IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

LAURA AUBERT,

Plaintiff,

v. No. 1:18-cv-00118-JHR-LF

CENTRAL NEW MEXICO COMMUNITY COLLEGE, et al.,

Defendants.

DEFENDANTS CENTRAL NEW MEXICO COMMUNITY COLLEGE, KRISTIN COULTAS-KAY, RANDALL CRANDALL, RUDY GARCIA, AND KATHARINE WINOGRAD'S MOTION TO DISMISS COUNTS I AND II AND FOR QUALIFIED IMMUNITY

Defendants Central New Mexico Community College ("CNM"), Kristin Coultas-Kay ("Coultas-Kay"), Randall Crandall ("Crandall"),[1] Rudy Garcia ("Garcia"), and Katharine Winograd ("Winograd")[2], referred to collectively as the "CNM Defendants", request that this Court dismiss the claims against them (Counts 1 and 2). Plaintiff fails to state a claim for violations of Title IX or the Equal Protection Clause,[3] Coultas-Kay, Crandall, and Garcia are protected by qualified immunity, and the claims against Coultas-Kay, Crandall, Garcia, and Winograd in their official capacity are duplicative of those against CNM and should be dismissed. Further, pre-judgment interest and punitive damages are not available against public entities.

Plaintiff does not consent to this Motion to Dismiss.

[1] Mr. Crandall's name is Randolph Crandall; he prefers to be called "Randy".

[2] Dr. Winograd's first name is spelled "Katharine"

[3] Counsel does not represent Defendant Craig Venderploeg [sic].

INTRODUCTION

Plaintiff Laura Aubert ("Plaintiff") is currently a student at the University of New Mexico.[4] She contends that during her spring 2015 semester, while she was a student at CNM. Defendant Craig Vanderploeg, a CNM math tutor, ("Tutor") sexually harassed her, depriving her of access to needed math tutoring services in violation of Title IX and violating her right to equal protection. In addition, she alleges that (1) two "supervisors" in the tutoring center, Randolph [sic] Crandall and Kristin Coultas-Kay, knew or should have known of the harassment and failed to respond appropriately; (2) Human Resources Consultant, Karen Montoya, and Dean of Students, Rudy Garcia, failed to respond appropriately to her initial reports of the harassment; and (3) CNM failed to complete its investigation after Tutor resigned. Plaintiff names CNM President Katharine Winograd only in her official capacity. As none of Plaintiff's claims have merit and her Complaint does not meet federal pleading standards, her claims against CNM, Crandall, Coultas-Kay, Montoya, Garcia, and Winograd should be dismissed. *See* Fed. R. Civ. P. 12(b)(6). Crandall, Coultas-Kay, Montoya, and Garcia are also entitled to qualified immunity.

STANDARD OF REVIEW

Rule 12(b)(6) permits a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A claim must contain a "plausible claim for relief" in order to survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 663, at 678 (2009). Such factual allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 595. "This requirement of plausibility

[4] Plaintiff does not allege her age. She does allege that she was first a student at CNM in 2002. (Complaint, ¶ 9). Assuming she was 18 in 2002, she would be around 34 now.

serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them." *Robbins v. Oklahoma***,** 519 F.3d 1242, 1248 (10th Cir. 2008). Thus, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not shown - that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 675 *citing* Fed. Rule Civ. Proc. 8(a)(2) (internal quotations omitted). The question to be decided is "whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Lane v. Simon*, 495 F.3d 1182, 1186 (10th Cir. 2007). Determining whether a complaint states a plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

This plausibility standard is equally relevant in qualified immunity cases. *Shero v. City of Grove, Okl.*, 510 F.3d 1196, 1200 (10th Cir. 2007). In fact, the principle that claims "shy" of meeting the plausibility standard should be disposed of before defendants are burdened by discovery is "especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity." *Iqbal*, 556 U.S. at 684.

FACTUAL ALLEGATIONS[5]

In 2015 Plaintiff was a CNM student with learning and other disabilities,[6] who sought math tutoring from the Student Resource Center.[7] She began to work with Tutor in February 2015

[5] The term "facts" herein means factual allegations in the Complaint, which are not necessarily accurate or complete.
[6] Plaintiff never explains why this fact is relevant. The Complaint does not allege a link to any other claim, and disabled persons are not a protected class for the purposes of her Equal Protection claim. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432.

[7] Plaintiff refers to the Student Resource Center (¶ 11), the tutoring center (¶ 20), the Learning Center (¶ 31), and the Assistance Centers for Education (¶ 78). The CNM Defendants understand these to be the same as referenced in the Complaint, and will refer to the "tutoring center," unless quoting the Complaint.

at the tutoring center. Complaint ¶¶ 10–12. Initially, Tutor was helpful; Plaintiff was grateful and friendly and returned for several sessions. *Id.* ¶¶ 13, 15. At some unspecified point, Plaintiff recognized that Tutor wanted more than friendship; she told him she was not interested. *Id.* ¶ 16. Tutor said that he would not help her if she refused his attentions; Plaintiff was uncomfortable and felt she was under his increasing control. Plaintiff had sexual intercourse with Tutor at his home on two occasions, but she does not allege other facts to provide context. *Id.* ¶¶ 17-18.

