IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
No. 4:16-CV-271-D

KIMBERLY BIGGS, in her individual capacity and as guardian ad litem of L.B., and L.B.,	)	
Plaintiffs,	)	
v.	)	**ORDER**
EDGECOMBE COUNTY PUBLIC SCHOOL BOARD OF EDUCATION, et al.,	)	
Defendants.	)	

On August 21, 2017, L.B., a minor, ("L.B."), and Kimberly Biggs, in her individual capacity and as lawful guardian ad litem of L.B. ("K.B.") (collectively, with L.B., "plaintiffs") filed a complaint against the Edgecombe County Public School Board of Education ("Board"), John Farrelly, Superintendent of Edgecombe County Public Schools ("Farrelly"), Marc Whichard, Assistant Superintendent and Title IX Coordinator of Edgecombe County Public Schools ("Whichard"), Craig Harris, Southwest Edgecombe High School Principal ("Harris"), Billy Strother, Southwest Edgecombe High School Assistant Principal ("Strother"), Alaina Ritter, Southwest Edgecombe High School Teacher ("Ritter"), Alyssa Parrish-Stafford, Southwest Edgecombe High School Teacher ("Parrish-Stafford"), Dara Harmon, Southwest Edgecombe High School Media Coordinator ("Harmon"), Miles Stafford, Edgecombe County Public School Teacher ("Stafford"), Rebecca Sugg, Southwest Edgecombe High School Counselor ("Sugg"), and Shannon Castillo, G.W. Carver Elementary School Principal ("Castillo"), alleging ten causes of action arising out of

disciplinary action taken against L.B. for her alleged sexual harassment of two male students [D.E. 1].[1]

On September 18, 2018, the court permitted plaintiffs' Title IX claims against the Board (counts one, two, and three) and K.B.'s claim against the Board under the North Carolina Whistleblower Act (count six) to proceed [D.E. 94]. The court dismissed all other claims against the Board. The court also permitted plaintiffs' 42 U.S.C. § 1983 claims against Farrelly (count four) and K.B.'s claim against Farrelly under the North Carolina Whistleblower Act (count six) to proceed. The court dismissed all other claims against Farrelly. Additionally, the court granted Castillo's motion to dismiss, and denied plaintiffs' motion to allow service after the deadline. On March 29, 2019, K.B. voluntarily dismissed her claims under the North Carolina Whistleblower Act (count six) [D.E. 111].

On July 11, 2019, Whichard and Harris moved for summary judgment on counts ten and eleven of the second amended complaint; Whichard, Harris, and Sugg moved for summary judgment on count nine; Whichard, Harris, Strother, and Sugg moved for summary judgment on count four; and Whichard, Harris, Strother, Sugg, Parrish-Stafford, Stafford, Harmon, and Ritter moved for summary judgment on counts seven and eight [D.E. 119]. The parties filed a statement of material facts and memorandum in support concerning counts four, seven, eight, ten, and eleven [D.E. 120, 140]. On August 15, 2019, plaintiffs responded in opposition [D.E. 161]. On September 3, Whichard, Harris, Strother, Sugg, Parrish-Stafford, Stafford, Harmon, and Ritter replied [D.E. 184].

On July 11, 2019, the Board moved for summary judgment on counts one, two, and three [D.E. 121] and filed statements of material facts [D.E. 124, 127] and a memorandum in support

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[1] Plaintiffs number the ten counts one through four and six through eleven.

[D.E. 129]. On August 15, 2019, plaintiffs responded in opposition [D.E. 155]. On August 29, 2019, the Board replied [D.E. 178].

On July 11, 2019, Farrelly moved for summary judgment on count four [D.E. 122] and filed statements of material facts [D.E. 124, 127] and a memorandum in support [D.E. 130]. On August 15, 2019, plaintiffs responded in opposition [D.E. 159]. On August 29, 2019, Farrelly replied [D.E. 179].

On July 11, 2019, plaintiffs moved for partial summary judgment on counts one, two, and three [D.E. 126] and filed a statement of material facts and memorandum in support [D.E. 132, 138]. On August 15, 2019, the Board responded in opposition [D.E. 152]. On August 29, 2019, plaintiffs replied [D.E. 175]. As explained below, the court grants in part and denies in part Whichard, Harris, Strother, Sugg, Parrish-Stafford, Stafford, Harmon, and Ritter's motion for summary judgment [D.E. 119], grants Farrelly's motion for summary judgment [D.E. 121], denies the Board's motion for summary judgment [D.E. 126], and denies L.B.'s motion for summary judgment [D.E. 122].[2]

I.

A.

In March 2016, L.B., a female, was 17 years old and a junior at Southwest Edgecombe High School ("SEHS") in the Edgecombe County Public Schools District ("ECPS"). L.B. Dec. [D.E. 132-7] ¶¶ 1, 3; Am. Compl. [D.E. 64] ¶ 33; [D.E. 71] ¶ 33. At the end of L.B.'s junior year, she had the highest grade point average in her class. See [D.E. 98] ¶ 52. SEHS designates the student with the

[2] Plaintiffs' complaint lacks clarity concerning whether L.B., K.B., or both plaintiffs assert each claim. The court questions whether K.B. has standing to bring certain claims. In the briefing, neither party addresses the issue, and defendants do not distinguish between plaintiffs. The court expects the parties to brief this issue before trial. The court reserves the right to permit additional summary judgment motions as to non-viable claims of a given plaintiff.

highest grade point average as "Chief Marshal" of the Junior Marshals for spring commencement exercises. See [D.E. 127-35, 132-27]. The four events associated with commencement were scheduled for May 19, June 5, and June 10, 2016. See id. Additionally, L.B. was a member of the National Honor Society, see [D.E. 132-32], and ECPS nominated L.B. for the North Carolina Governor's School, a prestigious summer educational program for which she was accepted on March 4, 2016. See [D.E. 98] ¶ 50. L.B. also founded a student group named "Tutor Tactics" that assisted fellow SEHS students with school work. See L.B. Dec. ¶ 7.

On May 12, 2016, L.B. left with fellow SEHS students on a school-sponsored field trip to Washington, D.C. See id. ¶ 7; [D.E. 125-4] 15. Parrish-Stafford, Ritter, Harmon, and Stafford served as chaperones for the trip. See [D.E. 64, 71, 98] ¶ 57. Before the field trip, SEHS sent a letter to students on the field trip that stated the rules governing student conduct at SEHS applied while on the trip. See [D.E. 125-4] 33; [D.E. 131-19]. L.B. received this letter, and understood that SEHS rules prohibited sexual activity and the use of drugs or alcohol while on the field trip. See [D.E. 125-4] 33; [D.E. 127-8] 27–28. Despite this instruction, one student alerted Stafford before the field trip that another student, D.M., planned to bring alcohol on the field trip. See [D.E. 132-61] 4. D.M. also "joked" with L.B. about participating in sexual activity with her on the field trip, see [D.E. 125-1] 100, [D.E. 125-2] 1, and told L.B. that he was bringing alcohol. See [D.E. 125-2] 9. L.B. did not share D.M.'s comments with SEHS staff. Another student, B.O., brought marijuana on the field trip. See [D.E. 132-51] 2; [D.E. 132-39] 1–2.

On May 12, 2016, the students visited Arlington National Cemetery. See [D.E. 125-2] 14–15. While there, D.M. put his arm around L.B. asked L.B. if she would allow both D.M. and B.O. to have sex with her that night. See id. at 14–15. L.B. testified that she thought D.M. was joking and that D.M.'s comments made her uncomfortable. See id. On the bus ride to the hotel from

Arlington National Cemetery, D.M. asked L.B. "[a]re you going to let me smash?," which L.B. interpreted as asking whether they were going to have sex. See id. 15–16, 23. L.B. testified that this comment made her uncomfortable, that she told D.M. "no, that's not even a possibility," and that she understood D.M. was joking. Id. at 23. Before D.M. made the comment, D.M. "smack[ed]" L.B. on her rear end which made L.B. uncomfortable. Id. L.B. testified she told D.M. that he did not have condoms as a way to diffuse the situation. See id. 15–16; [D.E. 131-3] 5. L.B. did not tell the chaperones about D.M.'s comments or actions. Once back at the hotel, B.O. purchased more alcohol from individuals who were not part of the SEHS group. See [D.E. 125-2] 18; [D.E. 131-3] 5; [D.E. 132-45] 2.

After dinner, the students returned to the hotel. See [D.E. 125-2] 25. Curfew was 10:30 p.m. See id. at 26; [D.E. 123-1] 1. Before curfew, L.B. attended an ice cream social that the SEHS chaperones hosted at the hotel. The social ended around 9:00 p.m.. See [D.E. 125-2] 26; [D.E. 132-58] 2. As L.B. left the social, she observed D.M., B.O., and another classmate, K.W.,[3] consuming alcohol in one of the hotel rooms. See [D.E. 125-2] 28. L.B. testified that D.M., B.O., and K.W. were slurring their words and stumbling. See id. at 28–29. At approximately 9:00 p.m., L.B. returned to her room to shower. See id. at 129. Although the chaperones assigned rooms, students switched rooms with each other as desired. See [D.E. 132-64] 2. The teacher chaperones did not conduct room checks that evening. See [D.E. 132-58] 2; [D.E. 132-64] 2; [D.E. 125-2] 32.

Approximately ten minutes after the 10:30 p.m. curfew, L.B. left her room to check on D.M., B.O., and K.W. because she was worried about potential effects of intoxication. See [D.E. 125-2] 30–31, 33. D.M., B.O., K.W. and other SEHS students were in the room. See id. at 33. L.B. did

[3] The parties also refer to K.W. as "T.W." See [D.E. 127-15] 96.

not consume alcohol, but observed D.M., B.O., and K.W. doing so. See id. at 34–35. Initially, L.B. remained by the door and watched to see if teachers were approaching the room. See id. at 34. At some point, every student except D.M., B.O., K.W., and L.B. left the room after observing D.M. "hugging on" L.B. See id. at 35–36; [D.E. 131-3] 6. L.B. then laid on one of the beds in the room, and shortly thereafter B.O. and D.M. laid on the same bed. See [D.E. 125-2] 40. D.M. and B.O. proceeded to have sexual intercourse with L.B. See id. 40–41. K.W. filmed the sexual encounter and sent videos of the sexual encounter to other students via a phone application. See [132-7] ¶ 20. At some point after filming the sexual encounter, K.W. stated "I'm next" and inserted himself into L.B.'s mouth. See [D.E. 125-2] 45; [D.E. 131-7] 1; [D.E. 132-7] ¶ 21. The sexual encounter ended when another student knocked on the door, at which point L.B. put on her clothes and returned to her room. See [D.E. 125-2] 45.

