2021 WL 2102837
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United States District Court,
W.D. Texas, Austin Division.

ROUND ROCK INDEPENDENT SCHOOL DISTRICT, Plaintiff/Counter-Defendant,

v.

AMY M., Individually and on Behalf of Sophia M., a Minor Child With a Disability, Defendant/Counter-Plaintiff/Third-Party Plaintiff,

v.

Matt Groff, in His Individual Capacity, and Antonio Lott, in His Individual Capacity, Third-Party Defendants.

CAUSE NO. 1:20-CV-496-LY
|
Signed 05/19/2021

Attorneys and Law Firms

Stacy C. Ferguson, Victor I. Cerda, Escamilla & Poneck, LLP, San Antonio, TX, for Plaintiff/Counter-Defendant/Third-Party Defendants.

Elizabeth Ann Angelone, Cuddy Law Firm, PLLC, Austin, TX, for Defendant/Counter-Plaintiff/Third-Party Plaintiff.

ORDER ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

LEE YEAKEL, UNITED STATES DISTRICT JUDGE

***1** Before the court in the above-styled and numbered cause of action are Defendant Amy M.'s Motion for Pendency or in the Alternative, Order to Show Cause Why Defendant Has Not Implemented Relief Ordered by Special Education Hearing Officer filed September 30, 2020 (Doc. #12), Plaintiff Round Rock Independent School District's ("RRISD") Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss Defendant's Counter-Claim filed December 18, 2020 (Doc. #16), Third-Party Defendants Matt Groff and Antonio Lott's Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss Plaintiff/Third-Party Plaintiff's Original Third Party Complaint filed December 18, 2020 (Doc. #17), Defendant Amy M.'s Unopposed Motion for Entry of Scheduling Order on Plaintiff's IDEA Claims filed April 7, 2021 (Doc. #24), and associated response and reply briefs.

This case was referred to a United States Magistrate Judge for resolution of nondispositive motions and report and recommendation on dispositive motions. *See* 28 U.S.C. § 636(b)(1)(A)-(B); Fed. R. Civ. P. 72; Loc. R. W.D. Tex. App'x C, R. 1(c)-(d).

The magistrate judge signed an order and report and recommendation on April 29, 2021 (Doc. #27) recommending that this court grant Amy M.'s motion by ordering RRISD to reimburse tuition and transportation expenses, deny RRISD's and Groff and Lot's motions to dismiss, and grant Amy M.'s scheduling-order motion.

A party may serve and file specific written objections to the proposed findings and recommendations of a magistrate judge within 14 days after being served with a copy of the report and recommendation and thereby secure *de novo* review by the district court. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b). A party's failure to timely file written objections to the proposed findings, conclusions, and recommendations in a report and recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. United Services Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

The record shows that all parties had notice of the report and recommendation by April 29, 2021, and that objections were due on or before May 13, 2021. RRISD, Groff, and Lott filed objections to the report and recommendation on May 13, 2021 (Doc. #29). Amy M. responded to RRISD, Groff, and Lott's objections to the report and recommendation on May 19, 2021 (Doc. #31), arguing that the objections "should be overruled and the [report and recommendation] should be adopted in full." In light of the objections, the court undertakes a *de novo* review of the record and applicable law.

The court is of the opinion that the objections do not raise issues that were not adequately addressed in the report and recommendation. Therefore, finding no error, the court accepts and adopts the report and recommendation filed in this case for substantially the reasons stated therein. Accordingly,

IT IS ORDERED that RRISD, Groff, and Lott's objections to the report and recommendation of the United States Magistrate Judge are **OVERRULED.**

***2 IT IS FURTHER ORDERED** that the report and recommendation of the United States Magistrate Judge is **ACCEPTED AND ADOPTED** by the court.

IT IS FURTHER ORDERED that Amy M.'s pendency-or-show-cause motion (Doc. #12) is **GRANTED.** RRISD shall reimburse Amy M. for tuition and transportation expenses as outlined in the magistrate judge's report and recommendation.

IT IS FURTHER ORDERED that RRISD's (Doc. #16) and Groff and Lot's (Doc. #17) motions to dismiss are **DENIED.**

IT IS FINALLY ORDERED that Amy M.'s scheduling-order motion (Doc. #24) is **GRANTED.** The court will render a separate scheduling order.

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

MARK LANE, UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE:

Before the court are Defendant Round Rock Independent School District's Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss Defendant's Counter-Claim (Dkt. #16); Third Party Defendants Matt Groff and Antonio Lott's Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss Plaintiff/Third-Party Plaintiff's Original Third Party Complaint (Dkt. #17); Defendants' Motion for Pendency or in the alternative, Order to Show Cause Why Defendant Has Not Implemented Relief Ordered by Special Education Hearing Officer (Dkt. #12); and Defendant's Unopposed Motion for Entry of Scheduling Order on Plaintiff's IDEA Claims (Dkt. #24).[1] After reviewing the entire case file, relevant case law, and determining a hearing is not necessary, the undersigned issues the following Report and Recommendation to the District Court.

I. Brief Background

This action started with two separate lawsuits. First, Amy M. ("Amy") filed a lawsuit, individually and on behalf of her minor daughter, Sophia M. ("Student"), seeking an award of attorneys' fees and costs against Round Rock Independent School District ("RRISD") under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq. M. v. RRISD*, No. 1:20-cv-00256-LY-ML (Dkt. #1). Second, RRISD filed a separate lawsuit seeking a *de novo* appeal of the Special Education Hearing Officer's underlying IDEA decision. Dkt. #1. Per RRISD's unopposed motion, these two suits were consolidated under the above-styled case number. Dkt. #15.

Subsequently, Amy filed two auxiliary claims. Amy, individually and on behalf of Student, first filed counterclaims against RRISD pursuant to Title II of the Americans with Disabilities Act (the "ADA") and Section 504 of the Rehabilitation Act of 1973 (the "RA"). Dkt. #5. Next, Amy filed a third-party complaint against Matt Groff ("Groff") and Antonio Lott ("Lott"), in their individual capacities, asserting 42 U.S.C. § 1983 and First Amendment retaliatory claims. Dkt. #6. The parties' present motions focus on these auxiliary claims. Accordingly, the undersigned will only provide the facts necessary to adjudicate the parties' currently pending motions.

II. Factual and Procedural Background

***3** Student is a high school student attending Round Rock High School in the Round Rock Independent School District. Dkt. #5 at 8. Due to a serious boating accident that occurred in July of 2013, Student is eligible for special education and related services as a student with a traumatic brain injury ("TBI") and an "other health impairment" ("OHI") of Chronic Headache Disorder. Dkt. #1-1 at 4 (Decision of the Hearing Officer).[2] Since the underlying accident, Student has had multiple individual education plans ("IEPs") in order to provide her with a free appropriate public education ("FAPE"). *See id.* During one such IEP, a March 7, 2014 IEP conducted in Hawaii, it was noted that Student was most alert during the mornings but then would deteriorate as the day progressed, resulting in ongoing headaches and significant mental and physical fatigue. *Id.* As a result of her TBI and OHI, Student missed a large amount of school during her middle school years. *See id.* at 4-7.

Student started her freshman year at Round Rock High School during the fall of 2018. *Id.* at 7. She was unable to complete freshman orientation because of headaches instigated by loud noises. *Id.* Student's parents, in what the pleadings reveal to be a pattern of attentive and proactive behavior, emailed

the school district to inform it about Student's issues and conditions. The parents recommended the high school reach out to the Student's middle school case manager to discuss Student's needs and provided the case manager's phone number. *Id.*

Student's neurologist completed a 504 service OHI form on September 21, 2018, indicating she had "refractory headaches/migraine, anxiety, and PTSD." *Id.* The neurologist recommended that Student be given a reduced workload, reduced homework, and other modifications as needed. *Id.* This medical finding was duplicated by other medical professionals throughout Student's childhood. *See id.*

In September of 2018, parents began emailing various school district employees notifying them of Student's absences due to migraines. *Id.* These migraines resulted in Student's admittance to Dell Children's Hospital and Boston Children's Hospital, of which the school district was notified. Furthermore, Student missed 65 days during the fall of the 2018-2019 school year and the entire spring semester of 2019. *Id.* at 12.

