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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JILL MCCLUSKEY and MATTHEW MCCLUSKEY, individually and for and on behalf of LAUREN MCCLUSKEY, deceased, Plaintiffs, v. STATE OF UTAH, UNIVERSITY OF UTAH, ET AL. Defendants.	**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** Case No. 2:19-cv-00449-HCN-PMW Judge Howard C. Nielson, Jr. Chief Magistrate Judge Paul M. Warner

[1] Defendant Todd Justesen's name was misspelled in Plaintiffs' Complaint and in the Motion as Todd Justensen. It is corrected here.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

INTRODUCTION

No law supports Plaintiffs' Title IX claims, and no clearly established law exists to put every reasonable official on notice that any action taken by the University Staff Members violated the Equal Protection Clause contained in the Fourteenth Amendment. Plaintiffs do not, and cannot, meet the legal standards set forth by the U.S. Supreme Court and the Tenth Circuit Court of Appeals to move forward with their claims, which seek $56 million in money damages.

In opposition to the motion to dismiss, Plaintiffs do not argue what the law is, they argue what they would prefer the law to be. Relevant authority from the Supreme Court, the Tenth Circuit, and other sources prohibit this Court from expanding Title IX and the Equal Protection Clause in the way Plaintiffs advocate.

By filing this motion, the University and its Staff Members are not saying that the University or its employees have no obligation to do their best to ensure student safety. The University, and all its employees, including the University Staff Members named in this suit, are committed to student safety. The University and its Staff Members deeply regret that they did not understand the danger that faced Ms. McCluskey and missed the opportunity to help her more. But the issues raised by Plaintiffs' Complaint and challenged in the motion to dismiss are not about job duties, moral obligations, or missed opportunities, all viewed with the benefit of hindsight. They are about whether Plaintiffs can state legally sufficient claims under Title IX and

the Equal Protection Clause. Based on applicable federal law, Plaintiffs cannot, and the claims should be dismissed.[2]

REPLY ARGUMENT

I. The University Cannot Be Sued Under Title IX for Damages Arising from Ms. McCluskey's Death Because Her Murderer Was Not Faculty, Staff, a Student, or an Invited Guest Over Whom the University Had Substantial Control.

Title IX prohibits discrimination "on the basis of sex" "under any education program or activity." 20 U.S.C. § 1681(a). But Title IX does not contain an explicit private right of action for damages. Rather, the Supreme Court has created a judge-made, limited, implied private right of action under the statute. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 709 (1979); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 71 (1992). Neither the Supreme Court, nor any other federal court, has extended the implied private right of action under Title IX to tragic circumstances like these, where the perpetrator of sexual violence was not affiliated with the educational institution. *See Hall v. Millersville Univ.*, 400 F. Supp. 3d 252, 258 (E.D. Pa. 2019).

In arguing to the contrary, Plaintiffs seek to read Supreme Court opinions expansively despite the Court's own guidance limiting and narrowing its holdings. They rely on inapposite guidance from the Department of Education. And they unsuccessfully attempt to distinguish cases contradicting their position, while at the same time failing to provide the Court with a single case supporting their position. Plaintiffs' Title IX claims must fail.

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[2] Plaintiffs' Complaint contained a § 1983 claim against the University for municipal liability and a claim for "interest on money judgment." Compl. (Doc. 2) at 40, 48. The University moved to dismiss these claims. *See* Mot. to Dismiss (Doc. 23) at 9–10 & n.34. Plaintiffs have conceded these points by not addressing the argument and by eliminating the claims in their Proposed Amended Complaint. *See generally* Pl.'s Mot. for Leave to Amend (Doc. 36). These claims must also be dismissed.

A. Neither the Text of Title IX nor Any Supreme Court Precedent Imposes Liability on Universities in These Circumstances.

Plaintiffs argue that potential Title IX liability in a case such as theirs can be found in the text of Title IX and in Supreme Court precedent. Their argument is incorrect.

Plaintiffs begin with the "plain text" of Title IX, arguing that the text "broadly prohibits funding recipients from allowing any person to be subjected to discrimination in connection with an education program or activity."[3] But the statutory language provides no guidance because Title IX's private right of action is judicially implied. "Because Congress did not expressly create a private right of action under Title IX, *the statutory text does not shed light* on Congress' intent with respect to the scope of available remedies." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998) (emphasis added).