On May 13, 2016, at approximately 12:32 p.m., Whichard received an email from Stafford that detailed drug and alcohol allegations concerning D.M., K.W., and B.O. See [132-38]. On the same date at approximately 12:41 p.m., Whichard forwarded the email to Harris. See [D.E. 131-4]. Earlier that morning, Harris had called Harmon concerning allegations of drug use on the trip. See [D.E. 138-8] 1. After receiving Whichard's forwarded email, Harris contacted Whichard and traveled to Washington, D.C. with Strother to investigate the allegations that he received that morning. See [D.E. 127-15] 21–22; [D.E. 132-39] 2. Throughout the investigation into the student behavior on the field trip, Farrelly "received updates" from Harris and Whichard. See [D.E. 127-1] ¶ 5. That afternoon, Harris and Strother arrived at the hotel in Washington, D.C. See [D.E. 132-39] 2. Harris interviewed D.M. and B.O. about the alcohol and drug-related allegations, and later decided to remove both students from the field trip. See [D.E. 127-17] 1–2. Harris and Strother also collected one student statement that indicated D.M., B.O., and L.B. had engaged in sexual activity

on the field trip. See [D.E. 132-53] 2. Harris also collected statements from Harmon, Ritter, and Stafford. See [D.E. 131-8, -9, -10]; [D.E. 131-1] 87–88. While Harris and Strother were investigating the behavior at the hotel, L.B. did not inform anyone of the sexual activity. See [D.E. 125-2] 52.

On May 15, 2016, Harris issued a "Discipline Referral and Notice of Suspension" to D.M. and B.O. for drug and alcohol possession in violation of SEHS rules. See [D.E. 127-49, 127-50]. On the same date, Harris issued ten-day suspensions to D.M. and B.O., effective May 16, 2016, and ending May 27, 2016, and recommended a long-term suspension for both. See [D.E. 127-51, 127-52]. Harris found that D.M. and B.O. committed a Level Three violation for "Drugs/Alcohol," and noted each student "[p]ossess[ed] . . . marijuana and [were] present in a room with alcohol, while on an out of state fieldtrip." See [D.E. 132-41, 132-44].

On May 15, 2016, the SEHS students returned from the field trip, but L.B. did not return to school until Tuesday, May 17, 2016. See [D.E. 125-2] 53, 57. On May 16, 2016, Sugg testified that students and teachers told her about D.M., B.O., and L.B.'s alleged sexual encounter on the field trip. See [D.E. 1217-23] 9. Once Sugg received those reports, Sugg contacted Harris. See id. at 9–10; [D.E. 132-55] 2. On May 17, 2016, Harris, Strother, and Sugg met with L.B. in Harris's office. See [D.E. 125-2] 59; [D.E. 132-55] 2. L.B. was informed of rumors of her involvement in sexual encounter on the field trip, which she denied. See [D.E. 125-2] 59; [D.E. 127-23] 11; [D.E. 132-55] 2. L.B. admitted being in D.M. and B.O.'s room on the night of May 12, but did not mention K.W. See [D.E. 125-2] 59–60; [D.E. 132-55] 2. After the meeting with L.B. and at Harris's request, Sugg spoke with another student, Z.W., about the sexual activity on the field trip. See [D.E. 127-23] 12. Z.W. told Suggs that he received videos on a phone application, Snapchat, from K.W. depicting sexual activity among D.M., B.O., and L.B., and Suggs asked Z.W. to make a written statement. See

[D.E. 127-23] 12; [D.E. 127-24] 1; [D.E. 132-55] 2. After speaking with Z.W., Sugg met with another student, J.S., who confirmed the information that Z.W. relayed to Sugg See [D.E. 127-23] 13; [D.E. 127-25] 1.

On May 18, 2016, after receiving a text message from her mother, K.B., asking about rumors of sexual encounter on the field trip, L.B. returned to Sugg's office. See [D.E. 125-2] 62–63. L.B. asked Sugg where the rumors of the sexual encounter originated. See id. at 63. L.B. also asked Sugg whether she would be in trouble, and Sugg responded that Harris was investigating the rumors of the sexual encounter and that the sexual encounter was captured on video. See id.; [D.E. 127-23] 15–16. Sugg told L.B. that participating in sexual activity on the field trip could get her in trouble with the school, including jeopardizing her role as a junior marshal. See [D.E. 127-23] 19, 30; [D.E. 125-2] 64. Sugg "urged [L.B.] to be honest and told [L.B.] that it was better to tell the truth now than have it come out later." [D.E. 132-55] 2. Sugg also said that information L.B. shared with Sugg would be shared with Harris. L.B. then asked that Harris be present when L.B. shared information concerning the sexual encounter. See [D.E. 127-23] 19; [D.E. 125-2] 75.

On May 18, 2016, with Harris and Sugg present, L.B. admitted to engaging in a sexual encounter on the field trip. See [D.E. 135-7] 30–31, 34; [D.E. 125-2] 64, 75–76; [D.E. 127-10]. At Harris's request, L.B. provided a written statement. See [D.E. 123-5] ¶ 5. L.B. was alone when writing her statement. See [D.E. 125-2] 65; [D.E. 125-7] 35. In her statement, L.B. identified D.M., B.O., and K.W. as the fellow students involved in the sexual encounter. See [D.E. 127-10]. Before L.B. provided the statement, Sugg did not inform L.B. that she was under investigation for sexual harassment, see [D.E. 127-23] 15, and did not ask L.B. whether the sexual encounter was consensual. See [D.E. 125-8] 71–72. Harris did not ask L.B. whether L.B. consented to K.W. videotaping the sexual encounter, see [D.E. 125-7] 43, and did not inform L.B. that she was being

investigated for sexual harassment. See [D.E. 132-4] 15. After writing the statement, L.B. requested and received a copy of her statement from Sugg. See [D.E. 125-2] 65–66. At the end of the school day on May 18, 2016, L.B. gave a copy of the statement to K.B. See id. at 67.

After L.B. provided her statement to Harris and Sugg, Harris spoke to Whichard about the statement and the circumstances of the sexual encounter. See [D.E. 125-7] 35–36. As part of the conversation, Harris gave the statement to Whichard. See id. at 36. After Whichard and Harris spoke, Harris decided to suspend L.B. for a violating the SEHS sexual harassment policy, but did not immediately issue the suspension. See [D.E. 125-7] 38–39.

The parties dispute whether L.B.'s conduct violated the ECPS sexual harassment policies. The Board code of student conduct states under the heading "Sexual Harassment or Harassment including Bullying (Physical)":

> No student shall physically engage in sexual harassment as defined in Policy 4315, which prohibits, among other things, any offensive touching of another person's private parts, including buttocks or breasts, or forcing or attempting to force another to engage in a sexual act against their will. Further, no student shall physically engage in harassment, including bullying, as defined in Board Policy 4315.

[D.E. 132-18] 9. Policy 4315, in turn, states "The following conduct is illustrative of disruptive behavior and is prohibited: . . . 4. engaging in behavior that is immoral, indecent, lewd, disreputable or of an overly sexual nature in the school setting . . . ." [D.E. 131-17] 1. The Board policy manual defines the term "sexual harassment." See [D.E. 132-10] 4–5. The policy manual states, in relevant part, that

> [u]nwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . 3) such conduct is sufficiently severe, persistent or pervasive that it has the purpose or effect of unreasonably interfering with . . . a student's educational performance, limiting a student's ability to participate in or benefit from an educational program or environment, or creating an abusive, intimidating, hostile or offensive . . . educational environment.

> Sexually harassing conduct includes, but is not limited to, deliberate, unwelcome touching that has sexual connotations or is of a sexual nature, suggestions or demands for sexual involvement accompanied by implied or overt promises of preferential treatment or threats, pressure for sexual activity, continued or repeated offensive sexual flirtations, advances or propositions, continued or repeated verbal remarks about an individual's body, sexually degrading words used toward an individual or to describe an individual, sexual assault, sexual violence, or the display of sexually suggestive drawings, objects, pictures or written materials. Acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex, but not involving sexual activity or language, may be combined with incidents of sexually harassing conduct to determine if the incidents of sexually harassing conduct are sufficiently serious to create a sexually hostile environment.

[D.E. 132-10] 4–5. Sexual harassment is a "level three" violation which "generally result[s] in long-term suspension, although a principal may impose a short-term suspension based on the circumstances of the offense." [D.E. 132-18] 8–9.[4]

B.

The Board's investigation is central to this dispute. Board Policy 4340 requires the school administrator to follow a three-step process. First, the administrator must "investigate the facts and circumstances related to the alleged misbehavior." [D.E. 127-32] 1. Next, the administrator must "offer the student an opportunity to be heard on the matter." Id. Lastly, the administrator must "determine whether a Board policy, school standard, school rule or the Code of Student Conduct has been violated." Id. Accordingly, "[i]f a violation has occurred, the school administrator shall implement an appropriate consequence in accordance with the school's plan for managing student behavior, the Code of Student Conduct, or applicable Board policy." Id. Ten-day suspensions are short-term suspensions under the Board policies. See [D.E. 127-33] 1. Before the administrator gives a ten-day suspension,

[4] The code of student conduct also prohibits "Inappropriate Peer Relations," which states that "no student shall engage in behavior which is immoral, indecent, overly affectionate, or of a sexual nature in the school setting" and is a level two violation. [D.E. 132-18] 7.

> a student must be provided with an opportunity for an informal hearing with the principal or designee before a short-term suspension is imposed. The principal or designee may hold the hearing immediately after giving the student oral or written notice of the charges against him or her. At the informal hearing, the student has the right to be present, to be informed of the charges and the basis for the accusations against him or her, and to make statements in defense or mitigation of the charges.

[D.E. 127-33] 1. While a student is suspended, the student cannot go to the school campus without permission from the principal or participate in extracurricular activities. See [D.E. 132-18] 2. As for extracurricular activities, student participation in such activities "may be restricted if," among other reasons, "a student . . . has violated the student conduct standards found in the 4300 series of policies, or [] has violated school rules for conduct." See [D.E. 131-22] 1.

