Case No. 24-1509

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMBER LAVIGNE,

Plaintiff-Appellant,

vs.

GREAT SALT BAY COMMUNITY SCHOOL BOARD; SAMUEL ROY, in his official capacity as a social worker for the Great Salt Bay Community School; JESSICA BERK, in her official capacity as a social worker at the Great Salt Bay Community School; KIM SCHAFF, in her official capacity as the principal at the Great Salt Bay Community School; LYNSEY JOHNSTON, in her official capacity as the Superintendent of Schools for Central Lincoln County School System,

Defendants-Appellees.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Maine
Case No. 2:23-cv-00158-JDL, Hon. Jon D. Levy, presiding

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SUMMARY OF ARGUMENT

Amber Lavigne's thirteen-year-old child was given a chest binder—an undergarment used to compress breasts so the wearer appears masculine—by a Great Salt Bay Community School ("GSB") social worker who also instructed the child on how to use it. School officials also took to calling the child by a different name and referred to the child with pronouns that matched the child's gender identity rather than biological sex. Yet no school official informed Lavigne of these actions What's more, her child was even assured that the social worker would not inform Lavigne and that the child need not do so, either.

These actions ***were not*** just rogue school officials acting outside their authority. Rather, they were undertaken pursuant to the official, if unwritten, policies of the Great Salt Bay Community School Board ("School Board"). Because these actions represent the School Board's *de facto* policy, Lavigne sued the School Board directly to hold the violators of her constitutional rights liable under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

Because Lavigne has pleaded sufficient facts to overcome the School Board's motion to dismiss, this Court should remand the case with instructions to permit discovery.

ARGUMENT

I. This Court should reject the School Board's attempt to muddy the factual waters and confuse the appropriate standard at this stage of litigation.

The School Board posits certain allegations that are irrelevant and inappropriately discount Lavigne's factual allegations—which *must* be taken as true at this stage of litigation. Here, Lavigne will address the inappropriate factual assertions made by the School Board.

A. The correct standard for review at this pre-discovery stage of litigation.

The School Board improperly faults Lavigne for allegedly not meeting the standard of proof for the *merits* stage of litigation. Numerous times throughout its brief, it faults Lavigne for allegedly not "establishing" some element of her claim.[1] But Lavigne does not need to establish—read prove—her claim at the 12(b)(6) stage. Rather, a plaintiff only needs to adequately plead "enough factual material 'to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). As this Court explained in *Rodriguez-Reyes*

[1] Appellee repeatedly argues that Appellant bears the "burden [of] establish[ing] an official municipal policy in order to state a claim against the GSB district." Red Br. at 14; *see also id* at 15, 22, 24.

v. Molina-Rodriquez, "[t]he relevant question for a district court in assessing plausibility is not whether the complaint makes any particular factual allegations but, rather, whether 'the complaint warrant[s] dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.'" 711 F.3d 49, 55 (1st Cir. 2013) (quoting *Twombly*, 550 U.S. at 569 n.14). This Court has said that a District Court must "*draw all reasonable inferences* in favor of the non-moving party," *Cheng v. Neumann*, 51 F.4th 438, 443 (1st Cir. 2022) (*quoting McKee v. Cosby*, 874 F.3d 54, 59 (1st Cir. 2017)) (emphasis added), and avoid applying the motion to dismiss standard "too mechanically." *Garcia-Catalan v. United States*, 734 F.3d 100, 101 (1st Cir. 2013). Instead, the complaint is to "be read as a whole," and for purposes of a motion to dismiss, "'circumstantial evidence often suffices to clarify a protean issue.'" *Id*. at 103 (quoting *Rodriquez-Reyes*, 711 F.3d at 56).

B. The School Board in faulting Lavigne for not pleading certain irrelevant allegations inappropriately attempts to muddy the waters.

With that standard in mind, it is important to address three separate assertions made by the School Board with respect to Lavigne's alleged failure to plead certain factual allegations; assertions that demonstrate how the School Board attempts to invert the motion to dismiss standard, but also assertions that show the Board is simply wrong about the relevance of the "missing" allegations. These

irrelevant allegations actually demonstrate why this Court should remand this case with instructions to permit discovery.

First, the School Board argues that "[t]here is no allegation in the Complaint concerning how long the District knew about this information before" Lavigne learned it from her child. Red Br. at 5. While true, such an allegation is not required to satisfy the 12(b)(6) demand.

Lavigne argues that the School Board, by concealing vital information from her, violated her "fundamental right … to make decisions concerning the care, custody, and control of [her] child[]." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Such particular details as how *long* the School Board knew the information that it concealed before Lavigne discovered the concealment is wholly irrelevant to her cause of action. What's more, the School Board's argument demonstrates the problem with dismissal at the pre-discovery stage: *the School Board* has access to this information—Lavigne does not. For the School Board to fault her for not pleading information she lacks, is logically contradictory: it penalizes her, in a case in which she alleges that the School Board has concealed information from her, precisely on the grounds that it concealed information from her.

Second, the School Board argues that there is no "allegation that Lavigne ever asked the School for any of the information that she alleges the School intentionally concealed from her." Red Br. at 5. True—but, again, irrelevant. The

School Board's agents are the ones who made decisions and took affirmative actions based on those decisions—including giving Lavigne's child a chest binder and socially transitioning the child—and then concealed that information. It is in the nature of concealment that its victim does not imagine that there is a need to ask about whether something is being concealed. To blame the victim—and to dismiss her lawsuit—on the grounds that she never asked whether something was being wrongfully withheld from her is perverse.

Courts follow the "presumption of regularity"—whereby courts presume officials are following the law, *Leveris v. England*, No. CIV.03-85-P-H, 2004 WL 1529293, at *21 (D. Me. May 27, 2004)—and surely law-abiding parents are entitled to presume that public schools are obeying the Constitution. Lavigne therefore bears no burden to periodically call up School Board officials to ask if, by any chance, they happen to have decided to violate her constitutional rights in secret. Public schools have a unique position of authority and trust. The School Board broke that trust and is now attempting to blame Lavigne for being too trusting. App.17 ¶ 38.

Third, the School Board—again arguing the merits, despite the fact that this case is at the pre-discovery 12(b)(6) stage—disputes Lavigne's argument that the School Board's January 14, 2023, statement ratified the GSB officials' actions, thereby affirming that they were, in fact, official policy. The School Board says

that "[its] January 14, 2023 statement said nothing at all about the giving of chest binders or the alleged failure to inform Lavigne of information of any kind." Red Br. at 7. But what a statement "says" and what a statement *means* are different things.

