions on discretionary grounds.'" Superior Performers, Inc. v. Ewing, No. 1:14CV232, 2015 WL 3823907, at *2–3 (M.D.N.C. June 19, 2015) (quoting F.T.C. v. Innovative Mktg., Inc., 654 F. Supp. 2d 378, 383 (D. Md. 2009)); see Emiabata v. BB&T, No. 1:17-CV-529, 2018 WL 6575471, at *4–5 (M.D.N.C. Dec. 13, 2018). Plaintiffs do not argue that the instant motion was improperly filed, and the court finds no indication that the Board's motion seeks to delay the proceedings. Moreover, failure to consider it at this stage would amount to needless delay and a waste of judicial and party resources. See Smith v. Bank of the Carolinas, No. 1:11CV1139, 2012 WL 4848993, at *7 n.9 (M.D.N.C. Oct. 11, 2012), adopted by 2013 WL 2156008 (M.D.N.C. May 17, 2013); see also Ewing, 2015 WL 3823907, at *3.

dismiss will be granted and the Title IX claim against the Board will be dismissed, Linn's motion for judgment on the pleadings will be granted and the claims against him will be dismissed, and Plaintiffs' motion to file a third amended complaint will be denied as futile.

I. BACKGROUND

A. Second Amended Complaint

The allegations of the second amended complaint, which are accepted as true and viewed in the light most favorable to Plaintiffs for purposes of the present motions, are set out in the court's September 14, 2018 memorandum order on Defendants' motion to dismiss. (Doc. 38.) The court acknowledges the facts as set out in the order and will not repeat them here.

B. Proposed Third Amended Complaint

The proposed third amended complaint reiterates most of the same facts as the second amended complaint, except as follows:

The proposed third amended complaint provides additional factual allegations about the RSSD Code of Conduct and policies for reporting bullying. (Doc. 45-2 ¶¶ 36, 44, 62, 74, 114, 115

Plaintiffs filed a surreply as to the Board's motion to dismiss the Title IX claim (Doc. 51), which will not be considered because the court's local rules do not authorize such a filing. See Local Rule 7.3. A surreply can be allowed "when fairness dictates based on new arguments raised in the previous reply." DiPaulo v. Potter, 733 F. Supp. 2d 666, 670 (M.D.N.C. 2010). Here, Plaintiffs not only fail to note any new arguments, but their surreply regurgitates verbatim large portions of their response brief. See (Doc. 51 at 6, 8–9.)

144–47.) It adds allegations that Hunter was similarly situated to his fellow classmates because he and the majority of students enrolled at SRHS are Caucasian, of a Judeo-Christian religious background, and cisgender. (Doc. 45-2 ¶ 175.) It further alleges that Defendants have impartial policies prohibiting harassment, bullying, assault, violent acts, and discrimination (Doc. 45-2 ¶ 178), and Defendants have impartial procedures providing how to investigate complaints of harassment, bullying, and discrimination (Doc. 45-2 ¶ 179). The proposed pleading adds allegations that Defendants received letters from a doctor and a psychologist after Hunter's third suicide attempt, documenting Hunter's PTSD, noting that it was due in part to the bullying he faced at school, and providing recommendations on how the school should respond to future incidents. (Doc. 45-2 ¶ 105, 108, 181.) Plaintiffs also add a list of students who were suspended between 2013–2016 for Level II and Level III violations of the RSSD Code of Conduct and allege that these suspensions show that Defendants enforced their policies on bullying, harassment, and discrimination unequally. (Doc. 45-2 ¶ 182.) A violation level for each alleged incident of harassment experienced by Hunter is provided, and it is alleged that "Defendants rarely and unequally adhered to policies regarding disciplinary action for Code of Conduct violations." (Doc. 45-2 ¶ 183.) The proposed third amended complaint drops the fourth cause of action, negligent infliction of emotional

distress. (Doc. 45-2.)