On May 19, 2016, L.B. met with Harris and Whichard. See [D.E. 125-2] 70. At some point during the meeting, Harris handed L.B. a copy of the "Discipline Referral and Notice of Suspension" form. See id.; [D.E. 132-29] 2; [D.E. 127-20]; [D.E. 125-2] 70–71. Under "Prohibited Conduct," the form notes a level three violation for sexual harassment. [D.E. 132-29] 2. The "Administrator's Findings" section notes that L.B. "engaged in sexual intercourse and contact with three male students while on a fieldtrip." Id. The form also notes that L.B. "admitted to" the sexual contact. See id. The form lists May 18, 2016, as the date of investigation. See id. Under "Administrative Decision," the "OSS 10 days or less" box is checked, and the number of days listed is 10. See id. The form also notes that an administrator contacted K.B. by phone on May 19, 2016. See id. During the May 19, 2016 meeting, Harris did not provide L.B. the statements he collected from other students during the investigation. See [D.E. 125-7] 85. After Harris handed L.B. the discipline referral form, Whichard questioned L.B. See [D.E. 125-2] 70–71. Whichard asked L.B. about her written statement, and L.B. responded that her written statement was true. See id.; [D.E. 131-1] 31–32. At some point following this meeting, K.B. came to the school and met with Harris. See [D.E. 127-4] 8. During

K.B.'s discussions with Harris, Harris handed K.B. a copy of the suspension form that Harris had provided L.B. earlier in the day. See id. Before handing K.B. the suspension form, SEHS officials had not notified K.B. that L.B. was under investigation for her role in the sexual encounter. See [D.E. 125-5] 91–93. K.B. then walked to the SEHS offices with L.B. and spoke with Whichard about the suspension. See id. at 11; [D.E. 127-27] 17. Whichard did not change Harris's decision to suspend L.B. See [D.E. 125-5] 104–05.

On May 19, 2016, Harris suspended K.W. See [D.E. 127-15] 95–96; [D.E. 127-21]. On K.W.'s "Discipline Referral and Notice of Suspension" form, the administrator's findings stated that K.W. "recorded a sexual act on his cell phone and engage[d] in sexual contact with a female student." [D.E. 127-21]. The form records this conduct as "sexual harassment," a level-three violation. Id. The date of the incident is May 13, 2016, and the date of investigation is May 19, 2016. See id. The description of K.W.'s offense notes that K.W.'s conduct occured on a school field trip, and that he admitted to both the recording of a sexual act "involving two other male students" and sexual contact with a female. Id. Harris did not tell K.W. that he was being investigated for sexual harassment. See [D.E. 127-15] 15–16. Whichard spoke with K.W., with Harris present, and K.W. admitted to sexual contact with L.B. and wrote a statement. See id. at 14. It is disputed whether K.W. appeared on SEHS's discipline data report. See [D.E. 132-4] 24–25; [D.E. 151-14]. K.W. was a member of the Career Technical Education Honor Society [D.E. 132-72], and SEHS officials did not revoke any award, title or recognition as a result of the investigation. See [D.E. 132-69] 7–8.

On May 19, 2016, Farrelly suspended D.M. and B.O. for "the remainder of the year." See [D.E. 127-54, 127-55]; [D.E. 127-1] ¶ 5. D.M. and B.O. were not punished for their involvement in the sexual encounter on the field trip, they did not receive a discipline referral based on that

conduct, and their participation in the sexual encounter did not appear on their school disciplinary records. See [D.E. 125-7] 103–04; [D.E. 132-4] 24–25, 31–32. It is disputed whether D.M. and B.O. appeared on the discipline data report. See [D.E. 132-4] 24–25; [D.E. 151-14]. Furthermore, D.M. and B.O. were not punished for sexual harassment. See [D.E. 127-15] 12–14. Following discipline for the alcohol and drug infractions, D.M. received the Keihin Apprenticeship and was a member of the Career Technical Honor Society. SEHS did not revoke any membership, title, or recognition from either D.M. or B.O. due to their conduct, see [D.E. 69] 7–8, although defendants' note that neither were National Honor Society members, currently participating on a sports teams, or recipients of titles or awards. See [D.E. 127-2] 1; [D.E. 127-3] 1.

C.

On May 26, 2016, K.B. filed a formal written grievance concerning L.B.'s suspension and included a second statement from L.B. regarding the sexual encounter on the field trip. See [D.E. 125-5] 114–16; [D.E. 127-7]; [D.E. 127-36]. In the grievance, K.B. objected concerning, inter alia, the chaperones' supervision of the field trip, and Sugg's actions concerning her discussions with L.B. In the grievance, K.B. argued that L.B.'s behavior was not "sexual harassment" under the Board policies but rather "inappropriate peer relations." See [D.E. 127-7]. K.B. also asked that L.B. participate as a junior marshal. See id.

On June 1, 2016, K.B. met with Farrelly to discuss the grievance. See [D.E. 127-38] 1. Before the meeting, Farrelly told Harris that Farrelly would listen to K.B. in the meeting, but he would then "support [Harris] and [Harris's] action steps 100%." [D.E. 132-48].

On June 1 and 2, 2016, Whichard conducted student interviews concerning the field trip, and Harris was present. See [D.E. 132-60]; [D.E. 131-1] 101–02. During the interviews, Whichard asked the students four questions concerning the field trip and collected student statements. See

[D.E. 132-60]; [D.E. 132-61]. The questions were:

> 1. What oc. on the D.C. field trip, in terms of activities and the role of the chap? 2. What oc., in terms of room checks, etc? 3. Did you see anything inapp. oc. on the trip, either by you or anyone else? 4. What do you know about what oc. on the trip. What do you know first hand, or have you heard, second-hand? (Who did you hear this from, if second-hand know.?)

[D.E. 132-60]. Several students reported in their written statements that they received videos via the Snapchat application of L.B., D.M., and B.O. engaging in sexual intercourse. See [D.E. 132-61] 15, 20, 21, 28. Whichard also obtained written statements from Harmon, Ritter, and Parrish-Stafford. See [D.E. 132-56, 132-57, 132-58]. On June 6, 2016, Whichard obtained a statement from K.W. [D.E. 132-47].

On June 3, 2016, SEHS revoked L.B.'s membership in the National Honor Society ("NHS"). See [D.E. 127-37]. Since the 2014-15 school year, NHS revoked two male students' membership for out-of-school suspensions and two other male students' membership for multiple out-of-school suspensions. See [D.E. 127-2] ¶ 8.

On June 6, 2016, Farrelly denied K.B.'s grievance. See [D.E. 127-38]. In the letter, Farrelly noted that L.B. "is not eligible to participate in her role as Chief Junior Marshal." See id. at 2. L.B. did not attend Senior Awards Night on May 19, 2016, the first day of her suspension, and did not meet the expectation stated in the letter as follows: "Marshals are reminded that your conduct is expected to be exemplary. All school rules apply. Each Marshal is expected to be courteous and cooperative at all times." [D.E. 127-35] 1–2. Farrelly also stated that L.B.'s "nomination to the North Carolina Governor's School has been revoked" because L.B. "violated the Governor's School honor code #3 which states 'I will refrain from inappropriate sexual conduct.'" See id. On the same date, Farrelly sent a "Nomination Recusal Form" to the Governor's School rescinding the L.B's nomination. See [127-44].

On June 10, 2016, Farrelly wrote to Harris. See [D.E. 132-66]. Farrelly stated that "[t]he personnel that you approved to 'lead this trip" was [sic] not adequate," that those personnel "violated several [Board] policies," and that Harris's investigation was not acceptable. Id. at 1. Specifically, Farrelly noted that two students told Harris on May 12, 2016, that they "had seen a video of students having sexual intercourse on the trip" and that Harris did not investigate the allegation until four days later. Id. Farrelly also noted that Harris "failed to take statements from the 3 adults who were later disciplined by the superintendent for inadequate performance" and that Harris failed to take statements from all students involved. Id. Farrelly also stated that Harris "failed to suspend a student who had sexual intercourse with 2 males and sexual contact with a 3rd until 6 days after the incidences occurred." Id. Farrelly concluded by stating that Harris's conduct violated North Carolina law concerning reporting incidents to the superintendent and Board, see N.C. Gen. Stat. § 115C-288(b), and violated Board policies concerning the discipline of students and assignment of teachers related to student discipline. See id. at 2.

On June 11, 2016, K.B. appealed Farrelly's response to her grievance. See [D.E. 127-39] 1. On June 16, 2016, a three-person panel of the Board heard K.B.'s appeal. See [D.E. 127-40] 1. K.B. read a prepared statement at the beginning of the hearing. See [D.E. 132-36]; [D.E. 127-42] 2. In her statement, K.B. stated "[m]y daughter is not guilty of sexual harassment as defined in Board Policy 4300. As a matter of fact, she is actually a victim, and each day with each mobile crisis unit, with each therapy session, a very ugly truth has been unpeeled." [D.E. 127-42] 4; see [D.E. 132-36].

On June 27, 2016, the Board issued its decision. See id. In its decision, the Board stated that L.B.'s suspension was "appropriate based on her conduct," and that the documents concerning L.B.'s suspension should not be changed. See [D.E. 127-40] 2. The Board concluded that Harris and Whichard did not violate the law or Board policies when handling L.B.'s suspension. See id. The

Board also concluded that revoking L.B.'s participation as a junior marshal and Governor's School was "appropriate." See id. Lastly, the Board "affirm[ed]" Farrelly's "decision in this matter." Id.

D.

L.B.'s senior year began in August 2016. L.B. participated in the Spanish Club at SEHS. See [D.E. 125-2] 80. L.B. claims that she was not allowed to participate in SEHS Leadership Academy, see id. 81, but Harris claims that the program was "dissolved." See [D.E. 127-15] 74. L.B. was also listed on the school's discipline data report, which meant that L.B. was ineligible for certain school awards. See [D.E. 132-4] 78–79. On October 26, 2016, K.B. emailed Harris alleging that one of the boys on the field trip was harassing L.B. See [D.E. 127-15] 30–31; [D.E. 127-22]. On October 27, 2016, Harris responded, and he encouraged L.B. to talk to him or a counselor about harassment. See [D.E. 127-41] 1. L.B. testified that she only had one interaction with B.O. where he made a gesture toward L.B. while driving past her in a car, but L.B. otherwise did not interact with B.O., D.M., or K.W. See [D.E. 125-2] 79–80, 97–98.

During her senior year, L.B. applied to Harvard University. See id. 44–46. On the application, L.B. responded "Yes" to a question asking about disciplinary violations in high school, but did not include details concerning the circumstances of the suspension. See [D.E. 127-45]. Sugg testified that Harvard contacted her regarding her reference of L.B. for Harvard. See [D.E. 127-23] 23–24. In response, Sugg sent a letter stating that L.B. "engaged in sexual activity with male students," that L.B. "freely admitted and reported the incident," and that L.B. was an exceptional student who made a mistake. See id.; [D.E. 127-46]. In December 2016, Harvard placed L.B. on its wait list. In February 2017, Harvard denied L.B. admittance to the school. See [D.E. 125-1] 49. L.B. applied to numerous other colleges. L.B. applied to Clemson University, but withdrew her application. See id. at 49–50. L.B. also applied to South Carolina Upstate University, was admitted,

and may have been offered scholarships. See id. at 49–50, 52. L.B. applied to Campbell University, included in her application an explanation of her suspension from SEHS, was admitted, received a scholarship offer, but did not attend. See id. at 49–50, 54–56; [D.E. 127-47]. In July 2018, L.B. worked for Total Facility Solutions, and in January 2019, L.B. pursued a five-year apprenticeship program for pipefitting and welding. See [D.E. 125-1] 58–59. L.B. is enrolled at Wilson Community College seeking an associate degree. See id. at 36.