The January 14 statement declared "[a]ll of the Board's policies comply with Maine law, and neither the Board nor school administration are aware of any violation of policy or law which requires further action at this time." APP.035. The School Board issued that statement in response to Lavigne's complaints about school officials giving her child a chest binder and socially transitioning her child without telling her. APP.017–18 ¶¶ 41, 43. Thus the question of whether the statement was "about" the giving of chest binders and the School Board's concealment of this information, Red Br. at 7, is a matter of interpretation—precisely the kind of issue that is supposed to be developed *after discovery,* as a matter of the *merits,* not at the 12(b)(6) stage.

The 12(b)(6) motion "tests *only* the sufficiency of a complaint," and "does not 'resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" *Riddick v. Barber*, 109 F.4th 639, 646 (4th Cir. 2024) (citation omitted, emphasis added). Whether the School Board—by answering Lavigne's complaints with a public statement that "neither the Board nor school administration are aware of any violation of policy," APP.035, was referring to the

GSB officials' actions with respect to her child is a factual question—and one regarding which Lavigne is entitled to a reasonable inference. *Ruiz v. Bally Total Fitness Holding Corp*., 496 F.3d 1, 6 (1st Cir. 2007).

II. Lavigne has pleaded sufficient facts at this early stage of litigation to lead to a reasonable inference that the School Board is liable under *Monell*.

A. The test for *Monell* liability.

Under *Monell*, an individual can sue a governmental body, like a school board, for constitutional violations committed by that body's employees—if those violations are traceable to a governmental policy. The Supreme Court has defined three separate ways that a plaintiff can prove the existence of a policy sufficient to give rise to this type of liability. Two are relevant here.

First, the plaintiff can point to an "'action pursuant to official municipal policy'" that caused the injury. *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (citation omitted). This "includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id*. at 61. This also includes unwritten practices or policies, such as are at issue here. *L.A. Cnty. v. Humphries*, 562 U.S. 29, 36 (2010). Further, "[p]ost-event evidence can shed some light on what policies existed … on the date of an alleged deprivation of constitutional right[s]." *Bordanaro v. McLeod*, 871 F.2d 1151, 1167 (1st Cir. 1989).

Second, an individual can also establish a governmental policy and therefore liability by showing that the entity with policy-making authority—here the School Board—*ratified* the complained-of action or decision. *See, e.g.*, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *Saunders v. Town of Hull*, 874 F.3d 324, 330 (1st Cir. 2017). "[R]atification … and thus the existence of a *de facto* policy or custom, can be shown by a [government entity's] post-event conduct." *Dorger v. City of Napa*, No. 12-cv-440 YGR, 2012 WL 3791447, at *5 (N.D. Cal. Aug. 31, 2012). Such ratification shows that the challenged actions were not a caprice or accident but were, in fact, the actual "official policy" of the government entity being sued.

A plaintiff making this type of argument must, at the 12(b)(6) stage, plausibly allege facts sufficient to lead to an inference that the entity approved not just of the actions but of the basis for the actions. *Cf. Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992) ("[t]here must … be evidence of a conscious, affirmative choice" by government to ratify official conduct).

At this point, before discovery, Lavigne has pleaded facts that lead to one of two conclusions: either it was the official, if unwritten, policy of the School Board that GSB officials could give students chest binders and engage in social transitioning without notifying parents ***or*** the School Board ratified the actions complained of here—thereby making those actions, which had perhaps violated

some *de jure* policy, into the *de facto approved* policy. Obviously, Lavigne cannot prove which of these two theories is the correct one without discovery. But either one would entitle her to relief. And all that is necessary to survive a 12(b)(6) motion is to plausibly allege facts that, if proven, would show that one of these two things occurred. Lavigne has easily met that requirement, as explained below.

B. Lavigne has pleaded sufficient factual allegations to support her *Monell* claim against the School Board.

Lavigne asserts eight separate factual allegations which support her claim for *Monell* liability against the School Board.

First, her child was given a chest binder by then-school social worker Mr. Roy in his office, where he instructed the child on how to wear it and explained to the child that he would not tell Lavigne, and that the child need not tell her either. APP.013–14 ¶¶ 20, 22. No school official informed Lavigne of this. APP.013 ¶ 20.

Second, Lavigne's child was socially transitioned at school—called a different name and referred to with different pronouns—by GSB officials, all without any of those officials notifying her. APP.014 ¶ 26.

Third, the Superintendent explained to Lavigne "that no policy had been violated by the giving of chest binders to A.B., or by school officials (specifically Defendants Roy and Berk) employing a different name and pronouns with respect to A.B., without informing Plaintiff." APP.016 ¶ 34. As it is the Superintendent's job to know the School Board's policies and ensure compliance, it is a reasonable

inference that (a) if no policy was violated by these actions, (b) notwithstanding the written Transgender Guidelines which purport to require parental involvement, (c) there must actually have been a *de facto* unwritten policy that blessed Mr. Roy's conduct. APP.011. ¶ 9. That conclusion is buttressed by the School Board's later ratification of his conduct.

Fourth, Lavigne spoke at the December 14, 2022, School Board meeting detailing her allegations and explaining how the School Board had violated her trust by making these decisions and taking these actions respecting her minor child without ever informing her or including her in the decision-making process. APP.17 ¶ 38.

Fifth, the School Board issued a statement five days later, in response to Lavigne's comments, claiming that students have a "right to privacy" regardless of age at the K-8 school district, and chastising parties—presumably including Lavigne—who had publicized the incident. APP.034. It is a reasonable inference that (a) if information was withheld from Lavigne, and (b) the School Board claims that all children at its K-8 school district have a right to privacy, that (c) there must be a general understanding within the district—i.e., a *de facto* policy—not to contravene that right, and to hold that it is even valid against parents.

Sixth, the School Board released a second statement on January 14, 2023, referring to Lavigne's statements as a "false narrative" (despite the fact that the

School Board later admitted many of her allegations in its Answer, including admitting that information was withheld and concealed from her. ECF Doc 13at 6 (Answer ¶ 33)).[2] Further, the statement also declared: "[a]ll of the Board's policies comply with Maine law, and neither the Board nor school administration are aware of any violation of policy or law which requires further action at this time." APP.035. This of course, is ratification for *Monell* purposes. *Praprotnik*, 485 U.S. at 127 ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.").

