UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE,	
Plaintiff,	
v.	**21-cv-01762 (DLF)**
DISTRICT OF COLUMBIA, *et al.*,	
Defendants.	

DEFENDANTS DISTRICT OF COLUMBIA AND D.C. PUBLIC SCHOOLS' MOTION TO DISMISS THE COMPLAINT

Defendants District of Columbia and the D.C. Public Schools respectfully move to dismiss the Complaint under Fed. R. Civ. P. 12(b)(5) and 12(b)(6). A memorandum of points and authorities in support of this motion, an exhibit, and a proposed order are attached.

Date: July 30, 2021

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ Christina Okereke
CHRISTINA OKEREKE [219272]
Chief, Civil Litigation Division Section II

/s/ *Steven N. Rubenstein*
STEVEN N. RUBENSTEIN [1013094]
Assistant Attorney General
400 6th Street, N.W.
Washington, D.C. 20001
(202) 727-9624
(202) 741-0592 (fax)
Steven.Rubenstein3@dc.gov

/s/ *Aaron Finkhousen*
AARON FINKHOUSEN [1010044]
Assistant Attorney General
400 6th Street, NW
Washington, D.C. 20001
(202) 724-7334
(202) 730-0492 (fax)
aaron.finkhousen@dc.gov

Counsel for Defendant District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE,	
Plaintiff,	
v.	**21-cv-01762 (DLF)**
DISTRICT OF COLUMBIA, *et al.*,	
Defendants.	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT DISTRICT OF COLUMBIA AND D.C. PUBLIC SCHOOLS' MOTION TO DISMISS THE COMPLAINT

INTRODUCTION

Plaintiff, a former student at Defendant Duke Ellington School of the Arts, alleges that Defendant Mark Walker, a former teacher at the school, sexually abused her from 2015 to 2016. Plaintiff sues the District of Columbia (the District), the D.C. Public Schools (DCPS), Duke Ellington School of the Arts, Walker, and Donna Hollis, the Dean of Students at the school, under federal and local law. As explained more fully below, Plaintiff's claims against the District and DCPS[1] under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (Title IX), and for negligent hiring, training, supervision and retention, intentional infliction of emotional distress, and wanton or reckless conduct cannot stand.

First, Plaintiff's claims against DCPS should be dismissed because she did not properly serve DCPS, and, in any event, DCPS is *non sui juris*. *Second*, Plaintiff's Title IX claim against the District fails because the Complaint does not allege that the District had actual knowledge of

[1] The Office of the Attorney General does not represent the school, Walker, and Hollis.

the alleged sex discrimination and an opportunity to avoid the harm to Plaintiff. *Third*, Plaintiff's common law claims against the District fail because she did not provide the District with the requisite notice of these claims under D.C. Code § 12-309. *Fourth*, Plaintiff's negligence claim fails because she does not assert that the District knew of Walker's allegedly inappropriate conduct prior to Plaintiff's injuries. *Fifth*, Plaintiff's claim for intentional infliction of emotional distress fails to allege sufficiently outrageous conduct by the District. *Finally*, Plaintiff's claim for wanton or reckless conduct fails because no such standalone claim is recognized under District law. For these reasons, the Court should dismiss Counts I, IV, V, and VII of the Complaint with prejudice as against the District and DCPS.

FACTS

The Duke Ellington School of the Arts (DESA) is a public, application-based high school offering a DCPS diploma through a specialized, performing arts-based curriculum. Under an agreement with DCPS, the Duke Ellington School of the Arts Project (DESAP), a nonprofit corporation governed by a board of directors, bears responsibility for the day-to-day administration of DESA. DESAP is a separate legal entity from the District and DCPS. DESAP, not the District, is responsible for the hiring and overseeing of DESA personnel, including Walker and Hollis, who were not employees of the District.