II.

A.

Initially, the court addresses L.B.'s claims against Assistant Superintendent Whichard, Principal Harris, Assistant Principal Strother, and counselor Sugg. L.B. asserts procedural due process, substantive due process, and equal protection claims under 42 U.S.C. § 1983 against Whichard, Harris, Strother, and Sugg.

1.

As for L.B.'s procedural due process claim against Whichard, Harris, Strother, and Sugg, section 1983 requires plaintiff to show that a defendant acting under the color of state law violated her rights under the Constitution or federal law. See West v. Atkins, 487 U.S. 42, 48 (1988); Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009). Additionally, a section 1983 plaintiff must show the personal involvement of the defendant. See, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691–92 (1978); Wright v. Collins, 766 F.2d 841, 850 (4th Cir. 1985). The Due Process Clause provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Under the Due Process Clause, a plaintiff must first show that she has a cognizable property interest. See Ingraham v. Wright, 430 U.S. 651, 672 (1977). After demonstrating that she has a property

interest, a plaintiff must then show that a state actor deprived her of the identified interest and that the deprivation occurred without constitutionally sufficient process. See, e.g., Sansotta v. Town of Nags Head, 724 F.3d 533, 540 (4th Cir. 2013); Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602, 613 (E.D. Va. 2016).

Generally, state law defines property interests. See Bishop v. Wood, 426 U.S. 341, 344 (1979). High school students in North Carolina have "legitimate claims of entitlement to a public education," and L.B. has a property interest in that education. Goss v. Lopez, 419 U.S. 565, 573–74 (1975); see N.C. Gen. Stat. § 115C-1, -378. When evaluating whether a plaintiff has been afforded procedural due process, courts analyze three elements: (1) whether a plaintiff's property interest is or will be affected by state action; (2) whether there is a risk of "erroneous deprivation of such interest through such procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) the weight of the government's interests, including the burdens of providing to plaintiff additional process. Mathews v. Eldridge, 424 U.S. 319, 333 (1976); see Mallette v. Arlington Cty. Emps.' Supplemental Ret. Sys. II, 91 F.3d 630, 640 (4th Cir. 1996); Rector & Visitors of George Mason Univ., 149 F. Supp. 3d at 614. Generally, procedural due process provides individuals both fair notice and an adequate opportunity to be heard. See Evans, 424 U.S. at 349. In the school disciplinary proceedings, fair notice requires that the student "is informed that the matter is pending" so that she "can choose for h[er]self whether to contest." Goss, 419 U.S. at 579 (quotation and alteration omitted). As for an adequate opportunity in those proceedings, a school must provide "oral or written notice of the charges against h[er] and, if [s]he denies them, an explanation of the evidence the authorities have and an opportunity to present h[er] side of the story." Id. at 581; Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 576 (4th Cir. 2011); see Horowitz, 435 U.S. 78, 85 (1978).

In Goss, before holding a hearing, certain Ohio public high schools issued ten-day suspensions to several students for conduct that violated school policies. See Goss, 419 U.S. at 569–71. The Court held that "students facing suspension . . . must be given some kind of notice and afforded some kind of hearing," recognizing that the precise contours of each may vary based on the particular educational setting. Id. at 579–80. The Court also described general principles for both notice and hearings. As for notice, a student must receive "oral or written notice of the charges against h[er], and, if [s]he denies them, an explanation of the evidence the authorities have and an opportunity to present h[er] side of the story." Id. at 581. Furthermore, "in being given an opportunity to explain h[er] version of the facts at this discussion, the student first be told what [s]he is accused of doing and what the basis of the accusation is." Id. at 582. As for the hearing, it may be informal, and may occur "almost immediately following the misconduct." Id. at 581–82.

As the Goss Court recognized, due process requirements in a school disciplinary setting are "flexible" in light of a school's interest in maintaining order and wide range of behaviors for which schools must provide discipline. Kowalski, 652 F.3d at 575; see Jones v. Board of Governors of Univ. of N.C., 704 F.2d 713, 717 (4th Cir. 1983) (holding that a "mere violation" of a school's discipline procedures does not violate due process, but "significant departures" from those procedures that induce "reasonable and detrimental reliance" that is "sufficiently unfair and prejudicial" do violate due process); E.W. v. Wake Cty. Bd. of Educ., No. 509-CV-198-FL, 2010 WL 1286218, at *4 (E.D.N.C. Mar. 30, 2010) (unpublished). The school may provide notice to the student at the same time as the disciplinary hearing. See Goss, 419 U.S. at 582; Kowalski, 652 F.3d at 576; Wofford v. Evans, 390 F.3d 318, 325 (4th Cir. 2004).

A student does not have a protected property interest in participating in extracurricular activities under either the Due Process or Equal Protection Clauses. See Farver v. Bd. of Educ.

Caroll Cty., 40 F. Supp. 2d 323, 324 (D. Md. 1999); Pegram v. Nelson, 469 F. Supp. 1134, 1139 (M.D.N.C. 1979); see also Doe v. Sislbee Indep. Sch. Dist., 402 F. App'x 852, 854 (5th Cir. 2010) (unpublished); Poling v. Murphy, 872 F.2d 757, 764 (6th Cir. 1989); cf. Denis J. O'Connell High Sch. v. Va. High Sch., 581 F.2d 81, 84 (4th Cir.1978). Courts determine whether an activity is "extracurricular" on an ad hoc basis. See Bailey v. Truby, 321 S.E.2d 302, 314–15 (W.D. Va. 1984) (collecting cases). The Supreme Court implicitly has recognized that the National Honor Society is an extracurricular activity. See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 826–27 (2002).

A person has a liberty interest "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); see Goss. 419 U.S. at 574–75. "[I]njury to reputation alone," however, "does not deprive an individual of a constitutionally protected liberty interest." Tigrett v. Rector & Visitors of Univ. of Va., 290 F.3d 620, 628 (4th Cir. 2002). Rather, "reputational injury [must be] accompanied by a state action that 'distinctly alter[s] or extinguishe[s]' [a] legal status." Shirvinski v. U.S. Coast Guard, 673 F.3d 308, 315 (4th Cir. 2012); see Paul v. Davis, 424 U.S. 693, 710–11 (1976); Alger, 175 F. Supp. 3d at 659–60; cf. Goss, 419 U.S. at 574–75. A school's notation of misconduct on a college student's transcript constitutes such an injury. See Rector & Visitors of Georg Mason Univ., 149 F. Supp. 3d at 613–14; see also Goss, 419 U.S. at 574–75, 580; Plummer v. Univ. of Houston, 860 F.3d 767, 773 (5th Cir. 2017); Doe v. Cummins, 662 F. App'x. 437, 446 (6th Cir. 2016) (unpublished); Wayne v. Shadowen, 15 F. App'x 271, 287 (6th Cir. 2001) (unpublished); Neal v. Colorado State Univ.-Pueblo, No. 16-cv-873-RM-CBS, 2017 WL 633045, at *20 (D. Colo. Feb. 16, 2017) (unpublished); Tanyi, 2015 WL 4478853, at *2.

Whichard, Harris, and Strother assert qualified immunity to L.B.'s procedural due process claim concerning their investigation of the sexual encounter and notice. They are entitled to qualified immunity under section 1983 unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (quotation omitted). "'Clearly established' means that, at the time of the [official's] conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." Id. (quotation omitted); see City of Escondido v. Emmons, 139 S. Ct. 500, 503–04 (2019) (per curiam); Kisela v. Hughes, 138 S. Ct. 1148, 1152–53 (2018) (per curiam); Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (per curiam); Ziglar v. Abbasi, 137 S. Ct. 1843, 1866–67 (2017); White v. Pauly, 137 S. Ct. 548, 551–52 (2017) (per curiam); Mullenix v. Luna, 136 S. Ct. 305, 308–09 (2015) (per curiam); Taylor v. Barkes, 135 S. Ct. 2042, 2044–45 (2015) (per curiam); City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1774 (2015); Carroll v. Carman, 574 U.S. 13, 16–17 (2014) (per curiam); Reichle v. Howards, 566 U.S. 658, 664 (2012); Pearson v. Callahan, 555 U.S. 223, 231 (2009); Adams v. Ferguson, 884 F.3d 219, 226 (4th Cir. 2018).

Although the Supreme Court "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." Kisela, 138 S. Ct. at 1152 (quotation and citation omitted); see Wesby, 138 S. Ct. at 590; Abbasi, 137 S. Ct. at 1867; White,137 S. Ct. at 551; Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 377–78 (2009); Feminist Majority Foundation v. Hurley, 911 F.3d 674, 699 (4th Cir. 2019). In the Fourth Circuit, "existing precedent" includes precedent of the United States Supreme Court and the Fourth Circuit. See Doe

ex rel. Johnson v. S.C. Dep't of Soc. Servs., 597 F.3d 163, 176 (4th Cir. 2010).[5]

Often, qualified immunity analysis does not require factual findings, because the inquiry is a "purely legal one: whether the facts alleged . . . support a claim of violation of clearly established law." Mitchell v. Forsyth, 472 U.S. 511, 528 n.9 (1985). When asserting qualified immunity at summary judgment, a defendant may challenge the adequacy of the evidence to support the complaint's allegations. See Cloaninger ex rel. Cloaninger v. McDevitt, 555 F.3d 324, 331 (4th Cir. 2009). A defendant is entitled to summary judgment if the record does not create a genuine issue of material fact as to whether the defendant committed the acts alleged in the complaint. See Mitchell, 472 U.S. at 526; Cloaninger, 555 F.3d at 331.