Plaintiffs then turn to U.S. Supreme Court cases—*Davis next friend LaShonda D. v. Monroe County Board of Education* in particular—to suggest that they have a plausible Title IX claim. But Plaintiffs are mistaken. The Supreme Court recognized in *Davis* that a school may be liable under Title IX only "in certain limited circumstances." *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999). In particular, a school may be liable for deliberate indifference to harassment of students caused by students at their school. *Id. Davis* imposed a "high standard" of liability, listing three requirements that must be met: First, a school may be liable only for its own conduct, not the harasser's. *Id.* at 643–44. Second, "the harassment must take place in a context subject to the school district's control." *Id.* at 645.

[3] Pls.' Mem. Opposing Defs.' Mot. to Dismiss ("Pls.' Opp.")(Doc. 35) at 7.

Third—and most important for this case—unless the school "exercises *substantial* control over *both* the harasser and the context in which the known harassment occurs," there can be no Title IX liability. *Id.* (emphasis added).

Addressing the third limitation, the Court imposed Title IX liability on the school in *Davis* because the harassment occurred in a context controlled by the school— "during school hours and on school grounds." *Id.* at 646. But even "more important[]"was the identity of the harassers—students of the school. *Id.* The Court recognized that the school could be liable because primary schools exercise "comprehensive authority" over their students, both "custodial and tutelary," to "control and influence behavior" and to impose comprehensive discipline. *Id.* (citations and quotations omitted). This degree of authority "could not be exercised over free adults." *Id.* (citations and quotations omitted). This unique level of control a primary school has over its students was the basis of the Court's decision to allow a Title IX case based on student-on-student harassment to go forward. *Id.* The *Davis* majority agreed with Justice Kennedy (who authored the dissenting opinion) that the Supreme Court's decision should not be read to "mislead courts to impose more sweeping liability than we read Title IX to require." *Id.* at 652.

The circumstances here are vastly different from those in *Davis*. The University has far less authority over its adult-aged student body than the primary school in *Davis* had over its fifth-grade students. The University lacked the "comprehensive authority" to exercise "substantial control" over Rowland, a "free adult." Imposing Title IX liability on the University for Rowland's harassment and sexual violence is thus contrary to every salient fact supporting *Davis's* outcome. *See id.*

As described in the University's opening Memorandum, lower federal courts have followed the Supreme Court's instruction, and there is no case law interpreting *Davis* to impose Title IX liability in the way Plaintiffs urge.[4] This Court should not break from *Davis's* limits.

B. Administrative Rules and Regulations Do Not Define the Scope of Private Suits for Damages Under Title IX.

Plaintiffs spend a significant amount of their brief recounting and interpreting the "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" (the "Guidance") written in 2001 by the U.S. Department of Education's Office of Civil Rights. The point of the Guidance is to "reaffirm[] the compliance standards that OCR applies in investigations and administrative enforcement" under Title IX, after the Supreme Court issued the *Gebser* and *Davis* opinions defining the scope of the Title IX private right of action for damages.[5] Plaintiffs attempt to use the Guidance to bolster their claim that Title IX provides a private right of action for damages in this case.[6] The Court should reject Plaintiffs' arguments. The Guidance is a nonbinding, nonprecedential document. The Department of Education itself recognizes the Guidance is not relevant in a claim for money damages. And the suggestions given in the Guidance do not support liability in this case.

First and foremost, the Court should not consider the Guidance document because the Department of Education's administrative rules and other writings do not determine whether a private right of action for damages exists under Title IX. *Gebser*, 524 U.S. at 291–92 ("[A

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[4] Mot. to Dismiss (Doc. 23) at 14–16.
[5] Office for Civil Rights, "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" (hereinafter "Guidance") (66 Fed. Reg. 5512, Jan. 19, 2001), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf, and attached as Exhibit A to Pls.' Opp.
[6] Pls.' Opp. at 8–10.

school district's] alleged failure to comply with [OCR's] regulations … does not establish the requisite actual notice and deliberate indifference."). Lower federal courts have therefore refused to use either administrative rules or other "best practices" documents such as the Guidance to define an educational institution's liability for damages under Title IX. *Roe v. St. Louis Univ.*, 746 F.3d 874, 883 (8th Cir. 2014) (concluding that a University's failure to involve a Title IX coordinator in a victim's case, in apparent violation of federal regulations, was insufficient to state a private Title IX claim); *Moore v. Regents of the Univ. of Cal.*, No. 15-CV-05779-RS, 2016 WL 2961984, at *5 (N.D. Cal. May 23, 2016) (not selected for publication) (rejecting a claim for damages based on the Guidance document).[7]

