UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 21-CV-81099-CANNON/REINHART

D.P. *et al.*,

Plaintiffs,

v.

SCHOOL BOARD OF PALM BEACH COUNTY, *et al.*,

Defendants.
_____/

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS (ECF No. 45)

Defendants School Board of Palm Beach County, Florida ("School Board"), Superintendent Dr. Donald E. Fennoy, II, Police Chief Daniel Alexander, Officer Jose Cuellar, Officer Howard Blochar, Officer Johnny Brown, Officer Jordan Lauginiger (collectively with the School Board, "School Board Defendants"), and Officer Joseph M. Margolis, Jr. move to dismiss the Plaintiff's First Amended Complaint ("FAC") for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons discussed below, it is **RECOMMENDED** that the Motion to Dismiss be **GRANTED** in part and **DENIED** in part.

Judge Cannon referred the Motion to Dismiss to me for appropriate disposition. ECF No. 46. I have reviewed the FAC (ECF No. 31), Defendant's Motion to Dismiss (ECF No. 45), Plaintiff's Response (ECF No. 50), and Defendant's Reply (ECF No. 54). This matter is now ripe for decision.

BACKGROUND

The Plaintiffs in this case are five students under the age of eighteen enrolled in the School District of Palm Beach County (D.P., E.S., L.A., W.B., and M.S., collectively, "Student Plaintiffs"), their respective legal guardians (P.S., J.S., A.B., L.H., S.S., and R.S., collectively, "Parent Plaintiffs"), Disability Rights of Florida ("DRF") and Florida State Conference of the National Association for the Advancement of Colored People ("FL NAACP"). The factual background given below has been drawn from allegations in the FAC which, on a motion to dismiss, the court must credit as true. *See Instituto de Prevision Militar v. Merill Lynch*, 546 F.3d 1340, 1342 (11th Cir. 2008).

The Student Plaintiffs were ages eight to eleven years old at the time of the incidents that led to this lawsuit. Each has been diagnosed with varying disabilities including Autism Spectrum Disorder ("ASD"), Attention Deficit Hyperactivity Disorder ("ADHD"), Dyslexia, Emotional/Behavioral Disability, and Post-Traumatic Stress Disorder ("PTSD"). ECF No. 31 ¶¶ 71–192. Each child was taken from school by a School Board police officer for involuntary psychiatric examination, pursuant to the Florida Mental Health Act, Fla. Stat §§ 394.451–.47892 (otherwise known as the "Baker Act"). ECF No. 31 ¶ 1. Plaintiffs seek damages for the harm caused to the individual Plaintiffs and for injunctive relief to "prevent future harm to all Plaintiffs and their members and constituents." *Id*. ¶ 8.

Plaintiffs allege that the Student Plaintiffs, and by association, the Parent Plaintiffs, were discriminated against in violation of (1) the Americans with

Disabilities Act ("ADA"), (2) Section 504 of the Rehabilitation Act, and (3) the Florida Educational Equity Act ("FEEA") (Counts I–V). Some Plaintiffs also raise several 42 U.S.C. § 1983 Procedural Due Process Claims for (1) deprivation of parental right to custody and control, (2) violation of right to have control over medical decision-making under the Fourteenth Amendment, (3) violation of Due Process Right to be free from unreasonable seizures under the Fourth and Fourteenth Amendments, and (4) excessive force under the Fourth and Fourteenth Amendments (Counts VI–XVIII).

The School Board Defendants move to dismiss the FAC pursuant to Fed. R. Civ. P. 12(b)(6) on the following grounds[1]: (1) the FAC constitutes a shotgun pleading in violation of Fed. R. Civ. P. 8(a) and 10(b), (2) all claims against the School Board Defendants should be dismissed because Fla. Stat. § 394.459 (10) provides a good faith defense and Plaintiffs have failed to allege that the School Board Defendants acted in bad faith[2]; (3) the FAC does not state a cause of action under the Rehabilitation Act, the ADA, or the FEEA because the FAC does not contain sufficient facts to establish

[1] Officer Margolis is employed by the City of Lantana and not the School Board, thus, he makes separate arguments as to why specific counts against him should be dismissed. The School Board Defendants' raise their arguments on pages 1–27 of the Motion to Dismiss and Officer Margolis' arguments can be found on pages 27–40.

[2] Plaintiffs are correct that this argument is an affirmative defense, not a basis for dismissal at the motion to dismiss stage. An affirmative defense must be established by a defendant, not negated by a plaintiff. *Garcia-Bengochea v. Carnival Corp.*, 407 F. Supp. 3d 1281, 1286 (S.D. Fla. 2019 (J. King). Furthermore, an affirmative defense is not properly raised by a motion to dismiss but should be pled as part of an answer. *Sunny Corral Mgmt., LLC v. Value Dining Inc.*, No. 08-60072-CIV, 2008 WL 5191466, at *2 n. 2 (S.D. Fla. Dec.10, 2008) (J. Moreno). Thus, I need not reach the merits of the School Board Defendants' argument at this stage.

that the Student Plaintiffs were Baker Acted *solely* because of their disability, (4) the FAC fails to satisfy the elements under *Monell* that are required in order to hold the School Board Defendants are liable for the Section 1983 claims, (5) the individual officer Defendants are entitled to qualified immunity and therefore are not liable under Section 1983, and (6) Superintendent Fennoy and Chief Alexander ("Official Defendants") should be dismissed because their inclusion in their "official capacity" is redundant. ECF No. 45 at 1–27.

Officer Margolis moves to dismiss the FAC pursuant to Fed. R. Civ. P. 12(b)(6) on the following grounds: (1) the FAC constitutes a shotgun pleading, (2) Plaintiffs D.P and P.S. are the only plaintiffs who have standing to bring claims against Officer Margolis, (3) P.S. (D.S.' grandmother) failed to state a claim for deprivation of procedural due process rights because (a) she received notice that D.P. was being taken for evaluation and (b) even if she had not received notice, the threat of imminent harm justified Officer Margolis' actions, (4) Officer Margolis is entitled to qualified immunity on Counts IX and XIV, (5) the FAC fails to establish a claim for unlawful seizure in violation of the Fourth Amendment because, under the circumstances, Officer Margolis' actions were reasonable, and (6) the FAC fails to establish a claim for excessive force in violation of the Fourth Amendment because Officer Margolis' actions were objectively reasonable in light of the specific circumstances confronting him. ECF No. 45 at 27–40.

STANDARD ON MOTION TO DISMISS

A pleading in a civil action must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy the Rule 8 pleading requirements, a claim must provide the defendant fair notice of plaintiff's claim and the grounds upon which it rests. *See Swierkiewicz v. Sorema N.A.*, 534 U. S. 506, 512 (2002). While a claim "does not need detailed factual allegations," it must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Ashcroft v. Iqbal*, 556 U. S. 662, 678 (2009) (explaining that the Rule 8(a)(2) pleading standard "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation"). Nor can a claim rest on "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U. S. at 678 (quoting *Twombly*, 550 U. S. at 557 (alteration in original)).

On a motion to dismiss under Rule 12(b)(6), the Court must view the well-pleaded factual allegations in a claim in the light most favorable to the non-moving party. *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1246 (11th Cir. 2016). Viewed in that manner, the factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the claim are true (even if doubtful in fact). *Twombly*, 550 U.S. at 555 (citations omitted). The Supreme Court has emphasized that "[t]o survive a motion to dismiss a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 570.

When evaluating a motion to dismiss under Rule 12(b)(6):

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. at 679. Factually unsupported allegations based "on information and belief" are not entitled to the assumption of truth. *See Scott v. Experian Info. Sols., Inc.*, No. 18-CV-60178, 2018 WL 3360754, at *6 (S.D. Fla. June 29, 2018) (J. Altonaga) ("Conclusory allegations made upon information and belief are not entitled to a presumption of truth, and allegations stated upon information and belief that do not contain any factual support fail to meet the *Twombly* standard.").

DISCUSSION

I. STANDING

A federal court is obligated to inquire into subject matter jurisdiction sua sponte whenever it may be lacking. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). Whether a plaintiff has standing under Article III, which limits the cases or controversies a federal court can entertain, directly implicates a federal court's subject matter jurisdiction, and is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims. *Bochese v. Town of PonceInlet*, 405 F.3d 964, 974 (11th Cir. 2005) (citations and internal quotation marks omitted). Only Officer Margolis challenged FL NAACP's standing in

his written motion, nevertheless, I found it necessary to review FL NAACP's standing to bring claims against all Defendants. ECF No. 45 at 30–31.[3]

I ordered FL NAACP to provide the Court with supplemental briefing on the limited issue of whether this Court has Article III standing to adjudicate FL NAACP's claims against Defendants. ECF No. 71. I allowed Defendants to file a singular response brief. ECF No. 72.

"Where … a case is at the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element" necessary to establish standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). An organization has standing to represent its members' rights "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *See United Food & Commercial Workers Union Local 751 v. Brown*

[3] FL NAACP clarifies in its supplemental brief that it "is not seeking to bring claims against the individual defendants and hence does not assert that it has standing to sue Officer Margolis or any other individual defendants." ECF No. 71 at 3. Since FL NAACP has conceded that it is not bringing any claims against Officer Margolis or any other individual defendants, I need not address Officer Margolis' arguments seeking to dismiss FL NAACP's claims against him for lack of standing. However, as will be discussed in more detail, I find that the way the FAC is written now, makes it unclear whether FL NAACP is bringing claims against the individual Defendants or not. *See, e.g.,* Count VI ("P.S., J.S., A.B., L.H., and FL NAACP against ALL defendants except Officer Lauginiger . . .). Thus, if the Court determines that Plaintiffs should be given an opportunity to amend the FAC, then that issue will need to be addressed by Plaintiffs.

Group, Inc., 517 U.S. 544, 552–53 (1996) (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

An individual plaintiff has standing under the Constitution's "case or controversy" requirement where the plaintiff has: (1) suffered an "injury in fact" that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). At least one member of the association must meet the individual standing requirements. *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1344 (11th Cir. 2005).

As to the first *Hunt* factor, FL NAACP argues that Parent Plaintiff L.H. is a member of FL NAACP, "which is all that is required for organizational standing" (citing *Warth*, 422 U.S. at 511). ECF No. 71 at 3. FL NAACP contends that any other parent member of the FL NAACP with children in the Palm Beach County public school system could bring suit because the risk of deprivation of the rights of FL NAACP members with children in the school district is both imminent and substantially likely to occur. *Id.* at 3–4.

FL NAACP argues that it satisfies the second *Hunt* factor because "ending the illegal use of involuntary examination under the Baker Act by SDPBC, which disproportionately harms Black children, is 'germane to the organization's purpose'" of "ending the disproportionate use of exclusionary discipline, which includes arrest, suspension, expulsion, and other forms of school discipline, on Black children in

Florida and spends a significant portion of its organizational resources on this priority." *Id.* at 6 (quoting *Friends of the Earth v. Laidlaw Env't Serv.*, 528 U.S. 167, 181 (2000)).

Finally, FL NAACP argues that the individual participation of the FL NAACP members in this lawsuit is not necessary because FL NAACP seeks only injunctive relief, not damages. *Id.* at 9.

The School Board Defendants seem to only take issue with the first *Hunt* factor, arguing that FL NAACP has not pled associational standing for past harm because it has not sufficiently alleged that any of its members have standing in their own right to assert a claim for the violation of the parents/children's rights. ECF No. 72 at 2. For one, the FAC does not allege that any FL NAACP members have an injury in fact. *Id.* (citing *Granite State Outdoor Advert., Inc. v. City of Clearwater, Fla*, 351 F.3d 1112, 1116). And furthermore, even if an injury was properly pled, the School Board Defendants argue that the FAC does not properly plead that it is likely that the injury would be redressed by a favorable decision. *Id.* at 3. Since Fla. Stat. 394.459(10) provides an adequate remedy at law for damages, there is no non-speculative basis for prospective injunctive relief. *Id.*

As an initial matter, I do not find that FL NAACP has properly pled that Parent Plaintiff L.H. is a member of FL NAACP. That fact is not alleged in the FAC. Therefore, I will not consider it. *Halmos v. Bomardier Aerospace Corp.*, 404 Fed. Appx. 376, 377 (11th Cir. 2010) (holding that the permissible scope of a 12(b)(6) motion to

dismiss encompasses "the complaint, attachments to the complaint, and matters of public record").