At some point, Tutor told Plaintiff that Crandall had asked about their relationship, and that he lied and said they were friends. *Id.* ¶ 21. Crandall told Tutor to circulate and not spend all his time with Plaintiff. Tutor told Plaintiff that their relationship was not against the rules. *Id.* ¶ 23. Plaintiff realized she could not trust Tutor and determined to resist his advances. *Id.* ¶ 26.

About a week later, probably in early April, *see Id.* ¶¶ 27-31, and 99, Plaintiff went to the tutoring center, which was crowded and noisy. She entered a "cubicle" with Tutor, so that they would have "more room" and time to focus on tutoring. Tutor grabbed her breasts, forced her hand over his crotch, and whispered that she was making him hard. Plaintiff pushed him away, told him his conduct was unacceptable, and began to cry. Tutor told her if she did not have intercourse, he would make sure she failed math. Plaintiff left the tutoring center in tears. As she left, Crandall called to her, but she did not return. However, she noticed that Crandall called Tutor over. She does not know what Crandall said. *Id.* ¶¶ 27-28. Plaintiff never alleges that Tutor had authority to give her a grade in math.

Tutor called her more than 100 times over the next several days. He left a message saying that he had her address and would come over if she continued to ignore him. *Id.* ¶ 29. Plaintiff's friend encouraged her to report Tutor's conduct to CNM. *Id.* ¶ 30.

Around April 6, 2015, four days after the incident in the cubicle, Plaintiff went to the

tutoring center. She could not find Crandall, so she told Coultas-Kay, another supervisor at the tutoring center, "of being violated" and of Tutor's "ongoing harassment and threats." *Id.* ¶¶ 31 and 99. Coultas-Kay left a telephone message for Crandall and assured Plaintiff that he would call her later that day. *Id.* ¶ 32. Plaintiff returned to the tutoring center two days later; Coultas-Kay told her that Crandall was aware of the situation, but she did not give Plaintiff any more information. *Id.* ¶ 34.

For the next month and a half, toward the end of May, Plaintiff avoided Tutor so she could get tutoring. *Id.* ¶ 37. Tutor continued to send text messages that he wanted to see her and to have sex. *Id.* ¶ 38. In May 2015, Plaintiff learned that Tutor had come to her home while she was out of town. *Id.* ¶ 39. Two of Plaintiff's friends encouraged Plaintiff to report Tutor's actions to CNM. *Id.* ¶ 40. Plaintiff does not allege that she saw Tutor after she reported the cubicle incident. The semester ended on May 7, 2015. *See* 2014-15 Academic Calendar, found at https://www.cnm.edu/calendars/documents/2014-2015-academic-calendar.pdf.

On May 20, 2015, Plaintiff left a voice message with CNM Human Resources to report Tutor's conduct and her concerns. She did not receive a return call. *Id.* ¶ 41. She also emailed the Dean of Students, Defendant Rudy Garcia, and complained that she had been subjected to sexual misconduct by a tutor. She requested a response, but did not receive one. *Id.* ¶ 42.

On May 26, 2016 [sic],[8] the first day of the summer semester, she went to Garcia's office. He said that he had not received her email, and explained she had to file a complaint with campus security. Campus security was dispatched and she filed a complaint. *Id.* ¶ 43. On June 9, 2015, Plaintiff met with Human Resources Consultant Karen Montoya and gave her copies of handwritten notes from Tutor, notes from Plaintiff's journal, and copies of her emails to Human

[8] The 2016 reference is likely a typographical error because all other dates are in 2015.

Resources[9] and the Dean of Students. *Id.* ¶ 44. Montoya agreed to let Plaintiff review her notes from the meeting, but she never gave them to Plaintiff. *Id.* ¶ 45.

In late June 2015, Plaintiff was told by CNM's Director of Talent Management that Tutor had resigned after he learned of Plaintiff's complaint. Much later, she learned that he actually resigned on June 11, soon after receiving a Pre-Termination Notice that referenced an "ongoing pattern of questionable conduct and extremely poor judgment." *Id.* ¶¶ 47-49.

After Tutor resigned, CNM treated Plaintiff's complaint as moot and as if nothing else was necessary. *Id.* ¶ 52 and 60. Plaintiff sent a letter of complaint to Garcia on July 11, 2015. She emailed Winograd on August 8, 2015, stating her concerns about Tutor's conduct, his future employment in education, safety for her and other students, her need for additional tutoring, and her emotional distress. On July 20, 2015, the director of the CNM Disability Resource Center told her in writing that he would work with Human Resources to make sure that Tutor did not receive a positive employment reference. *Id.* ¶¶ 53-54, and 58.

At some point, someone advised Plaintiff to get tutoring in a location other than the tutoring center. She received an incomplete in math, but she completed the class the next semester without support or assistance from CNM. Someone advised Plaintiff to use campus emergency phones if she felt unsafe, but the emergency phones were being removed. *Id.* ¶¶ 62-64. CNM did not give Plaintiff counseling or accommodate her tutoring needs. *Id.* ¶ 61. Plaintiff graduated from CNM in December 2015 and attends UNM full time. Plaintiff sees Tutor on the UNM campus, where he is employed. *Id.* ¶¶ 53-55, and 57. CNM did not have Title IX policies or grievance procedures or a Title IX coordinator. *Id.* ¶¶ 65-66.