II. ANALYSIS

A. Standards of Review

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).[3] In considering a Rule 12(b)(6) motion, a court first "separates factual allegations from allegations not entitled to the assumption of truth." Sauers v. Winston-Salem/Forsyth Cty. Bd. of Educ., 179 F. Supp. 3d 544, 550 (M.D.N.C. 2016) (citing Iqbal, 556 U.S. at 681). Conclusory allegations and allegations that are simply a "formulaic recitation of the elements" are not entitled to the assumption of truth. Id. (quoting Iqbal, 556 U.S. at 681). The court then determines "whether the factual allegations, which are accepted as true, 'plausibly suggest an entitlement to relief.'" Id. (quoting Iqbal, 556 U.S. at 681). A

[3] Plaintiffs argue that Linn has "failed to state the correct legal standard when ruling on a Rule 12(b)(6) motion to dismiss involving a § 1983 claim" and that there is a different legal standard for a Rule 12(b)(6) motion to dismiss involving a § 1983 claim. (Doc. 35 at 7.) This is incorrect; it is Plaintiffs who have failed to state the correct legal standard. As Linn correctly points out, the text cited by Plaintiffs to support their argument, from Veney v. Wyche, 293 F.3d 726 (4th Cir. 2002), does not change the standard for review as set forth in Twombly and Iqbal, particularly because Veney was decided before them and thus did not apply the new pleading standard they articulated. (Doc. 36 at 1–2.)

claim is facially plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable," demonstrating "more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556–57).

The standard of review governing motions for judgment on the pleadings is the same as that employed on motions to dismiss for failure to state a claim under Rule 12(b)(6). Drager v. PLIVA USA, Inc., 741 F.3d 470, 474 (4th Cir. 2014). A motion under Rule 12(c) differs from one under 12(b)(6) based on what the court may consider in testing the complaint's sufficiency. Under Rule 12(c), the court may consider the complaint, the answer, and documents incorporated by reference into these pleadings. Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 724 (M.D.N.C. 2012).

Federal Rule of Civil Procedure 15(a)(2) provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." While district courts have discretion to grant or deny a motion to amend, leave should be "freely given" absent "any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Foman v. Davis, 371

U.S. 178, 182 (1962).

"When a proposed amendment is frivolous or advances a claim or defense that is legally insufficient on its face, the motion to amend should be denied." Joyner v. Abbott Labs, 674 F. Supp. 185, 190 (E.D.N.C. 1987). "To determine whether a proposed amended complaint would be futile, the Court reviews the revised complaint under the standard used to evaluate a motion to dismiss for failure to state a claim." Amaya v. DGS Constr., LLC, 326 F.R.D. 439, 451 (D. Md. 2018) (citing Katyle v. Penn Nat'l Gaming, Inc., 637 F.3d 462, 471 (4th Cir. 2011)). "A motion to amend a complaint is futile 'if the proposed claim would not survive a motion to dismiss.'" Pugh v. McDonald, 266 F. Supp. 3d 864, 866 (M.D.N.C. 2017) (quoting James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996)).

B. Defendant Board's Motion to Dismiss Title IX Claim

Defendant Board moves to dismiss Plaintiff's Title IX claim against it on the grounds that the allegations of discrimination and harassment on the basis of sexual orientation are not covered under Title IX and, even if they were, Plaintiffs have failed to allege deliberate indifference. (Doc. 39 at 1.) Plaintiffs respond that discrimination based on sexual orientation is inherently discrimination based on sex, and the second amended complaint alleges facts sufficient to plausibly allege that the Board had actual knowledge of the harassment and responded

inadequately. (Doc. 47 at 3, 12.)

Under Title IX, "[f]unding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 650 (1999). A plaintiff bringing a Title IX hostile educational environment claim must show that (1) he was a student at an educational institution receiving federal funds, (2) he was subjected to harassment based on his sex, (3) the harassment was sufficiently severe or pervasive to create a hostile environment in an educational program or activity, and (4) there is a basis for imputing liability to the institution. Feminist Majority Found. v. Hurley, 911 F.3d 674, 686 (4th Cir. 2018) (citing Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007)). For student-on-student harassment claims, the school board can only be liable in damages if it has actual notice of known acts of harassment and its response was deliberately indifferent. Davis, 526 U.S. at 640–42; S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cty., 819 F.3d 69, 75 (4th Cir. 2016).

The court need not determine whether Plaintiffs' allegations of discrimination and harassment based on sexual orientation are

covered under Title IX, or whether the Board had actual notice of the harassment, because even assuming that both requirements are met, the second amended complaint fails to allege facts sufficient to permit a plausible inference that the school acted with deliberate indifference.