I also do not find that FL NAACP has pled that any of its other members would otherwise have standing to sue in their own right because the FAC does not allege an injury in fact. FL NAACP argues that its members' injury is one that will occur in the future. The threat of future injury must be "real and immediate—as opposed to merely conjectural or hypothetical." *Wooden v. Bd. of Regents of Univ. Sys. of Geo.*, 247 F.3d 1262, 1284 (11th Cir. 2001). FL NAACP argues that the threat is real and immediate because "[e]very member of the FL NAACP with children in SDPBC public schools may, on any school day, have their children taken away from school in handcuffs to a locked psychiatric facility without their consent." ECF No. 71 at 3. As evidence of the imminence of the threat, FL NAACP cites to the FAC's statistic that "before remote instruction began, SDPBC was on track to initiate involuntary psychiatric examination of students more than 400 times by the end of the academic year." *Id.* at 4 (citing ECF No. 31 ¶ 197).[4]

I decline to find that FL NAACP has demonstrated a threat of injury that is "real and immediate—as opposed to merely conjectural or hypothetical." The FAC is silent as to the number of FL NAACP members who have children enrolled in the Palm Beach County public school system. Knowing that information is crucial to

[4] Per the School District of Palm Beach County's website, 167,378 students are enrolled in Palm Beach County-operated schools.
https://www.palmbeachschools.org/about_us/district_information

determining how "real and immediate" the threat of injury is. For example, FL NAACP argues that its members with children enrolled at SDPBC are at risk every day of their parental rights being violated if their child can be taken for involuntary examination without parental consent. But, if out of 167,378 students enrolled in SDPBC, none of their parents are members of the FL NAACP, then that risk is eliminated, even if 400 student Baker Acts were initiated in one school year

Furthermore, FL NAACP argues that its members' children who are enrolled in SDPBC are at risk every day of their right to be free from unreasonable seizure being violated if they are taken for involuntary examination. However, the Court's analysis, as detailed below, of this particular injury hinges on the fact that the named Student Plaintiffs are diagnosed with a disability, *not* a mental illness, and the School Board's incorrect policy is what caused that injury. However, with regard to the FL NAACP members, the FAC does not allege whether any of them have children who are diagnosed with a disability. If there are no FL NAACP members whose children are enrolled in SDPBC and have been diagnosed with a disability, then the risk of injury is severely minimized.

In conclusion, I find that the FAC fails to identify crucial facts needed to establish that "the requisite injury really has occurred or will occur in the future to members of the [FL NAACP]." *Pub. Citizen v. F.T.C.*, 869 F.2d 1541, 1550–51 (D.C. Cir. 1989). Accordingly, the facts as alleged in the FAC are insufficient to plead that FL NAACP members would otherwise have standing to sue in their own right. Therefore, I find that FL NAACP lacks standing to bring its claims against the School

Board and should be dismissed from this lawsuit. As discussed later, however, if the Court should grant leave to amend the FAC, I recommend that the FL NAACP be given one final opportunity to establish associational standing.

II. SHOTGUN PLEADNG

Defendants argue that the FAC should be dismissed as a shotgun pleading because it asserts "multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." ECF No. 45 at 5, 29. Because there are multiple plaintiffs and multiple defendants, some of whom never interacted, Defendants argue that it is not clear whether each Plaintiff asserts a claim against each Defendant, or if only certain Plaintiffs are asserting claims against certain Defendants.

Plaintiffs' Response argues that this is a complex case and in order to avoid excessive counts, they combined claims by multiple Plaintiffs against multiple Defendants into single counts where the facts and legal issues were common, as is allowed by Fed. R. Civ. P. 8(a) and 10(b). They also point to the Appendix attached to the FAC for clarification of who is being sued for what. ECF No. 50 at 10. Plaintiffs also explain in a footnote that "each Plaintiff is stating a claim against the School Board, superintendent, police chief, and the individual Plaintiffs are stating claims against the individual officers involved in their examinations." *Id.* at 10 n. 8.

Finally, FL NAACP clarifies in its supplemental brief that FL NAACP is not seeking to bring claims against the individual defendants "and hence does not assert

that it has standing to sue Officer Margolis or any other individual defendant." ECF No. 72 at 3.

This is not the most common type of "shotgun pleading" where "each count also adopts the allegations of all preceding counts." *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1321 (11th Cir. 2015). However, a complaint still constitutes a shotgun pleading where it commits "the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." *Id.* at 1323.

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "And though Rule 10(b) requires a pleader to state her claims in numbered paragraphs, 'each limited as far as practicable to a single set of circumstances,' that Rule sets forth 'a flexible standard that turns on whether pleading multiple claims in one count advances or hinders the interests of clarity.'" *Doe v. School Board of Miami-Dade Cty.*, 403 F. Supp. 3d 1241, 1257 (S.D. Fla. 2019) (J. Ungaro) (citing *Cont'l 332 Fund, LLC v. Albertelli*, 317 F. Supp. 3d 1124, 1139 (M.D. Fla. 2018)). "[N]otice is the touchstone of the Eleventh Circuit's shotgun pleading framework." *Albertelli*, 317 F. Supp. 3d at 1138. "The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Weiland*, 792 F.3d at 1323.

With respect to the FAC, I find that Counts VI, VII, VIII, and XIII do not provide the Defendants with adequate notice of the claims brought against them. Both Officer Margolis' portion of the Motion to Dismiss as well as Plaintiffs' need to twice clarify whether specific plaintiffs are bringing claims against specific individual defendants (*see* ECF Nos. 50 at 10 n. 8 and 71 at 3) proves that the Defendants have had difficulty knowing what they were alleged to have done (or not done) and why they are allegedly liable for doing (or not doing) it. Similarly, I did not understand, even after reviewing the Appendix attached to the FAC, who was on the hook for each claim until it was clarified by the Plaintiffs in their subsequent pleadings.

For example, Count VI is a Section 1983 Procedural Due Process claim for deprivation of parental right to custody and control. It is brought by all Parent Plaintiffs (except one) and FL NAACP against "all defendants" (except one officer). It is unclear whether all Plaintiffs are bringing the claim against all of the School Board Officers, or whether each specific Plaintiff is directing the claim to the specific officer who took their child for the evaluation (i.e., P.S. against the School Board, the Official Defendants, and Officer Margolis specifically; J.S. against the School Board, the Official Defendants, and Officer Cuellar specifically; A.B. against the School Board, the Official Defendants, and Officer Blocher specifically; and L.H. against the School Board, the Official Defendants, and Officer Brown specifically).

To cite another example, Count XIII reads as follows: "D.P., E.S., L.A., W.B., M.S., DRF, and FL NAACP against All Defendants: § 1983 Claim for Excessive Force under the Fourth and Fourteenth Amendments." ECF No. 31 at 63. The Appendix

states that Count XIII is brought by D.P., E.S., L.A., W.B., M.S., DRF, and FL NAACP against "All Defendants." *Id*. at 79. Taking that at face value leads the Court to believe that FL NAACP is bringing a Section 1983 excessive force claim against "all defendants," even the individual officer defendants. However, their clarification in the supplemental brief makes clear that they are *not* bringing any claims against the individual officer defendants.

In conclusion, I find that because Counts VI through VIII and XIII do not give the Defendants adequate notice of the claims against them and the grounds upon which each claim rests, these specific counts should be dismissed without prejudice to Plaintiffs realleging them more clearly should they be granted leave to amend.[5]

III. SECTION 1983 CLAIMS

Section 1983 creates a private right of action against persons who, under color of law, subject a plaintiff to a deprivation of federally-protected rights. 42 U.S.C. § 1983. To state a Section 1983 claim, a plaintiff must allege that the defendant acted under color of state law and that the defendant's actions deprived the plaintiff of a federal right. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978). "Section 1983 is no source of substantive federal rights. Instead, to state a Section 1983 claim, a plaintiff must point to a violation of a specific

[5] Although I recommend dismissing Counts VI through VIII and XIII without prejudice as shotgun pleadings, I will discuss the merits of these counts in the interest of a thorough analysis for the District Court's review.

federal right." *Whiting v. Traylor*, 85 F.3d 581, 583 (11th Cir.1996) (citing *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (emphasis added).

A. *Section 1983 Claims Against the School Board*

The School Board is a unit of local government.[6] A municipality or other local government may be liable under Section 1983 if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. *See Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692 (1978). A plaintiff may only hold a local-government entity liable under Section 1983 for its own illegal acts; injuries caused solely by its employees are not attributable to the government entity. *Id*. at 665–83. Hence, a plaintiff must prove that "action pursuant to official municipal policy" caused his injury. *Id*. at 691. That is the essence of a *Monell* claim.

A plaintiff has two methods by which to establish a municipal policy or custom under *Monell*: identify either (1) an officially promulgated policy or (2) an unofficial custom or practice shown through the repeated acts of a final policymaker for the municipality. *Grech v. Clayton Cty., Ga.*, 335 F.3d 1326, 1329–30 (11th Cir. 2003). Rarely can a plaintiff point to a municipality's officially-adopted policy of permitting a particular constitutional violation. Most plaintiffs must show that the municipality has an unofficial custom or practice of permitting the violation and that the custom or

[6] *See Arnold v. Bd. of Educ. of Escambia Cty. Ala.*, 880 F.2d 305, 315 (11th Cir. 1989), *overruled on other grounds by Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

practice is the "moving force" behind the constitutional violation. *Doe*, 403 F. Supp. 3d at 1264 (citing *Grech*, 335 F.3d at 1330).

A "custom" is "a practice that is so settled and permanent that it takes on the force of the law." *McDowell v. Brown*, 392 F.3d 1283, 1290 (11th Cir. 2004) (quoting *Wayne v. Jarvis*, 197 F.3d 1098, 1105 (11th Cir. 1999)). A "custom" must be "so pervasive as to be the functional equivalent of a policy adopted by the final policymaker." *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir. 1994). Actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. *Id.* at 1345 (quoting *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986)).

A "[m]unicipal policy or custom may [also] include a failure to provide adequate training if the deficiency 'evidences a deliberate indifference to the rights of its inhabitants.'" *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1293 (11th Cir. 2009) (quoting *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)). "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of Comm'rs v. Brown*, 520 U.S. 397, 410 (1997).

> In order to establish deliberate indifference, the "plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Lewis*, 561 F.3d at 1293 (internal quotation omitted). A municipality may be put on notice if either (1) the municipality is aware that a pattern of constitutional violations exists, and nevertheless fails to provide adequate training, or (2) the likelihood for a constitutional violation is so high that the need for training would be obvious. *Id.*

Hoti v. Barkley Master Assoc., Inc., No. 18-cv-80484, 2019 WL 11660558, at *4 (S.D. Fla. Mar. 26, 2019) (J. Middlebrooks).

The first determination is whether the FAC sufficiently alleges that the School Board's actions deprived the plaintiffs of a federal right. *West*, 487 U.S. at 48. *See also Tomberlin v. Clark*, 1 F. Supp. 3d 1213, 1230 (N.D. Ala. 2014) ("The first element requires the Court to determine whether the plaintiff has pleaded both the existence of a constitutionally-protected interest and a deprivation of such an interest.") (citing *Arrington v. Helms*, 438 F.3d 1336, 1348 (11th Cir. 2006)). Plaintiffs allege that four separate federal rights were violated: (1) parental right to custody and control of one's child; (2) parental right to control over medical decisions of one's child; (3) Fourth and Fourteenth Amendment freedom from unnecessary seizure; and (4) Fourth and Fourteenth Amendment freedom from excessive force. I will discuss each in turn.

1. Parental Right to Care, Custody, and Control of Child (Count VI) and Parental Right to Control Over Medical Decisions of Child (Count VII)

    i. *Deprivation of a Federally Protected Right* [7]

[7] With regard to Counts VI and VII specifically, it is important to note that Parent Plaintiffs allege a *procedural* due process violation for deprivation of parental right to custody and control of their children and control over medical decision-making, which arises under the substantive due process clause. ECF No. 31 at 51 and 53. However, in a Section 1983 claim, the alleged wrong is not the state actor's deprivation of a person's constitutionally protected interest. It is the deprivation of that interest without due process of law. *See Zinermon v. Burch, 494 U.S. 113, 126 (1990)*. Such a cause of action arises, not when one suffers the deprivation of a constitutional right, but when the state actor fails to provide due process. *Id.*

Plaintiffs are correct that a parent's substantive due process right in the care, custody, and control of her children is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923)). The FAC alleges that each of the Parent Plaintiffs are the parents and/or guardians of their respective Student Plaintiffs. ECF No. 31 ¶¶ 13 (P.S. is D.P's grandmother and guardian), 15 (J.S. is E.S.'s mother), 17 (A.B. is L.A.'s mother), 19 (L.H. is W.B.'s mother), 21 (S.S. is M.S.'s mother and R.S. is M.S.'s father). I find that P.S., J.S., A.B., and L.H. have, for purposes of surviving a Motion to Dismiss, demonstrated the existence of a constitutionally protected interest.

Subsumed in the right to care, custody, and control of one's child is the right to make medical decisions for one's child. "[N]either the state nor private actors, concerned for the medical needs of a child, can willfully disregard the right of parents to generally make decisions concerning the treatment to be given to their children. '[P]arents have the right to decide free from unjustified governmental interference in matters concerning the growth, development and upbringing of their children.'" *Bendiburg v. Dempsey*, 909 F. 2d 463, 470 (11th Cir. 1990) (quoting *Arnold v. Board of Educ. of Escambia County Ala.*, 880 F.2d 305, 317 (11th Cir.1989), *overruled on other grounds by, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993)).

Plaintiffs must also show that they were deprived of this protected liberty interest without due process of law. *Arrington*, 438 F.3d at 1348. The FAC specifically

alleges that each of the Student Plaintiffs were escorted by one of the Officer Defendants from their classroom or school principal's office to a mental health facility for an involuntary examination under the Baker Act. ECF No. 31 ¶¶ 79, 91, 96, 107, 112, 115, 135, 142, 148, 162, 171, 182, 185 and 187. Although some of the Parent Plaintiffs were called and told that their child was being taken for an involuntary examination, not a single Parent Plaintiffs was given an opportunity to decline the involuntary examination in favor of taking their child home or otherwise removing them from the care of the school or police officers. For example, in one instance, a Parent Plaintiff (A.B.) was called by school staff when her eight-year-old (L.A.) was being Baker Acted. *Id*. at ¶ 144. A.B. did not have a car so she walked to the school and asked to see her child and take her home, but the school refused. *Id*. The FAC alleges that A.B. "told the school staff that she would come and take care of L.A., and that L.A. did not need to be hospitalized." *Id*. ¶ 145. Still A.B. was not allowed to take L.A. home or even see or speak to her. Instead, Officer Blocher deemed A.B. "uncooperative" and told her she would be allowed to see L.A. at the hospital. *Id*.