During this time, Student's health continued to decline. Student's parents inquired about "home tutoring" in an email to Student's case manager in light of her continued absences. *Id.* at 8. In the fall and winter of 2018-2019, Student's therapist recommended that Student return to school "when she was medically able to do so"; Student's neurologist provided a homebound needs assessment to RRISD and indicated Student would be confined to the house for an extended period of time; and Student's psychiatrist sent a letter to RRISD recommending that Student be reintegrated into the school environment via "homebound services" administered in the school library so that she could have "a flexible schedule for her difficult days." *Id.* at 9. Subsequently, Student's neurologist informed RRISD that Student "had experienced increased symptoms including escalating headaches that interfered with daytime and classroom functioning." *Id.* at 9. These communications culminated in an ARD Committee meeting completed on March 11, 2019. *Id.* The committee noted Student was missing long periods of school and instruction. *Id.* Despite the parents' request and medical professionals' suggestions that Student receive shortened school days, the IEP scheduled student for "a full school day" plus additional tutoring to help Student "transition back to school." *Id.* at 10. Parents assert they were later informed by the assistant principal that the before-school tutoring would not be rewarded with "course or attendance credit." Dkt. #5 at 6-7. The email further provided the ARD committee had "set up a 'full school day' of classes for Student." Dkt. #1-1 at 11. Student never attended regular school day classes following her tutorial sessions due to her OHI. *Id.*

***4** Amy contends she met with Principal Groff and Attendance Officer Lott ("RRISD Parties") in January of 2019. Dkt. #6 at 5. While she claims to have already provided RRISD with this documentation, Amy states she again provided RRISD Parties with medical notes indicating Student had a chronic illness and would not be able to attend school on a regular basis. *Id.* Per Amy, these medical notes also "explained [Student's] necessary accommodations includ[ing], *inter alia*, flexible scheduling and 1:1 instruction." *Id.* Noting the "meeting did not go well," Amy posits that RRISD Parties informed her that RRISD would not accommodate Student's disabilities and Student would "never graduate from high school." *Id.* Amy also contends RRISD Parties stated her only recourse "was to withdraw [Student] and 'homeschool' her or else face criminal action" in light of Student's absences. *Id.*

The following day, Amy claims she sent a letter to Groff explaining her dismay and indicating the letter "was her first step in filing a formal grievance against [RRISD Parties]." *Id.* About two weeks later, Lott filed truancy charges against Amy, stating she was criminally negligent and failed to require Student to attend school as required by law. Dkt. #1-1 at 10. Amy contends that Groff, at a minimum, approved the filing of the complaint. Dkt. #6 at 6. Lott claims that Amy never turned in documentation for Student's absences in a timely manner. Dkt. #1-1 at 10. Amy vehemently disagrees, contending she repeatedly turned in the necessary documentation and was unaware until the January ARD Committee Meeting that RRISD claimed they did not have the requisite documentation. *Id.*

Pursuant to the levied truancy criminal charges, Amy was served with a Parent Contributing to Non-Attendance summons. Dkt. #6 at 6. Amy states she made multiple court appearances and incurred attorney's fees defending herself from the criminal action. *Id.* Amy also argues she had to delay Student's medical treatment "by months" because of her mandatory court appearances, delays that caused Student physical and emotional harm. *Id.* Amy states she endured these criminal charges despite having provided RRISD with adequate documentation to excuse Student's attendance. The criminal complaint against her was eventually dismissed after Amy's counsel filed a motion to dismiss. *Id.*

Student was unilaterally disenrolled from RRISD when she did not physically appear for the first day of the 2019-2020 year. Dkt. #5 at 22. Amy claims this occurred despite having provided medical documentation excusing Student's absences. *Id.* On June 19, 2019, Amy provided her 10 day notice to RRISD of her intent to unilaterally place Student in private school at Fusion Academy ("Academy"). Dkt. #1-1 at 12. Following being admitted and receiving treatment at the Pediatric Pain Rehabilitation center at Boston Children's Hospital, Student began attending Fusion on November 5, 2019. *Id.* at 12-13. Fusion is a private, accredited school. *Id.* Every student is taught in a closed classroom in a one-on-one setting. *Id.* At Fusion, Student can attend school in a quiet, flexible setting where she starts school at 7:30 a.m. and attends for four hours. *Id.* While at Fusion, Student's attendance has improved. *Id.* at 14.

Amy claimed that RRISD failed to offer Student a FAPE for the 2018-2019 and 2019-2020 school year. *Id.* at 2. Accordingly, Amy instigated a special education due process hearing under the IDEA. The hearing was held on December 16, 17, and 18, 2019. Dkt. #5 at 23. Amy sought the following relief: (1) RRISD fund private placement for Student at Fusion for the 2019-2020 school year, fund transportation to Fusion, and fund Student's related services at Fusion; and (2) in the alternative, RRISD provide an appropriate program for Student. Dkt. #1-1 at 3.

In her final decision, the Special Education Hearing Officer ("SEHO") found that RRISD "denied Student a FAPE during the 2018-2019 school year through the most recent IEP scheduled to end in March 2020; therefore, Student is entitled to reimbursement of private placement at Fusion Academy." *Id.* at 1. Accordingly, the SEHO ordered the following:

> ***5** 1. The School District shall be responsible for tuition for the fall semester 2019 (November 5 to the end of the semester); tuition for the spring semester 2020 and summer school 2020 (if Student attends), payable within 30 school days from the date of this Decision.
>
> 2. The School District shall be responsible for reimbursement for mileage to and from Fusion for the above-listed time frames at a rate of .575 cents per mile. Parent shall provide the School District with Student's attendance records during the semesters to receive reimbursement. The School District shall reimburse Parent within 30 school days of receiving attendance records from each semester.
>
> 3. The School District shall reimburse for counseling services Student received during the 2018-2019 school year. Parent shall provide the School District with the bills within 30 days of this Decision. The School District shall pay Parent within 30 days of receipt of the bill.
>
> 4. The School District shall convene an ARD Committee meeting at least 10 days before the start of the 2020-2021 school year to discuss Student's proposed IEP for that school year.
>
> 5. Petitioner's claims arising under any law other than the IDEA are dismissed as outside the jurisdiction of the hearing officer.

Dkt. #1-1 at 22-23.

In the aftermath of the SEHO's decision, Amy filed suit to recover attorneys' fees and costs pursuant to the IDEA proceeding. *M. v. RRISD*, No. 1:20-cv-00256-LY-ML (Dkt. #1). RRISD subsequently filed its own suit seeking a *de novo* review of the SEHO's determination. Dkt. #1. Amy subsequently filed counterclaims against RRISD and third-party claims against RRISD Parties. *See* Dkt. #5, #6. Once these suits were consolidated into the above-styled case, the litigants filed a series of motions that are now before the court.

First, Amy filed her Motion for Pendency or in the alternative, Order to Show Cause Why Defendant Has Not Implemented Relief Ordered by Special Education hearing Officer. Dkt. #12. Per this motion, Amy asks the court to order RRISD to reimburse her "for tuition and transportation expenses incurred" in relation to Fusion "after February 14, 2020." *Id.* at 12 at 7. RRISD filed a response, and Amy filed a reply. *See* Dkt. #13, #14.

Second, RRISD filed its Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss Defendant's Counter-Claim. Dkt. #16. The same day, RRISD Parties filed their Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss Plaintiff/ Third Party Plaintiff's Original Third Party Complaint. Dkt. #17. Responsive briefings were filed in relation to these two motions. *See* Dkt. #17, #18, #20, #21.