Seventh, on February 26, 2023, Principal Schaff issued a statement in her capacity as GSB principal. She alleged that Lavigne misunderstood the laws and policies pertaining to gender identity, and effectively asserted that the school had followed its own official policies in all steps relating to the incident. APP.036. This

[2] The School Board attempts to get around this admission by arguing that "[i]t admitted only that that is what Lavigne alleged." Red Br. at 5 n.1. *See* ECF Doc. 13 at 6 (Answer ¶ 33) ("Defendants admit that Plaintiff alleges the material set forth in paragraph 33 of the Complaint"). This attempt to play semantic games is irrelevant and distracting, and has led the School Board to make a crucial error. It is well established that "[a]n allegation … is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided." Fed. R. Civ. P. 8(b)(6). The School Board chose to submit a responsive pleading (the Answer), and *not* to deny the allegation; thus the Court should consider the allegation admitted. Of course, this allegation must *already* be taken as true pursuant to Rule 12(b)(6), but it is noteworthy that the School Board is bound to admit it—even while denying it.

public defense of the social worker and his actions demonstrates what the actual, *de facto* (though unwritten) policy was at the school: the withholding of information from parents.

Eighth, the School Board unanimously voted to give Mr. Roy a probationary second-year contract.[3] That decision is further evidence of the School Board's *actual* policy; it is unlikely the School Board would grant a second-year contract to an employee who publicly violated actual, written policy.

Lastly, it is important to note that the School Board makes a factually incorrect statement with respect to Lavigne's allegations. The School Board argues that Lavigne did not argue below that the statements of the Superintendent, School Board, or Principal were evidence of a "pattern or practice" leading to the establishment of an unwritten policy actionable under *Monell*. Red Br. at 22. That is false. Lavigne directly argued the relevance of the statements to showing the

[3] The School Board attempts to fault Lavigne for not alleging in the complaint that Roy was given a second-year probationary contract. But the giving of the contract occurred *after* the complaint was filed. Lavigne cites the official meeting notes (which are available to the School Board) and attaches the minutes as Addendum 1 to this reply. Further, the School Board did not dispute the allegation that Mr. Roy was granted a second-year contract, nor point to any precedent that weighs against this Court taking judicial notice of this official public record as it has the power to do, *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993), and has done in other cases. *See e.g.*, *Pitta v. Medeiros*, 90 F.4th 11, 14 n.2 (1st Cir. 2024) ("On a motion to dismiss, we may consider documents which are of undisputed authenticity, official public records, central to the plaintiff's claim, or sufficiently referred to in the complaint. We will consider the e-mails attached to appellees' memorandum to the district court as documents of undisputed authenticity.") (internal citation omitted).

existence of a policy, custom, pattern, or practice below. *See* ECF Doc. 16 at 17 (Plaintiff's Opposition to Defendants' Motion to Dismiss).[4]

C. Lavigne has sufficiently pleaded facts to allow a reasonable inference that the actions of the school officials were pursuant to official policy.

The main thrust of the School Board's argument is that Lavigne has not pleaded sufficient facts to allege a widespread pattern or practice sufficient to establish *Monell* liability to be "inferable from [a] single incident." Red Br. at 18 n.3. There are two problems with this.

First, Lavigne has not identified *only* a single incident—she has alleged (1) the giving of a chest binder, (2) the giving of a *second* chest binder, (3) the fact that school officials made the decision to call her child by a different name and different pronouns without informing her, (4) the fact that GSB officials continued to withhold this information from her and would have continued to do so indefinitely, had she not learned about it on her own, and (5) that GSB officials also effectively encouraged *her child* to withhold this information from her. These

[4] The paragraph making these allegations explicit (thought implicit elsewhere) states: "Second, the Complaint references conversations and statements in which school officials and the School Board indicated that all policies were followed—in other words, that the withholding/concealment at issue was consistent with official policy. Compl. ¶ 34. Plaintiff also specifically alleges that the statements released by the School Board in the aftermath of Plaintiff's allegations at the December School Board meeting assert that all policies had been followed. Compl. ¶¶ 42, 43. The School Board's released statements alleging that all policies were followed throughout all incidents complained of in this case." ECF Doc. 16 at 17.

are all separate instances of GSB officials making decisions that directly affect the mental health and physical wellbeing of her thirteen-year-old child without informing her of those actions. And they all are part of a *de facto* policy of both concealment and of violation of Lavigne's fundamental "right, coupled with the high duty," to oversee her child's upbringing. *Troxel*, 530 U.S. at 65 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

Second, the argument ignores the factual allegations about how the school *reacted*. *See Bordanaro*, 871 F.2d at 1167 ("Post-event evidence can shed some light on what policies existed in the city on the date of an alleged deprivation of constitutional right."). And it is that reaction that shows the existence of an unconstitutional, *de facto* policy with the force of law. Lavigne argues that what happened in the aftermath of her discovery of the chest binder and her confrontation with school officials (the Superintendent telling her no policy was violated; the tenor and nature of the School Board's statements; the principal's statement; the granting to Mr. Roy of a second-year contract) coupled with the incidents themselves are sufficient to lead to an inference that there was a widespread custom, pattern, or practice. The post-confrontation actions are not what would be expected if the only relevant policies were the written Transgender Guidelines and the written Staff Conduct Policy, both of which purport to prohibit the complained-of incidents.

The School Board also argues, in reference to the Superintendent's statement that no policy was violated, that "the fact that an employee's conduct does not *violate* a school policy does not mean that such conduct *is* the policy …, let alone a policy or practice so well-settled that it can be considered adopted by the policymaker." Red Br. at 23 (emphasis in original). This, however, misses a crucial point.

The conduct violated the *written* Transgender Guidelines, which the School Board argues (correctly) require parental involvement. This is key. If the School Board had a written policy that was violated, one would expect some type of disciplinary action or other corrective action on the part of the School Board; at a minimum, statements of disavowal. Instead, what occurred was the opposite: a statement that all policies had been followed, and the rewarding of the GSB employee most responsible. This all indicates the existence of a *different*, *de facto* policy; one that *allows* what the written policy *forbids*. That is a reasonable inference—and that, again, is all that is required. *A.G. ex rel. Maddox v. v. Elsevier, Inc*., 732 F.3d 77, 80 (1st Cir. 2013) (all that is required is "a reasonable inference that the defendant is liable for the misconduct alleged." (citation omitted)).

The School Board also argues that "the fact that [Mr.] Roy was granted a second-year probationary contract likewise fails to fill the void of factual allegations in support of Lavigne's pattern or practice theory." Red Br. at 25. Yet

Mr. Roy violated written policy—only to be defended by the principal and the School Board. A reasonable inference of that, plus the giving of the second-year contract is that the School Board actually operates under a different policy—one that blessed the complained-of conduct.

D. The School Board's attempts to point to obvious alternative explanations for the conduct—rather than the most logical explanation—also fails.