Plaintiff Jane Doe alleges that Walker sexually abused her during the 2015-2016 school year and the summer of 2016 while she was a student at DESA. Compl. [2] ¶¶ 11, 13, 22, 24. During this time period, she allegedly attended afterschool programs at DESA where Walker was the only faculty member present, and, on one occasion, fondled Plaintiff's leg, and on other occasions, walked her home and committed sexual misconduct in a park. *Id.* ¶¶ 11, 12, 16-19.

During the summer of 2016, Plaintiff alleges Walker convinced her to visit his home on several occasions and engaged in sexual misconduct with her. *Id.* ¶¶ 22, 23.

According to Plaintiff, sometime during the 2016-2017 school year, a parent at the school "informed" Hollis, DESA's Dean of Students, "that there were allegations regarding a sexual relationship between Defendant Walker and Plaintiff." *Id.* ¶ 24. Plaintiff claims that Hollis did not "competently investigate these allegations" or report them. *Id.* ¶ 25. Plaintiff further alleges that the District "was put on notice" of Walker's conduct by a police report related to his arrest on June 20, 2020, which asserted that Walker sexually assaulted Plaintiff in 2015. Compl. ¶ 10.

Plaintiff filed her complaint in the Superior Court of the District of Columbia on May 17, 2021, and the District timely removed the action to this Court on June 30, 2021. Notice of Removal [1]. Plaintiff brings claims against the District and DCPS under Title IX and District common law.

STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(5)

"Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). When the sufficiency of service of process is challenged, the plaintiff "bears the burden of proving that she has effected proper service." *Jouanny v. Embassy of France in the United States*, 220 F. Supp. 3d 34, 37-38 (D.D.C. 2016) (citing *Light v. Wolf*, 816 F.2d 746, 751 (D.C. Cir. 1987)). "[T]o do so, [s]he must demonstrate that the procedure employed satisfied the requirements of the relevant portions of Rule 4 [of the Federal Rules of Civil Procedure] and any other applicable provision of law." *Light*, 816 F.2d at 751 (quotations omitted). If the plaintiff fails to meet her burden, then the court necessarily

"lacks authority to exercise personal jurisdiction over the defendant." *Jouanny*, 220 F. Supp. 3d at 38 (citing *Candido v. District of Columbia*, 242 F.R.D. 151, 160 (D.D.C. 2007)). Thus, improper service constitutes a "fatal jurisdictional defect, and is grounds for dismissal." *Id.* "A court may consider material outside of the pleadings in ruling on a motion to dismiss for lack of . . . personal jurisdiction . . . without converting the motion into a Rule 56 motion." *Artis v. Greenspan*, 223 F. Supp. 2d 149, 152 (D.D.C. 2002).

Fed. R. Civ. P. 12(b)(6)

"[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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted). A claim is facially plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although "detailed factual allegations" are not required to withstand a Rule 12(b)(6) motion, a plaintiff must offer "more than labels and conclusions" to provide "grounds" of "entitle[ment] to relief." *Twombly*, 550 U.S. at 555. A complaint alleging facts which are "'merely consistent with' a defendant's liability, . . . 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (brackets omitted).

On a motion to dismiss, courts may consider documents attached as exhibits or incorporated by reference in the complaint or documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff but by the defendant. *Patrick v. District of Columbia*, 126 F. Supp. 3d 132, 135-36 (D.D.C. 2015); *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011). In this case, because Plaintiff

must provide notice under D.C. Code § 12-309 before bringing any tort action for unliquidated damages against the District, the Court may consider the declaration attached to this motion concerning Plaintiff's non-compliance with § 12-309 to dismiss without converting the motion to a motion for summary judgment. *See Martin v. District of Columbia*, 720 F. Supp. 2d 19, 25 n.6 (D.D.C. 2010); *Patrick*, 126 F. Supp. 3d at 135-36.