Finally, Amy filed her Unopposed Motion for Entry of Scheduling Order on Plaintiff's Idea Claims. Dkt. #24. The court addresses these motions in turn.

III. Legal Standard

When evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6) the complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). Although Federal Rule of Civil Procedure 8 mandates only that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief," this standard demands more than unadorned accusations, "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Bell Atl. v. Twombly*, 550 U.S. 544, 555-57, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Rather, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* at 570, 127 S.Ct. 1955. The Supreme Court has made clear this plausibility standard is not simply a "probability requirement," but imposes a standard higher than "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

***6** The requisite standard is properly guided by "[t]wo working principles." *Id.* First, although "a court must 'accept as true all of the allegations contained in a complaint,' that tenet is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678, 129 S.Ct. 1937. Second, "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679, 129 S.Ct. 1937. Thus, in considering a motion to dismiss, the court must initially identify pleadings that are no more than legal conclusions not entitled to the assumption of truth, then assume the veracity of well-pleaded factual allegations and determine whether those allegations plausibly give rise to an entitlement to relief. If not, "the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.' " *Id.* at 679, 129 S.Ct. 1937 (quoting Fed. R. Civ. P. 8(a)(2)).

IV. Motion to Dismiss – Counterclaims

Amy and Student (collectively "Defendants") assert three counterclaims against RRISD.[3] Dkt. #5. First, Student asserts an ADA claim against RRISD, claiming RRISD failed in its responsibilities to provide its services in a full and equal manner to disabled persons. Second, Student brings similar claims against RRISD under the RA. And third, Amy brings a retaliatory claim against RRISD under the RA and ADA, claiming she "suffered adverse consequence[s] for advocating on behalf of [Student], who was at all times relevant herein a qualified individual with a disability as there defined." *Id.* at 28.

RRISD argues Defendants' counterclaims should be dismissed. First, RRISD argues Student's ADA and RA claims must be dismissed because she has not pleaded that Groff and Lott "intentionally discriminat[ed] by refusing to grant [Student's] requests for accommodations out of gross professional misconduct or prejudice, ill-will, or spite." Dkt. #16 at 10. RRISD further argues that rather than acting with prejudice, ill-will, or spite, Student's pleadings show that RRISD employees were "extremely concerned that [Amy was] actively impeding [Student's] ability to receive education services by encouraging her absenteeism." *Id.* In sum, RRISD argues that while its actions to address Student's "absenteeism problem may not have been successful – or even if they were negligent – [Defendants] cannot plausibly 'link' the allegations they have made in this case to any 'prejudice, ill-will or spite' against [Student] to meet the 'intentional discrimination' standard required for Section 504 and ADA claims." *Id.* at 12. RRISD also argues that Amy's claim should be dismissed because "[r]ights under Section 504 belong to the disabled student ... not to her mother." Dkt. #20 at 7.

In response, Defendants contend they have pleaded sufficient facts to state a claim for relief under the RA and ADA. *See* Dkt. #18. Amy also asserts she has standing to assert her retaliatory claim under the RA and ADA. *Id.* Finally, Defendants argue that RRISD's Rule 12(b)(6) Motion is untimely because "it was filed months after RRISD filed its answer." *See* Dkt. #18 at 2-3.

A. Untimely

As an initial matter, the court will not dismiss as untimely RRISD's Motion to Dismiss. Under Rule 12(b)(6), a motion raising the defense of failure to state a claim upon which relief may be granted must be made before the service of a responsive pleading. Rule 12(h)(2) provides, however, that the defense may be raised as late as trial. *See* 5A Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 1357 at 299-300. "Technically, 'a post-answer Rule 12(b)(6) motion is untimely and some other vehicle, such as a motion for judgment on the pleadings or for summary judgment, must

be used to challenge the failure to state a claim for relief.' " *Delta Truck & Tractor, Inc. v. Navistar Int'l Transp. Corp.*, 833 F. Supp. 587, 588 (W.D. La. 1993); *see Puckett v. United States*, 82 F. Supp. 2d 660, 663 (S.D. Tex. 1999), *aff'd sub nom. Puckett v. C.I.R.*, 213 F.3d 636 (5th Cir. 2000). However, courts do not mechanically or routinely deny any motion made after a responsive pleading as untimely. *See Puckett*, 82 F. Supp. 2d at 663. If the defendant has previously included in its answer the defense raised in the motion, thereby giving notice, then courts generally allow Rule 12(b)(6) motions filed after the answer. *See id.* Courts consider Rule 12(b)(6) motions to dismiss filed after a responsive pleading, not as a Rule 12(b) motion, but as a Rule 12(c) motion for judgment on the pleadings. *See Delta Truck & Tractor*, 833 F. Supp. at 588. Notably, however, a court applies the same standards to Rule 12(c) motions as it applies to timely Rule 12(b)(6) motions. *Id.*; *see Puckett*, 82 F. Supp. 2d at 663; *see also* 5A Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 1357 at 515-516.

***7** Here, RRISD filed its Rule 12(b)(6) motion after it filed its Answer. *See* Dkt. #8. However, its Answer expressly states that Defendants' counterclaims fail to state a cause of action upon which relief may be granted "as will be set out more fully in Counter-Defendants' Motion to Dismiss." *Id.* at 22. Based on this representation, the court treats RRISD's Rule 12(b)(6) motion as a Rule 12(c) motion for judgment on the pleadings; the court will also apply the same standard that applies under Rule 12(b)(6). *See Puckett*, 82 F. Supp. 2d at 663 (similarly converting a Rule 12(b)(6) motion into a Rule 12(c) motion). For these reasons, the court rejects Defendants' timeliness argument.[4]

B. Claims Asserted by Student

As noted, Student alleges that RRISD discriminated against her because of her disabilities – namely TBI and Chronic Headache Disorder – in violation of the RA and ADA. The RA mandates that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Similarly, the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Courts apply the same analysis to claims under the RA and Title II of the ADA. *Kemp v. Holder*, 610 F.3d 231, 234 (5th Cir. 2010) ("The RA and the ADA are judged under the same legal standards, and the same remedies are available under both Acts."); *Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567, 574 (5th Cir. 2002) (stating that the language in the ADA generally tracks the language in the RA, and jurisprudence interpreting either section is applicable to both).

In order to show a violation of either the RA or ADA, a plaintiff must allege that (1) she has a qualifying disability; (2) she is being denied the benefits of services, programs, or activities for which the public entity is responsible, or is otherwise discriminated against by the public entity; and (3) such discrimination is by reason of her disability. *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 690 (5th Cir. 2017). A plaintiff can recover monetary damages under either statute only if she also proves that the discrimination was intentional. *Cadena v. El Paso Cnty.*, 946 F.3d 717, 724 (5th Cir. 2020); *Delano-Pyle*, 302 F.3d at 574 ("A plaintiff asserting a private cause of action for violations of the ADA or the RA may only recover compensatory damages upon a showing of intentional discrimination.").

Although intent is a necessary element of a damages claim under the ADA and the RA, the Fifth Circuit "has hesitated to 'delineate the precise contours' of the standard for showing intentionality. But the cases to have touched on the issue require something more than 'deliberate indifference,' despite most other circuits defining the requirement as equivalent to deliberate indifference." *Cadena*, 946 F.3d at 724 (quoting *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 574 (5th Cir. 2018)). In practice, the Fifth Circuit has affirmed a finding of intentional discrimination when a county deputy knew that a hearing-impaired suspect could not understand him, rendering his chosen method of communication ineffective, and the deputy made no attempt to adapt. *Delano-Pyle*, 302 F.3d at 575-76. The court also has found that a plaintiff created a genuine dispute as to intentional discrimination when the evidence indicated that, "on several occasions, an interpreter was requested but not provided," and one of the forms of communication that a hospital used to speak with a hearing-impaired patient was often ineffective. *Perez v. Doctors Hosp. at Renaissance, Ltd.*, 624 F. App'x 180, 185 (5th Cir. 2015); *see also Cadena*, 946 F.3d at 724 (finding that plaintiff created a fact issue regarding intentional discrimination where prison refused to provide disabled inmate a wheelchair).