These court decisions are in accord with OCR's own view about whether its 2001 Guidance should be used to set the scope of the private right of action under Title IX. The Guidance document itself states that its suggestions to schools are broader than, and different from, the standards articulated by the Supreme Court for liability in a private suit for damages.[8] It is the Department's position that, at most, "the standards set out in OCR's guidance … would apply to private actions for injunctive and other equitable relief" and not for money damages.[9]

Even if the Court were to consider the 2001 Guidance, it is far from clear that it would support expansion of liability as advocated by Plaintiffs. While the Guidance suggests that an educational institution might be responsible for Title IX violations committed by "third parties,"

[7] *Accord Tubbs v. Stony Brook Univ.*, 343 F. Supp. 3d 292, 309 (S.D.N.Y. 2018); *Ross v. Univ. of Tulsa*, 180 F. Supp. 3d 951, 969–70 (N.D. Okla. 2016), *aff'd* 859 F.3d 1280 (10th. Cir. 2017); *Karasek v. Regents of Univ. of Cal.*, No. 3:15-cv-03717-WHO, 2018 WL 1763289, at * 11 (N.D. Cal. Apr. 12, 2018) (not selected for publication).
[8] Guidance, Ex. A to Pls.' Opp., at ii, iii–iv.
[9] *Id.* at iv n.2.

OCR's examples of hypothetical third parties include "a visiting speaker or visiting athletes."[10] Both of these hypothetical perpetrators would be directly involved in a school program—either providing an educational lecture or competing in school-sponsored sports. And while OCR recognized that a school might not be able to directly discipline harassing athletes on a visiting team, it could still "encourage the other school to take appropriate action" or even "choose not to invite the other school back." *Id.* at 12. In other words, it could act *within the relevant program* to end the harassment. The examples "are [not] at all analogous to a student's own guest …," the situation in this case. *Hall*, 400 F. Supp. 3d at 288.

In short, "[w]hat funding recipients' responsibilities are under Title IX and what they can be held liable for in a private cause of action for damages … are not one and the same." *Doe v. Bibb Cnty. Sch. Dist.*, 126 F. Supp. 3d 1366, 1377 (M.D. Ga. 2015). Accordingly, the Guidance does nothing to answer the question of whether Plaintiffs state a claim under Title IX.

C. The University's Case Law Supports Its Argument, While Plaintiffs Provide No Case Law to Support Their Argument.

In its Motion, the University provided multiple federal cases supporting its view that Title IX does not afford Plaintiffs a private right of action in this case.[11] In opposition, Plaintiffs attempt to distinguish those cases, arguing that they are either inapposite or should be disregarded. As the University explained in the opening memorandum, it is true that some of the cases cited involve different factual scenarios or were resolved at different points of the litigation process. But this is not a reason to disregard the precedent altogether. In the cases cited in the opening memorandum, courts from across the country uniformly recognized limitations on the

[10] *Id.* at 3.
[11] *See* Mot. to Dismiss (Doc. 23) at 16.

Title IX private right of action articulated by the Supreme Court and refused to extend the private right of action in one way or another.

Plaintiffs admit that one case is on point. *Hall v. Millersville University* held that Title IX liability could not extend to a university for the murder of a student in her university dorm room, even when evidence suggested that university officials may have had actual knowledge that the assailant had previously been abusive or harassing. 400 F. Supp. 3d 252, 258 (E.D. Pa. 2019). The court held that no precedent "suggest[s] that institutions are responsible [under Title IX] for the conduct of a third-party whose relationship to the injured student predates or is otherwise unconnected to the school." *Id.* at 289.[12]

Plaintiffs ask this Court to disregard *Hall* because it is a district court opinion subject to appeal and because "its conclusion is contrary to the Supreme Court's case law and the Department of Education's guidance."[13] *Hall* is, of course, nonbinding precedent. Even so, it persuasively summarizes the state of the law and applies it to a factual situation where the college's employees were alleged to have had direct, eyewitness evidence of sexual violence—facts not present in this case. And one of *Hall*'s factual assertions stands unrebutted: "[N]either the parties nor the court has identified *any case from any jurisdiction* in which a court held that Title IX applied to a guest whom the university had no role in bringing to campus." *Hall*, 400 F. Supp. 3d at 289 (emphasis added). So the fact remains: Plaintiffs invite this Court to chart a jurisprudential course rejected by every court in the nation that has previously considered it.

