APPEAL NO. 13-15444-A CONSOLIDATED WITH 14-12481-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEANNE DUNAWAY,

DEFENDANT-APPELLANT

V.

JAMES HILL, AS GUARDIAN AND NEXT FRIEND OF B.H.J., A MINOR,

PLAINTIFF-APPELLEE

APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

RESPONSE BRIEF OF THE PLAINTIFF-APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES HILL, *ET AL.*	)	
	)	
Plaintiff,	)	
	)	
v.	)	**APPEAL NO. 14-12481-A**
	)	
MADISON COUNTY SCHOOL BOARD, *ET AL.*,	)	
	)	
	)	
Defendants.	)	

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

The following is a list of all judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities known to Appellant that have an interest in the outcome of this case, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rule 26.1-1:

1. Artrip, Eric A., Counsel for Plaintiff/Appellant, James Hill, as guardian of B.H.J.

2. Belser, H. McGriff, III, Counsel for Defendant/Appellee, June Ann Simpson.

3. Blair, Ronnie J., Defendant/Appellee.

4. Boardman, Mark S., Counsel for Defendant/Appellee Jeanne Dunaway.

5. Boardman, Carr, Bennett, Watkins, Hill & Gamble, P.C., Counsel for

Defendant/Appellee, Jeanne Dunaway.

6. Carr, Clay R., Counsel for Defendant/Appellee, Jeanne Dunaway.

7. Chaudhry. Neena K, Counsel for Plaintiff/Appellant, James Hill, as guardian of B.H.J.

8. Dunaway, Jeanne, Defendant/Appellee.

9. Edwards, Belser & Smith, Counsel for Defendant/Appellee, June Ann Simpson.

10. Graves, Fatima Goss, Counsel for Plaintiff/Appellant, James Hill, as guardian of B.H.J.

11. James Hill, as guardian of B.H.J., Plaintiff/Appellant.

12. J., B.H., Plaintiff/Appellant.

13. Madison County Board of Education, Defendant/Appellee.

14. Mastando & Artrip, LLC, Counsel for James Hill, as guardian of B.H.J., Plaintiff/Appellant.

15. Mastando, Teri Ryder, Counsel for James Hill, as guardian of B.H.J., Plaintiff/Appellant.

16. National Women's Law Center, Counsel for James Hill, as guardian of B.H.J., Plaintiff/Appellant.

17. Putnam, Honorable T. Michael, United States Magistrate Judge, Northern District of Alabama.

18. Simpson, June Ann, Defendant/Appellee.

19. Terrell, Teresa G., Defendant/Appellee.

Respectfully submitted this the 17th day of June, 2014.

s/ Eric J. Artrip
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellee, pursuant to Federal Rules of Appellant Procedure 34(a) and Eleventh Circuit Rule 34-3, requests oral argument. Oral argument could assist the Court regarding the record herein and State agent immunity under Alabama state law.

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I. STATEMENT OF ISSUES

1. Whether the District Court correctly held that Defendant Jeanne Dunaway was not entitled to immunity for her negligent and wanton conduct under Alabama state law.

II. STATEMENT OF CASE

A. Nature of the Case

This case deals with whether Jeanne Dunaway, an assistant principal and an official of the Madison County School Board, is immune from personal liability for her own negligence and wantonness for her actions that resulted in the rape of BHJ. Dunaway was negligent and/or wanton by: 1) implementing a policy of only documenting and punishing sexual harassment if a student was "caught in the act;" 2) failing to properly train employees how to respond to complaints of sexual harassment; 3) failing to effectively address repeated harassing conduct toward multiple female students by a male student, CJC; and 4) allowing a teacher's aide, with her knowledge, to send a fourteen-year-old special education student, BHJ, who had complained of CJC's harassment, into the boy's bathroom as bait in a sting operation to "catch him in the act." CJC raped BHJ in the bathroom.

BHJ's rape was a direct result of the negligence and wantonness of Jeanne Dunaway (along with other administrators).

B. Procedural History

Plaintiff filed a Complaint on September 23, 2010 (Doc. 1) and an Amended Complaint on October 29, 2010 (Doc. 9) against the Madison County School Board, CJC (a minor), Blair, Terrell, Dunaway, and Simpson.

On July 19, 2012, Defendants School Board, Blair, Terrell, and Dunaway filed a Motion for Summary Judgment on all claims. (Doc. 86.) As part of Plaintiff's Response, Plaintiff moved that the Court infer that documents destroyed by Defendants supported Plaintiff's claims. (Doc. 94.) On July 12, 2013, the District Court granted in part and denied in part Defendants' motion—granting summary judgment on all claims against the School Board, Blair and Terrell and on the federal and Outrage claims against Dunaway, and denying Plaintiff's motion for a negative inference. The Court left pending state law claims for Wantonness and Negligence against Dunaway. (Doc. 105.)

On October 24, 2013, the District Court granted Defendant Simpson summary judgment on the Section 1983 and Outrage claims and denied her summary judgment on the state law claims for Negligence and Wantonness. (Doc. 113.)

Only Plaintiff's state law claims for Wantonness and Negligence remained pending against Dunaway and Simpson. On November 22, 2013, Dunaway appealed the District Court's denial of summary judgment on the Negligence and

Wantonness claims.[1] (Doc. 116.) On December 17, 2013, the District Court dismissed the state law claims against Dunaway and Simpson without prejudice to refile in state court. (Doc. 122.) On December 30, 2013, Plaintiff filed a Motion to Alter or Amend Judgment. (Doc. 123.)

On May 19, 2014, the District Court denied Plaintiff's Motion to Alter or Amend the grant of summary judgment. (Doc. 132.) Plaintiff filed a Notice of Appeal on June 3, 2014. (Doc. 133.)