***8** In the context of the IDEA, the Fifth Circuit has held that "facts creating an inference of professional bad faith or gross misjudgment are necessary to substantiate a cause of action for intentional discrimination under [the RA] or ADA against a school district predicated on a disagreement over compliance with IDEA." *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 455 (5th Cir. 2010).

With this background in mind, the court turns to Student's allegations in this case. In support of her argument that RRISD intentionally discriminated against her because of her disabilities, Student states that RRISD Parties knew she had TBI and Chronic Headache Disorder. Moreover, Student alleges that RRISD's staff had been repeatedly informed by treating medical professionals and Amy that she required, *inter alia*, a flexible schedule, shortened school day, and homebound services due to her illness. Despite the foregoing, Student contends that RRISD repeatedly ignored or denied these requests, including the refusal to implement any shortened or flexible school day. Furthermore, Student alleges that Amy "provided a plethora of medical records," notes from medical professionals, and copies of "numerous appointment notices/excuses" that not only apprised RRISD of Student's chronic illness, but also represented the required documentation to excuse Student's numerous absences.[5] Nonetheless, Student alleges she was "unilaterally disenrolled from RRISD when she did not physically appear for the first day of the 2019/20 school year." Dkt. #5 at 22. Student also alleges RRISD affirmatively asserted that unless Amy withdrew Student, Amy would face criminal charges. In response, RRISD argues that Student's allegations support only a common law negligence claim and do not rise to the level of intentional discrimination.

Upon review, Student's allegations are sufficient to create "an inference of professional bad faith or gross misjudgment" and state a plausible claim of intentional discrimination under the RA and ADA. *D.A. ex rel. Latasha A.*, 629 F.3d at 455; *see also Shaikh v. Texas A&M Univ. Coll. of Med.*, 739 F. App'x 215, 223 n.9 (5th Cir. 2018) (finding that medical school student adequately alleged college intentionally discriminated against him where college knew about student's health and psychiatric issues and dean of admissions stated that plaintiff was rejected for readmission because he was "a liability for psychiatric reasons"); *Casas v. City of El Paso*, 502 F. Supp. 2d 542 (W.D. Tex. 2007) (finding that fact issue existed as to whether city bus driver intentionally discriminated against disabled bus passenger under the ADA when bus driver required passenger's personal care attendant to pay fares even though the driver was told about plaintiff's privileges). As the Fifth Circuit has stated: "Intent is usually shown only by inferences. Inferences are for a fact-finder and we are not that." *Perez*, 624 F. App'x at 184. "RRISD's own interpretation of the facts is not sufficient to defeat [Student's] claims under the RA and ADA at the motion to dismiss stage." *S.C. v. Round Rock Indep. Sch. Dist.*, No. A-19-CV-1177-SH, 2020 WL 5351077, at *5 (W.D. Tex. Sept. 4, 2020).

***9** Relying on *Washington ex rel. J.W. v. Katy Indep. Sch. Dist.*, 403 F. Supp. 3d 610, 622 (S.D. Tex. 2019), RRISD argues Fifth Circuit jurisprudence requires a plaintiff to show that the defendant acted out of "prejudice, ill-will, or spite" against the plaintiff. Dkt. #16 at 12. However, as noted, "the Fifth Circuit has not delineated 'the precise contours' of what is required to show intentional discrimination and has not stated that a plaintiff must show prejudice, ill-will, or spite." *S.C.*, 2020 WL 5351077, at *5. In *Washington*, the court simply stated: "The Fifth Circuit has not articulated a clear standard for intentional discrimination under § 504 and Title II in the school context, but courts in this circuit have concluded that 'the plaintiff must link the discrimination claims to some evidence of prejudice, ill-will, or spite,' or, at the least, show deliberate indifference." 403 F. Supp. 3d at 623. The District Court went on to find that the "uncontroverted summary judgment evidence" undermined any inference of intentional discrimination. *Id.* Thus, RRISD's reliance on *Washington* is misplaced.

Based on the foregoing, RRISD's arguments are unpersuasive and, therefore, its Motion to Dismiss should be **DENIED** so far as it relates to the claims asserted on behalf of Student. Dkt. #16.

C. Claims Asserted by Amy

RRISD also seeks the dismissal of Amy's retaliatory ADA/RA claim. RRISD argues the perceived retaliation – the levied truancy charges – occurred not because of any retaliation but because Amy "had not turned in documentation for [Student's] absences" and Lott was therefore legally required to file truancy charges. Dkt. #20 at 7-12. RRISD also argues that Amy has not pleaded a "casual connection" between the protected act and the adverse action, and Amy does not have standing under the ADA or RA. *Id.*

The ADA prohibits a school district from "discriminat[ing] against any individual because such individual has opposed

any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA].” 42 U.S.C. § 12203(a). “To establish a prima facie case of unlawful retaliation under the ADA, “the plaintiff must show that: (1) she engaged in an activity protected by the ADA, (2) she suffered an adverse ... action, and (3) there is a causal connection between the protected activity and the adverse action.” ” *Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 304 (5th Cir. 2020). “If the [plaintiff] establishes a prima facie case of retaliation, the [school district] must come forward with a legitimate, nondiscriminatory reason for its action. If the [school district] meets its burden of production, the [plaintiff] must then demonstrate that the proffered reason is a pretext for retaliation.” *Id.*

As an initial matter, Amy directly refutes RRISD's alleged non-retaliatory reason for filing the truancy charges – RRISD's contention that the truancy charges had to be filed under existing law given Amy's failure to provide the necessary documentation regarding Student's absences. *See* Dkt. #5 at 7-8. Even taking RRISD's interpretation of the relevant truancy laws as true, Amy contends she provided RRISD with enough documentary evidence to, at the very least, excuse Student's absences under RRISD's policies. *See id.* At this stage of the proceedings, the court is bound to take the nonmoving parties well-pleaded facts as true. *See In re Katrina Canal Breaches Litig.*, 495 F.3d at 205. Accordingly, Amy has successfully pleaded that RRISD was not required to file the truancy charges and, therefore, that this proffered reason for the charges is a mere pretext for retaliation. Thus, RRISD's argument fails.

The court is also unpersuaded by RRISD's “temporal proximity” argument. *See* Dkt. #20 at 8. RRISD argues that “[w]ithout more than timing allegations, a close temporal proximity between the protected activity and the adverse action is insufficient to state a retaliation claim.” *Id.* However, the Fifth Circuit recently stated that “[c]lose timing between an [plaintiff's] protected activity and an adverse action against him *may* provide the ‘causal connection’ required to make out a prima facie case of retaliation.” *Lyons*, 964 F.3d at 304 (stated in an employment litigation context). Here, Amy alleges the retaliation is evident by the fact that “just two weeks after [she] stated she would be filing a grievance against Lott and Groff, Lott filed a criminal complaint alleging ‘Parent Contributing to Non-Attendance’ ” against her. Dkt. #5 at 15. Thus, RRISD's “temporal proximity” argument is rejected.

***10** This leaves only RRISD's standing argument, that Amy's retaliatory claim should be dismissed because she “is not a member of a protected class under [the RA] or ADA.” Dkt. #16 at 13. As an initial matter, “[b]ecause the ADA adopts the remedial provision of the [RA], ‘jurisprudence interpreting either section is applicable to both.’ ” *Hooker v. Dallas Indep. Sch. Dist.*, No. 3:09-CV-1289-D, 2010 WL 4025877, at *3 (N.D. Tex. Oct. 13, 2010) (quoting *Delano-Pyle*, 302 F.3d at 574).