Appellee argues that there are a number of "obvious, alternative explanations" for the situation, citing *Frith v. Whole Foods Market, Inc*., 38 F.4th 263, 275–76 (1st Cir. 2022), for the proposition that allegations do not meet the plausibility standard if there are obvious alternative explanations. *See* Red Br. at 23–24. To make such an argument, the School Board would have to show that "allegations of misconduct are equally consistent with some innocent explanation." *Foisie v. Worcester Polytechnic Inst.*, 967 F.3d 27, 52 (1st Cir. 2020). It has not met this standard.

First, the School Board attempts to introduce facts that are not in the Complaint or in the public record in order to provide this alternative explanation. That is not appropriate at the 12(b)(6) stage prior to discovery. See *Gomez v. Illinois State Bd. of Educ*., 811 F.2d 1030, 1039 (7th Cir. 1987) ("the defendant cannot, in presenting its 12(b)(6) challenge, attempt to refute the complaint or to present a different set of allegations. The attack is on the sufficiency of the

complaint, and the defendant cannot set or alter the terms of the dispute."). The School Board claims, for example, that Lavigne "already had the allegedly withheld information," Red Br. at 23, and it cites the Answer that it filed to support that claim. But defendants cannot obtain dismissals "simply by substituting their own version of the facts" for those in the complaint. *Buonocore v. Harris*, 65 F.3d 347, 357 (4th Cir. 1995). And, in any event, the School Board's claim here fails under the slightest scrutiny.

Lavigne alleges that "[a]t no time … did any Defendant or any other school official inform Plaintiff of these Facts." APP.015 ¶ 28. The School Board's Answer states: "Defendants deny that Plaintiff was not informed of this." ECF Doc. 13 at 5 (Answer ¶ 28). But the denial makes no statement about *when* she was informed. So even the School Board's *pro forma* denial actually isn't a denial.

Second, the School Board attempts to rest on Me. Rev. Stat. Tit. 20-A § 4008, which protects the confidentiality of *communications* between social workers and students. This argument, too, fails. The School Board makes no argument—and it is certainly not obvious—that the act of giving a minor child a chest binder is a "communication" or "information gathered," as opposed to conduct. Nothing in the statute says a counselor may not be required to disclose his *actions*—especially when those actions include the giving to a child an

undergarment and the encouragement of a child to conceal information from parents.

E. Lavigne has sufficiently pleaded facts to allow a reasonable inference that the School Board ratified the actions of the school officials and thereby adopted a policy permitting this withholding and adopting the actions as its own.

Monell and its progeny were meant to separate cases where a government should be responsible for an injury from cases where it should not be. *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1117 (6th Cir. 1994). It was never "meant to distinguish isolated incidents from general rules of conduct promulgated by city officials." *Id*. At its core, "*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986).

The School Board attempts to avoid responsibility—and in so doing, misunderstands the nature of ratification under *Monell*. To clarify: ratification is *a way that policy is made*. As Justice O'Connor explained in *Praprotnik*: "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, [that] ratification would be chargeable to the municipality because [that] decision is final." 485 U.S. at 127. Going forward, any teacher or social worker would understand that hiding information from parents about decisions made and actions taken to recognize a child's gender identity—like the giving of a chest binder—is perfectly consistent with the School Board's policy. After all, the School Board has ratified what happened here.

Thus ratification of an employee's conduct means that "a public employer becomes the author of the action for purposes of liability under section 1983." *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 469 (7th Cir. 2001). In other words, post hoc-approval is the same as pre-act direction for purposes of liability. *Cf. id.* ("direction and approval do not differ practically."). And that is what Lavigne argues here. The School Board approved the complained-of actions in such a way as to create a policy. Even assuming it to be true that official policy required parental notification, the presumed-true allegations in the Complaint show that the School Board retrospectively made actions that violated that policy—the concealment of information—*into* policy; in other words, to make lawful that otherwise would have been unlawful. And that is sufficient for *Monell* liability.

The School Board argues that because Lavigne already knew about the information that had been withheld from her by the time the School Board ratified the complained-of conduct, and had already withdrawn her child from school by that time, neither the ratification in the January statement nor the Board's decision to give Mr. Roy an additional second-year contract can be seen as the "moving force" behind her injury. Red Br. at 32. In support of that argument, the School Board points to S*tarbuck v. Williamsburg James City County School Board*, 28 F.4th 529, 535 (4th Cir. 2022). But that argument is not logical. *Starbuck* itself said: "the entire concept of ratification liability presupposes that the initial

complained-of conduct precedes involvement by the final policymaking authority." *Id*. In other words, *of course* Lavigne took these steps prior to the School Board's ratification of the complained-of conduct: ratification is, by its very nature, retrospective. That doesn't change the fact that *it is ratification*, and ratification proves the existence of a policy of concealment—which is all that is necessary for this case to proceed.

To the extent that the School Board is attempting to imply that the case is moot, however, that is simply not true. As Lavigne alleged in her Complaint, she has two additional children who will soon be school-aged. APP.013 ¶ 17. Maine's compulsory education law requires every school-age child to "be provided an opportunity to receive the benefits of a free public education." Me. Rev. Stat. Tit. 20-A, § 2(1). All children between 6 and 17 years old must attend a public school, or approved alternatives. Me. Rev. Stat. tit. 20-A, § 5001-A(1). APP.013. ¶ 15. Lavigne further alleged in her complaint that she would have sent her two other children to GSB if the school changed its policy. APP.013 ¶ 19. That all means that the ratification was a moving force behind Lavigne's injury, because if she is unable to find suitable alternatives, the default position of the law is that she *must* send her child to the GSB—with a School Board that, through its ratification of the complained-of conduct, has a policy of facilitating transition without parental

involvement and through concealment, in violation of the constitutional right to oversee a child's upbringing.

Lavigne has pleaded sufficient facts at this stage to allow for a reasonable inference that the School Board ratified the conduct of Mr. Roy and the officials calling her child by a different name and pronoun.

III. The School Board's argument that the court below was right to skip the first prong of the *Monell* test is legally incorrect.

This Court should address the constitutional violation prong of the *Monell* analysis as the court below erred in skipping it. The School Board attempts to refute this by pointing to four cases where courts supposedly skipped over the *Monell* prong and by pointing to the canon of constitutional avoidance. Both are unavailing.