The state may, under certain civil statutes, constitutionally remove a child from their parents' custody without consent or a court order only in "true emergencies" where "there is probable cause to believe the child is threatened with imminent harm." *Doe v. Kearney*, 329 F.3d 1286, 1294–95 (11th Cir. 2003). Based on the facts alleged in the FAC, I do not find that a "true emergency" existed that would justify an involuntary Baker Act without parental consent. The FAC describes children with disabilities becoming very upset, verbally aggressive, and sometimes even physically

violent. However, in each of the four scenarios at issue in these counts, it also alleges alternative actions the School Board not only could have taken to de-escalate the situation but *knew* it could have taken.[8]

Reading the FAC in the light most favorable to Plaintiffs, it alleges that D.P., a nine-year old, became upset when a teacher told him he could not use the computer. ECF No. 31 ¶ 80. In his anger, D.P. yelled, threw stuffed animals, "made no overt action to harm himself", and verbally threatened to shoot a teacher but did not have access to a weapon of any kind. *Id*. at ¶ 84, 87–88. Viewed in the light most favorable to the Plaintiffs, no true emergency existed to justify Baker Acting D.P. without first obtaining parental consent, especially when, during previous episodes, the school had used several effective strategies for calming D.P. down such as allowing him to take a brief walk or allowing him to sit quietly by himself. *Id*. ¶ 81. If the school did not feel comfortable allowing him to walk by himself or with a staff member, he certainly could have been placed in a secure, supervised location to wait for his mother to arrive and give consent to an involuntary examination.

The FAC alleges that E.S., a nine-year old, became upset and struck his board-certified behavioral analyst ("BCBA") in the chest without injury to either party and hit a window but did not cause damage. *Id* ¶ 108. He was subsequently able to self-soothe and remained seated with his arms across his chest and breathing deeply. *Id*. ¶ 109. It was at that point that the officer arrived, tackled E.S. to the ground, and

[8] Counts VI and VII are only brought by four of the Parent Plaintiffs: P.S., J.S., A.B., and L.H.

handcuffed him. He then took E.S. for involuntary examination despite the fact that (a) "the tantrum behavior had ceased and was under control," (b) the BCBA did not think the involuntary examination was appropriate, and (c) the school was aware that E.S.'s mother could successfully de-escalate E.S. when he became upset. *Id.* ¶¶ 106, 113, 126. Again, I find that there was not a true emergency justifying the Baker Act when E.S. had already calmed down and even if he had not, the school was aware of other previously successful strategies for de-escalation.

The FAC alleges that L.A., an eight-year old, became upset over a misconstrued drawing and ran out of the classroom but was intercepted by the principal and taken to the principal's office. *Id.* ¶¶ 133–34. L.A. made several troubling statements including that she did not want to go home, was suffering from abuse, wanted her mom to take her to church, and calling the principal a "devil" who had "eyes like Momo." *Id.* ¶ 136. The officer also reported that L.A. tried to leave the principal's office, was ripping up pieces of paper and putting them into her mouth, although L.A. claims she was doing so to wet the paper and use it as a blending tool for her drawings and her comments were also similarly misconstrued. *Id.* ¶ 137–38. L.A. did not make any statements threating to harm herself.

The mobile response team responded to the principal's office to evaluate L.A., but notably recommended that she be sent for counseling, *not* Baker Acted. *Id.* ¶ 141. The FAC raises alternative methods that would have ameliorated any risk of imminent threat of harm to L.A. and others: A.B. could have been allowed to meet with the assistant principal who had successfully calmed her down previously, A.B.

could have been allowed to speak with her mother, or A.B. could have been allowed to sit in a room (without access to any dangerous weapons) and draw while being supervised until her mother could arrive. None of these options involve Baker Acting L.A. without her mother's consent.

Finally, the FAC alleges that W.B., a ten-year old, became upset with another student and began throwing chairs and at some point "inadvertently came in physical contact" with a staff member. *Id.* ¶ 162. W.B.'s mother, L.H., was contacted and was told that W.B. would be taken for involuntary examination, but when she arrived, he was still at the school handcuffed and sitting in a chair. *Id.* ¶ 164. The FAC alleges that W.B. was still upset but remained seated and did not attempt to get up or flee. *Id.* The officer reported that W.B. threatened suicide by jumping off of a building, that he threatened to kill people with a gun, and that L.H. admitted that W.B. had looked up ways to kill people on the internet. *Id.* ¶ 167. W.B. alleges in the FAC that he did not say he wanted to commit suicide by jumping off of a building, but that he wanted to jump over a gate. *Id.* ¶ 168. L.H. denies ever saying that W.B. was researching ways to kill people and in fact states that she searched all devices at the home and did not find any record of those searches. *Id.*

Viewing the FAC in the light most favorable to L.H. and W.B., the situation surely was tense and perhaps alarming, but by the time L.H. arrived at the school, W.B. was sitting in a chair handcuffed, not posing an imminent threat of danger to himself or others. There was no true emergency to justify Baker Acting him over his mother's protests. Furthermore, *even if* W.B. had not been calm and restrained, the

school was aware of other tactics it could have used before involuntary examination such as calling W.B.'s counselor in for assistance or waiting for the mobile response team to respond and assess W.B.'s needs. *Id.* ¶¶ 158, 165, 169.

Each one of these four incidents, although surely stressful and alarming, do not rise to the level of a true emergency where "there is probable cause to believe the child is threatened with imminent harm" because there were ample alternatives to Baker Acting these children before seeking approval from their parents. Thus, I find that the School Board's actions cannot be justified by a "true emergency" and P.S., J.S., A.B., and L.H. have pled a plausible claim that their fundamental right to care, custody, and control of their children was violated.

School Board Defendants argue that Parent Plaintiffs P.S., J.S., A.B., and L.H. cannot state a claim for a procedural due process violation where an adequate post-deprivation remedy is available. ECF No. 45 at 6 (citing *Hudson v. Palmer*, 468 U.S. 517 (1984) holding that where a post-deprivation remedy was available, deprivation of property interest did not violate due process). School Board Defendants point to Florida Statute 394.459(10) as the adequate post-deprivation remedy. It states,

> Any person who violates or abuses any rights or privileges of patients provided by this part is liable for damages as determined by law. Any person who acts in good faith in compliance with the provisions of this part is immune from civil or criminal liability for his or her actions in connection with the admission, diagnosis, treatment, or discharge of a patient to or from a facility. However, this Section does not relieve any person from liability if such person commits negligence.

Fla. Stat. § 394.459(10). Put differently, Plaintiffs have a post-deprivation remedy in that they can, under Florida law, raise a claim of bad faith on the part of Defendants. Otherwise, Defendants are entitled to immunity from civil and criminal liability.

I disagree with the School Board Defendants that Fla. Stat. § 394.459(10) is an adequate post-deprivation remedy. "[U]nder certain extraordinary circumstances, a parent's custodial rights may be temporarily terminated without notice, provided a meaningful post-deprivation remedy is . . . available." *Bendiburg*, 909 F.2d at 467. However, post-deprivation remedies are not favored and "are constitutionally inadequate unless pre-deprivation remedies are unavailable or impracticable." *Novak v. Cobb County-Kennestone Hosp. Authority*, 849. F. Supp. 1559, 1568 (N.D. Ga. 1994). Thus, I must determine whether Plaintiffs have alleged sufficient facts in the FAC that call into question the need—real or perceived—to forego pre-deprivation procedures. *Bendiburg*, 909 F.2d at 468. As thoroughly described above, I find that the FAC sufficiently alleges facts to support the conclusion that there were adequate pre-deprivation remedies available that were practicable. Put differently, I do not find that in these four specific instances, it was "impracticable" for the school board to keep D.P., E.S., L.A., and W.B. in a safe and secure location where they would be monitored until their guardian was contacted and able to give consent to have their child committed for involuntary examination. It follows then that the post-deprivation remedy available to Parent Plaintiffs P.S., J.S., A.B., and L.H is constitutionally inadequate.

In conclusion, I find that the FAC plainly describes multiple scenarios of legal guardians being denied the opportunity for consultation before their child was taken to a facility for involuntary examination without a true emergency justification and without an adequate post-deprivation remedy. These plausible deprivations of Parent Plaintiffs P.S., J.S., A.B., and L.H.'s right to the "care, custody, and control" of their child are sufficient to overcome a motion to dismiss. *Troxel*, 530 U.S. at 65.

Regarding the parental right to make medical decisions for one's child, I note that parents can only be deprived of their rights to make medical decisions for their children if there is a true or reasonably perceived emergency. *Bendiburg*, 909 F.2d at 468 ("The validity of the [state consent to Baker Acting a child without a parent's consent] . . . for constitutional . . . purposes, turns on whether such an emergency existed, or was thought to exist by the state employees, so as to make constitutional what would be unconstitutional in the absence of a medical emergency . . . .").

For the same reasons discussed above, the FAC sufficiently alleges that there was no "true emergency" that would justify the deprivation. Thus, I find that the FAC is sufficient to establish that the Parent Plaintiffs P.S., J.S., A.B., and L.H. were deprived of their fundamental liberty interests in making medical decisions for their children without due process of law.

ii. *Official Policy, Custom, or Failure to Train that Caused the Deprivation*

Plaintiffs argue that "[t]his is the 'rare' case in which a municipality 'ha[s] an officially-adopted policy of permitting a particular constitutional violation.'" ECF Nos.

50 at 23 (citing *Grech*, 335 F.3d at 1330); 31 ¶ 296. As evidence of the official policy, Plaintiffs point to the School Board's "Baker Act Decision Tree Protocol," a bulletin written for the district principals by Deputy Superintendent Keith Oswald and administered on August 10, 2018. ECF No. 31 ¶ 206. The FAC alleges that this "Baker Act Bulletin" states that the "[c]riteria for an involuntary exam are that the individual: presents a danger to self or others; and/or appears to have a mental illness as determined by a licensed mental health professional." *Id*. The Baker Act Bulletin does not clarify that in the context of the Baker Act, a developmental disability does not constitute a "mental illness." *Id*. ¶ 209.

With regard to parental contact, the FAC alleges that the Baker Act Bulletin states that school officials should "make every effort to include the parents' guardians in all phases of the process," and "contacting parents is 'recommended'." *Id*. ¶¶ 208, 211, 296.

> First, after learning of a potential Baker Act situation, the tree indicates that a principal should contact the parents but does not suggest that they be involved further nor that their involvement might change the course of the situation. Second, the Decision Tree provides that after a school police officer or licensed staff has initiated an exam under the Act, a "School Designee contacts and informs parent(s)/legal guardian(s) and informs them that the decision has been made to BA and is being transported."

Id. at ¶ 211. Defendants do not address this argument in their Motion to Dismiss or Reply.

One way to establish a "policy," is via a "statement of the policy by the municipal corporation, and its exercise." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823

(1985). Another way, however, to determine whether the policy is that of the municipality, is to ascertain whether it is created and executed "by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy . . . ." *Monell*, 436 U.S. at 694. The FAC alleges that the person who distributed the Baker Act Bulletin, Keith Oswald, is the Deputy Superintendent. Taking all of Plaintiffs' asserted facts as true and making all reasonable inferences in their favor, under *Monell*, I find that the School Board would be liable for Mr. Oswald's actions, not because he is an employee, but because his actions of distributing a bulletin to all of the school district's principals may fairly be said to represent official policy. Furthermore, the FAC alleges that "SDPBC has not publicly disavowed use of the Baker Act Decision Tree or publicly released any updated or different Baker Act policy." ECF No. 31 ¶ 212. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1290–91 (11th Cir. 2004) (holding the school board liable under 1983 for an official policy directive that was disseminated by the school superintendent because he had "final decision-making authority").

Furthermore, this official policy was distributed on August 10, 2018, prior to any of the involuntary examinations at issue in this case. Although the official policy recommends contacting parents, it does not *require* the parents be contacted prior to involuntary examination. It does not require that parents be given an opportunity for review before their child is taken for involuntary examination. In fact, according to the FAC, the only time a school official is required to contact the parents is *after* involuntary examination has been initiated. Thus, I find that the FAC includes facts

sufficient to allege that the August 10, 2018 Baker Act Bulletin was an official policy of the School Board that caused the deprivation of Parent Plaintiffs P.S., J.S., A.B., and L.H.'s fundamental right to the care, custody, control, and medical decision making for their children without due process of law.[9]

In conclusion, I find that Counts VI and VII have pled a plausible claim under Section 1983 for Parent Plaintiffs P.S., J.S., A.B., and L.H. Therefore, I recommend that the School Board Defendant's Motion to Dismiss be DENIED in that respect.