Under the RA, “[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]” 29 U.S.C. § 794(a). “[A]ny person aggrieved by any act or failure to act by any recipient of Federal assistance” may bring suit under the Rehabilitation Act. 29 U.S.C. § 794a(a)(2). “This includes non-disabled persons.” *Hooker*, 2010 WL 4025877, at *4; *see Glass v. Hillsboro Sch. Dist.*, 142 F. Supp. 2d 1286, 1288 (D. Or. 2001) (“[T]o state a valid claim for associational discrimination under [the RA and the ADA], a plaintiff must allege some specific, direct, and separate injury as a result of association with a disabled individual.”) (internal quotation marks omitted).

To establish standing based on violations of Student's rights under the ADA and RA, Amy's injuries must be (1) independent of Student's injuries, and (2) casually related to the denial of federally-required services of Student. *See Hooker*, 2010 WL 4025877, at *4; *see also Disability Rights Wis., Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 801 (7th Cir. 2008) (holding the plaintiff did not have constitutional standing where it only alleged injuries to its members, not to itself); *L.F. v. Houston Indep. Sch. Dist.*, 2009 WL 3073926, at *21 (S.D. Tex. Sept. 21, 2009) (holding that parent did not have standing to pursue RA claim on behalf of her child). “A parent who suffers retaliation after asserting the rights of a disabled child ... has suffered a personal injury sufficient to establish standing to bring a [RA] claim.” *Hooker*, 2010 WL 4025877, at *4; *see Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 44-49 (1st Cir. 2000) (holding the plaintiff had sufficiently pleaded standing where she alleged that school district enacted a retaliatory policy to “ ‘put parent on defensive’ and ‘shut her down,’ ” restricted the plaintiff's access to school records, and threatened to report

the parent to the state Department of Children, Youth and Family Services).

Upon review, Amy has standing to assert RA and ADA claims against RRISD. Amy alleges she was harmed by the criminal truancy proceedings instigated by the actions of the RRISD Parties. She also alleges these charges were brought against her because of her advocacy in the IDEA proceedings on behalf of Student. Thus, it is plausible that Amy suffered injuries distinct from any injuries sustained by Student. Viewing all well-pleaded facts in the light most favorable to the nonmovant, Amy has sufficiently pleaded her retaliatory RA and ADA claims to survive RRISD's Motion to Dismiss.[6]

***11** Based on the foregoing, the undersigned recommends that RRISD's Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss Defendant's' Counter-Claims be **DENIED**. Dkt. #16.

V. Motion to Dismiss – Third-Party Claims

On July 16, 2020, Amy filed her Third-Party Complaint, asserting Section 1983 and First Amendment retaliatory claims against RRISD Parties in their individual capacities. *See* Dkt. #6. Amy alleges she "engaged in protected speech by advocating on behalf of her disabled child and by subsequently taking steps to file a grievance with RRISD against Matt Groff and Antonio [Lott]." *Id.* at 22. Amy states that RRISD Parties "retaliated against [her] by filing a frivolous and meritless criminal complaint of Parent Contributing to Non-attendance ... within two weeks of her advocacy and notice of intent to file a grievance." *Id.* Contending RRISD Parties' actions were done under the color of law and "would deter a person of ordinary firmness from engaging in advocacy for their disabled child," Amy asserts claims under the First Amendment pursuant to Section 1983. *Id.* at 22-23.

On December 18, 2020, RRISD Parties filed their Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss Plaintiff / Third-Party Plaintiff's Original Third Party Complaint. *See* Dkt. #17. RRISD Parties argue that Amy's third-party claim should be dismissed for the following reasons: (1) Amy failed to exhaust her administrative remedies pursuant to Texas Education Code Sections 7.57 and 22.0514; (2) RRISD Parties are immune from personal liability under Texas Education Code Sections 22.051 and 55.0511; (3) RRISD Parties are entitled to qualified immunity; (4) Groff is not liable for acts of other officers; and (5) Amy cannot show a casual link between the protected speech and the filing of the truancy charge. *See* Dkt. #17.

A. Failure to Exhaust

RRISD Parties first argues that Amy's third-party complaint must be dismissed because she did not exhaust her administrative remedies by appeal to the Texas Commissioner of Education as required by Texas Education Code Section 7.057. Dkt. #17 at 6-8.

In relevant part, Section 7.057 provides that:

> a person may appeal in writing to the commissioner if the person is aggrieved by:
>
> (1) the school laws of this state; or
>
> (2) actions or decisions of any school district board of trustees that violate:
>
> (A) the school laws of this state; or
>
> (B) a provision of a written employment contract between the school district and a school district employee, if a violation causes or would cause monetary harm to the employee.

Tex. Educ. Code § 7.057(a). The "school laws of this state" consist of Titles 1 and 2 of the Education Code and the administrative rules adopted under them. *Id.* § 7.057(f)(2). In short, "aside from employment-contract disputes, the Education Code limits administrative appeals to cases where a person is aggrieved by Titles 1 or 2 of the Education Code or a school board's violation of them." *McIntyre v. El Paso Indep. Sch. Dist.*, 499 S.W.3d 820, 824 (Tex. 2016). "Administrative appeals are only permitted when a person is aggrieved by the school laws, a school board's violation of the school laws, or its violation of a written employment contract." *Id.* (citing Tex. Educ. Code § 7.057(a)). In all other cases, a person may resort directly to the courts. *Id.*

***12** In *McIntyre v. El Paso Independent School District*, the plaintiffs were charged with criminal truancy despite their contention that the children were exempt from attending school under Texas truancy law. *See id.* at 821-22. Consequently, the plaintiffs sued the school district under the Texas and U.S. Constitution, alleging the school district violated their constitutional rights "by prosecuting [them] for

a crime [the district] knew [they] did not commit, and by using the charges to force [them] to cooperate with [the school district's] demands." *Id.* at 822. The school district in turn sought to dismiss the plaintiffs' claims under the theory that they failed to exhaust their administrative remedies pursuant to section 7.057. *Id.* at 823-24. The Texas Supreme Court clarified that "the mere fact that [the plaintiffs'] claims 'involve' the school laws does not mean they must exhaust administrative remedies. Rather, for administrative remedies to be available, they must be aggrieved by either (1) the school laws themselves or (2) a school board's violation of the school laws." *Id.* at 826. The Texas Supreme Court held the plaintiffs' claims did not satisfy either of these requirements because the parent's grievance was with the district's alleged constitutional violations, not the compulsory attendance law or any identified school regulation. *See id.* at 826; *see also id.* at 827 (finding the school district "neither challenge the school laws nor assert the District violated them. In other words, the Commissioner has no jurisdiction over [the plaintiffs'] claims, and the [plaintiffs] have no administrative remedies to exhaust").

This case falls directly in line with the *McIntyre* court's analysis. Amy does not challenge RRISD policy nor Texas truancy law. Rather, like in *McIntyre*, Amy sues RRISD Parties for their alleged constitutional violations – their decision to prosecute her for a crime she did not commit and their efforts to use the charges to retaliate against her for her threatened grievance and advocation on behalf of her daughter. Because she neither challenges the school laws nor asserts the District violated them, Amy had no administrative remedies to exhaust under Section 7.057. Accordingly, RRISD Parties' argument fails.