For one thing, none of those cases provided any analysis of whether a court could or should skip the constitutional violation prong. Also, the cases where a court of appeals skipped the first prong are distinguishable. For example, in *Abdisamad v. City of Lewiston*, 960 F.3d 56, 60–61 (1st Cir. 2020), the lower court specifically held that there was no constitutional violation even though this Court did not further address the issue on appeal. *See Abdisamad v. City of Lewiston*, No. 2:19-CV-00175-LEW, 2019 WL 3307039, at *3 (D. Me., 2019) ("While it is beyond tragic that R.I. drowned on the school-sponsored field trip, there are no factual allegations that reveal any conscience-shocking conduct on the part of the

City Defendants' team leader or the other chaperones."). The lower court did not address that prong here, so *Abdisamad* is irrelevant. The School Board's reliance on *Thomas v. Neenah Joint School District*, 74 F.4th 521 (7th Cir. 2023), fails for a similar reason. There, the district court said it was "questionable whether the amended complaint even states a claim for excessive force against any employee of the District." *Thomas v. Neenah Joint School District*, No. 1:21-cv-00366-WCG at 7–8 (ED Wis. July 28, 2022) (attached as Addendum 2). The School Board's reliance on *Masso-Torrellas v. Municipality of Toa Alta*, 845 F.3d 461, 469 (1st Cir. 2017), suffers the same fate; there, this Court held that the plaintiff had not even pleaded sufficient facts to enter into the *Monell* test—i.e., he was bounced for not sufficiently alleging municipal action. Here, of course, Lavigne *does* allege a government action and policy. *Id.*

The School Board's reliance on *Saved Magazine v. Spokane Police Department*, 19 F.4th 1193, 1201 (9th Cir. 2021), is also misguided, because there the District Court had held that the Police Department was not the proper entity to sue, and the plaintiff did not challenge that holding on appeal. *Id*. Instead it challenged only the alternative holding that if the proper entity had been sued, there still would be no *Monell* liability. *Id.* The School Board then is relying on the rejection of decision on an *alternative* holding that amounts to nothing more than dicta, because the court was answering a hypothetical question about whether an

individual would have a claim if the right entity had been sued. And again, there was no explanation as to the reason for skipping the first *Monell* prong.

Finally, the School Board's attempt to invoke the canon of constitutional avoidance by pointing to a concurring opinion in *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J, concurring), fares no better. The constitutional avoidance canon only comes into play when "a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law," but such a situation does not exist here. *Id*. Deciding the second prong of the *Monell* test is still deciding a constitutional issue.

CONCLUSION

This is an appeal from a dismissal under Rule 12(b)(6). All Lavigne needs to do is plausibly plead sufficient facts that, when taken as true—as they must be—would entitle her to relief. She has done that, and the School Board's strained attempts to show otherwise actually reinforces that conclusion. In short, the constitutional violation was fully briefed below (contrary to Appellee's suggestions, Red Br. at 37, n.8), and that issue is simply this: parental rights are fundamental. The School Board's *de facto* policy of withholding vital information—information any responsible parent would want, and need, to know in order to raise her child—prevented Lavigne from making fully informed

decisions about how best to discharge her "high duty to … prepare [her child] for [adulthood]." *Pierce,* 268 U.S. at 535. Lavigne is not claiming a right to dictate school policy or curriculum, as the School Board implies—but simply the right to know that the school has made that decision, so she can best evaluate what steps to take in the best interests of her child.

This Court should reverse the lower court's order granting the motion to dismiss and remand the case with instructions to deny the motion to dismiss and allow the case to proceed to discovery.

Respectfully submitted this 30th day of August 2024,

/s/ *Adam Shelton*
Adam Shelton (1207245)
John Thorpe (1212548)

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,862 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

Date: August 30, 2024

/s/ *Adam Shelton*
Adam Shelton
John Thorpe
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Adam Shelton*
Adam Shelton

INDEX TO ADDENDUM

Great Salt Bay CSD Board
REGULAR MEETING
Wednesday, May 10, 2023 – 5:30 p.m.
Great Salt Bay Community School
MINUTES

Call to Order – Board Chair

Roll Call – Board Chair
abs: Dennis Anderson X August Avantaggio X Sam Belknap X Jesse Butler X Amy Krawic X Christa Thorpe X Meridith Verney

Pledge of Allegiance

Adjustments to Agenda:

- *Add Boston Trip approval under Old Business*
- *Adjust to move Suzanne Robb to the 2nd Year Probationary contract renewals.*
- *Add Kristen Michaud to the 1st year Probationary contract renewals.*

Public Comment:

Action on Minutes:
- Approval of the minutes for the Regular meeting on April 12, 2023.

Motion: Jesse Butler Second: August Avantaggio Vote: 5-0-1-abs (S Belknap, due to absenteeism from prior mtg)

Presentation:

Chair's Report:

- *Extended sincere appreciation to the staff at GSB during Teacher Appreciation Week.*
- The next regular meeting of the Great Salt Bay CSD Board will be June 14, 2023 at 6pm at GSB.
- The next meeting of the AOS Board is Tuesday June 13, 2023 at JVS at 6pm. 5:30 tour.
- Committee Reports:
    - Facilities/Transportation: ~~May 15 at 4:45 pm @GSB~~ - *Next meeting TBD.*
    - Finance Committee: June 1 at 9:00 am @ Central Office
    - Policy Committee: Fall 2023
    - Strategic Planning Committee: May 24 at 6:00pm- Public Forum - @GSB
- GSB Board Workshop
- AOS Report

Principal's Report:

Superintendent's Report:

Old Business:

- Electric Bus Application: Action to authorize the Superintendent's Office to submit an application for round 2 of electric bus funding

Motion: Jesse Butler **Second: August Avantaggio** **Vote: 6-0**

- Approval of the plan for the 8th Grade Boston Trip:

Motion: Jesse Butler **Second: August Avantaggio** **Vote: 6-0**

New Business:

- 2023-2024 Teacher Nominations:
  - To approve a 1st probationary contract for Coreysha Stone (Art Teacher) and Kristin Michaud as recommended by the Superintendent.

Motion: August Avantaggio **Second: Christa Thorpe** **Vote: 6-0**

  - To approve a 2rd year probationary contract for Meghan Colby, Easter Connolly, Lauren Courtade, Haley Mank, Suzanne Robb, Sam Roy, Troy Sirkel, and Ian Snowdeal as recommended by the Superintendent.

Motion: Jesse Butler **Second: August Avantaggio** **Vote: 6-0**

  - To approve a 1st continuing contract for Sal Azzaretti, Jennifer Farnsworth, Sara Flewelling, and Erin Michaud as recommended by the Superintendent.