Even assuming that these allegations of fact are true, which the CNM Defendants deny,

[9] This is the only reference to emails to Human Resources.

they are not adequate to state a claim for relief for violations of Title IX or Constitutional and federal statutory claims under § 1983.

ARGUMENT AND AUTHORITIES

In Count I, against CNM for violation of Title IX, Plaintiff fails to allege specific, plausible facts to show that CNM had notice of the sexual harassment, that it was deliberately indifferent to the sexual harassment after learning of it, that it was severe and pervasive, or that Plaintiff was denied any access to educational benefits. Count II, against all defendants except Tutor, fails because Plaintiff does not establish any violation of any of her constitutional or statutory rights. In addition, the CNM Defendants are protected from individual liability by qualified immunity, and the official-capacity claims are duplicative. Finally, punitive damages and pre-judgment interest are not available against state entities such as CNM as a matter of law.

I. Count I Should Be Dismissed Because CNM Did Not Violate Title IX.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, ...be subjected to discrimination under any education program or activity receiving Federal assistance." 20 U.S.C. § 1681(a). A school recipient of federal funds may be liable under Title IX for its own conduct in being deliberately indifferent to sexual harassment. *Rost ex rel KC v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008). Plaintiff must show that the district (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived her of access to the educational benefits or opportunities provided by the school. *Murrell v. School Dist. No. 1, Denver Colo.*, 186 F.3d 1238, 1246 (10th Cir. 1999); *accord Escue v. Northern Oklahoma College*, 450 F.3d 1146, 1155 (10th Cir. 2006) (applying test for teacher-student harassment).

Liability under Title IX is not analyzed by a negligence standard, but requires a showing

that the district "is deliberately indifferent to known acts of teacher-student discrimination." *Davis next friend of LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642-43 (1999). This analysis requires a showing that a school official who possesses the "requisite control over the situation had actual knowledge of, and was deliberately indifferent to, the alleged harassment." *Murrell*, 186 F.3d at 1247. *See also Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274, 290 (1998) (an appropriate person is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination). Although the Tenth Circuit has declined to name "job titles" that would or would not constitute an "appropriate person," the requirement that the official must have the authority to halt the known abuse is clear. *Murrell,* 186 F.3d at 1247. In *Ross v. University of Tulsa,* the Tenth Circuit affirmed the significance of avoiding labels and focusing on authority. 859 F.3d 1280 (10th Cir. 2017). The court cautioned that characterizing expanding the concept of "appropriate person" to those who are merely authorized to report discriminatory conduct, would "turn the deliberate-indifference standard into vicarious liability." *Id.* at 1290.

The deliberate indifference standard makes a district liable "only where it has made a conscious decision to permit sex discrimination in its programs, and precludes liability where the school district could not have remedied the harassment because it had no knowledge thereof or had no authority to respond to the harassment." *Murrell,* 186 F.3d at 1246. Deliberate indifference must be "clearly unreasonable in light of the known circumstances" and "must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." *Davis*, 526 U.S. at 645, 648-49 (internal punctuation omitted). *See also Rost,* 511 F.3d at 1123. Plaintiff must show that the district "exercises substantial control over both the harasser and the context in which the known harassment occurs." *Davis*, 526 U.S. at 645.

Actual knowledge and deliberate indifference. Until Plaintiff had met with Dean Garcia on May 26, 2015, and security was dispatched, CNM did not have actual knowledge of Plaintiff's "overly familiar and personal" behavior, Tutor's desire to be "more" than Plaintiff's friend, or his sexual intercourse with Plaintiff because she does not allege that she ever reported those concerns. Plaintiff learned from Tutor that he had lied to Crandall about their relationship, but she did not report that he had lied. The only allegations that might suggest that CNM had actual knowledge of the harassment before May 26th are the report to the two tutoring center supervisors (Coultas-Kay and Crandall) that were made several days after the incident in the cubicle and Plaintiff's attempt six weeks later to contact Human Resources and the Dean of Students.

Plaintiff's reports to Coultas-Kay and Crandall in April 2016 and her telephone message to an unnamed person in Human Resources are not reports to school officials or any other arguably appropriate person, and therefore do not establish notice to CNM for Title IX liability. It is not plausible to believe that these employees had the level of authority necessary to be considered an appropriate person. *Compare Murrell*, 186 F.3d at 1247 (highest-ranking administrator at high school was appropriate person) *and Rost*, 511 F.3d at 1119 (vague statements to school counselor did not create notice). Plaintiff's contention that these employees were school officials is, in fact, highly unlikely, given the size and administrative complexity of a large community college.[10] *See* Central New Mexico Community College, https://www.cnm.edu (providing links to departments, staff, courses, and the like). Plaintiff's contention that her reports to Coultas-Kay, Crandall, and Human Resources were to an "appropriate person" is inadequate as a matter of law. Coultas-Kay