[12] Of course, the victim of sexual violence is not responsible either. The person to blame for the sexual violence is the perpetrator of the violence—in this case Melvin Rowland.
[13] Pls.' Opp. at 12.

Title IX places an even greater burden on Plaintiffs than simply distinguishing the precedent cited by the University. They must provide the Court with precedent putting the University on notice that when it receives Title IX funds it can be held liable for its response to sexual violence committed by a third party with no relation to the University. *Davis*, 526 U.S. at 640; *Hall*, 400 F. Supp. 3d at 289. They have not done so.

The only case discussed by Plaintiffs is *Simpson v. University of Colorado Boulder*, 500 F.3d 1170 (10th Cir. 2007). The plaintiffs in that case alleged that the University of Colorado-Boulder (a) created a program (b) involving invited guests and college "student ambassadors," (c) which suggested that student ambassadors act in a way (show recruits a "good time") such that (d) some of the ambassadors were sexually assaulted by the invited guests, and (e) after complaints were lodged, responded in a way to encourage rather than minimize the likelihood of assaults. *Id*. at 1173.

The school in *Simpson* created the program which, according to the court, was specifically related to and encouraged sexual assaults; the University did no such thing here (and Plaintiffs do not allege it did). The guests causing the assaults in *Simpson* were specifically invited by the school; Rowland was not invited by the University here (and Plaintiffs do not allege he was). The court in *Simpson* recognized that the allegations of the school's actions, "sanction[ing], support[ing], and even fund[ing]" the program, contained an "element of encouragement of the misconduct" such that the school itself "intentionally violat[ed] [Title IX]." *Id.* at 1177. Again, no such facts exist here. The most that Plaintiffs in this case allege are broad generalizations that the University "had a custom of treating reports of sexual abuse

dismissively."[14] The University denies that allegation, but even accepting its truth for the purpose of this motion, that allegation is a far cry from a school's direct, affirmative action putting its own students in harm's way and encouraging them to engage in behaviors likely to result in sexual abuse.

In attempting to distinguish the persuasive, helpful, and on-point cases provided by the University, Plaintiffs did not provide one case in which liability under Title IX was extended in a similar circumstance. Just as in *Hall*, that failure is determinative in this case.

Because an educational institution cannot be liable for its response to sexual violence perpetrated by someone with no relationship to the institution or its programs or activities, Plaintiffs' Title IX claim must be dismissed.

II. Plaintiffs' Equal Protection Claims Against University Staff Members Should Be Dismissed.

The Court should also dismiss Plaintiffs' Second Cause of Action, for alleged violations of the Equal Protection Clause, brought under 42 U.S.C. § 1983, against the University Staff Members. Plaintiffs assert two theories of liability under the Equal Protection Clause: University Staff Members violated Ms. McCluskey's right to equal protection when they "(1) were deliberately indifferent to known sexual harassment that Defendants had the ability to control and (2) discriminated against Ms. McCluskey by failing to adequately respond to reports of her sexual harassment based on gender stereotypes."[15] Plaintiffs' allegations are insufficient to state an equal protection violation under either theory.

[14] Pls.' Opp. at 16.
[15] Pls.' Opp. at 17.

The defense of qualified immunity applies to the claims against the University Staff Members because they took action under color of state law. The legal doctrine of qualified immunity holds government employees accountable by allowing lawsuits when those employees were on clear notice that they were violating an individual's constitutional rights. *Dist. of Columbia v. Wesby*, __ U.S. __, 138 S. Ct. 577, 589 (2018). At the same time, it protects against the "substantial social costs" of litigating constitutional claims against government officials, "including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

To overcome qualified immunity, Plaintiffs must prove (1) that the facts alleged state a violation of a constitutional right, and (2) that the contours of the right were sufficiently clearly established such that every reasonable school official would have understood that he or she was violating that right. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "If the plaintiff fails to satisfy either part of the two-part inquiry, the court must grant the defendant qualified immunity." *Grissom v. Roberts*, 902 F.3d 1162, 1167 (10th Cir. 2018). Here, Plaintiffs' allegations do not satisfy either requirement on the equal protection claims asserted against the Housing Staff or the Campus Officers.

A. Plaintiffs' Allegations Do Not Establish That the University Staff Members Violated Ms. McCluskey's Equal Protection Rights.