Motion: Jesse Butler **Second: August Avantaggio** **Vote: 6-0**

- LAU Plan Update- Action to accept as adjusted

Motion: Jesse Butler **Second: August Avantaggio** **Vote: 6-0**

- AOS #93 Strategic Vision: Action to Authorize Joint Representation for Counsel

Motion: Jesse Butler **Second: August Avantaggio** **Vote: 6-0**

Policies:

Acceptance of Donations/Grants:

- PTO Donation of $756.45 to support Gr 8 celebrations (additional from prior $14,000)

Motion: Amy Krawic Second: August Avantaggio Vote: 6-0

Executive Session

- Motion to adjourn the public portion of the meeting and enter executive session for the purpose of negotiations, educational support staff, pursuant to 1 M.S.R.A §405(6)(D).

Motion: Jesse Butler Second: Meredith Verney Vote: 6-0 In: 6:13pm Out: 6:24 pm

Adjournment: Without objection, the Board Chair declares the meeting adjourned at 6:24 p.m.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SARAH THOMAS, individually and as legal guardian of C.S., a minor child,

Plaintiff,

v. Case No. 21-C-366

NEENAH JOINT SCHOOL DISTRICT,

Defendant.

DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiff Sarah Thomas, individually and as legal guardian of C.S., a minor child, brought this action against Defendant Neenah Joint School District (the District) pursuant to 42 U.S.C. § 1983, alleging that the District violated C.S.'s constitutional rights when its staff used excessive and unlawful force against her as a result of the District's widespread practice or custom encouraging the utilization of such force. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. The Court dismissed Plaintiff's first complaint but granted her leave to file an amended complaint to cure the defects noted in the Court's decision. Dkt. No. 10. Plaintiff filed an amended complaint, and the District has again filed a motion to dismiss. Dkt. No. 12. For the following reasons, the motion will be granted, and the case dismissed.

LEGAL STANDARD

A motion to dismiss for failure to state a claim tests the sufficiency of the complaint. Rule 8 requires a pleading to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, the Supreme Court clarified the standard for meeting this requirement, emphasizing the need for

something "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action," *Twombly*, 550 U.S. 544, 555 (2007), or "an unadorned, the-defendant-unlawfully-harmed-me accusation," *Iqbal*, 556 U.S. 662, 678 (2009), before the doors to expensive and time-consuming discovery will be opened. Though the Court recognized in *Twombly* the need for caution before dismissing a case at the pleading stage before discovery has begun, it noted that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." 550 U.S. at 558 (internal quotation marks and citation omitted). The Court therefore held that it was not enough to allege the mere possibility of a claim.

"The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678; *see also Twombly*, 550 U.S. at 555 ("[A] formulaic recitation of the elements of a cause of action will not do."). A complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 556. "[T]he complaint's allegations must be enough to raise a right to relief above the speculative level." *Id*. at 555 (internal quotations omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has not shown that the plaintiff is entitled to relief. *Id.*

ALLEGATIONS IN THE AMENDED COMPLAINT

C.S. is a thirteen-year-old student enrolled full-time with the District. Am. Compl. ¶ 8, Dkt. No. 11. During the events at issue, C.S. attended Horace Mann Middle School, a predominantly sixth grade school in Neenah, administered by the District. *Id.* at ¶ 9. C.S. has "multiple developmental or cognitive disabilities," including autism spectrum disorder, attention deficit hyperactivity disorder (ADHD), and obsessive-compulsive disorder (OCD). *Id.* at ¶ 10. The amended complaint alleges that all three disorders were fully or substantially known to the staff at Horace Mann, and that, due to her disabilities, C.S. had an Individualized Education Plan (IEP) and was frequently taught or supervised by a special education teacher, Jason Fridley. *Id.* at ¶¶ 12–13.

On February 13, 2020, during the school day, C.S. was approached by Mr. Fridley as she was attempting to use an elevator in a second-floor hallway of the school. *Id.* at ¶¶ 14–15. The amended complaint alleges that, after Mr. Fridley made initial contact with C.S., he "aggressively pushed C.S. into the wall opposite the elevator and held her there against her will after she did not immediately comply with his demands." *Id.* at ¶ 17. After allegedly holding C.S. against the wall for several minutes while "C.S. screamed and pleaded to be let go," Mr. Fridley requested that the school's acting administrator, Andrew Braunel, assist him with C.S. *Id.* at ¶ 19. Braunel "made no attempt to direct Fridley to let go" but instead called School Resource Officer Rob Ross, a Neenah Police Department officer, to join them. *Id.* at ¶¶ 20–21. During this time, C.S. again attempted to free herself, prompting Mr. Fridley to escalate his physical hold. *Id.* at ¶¶ 22–23.

Upon arriving, Officer Ross allegedly "grabbed C.S. by the right arm and forced her onto the floor," eventually placing her in handcuffs "with her stomach and face on the floor." *Id.* at ¶¶ 25–28. Officer Ross then asked Mr. Fridley and Braunel what was going on, to which Mr.

Fridley responded, "she wanted to take the elevator today," or words to similar effect. *Id.* at ¶¶ 30–33. After some additional conversation, Officer Ross allegedly remarked that, for "tearing a shirt and being physically violent, she's gotta get detained." *Id.* at ¶ 34. Shortly thereafter, two additional officers arrived on scene. *Id.* at ¶ 35. The amended complaint alleges that, while C.S. remained handcuffed and in prone position on the floor, Mr. Fridley and those present did not attempt to calm or console C.S., but instead chose to "watch and at times smile and laugh as C.S. remained forcibly pinned to the ground crying, unable to comprehend what was being done to her or why." *Id.* at ¶ 38.

At some point, the officers and Mr. Fridley picked C.S. up from the floor and placed her into a wheelchair. *Id.* at ¶ 39. C.S. remained handcuffed but was also bound at the legs by a "hobble" and remained bound in the wheelchair until C.S.'s mother arrived at the scene. *Id.* at ¶¶ 45–47. In all, C.S. was not released for a total of 34 minutes. *Id.* at ¶ 48. According to the amended complaint, body-camera footage "shows multiple points at which Mr. Fridley, Braunel, and [Officer] Ross spoke in manners indicative of coordination." *Id.* at ¶ 53. This allegedly included whispers in which Officer Ross confirmed that they were "all on the same page," to which Fridley allegedly responded by saying, "oh yes, I'm on that page." *Id.* at ¶¶ 53–54. C.S. was ultimately taken home by her mother without further incident. *Id.* at ¶ 51.