Defendants argue that Plaintiffs have failed to allege deliberate indifference because school officials disciplined some students who harassed Hunter. (Doc. 40 at 5–6.) Plaintiffs respond that they have alleged enough facts to establish that the school had actual knowledge of the discrimination Nance was experiencing and that the school officials failed to adequately respond.[4] (Doc. 47 at 13.)

To state a claim for Title IX liability, the complaint must allege facts sufficient to permit an inference of deliberate indifference. Davis, 526 U.S. at 648. "[T]he deliberate indifference must, at a minimum, 'cause [students] to undergo'

[4] Plaintiffs incorrectly argue that deliberate indifference is not required to impute liability to the Board, asserting that an inadequate response is all that is required. (Doc. 47 at 12–13.) Both Supreme Court and Fourth Circuit precedent make clear that the nature of the inadequate response must amount to deliberate indifference. Davis, 526 U.S. at 646–47 ("We thus conclude that recipients of federal funding may be liable for 'subject[ing]' 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); see Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (stating that, in the teacher-on-student harassment context, "the response must amount to deliberate indifference to discrimination"); S.B., 819 F.3d at 75 (recognizing that the deliberate indifference standard for claims of student-on-student harassment under Title IX was established by the Supreme Court in Davis).

harassment or 'make them liable or vulnerable' to it." Id. at 645 (alteration in original) (quotations omitted). Where "the misconduct occurs during school hours and on school grounds . . . the misconduct is taking place 'under' an 'operation' of the funding recipient." Id. at 646. Because the harassment here occurred at school during school hours, it occurred in a circumstance over which the Board exercised control over the harassers and the environment in which the harassment occurred. Id.

Deliberate indifference is only found where the school board's "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." Davis, 526 U.S. at 648. "[N]either a school's negligence in addressing a sexual assault, nor its failure to provide the remedy wanted by the victim, constitutes deliberate indifference under Title IX." Facchetti v. Bridgewater Coll., 175 F. Supp. 3d 627, 638 (W.D. Va. 2016) (collecting cases); see S.B., 819 F.3d at 75. In Davis, the Supreme Court cautioned that "courts should refrain from second-guessing the disciplinary decisions made by school administrators" and noted that the possibility of imposing Title IX liability on school boards "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action." Davis, at 648 (quoting New Jersey v. T.L.O., 469 U.S.

325, 342–43 n.9 (1985)).

Though Plaintiffs argue that the school should be liable for its failure to abide by its own disciplinary policies, "a Title IX defendant's failure to comply with its own policy does not prove deliberate indifference, under clear Supreme Court precedent." Facchetti, 175 F. Supp. 3d at 638 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291–92 (1998); Doe v. Bd. of Educ. of Prince George's Cty., 982 F. Supp. 2d 641, 657 (D. Md. 2013)). The second amended complaint indicates that the school administrators in fact followed the Board's disciplinary policies on harassment on at least two occasions by suspending students pursuant to the Board's Code of Conduct. (Doc. 15 at 111, 116.)

"Davis sets the bar high for deliberate indifference. The point . . . is that a school may not be held liable under Title IX . . . for what its students do, but only for what is effectively 'an official decision by [the school] not to remedy' student-on-student harassment." S.B., 819 F.3d at 76–77 (citing Davis, 526 U.S. at 642). The Fourth Circuit has noted that it is not the case "that only a complete failure to act can constitute deliberate indifference, or that any half-hearted investigation or remedial action will suffice to shield a school from liability[,]" and where "a school has knowledge that a series of 'verbal reprimands' is leaving student-on-student harassment unchecked, then its failure to do more may amount to deliberate indifference under Davis."

S.B., 819 F.3d at 77. The second amended complaint fails to allege facts sufficient to create a plausible inference that the Board made a "decision to remain idle in the face of known student-on-student harassment" or an "official decision by [the school] not to remedy the violation." Davis, 526 U.S. at 641–42; see S.B., 819 F.3d at 77.