C. Statement of Facts

1. BHJ's Childhood

Due to her mother's illness and untimely death in 2007, BHJ spent parts of her childhood in foster homes in North Carolina. (Doc. 87-1 BHJ Dep., pg. 15:4-16:5, 23:8-26:3, Mar. 29, 2012.) In 2008, BHJ moved to Huntsville, Alabama to live with her siblings' stepmother, Patricia Jones, before starting seventh grade. (Doc. 87-1, pg. 16:7-17, 30:3-4.) BHJ attended seventh and a portion of eighth grade at Sparkman Middle School ("SMS"). (Doc. 87-1, pg. 30:5-12.) She is designated as a special education student. (Doc. 87-1, pg. 126:20-127:15.) She was fourteen when raped by CJC in January 2010. (Doc. 87-1, pg. 105:9-11.)

2. SMS Faculty

Ronnie Blair was in January 2010, and remains, the Principal at SMS. (Doc.

[1] That appeal has been consolidated with Plaintiff's.

87-2 Blair Dep., pg. 10:2-8, Mar. 29, 2012.) A principal has ultimate authority for operation of a school. (Doc. 87-9 Blair 30(b)(6) Dep., pg. 128:9-12, June 8, 2012.) Teresa Terrell and Jeanne Dunaway were, in January 2010, the Assistant Principals at SMS. (Doc. 87-8 Terrell Dep., pg. 11:11-22, 19:11-15, Mar. 29, 2012; Doc. 87-7 Dunaway Dep., pg. 15:1-5, Mar. 29, 2012.) During BHJ's eighth-grade year, June Simpson was a teacher's aide at SMS. (Doc. 93-1 Simpson Aff. ¶ 1, June 7, 2012.) Simpson's direct supervisors in January 2010 were Blair, Dunaway and Terrell. (Doc. 93-1 ¶ 2.) All faculty and staff at SMS reported to Blair. (Doc. 87-2, pg. 13:6-8.)

3. School Board Policies

a. Sexual harassment policy

SMS distributes a Student Code of Conduct to all students containing a School Board policy regarding sexual harassment of students. (Doc. 87-2, pg. 105:18-108:3; Doc. 87-4 Blair Dep. Exs. 4-5; *see also* Doc. 87-9, pg. 88:5-91:1, Exs. 7-8.) According to this policy, the principal is responsible for handling all harassment complaints. (Doc. 87-2, pg. 109:1-5.) A student may report harassment to the "principal, assistant principal, a teacher or to whomever he/she feels the most comfortable." (Doc. 87-4 Exs. 4-5.) The person receiving the complaint "shall" make the complaint known to the principal, and the principal "shall"

investigate the complaint and take appropriate action. (Doc. 87-4 Exs. 4-5.)[2]

According to Principal Blair, a student may report sexual harassment to anyone at the school, including a teacher's aide. (Doc. 87-2, pg. 23:19-23, 26:14-19.) All staff should elevate complaints of sexual harassment to the Principal or Assistant Principals. (Doc. 87-8, pg. 40:1-6; Doc. 87-7, pg. 16:21-17:3; Doc. 87-2, pg. 24:1-6.) However, at SMS, staff can also investigate complaints of sexual harassment. (Doc. 87-2, pg. 24:13-16; Doc. 87-9, pg. 64:15-65:2.)

Blair implemented the School Board's sexual harassment policy at SMS as follows: no student would be disciplined for sexual harassment unless they were "caught in the act" through witnesses, an admission, or physical evidence.[3] (Doc. 87-2, pg. 53:16-54:8; Doc. 87-8, pg. 48:12-50:23; Doc. 87-7, pg. 17:20-19:3; Doc. 93-1 ¶ 4.) According to Blair, a student would not be disciplined for sexual harassment if the only evidence was "one word against another without witnesses." (Doc. 87-2, pg. 54:2-8.) Further, if a student complained of sexual harassment and the complaint was not considered "proven," the disciplinary form reflecting the

[2] The School Board also has a general anti-harassment policy that covers harassment, violence, and threats based on sex and other characteristics. (Doc. 87-4 Ex. 5; *see also* Doc. 87-9 Ex. 9.) It provides for discipline for students that violate the policy and makes the principal or his designee responsible for receiving and responding to complaints.

[3] Although Blair now denies having such a policy, he continues to assert that punishment would require witness statements or other corroborating evidence. (Doc. 87-9, pg. 143:9-144:17.) It is therefore not contested that there was a policy and practice of not pursuing harassment complaints involving only the word of the complainant against that of the alleged harasser, no matter how credible the complainant's allegations. To the extent there is inconsistent evidence regarding the imposition of a "catch in the act" policy, the Court must accept the evidence in the light most favorable to Plaintiff. *See Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1247 (11th Cir. 2013).

report and related documents were simply discarded. (Doc. 87-8, pg. 48:12-49:18, 57:15-58:14; *see also* Doc. 87-2, pg. 34:2-13.)[4] Dunaway and Terrell implemented this policy.

Also, while the School Board policy empowered all school employees to receive complaints of peer sexual harassment (Doc. 87-2, pg. 23:19-23, 26:14-19; Doc. 87-4 Exs. 4-5; Doc. 87-9, pg. 63:3-65:2), the Board did not train employees about 20 U.S.C. §§ 1681-1688 (Title IX) requirements for responding to such complaints. (Doc. 87-8, pg. 51:1-15, 66:2-17; Doc. 93-1 ¶ 17). In fact, repeated requests for training by Teacher's Aide Simpson were ignored. (Doc. 93-1 ¶ 17.)[5]

b. Specific legal obligations under Title IX

Under Title IX, schools must take **immediate** action to eliminate a hostile environment, prevent its recurrence, and address its effects. *See* Office for Civil Rights, U.S. Dep't of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 12 (2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter 2001 Sexual Harassment Guidance]; Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence 4-5 (Apr. 4, 2011),

[4] Assistant Principal Terrell admitted that the policy of discarding complaints that do not meet this standard of "proof" means there is no system in place to track prior complaints (e.g., that the same "unfounded" complaint of sexual harassment was made against the same person ten times). (Doc. 87-8, pg. 59:10-60:11.)