The amended complaint also describes an incident that took place on February 25, 2020. On that day, C.S. was being bullied by one or more students and may have "fought back against a student by briefly scratching or grabbing him in a hallway." *Id.* at ¶¶ 60–61. As a result of this incident, C.S. was required to eat her lunch in the school office as punishment. *Id.* at ¶ 63. During the lunch period, C.S. began to experience elevated anxiety, causing her to become "dysregulated." *Id.* at ¶¶ 64–65. This led Mr. Fridley and additional staff to respond with "similar aggressive force"

as was used in the incident described above. *Id.* at ¶ 65. Police were again called to assist with this incident, but the District took the further step of seeking a juvenile delinquency prosecution of C.S. through the Winnebago County Circuit Court. *Id.* at ¶ 69. According to the amended complaint, the proceedings were halted approximately six months later, when C.S. was found not competent to stand trial. *Id.* at ¶¶ 71–72. This incident, along with an additional unspecified incident in March 2020, "resulted in Neenah staff issuing suspensions, which after the March incident became of indeterminate length." *Id.* at ¶ 80. As a result of this ongoing trauma, C.S. is alleged to have suffered deterioration of both her mental and physical health. *Id.* at ¶ 82.

The amended complaint also describes an incident that occurred on April 18, 2016, involving C.S.'s brother, A.S. *Id.* at ¶ 74. At the time, A.S. was a student at Horace Mann and had a disability that impacted his ability to understand and control his behaviors and interactions. *Id.* at ¶ 75. On April 18, 2016, following an altercation with students who had been bullying him, A.S. bit one of the bullies on the arm. *Id.* at ¶ 76. The principal of Horace Mann at the time, Jackie Munoz-Ellman, requested the assistance of a Neenah police officer to investigate and bring charges against A.S. because traditional school consequences "had not been sufficient to address A.S.'s behavior." *Id.* at ¶ 77. Just as with C.S., the prosecution of A.S. was later dropped because he was not competent to stand trial. *Id.* at ¶ 79.

Based on the foregoing, Plaintiff alleges that the District, "[t]hrough its use of excessive and unlawful force and retaliation against C.S. for manifestations of her disability," violated her constitutional rights. *Id.* at ¶ 83. Specifically, Plaintiff alleges that "the actions and omissions of Neenah staff reflect a practice or protocol of utilizing excessive punitive and retaliatory force or threats of force to punish students with behavioral disabilities, rather than engage in constructive use of supports or services." *Id.* at ¶ 86. She further asserts that this practice or protocol "does not

appear to be a written policy" of the District, but nevertheless "appears to have been known and understood by multiple school staff without need of explanation or discussion." *Id.* at ¶ 87.

ANALYSIS

The District seeks dismissal on the ground that Plaintiff has again failed to state a claim under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Section 1983 "creates a private right of action against any 'person' who violates [a] plaintiff's federal rights while acting under color of state law." *Dean v. Wexford Health Sources, Inc.*, 18 F.4th 214, 235 (7th Cir. 2021) (citing 42 U.S.C. § 1983). While the Supreme Court held in *Monell* that municipalities are "person[s]" who may be sued under § 1983, it "added an important caveat: Municipalities are not vicariously liable for the constitutional torts of their employees or agents." *Id.* (citing *Monell*, 436 U.S. at 691–94). Instead, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694.

There are several elements of a *Monell* claim, all of which must be met. First, a § 1983 plaintiff "must always show 'that he was deprived of a federal right.'" *Dean*, 18 F.4th at 235 (quoting *First Midwest Bank Guardian of Estate of LaPorta v. City of Chicago*, 988 F.3d 978, 987 (7th Cir. 2021)). Second, the plaintiff must "trace the deprivation to some municipal action (i.e., a 'policy or custom'), such that the challenged conduct is 'properly attributable to the municipality itself.'" *Id.* (quoting *LaPorta*, 988 F.3d at 986). There are three types of municipal action that may give rise to liability under § 1983: "'(1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or (3) an allegation that the constitutional injury was caused by a

person with final policymaking authority.'" *Id.* (quoting *LaPorta*, 988 F.3d at 986). Third, the plaintiff must show that the municipal action was the "moving force behind the federal-rights violation . . . . This rigorous causation standard requires a direct causal link between the challenged municipal action and the violation of [the plaintiff's] constitutional rights." *Id.* (quoting *LaPorta*, 988 F.3d at 986 (internal quotation marks omitted)).

At the outset, it is questionable whether the amended complaint even states a claim for excessive force against any employee of the District. "[I]n the context of a public school, a teacher or administrator who seizes a student does so in violation of the Fourth Amendment only when the restriction of liberty is unreasonable under the circumstances then existing and apparent." *Wallace v. Batavia Sch. Dist.*, 68 F.3d 1010, 1014 (7th Cir. 1995). The amended complaint alleges that on February 13, 2020, Mr. Fridley "aggressively pushed C.S. into the wall opposite the elevator and held her there against her will after she did not immediately comply with his demands." Am. Compl. ¶ 17. Apparently unable to restrain her by himself, Mr. Fridley asked for help, and Mr. Braunel came and joined Mr. Fridley in trying to restrain C.S. Braunel then called for School Resource Officer Rob Ross, a Neenah police officer, who took over. Altogether, Mr. Fridley and Mr. Braunel restrained C.S. for about 13 minutes before Officer Ross grabbed C.S. and placed her on the floor. *Id.* at ¶¶ 20–24.

The amended complaint identifies C.S. as a thirteen-year-old student with multiple developmental or cognitive disabilities, including:

> a. Autism Spectrum Disorder, characterized by impaired social and educational functioning, impaired reciprocal communication skills, and impaired abstract reasoning ability;
>
> b. Attention Deficit Hyperactivity Disorder (ADHD), characterized by impairments to concentration, impaired self-regulation skills, impaired peer relationships, some academic impairment, but otherwise intact or neurotypical basic cognitive abilities; and

> c. Obsessive Compulsive Disorder (OCD), characterized by recurrent and persistent thoughts, urges, or images to an unwanted extent at times causing marked anxiety and distress.

Id. at ¶ 10. Given the nature and extent of the disabilities alleged and the behaviors described in the complaint, and considering also the lack of any specific allegation of physical injury to C.S., it seems plausible that Mr. Fridley was simply trying to restrain C.S. when she failed to comply with his instructions. Ignoring the conclusory allegations of the amended complaint, this seems at least as plausible as the claim that Mr. Fridley used excessive force against C.S. in violation of her constitutional rights. Regardless of whether the complaint is sufficient to state a claim for excessive force against any individual, however, it fails to state a *Monell* claim against the District.

