

**IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT, IN AND
FOR FLAGLER COUNTY, FLORIDA**

**GREG AND TAMI DUNN, individually and
on behalf of their natural son, JOHN DOE,
a minor, and their natural daughter, SUSAN
DOE, a minor,**

CASE NO.: 2016 CA 000469

Plaintiffs,

v.

**FLAGLER COUNTY BOARD
OF EDUCATION, JACOB OLIVA,
Superintendent, BEN OSYPIAN, Principal,
ROBIN DUPONT, Principal, and CARMEN
HERNANDEZ, teacher,**

Defendants.

**DEFENDANT, SCHOOL BOARD OF FLAGLER COUNTY, FLORIDA'S,
ANSWER AND AFFIRMATIVE DEFENSES TO COUNT I OF
PLAINTIFFS' COMPLAINT**

Defendant, THE SCHOOL BOARD OF FLAGLER COUNTY, FLORIDA (hereinafter
"School Board"), by and through their undersigned counsel, serves this its Answer and
Affirmative Defenses to Count I¹ of Plaintiff's Complaint and states:

ANSWER

1. The allegations in paragraph 1 are admitted for jurisdictional purposes only.
2. The allegations in paragraph 2 are admitted for venue purposes only.
3. Defendant denies the allegations of paragraph 3 as worded. The correct title of the
entity that operates the public schools in Flagler County, Florida is: "The School

¹ Defendant School Board has filed contemporaneously herewith a Motion to Dismiss as to Counts II through VI of the Plaintiffs' Complaint; and, Defendant School Board is a party to the Motion to Sever also filed contemporaneously herewith.

Board of Flagler County, Florida".² Further, The School Board of Flagler County, Florida is not "headed" by JACOB OLIVA (Superintendent). As the Superintendent of Schools of the Flagler County School District³, JACOB OLIVA serves as the secretary and executive officer of the School Board of Flagler County, Florida. (See Section 1001.48, Fla. Stat.). Pursuant to Section 1001.41(4), Fla. Stat., the School Board of Flagler County, Florida has the power to "contract, sue, and be sued....." As such, only The School Board of Flagler County, Florida is the proper party defendant to this proceeding.

4. The allegations of paragraph 4 are denied as worded.⁴

² Pursuant to Section 1001.40, Fla. Stat.: "The governing body of each school district shall be a district school board. Each district school board is constituted a body corporate by the name of: "The School Board of _____ County, Florida." ...

³ Pursuant to Section 1001.30, Fla. Stat., "Each county shall constitute a school district and shall be known as the school district of _____ County, Florida. ..."

⁴ In addition to the clarification of Florida law set-forth in response to the allegations in paragraph (3) above, the operation of the Voluntary Prekindergarten Education Program is administered at the state level by the Florida Department of Education. (See Section 1002.73(1), Fla. Stat.) Each school district may administer the Voluntary Prekindergarten Education Program at the district level for students enrolled under Section 1002.53(3)(c), [Fla. Stat.] in a school-year prekindergarten program delivered by a public school. (See Section 1002.63(1), Fla. Stat.) The district school board of each school district shall determine which public schools in the district may deliver the prekindergarten program during the school year. (See 1002.63(3)(a)). Each public school delivering the school-year prekindergarten program must execute the statewide provider contract prescribed under Section 1002.75, except that the school district may execute a single agreement with the early learning coalition on behalf of all district schools. (See Section 1002.63(3)(b), Fla. Stat.) Each public school delivering the school-year prekindergarten program must register with the early learning coalition on forms prescribed by the Office of Early Learning and deliver the Voluntary Prekindergarten Education Program in accordance with this part.(See Section 1002.63(8), Fla. Stat.). There is created within the Office of Independent Education and Parental Choice the Office of Early Learning, as required under Section 20.15, [Fla. Stat.] which shall be administered by an executive director. The office shall be fully accountable to the Commissioner of Education but shall: (1) Independently exercise all powers, duties and functions prescribed by law and shall not be construed as part of the K-20 education system. ... (See Section 1001.213, Fla. Stat.) The Office of Early Learning shall adopt by rule a standardized statewide provider contract to be used by each Voluntary Prekindergarten Education Program provider, with standardized attachments by provider type. (See Section 1002.75(1), Fla. Stat.) The Office of Early Learning shall adopt, in consultation with and subject to approval by the [Florida] department [of Education], procedures governing the administration of the Voluntary Prekindergarten Education Program by the early learning coalitions and school districts (See Section 1002.75(3), Fla. Stat.) Each parent enrolling a child in the Voluntary Prekindergarten Education Program must complete and submit an application to the early learning coalition through the single point of entry established under Section 1002.82 (See Section 1002.53(4)(a), Fla. Stat.) Each early learning coalition shall coordinate with each of the school districts within the coalition's county or multicounty region in the development of procedures for enrolling children in prekindergarten programs delivered by public schools. (See Section 1002.53(4)(c), Fla. Stat.).