ARGUMENT

I. The Court Should Dismiss All Claims Against DCPS.

The Court should dismiss all claims against DCPS. To start, Plaintiff did not properly serve DCPS. To serve an agency of the District of Columbia, service must be made on "the Mayor (or designee), the Corporation Counsel (or designee), *as well as* the agency . . . ." Super. Ct. Civ. R. 4(j) (emphasis added). But Plaintiff's affidavit of service for DCPS merely represents that the process server delivered a copy of the Complaint by certified mail to the Office of the Attorney General at 441 4th Street, NW, Washington, D.C. 20001.[2] Aff. of Service on DCPS [1-5] (stating that the process server mailed a copy of the Complaint addressed to DCPS to the Office of the Attorney General). Because Plaintiff failed to serve process on DCPS, service was defective. Therefore, the Court should dismiss the Complaint.

And even if Plaintiff had properly served DCPS, the Complaint should be dismissed as against DCPS because it is *non sui juris*. Agencies that are subordinate to the mayor are not capable of suing or being sued absent explicit statutory authority. *Simmons v. Dist. of Columbia Armory Bd.*, 656 A.2d 1155, 1157 (D.C. 1995); *see also Amobi v. Dist. of Columbia Dep't. of Corrections*, 755 F.3d 980, 987 n.5 (D.C. Cir. 2014) (agencies subordinate to the mayor are *non sui juris*). DCPS is an agency of the District that is subordinate to the Mayor. D.C. Code § 38-

[2] The District notes that, effective August 24, 2020, the Office of the Attorney General's address changed to 400 6th Street, NW, Washington, D.C. 20001.

171 (establishing DCPS as an agency subordinate to the Mayor). Because DCPS is *non sui juris*, the Court should dismiss all claims against DCPS. *See Blue v. District of Columbia*, 850 F. Supp. 2d 16, 22 (D.D.C. 2012) (dismissing all claims against DCPS because it is *non sui juris*), *aff'd*, 811 F.3d 14 (D.C. Cir. 2015).

II. Plaintiff Fails to State a Claim Under Title IX Because the Complaint Fails to Allege Actual Knowledge of the Alleged Abuse By an Appropriate Official.

The Court should dismiss Count I of the Complaint because it fails to allege sufficient facts to support a claim under Title IX. The statute forbids sex discrimination by recipients of federal education funding. *See* 20 U.S.C. § 1681(a); *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 173 (2005). The Supreme Court has held that "a student can recover damages under Title IX for sexual harassment by a teacher when three elements exist: (1) an appropriate official at the school, *i.e.*, one with authority to institute corrective measures, (2) had actual notice of the harassment and (3) demonstrated deliberate indifference to the harassment." *Blue v. District of Columbia*, 811 F.3d 14, 21 (D.C. Cir. 2015) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)). Thus, Plaintiff must demonstrate that "an official who at minimum has authority to address the alleged discrimination and to institute corrective measures" on the school district's behalf has "actual knowledge of discrimination" and the school district had an "opportunity to rectify any violation." *Gebser*, 524 U.S.at 290; *see also id.* at 285 ("[I]t would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official."). To show actual notice, school officials must have been aware of "known acts of sexual harassment by a teacher," *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641 (1999), and "such

acts must have come to the school officials' attention *while the harassment was ongoing*," *Blue*, 811 F.3d at 21 (citing *Davis*, 526 U.S. at 642–43) (emphasis added).

Plaintiff fails to state a claim under Title IX because she does not "satisfy the *Davis* standard" to show the District's actual notice of ongoing sexual harassment *Id.* "Nowhere in her complaint d[oes] she allege that anyone—much less an appropriate official—knew of any acts of sexual harassment while the harassment was *ongoing*." *Id.* (emphasis added). Plaintiff alleges that Walker's last act of sexual misconduct occurred in the summer of 2016, before the start of the 2016-2017 school year. Compl. ¶ 22. But it was not until during the 2016-2017 school year that an unnamed parent allegedly told Hollis of "allegations" about Plaintiff's relationship with Walker. Compl. ¶ 24; *see also id.* ¶¶ 37-39 (alleging that the District knew of the alleged discrimination "at least by 2017"). Thus, according to the Complaint, the alleged report to Hollis occurred only *after* the sexual misconduct had ended. Therefore, the District had no opportunity to rectify the violation. Because Plaintiff does not allege that Walker's sexual harassment was ongoing when Hollis was informed of allegations of a sexual relationship between Plaintiff and Walker, the Court should dismiss Count I of the Complaint against the District and DCPS.