Plaintiffs argue that "Defendants did nothing to rectify the hostile environment, bullying, and harassment to which Hunter was subjected." (Doc. at 13.) But here, that claim is belied by the allegations in the second amended complaint that the school took a series of actions in response to the complaints of harassment, including requiring a student to apologize, holding meetings with school officials and Hunter's parents, questioning students reported to be involved in the alleged harassment, and suspending students on two separate occasions. (Doc. 15 ¶¶ 75, 102–03, 111, 116, 127 139); see S.B., 819 F.3d at 77 n.5. While the school may not have taken the remedial measures that Plaintiffs wanted, "school administrators are entitled to substantial deference when they calibrate a disciplinary response to student-on-student bullying or harassment, . . . and a school's actions do not become 'clearly unreasonable' simply because a victim or his parents advocated for stronger remedial measures." S.B., 819 F.3d at 77 (citations omitted). Therefore, the court finds that Plaintiffs' second amended complaint fails to allege facts permitting a

plausible inference that the Board acted with deliberate indifference to the student-on-student harassment, and the motion to dismiss will be granted.

C. Defendant Linn's Motion for Judgment on the Pleadings

1. 42 U.S.C. § 1983 Qualified Immunity

Linn asserts that he is entitled to qualified immunity on Plaintiffs' § 1983 claim. (Doc. 34 at 7–8.) Plaintiffs argue that the facts are sufficient to show that Linn's conduct violated Hunter's "constitutional right to Equal Protection" and that this right "has been clearly established since the Fourteenth Amendment was ratified on July 28, 1868." (Doc. 35 at 10.) Defendants argue that the allegations in the second amended complaint do not indicate that Linn treated Nance differently from anyone else due to Nance's sexual orientation, so there are no allegations that Linn violated Nance's constitutional rights. (Doc. 34 at 9; Doc. 36 at 3.)

The Supreme Court has established a two-part test to determine whether an official is entitled to qualified immunity: (1) the facts presented, taken in the light most favorable to the non-moving party, must establish a constitutional violation, and (2) if there is such a violation, the right must be clearly established. Pearson v. Callahan, 555 U.S. 223, 231, 236 (2009). For an alleged constitutional right to be clearly established, "[t]he contours of the right must be sufficiently clear that a

reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987), overruled on other grounds by Pearson, 555 U.S. 223 (2009). This determination is to be assessed as of "the time an action [or inaction] occurred." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A "clearly established right must be defined with specificity." City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019); E.W. by and through T.W. v. Dolgos, 884 F.3d 172, 187 (4th Cir. 2018). To determine whether a right is clearly established, the court first considers "cases of controlling authority in this jurisdiction — that is, decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." Hurley, 911 F.3d at 704 (quotation omitted). If there is no controlling authority, the court may then "look to a consensus of cases of persuasive authority from other jurisdictions, if such exists." Id. (quotation omitted) (emphasis omitted). Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Pearson, 555 U.S. 223 at 236.

As Linn correctly points out, only four allegations in the second amended complaint relate to him: that he threatened Hunter with charges for communicating threats against another student, although Hunter made no threats (Doc. 15 ¶ 74); that he threatened

Hunter with charges for filing a false 911 report after Hunter was chased by a group of boys on school grounds (id. ¶ 86); that he laughed at Hunter for being upset and shaking (id. ¶ 76); and that he asked Hunter why he could not defend himself and needed his friends to defend him when chased by some boys on school grounds (id. ¶ 77). (Doc. 36 at 2.) The second amended complaint contains only the conclusory allegation that "Defendants, acting under color of state law, deprived Hunter of the rights, privileges, or immunities guaranteed by the Equal Protection Clause of the Fourteenth Amendment by, without reasonable justification, treating Hunter differently than similarly situated [students] because of Hunter's sexual orientation." (Doc. 15 ¶ 154.) This allegation is wholly conclusory, and conclusory allegations and allegations that are simply a "formulaic recitation of the elements" are not entitled to the assumption of truth. Sauers, 179 F. Supp. 3d at 550 (quoting Iqbal, 556 U.S. at 681). None of the facts supports a plausible claim that Hunter was discriminated against based on his sexual orientation, or that a reasonable person in Linn's shoes would have deemed such conduct a violation of a clearly-established right against discrimination based on sexual orientation. As the pleading fails to allege facts sufficient to permit an inference that Linn violated Nance's Fourteenth Amendment right to equal protection, Linn is entitled to qualified immunity.