[5] To the extent there is any inconsistency regarding whether the School Board provided training for school employees on investigating complaints of sexual harassment, it must at this stage be resolved in the light most favorable to Plaintiff. *See Feliciano*, 707 F.3d at 1247.

available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter 2011 Sexual Violence Letter].

Schools are required by Title IX to establish and implement a policy against sex discrimination and grievance procedures providing for "prompt and equitable resolution of" complaints and an "effective means for preventing and responding to sexual harassment." (Sexual Harassment Guidance, p. 19). Among the specific requirements, the policy must provide for "adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence." (Sexual Harassment Guidance, p. 20). The Guidance is clear that "it is not appropriate for a student who is complaining of harassment to work out the problem directly with the individual alleged to be harassing him or her." (Sexual Harassment Guidance, p. 21).

4. Destruction of CJC's disciplinary records

Principal Blair received a letter from Plaintiff's counsel dated April 30, 2010, three months after BHJ's rape, notifying the school of the potential lawsuit and demanding that all related documents be preserved. (Doc. 87-2, pg. 145:1-8, Doc. 87-6 Blair Dep. Ex. 12.) Despite having received this letter prior to the end of the 2009/2010 school year, Defendants destroyed an untold number of documents relating to CJC's disciplinary history—leaving only the records in the computer system. (Doc. 87-8, pg. 139:12-144:15.)

5. CJC's Recorded History of Sexual Harassment Against Fellow Students

Due to Defendants' destruction of documents, CJC's disciplinary record amounts to only minimal summaries of numerous incidents recorded in the computer system. CJC's computer disciplinary record includes, in pertinent part, the following:

a. Infractions during the 2008/2009 School Year at Ardmore High School

- 9/24/08: CJC received five days of in-school suspension for "Inapp Public Display of Affect," described in the notes as "Touching girls in inappropriate places. Writing inappropriate note to girls asking them to have sex with him." (Doc. 87-9 Ex. 11.)

b. Infractions during the 2008/2009 School Year at SMS

- 2/4/09: CJC received out-of-school suspension for "sexual harassment" for making "inappropriate comments" to a female student. (Doc. 87-2, pg. 122:15-21; Doc. 87-4 Ex. 6.)

c. Infractions during the 2009/2010 School Year at SMS

- 9/23/09: CJC received out-of-school suspension for "harassment" for offering one girl money to beat up another girl and stating "he would like to kill her";
- 9/29/09: CJC failed to follow directions while already in in-school suspension;
- 10/16/09: CJC received in-school suspension for a verbal altercation;

- 10/23/09: CJC was removed from the bus for saying 'f__ you' to the bus driver;
- 10/28/09: CJC received in-school suspension for "inappropriate touching";
- 10/30/09: CJC was disciplined for disruption and disrespect in in-school suspension;
- 11/18/09: CJC was removed from the bus for failing to obey the driver and keep his hands off a female student;
- 11/25/09: CJC received in-school suspension for disobedience and "kissing";
- 12/15/09: CJC received in-school suspension for verbal confrontation with another student;
- 12/18/09: CJC received out-of-school suspension for "threats" and "intimidation" for threatening another student while in in-school suspension;
- 1/13/10: CJC received twenty days of in-school suspension for constant disruption in class;
- 1/22/10: CJC raped BHJ in the boys' bathroom. (Doc. 87-4 Ex. 6; Doc. 87-5 Blair Dep. Ex. 7.)

The records that Defendants did not destroy reflect that CJC had an extensive history of "proven" sexual harassment and threats of violence during the months and year prior to his rape of BHJ. (Doc. 87-2, pg. 132:20-133:2; Doc. 87-4 & Doc. 87-5 Exs. 6-7; Doc. 87-9 Ex. 11.) Principal Blair admitted that CJC's disciplinary record shows he was in trouble "more than an average" amount. (Doc. 87-2, pg. 152:4-11.) Blair agreed that the cumulative nature of CJC's extensive number of infractions in a tight timeframe should have been taken into account when considering disciplinary action. (Doc. 87-2, pg. 164:6-21, 166:5-14.)

6. CJC's Unrecorded History of Harassing Female Students

Principal Blair admitted that as early as the 2008/2009 school year, he was aware of allegations that CJC was propositioning girls for sex at SMS. (Doc. 87-9, pg. 133:12-20.) Teacher's Aide Simpson stated that before Thanksgiving 2009 there were numerous stories of CJC asking female students to have sex with him in the boys' bathroom, which she relayed to Blair shortly after Christmas break, along with her suggestion that CJC be monitored at all times. (Doc. 93-1 ¶ 4.) According to Simpson, Blair told her CJC would have to be "caught in the act" before disciplinary action could be taken against him. (Doc. 93-1 ¶ 4; Doc. 87-2, pg. 53:16-23.)

Blair admitted that the week before BHJ's rape Simpson had told him CJC was meeting another female student in the bathroom to have sex. (Doc. 87-2, pg. 30:10-31:3.) Upon questioning, both students denied any sexual contact. (Doc. 87-2, pg. 35:5-11.) Blair did not check CJC's prior record as a result of this complaint because "nothing was proven." (Doc. 87-2, pg. 40:3-41:2.)

On January 13, 2010, just days before BHJ's rape, CJC was accused of inappropriately touching a girl in a sexual manner. (Doc. 87-7, pg. 21:12-22:6; Doc. 87-2, pg. 41:16-43:2.) The Assistant Principals Dunaway and Terrell interviewed witnesses, but did not take CJC's extensive history of harassment into

account nor review his disciplinary files.[6] (Doc. 87-7, pg. 44:4-46:22.) Per Terrell, because some witnesses said it happened and others said it did not, they "didn't have any proof" of the inappropriate touching. (Doc. 87-8, pg. 146:3-7.)