2. Fourth Amendment Freedom from Unnecessary Seizure (Counts VIII–XII)

Counts VIII–XII are brought by Student Plaintiffs D.P., E.S., L.A., W.B., as well as by DRF and FL NAACP against the School Board for violation of their right under the Fourth (and Fourteenth) Amendment to be free from unreasonable seizure. I find the FAC pleads plausible claims for Fourth Amendment violations based on unreasonable seizure, and that those violations were caused by the School Board's official policy.

i. *Deprivation of a Federally Protected Right*

The Fourth Amendment, incorporated against the states by the Fourteenth Amendment, *Bates v. Harvey*, 518 F.3d 1233, 1243 (11th Cir. 2008), provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects,

[9] Because I find that the School Board had an "official policy" that promulgated the violations of Parent Plaintiffs P.S., J.S., A.B., and L.H.'s federal right to care, custody, control, and medical decision making of their children, I need not address whether there was also an unofficial custom or practice or failure to train through deliberate indifference that caused the deprivation.

against unreasonable searches and seizures, shall not be violated." U.S. Cont. amend. IV. The Fourth Amendment's prohibition against unreasonable searches and seizures applies to civil as well as criminal investigations. *Lenz v. Winburn*, 51 F.3d 1540, 1548 n. 7 (11th Cir. 1995). It is well established that the Fourth Amendment applies to searches and seizures conducted by school authorities. *N.J. v. T.L.O.*, 469 U.S. 325, 337 (1985); *see also Ziegler v. Martin Cty. Sch. Dist.*, 831 F.3d 1309, 1319 (11th Cir. 2016) (noting that the "applicable reasonableness principles guide" the analysis of searches and seizures).

To show a violation of the Fourth Amendment's protection against an illegal seizure, Plaintiffs must include in the FAC facts which sufficiently allege that there was no probable cause to detain the Student Plaintiffs under Florida's Baker Act. *Khoury v. Miami-Dade Cnty. Sch. Bd.*, 4 F.4th 1118, 1126 (11th Cir. 2021). The Court must evaluate the totality of the circumstances to determine whether probable cause existed. *Id.* For an officer to detain someone properly under the Baker Act, adult or child, the officer must have "reason to believe that the person has a mental illness and because of . . . her mental illness . . . [t]here is a substantial likelihood that without care ore treatment the person will cause serious bodily harm . . . to herself or others in the near future, as evidenced by recent behavior." Fla. Stat. § 394.463(1)(b)(2). If a reasonable officer, based on the information before them, believes that the person before them meets the criteria for involuntary examination, then the officer, without violating the Fourth Amendment, can take that person "into custody and deliver the person or have . . . her delivered to an appropriate, or the nearest facility . . . for

examination." Fla. Stat. § 394.463(2)(a)(2). "Vague notions about what a person might do—for example, a belief about *some* likelihood that without treatment a person *might* cause *some* type of harm at *some* point—does not meet this standard." *Khoury*, 4 F.4th at 1126 (emphasis in original).

Assessing the totality of the circumstances as alleged in the FAC regarding the detention of Student Plaintiffs D.P., E.S., L.A., and W.B., I find that, for several reasons, probable cause did not exist to justify detention of these four Student Plaintiffs.

Initially, I find Plaintiffs' arguments regarding the "mental illness" component to be persuasive. When viewing the facts in the light most favorable to D.P., E.S., L.A., and W.B., the record does not support a finding that these officers would have reason to believe that any of these children had a mental illness. Section 394.455(29) of the Florida Mental Health Act specifically defines "mental illness" as

> an impairment of the mental or emotional processes that exercise conscious control of one's actions or of the ability to perceive or understand reality, which impairment substantially interferes with the person's ability to meet the ordinary demands of living. For the purposes of this part, *the term does not include a developmental disability as defined in chapter 393*, intoxication, or conditions manifested only by dementia, traumatic brain injury, antisocial behavior, or substance abuse.

The FAC alleges, and Defendants do not contest, that D.P., E.S., L.A., and W.B. have each been diagnosed with varying developmental disabilities. Three of them qualify for "Exceptional Student Education" and have been placed in specialized classrooms. ECF No. 31 ¶ 12–18, 73, 104, 157. Developmental disability is not synonymous with

mental illness and, under the circumstances presented to each of the officers, they would not have a reasonable basis to believe that four young children who were acting out in their classrooms were mentally ill.

Furthermore, even if the officers had probable cause to believe that D.P., E.S., L.A., and W.B. suffered from mental illness, I do not find there was probable cause for the officers to believe that because of a mental illness (that they didn't have), that there was a substantial likelihood that without care or treatment these Student Plaintiffs would have caused serious bodily harm to themselves or others in the near future. Fla. Stat. § 394.463(1)(b)(2). Again, viewing the totality of the circumstances as they are alleged in the FAC, I have before me four children under ten years old, each of whom was very upset and became physically aggressive, verbally aggressive, or both. However, the children did not have weapons or dangerous objects, did not have imminent access to weapons or any item that could be said to cause "serious bodily injury", they did not have a meaningful opportunity or access to carry out their threats, and did not make many overt acts to harm themselves. Furthermore, in some of these cases, the mobile response team even recommended *against* the involuntary commitment, further highlighting the lack of perceived danger of serious bodily harm.

Although each of the officers in these four scenarios certainly may have had reason to believe that there was some likelihood that without treatment, D.P., E.S., L.A., and W.B., could *potentially* cause some type of harm at some point, that does not satisfy the probable cause standard. *Khoury*, 4 F.4th at 1126 (emphasis in original). Thus, *even if* the officers had probable cause to believe that D.P., E.S., L.A., and W.B.

had a mental illness, I do not find there was probable cause for the officers to reasonably believe that there was a substantial likelihood that without treatment, these four students would have caused serious bodily harm to themselves or others in the near future. Fla. Stat. § 394.463(1)(b)(2).

In conclusion, I find that the FAC alleges sufficient facts to establish that the officers did not have probable cause to detain D.P., E.S., L.A., and W.B. under the Baker Act. Thus, for purposes of this Section 1983 claim, I find the FAC has pled a plausible deprivation of D.P., E.S., L.A., and W.B.'s fundamental right to be free from unreasonable seizure under the Fourth and Fourteenth Amendments.

ii. *Official Policy, Custom, or Failure to Train that Caused the Deprivation*

Plaintiffs argue that the Baker Act Bulletin is evidence of the School Board's "official policy" of permitting students to be Baker Acted without sufficient probable cause, thus causing the violation of their Fourth Amendment right to be free from illegal seizure. ECF Nos. 50 at 23 (citing *Grech*, 335 F.3d at 1330); 31 ¶ 296. The FAC describes the "Baker Act Bulletin" as stating that the "[c]riteria for an involuntary exam are that the individual: presents a danger to self or others; and/or appears to have a mental illness as determined by a licensed mental health professional." *Id*. The Baker Act Bulletin does not clarify that in the context of the Baker Act, a developmental disability does not constitute a "mental illness." *Id*. ¶ 209.

The Baker Act Bulletin misstates the law. The way it is written makes the mental illness component an option instead of a necessary requirement. But the Baker

Act requires both elements—imminent danger and mental illness—collectively, not alternatively. This is notable because, as stated above, the school officials and officers had these students involuntarily committed despite the fact that they did not have a mental illness. When viewed in the light most favorable to Plaintiffs, it is plausible that the school administrators and teachers, when faced with the decision of whether to Baker Act a student, based their decision on what they read in the Baker Act Bulletin, which told them they only needed one of the two Baker Act elements, when in reality, the law required both.

Furthermore, the Baker Act Bulletin does not sufficiently describe the "danger" element. It states simply that the child must "present a danger to self or others" when the statute actually requires there be a "substantial likelihood" that the child will cause "serious bodily harm . . . to herself or others in the *near future*." Fla. Stat. § 394.463(1)(b)(2) (emphasis added). The Baker Act Bulletin completely obviates the requirements that the "danger" be (1) of serious bodily harm, (2) substantially likely to occur, and (3) in the near future. Instead, it leads teachers, administrators, and officers to incorrectly believe that *any* danger at all that *could* happen at *some* point, is sufficient to involuntarily commit a student. I find that the misstatement of the law in the Baker Act Bulletin that was administered to school staff is sufficient to establish, for purposes of surviving a motion to dismiss, that an official policy of the

School Board caused the deprivation of D.P., E.S., L.A., and W.B.'s fundamental right to be free from unreasonable seizure under the Fourth and Fourteenth Amendments.[10]

In conclusion, I find that Counts VIII through XII have pled a plausible claim under Section 1983 for Student Plaintiffs D.P., E.S., L.A., and W.B. Therefore, I recommend that the School Board Defendant's Motion to Dismiss be DENIED in that respect.

3. Fourth Amendment Freedom from Excessive Force (Counts XIII–XVIII)

Counts XIII–XVIII are brought by all five Student Plaintiffs (D.P., E.S., L.A., W.B., and M.S.) as well as by DRF and FL NAACP against the School Board for violation of their right under the Fourth and Fourteenth Amendments to be free from excessive force. The basis of the excessive force claims is the officers' use of handcuffs to restrain the Student Plaintiffs before and during transport for involuntary examination. I find that the FAC contains sufficient facts to properly plead under *Monell* that the School Board failed to properly train its officers, therefore subjecting the Student Plaintiffs to deprivation of their rights to be free from excessive force.

i. *Deprivation of a Federally Protected Right*

The Student Plaintiffs have invoked a federally protected right. In *Graham v. Connor*, the Court made clear that freedom from excessive force is a right protected by the Fourth Amendment:

[10] As discussed previously, I find the FAC alleges sufficient facts to establish that the Baker Act Bulletin constitutes an official policy of the School Board.

> "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. . . . In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct. . . . Where, as here, the excessive force claim arises in the context of a [detention] of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person. . . . Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.

Graham, 490 U.S. 386, 394 (1989).[11]

Claims that law enforcement used excessive force in the course of a "seizure" of a free citizen are analyzed under the Fourth Amendment and its "reasonableness" standard. *Id*. at 395. To determine what is "reasonable" requires looking at the totality of the circumstances in each particular seizure and evaluating it based on what would be *objectively* reasonable for an officer on the scene faced with the particular circumstances of that seizure, "rather than with the 20/20 vision of hindsight." *Id*. at

[11] Unlawful seizure and excessive force are distinct claims. *See Humphrey v. Mabry*, 482 F.3d 840, 846 (6th Cir. 2007). However, when the seizure itself is unlawful, a claim that the force used was excessive is subsumed in the seizure analysis because any amount of force is excessive. *M.D. v. Smith*, 504 F. Supp. 2d 1238, 1248 (M.D. Ala. 2007) (citation omitted). Since I have already found that the seizure of four out of the five Student Plaintiffs was unreasonable, the use of handcuffs on those four Student Plaintiffs is per se excessive. However, in the interest of a thorough analysis, I will discuss the reasonableness of the use of force for all five Student Plaintiffs.

396–97 (citing *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968)). Some factors to consider when evaluating reasonableness include (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396. The Eleventh Circuit has added to that list of inquiries "(4) the need for force to be applied; (5) the amount of force applied in light of the nature of the need; and (6) the severity of the injury." *Patel v. City of Madison, Ala.*, 959 F.3d 1330, 1339 (11th Cir. 2020) (citing *Lee v. Ferraro*, 284 F.3d 1188, 1197–98 (11th Cir. 2002); *Sebastian v. Ortiz*, 918 F.3d 1301, 1308 (11th Cir. 2019)).

D.P. (Counts XIII and XIV)

Applying the *Graham* factors first to D.P's interaction with law enforcement, the severity of the "crime" committed by him—assault and battery—weighs in his favor. While D.P. threw a stuffed animal that hit the assistant principal and threatened physical violence towards a teacher, this was a very young child (nine years old), and his actions are not that of a typical "assault" or "battery" that would warrant physical restraint.

The second factor, whether D.P. posed an immediate threat to the officers or others, also weighs in D.P.'s favor. Officer Margolis' report, attached to the FAC as an exhibit (ECF No. 31-1), describes the events from Officer Margolis' point of view. In addition to the throwing of stuffed animals and yelling verbal threats, Officer Margolis notes that D.P. jumped on a desk and "place[d] his hands on" a container "that held pens and scissors." ECF No. 31-1 at 4. Officer Margolis removed the container right

away. *Id*. The report does not mention D.P. having access to any other dangerous items. D.P. was subsequently handcuffed for thirty minutes during transport to the facility.

I find that these facts are not sufficient to establish that D.P. was an immediate threat to the officer or to others at the time he was handcuffed. By that time, D.P. had been separated from other students, did not have access to any dangerous objects or weapons, and was sitting in the back of a locked police car being transported to a secure facility. ECF No. 31 ¶¶ 82, 96, 96, 325. Furthermore, even considering D.P.'s actions prior to transport, I fail to see how his actions of throwing stuffed animals and yelling verbal threats can be considered a serious physical threat from an unarmed nine-year old child.[12]

The third factor, whether D.P. was actively resisting arrest or attempting to evade arrest by flight, also weighs in D.P.'s favor. Officer Margolis' report states that at some point during the altercation D.P. stated, "I will run out of this school and get myself murdered." ECF No. 31-1 at 4. There are no allegations of actual attempts to flee to accompany D.P.'s threat to run away from the school.

Quickly addressing the three additional factors discussed in Eleventh Circuit case law, (4) the need for force to be applied; (5) the amount of force applied in light of

[12] The age and stature of these children is highly relevant to this analysis. *See Hoskins v. Cumberland Cnty. Bd. of Educ.*, No. 2:13-cv-15, 2014 WL 7238621, at *8 (M.D. Tenn. Dec. 17, 2014); *Williams v. Nice*, 58 F.Supp.3d 833, 838 (N.D. Ohio 2014) (in analyzing reasonableness of officer's actions in seizing student, the Court must consider the size and stature of the parties involved).

the nature of the need; and (6) the severity of the injury, I find these too weigh in D.P.'s favor. As stated, I don't see a need for any force to be applied to D.P. while he was being transported in the back of a locked and secure police vehicle without access to any weapons and without evidence of an intent to injure himself. Thus, the amount of force applied—handcuffs for thirty minutes—was not proportional to the need. Finally, D.P. alleges that he suffered severe emotional trauma from the use of excessive force. ECF No. 31 ¶¶ 100–101. The School Board argues that the injury caused by the alleged excessive force must be physical, not psychological. ECF No. 45 at 20–22 (citing *Digennaro v. Malgrat*, No. 4:20-cv-10094, 2021 WL 3025322 (S.D. Fla. June 14, 2021) (J. Moore)).