Goss clearly established a student's right to notice and a hearing before the school metes out punishment. See Goss, 419 U.S. at 579–80. Viewing the evidence in the light most favorable to plaintiffs, Whichard, Harris, and Strother did not give L.B. notice of the charges against her, i.e., sexual harassment, before punishing her. Moreover, after L.B.'s initial denial of involvement in the sexual encounter, they did not provide L.B. with the evidence that the school had against her. See id. at 585; cf. Kowalski, 652 F.3d at 576. At the same time, L.B. does not have a property interest in extracurricular activities (i.e., Governor's School, National Honor Society, the Leadership Academy). See Farver, 40 F. Supp. 2d at 324; Pegram, 469 F. Supp. at 1139; see also Doe, 402 F. App'x at 854; Poling, 872 F.2d at 764. Accordingly, the court grants Whichard's and Harris's

[5] The United States Supreme Court has held that its precedent qualifies as controlling for purposes of qualified immunity. See Wesby, 138 S. Ct. at 591–93. The Supreme Court has reserved judgment on whether decisions of a federal court of appeals are a source of clearly established law for purposes of qualified immunity. See id.; Kisela, 138 S. Ct. at 1152–54; Taylor, 135 S. Ct. at 2044–45; Sheehan, 135 S. Ct. at 1776; Carroll, 574 U.S. at 16–17

motion for summary judgment to the extent L.B.'s claim concerns extracurricular activities, and otherwise denies their motion concerning L.B.'s procedural due process claim.

As for Strother, he argues that he is entitled to qualified immunity because his involvement in the investigation of the sexual encounter and notice was limited to questioning L.B. on May 17, 2016, that L.B. only accuses him of failing to inform L.B. that she was being investigated for sexual harassment, that questioning L.B. about the sexual encounter was reasonable, and that he informed L.B. about rumors of her role in the sexual encounter. See [D.E. 140] 9. Although Strother's involvement may have been limited, L.B.'s accusation–a failure to notify L.B. of the nature of the charges against her–goes to the core of L.B.'s procedural due process right. Because Strother failed to notify L.B. of the sexual harassment charges, the court rejects Strother's qualified immunity defense to the procedural due process claim concerning the sexual encounter and notice. Strother has qualified immunity related to L.B.'s loss of extracurricular activities.

As for Whichard's, Harris's, and Strother's qualified immunity defense to L.B.'s procedural due process claim concerning L.B.'s reputation, Goss clearly established that a high school student has a reputational rights associated with a ten-day suspension. See Goss, 419 U.S. at 574–75. Furthermore, Goss and its progeny clearly established that school discipline that does not meet the requirements of procedural due process, and that is "sustained and recorded" against the student, causes a reputational injury. See id. at 575. North Carolina law confers to L.B. the right to a public education, and her ten-day suspension altered that right. See N.C. Gen. Stat. §§ 115C-1, -378. Viewing the evidence in a light most favorable to plaintiffs, Whichard, Harris, and Strother did not afford L.B. adequate procedural due process. Accordingly, the court rejects Whichard, Harris, and Strother's qualified immunity defense to L.B.'s procedural due process claim concerning L.B.'s reputation.

As for L.B.'s procedural due process claim against Sugg concerning her reputation, viewing the evidence in a light most favorable to plaintiffs, Sugg did not afford L.B. adequate procedural due process, and SEHS officials both upheld and recorded the sexual harassment charge. See Goss, 419 U.S. at 574–75. Accordingly, the court denies Sugg's motion for summary judgment concerning L.B.'s reputational claim, but grants it as to any claim about extracurricular activities.

2.

L.B. asserts a substantive due process failure to train claim against Whichard, Harris, and Strother concerning their alleged failure to train the chaperones. A plaintiff may make a failure to train claim under section 1983 in "limited circumstances." City of Canton v. Harris, 489 U.S. 378, 387 (1989). A plaintiff must show "(1) [that] the subordinates actually violated the plaintiff's constitutional or statutory rights; (2) [that] the supervisor failed to train properly the subordinates thus illustrating a "deliberate indifference" to the rights of the persons with whom the subordinates come into contact; and (3) [that] this failure to train actually caused the subordinates to violate the plaintiff's rights." Moody v. City of Newport News, 93 F. Supp. 3d 516, 537 (E.D. Va. 2015); see City of Canton v. Harris, 489 U.S. 378, 388–92 (1989); Sanders v. Brown, 257 F. App'x 666, 671 (4th Cir. 2007) (per curiam) (unpublished); Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994); Gallimore v. Henrico Cty. Sch. Bd., 38 F. Supp. 3d 721, 726 (E.D. Va. 2014); cf. Connick v. Thompson, 563 U.S. 51, 61 (2011).

"Deliberate indifference is a very high standard—a showing of mere negligence will not meet it." Grayson v. Peed, 195 F.3d 692, 695 (4th Cir. 1999). Deliberate indifference involves the "continued adherence to an approach that [a defendant] know[s] or should know has failed to prevent tortious conduct by employees," or "the existence of a pattern of tortious conduct by inadequately trained employees." Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 407–08 (1987). "A pattern of

similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train . . . Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." Connick, 131 S. Ct. at 1360 (quotation omitted); see Doe, 225 F.3d at 456; Smith v. Atkins, 777 F. Supp. 2d 955, 967 (E.D.N.C. 2011). Only in the rarest of circumstances may "the unconstitutional consequences of failing to train . . . be so patently obvious that a [county] could be liable under [section] 1983 without proof of a pre-existing pattern of violations." Connick, 131 S. Ct. at 1361; see, e.g., City of Okla. City v. Tuttle, 471 U.S. 808, 823–24 (1985) (plurality opinion); Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983). At the same time, even if a section 1983 plaintiff can show the requisite culpability, she also must show "a direct causal link between the municipal action [or inaction] and the deprivation of federal rights." Brown, 520 U.S. at 404; see Buffington v. Baltimore Cty., 913 F.2d 113, 122 (4th Cir. 1990).

It does not "suffice to prove that an injury . . . could have been avoided if an [official] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct" because "[s]uch a claim could be made about almost any encounter." Harris, 489 U.S. at 391. Instead, a plaintiff must demonstrate specific training deficiencies and either (1) that inadequately trained employees engaged in a pattern of unconstitutional conduct, or (2) that a violation of a federal right is a "highly predictable consequence of a failure to equip [government] officers with specific tools to handle recurring situations." Brown, 520 U.S. at 407–09; see Connick, 131 S. Ct. at 1359–60; Harris, 489 U.S. at 388–91; Doe v. Broderick, 225 F.3d 440, 456 (4th Cir. 2000); Carter v. Morris, 164 F.3d 215, 220–21 (4th Cir. 1999); Cornfield v. Consol. High Sch. Dist. No. 230, 991

F.2d 1316, 1327 (7th Cir. 1993); Hill v. Robeson Cty., 733 F. Supp. 2d 676, 686–88 (E.D.N.C. 2010).

Even viewing the record in a light most favorable to L.B., no rational jury could find that the chaperones engaged in a pattern of tortious conduct sufficient to put Whichard, Harris, and Strother on notice that the chaperones would likely violate L.B.'s constitutional rights. See Brown, 520 U.S. at 407–08; Gallimore v. Henrico Cty. Sch. Bd., 38 F. Supp. 3d 721, 726–27 (E.D. Va. 2014). Accordingly, Whichard, Harris, and Strother are entitled to qualified immunity concerning L.B.'s substantive due process claim concerning their alleged failure to train the chaperones.

3.

L.B. asserts an equal protection claim against Whichard, Harris, Strother, and Sugg. Essentially, L.B. alleges an equal protection violation against Whichard, Harris, and Strother because D.M. and B.O. were suspended for using drugs and alcohol on the field trip, but she was suspended for sexual harassment. Whichard, Harris, and Strother respond that Farrelly already had suspended D.M. and B.O. for drug and alcohol use when Harris disciplined L.B. Because Farrelly could not discipline D.M. and B.O. any more than he did in suspending D.M. and B.O., they argue that there was not disparate treatment based on gender.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To establish an equal protection claim, a plaintiff must show that "[s]he has been treated differently from others with whom [s]he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001) (citation omitted). Purposeful discrimination "implies that a decisionmaker . . . selected or affirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its

adverse effects upon an identifiable group." Personnel Admin. of Ma. v. Feeney, 442 U.S. 256, 279 (1979); see C&H Co. v. Richardson, 78 F. App'x 894, 902 (4th Cir. 2003) (per curiam) (unpublished). If a plaintiff demonstrates intentional unequal treatment, the court must then determine whether the treatment is justified. See Morrison, 239 F.3d at 654. For gender-based claims, the difference in treatment is justified only if the difference "serve[s] important governmental objectives and [is] substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1975).

The general prohibition on disparate treatment of students based on gender is clearly established. See, e.g.; United States v. Virginia, 518 U.S. 515, 531–34 (1996); Hurley, 911 F.3d at 700–01. So too are the more specific prohibitions in the context of student-on-student sexual harassment, see, e.g., Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257–59 (2009), and athletics. See Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 104–05 (4th Cir. 2011).

Genuine issues of material fact exist concerning this claim against Whichard, Harris, and Strother. Thus, the court denies Whichard, Harris, and Strother qualified immunity concerning L.B.'s equal protection claim against them.

As for L.B.'s equal protection claim against Sugg, Sugg argues that L.B.'s equal protection claim against her fails because the SEHS officials' investigation and discipline of L.B. occurred "in the same manner" as K.W. See [D.E. 140] 7–8. Sugg also asserts defendants used the "same fact finding process" for both the drug investigation and the sexual harassment investigation. See [D.E. 184] 6. Both assertions, however, involve disputes about genuine issues of material fact concerning the process of questioning K.W., and the failure to investigate D.M. and B.O. for their role in the sexual encounter. Cf. Doe v. Oberlin College, 963 F.3d 580, 585–88 (6th Cir. 2020); Doe v. Miami

Univ., 882 F.3d 579, 597 (6th Cir. 2018). Accordingly, the court denies Sugg's motion for summary judgment on L.B.'s equal protection claim.

B.

Plaintiffs assert negligence claims against Whichard, Harris, Strother, Sugg, Parrish-Stafford, Stafford, Harmon, and Ritter in their individual capacities. See Meyer v. Walls, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997); Lynn v. Clark, 254 N.C. 460, 461–62, 119 S.E.2d 187, 188 (1961); Taylor v. Ashburn, 112 N.C. App. 604, 607, 436 S.E.2d 276, 279 (1993). To prove a negligence claim, a plaintiff must prove "(1) duty, (2) breach, (3) causation, and (4) damages." Bryant v. Adams, 116 N.C. App. 448, 465, 448 S.E.2d 832, 841 (1994); see Holley v. Burroughs Wellcome Co., 318 N.C. 352, 355, 348 S.E.2d 772, 774 (1986); Morgan v. Cavalier Acquisition Corp., 111 N.C. App. 520, 528, 432 S.E.2d 915, 919, disc. review denied, 335 N.C. 238, 439 S.E.2d 149 (1993).