As a result, CJC received twenty days of in-school suspension after this incident, but this placement was not considered "discipline" for proven misconduct by CJC, but rather a "precautionary measure." (Doc. 87-2, pg. 43:9-22, 46:4-13.) The incident was recorded in CJC's disciplinary report as "constant distraction, continued disruption of learning" and classified as "disobedience," with no reference at all to the sexual touching. (Doc. 87-788, pg. 144:16-23.) The report did not mention the inappropriate touching at all because, under Blair's implementation of the sexual harassment policy, it could not be "proven." (Doc. 87-8, pg. 146:18-147:17.)

As part of his "precautionary" in-school suspension, CJC was assigned **unsupervised** cleaning duties in the hallway. (Doc. 87-2, pg. 44:14-23, 152:14-154:4; Doc. 87-8, pg. 189:4-190:23, 196:16-198:5.) CJC was still in this "precautionary" unsupervised in-school suspension when he raped BHJ on January 22, 2010. (Doc. 87-2, pg. 44:10-13; 152:14-17.) Blair agreed that if CJC had been

[6] Although she claims to have "investigated" this incident, Dunaway has absolutely no recollection of the name of the female touched by CJC, or the names of *any* of the girls she claimed that she interviewed. (Doc.87-7, pg. 77). Any documents that might provide additional information about this incident were destroyed. (Doc. 87-7, pg. 148-9)

found guilty of the January 13th allegations, he likely would not have been doing unsupervised cleaning, but rather his discipline "would have been something higher." (Doc. 87-2, pg. 154:11-18.)

7. CJC's Sexual Harassment of BHJ

CJC began pressuring BHJ to have sex with him in the school bathroom about two weeks before he raped her. (Doc. 87-1, pg. 50:14-52:6.) BHJ initially ignored him (Doc. 87-1, pg. 52:12-17), but then, on January 21, 2010, told Teacher's Aide Simpson about the harassment. (Doc. 87-1, pg. 54:3-9.)

8. The Rape of BHJ

On January 22, 2010, while on "precautionary" in-school suspension, CJC was in the hallway on unsupervised cleaning duty. (Doc. 87-1, pg. 55:3-9; Doc. 93-1 ¶5.) When BHJ passed him on her way to Physical Education class, CJC stopped her and again asked her to have sex with him. (Doc. 87-1, pg. 55:15-56:12.) BHJ ignored him and continued to class (Doc. 87-1, pg. 56:4-14), where she told Teacher's Aide Simpson that CJC was still "messing" with her (Doc. 87-1, pg. 60:16-61:1; Doc. 93-1 ¶ 5).

Simpson asked BHJ if she wanted to get CJC in trouble, and BHJ responded that she did, because she wanted CJC to leave her alone. (Doc. 87-1, pg. 61:8-16, 141:1-11.) Simpson asked BHJ if she would meet CJC in the bathroom to "set him up" so he would be caught because he had "been doing this awhile." (Doc. 87-1,

pg. 61:8-20; Doc. 93-1 ¶ 5.) Simpson suggested this course of action because Principal Blair told her that CJC had to be "caught in the act" before disciplinary action could be taken against him. (Doc. 93-1 ¶ 5.) BHJ responded that she did not want to meet CJC. (Doc. 87-1, pg. 61:21-23; Doc. 93-1 ¶ 5.) After sitting in the locker room for a few minutes, BHJ went back to Simpson to say she would meet CJC as suggested. (Doc. 87-1, pg. 62:7-19, 64:22-65:8; Doc. 93-1 ¶ 6.)

Simpson and BHJ went to Assistant Principal Dunaway's office. (Doc. 93-1 ¶ 7.) According to BHJ, Simpson told "one of the female principals" that BHJ was going to meet CJC in the bathroom. (Doc. 87-1, pg. 65:15-66:20.) According to Simpson, she told both Dunaway and Andrea Hallman (a faculty member) that she had suggested BHJ meet CJC in the bathroom so he could be caught in the act of harassment. (Doc. 93-1 ¶ 8.) Simpson told them that she "hoped this was legal" and that she did not know what she was doing. (Doc. 93-1 ¶ 8.) Dunaway did not tell Simpson there was anything inappropriate about the plan. (Doc. 93-1 ¶ 8.)[7]

Simpson sent BHJ to tell CJC she would meet him. (Doc. 87-1, pg. 67:22-68:3.) Simpson then returned to the gym, where BHJ's friend told her that BHJ

[7] Assistant Principal Dunaway now denies having any prior knowledge of this plan. (Doc. 87-10 Dunaway Aff. 2, July 19, 2012.) Dunaway disingenuously states in her Statement of Facts that "Ms. Simpson did not inform Jeanne Dunaway of her plan for BHJ to meet CJC in the bathroom in order to catch him in inappropriate conduct." (Appellant's Brief, p. 6.) Simpson is clear that she did so inform Dunaway, and the District Court properly concluded that the evidence, when viewed favorably to Plaintiff, established that Dunaway was told about the plan to use BHJ as bait to catch CJC in the act of harassment before it was implemented. *Hill v. Madison County Sch. Bd.*, 957 F. Supp. 2d 1320, 1334 (N.D. Ala. 2013).

was on her way to meet CJC in the bathroom. (Doc. 93-1 ¶¶ 8-9.) Simpson returned to Dunaway's office and advised her that BHJ was going to meet CJC. (Doc. 93-1 ¶ 10.) Simpson asked Ms. Hallman to go to the bathroom to catch CJC, but Hallman refused because she "did not want . . . to catch another student with their clothes off." (Doc. 93-1 ¶ 10.) Dunaway heard this conversation but said and did nothing. (Doc. 93-1 ¶ 10.) Principal Blair admitted that, assuming that Dunaway knew about the plan, she should have intervened and notified him. (Doc.87-9, at 35-36.)