I disagree with the School Board's reading of *Digennaro* and find it to be distinguishable from the facts of this case. In *Digennaro*, an eight-year-old boy was arrested for hitting a teacher in the chest. *Id.* at 2. Upon his arrest, an officer attempted to handcuff the plaintiff, but the handcuffs did not fit and the plaintiff was arrested and transported without restraint. *Id.* at 2–3. Citing heavily to *Stephens v. DeGiovanni*, 852 F.3d 1298, 1325 (11th Cir. 2017), the Court in *Digennaro* reasoned that "the relevant inquiry in assessing excessive force claims relates to *physical* harm suffered." *Id.* at 5. However, *Stephens* did not hold, nor does *Digennaro* argue, that emotional or psychological injury is *never* relevant. Instead, the Court in *Stephens* held that physical injuries are relevant, but also discussed the psychological trauma that the plaintiff in that case endured as well. *Stephens*, 852 F.3d at 1326 ("Deputy DeGiovanni had no reason to use the force he did on Stephens that resulted in severe

and permanent physical injuries *as well as psychological trauma*.") *See also Galvez v. Bruce*, 552 F.3d at 1238, 1244–1245 (11th Cir. 2008) (vacating summary judgment on qualified immunity in a Section 1983 case, because of force used in arrest by the officer's actions causing extensive physical harm *as well as psychological harm* to be unconstitutional excessive force). I do not read the Eleventh Circuit caselaw to mean that emotional or psychological trauma is *never* relevant in determining excessive force. Of course, perhaps physical trauma is, in most cases, more indicative of excessive force than emotional trauma, as was the case in *Digennaro* where the officer only briefly attempted to handcuff the juvenile.

Accordingly, I do not find that the case law precludes me from considering the emotional trauma the Student Plaintiffs claim to have suffered as a result of the use of handcuffs, and evaluate that in conjunction with the fact that no physical injuries are alleged. In D.P.'s case, he alleges that the entire experience has had a lasting impact on him in that it has "compounded his pre-existing traumatic experiences," necessitated ongoing therapy, and instilled in him a pervasive fear that police and school staff are out to get him. ECF No. 31 ¶¶ 100–101. Although D.P. alleges psychological harm from the entire Baker Act experience, the FAC does not specify that any psychological harm resulted specifically from being handcuffed. This, coupled with the fact that D.P. has not alleged any physical injuries from the handcuffs, weighs this factor in favor of the School Board. However, that does not discount the other five factors weighing in D.P.'s favor. When analyzing the totality of the circumstances, I find that, viewed in the light most favorable to D.P., it was *not* objectively reasonable

for an officer to handcuff a nine-year-old for thirty minutes in the back of a secure police vehicle where D.P. had no access to weapons, was not attempting to flee, and was not making any immediate threats to harm himself or others.

E.S. (Counts XIII and XV)

Applying the *Graham* factors to E.S.'s interaction with law enforcement, the severity of the "crime" committed by him weighs in his favor.[13] The FAC alleges that E.S. got upset and began to swing his arms, accidentally hitting his behavioral analyst in the chest. ECF No. 31 ¶ 108. This behavior is, at its most consequential, a misdemeanor battery, and considering that this was a very young child (nine years old), I do not find that his actions are that of a typical battery that would warrant physical restraint.

The second factor too weighs in E.S.'s favor. By the time Officer Cuellar arrived on the scene, E.S. had already been able to "self-soothe and was seated with his arms crossed across his chest, breathing heavily." *Id.* ¶ 109. It wasn't until after Officer Cuellar tackled him to the ground that E.S. became upset again, but he did not physically or verbally threaten to hurt anyone, nor is it alleged that he had access to weapons of any kind. I do not find that a nine-year-old child who is seated with his arms across his chest and taking deep breaths, is an immediate threat to the safety of the officers or others.

[13] E.S.'s excessive force claim is based not only on Officer Cuellar's use of handcuffs, but also on his tackling of E.S. to the ground causing E.S. to scrape his knees. ECF No. 31 ¶¶ 110, 111, 387.

The remaining factors all weigh in E.S.'s favor as well. He was not actively resisting arrest nor attempting to evade arrest by flight at the time Officer Cuellar secured him on the ground or kept him in handcuffs for thirty minutes during transport. He was seated with his arms crossed across his chest when Officer Cuellar came in, and the FAC alleges that E.S. "did not try or threaten to escape Officer Cuellar's custody." *Id.* ¶ 393. There was no need for force to be used on a nine-year-old who had calmed himself down and was seated in a chair, thus any amount of force, whether tackling or handcuffing, was unnecessary in light of the non-existent need. Finally, as explained previously, both physical and psychological harm is relevant, especially when dealing with children. Here the FAC alleges that E.S. experienced both physical and psychological injuries in the form of ongoing emotional distress, pain, fear, humiliation, distrust, anxiety, as well as scuffed knees. *Id.* ¶ 387, 398.

Each factor weighs in E.S.'s favor when analyzing the totality of the circumstances. Therefore, I find that it was *not* objectively reasonable for an officer to tackle a compliant nine-year-old child to the ground and keep him handcuffed for thirty minutes where E.S. was calm when Officer Cuellar arrived, had no access to weapons, was not attempting to flee, and was not making any immediate threats to harm Officer Cuellar or others.

L.A. (Counts XIII and XVI)

Applying the *Graham* factors to L.A.'s interaction with law enforcement leads to the same conclusion. First, the severity of the "crime" weighs in her favor because there is none. She did not hit or harm anyone or anything. She ran from her classroom,

made some troubling comments to the principal about her and her mother, tried to leave the principal's office, and ripped up pieces of paper and threw them or put them in her mouth "to use as a blending tool for her drawings." *Id.* ¶ 137–38. This behavior from an eight-year-old child is not that of a typical "crime" that would warrant physical restraint.

The second factor too favors L.A. in that L.A. was not an immediate danger to the officers or others. The Amended Complaint describes a verbally aggressive tantrum by an eight-year-old girl who did not have access to any weapons or tools to carry out even the most violent of threats (which L.A. argues she never said to begin with). The only item the FAC alleges she had with her at the time was paper, which is hardly a weapon and surely not a weapon that L.A. could use to kill anyone, as Officer Blocher's incident report describes. *Id.* ¶ 136–38. I do not find that an eight-year-old child making verbal threats to a room full of adults while armed with nothing more than paper was an immediate threat to the safety of Officer Blocher or others.

The third factor, whether L.A. was actively resisting arrest or attempting to evade arrest by flight, is a closer call. L.A. allegedly "tried to leave the principal's office and had to be redirected." *Id.* ¶ 137. Later, after Officer Blocher decided to Baker Act L.A., he asked L.A. "if she wanted to see what handcuffs felt like before putting them on her. He then handcuffed her while walking her from the school to his police car, removing them before placing her in the back of the car." *Id.* ¶ 149. It is not entirely clear from the FAC whether L.A. attempted to evade Officer Blocher's custody. There are no allegations that L.A. ran from him when he attempted to take her to his police

vehicle or that she resisted him at all. Without facts pleading that she actively resisted Officer Blocher's attempts to take her into custody, I do not find that an eight-year-old's single unsuccessful attempt to leave the principal's office necessitates the use of handcuffs when walking her to the police vehicle.

The last three factors also weigh in L.A.'s favor. In this instance, there was no need for force to be used on an unarmed eight-year-old child. Thus, any amount of force, even five minutes in handcuffs, is disproportionate to the need. Finally, the FAC alleges that L.A. experienced psychological injuries from the handcuffing including ongoing emotional distress, pain, humiliation, fear, distrust, and anxiety. *Id.* ¶ 409. Although these are not physical symptoms, I find that they are still relevant for determining whether excessive force was used on a child.

Viewing the totality of the circumstances around the incident with L.A., I find that it was *not* objectively reasonable for an officer to handcuff an unarmed eight-year-old during the walk to the police vehicle when she was not making any immediate threats to harm Officer Blocher or others and was not resistant to going with Officer Blocher.

W.B. (Counts XIII and XVII)

Applying the *Graham* factors to W.B.'s interaction with law enforcement, the severity of the "crime" committed by him weighs in his favor. The FAC alleges that W.B. became upset and began throwing chairs. *Id.* ¶ 162. At some point he also "inadvertently came in physical contact" with a staff member. *Id.* This behavior is, at its most consequential, a misdemeanor assault and battery, and considering that this

was a very young child (ten years old), I do not find that his actions are that of a typical assault or battery that would warrant physical restraint.

The second factor weighs somewhat in W.B.'s favor. The FAC describes that when W.B.'s mother arrived at the school, W.B. was handcuffed and sitting in a chair making no attempts to get up from the chair or flee. *Id.* ¶ 164. The FAC contains no facts indicating that W.B. continued to be a danger to anyone after he was seated in a chair with his hands handcuffed behind his back.[14] Officer Brown reported that W.B. threatened suicide by jumping off of a building, threatened to kill people with a gun, and that W.B.'s mother reported that he had looked up ways to kill people on the internet. *Id.* ¶ 167. W.B. and his mother both deny that those statements were made. *Id.* So, we have a ten-year old boy who, at worst, is seated in a room full of adults (or in the back of a locked and secure police vehicle), unarmed, and making verbal threats towards others. I do not find that these facts support a finding that W.B. posed an immediate threat to the safety of Officer Brown or others so as to justify W.B.'s use of handcuffs during the fifty-mile transport.

[14] To be clear, there are insufficient facts in the complaint to determine whether W.B. was a danger to the officer or others when the officer initially handcuffed him while he was seated in the chair. The FAC simply alleges that W.B. was upset, threw chairs, and inadvertently came into physical contact with a staff member. At some point after that, he was handcuffed and seated in a chair in the office. There are no facts to suggest he had calmed down by that point and was no longer throwing chairs or striking staff members. Thus, the FAC does not allege a plausible claim that Officer Brown's use of handcuffs to restrain W.B. while he was seated in the chair to be excessive force.

There are no facts to support a finding that W.B. was actively resisting arrest or attempting to evade arrest by flight. When Officer Brown took W.B. into custody he was apparently "angry and upset, but not getting up" and "did not try or threaten to escape Officer Brown's custody." *Id.* ¶ 164, 415.

The remaining three factors all weigh in W.B.'s favor as well. There was no need for force to be used on a ten-year-old who, although still upset, had calmed down and was seated in a chair or the back of a police car not trying to flee or resist. Thus any amount of force during transport was unnecessary in light of the non-existent need, especially handcuffs for a fifty-mile car ride. Lastly, the FAC alleges that W.B. was psychologically injured from the use of excessive force. *Id.* ¶ 421. He experiences ongoing emotional distress, pain, humiliation, and fear. *Id.* Although these are not physical symptoms, I find that they are relevant for determining whether excessive force was used on a child.

Each factor weighs in W.B.'s favor when analyzing the totality of the circumstances. Therefore, I find that it was *not* objectively reasonable for an officer to keep an angry, but compliant ten-year old handcuffed for one-hour, especially when that ten-year-old has no access to weapons, was not attempting to flee, and could not take any immediate action to harm Officer Brown or others.

M.S. (Counts XIII and XVIII)

Finally, I apply the *Graham* factors to M.S.'s interaction with Officer Lauginiger. The circumstances involving M.S., as described in the FAC differ slightly from the other four Student Plaintiffs. M.S. did not commit any crime, no matter how

minor, rather, the police report states that a mental health professional said M.S. had "attempted suicide" using "the sharpened edge of her student ID card." *Id.* ¶ 186. While an attempt at self-harm is certainly alarming, M.S. did not attempt to harm or threaten anyone else so as to constitute a battery or assault. M.S.'s behavior is certainly not typical of "criminal" behavior for which anyone, let alone a child, would be arrested and charged criminally.

The FAC is devoid of any facts alleging that M.S. threatened or attempted to harm Officer Lauginiger or others. There is also no description of her resisting or fleeing from Officer Lauginiger's custody. Thus, I find that the second and third factors weigh in M.S.'s favor. The remaining three factors all weigh in M.S.'s favor as well. There was no need for handcuffs to be used on an unarmed, compliant eleven-year-old riding in the back of a police vehicle with two adults up front. *Id.* ¶ 187. Thus any amount of force during transport was unnecessary in light of the non-existent need. Lastly, the FAC alleges that W.B. was psychologically injured from the use of excessive force. *Id.* ¶ 433. She experiences ongoing emotional distress, pain, humiliation, guilt, and embarrassment. *Id.* Although these are not physical symptoms, I find that they are relevant.

Viewing the totality of the circumstances around the incident with M.S., I find the FAC has pled a plausible claim that it was *not* objectively reasonable for an officer to handcuff an unarmed and compliant eleven-year-old during transport when she was not making any immediate threats to harm Officer Lauginiger or others and was not resisting.

Because I have found the FAC pleads sufficient facts to support excessive force claims for all five Student Plaintiffs, I must now turn to the main *Monell* question, whether the School Board caused the deprivation of the Student Plaintiff's Fourth Amendment right to be free from use of excessive force due to an official policy, custom, or failure to train.

ii. *Official Policy, Custom, or Failure to Train that Caused the Deprivation*

The Baker Act Bulletin apparently does not discuss or advise officers whether they should or should not be using handcuffs or other restraints while transporting a child for evaluation.