Under North Carolina law, individuals who are public officials may be entitled to immunity negligence claims. Public officials are those individuals "engaged in the performance of governmental duties involving the exercise of judgment and discretion." Smith v. Hefner, 235 N.C. 1, 7, 68 S.E.2d 793, 787 (1952); see Isenhour v. Hutto, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999). A public employee, however, is not entitled to immunity from mere negligence claims, and may be liable for negligent acts personally committed during the course of his or her professional duties. See Hutto, 350 N.C. at 611, 517 S.E.2d at 127; Reid v. Roberts, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119 (1993). North Carolina courts distinguish public officials from public employees on three bases: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties." Hutto, 350 N.C. at 610, 517 S.E.2d at 127; see Farrell ex. rel. Farrell v. Transylvania Cty. Bd. of Educ., 199 N.C. App. 173, 176–77, 682 S.E.2d

224, 228 (2009). "Discretionary acts are those requiring personal deliberation, decision, and judgment." Meyer, 347 N.C. at 113, 489 S.E.2d at 889; see Hutto, 350 N.C. at 610, 517 S.E.2d at 127. "Ministerial duties . . . are absolute and involve merely the execution of a specific duty arising from fixed and designated facts." Hutto, 350 N.C. at 610, 517 S.E.2d at 127; Meyer, 347 N.C. at 113–14, 489 S.E.2d at 889.

A principal, assistant principal, supervisor, or director is a public official because N.C. Gen. Stat. § 115C-287.1 creates each position, listing the specific titles under the broader title of "school administrator." See N.C. Gen. Stat. § 115C-287.1; Farrell, 199 N.C. App. at 177, 682 S.E.2d at 228. Teachers, however, are public employees. See Farrell, 199 N.C. App. at 177, 682 S.E.2d at 228; Mullis v. Sechrest, 126 N.C. App. 91, 98, 484 S.E.2d 423, 427 (1997), rev'd on other grounds, 347 N.C. 548, 495 S.E.2d 721 (1998); Daniel v. City of Morganton, 125 N.C. App. 47, 55, 479 S.E.2d 263, 268 (1997).

A public official may be liable for negligence only if a plaintiff shows that his or her actions were "corrupt or malicious, or that he acted outside of or beyond the scope of his duties." Hefner, 235 NC. 7, 68 S.E.2d at 787. "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, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). "[A]bsent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." Leete v. Cty. of Warren, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995) (quotation omitted). Furthermore, "[e]very reasonable intendment will be made in support of [this] presumption." Styers v. Phillips, 277 N.C. 460, 473, 178 S.E.2d 583, 591 (1971) (quotation omitted). A plaintiff

overcomes the presumption by showing "competent and substantial evidence" of malicious conduct. Leete, 341 N.C. at 119, 462 S.E.2d at 478.

In contrast to a public official, a public employee may be "personally liable for his negligence in the performance of his duties proximately causing injury." Givens v. Sellars, 273 N.C. 44, 49, 159 S.E.2d 530, 534–35 (1968); see Mullis v. Sechrest, 347 N.C. 548, 553, 495 S.E.2d 721, 723 (1998).

As for Whichard, Harris, and Strother, they are entitled to public official immunity because each is a school administrators under N.C. Gen. Stat. § 115C-287.1. See Farrell, 199 N.C. App. at 177, 682 S.E.2d at 228. Furthermore, Whichard and Harris are entitled to public official immunity because each performed duties requiring individual discretion and decisionmaking. See Meyer, 347 N.C. at 113, 489 S.E.2d at 889. Accordingly, the court grants summary judgment to Whichard, Harris, and Strother concerning plaintiffs' negligence claims.

As for Sugg, Parrish-Stafford, Stafford, Harmon, and Ritter, they are not entitled to public official immunity. Each defendant is or was a teacher at SEHS at the time of the sexual encounter, investigation and discipline, and they are not entitled to public official immunity. See Farrell, 199 N.C. App. at 177, 682 S.E.2d at 228; Sechrest, 126 N.C. App. at 98, 484 S.E.2d at 427. Alternatively, these defendants are not entitled to public official immunity because the evidence in the case shows that each performed ministerial duties that are not exercises of sovereign power, and each held a position that North Carolina law did not create. See , e.g., Hutto, 350 N.C. at 610, 517 S.E.2d at 127.

As for plaintiffs' negligence claim against Sugg, a teacher's duty toward a student is the "same standard of care which a person of ordinary prudence, charged with the teacher's duties, would exercise in the same circumstances." Foster v. Nash-Rocky Mount Cty. Bd. of Educ., 191

N.C. App. 323, 326, 665 S.E.2d 745, 748 (2008) (quotation omitted); see Payne v. North Carolina Dep't of Human Res., 95 N.C. App. 309, 313, 382 S.E.2d 449, 451 (1989). In applying the standard, a court may take into account the student's personal characteristics, along with the "particular circumstances of the situation." Payne, 95 N.C. App. at 314, 382 S.E.2d at 452; see Foster, 191 N.C. App. at 327, 665 S.E.2d at 748. The "predominant issue" when analyzing duty and breach in a negligence claim is whether the alleged harm was foreseeable. Foster, 191 N.C. App. at 327, 665 S.E.2d at 748; see James v. Charlotte-Mecklenburg Bd. of Educ., 60 N.C. App. 642, 648, 300 S.E.2d 21, 24 (1983).

Sugg argues that she complied with any legal duty she may have had to report the sexual encounter. See [D.E. 140] 13–14. Specifically, Sugg argues that she immediately reported rumors of the sexual encounter to Harris, and that L.B.'s statements to Sugg concerning the sexual encounter were made in the presence of Harris. See id. Sugg also asserts that she immediately reported Z.W.'s statements concerning the videotaping of the sexual encounter to Harris. See id. at 14. Lastly, Sugg argues that she fulfilled any duty to counsel L.B. because L.B. "felt better" following the conversation concerning the sexual encounter. See id. at 15.

Genuine issues of material fact exist over the nature of Sugg's conduct during her interactions with L.B. and throughout the course of the investigation. Accordingly, the court denies Sugg's motion for summary judgment concerning plaintiffs' negligence claim.

As for plaintiffs' negligence claims against Harmon, Ritter, Parrish-Stafford and Stafford (the "chaperones"), the chaperones assert that they fulfilled their duty of supervision of the students because the standard under North Carolina law is that a teacher's supervision of students must be reasonable, not constant, and that the chaperones reasonably supervised the students on the field trip. See [D.E. 140] 16–17. The school, however, punished the chaperones for the poor quality of

supervision of students on the field trip that led to both the sexual encounter and student purchases and use of drugs and alcohol. Moreover, genuine issues of material fact exist concerning this claim.

Alternatively, the chaperones argue that L.B.'s injury (i.e., the sexual encounter) was not reasonably foreseeable to the chaperones, and that the chaperones did not proximately caused her injuries. See id. 17–19. Essentially, the chaperones argue that L.B.'s actions after curfew "broke the causal chain." Again, however, genuine issues of material fact exist. Cf. Frankenmuth Ins., 235 N.C. App. at 34, 760 S.E.2d at 100–01; Nicholson, 124 N.C. App. at 64, 476 S.E.2d at 675–76. Thus, the court denies summary judgment on plaintiffs' negligence claims against the chaperones.

The chaperones also argue that they did not have a duty to report the sexual encounter because they did not know about it until after the field trip and once the administration began its investigation. See id. 19; cf. [D.E. 64] ¶ 291. Plaintiffs do not dispute this fact, and the evidence in the record supports the chaperones' argument. Accordingly, court grants summary judgment as to plaintiffs' claim in complaint paragraph 291, but otherwise denies summary judgment on all other negligence claims against the chaperones.

C.

L.B. asserts a negligent infliction of emotional distress claim against Whichard, Harris, Strother, Sugg, Parrish-Stafford, Stafford, Harmon, and Ritter. To state a negligent infliction of emotional distress ("NIED") claim, a plaintiff must plausibly allege (1) the defendant negligently engaged in conduct; (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress; and (3) the conduct did in fact cause the plaintiff severe emotional distress. See, e.g., Andersen v. Baccus, 335 N.C. 526, 531, 439 S.E.2d 136, 139 (1994); Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990).

L.B. does not address her NIED claim. Cf. [D.E. 161]. As for L.B.'s NIED claims against Whichard, Harris, and Strother, these defendants are entitled to official immunity. See Farrell, 199 N.C. App. at 177, 682 S.E.2d at 228. Alternatively, even viewing the record in a light most favorable to plaintiffs, no rational jury could find that Whichard, Harris, or Strother acted maliciously or wantonly. Thus, the court grants Whichard, Harris, and Strother's motion for summary judgment on L.B.'s NIED claims.

As for Sugg and the chaperones, none of these defendants are entitled to public official immunity. See Sechrest, 126 N.C. App. at 98, 484 S.E.2d at 427. Nonetheless, even viewing the record in a light most favorable to plaintiffs, no rational jury could find in L.B.'s favor on her NIED claim. Cf. Riddle v. Buncombe Cty. Bd. of Educ., 256 N.C. App. 72, 74–75, 805 S.E.2d 757, 760–61 (2017). Accordingly, the court grants Sugg and the chaperones' summary judgment motion concerning L.B.'s NIED claims.

D.

Plaintiffs assert an intentional infliction of emotional distress ("IIED") claim against Whichard, Harris, and Sugg. Under North Carolina law, a plaintiff must show that (1) the defendants engaged in extreme and outrageous conduct, (2) the conduct was intended to cause severe emotional distress, and (3) the conduct caused severe emotional distress. See Waddle v. Sparks, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992). To be considered "extreme and outrageous," a defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 493, 340 S.E.2d 116, 123 (1986) (quoting Restatement (Second) of Torts § 46 cmt. d (1965)). Whether conduct qualifies as "extreme and

outrageous" is a question of law for the court. See, e.g., Lenins v. K-Mart Corp., 98 N.C. App. 590, 599, 391 S.E.2d 843, 848 (1990).

Plaintiffs do not address this claim in opposing defendants' motion for summary judgment. Cf. [D.E. 161]. In any event, plaintiffs fail to raise a genuine issue of material fact concerning whether Whichard, Harris and Sugg engaged in extreme and outrageous conduct. They did not. See, e.g., Rouse v. Duke Univ., 914 F. Supp. 2d 717, 728 (M.D.N.C. 2012); J.W. v. Johnston Cty. Bd. of Educ., No. 5:11–CV–707–D, 2014 WL 4771613, at *13 (E.D.N.C. Sept. 24, 2014) (unpublished). Thus, the court grants summary judgment on plaintiffs' IIED claims against Whichard, Harris, and Sugg.

E.