The court also finds RRISD Parties' argument predicated on Texas Education Code Section 22.0514 unpersuasive. *See* Dkt. #17 at 8-9. As it relates to Section 22.0541, "Texas law recognizes that a party is not required to exhaust administrative remedies when ... a plaintiff raises Title 42 or constitutional claims." *Moreno v. Northside Indep. Sch. Dist.*, No. CV SA-11-CA-0746-XR, 2012 WL 13029076, at *2 (W.D. Tex. Jan. 23, 2012); *Stephens v. Allen Indep. Sch. Dist. Bd. of Trustees*, No. 4:08-CV-058, 2009 WL 394324, at *2 (E.D. Tex. Feb. 13, 2009) (holding constitutional claims against school's professional employees not governed by statutory exhaustion requirement). Amy only brings a constitutional claim against RRISD Parties. Thus, RRISD Parties' argument predicated on Section 22.0514 also fails.

B. Statutory Immunity

RRISD Parties also argue that Amy cannot state a valid Section 1983 or First Amendment claim because RRISD Parties are immune from personal liability for acts undertaken within the course and scope of their professional employment pursuant to Texas Education Code Sections 22.051 and 22.0511. *See* Dkt. #17 at 9-10; *see also* Dkt. #21 at 8-9. However, immunity granted under this statutory scheme does not shield defendants from federal constitutional claims. *Doe v. S&S Consol. I.S.D.*, 149 F. Supp. 2d 274 (E.D. Tex. 2001), *affirmed* 309 F.3d. 307 (5th Cir. 2002); *see also Vasquez v. San Benito Consol. Indep. Sch. Dist.*, No. CV B-04-189, 2006 WL 8446896, at *20 (S.D. Tex. Feb. 22, 2006), *report and recommendation adopted*, No. CV B-04-189, 2006 WL 8446897 (S.D. Tex. June 15, 2006) (asserting this finding in the context of Section 22.051). While Amy makes this point clear in her response, RRISD Parties fail to address it. *Compare* Dkt. #19 at 12-13, *with* Dkt. #21. Thus, RRISD Parties' statutory immunity arguments fail.

C. Qualified Immunity

RRISD Parties argue they are entitled to qualified immunity with respect to Amy's Section 1983 claim.

The qualified immunity defense serves to shield government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kinney v. Weaver*, 367 F.3d 337, 349 (5th Cir. 2004) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). When the court is considering a qualified immunity defense raised in the context of a Rule 12(b)(6) motion to dismiss, the court must determine whether "the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (quoting *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 994 (5th Cir. 1995)). "Thus, a plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." *Backe*, 691 F.3d at 648. A defendant is entitled to qualified immunity unless he (1) "violated a statutory or constitutional right" (2) that "was 'clearly established' at the time of the challenged

conduct." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)).

***13** Amy contends that RRISD Parties infringed on her First Amendment rights by retaliating against her after she threatened to levy a formal grievance against them. Amy posits that her advocacy on behalf of her daughter and her "taking steps to file a grievance" with RRISD against Groff and Lott constituted "protected speech." Dkt. #6 at 22. Disputing RRISD Parties' argument that they were required by law to file truancy charges, Amy contends she provided adequate documentation to excuse Student's absences under state and local law and, additionally, satisfied the "chronic illness" exception to school attendance under state and local law. *See id.* Thus, Amy argues that RRISD Parties retaliated against her, and thus infringed her First Amendment rights under Section 1983, "by filing a frivolous and meritless criminal complaint ... against [her] within two weeks of her advocacy and notice of intent to file a grievance." *Id.* Notably, despite alleging that "Groff and Lott retaliated against [her]," Amy asserts only that Lott filed the underlying criminal complaint. *See id.* at 14, 22.

Starting with the "clearly established" prong of qualified immunity, "the law has long been clearly established that government officials cannot retaliate against ordinary citizens for exercising their First Amendment rights." *R.S. ex rel. Smith v. Starkville Sch. Dist.*, No. 1:12-CV-00088-SA-DAS, 2013 WL 5295685, at *8 (N.D. Miss. Sept. 19, 2013); *see Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002) (explaining the First Amendment prohibits "adverse governmental action against an individual in retaliation for the exercise of protected speech activities"); *see also Kinney v. Weaver*, 367 F.3d 337, 358 (5th Cir. 2004) (finding "the First Amendment is violated in 'ordinary citizen' cases if the individual engaged in conduct protected by the First Amendment and the government took action against the person because of that protected conduct").

Based on clear Fifth Circuit jurisprudence, the law prohibiting retaliation by government actors for the exercise of ordinary citizens' First Amendment rights is clearly established. *See R.S. ex rel. Smith*, 2013 WL 5295685, at *8. Moreover, any reasonable official would have understood that filing improper criminal truancy charges against a parent in retaliation for that parent's advocacy of her disabled daughter is a violation of the law. Therefore, the second prong of the qualified immunity test is satisfied.

Turning to the remaining prong, it is abundantly clear at this stage of the proceedings that Amy has overcome the qualified immunity defense as it relates to Lott. Taking the allegations in Amy's Third-Party Complaint as true, Amy has sufficiently pleaded that Lott retaliated against her by filing an impermissible and inapplicable criminal charge against her. *See* Dkt. #6. Although RRISD Parties contend that Lott was required by law to file this charge because Amy did not provide the necessary documentation to excuse Student's absences, Amy's pleadings directly refute this contention. *See* Dkt. #6 at 5, 12, 14. Additionally, while RRISD Parties argue there is no connection between Amy's speech and Lott's levied criminal charges – and thus no retaliation – Amy has sufficiently and unequivocally pleaded facts that show such a connection plausibly exists. Accordingly, Lott is not entitled to qualified immunity at this point in the proceedings as to Amy's First Amendment retaliation claim.

This leaves Groff. Amy does not plead any specific allegations as to how Groff retaliated against her. As a reminder, Amy's claim is based on "the right of an advocate to be free from retaliation in the form of [a] criminal complaint." Dkt. #19 at 17. As noted above, Lott, not Groff, filed the criminal complaint; thus, Lott, not Groff, allegedly retaliated against Amy. Thus, Amy's contention that "Groff and Lott ... violated the First Amendment when they took action against Amy" is flawed. *Id.* at 18. Because Amy has only pleaded that Lott took an action against her, Groff may be found liable under Section 1983 only if a theory of vicarious or *respondeat superior* liability is applicable. In her response, Amy tersely notes that "Groff is liable for inadequate supervision of Lott." *See id.*[7]

***14** "Under section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability." *Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987) (citations omitted). "A supervisory official may be held liable ... only if (1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the constitutional injury." *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011). As a reminder, at this stage of the proceedings, Amy's Complaint must be liberally construed in her favor and all facts pleaded therein must be taken as true. *Leatherman*, 507 U.S. at 164, 113 S.Ct. 1160. Here, Amy alleges that "Groff and Lott informed [her] that [her] only recourse was to withdraw [Student] and 'homeschool' her or else face criminal action." Dkt. #6 at 5. Taken with

the rest of her pleadings, this assertion strongly suggests that Groff "affirmatively participat[ed]" in the filing of the criminal charge – he threatened Amy with the criminal charge if she did not take specific action. Accordingly, at this stage of the proceedings, Amy's "inadequate supervision" theory is supported by her pleadings. Consequently, Groff is not entitled to qualified immunity on Amy's First Amendment claim.

In summary, the undersigned recommends that Third Party Defendants Matt Groff and Antonio Lott's Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss Plaintiff/Third-Party Plaintiff's Original Third Party Complaint be **DENIED**. *See* Dkt. #17.[8]

VI. Motion for Pendency

Per their Motion for Pendency, Defendants argue that RRISD has failed to implement the relief awarded per the SEHO's decision. *See* Dkt. #12. Positing that RRISD is required to implement the SEHO's ordered relief during the pendency of this appeal, Defendants ask the court to order RRISD to reimburse Student's educational placement at Fusion from its start, February 14, 2020, through the pendency of this litigation. Dkt. #12 at 7. In the alternative, Defendants ask the court to implement a show cause order "as to why [RRISD] has not implemented the relief awarded by [the] SEHO." Dkt. #12 at 7. To be clear, both sides agree that retroactive reimbursement for private school tuition may be withheld at this stage of the proceedings. *See* Dkt. #14 at 2.