Plaintiffs argue instead that the School Board has enacted a written policy and practice of handcuffing children who were being Baker Acted. ECF Nos. 31 ¶¶ 194, 215, 369; 50 at 33–34. The FAC alleges the following facts regarding the "policy" that causes the excessive force 4th Amendment violations:

> 194. . . . while the Baker Act requires that handcuffs and other restraints only be used when necessary to protect the person subject to involuntary examination or others, Fla. Stat. § 394.459(1), SDPBC policy provides that officers shall handcuff and restrain children both while at school and during transportation to the receiving facility.
>
> 215. The SDPBC Police Department's policy on Baker Act use is similarly inadequate . . . It does not address the Baker Act's requirement that handcuffs and other restraints only be used when necessary for safety purposes. Fla. Stat. § 394.459(1).
>
> 248. SDPBC has a history of … handcuffing all children transported for involuntary examination regardless of any individualized determination; of disregarding or denying its own stark Baker Act data; and of failing to develop policies and practices to ensure legal and appropriate use of the Baker Act. This history shows that SDPBC cannot

> and will not remedy its Baker Act issues without court oversight. Instead, SDPBC's abuse of the Baker Act use will only end with comprehensive injunctive relief.
>
> 369. As a matter of policy, SDPBC police officers employ handcuffs and/or hobble restraints on every child transported to a receiving facility for involuntary examination under the Baker Act.
>
> 370. Because the policy mandates handcuffing even when there is no need for any application of force, it violates the Fourth Amendment.

ECF No. 31 ¶¶ 194, 215, 248, 369–70.

I find the requisite pleading standards have not been met. The FAC contains no factual allegations whatsoever of an official policy that could serve as grounds for imposing liability against the School Board. Instead, Plaintiffs simply make a conclusory allegation that the School District's "policy provides that officers shall handcuff and restrain children both while at school and during transportation to the receiving facility," and "[a]s a matter of policy, [School District] police officers employ handcuffs and/or hobble restraints on every child transported to a receiving facility for involuntary examination under the Baker Act." Yet, as the School Board correctly points out, Plaintiffs fail to point to a specific written policy or training manual to support their conclusory allegation. ECF No. 54 at 4. *Perez v. Metro. Dade Cnty.*, No. 06–20341, 2006 WL 4056997, at *2 (S.D. Fla. Apr. 28, 2006) ("[T]he simple mention of a policy and/or custom is not enough, for a plaintiff must do something more than simply allege that such an official policy exists.") (internal citations omitted)). The FAC fails to plead sufficient facts entitled to the assumption of truth to plausibly

allege that an official promulgated policy of the School Board caused the constitutional violations.[15]

I do find, however, that the FAC pleads sufficient facts to establish that there was an unofficial custom or practice of handcuffing students who were Baker Acted without regard for whether the circumstances required handcuffs according to the Baker Act. *Grech*, 335 F.3d at 1329–30.

A "custom" is "a practice that is so settled and permanent that it takes on the force of the law." *McDowell*, 392 F.3d at 1290 (quoting *Wayne*, 197 F.3d at 1105). *See also Natale v. Camden County Corr. Facility,* 318 F.3d 575, 584 (3d Cir. 2003) (quoting *Brown*, 520 U.S. at 404) ("A government 'custom,' in contrast, is 'an act that has not been formally approved by an appropriate decision-maker, but that is so widespread as to have the force of law.'").

"Normally random acts or isolated incidents are insufficient to establish a custom or policy." *Whitaker v. Miami-Dade Cnty.*, 126 F. Supp. 3d 1313, 1321 (S.D. Fla. 2015) (quoting *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986) (finding that four isolated shootings did not "establish a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law" (quoting *Brown*, 923 F.2d at 1481) (internal quotations omitted)); *Casado v. Miami-Dade Cnty.*,

[15] This finding is without prejudice to Plaintiffs alleging additional facts to support this alternative theory should they be granted leave to file a second amended complaint.

340 F. Supp. 3d 1320, 1328 (S.D. Fla. 2018) (J. O'Sullivan) ("[T]he plaintiff must allege a 'pattern' of excessive force including specific facts of numerous incidents[.]"). To establish a pattern, the plaintiff must show other incidents involving facts "substantially similar to the case at hand." *See Bowe v. City of Hallandale Beach*, No. 0:16-CIV-60993, 2017 WL 5643304, at *5 (S.D. Fla. Aug. 7, 2017) (J. Dimitrouleas); *see also Gurrera v. Palm Beach Cnty. Sheriff's Office*, 657 F. App'x 886, 893 (11th Cir. 2016) ("A pattern of similar constitutional violations is ordinarily necessary.") (quoting *Craig v. Floyd Cnty.*, 643 F.3d 1306, 1310 (11th Cir. 2011)). Moreover, the plaintiff must allege that the final policymaker for the county "know[s] about [the custom] but failed to stop it." *Brown*, 923 F.2d at 1481.

I find that Plaintiffs have sufficiently pled a "custom" in the form of the School Board's failure to train officers on the appropriate use of handcuffs during Baker Act situations. "A municipality's failure to train or supervise its police officers may rise to the level of an actionable 'custom' if there existed a prior history or widespread practice of a constitutional abuse that would have put the municipality on notice of a need for improved training or supervision in that area, and the municipality deliberately chose to ignore the problem, i.e. the government displayed a 'deliberate indifference' to a history of constitutional abuses." *Bakst v. Tony*, No. 13-CV-61411, 2019 WL 1 1497910, at *8 (S.D. Fla. Mar. 18, 2019) (J. Marra) (citing *Brown*, 520 US 397). *See also Wright v Sheppard*, 919 F.2d 665, 674 (11th Cir. 1990); *Warren v. District of Columbia*, 353 F.3d 36 (D. C. Cir. 2004)).

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown*, 520 U.S. at 410.

> In order to establish deliberate indifference, the "plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Lewis*, 561 F.3d at 1293 (internal quotation omitted). A municipality may be put on notice if either (1) the municipality is aware that a pattern of constitutional violations exists, and nevertheless fails to provide adequate training, or (2) the likelihood for a constitutional violation is so high that the need for training would be obvious. *Id.*

Hoti, 2019 WL 11660558, at *4.

The FAC plausibly alleges deliberate indifference. The FAC describes six specific instances in which handcuffs were used to restrain a child during transport for involuntary examination. It also alleges that School Board employees were "made aware of inappropriate use of the Baker Act in numerous individual instances by medical experts and child advocates over the intervening years, including some it employs itself." ECF No. 31 ¶ 223. Specifically, the FAC alleges that after the incident involving E.S. in 2019, an Internal Affairs investigation was conducted and found that although Officer Cuellar's use of force was not "excessive" due to E.S.'s "resistance," there were still "concerns which should be addressed through training, with regards to Baker Acts" and the report "recommended that supervisors and school-based police officers, particularly those who are assigned to schools with ASD cluster sites, have up-to-date training regarding ASD and Baker Acts." ECF No. 31 ¶¶ 227–28. The FAC

alleges that the School Board "has not acted on these recommendations for increased training." *Id*. ¶ 229.

Despite warnings that the constitutional rights of students were potentially being violated by the officers' invocation and implementation of the Baker Act, the FAC alleges that the School Board did nothing to change the handcuffing policy or provide adequate training to the officers regarding the use of force. ECF No. 31 ¶225.

I find that the FAC establishes sufficient facts to plead that the School Board was on notice that its officers needed further training on interacting with and assessing the needs of children with ASD in situations in which the officer is taking the child into custody pursuant to the Baker Act. That includes the restraints that are used in the process of Baker Acting the child. I find a reasonable inference can be made based on the facts plead in the FAC that, because the School Board was on notice of its need to train its officers in proper use of Baker Act procedures and protocols with ASD students, they were aware of a need to train those same officers on how to appropriately transport students without using excessive force.

In conclusion, I find that Plaintiffs have presented "some evidence that the [School Board] knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Lewis*, 561 F.3d at 1293. I find that Counts XIII through XVIII have pled a plausible claim under Section 1983 for the Student Plaintiffs. Therefore, I recommend that the School Board Defendant's Motion to Dismiss be DENIED in that respect.

B. *Section 1983 Claims Against the Officer Defendants*

Although several constitutional violations did occur, the School Board Officers and Officer Margolis are entitled to qualified immunity unless the Plaintiffs can show that their rights were "clearly established" at the time of the violations. The School Board Officers as well as Officer Margolis argue that they were not clearly established and thus they are entitled to qualified immunity. ECF No. 45 at 15–23, 35, 40. If they are correct, then Counts VI through XVIII should be dismissed as to the individually named Officer Defendants.

1. Qualified Immunity Generally

The Supreme Court has stressed that qualified immunity represents an immunity from suit rather than a defense to liability, and that it should therefore be addressed in the earliest possible stage of a case. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Qualified immunity offers "complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Qualified immunity is a "muscular doctrine that impacts on the reality of the workaday world as long as judges remember that the central idea is this pragmatic one: officials can act without fear of harassing litigation only when they can reasonably anticipate—before they act or do not act—if their conduct will give rise to damage liability for them." *Maddox v. Stephens*, 727 F.3d 1109, 1120 (11th Cir. 2013)

(citing *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). "If objective observers cannot predict—at the time the official acts—whether the act was lawful or not, and the answer must await full adjudication in a district court years in the future, the official deserves immunity from liability for civil damages." *Id.* (citing *Elder v. Holloway*, 510 U.S. 510, 513–15 (1994)).

"In order to receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Lee*, 284 F.3d at 1194 (internal quotation marks omitted) (*quoting Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991)). "Once the defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate." *Id.*[16] In addressing a motion to dismiss on qualified immunity, the Court may begin by addressing either the existence of a constitutional violation or the question of whether the right being violated has been "clearly established." *Pearson v. Callahan*, 555 U.S. 223, 235 (2009). Qualified immunity applies to damages claims only. *Id.* at 242–43.

A right may be clearly established for qualified immunity purposes in one of three ways: "(1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so

[16] Plaintiffs do not contest that the Officer Defendants were acting within the scope of their discretionary authority.

egregious that a constitutional right was clearly violated, even in the total absence of case law." *Lewis*, 561 F.3d at 1291–92 (internal citations omitted).

Regarding the first category, "the clearly established right must be defined with specificity . . . ." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019). "[O]nly Supreme Court cases, Eleventh Circuit caselaw, and [state] Supreme Court caselaw can 'clearly establish' law in this circuit." *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003) (citation omitted).

The third category is "narrow" and "encompasses those situations where 'the official's conduct lies so obviously at the very core of what the [relevant constitutional provision] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law.'" *Loftus v. Clark–Moore*, 690 F.3d 1200, 1205 (11th Cir. 2012) (quoting *Terrell v. Smith*, 668 F.3d 1244, 1257 (11th Cir. 2012)). *See also Maddox*, 727 F.3d at 1121. "The inquiry whether a federal right is clearly established 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Id*. at 1204 (quoting *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011) (en banc)).

2. Qualified Immunity applied to the School Board Officers and Officer Margolis

I found three separate categories of constitutional violations: (1) violation of the parental right to care, control, and medical decision making of one's children, (2) violation of the Fourth Amendment right to be free from unreasonable seizure, and (3) violation of the Fourth Amendment right to be free from use of excessive force. Having

found those constitutional violations occurred, I must evaluate each one separately to determine whether the constitutional right was "clearly established" at the time of the violation. I find that the three constitutional rights were *not* clearly established at the time of the violation and, therefore, each of the Officer Defendants is entitled to qualified immunity.

i. Parental Right to Custody/Control of Child (VI) and Parental Right to Control over Medical Decisions of Child (VII)

The Officer Defendants (with the exception of Officer Lauginiger, who is not accused of violating this constitutional right) argue that there is no case from the United States Supreme Court, the Eleventh Circuit, or the Florida Supreme Court establishing that the officers violated the parental rights to custody, control, and medical decision making of their children by Baker Acting the Student Plaintiffs without first obtaining parental permission. ECF No. 45 at 18, 25. Furthermore, they argue that the officers' conduct was not "so obviously abhorrent to the rights protected by the Constitution that it would have been readily apparent to the Defendants." *Id.*

Plaintiffs are correct in arguing that qualified immunity does not apply to Counts VI and VII because Parent Plaintiffs P.S., J.S., A.B., and L.H. seek only injunctive relief. *See* ECF No. 31 ¶ 299, 310. Since qualified immunity applies to damages claims only, Counts VI and VII should not be dismissed as to the individual Officer Defendants on the basis of qualified immunity and the Motion to Dismiss should be DENIED in that respect. *Pearson*, 555 U.S. at 242–43. *See also County of Sacramento v. Lewis*, 523 U.S. 833, 841, n. 5, (1998) (noting that qualified immunity

is unavailable "in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion").

ii. Fourth Amendment Freedom from Unnecessary Seizure (Counts VIII –XII)

The Officer Defendants argue that there is no case from the United States Supreme Court, the Eleventh Circuit, or the Florida Supreme Court establishing that the officers violated the Fourth Amendment by transporting Student Plaintiffs for involuntary examination pursuant to Florida's Baker Act. ECF No. 45 at 18, 37–38.