5. The allegations of paragraph 5 are denied as worded, but Defendant School Board asserts the claims of JOHN DOE should be severed from the claims of SUSAN DOE, as set-forth in the Motion to Sever filed contemporaneously herewith.
6. Defendant School Board re-asserts its clarification of Florida law as set-forth in response to the allegations in paragraph 3 above, but otherwise admits the allegations of paragraph 6.
7. Denied. Pursuant to Section 768.28(9)(a), Fla. Stat., Defendant School Board's employees: JACOB OLIVA, BEN OSYPIAN, ROBIN DUPONT and CARMEN HERNANDEZ shall not be held personally liable, and accordingly shall not be named individually as parties to this proceeding. Defendant SCHOOL BOARD admits that JACOB OLIVA, BEN OSYPIAN, ROBIN DUPONT and CARMEN HERNANDEZ are, or were during the 2014-2015 school year, employees of the Defendant SCHOOL BOARD.
8. Defendant School Board re-asserts its clarification of Florida law as set-forth in response to the allegations in paragraph 3 above, but otherwise admits the allegations of paragraph 8.

COUNT I - NEGLIGENT SUPERVISION

9. Defendant SCHOOL BOARD reasserts its responses to the allegations in paragraphs 1-8 above as if fully set-forth herein.
10. The allegations of paragraph 10 are denied.
11. The allegations of paragraph 11 are denied.
12. The allegations of paragraph 12 are denied

13. The allegations of paragraph 13 are denied and Defendant SCHOOL BOARD demands strict proof thereof.

14. The allegations of paragraph 14 are denied and Defendant SCHOOL BOARD demands strict proof thereof.

15. The allegations of paragraph 15 are denied and Defendant SCHOOL BOARD demands strict proof thereof.

16. The allegations of paragraph 16 are denied and Defendant SCHOOL BOARD demands strict proof thereof.

**COUNT II - RECKLESS / INTENTIONAL INFLICTION OF EMOTIONAL
DISTRESS- JOHN DOE, a minor**

17. Count II is the subject of a Motion to Dismiss filed contemporaneously herewith.

18. Count II is the subject of a Motion to Dismiss filed contemporaneously herewith.

19. (including 19 a) through 19 d)) Count II is the subject of a Motion to Dismiss filed contemporaneously herewith.

20. Count II is the subject of a Motion to Dismiss filed contemporaneously herewith.

**COUNT III - RECKLESS / INTENTIONAL INFLICTION OF EMOTIONAL
DISTRESS- SUSAN DOE, a minor**

21. Count III is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

22. Count III is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

23. Count III is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

24. Count III is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

25. (including 25 a) through 25 d)) Count III is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

**COUNT IV - RECKLESS / INTENTIONAL INFLECTION OF EMOTIONAL
DISTRESS- GREG DUNN**

26. Count IV is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

27. Count IV is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

28. Count IV is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

29. Count IV is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

30. (including 30 a) through 30 e)) Count IV is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

31. Count IV is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

**COUNT V - RECKLESS / INTENTIONAL INFLECTION OF EMOTIONAL
DISTRESS- TAMI DUNN**

32. Count V is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.
33. Count V is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.
34. Count V is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.
35. (including 35 a) through 35 e)) Count V is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.
36. Count V is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

COUNT VI- CONSEQUENTIAL DAMAGES FOR RELOCATION

37. Count VI is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.
38. Count VI is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.
39. Count VI is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.
40. Count VI is the subject of a Motion to Dismiss and a Motion to Sever, filed contemporaneously herewith.