Simpson then asked John Kennedy, a teacher whose classroom was across from the bathroom, and Coach Lance Hallman to check the bathroom, while she waited in the gym. (Doc. 93-1 ¶¶ 12-13.)

CJC told BHJ to meet him in the boys' bathroom and he would follow her. (Doc. 87-1, pg. 68:19-21.) BHJ walked ahead of CJC and tried to walk slowly. (Doc. 87-1, pg. 69:21-70:4.) BHJ stood outside the bathroom by the drinking fountain. (Doc. 87-1, pg. 70:5-7.) CJC arrived and asked her if she was going in, and she responded "yes." (Doc. 87-1, pg. 70:16-71:1.) CJC told BHJ to go into a stall, and she complied. (Doc. 87-1, pg. 71:15-21.) In spite of her protests to CJC that teachers would come, her attempts to delay him, her attempts to block him from unbuttoning her pants, her efforts to talk him out of it and to pull her pants back up, and her telling him specifically she did not want to do this, CJC raped

BHJ anally. (Doc. 87-1, pg. 76:6-79:23.) CJC then attempted to rape BHJ again. (Doc. 87-1, pg. 80:9-19.) BHJ kept telling CJC "I just can't do this" and attempted to block herself until teachers finally arrived. (Doc. 87-1, pg. 82:9-21.)

9. The Aftermath

Mr. Kennedy finally arrived in the bathroom, asked if anyone was there, saw them, and asked them to come out. (Doc. 87-1, pg. 83:3-84:3; Doc. 87-5 Blair Dep. Ex. 8.) BHJ and CJC exited the stall. (Doc. 87-1, pg. 84:4-8). A female teacher, Melody Campbell, asked BHJ what had happened and BHJ at first was not able to tell the teacher she had been raped but responded "yes" to Ms. Campbell's question about whether CJC had touched her. (Doc. 87-1, pg. 86:6-87:11; Doc. 87-5 Ex. 8.) She was able to tell her about the rape on the way to Principal Blair's office. (Doc. 87-1, pg. 92:1-15.) Assistant Principal Terrell, who saw BHJ and CJC as they walked to Blair's office, told BHJ she would probably be suspended. (Doc. 87-8, pg. 153:14-154:6.) Teacher's Aide Simpson later told Terrell that BHJ should not be in trouble because Simpson had "sent her." (Doc. 87-8, pg. 154:17-19.)

BHJ initially was unable to tell Blair about the rape, and just sat in his office and cried. (Doc. 87-1, pg. 88:5-89:4.) After her guardian, Ms. Jones, arrived, and with Simpson in the room, BHJ was able to tell Blair that CJC had raped her. (Doc. 87-1, pg. 90:11-92:22.) The police arrived, and a male officer asked her

questions. (Doc. 87-1, pg. 93:12-20.) BHJ wrote a handwritten statement consistent with her testimony of her rape. (Doc. 87-1 Ex. 1; Doc. 87-2, pg. 68:18-20.)

After meeting with the police, Ms. Jones took BHJ to the Madison County Children's Advocacy Center where the anal rape was confirmed by a physical exam and documented with numerous photographs. (Doc. 87-1, pg. 95:8-96:2; Doc. 93-2 Hill Aff. Ex. A, June 11, 2012.)

Blair had everyone involved write a statement. (Doc. 87-2, pg. 64:5-7; Doc. 87-5 Ex. 8.) Blair spoke with CJC, who denied the rape and wrote a statement to that effect. (Doc. 87-2, pg. 64:23-66:11; Doc. 87-5 Ex. 8.) Blair called Simpson to his office and instructed her to write and sign a statement regarding what happened, threatened her with criminal prosecution and termination, and suggested she resign. (Doc. 93-1 ¶ 15.) Simpson eventually did write a statement. (Doc. 93-1 ¶ 15; Doc. 87-5 Ex. 8.) Later, Blair apologized for his actions and told Simpson he had to get a statement from her to protect the School Board from potential legal ramifications. (Doc. 93-1 ¶ 16.)

When investigating the rape, school administrators reviewed CJC's prior record. (Doc. 87-2, pg. 73:22-74:2.)

Sparkman listed the sexual assault as "[i]nappropriate touching a female in boys bathroom" on CJC's computerized disciplinary report. (Doc.87-4, at 42.)

Even after reviewing photographs of BHJ's injuries, Assistant Principal Terrell testified that she did not know whether BHJ had consented to the assault. (Doc.87-8, at 48.) Dunaway testified that BHJ was responsible for herself once she entered the bathroom. (Doc.87-7, at 25.) Following a five-day suspension and a hearing, CJC was sent to an alternative school, but returned to Sparkman after approximately 20 days. (Doc.87-2, at 25; Doc.87-7, at 22.) CJC was suspended for five days and a hearing was held at the School Board's central office. (Doc. 87-2, pg. 67:9-14.)

10. Lasting Effects of the Rape on BHJ

BHJ does not recall returning to SMS after she was raped.[8] (Doc. 87-1, pg. 99:7-13, 101:13-20). Instead, she returned to the foster program in North Carolina, and finished eighth grade there. (Doc. 87-1, pg. 13:22-15:6, 30:16-31:9.) BHJ missed some school before starting in North Carolina. (Doc. 87-1, pg. 99:23-100:7). She saw a therapist to help her deal with the rape and was prescribed medication for depression. (Doc. 87-1, pg. 120:5-121:20.)