[10] It is a matter of public record that in 2015, CNM had an enrollment of almost 26,000. It employed 358 full-time faculty, 726 part-time faculty, 912 full-time staff, and 115 part-time staff. The 2015 Organizational Chart suggests that human resource consultants and tutoring center supervisors are far from being school officials. *See Central New Mexico Community College Fact Book 2015-2016*, pp. 5, 67, and 75, attached hereto as Exhibit A.

and Crandall are not school officials and she does not allege any specific facts to support her conclusory allegations that she believed Coultas-Kay or Crandall could take corrective action, initiate an investigation, or suspend Tutor[11]. *See* Complaint ¶¶ 79, 83, 84, and 85. Even if Coultas-Kay and Crandall had a duty to convey Plaintiff's report to an appropriate person, that duty does not transform them into appropriate persons for Title IX liability. *Ross*, 859 F.3d at 1290. Although Plaintiff alleges that Coultas-Kay and Crandall knew or should have known that Tutor had an inappropriate relationship with her, Complaint ¶¶ 24 and 36, that allegation fails because it relies on a negligence standard and is unsupported by any specific allegations of fact. *See e.g.*, *Davis*, 526 U.S. at 642, and *Twombly*, 550 U.S. at 595.

Plaintiff's allegations as to her "report" to Human Resources are equally unavailing. She does not identify the person with whom or for whom she left the telephone message, so there is no specific allegation to support any contention that she gave notice to an appropriate person. She never alleges that she left a message for Karen Montoya; her first specific involvement was an interview after the investigation had begun. She cannot logically be "deliberately indifferent" at that stage. To the contrary, the Complaint establishes that after she was interviewed by HR Consultant Montoya, Tutor was issued a pre-termination notice and then resigned. Complaint ¶¶ 44, 47, and 48.

Ironically, although Coultas-Kay and Crandall were *not* appropriate persons for Title IX liability, Plaintiff's allegations show that both responded and may have reduced Tutor's harassment. Four days after the incident in the cubicle, Plaintiff told Coultas-Kay "of being violated by the Tutor" and of Tutor's ongoing harassment and threats. This allegation is vague' it

[11] Similarly, although Plaintiff alleges that Tutor threatened her with failing math, there are no allegations to show that he had any authority over her course grade, or that he was the only tutor available. In fact, the allegations that Coultas-Kay and Crandall were tutor supervisors suggests that there were other options available to her. *See, e.g.*, Complaint ¶¶ 28, 31, 78, and 83.

does not report exactly what Plaintiff told Coultas-Kay and does not make clear whether Plaintiff disclosed that Tutor had lied about their relationship, that she wanted better boundaries, that they had engaged in sexual intercourse, or when any of these things happened.[12] Plaintiff never denies that at one point, she treated Tutor as a friend. *See* Complaint ¶ 15. An allegation of "being violated" in a cubicle off a tutoring center, although clearly inappropriate, is simply not specific enough to establish constitutional or statutory liability by any of the CNM Defendants.

Rather than refusing to investigate the allegations, compare, *e.g.*, *Murrell*, 186 F.3d at 1247, Coultas-Kay listened to Plaintiff and called Crandall while Plaintiff was present. Crandall had already told Tutor to circulate more and to avoid spending all of his time with Plaintiff. He had also spoken to Tutor immediately after Plaintiff left the tutoring center in tears. Plaintiff does not know what Crandall told Tutor after she left, but it is implausible that he was anything but critical. *See* Complaint ¶¶ 27-28. Even if Crandall or Coultas-Kay could have done more, their response was not clearly unreasonable in light of the known circumstances – that Crandall had already spoken to Tutor about the incident.

This is not a situation where Plaintiff had made repeated complaints over months and years, but CNM chose to do nothing. Moreover, it would not be clearly unreasonable for Crandall to believe that the harassment had ended because Plaintiff did not complain again for six weeks. Even if Crandall and Coultas-Kay had known about the off-campus text messages, telephone calls, and notes, they could reasonably believe that this behavior was outside of their control. *See Rost*, 511 F.3d at 1121 (district could reasonably believe it did not have power to discipline students for behavior outside of school grounds and before students enrolled at the school). Plaintiff does not

[12] In paragraph 31 of the Complaint she says only that on "the following Monday, four days after the cubicle incident, later, ….she told Ms. Coultas-Kay of being violated by the Tutor the previous Thursday and of his ongoing harassment and threats."

allege that Crandall and Coultas-Kay's response made the harassment worse or increased her vulnerability.

Plaintiff's second attempt to report Tutor's misconduct, and her first report to an appropriate person, was on Wednesday, May 20, after Tutor continued to send text messages and visited her home. This attempt consisted of leaving a "voice message" with an unidentified person at Human Resources and sent an email message to Dean Garcia.[13] Complaint ¶¶ 41-42. Although the telephone message was never returned, when Plaintiff went to Garcia's office without an appointment, he responded appropriately and had her file a formal complaint with campus security. Plaintiff was interviewed by Human Resources on June 9, CNM issued a Pre-Termination Notice, and Tutor resigned on June 11. *Id.* at ¶¶ 43-44, 47-48. Although Plaintiff does not allege any other specific facts about the investigation, other than her interview with Montoya, CNM's response was not deliberately indifferent or clearly unreasonable if it led to Tutor's resignation three weeks later. Significantly, her Complaint is silent about any in-person harassment after April 6, when she spoke to Coultas-Kay and any harassment at all after May 26, after her formal complaint. CNM's response was effective and appropriate.