A. Jurisdictional Argument

RRISD first argues this court lacks jurisdiction to hear Defendants' pendency motion. Dkt. #13 at 2. Citing 34 C.F.R. § 300.152(c)(3), RRISD claims "a complaint alleging a public school district's failure to implement a due process hearing decision must be resolved by the State Education Agency" ("SEA"). *Id.* Because it is undisputed that Defendants bypassed the State Education Agency and filed their complaint directly to the presiding District Court, RRISD argues this court lacks jurisdiction to address the portion of Defendants' Motion that pertains to implementation of the SEHO's decision *Id.*

The court is unpersuaded. Section 300.152(c) and its subsections explicitly deal with "[c]omplaints filed under this section and due process hearings under § 300.507 and §§ 300.530 through 300.532." 34 C.F.R. § 300.152(c). Section 300.152(c)(3) provides that "[a] complaint alleging a public agency's failure to implement a due process hearing decision must be resolved by the SEA." 34 C.F.R. § 300.152(c)(3). Taken together, these subsections provide that the SEA *must* resolve a complaint alleging a public agency's failure to implement a due process hearing *if* the complaint is "filed under this section" with the SEA. *See id.* "In accordance with Section 300.152(c)(3)," Texas Administrative Code Section 89.1185(p) states "a parent *may* file a complaint with the TEA alleging that a public education agency has failed to implement a hearing officer's decision." Tex. Admin. Code § 89.1185(p) (emphasis added). Additionally, this statute provides that "[t]he decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, *or the performance thereof* by any other party, *may bring a civil action with respect to the issues presented at the hearing in any state court of competent jurisdiction or in a district court of the United States*, as provided in 34 C.F.R. § 300.516." *Id.* at § 89.115(n) (emphasis added). These statutes provide that a litigant may challenge an SEHO's decision by filing a complaint directly to the District Court. Thus, RRISD's jurisdictional argument fails.

B. Pendency Arguments

***15** RRISD also argues, in the alternative, that it should not be forced to abide by the SEHO's decision. First, RRISD states it "strongly believes the [SEHO] erred as a matter of law and ... thus [it] has a strong chance of prevailing on Appeal which would result in the [SEHO's] decision being overturned." Dkt. #13 at 3-4. Based on this posture, RRISD argues it would face "undue hardship" if it was forced to pay funds to Defendants and then, upon the reversal of the SEHO's decision, be forced "into a position that may require it to file separate litigation against a parent for the return of such monies." *Id.* at 4. RRISD argues this hardship is highlighted by the fact that a better remedy exists – the placement of the funds into the registry of the court awaiting the pendency of this appeal. *See id.*[9] Second, RRISD argues "it is not clear as to what amount of funds were ordered as reimbursement." *Id.* at 6. Third, RRISD contends a substantive decision regarding whether Student's current placement at Fusion is the "Stay-Put" placement in the underlying hearing is premature. *Id.* at 8. And finally, regardless of the court's answers to the above inquiries, RRISD contends Fusion is no longer the "Stay-Put" placement because Student elected to attend Fusion remotely

in light of the Covid-19 pandemic rather than receive "in-person" placement. *Id.* at 8-11. For the reasons given below, the court rejects these arguments.

The IDEA provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child ...." 20 U.S.C. § 1415(j). The Supreme Court held that an administrative decision in favor of parents who had placed their child in a private school after they rejected a proposed IEP constitutes an agreement by the state to the change of the child's placement, making the new, private school placement the current educational placement of the child. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 371-72, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

In the Third Circuit case *Susquenita School District v. Raelee S.*, the school district appealed the hearing officer's finding that the parents had "a right to withdraw their children from public school unilaterally ... and receive reimbursement for private school tuition" because the district failed to provide a FAPE. *Susquenita Sch. Dist. v. Raelee S. By & Through Heidi S.*, 96 F.3d 78, 80 (3d Cir. 1996). The Third Circuit reviewed the District Court's denial of the school district's motion to stay the requirement that it reimburse the parents for the private school placement during the pendency of the appeal. *Id.* As summarized with approval by the Fifth Circuit:

> On interlocutory appeal, the Third Circuit concluded that the school district was required to pay for the child's private school placement from the point of the administrative decision forward; it also held that the school district "may be required to pay for tuition and expenses associated with a pendent placement prior to the conclusion of the litigation." The court explained that "[t]he purpose of the Act ... is not advanced by requiring parents, who have succeeded in obtaining a ruling that a proposed IEP is inadequate, to front the funds for continued private education."

Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P., 582 F.3d 576, 591 (5th Cir. 2009) (citing *Susquenita Sch. Dist.*, 96 F.3d at 85-87). In concluding the school district "cannot avoid interim responsibility for funding what the state has agreed is an appropriate pendent placement," the Third Circuit was "mindful of the financial burden which will, in some instances, be borne by local school districts." *Susquenita Sch. Dist.*, 96 F.3d at 87. To that effect, the Third Circuit adopted the following statement from the Supreme Court:

> There is no doubt that Congress has imposed a significant financial burden on the States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

***16** *Id.* (quoting *Florence County School District Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993)).

Here, "by force of Supreme Court opinion and federal regulation," the SEHO's February 14, 2020 decision constitutes an agreement between RRISD and Amy that Fusion is the appropriate stay-put placement for the pendency of this lawsuit. *See Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 591 (5th Cir. 2009). Finding the Third Circuit's analysis in *Susquenita* persuasive, the undersigned also finds that RRISD's purported hardship for having to pay funds during the pendency of this appeal, while present, is not so great as to warrant a departure from the jurisprudence depicted above. While paying funds into the court's registry may relinquish RRISD's burden, "[t]he prospect of reimbursement at the end of the litigation turnpike is of little consolation to a parent who cannot pay the toll at the outset." *Susquenita Sch. Dist.*, 96 F.3d at 87. Accordingly, the court finds that RRISD is obligated under existing law to reimburse Defendants during the pendency of this litigation for the continued tuition and transportation expenses needed to maintain Student's statutory pendency placement.[10]

Notwithstanding the above, RRISD "asserts that Student's current remote learning status at Fusion Academy for the 2020-2021 school year is neither the placement that was ordered appropriate by the [SEHO] nor a placement that has been agreed upon by the School District in accordance with 34 C.F.R. § 300.518." Dkt. #13 at 9-10. RRISD notes that (1) the SEHO found the 1:1 in-person placement at Fusion the appropriate placement; (2) Student began attending Fusion virtually due to Covid-19 on March 23, 2020; (3) Texas schools re-opened for in-person attendance in mid-September 2020; and (4) Student has elected not to return to in-person classes at Fusion. *Id.* at 8-9. Based on these factors, RRISD argues that Student has unilaterally changed her placement from that ordered by the SEHO.[11] *Id.* at 8. The court

disagrees. "A change in location alone does not qualify as a change in 'educational placement.' Rather, a change in placement occurs 'when there is a significant change in the student's program.' " *Oliver C. by & through Nichole C. v. Dep't of Educ.*, 762 F. App'x 413, 415 (9th Cir. 2019) (quoting *N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010)). Considering the Covid-19 pandemic, Student's choice to attend Fusion virtually does not constitute a "significant change" to her program. Moreover, Student stipulates she will be returning to Fusion in-person "on or about October 19, 2020" – a date that has since passed. Dkt. #14 at 6. Based on the foregoing, there has not been a meaningful change to Student's placement that influences her statutorily entitled pendency reimbursement.