The Defendant SCHOOL BOARD denies each and every allegation not specifically admitted herein.

The Defendant SCHOOL BOARD demands dismissal of all claims against it.

DEMAND FOR JURY TRIAL

The Defendant SCHOOL BOARD demands trial by jury, judgment in its favor, and taxable costs as the prevailing party.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a cause of action against Defendant, The School Board of Flagler County, Florida for negligent supervision.

SECOND AFFIRMATIVE DEFENSE

Defendant FCSB did not have any actual knowledge of the alleged act of sexual battery on May 27, 2015 until immediately after the alleged incident on May 27, 2015.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a cause of action against Defendant, The School Board of Flagler County, Florida, in that employee CARMEN HERNANDEZ had no opportunity to intervene due to the event on May 27, 2015 transpiring so quickly. Thus, there was no breach of duty by CARMEN HERNANDEZ and hence no liability on The School Board of Flagler County, Florida for "Bill's" and "Dave's" (if said children are indeed known as "Bill" and

"Dave"), youthful insouciance. (See *The School Board of Miami-Dade County, Florida v. Martinez-Oller*, 167 So. 3d 451 (Fla. 3rd DCA 2015).

FOURTH AFFIRMATIVE DEFENSE

Defendant, The School Board of Flagler County, Florida, is sovereignly immune from liability for the planning and operational decisions it makes pertaining to its discipline policies. (See *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979)).

FIFTH AFFIRMATIVE DEFENSE

Defendant, The School Board of Flagler County, Florida, did not have any actual knowledge of any sexual behaviors of "Bill" and "Dave" (if said children are indeed known as "Bill" and "Dave") while same attended the Pre-Kindergarten Program at Old Kings Elementary School.

SIXTH AFFIRMATIVE DEFENSE

As pre-kindergarten aged children, the intent which necessarily must be formed in order to commit "sexual battery" as that term is defined in Florida law, could not be, and was not present.

SEVENTH AFFIRMATIVE DEFENSE

Defendant's, The School Board of Flagler County, Florida's actions in response to the complained of conduct were clearly reasonable in light of the known circumstances of the event which occurred on May 27, 2015.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to mitigate their damages.

NINTH AFFIRMATIVE DEFENSE

The incident that allegedly occurred on May 27, 2015 was not a "sexual battery" as neither "JOHN DOE", "BILL" nor "DAVE", (if said children are indeed known as "Bill" and "Dave") due to the fact that they were all toddlers, had the capacity to form the intent or malice to engage in sexual activity and/or perpetrate sexual battery.

WHEREFORE, based upon the foregoing, Defendant, THE SCHOOL BOARD OF FLAGLER COUNTY, FLORIDA, serves this its Answer and Affirmative Defenses to Count I of Plaintiffs' Complaint, and respectfully requests trial by jury, dismissal of all claims against it, entitlement and award of its taxable costs incurred in defending itself in this proceeding, and such further relief as deemed necessary and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of September, 2016, a true and correct copy of the foregoing Defendant, The School Board of Flagler County, Florida's Answer and Affirmative Defenses to Count I of the Plaintiffs' Complaint, was electronically filed with the Flagler County Clerk of the Courts by being transmitted through the E-Portal filing system and sent by e-mail delivery to: Howard G. Butler, Esq. hgb@butlerlawgroup.net and Drew Baskin, Esq., dwb@butlerlawgroup.net; and paralegal@butlerlawgroup.net, Butler Law Group.

s/ Lisa J. Augspurger
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BEN OSYPIAN, Principal;
ROBIN DUPONT, Principal; and,
CARMEN HERNANDEZ, Teacher