Plaintiff alleges that CNM's response was deliberately indifferent because it took the position, after Tutor's resignation, that the complaint was moot. Complaint ¶¶ 60 and 104. Although she continued to raise concerns about Tutor's conduct, his future employment in education, her safety, her need for tutoring, and her emotional distress, her concerns were not

[13] This court may also take judicial notice of the CNM academic calendar for 2015, attached as Exhibit B. https://www.cnm.edu/calendars/documents/2014-2015-academic-calendar.pdf. A court "may take judicial notice of the contents of an agency's website." *Crespo-Gutierrez v. Resendiz Ramirez*, No. 16–cv–01028–GPG, 2016 WL 9441427, at *1 n.2 (D. Colo. Sept. 23, 2016), *aff'd sub nom. Crespo-Gutierrez v. Ramirez*, 691 Fed. Appx. 521 (10th Cir. 2017) *citing N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n. 22 (10th Cir. 2009) (taking judicial notice of information on "[t]he websites of two federal agencies"). This calendar shows that spring semester ended on May 7, 2015. Break continued until classes resumed on May 26. Thus, Plaintiff's complaint to Coultas-Kay was during the semester, but she did not attempt to make any further reports until close to the end of semester break. Any delays in receiving or returning messages are entirely reasonable.

addressed. Complaint ¶ 52. She never received a report of the investigation's outcome or was notified that she could get tutoring without encountering Tutor. *Id.* ¶ 104. These allegations do not establish deliberate indifference merely because she believes that CNM possibly could have taken more aggressive action. *See Escue,* 450 F.3d at 1155 (school administrators need not engage in particular disciplinary action and victims do not have a right to seek particular remedial demands). Further, Plaintiff does not allege that CNM's inaction after Tutor resigned caused her to undergo additional harassment or made her liable or vulnerable to additional harassment. *See Rost,* 511 F.3d at 1123-24. It was, of course, not clearly unreasonable for CNM to believe that the issue had been fully resolved or that it could not share with Plaintiff the results of a personnel investigation. Even if the results of the investigation had substantiated her allegations, CNM could not discipline a former employee, it could not control over Tutor's conduct in the future, it could not publicize Plaintiff's concerns about Tutor, it could not control other employers' decisions, and it could not blackball Tutor in the educational community. Plaintiff never alleges that she reported the harassment to the police.

Severe, Pervasive, and Objectively Offensive Conduct. CNM does not dispute that Tutor's actions described in the Complaint are objectively offensive. His most offensive actions -- grabbing Plaintiff's breast and forcing her hand onto his crotch during a tutoring session in a cubicle – took place before she reported his misconduct to Coultas-Kay and Crandall – and were not repeated. This one incident cannot be pervasive harassment. *See Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052, 1082 (D. N.M. 2010) ("a single attack, by definition, cannot be pervasive"). The sexual intercourse took place at Tutor's home, an area not subject to CNM's control; Plaintiff does not allege anything about the timing or context, so it is impossible to determine if the intercourse was consensual or part of the harassment. In any event, the intercourse

occurred before Plaintiff made any report whatsoever to CNM. Although the number of text messages and telephone calls alleged in the complaint could be pervasive harassment, Plaintiff does not allege much specific factual content to support her conclusion that they were severe and objectively offensive. They indicate that he has her address, wants to see her, and wants to have sexual intercourse with her. Complaint ¶ 38. She does not, however, provide more than these conclusory allegations.

Deprivation of Access to School Resources. Plaintiff alleges that Tutor's misconduct deprived her of access to the benefits of CNM's tutoring program. Complaint ¶ 77. This allegation is wholly conclusory and contradicted by other, more specific allegations. For example, that Plaintiff still had access to tutoring is shown by her allegation that she had to "purposely avoid [Tutor] to obtain still needed tutoring." *Id.* ¶ 37. Although she rejects other suggestions, such as using a different location for math tutoring, CNM was attempting to work with her and meet her needs. *Id.* ¶ 62. Finally, her December 2015 graduation from CNM shows that she was not deprived of its educational resources. *See Id.* ¶¶ 9 and 55. Plaintiff never alleged that she had to miss school, *see Schaefer*, 716 F. Supp. 2d at 1083, became a danger to herself, was hospitalized, or became homebound, *see Murrell*, 186 F.3d at 1248-49. She chose not to take advantage of tutoring after Tutor left, but that was not a result of any action or inaction attributable to CNM. Although she claims her graduation was "endangered," Complaint ¶ 103, she never claims it was delayed, she graduated in December 2015, and is enrolled at UNM. *Id.* ¶ 9.

Other Allegations. Plaintiff alleges that CNM did not have any Title IX policies or grievance procedures in place. Complaint ¶ 66. Although this allegation is contradicted by her allegations that CNM's policies are unreasonable, *see Id.* ¶¶ 95-96, (policy of reporting sexual harassment to security is unreasonable), it is legally irrelevant to her Title IX claim. Failure to

comply with federal regulations regarding grievance procedures does not establish actual notice and deliberate indifference. *Gebser,* 524 U.S. at 291-92. [14]

As Plaintiff has failed to state a claim for violation of Title IX, Count I should be dismissed.