***17** Finally, RRISD argues there is a "dispute regarding the amount of funds that should be reimbursed for summer school." Dkt. #13 at 6. The SEHO ordered, *inter alia*, that RRISD "be responsible for tuition for ... summer school 2020 (*if Student attends*), payable within 30 school days from the date of this Decision." Dkt. #1-1 at 22 (emphasis added). It is undisputed that Student was enrolled in, and attended at least some of, Fusion's 2020 summer school session. Dkt. #14 at 4. It is also undisputed that Student, allegedly because of her qualified disabilities, missed several summer school classes. Without citing any cases in support, RRISD argues "the hearing officer's notion of '(if Students attends)' means that the significant charges for courses that Student did not actually attend is not a part of the ordered relief." Dkt. #13 at 6-7. Consequently, RRISD contends it is not obligated to pay for the fraction of the summer school tuition representing the dates missed by Student.

This argument falls flat. The court declines to read into the SEHO's order a perfect attendance requirement. It is entirely foreseeable that a student with disabilities will not have perfect attendance, and the court will not put an disabled child and her parents in a position where they must attend every class of a private school placement to receive the full tuition reimbursement ordered by a hearing officer. Not only would such a ruling defeat the spirit of IDEA as discussed above, but it is also not in alignment with the SEHO's decision. The decision's language "if Student attends" means that RRISD must reimburse the cost of summer school tuition at Fusion if Student attends summer school – not that RRISD will reimburse Student's tuition for only the fraction of dates attended. Because it is undisputed that Student attended at least a portion of Fusion's 2020 summer school, RRISD must comply with the SEHO's order that it cover the full tuition cost of Student's 2020 summer school placement at Fusion.[12]

C. Summary

In light of the SEHO's decision, the affidavits of costs provided as exhibits by Defendants, and the foregoing law and analysis, the undersigned recommends the District Judge order RRISD to reimburse Defendants for tuition and transportation expenses incurred after February 14, 2020. Per Defendants' exhibits, these sums include:

(1) Pro-rated tuition from February 2020 through May 2020 in the amount of $5,409.60;

(2) Tuition for summer school in the amount of $12,500.00;

(3) Transportation/mileage reimbursement in the amount $402.96;

(4) Reimbursement for the first installment payment for the Fall 2020 in the amount of $11,246.84;

(5) Reimbursement for future tuition payments and reimbursements as ordered by the SEHO.

VII. Scheduling Order

Also before the court is Defendants' Unopposed Motion for Entry of Scheduling Order on Plaintiff's IDEA Claims. Dkt. #24. Generally, the undersigned does not interfere with the District Judge's schedule. Thus, rather that issuing an order, the undersigned recommends the District Judge **GRANT** Defendants' Unopposed Motion. Dkt. #24.

VIII. Recommendations

Based on the foregoing, the undersigned **RECOMMENDS** the following:

- Defendants' Unopposed Motion for Entry of Scheduling Order on Plaintiff's IDEA Claims (Dkt. #24) be **GRANTED**.
- RRISD's Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss Defendant's Counter-Claim (Dkt. #16) be **DENIED**.
- Third-Party Defendants Matt Groff and Antonio Lott's Federal Rule of Civil Procedure 12(b)(6) Motion to

Dismiss Plaintiffs/Third-Party Plaintiff's Original Third Party Complaint (Dkt. #17) be **DENIED**.

- Defendants' Motion for Pendency or in the alternative Order to Show Cause Why Defendant Has Not Implemented Relief Ordered by Special Education Hearing Officer (Dkt. #12) be **GRANTED**. Accordingly, the undersigned **RECOMMENDS** the District Judge order RRISD to reimburse Defendants for tuition and transportation expenses as dictated above.

IX. Objections

***18** The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*).

SIGNED April 29, 2021.

All Citations

--- F.Supp.3d ----, 2021 WL 2102837

Footnotes

1 These motions were referred by United States District Judge Lee Yeakel to the undersigned pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

2 RRISD repeatedly references the Hearing Officer's underlying decision in its Complaint. *See* Dkt. #1. Moreover, RRISD has attached the decision as an exhibit to its Complaint, and the decision is central to RRISD's claim. *See* Dkt. #1-1. Accordingly, the court considers the Hearing Officer's decision part of the pleadings. *Johnson v. City Secretary Theresa Bowe*, No. 19-40615, —— Fed.Appx. ——, ——, 2021 WL 1373959, at *3 (5th Cir. Apr. 12, 2021) ("Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.").

3 As noted above, the court recognizes that Amy is the only defendant and is proceeding both individually and on behalf of Student. *See* Dkt. #5, #6. That said, the court refers to both Amy and Student as Defendants for the sake of keeping separate those claims brought by Amy individually and those claims brought by Amy on behalf of Student.

4 Likewise, the court dismisses any arguments that RRISD Parties' Motion to Dismiss is untimely.

5 The parties disagree on whether Amy timely provided sufficient documentation under RRISD policies to excuse Student's absences. *See* Dkt. #1-1 at 10 ("[Lott] stated [Amy] did not turn in documentation for Student's absences in a timely manner.... Amy stated she turned in absence documentation to the School District ...."). Similarly, the parties appear to also disagree as to whether Amy was excused from providing additional documentation on Student's illness under RRISD's absence policy because she had shown that Student had a chronic illness. *See, e.g.*, Dkt. #18 at 9 ("Because [Student] had a documented chronical illness, under RRISD's Policy (FEC Local), the principal, Groff, had the authority to waive compulsory attendance requirements."). At this stage of the proceedings, all well-pleaded facts are viewed "in the light most favorable to the [nonmovant]." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

6 RRISD also argues it has immunity "[t]o the extent any of [Defendants'] allegations sound in common law tort, under Texas law." Dkt. #16 at 17. While this may be true, Defendants have not levied any claims sounding in common law tort. *See* Dkt. #5, #6. Thus, this argument is moot.

7 In her Third-Party Complaint, Amy alleges that "Groff is a supervisor of ... Lott." Dkt. #6 at 4. RRISD Parties attempt to argue Groff is not Lott's supervisor and, in any case, Amy has not provided any evidence that Groff is the supervisor of Lott. *See* Dkt. #17 at 17. However, this is the motion to dismiss phase. Amy is not required to provide any evidence. Moreover, questions of fact, like who was Lott's supervisor, are not meant to be addressed at this juncture.

8 Amy asks the court for leave to amend her pleadings if the court grants any aspect of RRISD Parties' Motion. Given the above recommendation, the court does not reach this alternative request.

9 The court notes that RRISD previously filed a motion to deposit the underlying funds into the court's registry. *M. v. Round Rock Independent School District*, No. 1:20-cv-256-LY-ML (Dkt. #10). Given RRISD's lack of rationale for why depositing the funds was necessary, the undersigned rejected RRISD's motion. *M. v. Round Rock Independent School District*, No. 1:20-cv-256-LY-ML (Dkt. #18).

10 The court is unconvinced by RRISD's constitutional argument. Noting the Texas Constitution prohibits "granting public money to individuals for private purposes," RRISD argues such an improper instance may occur if it is forced to abide by the SEHO's order during the pendency of this appeal. *See* Dkt. #13 at 4-5. Specifically, RRISD contends if it wins the appeal it may have to file suit to collect any funds paid to Defendants during the pendency of this proceeding and "[s]uch a lawsuit still might not be effective in ensuring the return of the public funds as there is no guarantee that [it] would be successful collecting upon any Judgment that it would obtain from such litigation." *Id.* at 5. Although RRISD is correct under its hypothetical that it may have to file a separate lawsuit to collect funds paid to Defendants during the pendency of this suit, RRISD has not sufficiently articulated how a constitutional violation will arise if Defendants fail to satisfy this hypothetical secondary judgment. Thus, this argument fails.

11 RRISD fails to cite a single case in support of this argument. *See* Dkt. #13.

12 RRISD states the "summer school" discrepancy is "just one example of the discrepancies that exists." Dkt. #13 at 6. However, because RRISD does not articulate any discrepancy outside the summer school context, it has effectively waived these arguments. *See id.*

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