What is more, the Complaint does not plausibly allege actual notice because it does not allege that Hollis was made aware of any "known acts" of sexual harassment by Walker. *Davis*, 526 U.S. at 641. To the contrary, the Complaint only alleges that Hollis was informed of "allegations" about the sexual relationship by an unnamed third party who is not claimed to have any concrete knowledge of the sexual misconduct alleged in the Complaint. *See* Compl. ¶ 24; *Blue*, 811 F.3d at 21 ("*Davis* requires that the sexual harassment be 'known,' and Blue has failed to allege that anyone *knew* sexual harassment was occurring in Weismiller's classroom. Blue has therefore failed to state a claim to relief under Title IX."). On this front, Plaintiff's

allegations fall far short of even those the D.C. Circuit found insufficient in *Blue v. District of Columbia*, 811 F.3d 14 (D.C. Cir. 2015). There, the plaintiff alleged that the school had actual notice through a pregnancy test she took at the school's request and interviews of teachers and staff who had seen her and the teacher alone in a classroom. 811 F.3d at 21. Here, Plaintiff does not even allege that other teachers and staff observed her and Walker together; in fact, she concedes that Walker was the *only* faculty member in attendance at the after-school program where he inappropriately touched Plaintiff, and she does not allege that any staff member observed any other sexual contact between them. *See* Compl. ¶¶ 11-20. Therefore, the Complaint does not state a claim under Title IX.

Finally, Count I also fails because the Complaint does not allege facts indicating that Hollis was an "appropriate official" at the school with the authority to fire or discipline Walker. An "appropriate person" to whom a report must be made under Title IX must have "authority to take action," meaning the authority to "fire or discipline the teacher in question." *Blue*, 850 F. Supp. 2d at 34; *Baynard v. Malone*, 268 F.3d 228, 238-39 (4th Cir. 2001) (holding that an "appropriate person" under Title IX has the authority to hire and fire); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir. 1997) (defining an "appropriate person" under Title IX as "someone whom the school board has appointed to monitor the conduct of other employees and, as distinguished from reporting to others, remedy the wrongdoing themselves"). Here, the Complaint does not allege that Hollis had the authority to take action herself and instead faults her for failing to investigate or report the allegations of Walker's relationship with Plaintiff. *See* Compl. ¶ 25. As a result, the Court should dismiss Count I because the Complaint fails to allege that a report of sex discrimination was made to an appropriate person under Title IX.

III. Plaintiff's Common Law Claims Against the District in Counts IV, V and VII Fail.

A. Plaintiff's Common Law Claims Against the District Are Barred Because She Did Not Comply with D.C. Code § 12-309.

Plaintiff's failure to provide statutory notice under D.C. Code § 12-309 before filing the Complaint forecloses her common law claims against the District. Section 12-309 "imposes a notice requirement on everyone with a tort claim against the District of Columbia." *District of Columbia v. Dunmore*, 662 A.2d 1356, 1359 (D.C. 1995). Notice must be provided *before* filing a lawsuit against the District and cannot be provided after filing suit. *McGee v. District of Columbia.*, 646 F. Supp. 2d 115, 121 (D.D.C. 2009). The statute is to be construed narrowly against claimants "because it is in derogation of the common law principle of sovereign immunity." *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 436 (D.C. 2000) (citations omitted). Furthermore, "[w]hile . . . 'precise exactness' in the notice statement [is not required], the requirements of the statute are nevertheless to be strictly construed." *Braxton v. Nat'l Capital Hous. Auth.*, 396 A.2d 215, 217 (D.C. 1978) (citations omitted).