II. Count II Should Be Dismissed Because Neither CNM nor Defendants Crandall, Coultas-Kay, Garcia, and Winograd Violated Plaintiff's Civil Rights.

In Count II, Plaintiff asserts a § 1983 claim against all of the defendants except Tutor. She contends that Tutor's sexual harassment was a deprivation of her right to equal protection and her right to be free from sexual discrimination under Title IX. Complaint ¶¶ 122 and 127. She alleges that CNM is liable because of a policy of not reasonably investigating and ending teacher-on-student sexual harassment, and that Coultas-Kay, Crandall, Montoya, and Garcia are individually liable for failing to take appropriate action in response to her reports of sexual harassment. She also contends that Coultas-Kay, Crandall, Montoya, Garcia, and Winograd are liable in their official capacities. *Id.* ¶¶ 111, 117, 127, and 129.

Section 1983 does not create substantive rights, but instead creates a remedy for violation of a person's constitutional or federal statutory rights. *Schaefer*, 716 F. Supp. 2d at 1062. To establish a claim under § 1983, plaintiff must establish that she was deprived of a constitutional or statutory right by someone acting under the color of state law. *Id.* at 1063. There is no *respondeat superior* liability under § 1983, but a defendant must be personally involved in the alleged wrongful conduct, either directly or through actual knowledge and acquiescence. *Id.* "[S]upervisors are not liable under § 1983 unless there is an affirmative link between the constitutional deprivation and the supervisor's exercise of control or direction, his personal participation, or his failure to supervise." *Id.* (citations and quotations omitted). On the other

[14] Although a Motion to Dismiss must assume the veracity of the facts as pled, CNM disputes this allegation.

hand, "mere negligence or mistake resulting in uneven application of the law is not an equal protection violation." *Id.* at 1067 (citations omitted)

Although CNM does not dispute that in general, a plaintiff may use § 1983 to assert an equal protection claim for sexual harassment, it is not correct that Plaintiff may use § 1983 to create an individual liability claim under Title IX. "Title IX does not authorize a cause of action against individuals; rather, it creates a right enforceable against educational institutions only." *Schaefer*, 716 F. Supp. 2d at 1068. *See also Williams v. Bd. of Regents of the Univ. of Georgia*, 477 F.3d 1282, 1300 (11th Cir. 2007) (noting that individual school officials may not be sued under Title IX; only recipient of federal funds can be held liable for Title IX violations). To hold otherwise "would permit an end run around Title IX's explicit language limiting liability to funding recipients." *Id.*

CNM is not liable under §1983. In order to show that CNM is liable under the Equal Protection Clause for sexual harassment, Plaintiff must show that that the harassment was the result of municipal custom, policy, or practice. *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 257-58 (2009) (comparing standards of liability for sexual harassment under Title IX and § 1983). Her Equal Protection claim, therefore, will require a showing of "(1) a continuing, widespread, and persistent pattern of misconduct by the state; (2) deliberate indifference to or tacit authorization of the conduct by policy-making officials after notice of the conduct; and (3) a resulting injury to the plaintiff." *Rost*, 511 F.3d at 1124–25 (reasoning that this test is appropriate where plaintiff alleges that district has custom of acquiescing to student-on-student harassment).

Plaintiff cannot meet this standard. She alleges that Tutor harassed her from sometime in February 2015 until the end of May 2015, and that her first report (to Coultas-Kay, who was not a policy-making official) was in early April 2015. Although she claims that CNM failed to respond

appropriately, lacked appropriate polices, and failed to complete its investigation, these allegations are wholly conclusory. She does not allege any specific facts that could plausibly establish either widespread misconduct or deliberate indifference or tacit authorization of the harassment. Rather, Crandall instructed Tutor to circulate and not focus on Plaintiff and he spoke to Tutor after the cubicle incident; Coultas-Kay met with Plaintiff and placed a call to Crandall; that when Plaintiff complained to Dean of Students Garcia, he explained the official reporting procedure and dispatched campus security; that Montoya interviewed Plaintiff; that CNM issued a Pre-Termination Notice; and that Tutor resigned. CNM also had policies against tutors having sexual relationships with students and required that teachers report allegations of sexual harassment. Complaint ¶¶ 31-32, 43, 44, 48, 84, and 85. These allegations do not show a continuing, widespread, and persistent pattern or misconduct, or a persistent pattern of failing to respond to allegations of sexual harassment.

Furthermore, Plaintiff does not allege that any of these defendants had final policy-making authority or that there was any custom of sexual harassment that would support institutional liability. Plaintiff alleges that the language in Tutor's pre-termination notice, which referred to an "ongoing pattern or questionable conduct and extremely poor judgment," *Id.* 49, meant that CNM knew or should have known that it should have terminated Tutor's employment or that he had a past history of inappropriate, predatory conduct with female students *Id.* 50-51, but that allegation is mere speculation. She provides no facts that would indicate what CNM should have known, why it should have known, or to identify any past inappropriate, predatory conduct with female students – or anyone else. These conclusory allegations are not supported by a single factual allegation, and do not suffice to establish even a mere possibility of liability.