Plaintiffs also argue that Linn is liable because he has an affirmative duty to protect. (Doc. 35 at 10.) They contend that the State created a hostile educational environment and failed to provide for Hunter's "basic human needs of being safe from bodily and mental injury" and restrained his ability to act on his own behalf when Linn "threatened" Hunter not to file a 911 report for his classmates' conduct on the school campus. (Doc. 35 at 11.) Plaintiffs' sole citation for support is to DeShaney v. Winnebago Cty. Dept. of Social Servs., 489 U.S. 189 (1989). (Doc. 35 at 10.)

Linn does not respond separately to this argument, likely because DeShaney involved a due process claim, and Plaintiffs' second amended complaint alleges an equal protection violation. (Doc. 15 at 21, ¶ 154, 170; Doc. 35.) To be sure, even DeShaney rejected the contention that the Due Process Clause imposed an affirmative duty on the State in that case. Plaintiffs cite no authority recognizing an affirmative duty to protect under the Equal Protection Clause. In any event, for the reasons noted previously as to the equal protection claim, the second amended complaint fails to allege facts sufficient to permit a plausible inference that Linn's conduct constituted a violation of a clearly established right, even if Linn could be said to have some kind of affirmative duty to protect. Linn's actions, viewed from the perspective of a reasonable officer at the time, fell squarely

within the range of reasonable behavior. He is therefore entitled to qualified immunity. See Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir. 1995).

2. Intentional Infliction of Emotional Distress

As to Plaintiffs' claim against Linn for intentional infliction of emotional distress, the court need not resolve Linn's contention that he is entitled to public official immunity[5] because the second amended complaint fails to plausibly allege that he engaged in extreme and outrageous conduct. See Dickens v. Puryear, 276 S.E.2d 325, 335 (N.C. 1981). A claim of intentional infliction of emotional distress requires allegations of three elements: (1) extreme and outrageous conduct by the defendant, (2) which is intended to and does in fact cause, (3) severe emotional distress to another. Id.; Hensley v. Suttles, 167 F. Supp. 3d 753, 767 (W.D.N.C. 2016). "[L]iability clearly does not extend to mere insults, indignities, [and] threats." Hogan v. Forsyth Country Club Co., 340 S.E.2d 116, 123 (N.C. Ct. App. 1986) (quoting Restatement (Second) of Torts, § 46 comment (d) (1965)).

Linn argues that there are no allegations in Plaintiffs'

[5] There is a split in authority whether public official immunity applies to intentional torts. Compare Hensley v. Price, 876 F.3d 573, 586 n.8 (4th Cir. 2017) (noting split under North Carolina law as to whether public official immunity can apply to intentional tort claims) with Ayala v. Wolfe, 546 F. App'x 197, 202 (4th Cir. 2013) (affirming dismissal of intentional infliction of emotional distress claim as barred by public official immunity) and Maney v. Fealy, 69 F. Supp. 3d 553, 564–65 (M.D.N.C. 2014) (determining application of public official immunity to intentional torts requires tort-by-tort analysis).

second amended complaint that Linn did anything so outrageous or so extreme as to be outside the bounds of human decency and constitute an intentional infliction of emotional distress. (Doc. 34 at 7.) Plaintiffs respond that "[t]o submit a teenager to years of bullying and harassment, to the point where the teenager has tried to take his own life three times, and has been diagnosed with post-traumatic stress disorder exceeds all bounds of decency." (Doc. 35 at 8 (citations omitted) (emphasis omitted).) Plaintiffs argue that Linn's "perpetuation of toxic masculinity and laughing at [Hunter] who was unable to defend himself," as well as his threat to file charges for filing a false report if Hunter were to call 911 for his classmates' conduct evidences Linn's "discriminatory intent." (Id. at 9.)

Linn's actions simply do not rise to the level of extreme and outrageous conduct necessary to constitute a plausible claim of intentional infliction of emotional distress. Linn is not accused of submitting a teenager to years of bullying, as Plaintiffs argue. Even if his alleged laugh at Hunter's predicament of being chased by other boys was insensitive, his actions, including his alleged directive to Hunter regarding the making of a 911 report for his classmates' conduct, fall within the ambit of a reasonable school resource officer. See Gooden v. Town of Clarkton, N.C., 898 F.2d 145, at *4 (4th Cir. 1990) (unpublished table opinion) (noting that North Carolina cases imposing liability for intentional

infliction of emotional distress frequently involve sexual harassment, physical abuse, or harassment in the workplace, and finding that the local building inspector's arbitrary denial of a building permit, calling plaintiff a gay slur, and saying "that he intended to 'get'" the plaintiff did not constitute extreme and outrageous conduct);[6] cf. Dickens, 276 S.E.2d at 335 (finding that a threat of death in the future was actionable as intentional infliction of emotional distress). Therefore, the intentional infliction of emotional distress claim against Linn will be dismissed.