Before the rape, BHJ played basketball (Doc. 87-1, pg. 35:19-36:16), and her grades were As, Bs, and Cs (Doc. 87-1, pg. 124:12-13). After the rape, BHJ testified that she preferred to be alone, no longer trusted anyone, and no longer felt

[8] Defendants assert that BHJ did return to SMS for a short time following her rape (Doc. 87-8, pg. 174:21-175:3), but this Court must resolve any factual dispute in Plaintiff's favor. *Feliciano*, 707 F.3d at 1247. In any event, it is not disputed that BHJ suffered many negative effects as a result of her rape, including ultimately leaving SMS, which interfered with her educational opportunities.

safe. (Doc. 87-1, pg. 122:14-22.) She stopped playing basketball. (Doc. 87-1, pg. 36:17-22, 123:7-16). She has had trouble with grades, sometimes receiving all Fs, because she felt depressed and unable to focus. (Doc. 87-1, pg. 124:8-125:4.) At the time of her deposition, BHJ was still receiving counseling from a mental health professional. (Doc. 87-1, pg. 130:6-131:18.) In high school, BHJ had to repeat some ninth-grade classes during her tenth-grade year (Doc. 87-1, pg. 26:15-27:5), and she received in-school suspension for acting angry toward teachers (Doc. 87-1, pg. 32:17-33:13).

III. STANDARD OF REVIEW

The Court of Appeals reviews *de novo* the District Court's denial of summary judgment on state law immunity grounds, viewing all facts and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Tinker v. Beasley*, 429 F.3d 1324, 1327 (11th Cir. 2005) (citations omitted); *Taylor v. Adams*, 221 F.3d 1254, 1256-7 (11th Cir. 2000) (citations omitted).

IV. SUMMARY OF ARGUMENT

Dunaway acted beyond her authority by authorizing and ratifying Simpson's plan to use BHJ as "bait" in a sting operation to catch CJC in the act of sexual harassment and by failing to take immediate action to prevent the plan. Dunaway exceeded her discretion and authority when she implemented the "catch in the act"

policy in violation of federal law, resulting in a complete failure to investigate or adequately investigate many complaints of harassment against CJC. Dunaway acted in bad faith when, as a direct result of her actions and inaction, BHJ was raped by CJC. Thus, Dunaway acted willfully, maliciously, fraudulently, in bad faith, and/or beyond her authority and is not entitled to state-agent immunity.

V. ARGUMENT AND CITATION OF AUTHORITY

A. The District Court Correctly Held that Defendant Dunaway Is Not Entitled to State-agent Immunity for Plaintiff's Negligence and Wantonness Claims.

To claim immunity for her own negligent and/or wanton conduct, a State agent bears the initial burden of demonstrating that the plaintiff's claims arise from a function that would entitle the State agent to immunity. *Giambrone v. Douglas*, 874 So. 2d 1046, 1052 (Ala. 2003); *Ex parte Wood*, 852 So. 2d 705, 709 (Ala. 2002).

A State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's:

> (1) formulating plans, policies, or designs; or
> (2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:
> (a) making administrative adjudications;
> (b) allocating resources;
> (c) negotiating contracts;

> (d) hiring, firing, transferring, assigning, or supervising personnel; or
>
> (3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or
>
> (4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons; or
>
> "(5) exercising judgment in the discharge of duties [**11] imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.

Ex parte Cranman, 792 So. 2d 392, 397 (Ala. 2000)*; see also Ex parte Butts*, 775 So. 2d 173 (Ala. 2000) (majority of this Court adopted the *Cranman* restatement of the rule governing State-agent immunity).

If the State agent succeeds in initially showing that she was engaging in a discretionary function under *Cranman*, the burden shifts to the plaintiff to show that the State agent acted willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority to defeat state-agent immunity for the agent's conduct. *Giambrone*, 874 So. 2d at 1052; *Wood*, 852 So. 2d at 709; *Ex parte Davis*, 721 So. 2d 685, 689 (Ala. 1998).

Dunaway was negligent and/or wanton by: 1) allowing an assistant teacher, with her knowledge, to send a fourteen-year-old special education student, BHJ,

who had complained of CJC's harassment, into the boys' bathroom as bait in a sting operation to catch him "in the act;" 2) implementing a policy of only documenting and punishing sexual harassment if a student was "caught in the act" in clear violation of Title IX; and 3) failing to effectively address repeated harassing conduct toward multiple female students by CJC as required by Title IX.[9]

Dunaway claims that when she implemented the "catch in the act" sexual harassment policy, failed to properly discipline a serial sexual harasser with a history of sexual and violent misconduct, and ratified Simpson's plan to catch CJC in the act of sexual harassment,[10] she was "exercising judgment in the discharge of duties imposed by statute, rule, or regulation in … educating students" - one of the discretionary functions set forth in *Cranman. Ex parte Cranman*, 792 So. 2d 392, 397 (Ala. 2000). Even if ratifying such a sting operation is "exercising judgment . . . in educating students and a discretionary function," Dunaway acted outside of

[9] The District Court denied Dunaway's Motion for Summary Judgment on state-agent immunity only as to her knowledge and ratification of Simpson's plan to send BHJ into the bathroom with CJC as bait. The Plaintiff maintains that Dunaway is not entitled to state-agent immunity from responsibility for her own negligence and/or wantonness in implementing a policy that harassers like CJC could only be punished if they are "caught in the act" as well as for failing to investigate, address or properly discipline CJC's history of sexual and violent misconduct in violation of Title IX. All of this conduct proximately caused the rape of BHJ.

[10] Arguably, ratifying and authorizing this sting operation is not within her discretion because Dunaway was violating Title IX – the very law she was supposedly enforcing in a "discretionary" manner. This ratification should not be considered an action within her discretion to further government policy. *See, e.g., Cranman,* 792 So. 2d at 406 (physicians treating patients at a university too remote from governmental policy to entitle them to immunity); *Wilson v. Colbert Co. Board of Educ.*, 952 So. 2d 1122, 1127-8 (Ala. Civ. App. 2006) (driving a school bus negligently not a discretionary function entitling the bus driver to claim immunity).

her authority, in bad faith, and under a mistaken interpretation of the law, and is not entitled to state-agent immunity.