None of the CNM individual Defendants' actions showed deliberate indifference to

Plaintiff's situation after notice of Tutor's conduct. Plaintiff does not allege any specific facts to show that either Coultas-Kay or Crandall were policy-making officials, but even if they were, they had nothing concrete to report until April 6, when Plaintiff reported the cubicle incident to Coultas-Kay. Plaintiff does not know what happened then, except that she knew that Crandall had been mis-informed about the nature of their relationship and that he had already spoken to Tutor, immediately after she left the tutoring center in tears, and that he spoke to Coultas-Kay two days later. These few allegations are not plausible allegations of a policy or practice of deliberate indifference or conscious acquiescence in sexual harassment. Notably, Plaintiff does not allege that Tutor engaged in any more groping or physical contact or even that she saw him again on the CNM campus. When Plaintiff met with Garcia six weeks later, Garcia arranged for her to file a complaint with campus security. Montoya participated, leading to Tutor's resignation. These allegations do not meet the standard for any institutional liability.

And CNM's decision to end the investigation does not support Plaintiff's allegation that CNM had a policy of not investigating and ending teacher-on-student harassment. In fact, this decision acknowledges (1) CNM actually began an investigation and (2) it ended with Tutor's resignation, so CNM did not have any control over his behavior. Although Plaintiff alleges that CNM's failure to complete an investigation contributed to allowing Tutor to become employed at UNM, that allegation is wholly speculative and conclusory. There is no allegation she ever reported him to the police, and she must concede that CNM does not control UNM's or any other employer's hiring decisions. And any insinuation that CNM should have completed the investigation and taken action to prevent Tutor's future employment is disturbing, at best.

Individual liability under § 1983. Plaintiff seeks to hold Coultas-Kay, Crandall, Montoya, and Garcia individually liable on the basis that each failed to take appropriate action in response

to Plaintiff's reports of Tutor's harassment. Complaint ¶ 117. In order "to hold a supervisory employee liable in his or her individual capacity for sexual harassment conducted by a third party, the plaintiff must show 'deliberate indifference to known sexual harassment.'" *Schaefer*, 716 F. Supp. 2d at 1067. Deliberate indifference is more than "mere negligence," and requires Plaintiff to "state facts sufficient to allege 'defendants actually knew of and acquiesced in [the third-party's] behavior." *Id.* (citations omitted).

Plaintiff does not allege any such facts. At best, Crandall inquired about Tutor's relationship with Plaintiff, was misinformed, and instructed Tutor to circulate and not spend all his time with Plaintiff. Crandall again responded by speaking to Tutor when Plaintiff left the tutoring center in tears. Crandall called to Plaintiff, asking her to return, but she did not. Four days later, Coultas-Kay listened to Plaintiff, attempted to contact Crandall, and later assured Plaintiff that Crandall was aware of the situation. None of these facts show either acquiescence in known sexual harassment or deliberate indifference.

Montoya's actions also do not establish deliberate indifference. Plaintiff alleges that she left a "voice message" with Human Resources, but did not receive a return call. This allegation does not make clear whether this was a recorded message on a general line, a recorded message on Montoya's line, or simply a message with another employee. Complaint ¶ 41. Although Plaintiff alleges that her call to Montoya was "completely ignored," Complaint ¶ 91, this allegation is not entirely consistent with her allegation that she "called Human Resources." Complaint ¶ 41. Furthermore, she does not allege any factual allegations regarding the content of the message or allege any facts to show that Montoya received the message and deliberately chose not to return it or acquiesced in the alleged harassment.[15] In fact, on June 9, Montoya later met with Plaintiff and

[15] In fact, a quick review of the May 2015 calendar and the TVI academic calendar shows that May 20 was the Wednesday before the Memorial Day weekend and that CNM was not in session from May 8 through May 25, 2015.

her friend, listened to her story, received copies of documents, and took notes. *Id.* ¶ 44. Although Montoya did not allow Plaintiff to review her notes from the meeting as promised, *Id.* ¶ 45, this could have been simple forgetfulness or a recognition that allowing a complainant to review an investigator's notes for accuracy is not appropriate. It is not a specific fact showing deliberate indifference or conscious acquiescence in sexual harassment.

Garcia's individual actions were also not deliberately indifferent. He told Plaintiff that he did not receive the May 20 e-mail, and Plaintiff does not allege any facts that suggest he deliberately ignored it. Several days later, when Plaintiff went to Garcia's office, he explained that she had to file the complaint with campus security. Within a month, Tutor was gone from CNM. Complaint ¶¶ 42, 43, 47, and 48.

None of these individuals did anything that violated any of Plaintiff's constitutional or statutory rights. Any attempt to blame these individual defendants for CNM's decision to discontinue the investigation after Tutor's resignation is equally futile. Even assuming that CNM had the authority to investigate and discipline a former employee, Plaintiff does not allege any specific facts regarding who made the decision to discontinue the investigation, what that investigation might have shown, how its completion might have made a difference, what it might have revealed, or how the failure to complete the investigation caused a violation of any of her rights. This vague allegation simply does not meet federal pleading standards.