Section 12-309 includes two requirements: timely notice and sufficient notice. A plaintiff provides timely notice by providing notice "within six months after the injury." D.C. Code § 12-309. A sufficient notice requires provision of the "time, place, cause, and circumstances of the injury." *Id.* "A report in writing by the Metropolitan Police Department, in regular course of duty, is a sufficient notice under [§ 12-309]." D.C. Code § 12–309. But the mere "existence of a police report does not necessarily mean that the District has received the type of actual notice which § 12-309 contemplates." *Allen v. District of Columbia*, 533 A.2d 1259, 1262 (D.C. 1987); *Patrick v. District of Columbia*, 126 F. Supp. 3d 132, 136 (D.D.C. 2015) (quoting *Allen*). Rather, the same requirements for timeliness and sufficiency apply both to written notice letters and notice through police reports. *See Snowder v. District of Columbia*,

949 A.2d 590 (D.C. 2008) (vehicle owners' stolen vehicle police reports did not provide sufficient notice of their intent to sue for damages arising from costs of towing and storage of their vehicles without adequate notice, the injury detailed in the reports was not the injury complained of in the lawsuit, and the reports did not establish a reasonable basis for anticipating legal action); *Washington v. District of Columbia*, 429 A.2d 1362, 1367 n.17 (D.C. 1981) (noting that, to satisfy the requirements of D.C. Code § 12-309, a police report "must contain information as to time, place, cause and circumstances of injury or damage with at least the same degree of specificity required of a written notice.") (citation, footnote, and quotation marks omitted). This interpretation is consistent with the purpose of the statute to give the District timely notice of the injury so that it can investigate, correct, and settle. *See, e.g.*, *Gwinn v. District of Columbia*, 434 A.2d 1376, 1378 (D.C. 1981) (explaining § 12-309 was intended to give the District "a litigative advantage over an ordinary civil defendant" by affording the District opportunity to "quickly investigate before evidence became lost or witnesses unavailable; correct hazardous or potentially hazardous conditions; and settle meritorious claims.").

Here, Plaintiff did not provide the mandatory notice to the District. First, she did not provide written notice before filing this lawsuit. *See* Ex. 1, Declaration of Lana Craven. Furthermore, Plaintiff's tort claims cannot be saved by MPD's June 20, 2020 arrest report because it did not provide timely notice to the District of Plaintiff's claims. The arrest report indicates only that the complainant (presumably Plaintiff here) "engag[ed] in sexual acts with [Walker] in 2015." Compl. Ex. A. Because the report was generated approximately five years after the injury occurred, the police report did not provide timely notice of Plaintiff's claim. And

to the extent that Plaintiff seeks to recover for injuries sustained after 2015, the report did not provide sufficient notice because it provides only that the alleged abuse occurred in 2015.

Nor does the police report meet the "cause" or "circumstances" elements under Section 12-309. To satisfy the "cause" element, the police report must "recite[] facts from which it could be reasonably anticipated that a claim against the District might arise." *Washington*, 429 A.2d at 1367 (citation, footnote, and internal quotation marks omitted). The written notice or police report must disclose both the factual cause of the injury *and* a reasonable basis for anticipating legal action as a consequence. *Id.* at 1366. Such notice would suffice "if it either characterized the injury and asserted the right to recovery, or without asserting a claim described the injuring event with sufficient detail to reveal, in itself, a basis for the District's potential liability." *Id.* "As to the 'circumstances' element under § 12-309 . . . the adequacy of the circumstances described must be determined with reference to the purpose of the statutory notice requirement which is to give the District timely information concerning a claim against it, so it may adequately prepare its defense." *Id.* (citations, ellipses, and quotation marks omitted). Nothing in the report puts the District on reasonable notice of any potential legal action based on its alleged negligence or intentional conduct. *See* Compl. Ex. A. The mere statement that Plaintiff engaged in sexual acts with a "teacher at the school [she] attended", *id.*, is not sufficient notice to the District. The Court should dismiss Plaintiff's common law claims against the District because she failed to provide timely and sufficient notice under D.C. Code § 12-309.