1. Dunaway Acted Beyond Her Authority by Authorizing and Ratifying Simpson's Plan to Use BHJ as "Bait" to Catch CJC in the Act of Sexual Harassment.

The District Court correctly held that Dunaway is not entitled to state-agent immunity because her authorization of the sting operation that led to BHJ's rape was beyond her authority as Assistant Principal. The primary basis for the District Court's holding that Dunaway acted beyond her authority was that, according to Simpson, Dunaway approved or ratified her plan to use BHJ as "bait." *Hill v. Madison Co. Bd. Educ.*, 957 F. Supp. 2d 1320, 1345-6 (N.D. Ala. 2013). In *N.C. v. Caldwell*, 77 So. 3d 561, 569 (Ala. 2011), the case primarily relied on by the District Court in denying Dunaway State-agent immunity, a girl was raped by an older male student in the school gym when the teacher left her alone with another student. Significantly, two other girls testified they had complained before the rape that this boy sexually harassed them but the teacher ignored them and did not report the complaints to start an investigation.

In *N.C.*, the school board's policy also required teachers to report claims of sexual harassment. *Id.*, at 568-9. Like the teacher in *N.C.*, Dunaway ignored complaints of sexual harassment and failed to immediately stop or prevent the rape of BHJ by allowing Simpson to use her as "bait" in a sting operation to catch a

known sexual harasser. *See, e.g.*, *Ex parte Jones*, 52 So. 3d 475, 482-4 (Ala. 2010) (holding that evidence a DHR investigator did not turn in her report about possible child abuse in violation of DHR policy sufficient to create a fact question as to whether she was entitled to state-agent immunity); *C.C. v. Monroe County Bd. of Educ.*, 299 F. App'x 937, 942 (11th Cir. 2008) (upholding denial of state agent immunity where principal failed to investigate complaint of sexual harassment in compliance with detailed school policy requiring investigation of all sexual harassment complaints). In addition, as the District Court correctly noted, Dunaway did not make BHJ's complaint of harassment by CJC known to the principal, as required by school board policy. *Hill*, 957 F. Supp. 2d at 1347-8

The District Court correctly held that Dunaway's authorization of the sting operation was beyond her authority as Assistant Principal and she is not entitled to claim state-agent immunity.

In addition, the District Court also correctly found that there was sufficient evidence that Dunaway's actions in making no effort to protect BHJ after she was told about the "sting" operation were "at best negligent and probably recklessly wanton." *Hill*, 957 F. Supp. 2d at 1345-6.

2. Dunaway Acted Beyond Her Authority by Implementing a "Catch in the Act" Sexual Harassment Policy, in Violation of Title IX and Its Regulations.

In arguing that the School Board's written policy was general and allowed her discretion, Dunaway incorrectly reads the policy in isolation from the federal law it was promulgated to comply with – Title IX. Dunaway argues extensively that the School Board's written sexual harassment policy is very "general" and does not require "immediate" action to address sexual harassment, therefore allowing her the discretion to do nothing. But Dunaway completely disregards Title IX's clear mandate that, if the school knows or reasonably should have known about sexual harassment of one student by another, "the school is responsible for **taking immediate effective action to eliminate the hostile environment and prevent its reoccurrence."** 2001 Sexual Harassment Guidance at 12 (emphasis added). Dunaway had an opportunity to prevent Simpson from sending BHJ in to the bathroom to be sexually harassed (and ultimately raped) by CJC, but she chose not to do so in violation of Title IX's clear instruction that "**immediate**" action must be taken to prevent or stop known sexual harassment. *See Caldwell*, 77 So. 3d at 569 (holding that teacher acted beyond his authority and was not immune where girl was raped in the gym and teacher failed to report or investigate claims of harassment by other students prior to rape); *see also Ex parte Al. Dept. Mental Health Ctr.*, 937 So. 2d 1018, 1028-9 (Ala. 2006) (holding that

mental health workers acted beyond their authority by failing to immediately intervene in physical assault of mentally-challenged patient by another employee in violation of policy) Dunaway acted beyond her discretion and authority under federal law in allowing Simpson to use BHJ as "bait" to catch a known sexual harasser.

Dunaway argues that she had discretion in addressing sexual harassment complaints. The Plaintiff agrees that Dunaway, as Assistant Principal, had the authority to do something to prevent and stop the sexual harassment and rape of BHJ. She did not have the discretion or authority, however, to violate federal law. Dunaway's "discretion" does not extend to implementing a policy that completely failed to stop or prevent the sexual harassment and rape of BHJ.

As a school official, Dunaway has an obligation to comply with Title IX, and she clearly failed to do so by not investigating numerous allegations of chronic sexual harassment and violence and by not taking effective action to stop CJC's ongoing sexual harassment of female students well before he raped BHJ. In effect, Dunaway's (and the other administrators') "investigations" were tantamount to no investigation at all, and Title IX clearly requires a prompt and thorough investigation. *See Slack v. Stream*, 988 So. 2d 516, 527-31 (Ala. 2008) (holding that university professor was not entitled to qualified immunity where he failed to conduct proper investigation before accusing another professor of plagiarism,

where detailed guidelines for investigating claim of plagiarism were not followed); *see also Giambrone*, 874 So. 2d at 1052-53 (holding that wrestling a student in violation of wrestling association's detailed safety guidelines resulted in no state-agent immunity); *Caldwell*, 77 So. 3d at 569 (holding that teacher acted beyond his authority and was not immune where girl was raped in gym and teacher failed to report or investigate claims of harassment by other students prior to rape); *Ex parte Yancey*, 8 So. 3d 299, 305-07 (Ala. 2008) (holding that gym teacher acted beyond his authority by allowing students to leave campus where Student Handbook was clear that students were not to leave campus without approval of administration); *C.C. v. Monroe County Bd. of Educ.*, 299 F. App'x at 942 (upholding denial of state agent immunity where principal failed to investigate complaint of sexual harassment in compliance with detailed school policy requiring investigation of all sexual harassment complaints).