Plaintiffs assert a defamation claim and a libel per se claim against Whichard and Harris. In support, plaintiffs cite Whichard's alleged statements to Tom Winton concerning Governor's School, Harris's statement on L.B.'s discipline form that L.B. engaged in sexual harassment, and Whichard's statement in K.B.'s personnel file and to other school administrators. See [D.E. 64] ¶¶ 330–82.

To establish a defamation claim under North Carolina law, a "plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation." Griffin v. Holden, 180 N.C. App. 129, 133, 636 S.E.2d 298, 302 (2006) (quotation omitted); see Desmond v. News & Observer Publ'g Co., No. 132PA18-2, 2020 WL 4726565, at *12 (N.C. Aug. 14, 2020); Renwick v. News & Observer Publ'g Co., 310 N.C. 312, 316–19, 312 S.E.2d 405, 408–10 (1984); Boyce & Isley, PLLC v. Cooper, 211 N.C. App. 469, 478, 710 S.E.2d 309, 317 (2011); Craven v. Cope, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008); Smith-Price v. Charter Behavioral Health Sys., 164 N.C. App.

349, 356, 595 S.E.2d 778, 783 (2004). A statement is defamatory if it either, directly or by implication, ascribes dishonesty, fraud, lack of integrity, or reprehensible conduct to the subject of the statement. See Flake v. Greenboro News Co., 212 N.C. 780, 785–86, 195 S.E. 55, 60 (1938); Donovan v. Fiumara, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994); Beane v. Weiman Co., 5 N.C. App. 276, 277, 168 S.E.2d 236, 237 (1969). A defamatory statement "tend[s] to prejudice another in his reputation, office, trade, business, or means of livelihood." Donovan, 114 N.C. App. at 526, 442 S.E.2d at 574; see West v. King's Dep't Store, Inc., 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1998); Renwick, 310 N.C. at 317–18, 312 S.E.2d at 409; Flake, 212 N.C. at 786, 195 S.E. at 60. Defamation can be either libel or slander. See, e.g., Craven, 188 N.C. App. at 816, 656 S.E.2d at 732; Tallent v. Blake, 57 N.C. App. 249, 251, 291 S.E.2d 336, 338 (1982); cf. Renwick, 310 N.C. at 323–24, 312 S.E.2d at 412–13. Generally, libel is written and slander is oral. See Bell v. Simmons, 247 N.C. 488, 494, 101 S.E.2d 383, 387 (1958); Aycock v. Padgett, 134 N.C. App. 164, 165, 516 S.E.2d 907, 909 (1999).

In addition to plaintiffs' general defamation claim, plaintiffs allege that Whichard and Harris's statements are libelous per se. See [D.E. 64] ¶¶ 350–82. Libel per se is a false written statement communicated to a third party that "tends to impeach a person in that person's trade or profession [or] otherwise tends to subject one to ridicule, contempt or disgrace." Renwick, 310 N.C. at 317, 312 S.E.2d at 408–09; see Flake, 212 N.C. at 782, 195 S.E. at 59–60; Cherry v. United Parcel Serv., Inc., No. 5:07-CV-403-D, 2009 WL 8641019, at *9 (E.D.N.C. Sept. 28, 2009) (unpublished). In evaluating whether a publication constitutes libel per se, a court must analyze whether the publication is defamatory when "stripped of all insinuations, innuendo, colloquium, and explanatory circumstances." Griffin, 180 N.C. App. at 134, 636 S.E.2d at 303; see, e.g., Nucor Corp. v. Prudential Equity Grp., LLC, 189 N.C. App. 731, 736, 659 S.E.2d 483, 487 (2008).

Whether a statement is defamatory per se is a question of law. See, e.g., Ellis v. N. Star Co., 326 N.C. 219, 224, 388 S.E.2d 127, 130 (1990). When a plaintiff alleges that statements are defamatory per se, the statements "must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." Cooper, 153 N.C. App. at 30–31, 568 S.E.2d at 898–99; see, e.g., Renwick, 310 N.C. at 317–18, 312 S.E.2d at 409; Oates v. Wachovia Bank & Tr. Co., 205 N.C. 14, 16, 169 S.E.2d 869, 871 (1933). "The question always is how would ordinary men naturally understand the publication." Renwick, 310 N.C. at 318, 312 S.E.2d at 409 (quotation omitted).

As for plaintiffs' libel per se and defamation claims, plaintiffs do not address these claims in opposing defendants' motion for summary judgment. Cf. [D.E. 161]. Plaintiffs do not point to anything in the record that support plaintiffs' claims that defendants communicated the alleged defamatory statements to a third party. As such, no rational jury could find that the statements at issue were published. See Renwick, 310 N.C. at 317, 312 S.E.2d at 408–09. Moreover, plaintiffs' claims concern not the alleged statements, but rather the implications of those statements on L.B.'s future academic success and K.B.'s future professional success. See Skinner v. Reynolds, 237 N.C. App. 150, 156, 764 S.E.2d 652, 657 (2014). Accordingly, the court grants Whichard's and Harris's motion for summary judgment on plaintiffs' libel per se claim and defamation claim.

III.

A.

Next, the court addresses L.B.'s claims against superintendent Farrelly. As for L.B.'s procedural due process claims against Farrelly concerning Farrelly's decision to revoke L.B.'s invitation to Governor's School, Farrelly argues that L.B.'s complaint does not allege procedural due

process violations concerning her ten-day suspension. See [D.E. 130] 5 & n.2; [D.E. 64] ¶ 267. L.B.'s response brief does not contest this assertion. See [D.E. 159]. Furthermore, L.B. cannot amend her complaint through summary judgment briefing. See, e.g., United States ex rel. Owens v. First Kuwati Gen. Trading & Contracting Co., 612 F.3d 724, 731 (4th Cir. 2010); Wahi v. Charleston Area Med. Ctr., Inc., 562 F.3d 599, 617 (4th Cir. 2009); United States for Graybar Elec. Co. v. TEAM Constr, LLC, 275 F. Supp. 3d 737, 748 n.3 (E.D.N.C. 2017). Accordingly, to the extent that L.B.'s procedural due process claim against Farrelly concerns L.B.'s ten-day suspension, the court grants summary judgment to Farrelly.

As for L.B.'s remaining procedural due process claim against Farrelly concerning Farrelly's revocation of L.B.'s membership in the National Honor Society, Farrelly argues that L.B.'s membership in the National Honor Society is not a protectible interest. See [D.E. 130] 5. In response, L.B. does not address her membership in the National Honor Society.

As discussed, Farrelly is correct. Accordingly, the court grants summary judgment to Farrelly concerning L.B.'s procedural due process claim and the National Honor Society.

As for L.B.'s procedural due process claim against Farrelly concerning L.B.'s alleged reputational harms concerning the invitation to Governor's School, L.B. does not have a protectible property right in her invitation to Governor's School. See Goss, 419 U.S. at 578; Dennis J. O'Connell High Sch., 581 F.2d at 84; Thorns, 2007 WL 1647889, at *3. Accordingly, the court grants summary judgment to Farrelly concerning L.B.'s procedural due process reputation claims.

B.

As for L.B.'s substantive due process claims, Farrelly argues that the evidence does not demonstrate a causal connection between a deficiency in training and L.B.'s injury or a pattern of ignoring sexual harassment sufficient to support deliberate indifference. See [D.E. 130] 14.

Specifically, Farrelly asserts that L.B. did not report the sexual encounter as sexual harassment, but rather as a consensual encounter. See id. 14–15. Farrelly also argues that L.B. decided to go to D.M. and B.O.'s motel room after curfew, thereby "breaking the causal chain." See id.

L.B. fails to identify a pattern of tortious conduct by employees under Farrelly's direction. Thus, L.B.'s failure to train claim fails. See, e.g., Brown, 520 U.S. at 407–08. Accordingly, the court grants Farrelly's motion for summary judgment concerning L.B.'s substantive due process claims.

C.

As for L.B.'s equal protection claims, L.B. alleges that Farrelly was deliberately indifferent. If a plaintiff bases an equal protection claim on deliberate indifference, the plaintiff must show that she was the subject of peer harassment, that the school official was deliberately indifferent to the harassment, and that the school official acted with a discriminatory motive. See Hurley, 911 F.3d at 702–03. A plaintiff meets this standard by showing "that the school administrator knew about harassment of the plaintiff and acquiesced in that conduct by refusing to reasonably respond to it." See id.

Farrelly argues that L.B. cannot show that Farrelly was deliberately indifferent to L.B.'s sexual harassment claim during the grievance process because L.B. and K.B. described the sexual encounter as consensual, Farrelly did not receive a report of sex discrimination, and Farrelly timely responded to the L.B.'s grievance. See [D.E. 130] 13–14. Even viewing the record in a light most favorable to L.B., Farrelly did not have an allegation of sexual harassment to which he could fail to reasonably respond. See Hurley, 911 F.3d at 702–03. Accordingly, the court grants Farrelly's motion for summary judgment concerning L.B.'s equal protection claims.

IV.

L.B. alleges that the Board violated Title IX by (1) conducting an investigation that reached an erroneous outcome and singling out L.B. for punishment based on her gender, and (2) selectively enforcing disciplinary proceedings against L.B. based on her gender. See Sec. Am. Comp. ¶¶ 230–50. Title IX bars schools receiving federal funds from discriminating based on sex, and students may sue to enforce Title IX. See 20 U.S.C. § 1681; Cannon v. Univ. of Chi., 441 U.S. 677, 688–89 (1979). "Title IX bars the imposition of [school] discipline where gender is a motivating factor in the decision to discipline." Yusuf v. Vassar College, 35 F.3d 709, 715 (2d Cir. 1994); see 20 U.S.C. § 1681. Title IX claims concerning school disciplinary proceedings generally fall within two categories. In the first, a plaintiff alleges that she was actually innocent and "wrongly found to have committed an offense." Id.; Doe 2 by and through Doe 1 v. Fairfax Cty. Sch. Bd., 384 F. Supp. 3d 598, 606 (E.D. Va. 2019). In the second, a plaintiff "alleges selective enforcement." Yusuf, 35 F.3d at 715; see Fairfax Cty. Sch. Bd., 384 F. Supp. 3d at 606. A selective enforcement claim "asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender." Yusuf, 35 F.3d at 715; see Fairfax Cty. Sch. Bd., 384 F. Supp. 3d at 606–07. Courts look to case law interpreting Title VII when evaluating claims brought under Title IX because of their similar language and purpose. See Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 636–37 (1999); Hurley, 911 F.3d at 693; Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) (en banc).

A.