B. Plaintiff Fails to State a Claim for Negligent Hiring, Supervision, Training or Retention.

In any event, Plaintiff fails to state a plausible claim of negligent hiring, supervision, training, and retention against the District.[3] To prevail on this claim under District law, a plaintiff must "show that an employer knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee." *District of Columbia v. Tulin*, 994 A.2d 788, 794 (D.C. 2010) (citations omitted). A plaintiff must demonstrate that an employer or supervisor either observed the tortious conduct or otherwise had an opportunity to stop the tortious conduct to prove negligent supervision. *Brown v. Argenbright Sec. Inc.*, 782 A.2d 752, 760 (D.C. 2001). As for hiring, "to state a claim for negligent hiring, a plaintiff must allege specific facts from which an inference can be drawn that the employer did not conduct a reasonable background investigation, and that such an investigation would have uncovered a reason not to hire the alleged tortfeasor." *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 230 (D.D.C. 2015)

Plaintiff's threadbare and conclusory allegations fail to state a claim. *See Harvey v. Kasco*, 109 F. Supp. 3d 173, 179 (D.D.C. 2015) (granting motion to dismiss negligent training and supervision claim where plaintiff offered no facts "regarding the District of Columbia's knowledge that one of its officers would allegedly use excessive force in effectuating an unjustified arrest in a single incident, or that other officers would fail to intercede"). Plaintiff also has failed to present facts about the District's training and supervision, or lack thereof, of

[3] The Complaint alleges that Walker and Hollis were employees of the District. Compl. ¶¶ 8-9. In fact, neither was employed by the District. For purposes of this motion to dismiss only, the District treats these allegations as true as required by the legal standard for motions to dismiss under Rule 12(b)(6).

staff at DESA. *See Blakeney v. O'Donnell*, 117 F. Supp. 3d 6, 21 (D.D.C. 2015) (granting District's motion to dismiss negligent training claim). Instead, Plaintiff alleges that the District received notice of the 2015 sexual misconduct five years later on June 20, 2020. Compl. ¶ 10; *Id.* Ex. A. At best, the Complaint alleges that Hollis was "informed by another parent that there were *allegations* regarding a sexual relationship between Walker and Plaintiff" at some point in 2017. Compl. ¶¶ 24, 37-38 (emphasis added). But Plaintiff alleges that the sexual misconduct occurred, at the latest, in the summer of 2016. Compl. ¶ 22. Therefore, the Complaint lacks any allegation that the District's alleged negligence in retaining Walker after it received notice of allegations of his wrongdoing in 2017 caused any harm to Plaintiff. And Plaintiff fails to allege *any* facts from which an inference can be drawn that the District did not conduct a reasonable background investigation, and that such an investigation would have uncovered a reason not to hire Walker. Therefore, the Court should dismiss Count IV of the Complaint. *See Spiller v. District of Columbia*, 302 F. Supp. 3d 240, 255 (D.D.C. 2018) (dismissing negligent supervision and training claim where the complaint made no allegations that the defendant knew or should have known of incompetent or dangerous behavior by its employee before the incident giving rise to the claim).

C. Plaintiff Fails to State a Claim for Intentional Infliction of Emotional Distress.

To make out a claim for intentional infliction of emotional distress, Plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) either intentionally or recklessly (3) causes Plaintiff severe emotional distress. *Kowalevicz v. United States*, 302 F. Supp. 3d 68, 76 (D.D.C. 2018). Liability will be imposed only for conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Homan v. Goyal*, 711

A.2d 812, 818 (D.C. 1998). Determining whether the alleged conduct clears this high bar is a question for courts at the dismissal stage. *Kowalevicz*, 302 F. Supp. 3d at 76.