1. The Housing Staff Did Not Participate or Acquiesce in Rowland's Harassment.

Under the Equal Protection Clause, a government official may be held individually liable for a third-party's sexual harassment only if the plaintiff can show "deliberate indifference to

known sexual harassment" such that the individual, in effect, "*participate[d]* in or *consciously acquiesce[d]*" in the sexual harassment. *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1250–51 (10th Cir. 1999) (emphasis added). Even accepting Plaintiffs' allegations as true, they do not establish that Justesen, McCarthy, or Thompson (the "Housing Staff") either participated in or consciously acquiesced in Melvin Rowland's sexual harassment of Ms. McCluskey.

Plaintiffs allege that the Housing Staff failed to act on reports from Ms. McCluskey's friend that she had observed several indicators that Ms. McCluskey was in an abusive relationship with Rowland.[16] The Housing Staff received these reports and evaluated them internally to determine an appropriate response that met with their understanding of all of their obligations to students.[17] As Plaintiffs allege, the Housing Staff ultimately decided not to take immediate action (other than monitoring the situation) because the reports were coming from a third party's perception of what was happening with Ms. McCluskey and because the Housing Staff believed they needed to respect the privacy of Ms. McCluskey, an adult-age student who had not made any reports to them about Rowland. Without Ms. McCluskey reporting concerns directly to them or requesting action, the Housing Staff determined it was not appropriate for them to unilaterally take action to interfere with Ms. McCluskey's personal relationship.[18] These allegations do not show the Housing Staff "participated in" or "consciously acquiesced in" known sexual harassment. Rather, some of the Housing Staff made a reasoned decision not to act on reports from Ms. McCluskey's friend and decided to keep an eye on Ms. McCluskey.

[16] Compl. ¶¶ 48–52.
[17] Compl. ¶¶ 54–59.
[18] Compl. ¶¶ 54–59.

What is more, a state actor must have the ability to take decisive action against a harassing party under the state actor's control to be held individually liable under the Equal Protection Clause for sexual harassment perpetrated by a third party. *See, e.g.*, *Murrell*, 186 F.3d at 1250–51 (holding principal and teachers had authority over student harasser); *Woodward v. City of Worland*, 977 F.2d 1392, 1401 (10th Cir. 1992) (noting supervisor of harassed employee could be liable for acquiescing in harassment). None of the Housing Staff fit that mold. None had authority over Rowland. They were not principals or teachers, and he was not a student whom they could call in and discipline. *See Murrell*, 186 F.3d at 1250–51. Neither was Rowland a University employee over whom they had supervisory authority. *Cf. Woodward*, 977 F.2d at 1401. Because they could not take corrective action against Rowland, the Housing Staff cannot be liable under Plaintiffs' first theory.

Plaintiffs dispute this prerequisite to liability, contending that "a harasser's identity" "does not . . . limit[]" the "reach" of Equal Protection Clause liability.[19] Instead, they contend that "the applicable legal limit to the Equal Protection Clause in this context is the extent to which the University knows about and is deliberately indifferent toward sexual harassment."[20] Plaintiffs cite no authority for that sweeping view.

Instead, Plaintiffs cite to *Ross v. Univ. of Tulsa*, 859 F.3d 1280, 1284, 1288 (10th Cir. 2017), *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1152-54 (10th Cir. 2006), *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999), and the Guidance to support their arguments. Those cases and guidelines, however, generally analyze Title IX claims

[19] Pls.' Opp. at 28–29.
[20] Pls.' Opp. at 28–29.

against an educational institution, not equal protection claims brought against individual government actors.

In short, the Housing Staff did not acquiesce in known harassment and they did not have direct authority over Rowland. Plaintiffs' claims against the Housing Staff fail as a matter of law.

2. The Campus Officers Did Not Discriminate Against Ms. McCluskey in Responding to Her Reports.

Plaintiffs have not alleged facts to show that University of Utah campus police officers Brophy, Dallof, Newbold, and Deras (the "Campus Officers") violated Ms. McCluskey's equal protection rights in their response to her reports that Rowland was harassing her. Plaintiffs ask the Court to analyze the Campus Officers' actions based on independent and unrelated prior actions of different individuals that Plaintiffs claim contributed to the culture on campus and in the University's police department. But this is contrary to established equal protection law.

"Although there is no general constitutional right to police protection, the state may not discriminate in providing such protection." *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988). In pleading such a claim, the plaintiff must show the individual officers intentionally discriminated; that is, the plaintiff must show discriminatory intent was a "motivating factor" in the action they took. *Id.* Plaintiffs make general allegations that the Campus Officers "work[ed] within a "campus culture" of not taking women's reports of sexual harassment seriously, and thus may have engaged in gender stereotyping against Ms. McCluskey.[21] While Plaintiffs use these allegations to support what they describe as a separate theory of liability based on "Gender Stereotypes," such a theory must still be premised on a

[21] Pls.' Opp. at 30–31.

claim that the Campus Officers allegedly provided police services in a discriminatory fashion. The Campus Officers therefore understand Plaintiffs' "Gender Stereotyping" allegations as an attempt to show they were motivated by discriminatory intent when they responded to Ms. McCluskey's reports that Rowland was harassing her.