3. Negligent Infliction of Emotional Distress

Plaintiffs do not contest that as a police officer serving as a school resource officer, Linn is a public official entitled to public official immunity as to this negligence claim. See Howard v. City of Durham, No. 1:17CV477, 2018 WL 1621823, at *7 (M.D.N.C. Mar. 31, 2018) (citing Schlossberg v. Goins, 540 S.E.2d 49, 56 (2000)). They only argue that he acted maliciously and corruptly and thus waived immunity. (Doc. 35 at 11–13.) Linn argues that the allegations are conclusory and fail to overcome his immunity. (Doc. 34 at 9; Doc. 36 at 3.)

Under the public official immunity doctrine, a public

[6] While not precedential, an unpublished decision of the Fourth Circuit is valuable for its persuasive reasoning and is cited herein for that limited purpose. See Collins v. Pond Creek Mining Co., 468 F.3d 213, 219 (4th Cir. 2006).

official is only liable where his actions were "corrupt or malicious, or . . . outside of and beyond the scope of his duties." Meyer v. Walls, 489 S.E.2d 880, 880 (N.C. 1997) (quoting Smith v. Hefner, 68 S.E.2d 783, 787 (N.C. 1952)). A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." Grad v. Kaasa, 321 S.E.2d 888, 890 (N.C. 1984). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." Id. at 890–91 (quotations omitted).

None of the limited allegations of the second amended complaint as to Linn detailed above rises to the level of malice or corruption, or indicates that he exceeded the scope of his legitimate duties as a school resource officer. See Meyer, 489 S.E.2d at 888. This is perhaps why Plaintiffs' proposed third amended complaint eliminates this claim. Defendants do not oppose its withdrawal. Therefore, the motion to dismiss will be granted as to this claim.[7]

D. Plaintiffs' Motion to Amend

[7] Because the proposed third amended complaint drops the fourth cause of action, negligent infliction of emotional distress, as to all Defendants, the court presumes Plaintiffs have abandoned this claim against the other Defendants. See Young v. City of Mount Ranier, 238 F.3d 567, 573 (4th Cir. 2001) (observing that where "an amended complaint omits claims raised in the original complaint, the plaintiff has waived those omitted claims.").

Plaintiffs seek to amend their complaint in response to the court's order on Defendants' motions to dismiss (Docs. 37, 38) without consent of opposing parties, pursuant to Federal Rule of Civil Procedure 15(a)(2). (Docs. 45, 50.) Defendants oppose the amendment because Plaintiffs have previously amended their complaint twice, Plaintiffs waited four months from the date of dismissal of Plaintiffs' claims to bring this complaint, reviewing the proposed third amended complaint will cause the Plaintiffs to undertake great expense to determine whether a new motion to dismiss is warranted, each time Plaintiffs amend their complaint it disrupts the individual Defendants' duties as teachers, principals, and superintendent, and amendment would be futile. (Doc. 47.)

As to the first cause of action, Fourteenth Amendment deprivation of equal protection on the basis of sexual orientation, pursuant to 42 U.S.C. § 1983,[8] the motion to amend is futile as to the Board, Linn, and the individual Defendants, because the third amended complaint fails to plausibly allege that Hunter was treated differently from others with whom he is similarly situated as a result of intentional or purposeful discrimination. See Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001). "To state an equal protection claim, a plaintiff must allege 'that he has been

[8] The proposed third amended complaint incorrectly cites to Title 28 of the U.S. Code.

treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination.'" J.W. v. Johnston Cty. Bd. of Educ., No. 5:11-CV-707-D, 2012 WL 4425439, at *8 (E.D.N.C. Sept. 24, 2012) (quoting Morrison, 239 F.3d at 654). The proposed third amended complaint does add allegations that Hunter was similarly situated to his fellow classmates because he and the majority of students enrolled at SRHS are Caucasian, of a Judeo-Christian religious background, and cisgender. (Doc. 45-2 ¶ 175.) However, Plaintiffs' addition of a list of students who were suspended or disciplined for Level II or Level III violations (Doc. 45-2 ¶ 182) does not permit the court to draw a plausible inference that the school was treating students committing Level II and III violations differently based on whether the harassment was directed towards LGBT students. The allegations simply list students who were suspended from the school between 2013 and 2016. There is no factual allegation that these suspensions resulted from bullying or harassment of non-LGBT students (in fact some of the suspensions listed are not related to bullying at all – one suspension listed is for using fireworks, one is for talking about school shootings, and several are for fighting (Doc. 45-2 ¶ 182)). The proposed complaint fails to plausibly allege that the school suspended students who bullied or harassed non-LGBT students but did not suspend students who bullied or harassed Hunter, or that it engaged

in this different discipline because of Hunter's sexual orientation. Thus, it fails to plausibly allege that Hunter was treated differently from others with whom he is similarly situated as a result or intentional or purposeful discrimination. The motion to amend as to the first cause of action is therefore futile.

As to the second cause of action alleging a Title IX violation against the Board, the proposed third amended complaint fails to plausibly allege deliberate indifference, for the same reasons as provided in the motion to dismiss analysis. The proposed third amended complaint adds conclusory allegations that Title IX prohibits discrimination based on sex and that discrimination based on a person's sexual orientation is discrimination based on sex. (Doc. 45-2 ¶¶ 198–99). These are legal contentions and are not entitled to the presumption of truth. See Iqbal, 556 U.S. at 678–79. The proposed pleading also adds the allegations that Defendants received letters from a doctor and a psychologist documenting Hunter's PTSD, that it was caused by the bullying he was facing at school, and providing recommendations to assist Hunter. (Doc. 45-2 ¶ 205.) That the school did not implement these recommendations is insufficient to permit a plausible inference that the school was deliberately indifferent, as neither the school's alleged negligence nor the school's "failure to provide the remedy wanted by the victim[] constitutes deliberate

indifference under Title IX." Facchetti, 175 F. Supp. 3d at 638; accord Hurley, 911 F.3d at 686 (citing Davis, 526 U.S. at 648) ("[A]n institution is not normally liable for failing to cede to a harassment victim's specific remedial demands.") Therefore, for the same reasons addressed as to the motion to dismiss, the proposed third amended complaint fails to plausibly allege deliberate indifference, and the motion to amend is denied as futile.

As to the third cause of action alleging intentional infliction of emotional distress, the motion to amend is futile because the proposed third amended complaint fails to plausibly allege extreme and outrageous conduct or that any Defendant intended for Hunter to suffer the injuries alleged. Dickens, 276 S.E.2d at 335. Though the proposed pleading adds sub-paragraphs to attempt to explain how the Defendants' actions and/or inactions were extreme and outrageous, these additional subparagraphs merely restate facts already stated in the second amended complaint. (Doc. 45-2 ¶ 216.) Therefore, the motion to amend will be denied as futile.

Drawing all favorable inferences in Plaintiffs' favor, the court finds that the third proposed amended complaint fails to allege facts sufficient to state plausible claims, and thus the motion to amend is denied as futile.

III. CONCLUSION

For the reasons stated,

IT IS THEREFORE ORDERED that the Defendant Rowan-Salisbury Board of Education's Motion to Dismiss the Title IX claim (Doc. 39) is GRANTED and the claim is DISMISSED WITHOUT PREJUDICE;

IT IS FURTHER ORDERED that Defendant Linn's Motion to Dismiss (Doc. 33) is GRANTED and the § 1983 claim is DISMISSED WITH PREJUDICE on the ground that Linn is entitled to qualified immunity, the claim for intentional infliction of emotional distress is DISMISSED WITHOUT PREJUDICE, and the claim for negligent infliction of emotional distress is DISMISSED WITH PREJUDICE on the ground that Linn is entitled to public official immunity.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Amend (Doc. 45) is GRANTED to the extent the court construes it as a withdrawal of the negligent infliction of emotional distress claim, and it is otherwise DENIED as futile.

/s/ Thomas D. Schroeder
United States District Judge

February 27, 2019