Plaintiff falls far short of clearing this high bar. She does not allege facts showing that the District intentionally or recklessly engaged in behavior amounting to "extreme or outrageous" conduct. Further, Plaintiff's bald assertions of emotional distress are insufficient as to satisfy the third element of intentional infliction of emotional distress. Accordingly, the Court should dismiss Plaintiff's claim for intentional infliction of emotional distress. *See, e.g.*, *Avent v. District of Columbia*, No. 08-cv-20 (JR), 2009 WL 387668, at *1 (D.D.C. Feb. 13, 2009) (dismissing intentional infliction of emotional distress claim where the D.C. Department of Youth Rehabilitation Services allegedly "failed to address [the plaintiff's] concerns about her son's treatment, refused her requests to investigate an ongoing sexual relationship between one of its employees and her son, and implied that she was the cause of her son's problems").

D. Wanton or Reckless Conduct Is Not a Cognizable Claim under District Law.

Finally, the Court should dismiss Count VII as against the District because "wanton or reckless conduct" is not a cognizable, standalone tort under District law. Instead, under District law, whether a "defendant's tortious conduct [was] . . . outrageous, characterized by malice, wantonness, gross fraud, recklessness, or willful disregard of the plaintiff's rights" is a factor to consider when determining whether a plaintiff may be entitled to punitive damages. *Sere v. Grp. Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. 1982); *see also Tolson v. District of Columbia*, 860 A.2d 336, 345 (D.C. 2004) ("[P]unitive damages may be awarded only if it is shown by clear and convincing evidence that the tort committed by the defendant was aggravated by egregious conduct and a state of mind that justifies punitive damages.") (citations and quotations omitted). And punitive damages are not available against the District under these circumstances. *See, e.g.*, *Smith v. District of Columbia*, 336 A.2d 831, 832 (D.C. 1975) (per curiam) (holding that, "as a

general rule," punitive damages are not available against a municipality in the absence of a statute expressly authorizing the award of punitive damages, and noting that no such general statute exists in the District of Columbia); *Flythe v. District of Columbia*, 791 F.3d 13, 23 (D.C. Cir. 2015) (citing *Smith* for this proposition). Thus, wanton or reckless conduct cannot constitute a separate cause of action from the underlying tort. Therefore, the Court should dismiss Count VII of the Complaint as against the District.

CONCLUSION

For these reasons, the Court should grant Defendants' motion to dismiss and dismiss all claims against the District and DCPS.

Date: July 30, 2021

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ Christina Okereke
CHRISTINA OKEREKE [219272]
Chief, Civil Litigation Division Section II

/s/ *Steven N. Rubenstein*
STEVEN N. RUBENSTEIN [1013094]
Assistant Attorney General
400 6th Street, N.W.
Washington, D.C. 20001
(202) 727-9624
(202) 741-0592 (fax)
Steven.Rubenstein3@dc.gov

/s/ *Aaron Finkhousen*
AARON FINKHOUSEN [1010044]
Assistant Attorney General
400 6th Street, NW
Washington, D.C. 20001

(202) 724-7334
(202) 730-0492 (fax)
aaron.finkhousen@dc.gov

Counsel for Defendant District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**21-cv-01762 (DLF)**
	)	
DISTRICT OF COLUMBIA, *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER

Upon consideration of Defendants District of Columbia and the D.C. Public Schools' Motion to Dismiss the Complaint, any opposition and reply, and the entire record, it is this _____ day of _____, 2021, hereby,

ORDERED that Defendants' Motion is **GRANTED**; and it is further

ORDERED that Counts I, IV, V, and VII of the Complaint are **DISMISSED WITH PREJUDICE** as against Defendants District of Columbia and the D.C. Public Schools.

SO ORDERED.

_____
DABNEY L. FRIEDRICH
United States District Judge