Official capacity claims. Plaintiff seeks to hold Coultas-Kay, Crandall, Montoya, Garcia, and Winograd liable in their official capacity for Tutor's sexual harassment. Any such allegations

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Although Plaintiff does not allege these facts in her Complaint, "[t]he Court may take judicial notice of the contents of an agency's website." *Crespo-Gutierrez v. Resendiz Ramirez*, No. 16–cv–01028–GPG, 2016 WL 9441427, at *1 n.2 (D. Colo. Sept. 23, 2016), *aff'd sub nom. Crespo-Gutierrez v. Ramirez*, 691 Fed. Appx. 521 (10th Cir. 2017) *citing N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009) (taking judicial notice of information on "[t]he websites of two federal agencies").

are duplicative of the claims against CNM and should be dismissed for the reasons explained above. *See Board of County Commissioners v. Brown*, 520 U.S. 397, 403 (1997).

Characterizing CNM's or any of these individual's actions as deliberately indifferent is not plausible and defies common sense. The claims should be dismissed.

QUALIFIED IMMUNITY

The claims against Coultas-Kay, Crandall, Montoya, and Garcia as individuals should be dismissed on the basis of qualified immunity. "Qualified immunity 'protects federal and state officials from liability for discretionary functions, and from the unwarranted demands customarily imposed upon those defending a long-drawn-out lawsuit.'" *Schaefer*, 716 F. Supp. 2d at 1070. These issues are best resolved at the earliest possible stage of the litigation. *Id.* If the defendant asserts the defense of qualified immunity, the plaintiff must show that "(1) the defendant's actions violated his or her constitutional or statutory rights and (2) that the right was clearly established at the time of the alleged unlawful activity." *Id.* (citation omitted). "In assessing whether the right was clearly established, the court asks whether the right was sufficiently clear that a reasonable person in the defendant's shoes would understand that what he or she did violated that right." *Id.*

Although CNM does not dispute that Plaintiff has a clearly established right to be free from sexual harassment, she has not alleged any actions specific to any of these Defendants that would violate that right. All of these Defendants (except Winograd, who is named only in her official capacity)[16] responded in some way to Plaintiff's complaints. Even if Plaintiff would have preferred a different response, her preference does not establish that these defendant's actions could violate any established statutory right. Montoya would have no reason to believe that any delay in returning Plaintiff's call would violate her constitutional or statutory rights or that Plaintiff

[16] If Plaintiff asserts that Winograd is, in fact, also sued in her individual capacity, the claims against her should be dismissed and she is entitled to qualified immunity for the same reasons as the other CNM Defendants.

had any right to review her investigation notes. Crandall and Coultas-Kay would have no reason to believe that their response to the cubicle incident might violate her constitutional or statutory rights or that Crandall's response to Plaintiff's tearful exit from the tutoring center would implicate the same rights.

Even if in retrospect, these Defendants might have acted differently, Plaintiff does not allege any specific facts that can plausibly support the conclusion that they were deliberately indifferent or consciously acquiesced in Tutor's known sexual harassment. Mere negligence is not enough. *See Murrell*, 186 F.3d at 1250 (plaintiff "must state facts sufficient to allege 'defendants actually knew of and acquiesced in'" the tutor's behavior).

PUNITIVE DAMAGES AND PREJUDGMENT INTEREST

Plaintiff is not entitled to punitive damages or pre-judgment interest against CNM or the CNM defendants. Punitive damages are not recoverable against a public entity or official for any tort under the TCA. *See* NMSA 1978, § 41-4-19(C) (specifically precluding the award of punitive damages against a public entity); *see also Lopez, Sr. v. Las Cruces Police Dept.*, 2006-NMCA-074, ¶ 13, 139 N.M. 730 (citing TCA for rule that "no judgment 'against a governmental entity or public employee' shall include punitive damages or pre-judgment interest")). *Accord Torrance County Mental Health Program, Inc. v. New Mexico Health and Environment Dept.*, 1992-NMSC-026, ¶¶ 12-13, 113 N.M. 593 (recognizing that public policy as established in New Mexico is that awarding punitive damages against a governmental entity ultimately penalizes the taxpayers, who had no part in the commission of the tort).

It is also well established that punitive damages are not recoverable against public entities in Section 1983 litigation. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981); *Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1307 (10th Cir. 2003); *Fernandez v. Taos Mun. Sch. Bd. of Educ.*,

403 F. Supp. 2d 1040, 1043 (D.N.M. 2005). Accordingly, Plaintiff cannot seek punitive damages under 42 U.S.C. § 1983 against CNM or individual defendants Crandall, Coultas-Kay, Montoya, or Garcia. Because the claims against the CNM Individual Defendants in their individual capacities should be dismissed for failure to state a claim and because they are entitled to qualified immunity, Plaintiff is not entitled to any punitive damages.

CONCLUSION

For all of these reasons, Defendants CNM, Randolph (Randall) Crandall, Kristin Coultas-Kay, Karen Montoya, and Katherine (Katharine) Winograd request that all claims against them be dismissed with prejudice.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of February, 2018, I filed the foregoing electronically through the CM/ECF system, which caused counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Elizabeth L. German