As before, Plaintiff seeks to fit her *Monell* claim within the second category of municipal action listed above, that is, "a widespread practice that is so permanent and well-settled that it constitutes a custom or practice." *Id.* To succeed on her theory, Plaintiff "must demonstrate that the practice is widespread and that the specific violations complained of were not isolated incidents." *Gill v. City of Milwaukee*, 850 F.3d 335, 344 (7th Cir. 2017) (citing *Jackson v. Marion Cty.*, 66 F.3d 151, 152 (7th Cir. 1995)). At the pleading stage, this requires Plaintiff to "allege facts that permit the reasonable inference that the practice is so widespread so as to constitute governmental custom." *Id.* (citing *McCauley v. City of Chicago*, 671 F.3d 611, 618 (7th Cir. 2011)). Although the Seventh Circuit has not adopted any "bright-line rules" defining a "widespread custom or practice," it has stated that the conduct must occur on more than one, or even three, occasions. *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010). At bottom, the word "widespread" must be taken seriously. *Phelan v. Cook Cty.*, 463 F.3d 773, 790 (7th Cir. 2006), *overruled on other grounds*, *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016). "It is not enough to demonstrate that the policymakers could, or even should, have

been aware of the unlawful activity because it occurred more than once. The plaintiff must introduce evidence demonstrating that the unlawful practice was so pervasive that acquiescence on the part of the policymakers was apparent and amounted to a policy decision." *Id.* Despite the additional information contained in the amended complaint, Plaintiff still fails to allege sufficient facts to make such a showing here.

As an initial matter, Plaintiff has failed to demonstrate that the allegedly unlawful practice was "so pervasive that acquiescence on the part of the policymakers was apparent and amounted to a policy decision." *Id.* In an attempt to satisfy this requirement, Plaintiff includes additional allegations about the February 13 incident, namely, by describing the presence of Braunel, the school's acting administrator. Plaintiff alleges that Braunel "made no attempt to direct Fridley to let go or stop his assault of C.S., but rather joined Fridley without any question or expression of concern." Am. Compl. ¶ 20. Setting aside the question of whether Braunel may be considered a "policymaker," the mere presence of Braunel during the incident, and indeed, his efforts to support Mr. Fridley, do not support an inference that the alleged practice was so pervasive that it amounted to a policy decision. As the Court noted in its last decision, the fact that Fridley continued to restrain C.S. "is not enough to put onlookers on notice that excessive force was being used if, as the complaint suggests, C.S. continued to resist and refused to comply with Mr. Fridley's directions." Dkt. No. 10 at 9. Indeed, Braunel's decision to assist Mr. Fridley "just as likely reflects the District's view that Mr. Fridley and other staff did nothing wrong." *Id.* The allegation that Braunel witnessed a single incident is insufficient to permit the inference that the alleged unlawful practice was "so pervasive that acquiescence of the policymakers was apparent and amount to a policy decision."

Furthermore, Plaintiff's amended complaint fails to "demonstrate that there is a policy at issue rather than a random event." *Thomas*, 604 F.3d at 303. At best, Plaintiff has offered three incidents in which excessive force was allegedly used: (1) the February 13 incident; (2) the February 25 incident; and (3) an unspecified incident that allegedly occurred in March 2020. Am. Compl. ¶¶ 14–73, 80. While the first incident is described in detail, the latter two are vague and provide no information from which the Court could infer that excessive force was used on C.S. Even if the allegations were sufficient to allege three such instances of excessive force, this would still be insufficient to establish a pattern or practice. *See Thomas*, 604 F.3d at 303.

Plaintiff also fails to plausibly allege that the supposed custom or practice has been enforced against anyone other than C.S. As the Court noted in its last decision, Plaintiff "does not provide examples of other students with behavioral disabilities being treated in the same manner," Dkt. No. 10 at 10, and more importantly, she does not "plausibly allege that such examples exist." *Gill*, 850 F.3d at 344. The actions taken by Mr. Fridley and others with respect to C.S. alone, without more, are insufficient to establish the plausible existence of a widespread custom or practice. *Id.* ("The specific actions of the detectives in Gill's case alone, without more, cannot sustain a *Monell* claim based on the theory of a *de facto* policy."). The amended complaint attempts to circumvent this deficiency by describing an incident involving C.S.'s brother, A.S. Am. Compl. ¶¶ 74–79. But, as described in the amended complaint, that incident did not involve the utilization of "excessive punitive and retaliatory force or threats of force." *Id.* at ¶ 86. Instead, it involved the Neenah Police Department investigating the biting of another student by A.S. and its decision to initiate proceedings against A.S. *Id.* at ¶¶ 74–79. Although C.S. also had a prosecution initiated against her, the alleged policy or custom complained of is not the use of prosecution or judicial proceedings, but the use of excessive force. *Id.* at ¶ 86. The incident

involving A.S., then, does not illustrate an instance in which the alleged policy or practice was utilized against someone other than C.S.

Plaintiff argues that it is "neither necessary nor practicable" to include information regarding other individuals that have experienced the utilization of excessive force as a result of the alleged policy or custom. Dkt. No. 14 at 4–5. She claims it is unnecessary because "the plausibility of the practice in question is demonstrated by the allegations" discussed in the amended complaint, "not by claims founded in mere repetition or widespread similarity in actions or results." *Id.* at 5. She also argues that requiring Plaintiff to identify other students impacted prior to discovery would "carry a unique and unrealistic burden in a case in which the policy or practice applies to a minor child exhibiting manifestations of disability within a school." *Id.* True, Plaintiff need not specifically identify "every other or even one individual" who suffered as a result of the alleged policy or custom, *White v. City of Chicago*, 829 F.3d 837, 844 (7th Cir. 2016), but she must at least "plausibly allege that such examples exist." *Gill*, 850 F.3d at 344. Plaintiff has not plausibly alleged the existence of any such examples. Indeed, she notes that, in order to determine whether other individuals have been impacted, she would need to obtain records through discovery. Dkt. No. 14 at 5. In essence, Plaintiff seeks to embark on a fishing expedition to discover instances in which others were subjected to the alleged policy or custom. But that "is not how *Monell* claims work." *Barbaccia v. Vill. of Lombard*, No. 19 C 5410, 2020 WL 469302, at *4 (N.D. Ill. Jan. 29, 2020). Therefore, Plaintiff has failed to state a *Monell* claim premised on a "widespread practice that is so permanent and well-settled that it constitutes a custom or practice." *Dean*, 18 F.4th at 235.

CONCLUSION

For the foregoing reasons, the District's motion to dismiss (Dkt. No. 12) is **GRANTED**. Plaintiff's amended complaint fails to plausibly allege the existence of a widespread custom or practice sufficient to support a *Monell* claim against the District for the violation of C.S.'s constitutional rights. This case is dismissed. The Clerk is directed to enter judgment accordingly.

SO ORDERED at Green Bay, Wisconsin this 28th day of July, 2022.

s/ William C. Griesbach
William C. Griesbach
United States District Judge