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.
_____/

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 that the Motion to Dismiss be in part and 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.

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

A pleading in a civil action must contain "a short and plain st

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,

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

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.

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 it (s 0 Td 12.64rTj/TT3 1 TT3 1 j1.32 0 Td(t)-4(e)5 (x)2 (a

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.

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

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*

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*

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]

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

Fla. Stat. § 394.459(10). Put differently, Plaintiffs have a post-deprivation remedy in

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.

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 ,ctsrnngC5gF4 (e)(e F)i1dswfavorable to D.P., E.S., L.A. and W.B., the record does not support awfinding that these officers wuld have reason to believe that any of theee e children had a mental illneeSee Section 394.455(29) of the Florida Mental Hnalth 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 abili(n).9 (yes)60 (the)-1 (o p)4 (er)4 (c)- person's ability to meet the ordina ry demands of living. For the purposes of this part, *the term does not include a developmental disability as defined in chapter 39* ,3intoxication, or conditionsnn4 (a)1.1 (n)6 (if)8 (e)5 (s)8 (t)4 (e)5 (abuse.

The FAC alleges, and Defendante do not contest, tha(n).9 ( )]TJ0.002 Tc 0 Tw [(D.P)-1 (for "Exceptional Student Education" and have been placed in specialized claseroome. ECF No. 31 ¶ 12–18, 73, 104, 157. Developmental disability ie not eynonymous with

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-3 (t)-4wgut e0n (t)-4 (i)-8 (ffs)-3 (sa( )TjEM (

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).

away. *Id*.

the nature of the need; and

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

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

The remaining factors all

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-

oetilg eh haotia dt8-4 (m)-21 (92 ( )]TJ-1 (o)-11 (ha)-ci)-6 (s)2 rcs ance(uf)2.29 0 Td[(e)]T

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 4 (l)-5 (s)4 an 4 (l)narmed-eight-year-old child. Thus, any amount of force, even five minutes in handcuffs, is disproportionate to the need. Finally, the FAC allegel 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 thand(,)e(s)2 (,[2 ( )]h-1 (m)0.003 Tjw 0.24

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

> 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

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

(citing *Davis v. Scherer*

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."

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)

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

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

lead every reasonable officer in [the defendant's] position to conclude the force was unlawful." *Oliver v. Fiorino*, 586 F.3d 898, 907 (11

> 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

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 tXIII0 Tc 0.022 Tw

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]

A. *Violations of Title II of the ADA and Section 504 of the Rehabilitation Act*

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.

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

allegations of reasonable modifications that Defendants "knew or should have known

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).[10]

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 re1 (d)4[X1 (y)-, (n)-2 (p)4 (r)43 (on)1 -5nyntiled tinautiov orrecl prat4ny

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.* des

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.

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 leave to file a Second Amended Complaint.

For the foregoing reasons, I

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

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 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).