Dunaway had a clear obligation to comply with the detailed sexual harassment policies implementing Title IX, which are distributed to all schools. She acted beyond her authority by implementing an illegal policy and then actually authorizing the very result this policy is required to prevent – sexual harassment and rape.

3. Dunaway Acted in Bad Faith by Approving Simpson's Plan to use BHJ as "Bait," Failing to Discipline CJC for His Repeated Sexual and Violent Misconduct, and Allowing CJC to Roam the Halls Unsupervised on the Day BHJ Was Raped.

Dunaway's "disinterested" and dismissive attitude when Simpson explained her plan to use BHJ as "bait" in a sting operation to catch CJC in the act of sexual harassment and her testimony that BHJ was responsible for herself once she entered the bathroom is evidence that Dunaway had no interest in protecting students, like BHJ, entrusted to her care and that she acted in bad faith. She ignored her obligation to comply with Title IX by failing to address CJC's sexual harassment of BHJ and other girls at SMS and not immediately acting to stop the sting operation. Dunaway also acted in bad faith by failing to take CJC's recidivism into account when allowing him to be unsupervised during in-school suspension.

A jury could find that Dunaway's dismissive attitude about the rape of BHJ, her failure/refusal to stop Simpson's sting operation, and her failure to properly discipline CJC in light of his recidivism constitute "bad faith." Her actions and attitude are sufficient to warrant denial of state law immunity. *See, e.g. Slack v. Steam,* 988 So. 2d 516, 530-2 (Ala. 2008) (holding that professor's dissemination of reprimand letter outside the university when the allegations of plagiarism had not been properly investigated was evidence of bad faith); *Wright v. Wynn,* 682 So. 2d 1, 4 (Ala. 1996) (holding evidence that officer acted in bad faith during an arrest

sufficient to create a jury question as to whether he was entitled to state law immunity).

4. Dunaway Acted Under a "Mistaken" Interpretation of Federal and State Law.

At a minimum, Dunaway's failure to stop Simpson's sting operation, implementation of a policy that a harasser must be "caught in the act" to be punished, and failure to conduct proper investigations required by Title IX were taken based on a "mistaken interpretation" of that law and its requirements. Under *Cranman*, a state official is not immune for action taken due to a "mistaken interpretation" of a law such as Title IX. 792 So. 2d at 405. To the extent Dunaway believed that federal law (Title IX) allowed her to approve and ratify sending a girl to meet a boy in the boys' bathroom to catch him in the act of sexual harassment, or allowed a policy of only punishing a sexual harasser if he is caught in the act, she was most certainly mistaken. *See, e.g.*, *J.S. v. Campbell*, 2006 U.S. Dist. Lexis 72943, *28-30 (M.D. Ala. 2006) (holding that jury could find that officer acted under mistaken interpretation of the law by detaining someone for making hand gesture that did not meet legal definition of "disorderly conduct" and denying him state-agent immunity).

Dunaway is not entitled to state law immunity because her negligent and wanton actions were in violation of applicable federal law, in bad faith, and/or due to a mistaken interpretation of federal law.

5. Dunaway Did Not Have Discretion to Ignore Simpson's Plan for BHJ and Her Reliance on the Concurring opinion in *L.N. v. Monroe County Board of Education* Is Misplaced.

Dunaway argues that *L.N. v. Monroe Co. Board of Educ.*, 141 So. 3d 466 (Ala. 2013) a case affirmed without opinion by the Alabama Supreme Court after the District Court's decision in this case, somehow supports her position that she acted within her discretion by ignoring Simpson's plan to use BHJ as "bait**.**"

Dunaway acknowledges that a concurring opinion is not binding precedent. *Maryland v. Wilson*, 519 U.S. 408, 412-13, 117 S.Ct. 882, 137 L. Ed. 2d 41 (1997). (Appellant Dunaway's Brief at 45 n.16.) Nonetheless, she dedicates almost nine pages to discussing *L.N.*'s applicability to her claim that she is entitled to state-agent immunity because she had the discretion to ignore Simpson's plan to use BHJ as "bait." Because that case was affirmed without opinion, neither the legal reasoning nor the rationale the Court used to determine that state-agent immunity was appropriate in that case are available. Nonetheless, the facts as set forth in one concurring and one dissenting opinion are distinguishable from this case.

In *L.N.*, there was no school policy that sexual harassers had to be "caught in the act" to be punished. The female student found to have engaged in a sexual relationship with a male teacher was not used in a failed "sting" operation that resulted in her rape. The administrator's only prior notice of an improper relationship between the student and her teacher was one complaint by a parent

based on "rumors." The female student's parents reported that they did not believe the rumors and felt the rumors were started by girls who hated their daughter. *L.N.* at 487. Nonetheless, the complaint was investigated and all parties denied any relationship. *Id.*

Nothing in this concurrence indicates that this teacher had a known extensive history of sexual and violent misconduct, or that an Assistant Principal authorized the girl to be used as bait in a "sting" operation to catch him in the act of sexually harassing her. Again, Dunaway's discretion does not extend to authorizing and ratifying using a child as bait in a sting operation that results in her rape.

VI. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the reasons stated above, Plaintiff respectfully requests that this Court uphold the District Court's denial of summary judgment to Dunaway as to the Plaintiff's state law claims for negligence and wantonness.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This proportionally spaced Brief utilizes 14 point Times New Roman font and contains 7,212 words according to the word count of the word processing system used.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 21st day of October, 2014, I electronically filed the foregoing with the Clerk of Court and have served a copy of same upon the following by electronic service, by facsimile or by placing a copy of same in the United States mail, postage prepaid and properly addressed.

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