UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

J.J. and AMANDA JACKSON,

Plaintiffs,

v.

OLYMPIA SCHOOL DISTRICT,

Defendant.

CASE NO. C16-5060BHS

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on Defendant Olympia School District's ("District") motion for partial summary judgment (Dkt. 16). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On January 22, 2016, Plaintiffs J.J. and Amanda Jackson (collectively, "Plaintiffs") filed a complaint against the District. Dkt. 1 ("Comp."). Plaintiffs allege the District failed to protect J.J. from sexualized hazing when he was a high school student. *See id*. Plaintiffs assert claims under 42 U.S.C. § 1983 and Title IX, as well as a state law claim for negligence. *Id*., ¶¶ 30–55.

On June 14, 2016, the District filed a motion for partial summary judgment on Plaintiffs' federal claims as stated in Counts I and II of the complaint. Dkt. 16. Plaintiffs did not respond, and the District did not reply. Plaintiffs' failure to respond does not relieve the District from meeting its burden to show that it is entitled to summary judgment. *Martinez v. Stanford*, 323 F.3d 1178, 1182 (9th Cir. 2003). It is odd, however, that Plaintiffs' attorneys, who are experienced civil rights attorneys and often litigate in this Court, would fail to file anything in opposition. Moreover, the complaint is not verified and is not evidence. *Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995) ("A verified complaint may be used as an opposing affidavit under Rule 56"). Regardless of these unusual circumstances, the Court will consider the District's motion on the merits.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must

present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

B. Title IX

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance[.]" 20 U.S.C. § 1681(a). Damages are available under Title IX only where

"an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of the discrimination in the recipient's programs and fails to adequately respond." *Gebser v. Lago Independent School Dist.*, 524 U.S. 274, 283 (1998). "In sexual harassment cases, it is the deliberate failure to curtail known harassment, rather than the harassment itself, that constitutes the intentional Title IX violation." *Mansourian v. Regents of Univ. of California*, 602 F.3d 957, 967 (9th Cir. 2010).

The elements of proof for a Title IX claim are (1) deliberate indifference, (2) to sexual harassment, (3) of which the school district has actual knowledge, (4) that is so severe, pervasive, and objectively offensive, (5) that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1169 (N.D. Cal. 2000) (citing *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999)). In the context of student-on-student harassment, the standard has been modified slightly:

> (1) the school district must exercise substantial control over both the harassed and the context in which the known harassment occurs, (2) the plaintiff must suffer sexual harassment . . . that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school, (3) the school district must have actual knowledge of the harassment, and (4) the school district's deliberate indifference subjects its students to harassment.

Reese v. Jefferson Sch. Dist. No.14J, 208 F.3d 736, 739 (9th Cir. 2000).

In this case, the District argues that there is no evidence in the record showing that the District had actual knowledge of the harassment in question or acted with deliberate indifference. Dkt. 16 at 7–10. The Court agrees. Where no factual showing is made in

opposition to a motion for summary judgment, the court is not required to search the record *sua sponte* for some genuine issue of material fact. *See Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029–31 (9th Cir. 2001)("Requiring the district court to search the entire record for a genuine issue of fact, even though the adverse party does not set it out in the opposition papers, is also profoundly unfair to the movant."). The District has shown that it is entitled to judgment as a matter of law because of a lack of evidence on elements of Plaintiffs' claim, and Plaintiffs have failed to submit evidence showing that material questions of fact exist on these elements. Therefore, the Court grants the District's motion on Plaintiffs' Title IX claim.

C. Section 1983

Section 1983 is a procedural device for enforcing constitutional provisions and federal statutes; the section does not create or afford substantive rights. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). In order to state a claim under § 1983, a plaintiff must demonstrate that (l) the conduct complained of was committed by a person acting under color of state law and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or by the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

In this case, Plaintiffs assert causes of action under the Due Process and Equal Protection clauses of the Fourteenth Amendment. With regard to the substantive due process claim, the District argues that Plaintiffs' claim that the District had a duty to act fails as a matter of law and that Plaintiffs fail to meet either the special relationship

exception or the deliberate indifference to a known or obvious danger exception. Dkt. 16 at 17–20. The Court agrees. Plaintiffs have failed to submit evidence or argument in support of this claim. The District has adequately shown that it is entitled to judgment as a matter of law based on a lack of evidence and no evidence has been submitted contesting this position. Therefore, the Court grants the District's motion on Plaintiffs' substantive due process claim.

With regard to the equal protection claim, the District argues that Plaintiffs have failed to show discrimination based on membership in a protected class. Dkt. 16 at 20. The Court agrees and grants the District's motion on Plaintiffs' equal protection claim.

Plaintiffs also assert a claim alleging the District implemented unconstitutional policies or customs and the District failed to train or supervise employees. Comp., ¶¶ 38-–42. A plaintiff may establish local governmental liability by establishing that: (1) a governmental employee committed the alleged constitutional violation pursuant to a formal governmental policy or a "longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity"; (2) the individual who committed the constitutional tort was an official with "final policy-making authority" and the challenged action itself thus constituted an act of official governmental policy; or (3) an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it. *Gillette v. Delmore*, 979 F.2d 1342, 1346–47 (9th Cir. 1992), *cert denied*, 510 U.S. 932 (1993) (citations omitted). "[T]he inadequacy of . . . training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [actors] come

into contact." *Flores v. Cty. of Los Angeles*, 758 F.3d 1154, 1158 (9th Cir. 2014) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). Plaintiffs must show that the District "was deliberately indifferent to the need to train subordinates, and the lack of training actually caused the constitutional harm or deprivation of rights." *Id*. (citing *Connick v. Thompson*, ___ U.S. ___, 131 S.Ct. 1350, 1358 (2011)).

In this case, the District argues that Plaintiffs fail to show both deliberate indifference and causation. Dkt. 16 at 21–23. The Court agrees. The record is devoid of evidence showing a policy allowing sexual assault, a widespread custom or practice of sexual assault, knowledge of a harm that is likely to occur, failure to act upon that knowledge, or but for causation. Therefore, the Court grants the District's motion on Plaintiffs' supervisor liability claim as alleged in Count II.

III. ORDER

Therefore, it is hereby **ORDERED** that the District's motion for partial summary judgment (Dkt. 16) is **GRANTED** as to Counts I and II of the complaint.

Dated this 28th day of July, 2016.

BENJAMIN H. SETTLE
United States District Judge