Plaintiffs argue that improper gender stereotypes within the University police department may be used as evidence that the individuals acted based on discrimination.[22] But allegations against a department do not demonstrate discrimination by an individual officer. Section 1983 liability may only be "imposed upon those defendants whose own individual actions cause a constitutional deprivation …." *Dodds v. Richardson*, 614 F.3d 1185, 1200 (10th Cir. 2010). The actions and motives of one state actor cannot be imputed to another state actor. Thus, even where related state actors or institutions may have acted based on gender stereotypes, liability must still be evaluated for each individual based on each individual's action or inaction. *See Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 129 (2d Cir. 2004) (dismissing § 1983 claim against superintendent but allowing claims against other employees alleged to have acted based on gender stereotypes). Plaintiffs must show each of the Campus Officers separately and intentionally violated the constitution; that is, they must show an intent to discriminate on the basis of sex was a "motivating factor" in the actions they took. *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988).

To make their claim, Plaintiffs cite employment cases involving a hostile work environment but do not articulate the reasoning for extending application of those cases to an

[22] Pls.' Opp. at 31.

equal protection claim involving police officers working on a college campus.[23] Because Plaintiffs have not alleged sufficient facts against the individual Campus Officers, Plaintiffs are essentially inviting the Court to use the Campus Officers as proxies for claims against the University and its police department—claims they cannot bring under § 1983. *Roach v. Univ. of Utah*, 968 F. Supp. 1446, 1451 (D. Utah 1997) (dismissing § 1983 claim against the University of Utah because it is an arm of the state and is therefore not a "person" within the meaning of § 1983). Plaintiffs' invitation is inappropriate and unsupported.

For purposes of § 1983, the question is not what the University or its police department did. The question is whether Plaintiffs have alleged sufficient facts to state individual claims for equal protection violations against each of the Campus Officers. The few specific facts Plaintiffs allege against the various Campus Officers fall far short of their obligation.

Plaintiffs allege various Campus Officers met with Ms. McCluskey in the lobby of the police department instead of in an interview room; ignored signs of sexual abuse; mistakenly confused Rowland with a student with a similar name; ran a background check on Rowland but did not check to see if he was on parole; and did not timely follow up on Ms. McCluskey's reports while Dallof, who was assigned to the investigation, was out of the office.[24] These allegations may demonstrate a gap in what the Campus Officers did to help Ms. McCluskey and what they could have done, but they do not demonstrate discriminatory intent.

As to the claims specifically against former Chief Brophy, Plaintiffs concede there are no facts showing Brophy had personal knowledge of Ms. McCluskey's abuse. Rather, they ask the

[23] Pls.' Opp. at 30–31.
[24] Compl. ¶¶ 80–95.

Court to infer from her "multiple contacts with [the police department]" that he became aware of Ms. McCluskey's situation.[25] That admission should end their claims against Brophy for two reasons. First, Plaintiffs' request contradicts the Supreme Court's instruction to dismiss claims "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability," since those types of claims "'stop[] short of the line between possibility and plausibility of "entitlement to relief."'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Second, "if a plaintiff merely shows that a supervisor 'should have known' that a subordinate was violating someone's constitutional rights and it is not established that the supervisor actually had such knowledge, the plaintiff will not have established a deliberate, intentional act by the supervisor to violate constitutional rights." *Woodward*, 977 F.2d at 1399.

For these reasons, Plaintiffs have failed to adequately allege constitutional violations by the Campus Officers.

B. The University Staff Members Cannot Be Held Liable Because There Are No Cases That Clearly Establish the Asserted Constitutional Rights.

Even if Plaintiffs had adequately alleged individual actions by each named University Staff Member that would be tantamount to a violation of the Equal Protection Clause (which they did not), Plaintiffs' claims must still be dismissed because there are no cases clearly establishing the alleged constitutional right. The "clearly established" component of qualified immunity requires the "legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *Dist. of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577, 590

[25] Pls.' Opp. at 33 n.3.