Plaintiffs failed to present any materially similar case from the United States Supreme Court, the Eleventh Circuit, or the Supreme Court of Florida that would have given the Officer Defendants fair warning that their particular conduct violated the Fourth Amendment. Admittedly, I could not find a case in the course of my own research that clearly establishes a constitutional right for children diagnosed with a developmental disability—who (a) may also be exhibiting signs of mental illness and (b) may be likely to cause serious bodily harm to themselves or others in the near future—to be free from involuntary commitment pursuant to the Baker Act. *Emmons*, 139 S. Ct. at 503 ("[P]olice officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.").

Plaintiffs also failed to articulate how the Defendant Officers' conduct was so egregious that a constitutional right was clearly violated. *Lewis*, 561 F.3d at 1291–92. "This is not a case that so obviously violates the Fourth Amendment that prior case law is unnecessary to hold [the Officer Defendants] individually liable for [their]

conduct. To find otherwise would require [this Court] to conclude that [no reasonable officer would have Baker Acted D.P., E.S., L.A., and W.B.]." *Corbitt v. Vickers*, 929 F.3d 1304, 1321 (11th Cir. 2019). I do not find that to be a reasonable conclusion. Accordingly, I find that the Officer Defendants are entitled to qualified immunity on Counts IX through XII. I recommend that the Motion to Dismiss be GRANTED in that respect and Counts IX through XII be DISMISSED with prejudice as to the individually named Officer Defendants. Qualified immunity applies to damages claims only. *Pearson*, 555 U.S. 223, 242–43 (2009). Therefore, Count VIII seeking only injunctive relief, remains.

iii. Fourth Amendment Freedom from Excessive Force (Counts XIII–XVIII)

The Officer Defendants argue that there is no case law from United States Supreme Court, the Eleventh Circuit, or the Florida Supreme Court establishing that an officer violates the Fourth Amendment by handcuffing a child—especially when that child had made verbal threats to hurt themselves or others and/or had acted out in a physically aggressive manner—as he or she was transported to a medical facility pursuant to Florida's Baker Act. ECF No. 45 at 18, 22–23, 40.

Plaintiffs argue that although there may be no factually similar case law, the officers had "fair warning that [their] conduct [was] unconstitutional" because the constitutional violation was obvious. ECF No. 50 at 32. Under this test, often called the "obvious clarity test," "the law is clearly established, and qualified immunity can be overcome, only if the standards set forth in *Graham* and our own case law inevitably

lead every reasonable officer in [the defendant's] position to conclude the force was unlawful." *Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009) (quoting *Lee*, 284 F.3d at 1199)).

Plaintiffs liken the facts here to another "obvious clarity" case: *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1306–07 (11th Cir. 2006). Gray, a nine-year-old student, physically threatened her physical education teacher during gym class. *Id.* at 1300–01. A school resource officer, Deputy Bostic, intervened to "handle the matter." *Id.* at 1301. He escorted Gray out of the gym where he told her "to turn around, pulled her hands behind her back and put Gray in handcuffs. Deputy Bostic tightened the handcuffs to the point that they caused Gray pain. Deputy Bostic told Gray, '[T]his is how it feels when you break the law,' and '[T]his is how it feels to be in jail.'" *Id.* Deputy Bostic stated that he handcuffed Gray "to impress upon her the serious nature of committing crimes that can lead to arrest, detention or incarceration" and "to help persuade her to rid herself of her disrespectful attitude." *Id.* The other adults who witnessed the incident did not believe Gray was a danger to them. *Id.* at 1302. Ultimately, the Court denied Deputy Bostic's qualified immunity argument:

> Deputy Bostic's conduct in handcuffing Gray, a compliant, nine-year-old girl for the sole purpose of punishing her was an obvious violation of Gray's Fourth Amendment rights. After making the comment, Gray had complied with her teachers' and Deputy Bostic's instructions. Indeed, one of the teachers had informed Deputy Bostic that she would handle the matter. In addition, Deputy Bostic's purpose in handcuffing Gray was not to pursue an investigation to confirm or dispel his suspicions that Gray had committed a misdemeanor. Rather, Deputy Bostic's purpose in handcuffing Gray was simply to punish her and teach her a lesson. Every reasonable officer would have known that handcuffing a compliant nine-year-old child for purely punitive purposes is

> unreasonable. We emphasize that the Court is not saying that the use of handcuffs during an investigatory stop of a nine-year-old child is always unreasonable, but just unreasonable under the particular facts of this case.

Id. at 1307.

I do not find the facts as pled in the FAC to be as egregious as *Gray* so as to qualify the officers' conduct as "well beyond the 'hazy border' that sometimes separates lawful conduct from unlawful conduct," such that every objectively reasonable officer would have known that the conduct was unlawful. *Id*. (quoting *Evans v. Stephens*, 407 F.3d 1272, 1283 (11th Cir. 2005)). The facts of this case are not as clear-cut as those in *Gray* or the other "obvious clarity" cases. Surely, the facts as alleged in the FAC are sufficient to plausibly plead Fourth Amendment excessive force violations and overcome a motion to dismiss. But, I find that each officer's choice to handcuff a previously verbally and physically aggressive student during transport does not so obviously fly in the face of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the officer. In other words, I do not believe that *every* reasonable officer in the Officer Defendants' respective positions would conclude that the force applied was unlawful. *Oliver*, 586 F.3d at 907.

A recent "obvious clarity" case from the Supreme Court demonstrates this point further. In *Taylor v. Riojas*, the Supreme Court overturned a Fifth Circuit decision granting officers qualified immunity. 141 S. Ct. 52, 53 (2020). There, an inmate was confined first to a cell covered in "massive amounts of feces," then moved to a "frigidly cold cell" with a clogged drain in the floor and overflowing raw sewage on the floor,

without a bunk or clothing. *Id.* at 53. The majority found that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). *See also Smith v. Mattox*, 127 F.3d 1416, 1418 (11th Cir. 1997) (affirming denial of qualified immunity where officer put his knee into the plaintiff's lower back to prepare an arrest and in the process of pulling the plaintiff's left arm behind his back, put the plaintiff's forearm in a position that caused discomfort and then, "with a grunt and a blow," broke the plaintiff's arm).

The facts of that case were egregious and well beyond the "hazy border" that sometimes separates lawful conduct from unlawful conduct. *Evans*, 407 F.3d at 1283. I do not find that to be the case here and, accordingly, find that the Officer Defendants are entitled to qualified immunity as to the excessive force claims. I recommend that the Motion to Dismiss be GRANTED in that respect and Counts XIV through XVIII be DISMISSED with prejudice as to the individually named Officer Defendants. Qualified immunity applies to damages claims only. *Pearson*, 555 U.S. 223, 242–43 (2009). Therefore, Count XIII seeking only injunctive relief, remains.

IV. ALL CLAIMS AGAINST THE OFFICIAL CAPACITY DEFENDANTS

Superintendent Fennoy and Chief Alexander move to dismiss all official capacity claims against them on the basis that these claims are the functional equivalent of claims against the local government entity for which the individuals work. This is consistent with Eleventh Circuit precedent. *See Busby v. City of Orlando*,

931 F.2d 764, 776 (11th Cir. 1991) ("when an officer is sued under § 1983 in his or her official capacity, the suit is simply another way of pleading an action against an entity of which an officer is an agent.") (internal quotation marks omitted); *see also Penley v. Eslinger*, 605 F.3d 843, 854 (11th Cir. 2010) ("Official-capacity suits ... generally represent only another way of pleading an action against an entity of which an officer is an agent.") (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)).

Based on this precedent, I recommend that the Motion to Dismiss be GRANTED in this respect and that Counts I, III, and V through XVIII be DISMISSED with prejudice as to Superintendent Fennoy and Chief Alexander.[17]

V. ADA, REHABILITATION ACT, AND FEEA

A. *Violations of Title II of the ADA and Section 504 of the Rehabilitation Act (Counts I–IV)*

Counts I and II are brought by all Plaintiffs except M.S. and her parents against the School Board and the Official Capacity Defendants for violations of Title II of the ADA ("ADA") and Section 504 of the Rehabilitation Act ("Section 504"), respectively. Counts III and IV are brought by M.S. and her parents against the School Board and the Official Capacity Defendants for violations off Title II of the ADA and Section 504 of the Rehabilitation Act, respectively.

[17] A footnote in Plaintiffs' Response states "To the extent the School Board is waving any sovereign immunity defense on Plaintiffs' Fourth and Fourteenth Amendment claims, Plaintiffs do not object to dismissing these Defendants in their official capacities." ECF No. 50 at 9 n. 4.

The Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq., and the Rehabilitation Act, 29 U.S.C. § 701 et seq., prohibit discrimination against persons with disabilities in specified programs or activities. The standards for determining liability under the two statutes are the same. *See* 42 U.S.C. § 12133 ("[T]he remedies, procedures, and rights set forth in [§ 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter [the ADA] provides ...."); *Sutton v. Lader*, 185 F.3d 1203, 1207 n. 5 (11th Cir. 1999) ("The standard for determining liability under the Rehabilitation Act is the same as that under the ADA") (citing *Allison v. Dep't of Corr.*, 94 F.3d 494, 497 (8th Cir. 1996)). Accordingly, I address Plaintiffs' claims under a single standard.

In order to sufficiently plead a case of discrimination "under the [Rehabilitation Act] or ADA, the plaintiff must demonstrate that he (1) is disabled, (2) is a qualified individual, and (3) was subjected to unlawful discrimination because of his disability." *J.A.M. v. Nova Se. Univ., Inc.*, 646 Fed. Appx. 921, 926 (11th Cir. 2016) (citing *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000)).

A plaintiff can meet the third prong by showing that "she was 'denied the benefits of' or 'subject to discrimination' under" a program that receives federal assistance." *Schwarz v. The Villages Charter Sch., Inc.*, 165 F. Supp. 3d 1153, 1202 (M.D. Fla. 2016), aff'd sub nom., 2017 WL 104460 (11th Cir. Jan. 11, 2017) (quoting *Nathanson v. Med. Coll. Of Pa.*, 926 F.2d 1368, 1380 (3d Cir. 1991)).

> Discrimination claims can be "based on either a conventional 'disparate treatment' theory, or a theory that the defendant failed to make 'reasonable accommodations,' or both. Disparate treatment involves

> discriminatory intent and occurs when a disabled person is singled out for disadvantage because of her disability. By contrast, a failure to make reasonable accommodations claim requires no animus and occurs when a covered entity breaches its affirmative duty to reasonably accommodate the known physical or mental limitations of an otherwise qualified person.

Iaciofano v. Sch. Bd. of Broward Cty., Fla., No. 16-cv-60963, 2017 WL 564368, at *3 (S.D. Fla. Feb. 13, 2017) (J. Bloom) (quoting *Forbes v. St. Thomas Univ.*, Inc., 768 F. Supp. 2d 1222, 1227 (S.D. Fla. 2010)). "To establish a disparate treatment theory, 'plaintiffs must prove that they have either been subjected to discrimination or excluded from a program or denied benefits solely by reason of their disability. To prove discrimination in the education context, something more than a mere failure to provide the free appropriate education . . . must be shown.'" *Id.* (quoting *Long v. Murray Cty. Sch. Dist.*, 2012 WL 2277836, at *25 (N.D. Ga. May 21, 2012), aff'd in part, 522 Fed. Appx. 576 (11th Cir. 2013)) (internal quotations omitted).

School Board Defendants do not appear to challenge the Student Plaintiffs' claims that they are disabled or "qualified individuals" under prongs one and two. *J.A.M.*, 646 Fed. Appx. at 926. Instead, School Board Defendants focus on the third prong and argue that the FAC lacks sufficient facts to plead that the School Board Defendants transported the Student Plaintiffs to the mental health facilities *solely* because of their disability. ECF No. 45 at 7–11.

As for their intentional discrimination claims (or "disparate treatment" claims) under the ADA and Section 504, Plaintiffs counter that they are not required to show sole causation because (1) according to *McNealy v. Ocala Star-Banner Corp.*, 99 F.3d

1068, 1074 (11th Cir. 1996), the ADA imposes a "but for" liability standard, and (2) Plaintiffs have alleged sufficient facts to properly plead that they were excluded from participation in their public school under both liability standards. ECF No. 50 at 11–13. I disagree and find that Plaintiffs have failed to plead intentional discrimination under either standard.

Plaintiffs point to their allegations in the FAC that various Defendants were "aware of" the Student Plaintiffs' diagnoses with ASD, were "aware of" their particular sensitivities due to their disabilities, and were "aware of" their counseling for past traumatic experiences. *Id*. at 13. However, just because the School Board Defendants were aware of the students' disability diagnoses, does not mean or lead to the reasonable inference that involuntary examination or handcuffing was initiated *solely* because of their disability. Similarly, it does not support the reasonable inference that *but for* the Student Plaintiffs' disability diagnoses, the Student Plaintiffs would not have been Baker Acted or handcuffed. In fact, the FAC alleges that after E.S. had been taken for involuntary examination, Officer Cuellar told E.S.'s mother that "regardless of E.S.'s disability, he would have initiated involuntary examination under the Baker Act." ECF No. 31 ¶ 116.

Since Plaintiffs are unable to survive the Motion to Dismiss under a disparate treatment theory, we move to their invocation of the "reasonable accommodations" theory. Plaintiffs argue that they have pled facts sufficient to state a claim for disability discrimination based on the School Board Defendants' failure to provide reasonable modifications. ECF No. 50 at 13–15. Plaintiffs point to the FAC's multiple

allegations of reasonable modifications that Defendants "knew or should have known would prevent discrimination against Plaintiffs" such as: (1) employment of multiple strategies known to de-escalate the Student Plaintiffs; (2) contacting mental health and case management providers who worked with the Student Plaintiffs or other appropriate trained mental health or medical staff working for the District such as a mobile crisis team member; (3) releasing the Student Plaintiffs to the care of their parent or guardian; and finally (4) applying a reasonably modified handcuffing policy that takes into account students with disabilities. *Id*. at 14–15.