To state a claim for erroneous outcome discrimination, a plaintiff must plausibly allege "(1) a procedurally or otherwise flawed proceeding; (2) that has led to an adverse and erroneous outcome; and (3) particular circumstances suggesting that gender bias was a motivating factor behind the

erroneous finding." Doe v. Salisbury Univ., 123 F. Supp. 3d 748, 766 (D. Md. 2015) (quotations and citations omitted); see Doe v. Loh, 767 F. App'x 489, 491 (4th Cir. 2019) (per curiam) (unpublished); Miami Univ., 882 F.3d at 592; Yusuf, 35 F.3d at 715; Fairfax Cty. Sch. Bd., 384 F. Supp. 3d at 607; Doe v. Coastal Carolina Univ., 359 F. Supp. 3d 367, 374 (D.S.C. 2019); Doe v. Marymount Univ., 297 F. Supp. 3d 573, 583 (E.D. Va. 2018); Rector & Visitors of George Mason Univ., 132 F. Supp. 3d at 732; Doe v. Washington & Lee Univ., No. 6:14–CV–00052, 2015 WL 4647996, at *9–10 (W.D.Va. Aug. 5, 2015) (unpublished).

As for the first two elements, a court initially must determine whether the investigation or adjudication of discipline was procedurally flawed, whether errors or inconsistencies exist in the investigation's oral or written filings, or whether the sufficiency or reliability of evidence is in question. See Marymount Univ., 297 F. Supp. 3d at 584; Fairfax Cty. Sch. Bd., 384 F. Supp. 3d at 607. As for the third element, the causal connection between gender discrimination and the procedurally flawed proceeding must be "particularized." See Yusuf, 35 F.3d at 715; Marymount Univ., 297 F. Supp. 3d at 583; Fairfax Cty. Sch. Bd., 384 F. Supp. 3d at 608. Evidence that tends to show such a connection includes, inter alia, "statements by members of the disciplinary tribunal, statements by pertinent [Board] officials, or patterns of decision-making that also tend to show the influence of gender." Yusuf, 35 F.3d at 715. "[C]onclusory allegation[s] of gender discrimination" are insufficient. Id.[6]

[6] L.B. appears to raise a new claim in her summary judgment motion alleging a violation of Title IX due to the Board's failure to train its employees that is not presented in her complaint. Compare [D.E. 138] 11–17 with [D.E. 64] ¶¶ 230–63. L.B. cannot "raise new claims after discovery has begun without amending [her] complaint." First Kuwaiti Gen. Trading & Contracting Co., 612 F.3d at 731; see Wahi, 562 F.3d at 617. Accordingly, the court does not address this claim.

As for the Board's motion, a genuine dispute of material fact exists concerning whether the Board had sufficient evidence to make its determination in light of the fact that D.M. and B.O. were not interviewed. See Fairfax Cty. Sch. Bd., 384 F. Supp. 3d at 607. Additionally, genuine issues of material facts exist concerning procedural flaws in the investigation and discipline process. See, e.g., Goss, 419 U.S. at 574–83. Furthermore, a genuine issue of material fact exists concerning whether gender motivated the Board's decision. See, e.g., Yusuf, 35 F.3d at 715; Marymount Univ., 297 F. Supp. 3d at 583; Fairfax Cty. Sch. Bd., 384 F. Supp. 3d at 608. Accordingly, the court denies the Board's motion for summary judgment. Similarly, genuine issues of material fact exist concerning L.B.'s motion for summary judgment on her Title IX erroneous outcome claim. Thus, the court denies L.B.'s motion for summary judgment.

B.

To state a selective enforcement claim, a plaintiff must show that, independent of whether a plaintiff was guilty or innocent of the charge leveled against her, "the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender." Yusuf, 35 F.3d at 715; see Miami Univ., 882 F.3d 579, 589; Plummer v. Univ. of Houston, 860 F.3d 767, 777–78 (5th Cir. 2017). A plaintiff also must show that she was similarly situated to a student of a different gender that the school "treated more favorably." Doe v. Univ. of the S., 687 F. Supp. 2d 744, 756–57 (E.D. Tenn. 2009); see Fairfax Cty. Sch. Bd., 384 F. Supp. 3d at 608; Doe v. Fairfax Cty. Sch. Bd., 403 F. Supp. 3d 508, 515 (E.D. Va. 2019); Streno v. Shenandoah Univ., 278 F. Supp. 3d 924, 932 (E.D. Va. 2017).[7] Specifically, a "[female] plaintiff must demonstrate that a female was in circumstances

[7] The Fourth Circuit has not decided whether a plaintiff must identify a comparator to maintain a Title IX selective enforcement claim. See, e.g., Fairfax Cty. Sch. Bd., 403 F. Supp. 3d at 515. District courts in the Fourth Circuit, and courts in other circuits do require a comparator for such claims. See, e.g., Klocke v. Univ. of Tex. at Arlington, 938 F.3d 204, 213 (5th Cir. 2019); Doe

sufficiently similar to [her] own and was treated more favorably by the school." See Fairfax Cty. Sch. Bd., 403 F. Supp. 3d at 516. Furthermore, a plaintiff also must show that gender was a motivating factor in the decision. See Yusuf, 35 F.3d at 715.

As for L.B.'s Title IX selective enforcement claim, genuine issues of material fact exist concerning whether K.W., D.M., and B.O. were treated more favorably during the investigation of the sexual encounter and subsequent discipline, and whether gender was a motivating factor. See Doe v. Va. Polytechnic Inst. & State Univ., No. 7:19-cv-00249, 2020 WL 1309461, at *3 (W.D. Va. Mar. 19, 2020) (unpublished). Similarly, genuine issues of material fact exist concerning L.B.'s motion for summary judgment on her Title IX selective enforcement claim. Accordingly, the court denies the Board's and L.B.'s motions for summary judgment concerning L.B.'s Title IX selective enforcement claims.

C.

Plaintiffs assert a Title IX retaliation claim. See [D.E. 64] ¶¶ 251–63. Title IX prohibits "[r]etaliation against a person because that person complained about sex discrimination." Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005); see Aleman v. Chugach Support Servs., 485 F.3d 206, 214 (4th Cir. 2007). To show retaliation, a plaintiff must demonstrate (1) engagement in a protected activity; (2) an adverse action; and (3) a causal link between the protected activity and the adverse action. See Jackson, 544 U.S. at 173; Coleman v. Maryland Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010); Harmon v. Cumberland Cty. Bd. of Educ., 186 F. Supp. 3d 500, 506 (E.D.N.C. 2016); Salisbury Univ., 123 F. Supp. 3d at 769. The Fourth Circuit applies Title VII

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v. Cummins, 662 F. App'x 437, 452 (6th Cir. 2016) (unpublished); Rossley v. Drake Univ., 342 F. Supp. 3d 904, 931 (S.D. Iowa 2018); Streno, 278 F. Supp. 3d at 932. L.B. has identified K.W., D.M., and B.O. as comparators.

"concepts" to Title IX retaliation claims. Hurley, 911 F.3d at 694; Preston v. Virginia ex rel. New River Comm. Col., 31 F.3d 203, 207 (4th Cir. 1994).

A plaintiff engages in protected activity by "opposition" or "participation." Laughlin v. Metro Washington Airports Auth., 149 F.3d 253, 258–59 (4th Cir. 1998). "Opposition activity encompasses utilizing informal grievance procedures as well as staging informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities." Id. at 259. Participation involves taking part in processes established by Title IX. See id. Filing a formal grievance alleging a Title IX violation in an educational setting constitutes protected activity. See Demasters v. Carilion Clinic, 796 F.3d 409, 417 (4th Cir. 2015); Laughlin, 149 F.3d at 258–59; Brady v. Board of Educ., 222 F. Supp. 3d 459, 474 (D. Md. 2016); Mandsager v. Univ. of N.C. at Greensboro, 269 F. Supp. 2d 662, 673–74 (M.D.N.C. 2003).

An action in retaliation must be "materially adverse," which means that the action "must suffice to dissuade a reasonable person from making or supporting a charge of discrimination." Hurley, 911 F.3d at 694 (quotation and alteration omitted); see Burlington N. & Sante Fe Ry. v. White, 548 U.S. 53, 68 (2006). The "causal link" element requires a plaintiff to show that she was retaliated against because she complained of sex discrimination. See Jackson, 544 U.S. at 183; Doe v. Belmont Univ., 367 F. Supp. 3d 732, 757 (M.D. Tenn. 2019).

As for plaintiffs' Title IX retaliation claims, the Board argues that L.B.'s statements during the investigation cannot amount to protected activity, and that K.B.'s statements in her grievance letter are not protected activity because K.B. did not complain of sex discrimination under Title IX. See [D.E. 129] 20–21. L.B. does not contest the first point. Nonetheless, a rational juror could find that K.B.'s statements in the grievance letter constitute protected activity because K.B. complained of the specific treatment L.B. received as opposed to K.W., D.M., and B.O. See Randa v. Whitaker,

No. 5:18-CV-19-FL, 2019 WL 79357, at *6 (E.D.N.C. Jan. 2, 2019) (unpublished); Young v. Giant Food Stores, LLC, 108 F. Supp. 3d 301, 316–17 (D. Md. 2015).

Next, the Board argues that no causal connection exists between K.B.'s statement that L.B. was a "victim" and the Board's adverse action. See [D.E. 129] at 21. The Board's argument sidesteps, however, that K.B. filed the grievance before SEHS officials revoked L.B.'s National Honor Society membership and invitation to Governor's School. Moreover, viewing the evidence in the light most favorable to L.B., the short time period between K.B. filing the grievance and the SEHS officials' actions related to revoking L.B.'s National Honor Society Membership and invitation to Governor's School supports an inference both actions were retaliatory. See Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir. 1998); Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir.1989).

Finally, the Board argues that L.B.'s suspension and revocation of privileges is not adverse because it comported with Board policy and the Governor's School code of conduct. See [D.E. 129] at 22. Genuine issues of material fact exist as to whether a suspension and revocation of numerous honors and activities would dissuade another student from grieving a suspension. See Hurley, 911 F.3d at 694. Accordingly, the court denies the Board's motion for summary judgment on L.B.'s Title IX retaliation claim.

V.

In sum, the court GRANTS IN PART and DENIES IN PART Whichard, Harris, Strother, Sugg, Parrish-Stafford, Stafford, Harmon, and Ritter's motion for summary judgment [D.E. 119], GRANTS Farrelly's motion for summary judgment [D.E. 121], DENIES the Board's motion for summary judgment [D.E. 126], and DENIES L.B.'s motion for summary judgment [D.E. 122].

The parties shall engage in mediation with United States Magistrate Judge Gates. If the parties are unable to resolve the case at mediation, the parties shall propose trial dates.

SO ORDERED. This 16 day of September 2020.

JAMES C. DEVER III
United States District Judge