(2018). To show "clearly established law" a plaintiff must identify an on-point Supreme Court or Tenth Circuit decision or show the clear weight of authority from other courts has found the law to be as the plaintiff maintains. *Cummings v. Dean*, 913 F.3d 1227, 1240 (10th Cir.), *cert. denied sub nom. Cummings v. Bussey*, 140 S. Ct. 81 (2019)."[E]xisting precedent must have placed the statutory or constitutional question [regarding the illegality of the defendant's conduct] beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "This demanding standard protects all but the plainly incompetent or those who knowingly violate the law." *Wesby*, 138 S. Ct. at 589 (citations and quotations omitted). Plaintiffs have not met their burden.

1. The Law Is Not Clearly Established for Sexual Harassment by an Unaffiliated Third Party.

Plaintiffs rely exclusively on *Murrell v. School Dist. No. 1* to define the constitutional rights at issue under their sexual harassment theory. *Murrell* involved sexual harassment at a public high school by one student against another student under the supervision of school personnel who were aware of the risks posed by the offending student. *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1251 (10th Cir. 1999). *Murrell* does not clearly establish the right asserted by Plaintiffs in this case. First, Ms. McCluskey's harassment did not take place under the supervision and control of school personnel. Second, the high school setting where the harassment took place in *Murrell* is very different from that of a university, where there is significantly less supervision and control over a college-aged student body. There was even less control and supervision here because the perpetrator was not a student, employee, invited guest, or otherwise associated with the University. The University Staff Members had no more control over Rowland than any other member of the public visiting the campus. The legal principles in *Murrell* establishing potential liability for failures of a principal and teachers to stop student-on-

student harassment in a high school do not "clearly prohibit" the conduct alleged against the Staff Members in this case such that the issue has been resolved "beyond debate." *Wesby*, 138 S. Ct. at 590; *al-Kidd*, 563 U.S. at 741.

Hewlett v. Utah State University, where the court granted qualified immunity under similar circumstances, is instructive here. No. 2:16-cv-01141-DN, 2018 WL 794529, at *4 (D. Utah Feb. 8, 2018) (not selected for publication). In that case, plaintiff was sexually assaulted at an off-campus fraternity house by a fellow student. Plaintiff alleged that the university knew the student posed a threat to other students because of prior reports against him and cited to *Murrell* clearly establishing her right. In granting qualified immunity, the Court distinguished *Murrell* because 1) the harassment did not take place at the university under the university's supervision; and 2) the university did not have control over the offending student similar to that of the defendant high school in *Murrell*. *Id*. at *4–5.

Plaintiffs do not attempt to distinguish *Hewlett* but instead argue that it was wrongly decided.[26] Plaintiffs' disagreement with the ruling is not relevant or helpful to determining whether the law was clearly established. The disagreement only reflects the reality that the contours of the constitutional rights in cases like this one remain ambiguous and not clearly established. And that is true even though *Hewlett* is a district court opinion not selected for publication. *See Grissom*, 902 F.3d at 1168 (noting "an unpublished opinion can be quite relevant in showing that the law was *not* clearly established").

The University Staff Members are entitled to qualified immunity and Plaintiffs' claims against them should be dismissed.

[26] Pls.' Opp. at 28.

2. The Law Was Not Clearly Established Under the Gender Stereotyping Theory.

Plaintiffs bear the burden to cite to cases clearly establishing the constitutional right. *Grissom*, 902 F.3d at 1167. None of the cases cited in their "gender stereotype" section involved a case where a university official violated a student's constitutional rights by allegedly inadequately responding to reports of sexual harassment. That's because Plaintiffs' legal theory—that generic allegations of "gender stereotypes" state a stand-alone equal protection violation—is novel. Instead, the cases Plaintiffs cite deal with 1) gender stereotyping remarks or behavior engaged in by supervisors as evidence in an employment context where the employer can be held liable,[27] 2) denial of employment benefits based on sexual orientation as a violation of equal protection,[28] and 3) a statute treating unwed mothers and fathers differently based on gender stereotypes in violation of the Equal Protection Clause.[29] While these cases present examples of equal protection violations, they do not provide any guidance on the particular conduct at issue in this case with the required "high degree of specificity." *Wesby*, 138 S. Ct. at 590 (citations and quotations omitted). Therefore, Plaintiffs have failed to meet their burden and the University Staff Members are thus entitled to qualified immunity.