A qualified individual with a disability is not entitled to the accommodation of his choice, but only to a reasonable accommodation. *Shannon v. Postmaster Gen. of U.S. Postal Serv.*, 335 Fed. Appx. 21, 25 (11th Cir. 2009) (citing *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285–86 (11th Cir. 1997)). As explained in *Wilf v. Board of Regents of the University System of Georgia*,

> in the academic setting, "reasonable accommodations" jurisprudence contemplates an interactive process between the student and the school, under which both sides have a responsibility to bring the issue of reasonable accommodations front and center. *See, e.g., Forbes*, 768 F. Supp. 2d at 1231–32 (stating that federal law "does not require a university to provide every accommodation that might help a disabled student perform better. Schools need only provide accommodations that they deem reasonable"). The initial burden is on the student, who must identify his disability, provide supporting medical documentation, and make a case for specific accommodations. *Id*. (citing *Stern v. Univ. of Osteopathic Med. And Health Sciences*, 220 F.3d 906 (8th Cir. 2000) . . . In order to be a reasonable accommodation, any modifications requested in a program must be related to the disability. *See Stern*, 220 F.3d at 908 (citing *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1029 (8th Cir. 1999) (ADA claim)).

No. 1:09-cv-01877, 2012 WL 12888680, at *18 (N.D. Ga. Oct. 15, 2012). Once the modification has been requested, the school is required to consider the request and make a reasoned decision to grant or deny it. *Forbes*, 768 F. Supp. 2d at 1231. "Because academic faculties have a special understanding about which aspects of the educational experience can be modified, a school's decision about accommodations will be upheld unless it is plainly not based on professional judgment." *Id.*

Similarly speaking of "reasonable accommodations", the Fifth Circuit has explained that "[i]n addition to their respective prohibitions of disability-based discrimination, both the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals. Where a defendant fails to meet this affirmative obligation, the cause of that failure is irrelevant." *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454–55 (5th Cir. 2005). The Fifth Circuit goes on to note that in lieu of a causation analysis, "the court must determine whether the requested accommodation was 'reasonable'—that is, whether it would impose 'undue financial or administrative burdens' or would require a 'fundamental alteration in the nature of the program'." *Id.* at 455 n. 12 (citing *School Board of Nassau County v. Arline*, 480 U.S. 273, 288 n. 17 (1987)).

The FAC alleges that the School Board was well aware of each child's diagnoses and the School Board does not contest that Student Plaintiffs identified their disabilities to the school and provided supporting medical documentation. Regarding the requests for accommodations, I find that the FAC plausibly alleges that three out

of the four requests had been made and the School Board, through its employees, was well aware of the proposed modifications: (1) various school staff members were aware of alternative de-escalation tactics that had been successfully used in the past with the Student Plaintiffs (ECF No. 31 ¶¶ 81, 106, 134, 158, 169); (2) various school staff members were aware that they could or should contact either the Student Plaintiffs' mental health and case management providers or the mobile crisis team member and follow their professional advice (*Id*. ¶¶ 75, 105, 113, 126, 132, 146, 158, 165, 169, 184); and (3) various school staff members were aware of some Parent Plaintiffs' requests to take their children home to de-escalate (*Id*. ¶¶ 144, 145, 166, 184, 185).[18]

Once the modification has been requested, the school is required to consider the request and make a reasoned decision to grant or deny it. *Forbes*, 768 F. Supp. 2d at 1231. A requested accommodation is unreasonable if it would impose "undue financial or administrative burdens'" or would require a "fundamental alteration in the nature of the program." *Arline*, 480 U.S. at 288 n. 17. The School Board Defendants have not argued, nor do I find, that the requested modifications were unreasonable. I fail to see how asking school staff members to employ alternative de-escalation tactics before Baker Acting, especially when those tactics are already known to them and known to be successful, would impose "undue financial or administrative burdens'" or would

[18] I do not find that the FAC has alleged sufficient facts to establish that these particular Student Plaintiffs or Parent Plaintiffs adequately requested that the handcuffing practices be modified. Thus, I will not address whether this accommodation was reasonable or not. The initial burden is on the student, who must identify his disability, provide supporting medical documentation, and make a case for specific accommodations. *Forbes*, 768 F. Supp. 2d at 1231–32.

require a "fundamental alteration in the nature of the program." Similarly, I do not find that requiring school staff members to contact a students' mental health provider or the mobile crisis team causes any undue burden. The mobile crisis team in particular is a program that is already set up and available to school staff when faced with these very decisions. Thus, I do not find that requiring consistent use of this valuable resource is unreasonable. Finally, I do not find it to be unreasonable to honor a parent or legal guardian's request to take their child home prior to Baker Acting. Calling a child's parents and giving them the opportunity to come get their child before sending the child for involuntary examination does not impose an "undue financial or administrative burdens'" nor would it cause a "fundamental alteration" in the nature of educational programming, ESE or otherwise.

All three of the proposed modifications are reasonable. I find that the FAC has plausibly alleged that the School Board had an obligation to provide these reasonable accommodations to the Student Plaintiffs and, "where a defendant fails to meet this affirmative obligation, the cause of that failure is irrelevant." *Bennett-Nelson*, 431 F.3d at 454–55. For purposes of surviving a motion to dismiss, Plaintiffs have alleged sufficient facts to properly plead that they were subjected to unlawful discrimination because of their disability by way of the reasonable accommodations theory.

I find that the FAC has stated sufficient facts to plausibly allege a cause of action for discrimination in violation of Title II of the ADA and Section 504 of the Rehabilitation Act. Therefore, I recommend that the Motion to Dismiss be DENIED with respect to Counts I through IV.

For the claims brought under Counts I through IV, Plaintiffs seek injunctive relief, declaratory relief, and damages. ECF No. 31 ¶¶ 257, 266, 275, 283. However, because Plaintiffs have not pled *intentional* discrimination in violation of the ADA or Section 504, they are not entitled to compensatory damages. *See Wood v. Spring Hill Coll.*, 978 F.2d 1214, 1219–20 (11th Cir. 1992) (holding "plaintiffs who proceed under a theory of disparate treatment in Section 504 actions must prove intentional discrimination or bad faith in order to recover compensatory damages" and "good faith attempts to pursue legitimate ends are not sufficient to support an award of compensatory damages under Section 504" but declining to address waived issue of declaratory judgment and other possible relief); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 126 (1st Cir. 2003) ("[P]rivate individuals may recover compensatory damages under § 504 and [the ADA] only for intentional discrimination."); *Delano-Pyle v. Victoria County*, 302 F.3d 567, 574 (5th Cir. 2002) ("A plaintiff asserting a private cause of action for violations of the ADA or the Rehabilitation Act may only recover compensatory damages upon a showing of intentional discrimination."); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147 (10th Cir. 1999) (holding that recovery under the Rehabilitation Act requires "proof the defendant has intentionally discriminated against the plaintiff"). That compensatory damages are available only upon a showing of intentional discrimination of course does not preclude other forms of relief based on a lesser showing. In the case at bar, I find that Plaintiffs, if found to be entitled to any remedy, are only entitled to injunctive or declaratory relief, not compensatory damages.

B. *Violation of the Florida Educational Equity Act (Count V)*

Count V is brought by all Plaintiffs against the School Board and the Official Capacity Defendants for violation of FEEA. The FAC alleges that the School Board acted with deliberate indifference by "failing to establish appropriate safeguards to prevent the Baker Act from being used inappropriately against students with disabilities and by failing to establish appropriate safeguards to prevent handcuffing from being used inappropriately against students with disabilities." ECF No. 31 ¶ 287.

School Board Defendants' sole argument is that the same causation requirement applies to FEEA claims as ADA and Section 504 claims and, therefore, that Count V should be dismissed because the FAC does not allege sufficient facts to show that the Student Plaintiffs were Baker Acted and transported in handcuffs *solely* because of their disability. ECF No. 45 at 8–11. School Board Defendants cite *J.A.M.* to support their argument, however, as discussed, *J.A.M.* dealt only with ADA and Section 504 claims. It did not address FEEA claims at all, let alone discuss the causation requirement for FEEA claims. *See J.A.M.*, 646 Fed. Appx. at 924.

FEEA prohibits disability discrimination in public education. The Act is patterned after Title IX and expressly prohibits discrimination "on the basis of race, ethnicity, national origin, gender, disability, religion, or marital status against a student or an employee in the state system of public K-20 education." Fla. Stat. § 1000.05(2)(a); *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279, 1286 (11th Cir. 2003). A plaintiff must establish at least "deliberate indifference" as a basis for recovery under the Florida Educational Equity Act. *Id.* at 1284. Defendant did not

argue a lack of deliberate indifference and therefore, that argument is waived. Accordingly, I recommend that the Motion to Dismiss be DENIED with respect to Count V.

VI. LEAVE TO AMEND

The Court must next consider whether to grant Plaintiffs leave to amend Counts VI—VIII and XIII, and whether FL NAACP should be granted leave to replead standing. Federal Rule of Civil Procedure 15 states that the "court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). In general, a plaintiff must be given at least one opportunity to amend a complaint. *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001). "After a plaintiff's first opportunity to amend, leave for additional amendments may be denied because of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previous allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment.'" *In Re Zantac (Ranitidine) Prods. Liab. Litig.*, No. 20-MD-2924-RLR, 2021 WL 2865869, at * 23 (S.D. Fla. July 8, 2021) (J. Rosenberg) (citing *Andrx Pharms., Inc. v. Elan Corp.*, PLC, 421 F.3d 1227, 1236 (11th Cir. 2005)). Denial of leave to amend is justified by futility when the complaint as amended would still be subject to dismissal. *See, e. g.*, *Christman v. Walsh*, 416 Fed. App'x 841, 844 (11th Cir. 2011) ("A district court may deny leave to amend a complaint if it concludes that the proposed amendment would be futile, meaning the amended complaint would not survive a motion to dismiss.").

Plaintiffs should be granted leave to file a Second Amended Complaint. Permitting a Second Amended Complaint would not be futile, nor has there been a showing of undue delay, bad faith, or repeated failure to cure errors. Also, Defendants have not articulated undue prejudice from allowing an amended pleading. Therefore, I recommend that Counts VI—VIII and XIII and the FL NAACP be DISMISSED WITHOUT PREJUDICE, and Plaintiffs be granted one final opportunity to amend. I recommend that Counts IX–XII and XIV–XVIII (as to the individually named Officer Defendants) and Counts I, III, and V–XVIII (as to the Official Capacity Defendants) be DISMISSED WITH PREJUDICE because amendment would be futile.

Although the Court recommends that Plaintiffs be given one more opportunity to amend his pleading, Plaintiffs are cautioned not to repeat past errors. *Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1357 (11th Cir. 2018) ("Implicit in [permitting] a repleading . . . is the 'notion that if the plaintiff fails to comply with the court's order—by filing a repleader with the same deficiency—the court should strike his pleading or, depending on the circumstances, dismiss his case and consider the imposition of monetary sanctions.'") (quoting *Byrne v. Nezhat*, 261 F.3d 1075, 1133 (11th Cir. 2001), abrogated on other grounds by *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008)).

RECOMMENDATION

For the foregoing reasons, I **RECOMMEND** that Defendants' Motion to Dismiss (ECF No. 45) be **GRANTED in part** and **DENIED in part.**

1. The FL NAACP's claims should be **DISMISSED** without prejudice for a lack of standing. FL NAACP should be granted leave to amend the FAC one final time.
2. As to Counts VI—VIII and XIII, the Motion to Dismiss should be **GRANTED,** and those counts should be **DISMISSED** without prejudice as shotgun pleadings.
3. As to Counts VI–XVIII, the Section 1983 claims brought against the School Board, the Motion to Dismiss should be **DENIED**.
4. As to Counts IX–XII and XIV–XVIII brought against the individually named Officer Defendants, the Motion to Dismiss should be **GRANTED** and those counts **DISMISSED WITH PREJUDICE** as to the individually named Officer Defendants because they are entitled to qualified immunity.
5. As to Counts VI–VIII and XIII, the Motion to Dismiss should be **DENIED** with respect to the individually named Officer Defendants because the FAC seeks injunctive relief only, to which qualified immunity does not apply.
6. As to Counts I, III, and V–XVIII brought against the Official Capacity Defendants, the Motion to Dismiss should be **GRANTED** and those counts **DISMISSED WITH PREJUDICE** as to the Official Capacity Defendants.

7. As to Counts I–V, the ADA, Rehabilitation Act, and FEEA claims brought against the School Board, the Motion to Dismiss should be **DENIED**.

NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with the Honorable Aileen M. Cannon, United States District Judge for the Southern District of Florida, within **FOURTEEN (14) DAYS** of being served with a copy of this Report and Recommendation. Failure to timely file objections shall constitute a waiver of a party's "right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." 11th Cir. R. 3-1 (2016).

If counsel do not intend to file objections, they shall file a notice advising the District Court within FIVE DAYS of this Report and Recommendation.

DONE and ORDERED in Chambers at West Palm Beach, Palm Beach County, in the Southern District of Florida, this 14th day of December 2021.

BRUCE E. REINHART
UNITED STATES MAGISTRATE JUDGE