[27] Pls.' Opp. at 30–31 (citing *Back v. Hastings on Hudson Free Sch. Dist.*, 365 F.3d 107, 117–23 (2d Cir. 2004); *Penry v. Fed. Home Loan Ass'n Bank of Topeka*, 155 F.3d 1257, 1263 (10th Cir. 1998)). *Penry* is a Title VII hostile work environment case and thus cannot "clearly establish" an equal protection claim.

[28] Pls.' Opp. at 30 (citing *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346–47 (7th Cir. 2017)).

[29] Pls.' Opp. at 29 (citing *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692–93 (2017)).

III. The Court Should Dismiss Plaintiffs' Failure-to-Train Claim.

Finally, for the reasons stated in the opening Memorandum, the Court should dismiss Plaintiffs' Fourth Cause of Action for "failure to train".[30] A supervising official may only be liable for a failure to train under § 1983 "[w]here there is essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable." *Keith v. Koerner*, 843 F.3d 833, 838 (10th Cir. 2016) (citing *Houston v. Reich*, 932 F.2d 883, 888 (10th Cir. 1991)). Here, Plaintiffs have failed to assert specific facts regarding former Chief Brophy's, or any other individual's, failure to train or that such failure was so egregious that it inevitably caused the Campus Officers to violate Ms. McCluskey's constitutional rights.

Plaintiffs attempt to salvage their § 1983 claim for failure to train by citing to newspaper articles not mentioned or cited in the Complaint. Those "facts" from outside the four walls of the Complaint are similarly lacking in substance. Moreover, "[w]hen ruling on a Rule 12(b)(6)

[30] Plaintiffs claim that the University did not move to dismiss Plaintiffs' failure-to-train claim against "UUPS, the Department of Housing, or the individual capacity claim against the Department of Housing's administrator, [a John Doe defendant]." Pls.' Opp. at 37 n.5. The Motion to Dismiss sought dismissal of all claims, including § 1983 claims against the University because it is not a person subject to suit under § 1983. *See* Mot. to Dismiss at 10, 29. Plaintiffs have provided no law suggesting that an internal operating unit of the University could be subject to suit, and these internal operating units cannot be sued in their department name. *See, e.g.*, *Kojima v. Lehi* City, No. 2:13-cv-000755-EJF, 2015 WL 4276399, at *4 (D. Utah July 14, 2015) (not selected for publication). Therefore, a claim against the University's internal operating units must be construed as a claim against the University. Similarly, a claim against Brophy in his official capacity is construed as a claim against the University. *Haver v. Melo*, 502 U.S. 21, 25 (1991). Because the University is not a person for purposes of § 1983, the § 1983 claims against Brophy in his official capacity and the University internal operating units must be dismissed. *Johns v. Stewart*, 57 F.3d 1544, 1553 (10th Cir. 1995); *Roach v. Univ. of Utah*, 968 F. Supp. 1446, 1451 (D. Utah 1997). Plaintiffs cannot keep a complaint alive against an unnamed, unserved John Doe Defendant. But in any event, all arguments made regarding Brophy would equally apply to their "John Doe" defendant, and the case should be dismissed.

motion, the district court must examine only the plaintiff's complaint. The district court must determine if the complaint alone is sufficient to state a claim; the district court cannot review matters outside of the complaint." *Jackson v. Integra Inc*., 952 F.2d 1260, 1261 (10th Cir. 1991). Plaintiffs have not identified any specific facts from their Complaint demonstrating Brophy's alleged failure to train caused the Campus Officers to violate Ms. McCluskey's constitutional rights. And their reliance on the newspaper articles only highlights the deficiencies in the Complaint. Therefore, the Court should dismiss Plaintiffs' Fourth Cause of Action.

CONCLUSION

"No one is … happy about the events that led to this litigation." *Hedgepeth ex rel. Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1150 (D.C. Cir. 2004) (Roberts, J.). The University and the University community mourn the senseless and tragic loss of life caused by the murderous actions of Melvin Rowland. The University has taken numerous actions to improve its policies, processes, and training so that it will be in a better position to identify and intervene in any future danger of a similar tragic event. It shares the common goal with Plaintiffs to make institutions of higher learning places free from violence. The question before the Court in this motion, however, is not whether the circumstances were tragic, whether any University employee's acts (as pleaded by Plaintiffs) were sufficient, or whether the University's response to this tragedy or plans for the future are adequate. The question is whether the University or its Staff Members violated clearly established federal statutory or constitutional law. Even under the facts as pleaded by Plaintiffs, they did not. Therefore, the Court should grant the motion and dismiss Plaintiffs' Complaint.

DATED this 27th day of January 2020.

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