IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JANE DOE,
JANE ROE,

OPINION AND ORDER

Plaintiffs,

03-C-0728-C

v.

FALL RIVER SCHOOL DISTRICT
and JEFFREY A. MROZ, in his
individual capacity,

Defendants.

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This is a civil action brought by plaintiffs Jane Doe (Rachel Amato) and Jane Roe (Alanna Mortensen) against defendants Fall River School District and Jeffrey A. Mroz, in his individual capacity. Plaintiffs began this suit using pseudonyms but have since abandoned them in the majority of their submissions. In the future, the caption will show their real names.

Plaintiffs assert a federal claim under 42 U.S.C. § 1983 for violation of their right to equal protection of the law. They contend that defendant Mroz violated this right by touching each of the plaintiffs in or near private areas of their bodies but not touching any

male students in the same way and by retaliating against plaintiffs after they reported his inappropriate touching. Also, they allege that his touching of them constituted a state law battery. Plaintiffs contend that defendant school district acted unconstitutionally by failing to prevent the improper touching and trying to cover up the improper acts and mislead the authorities, failing to fully and impartially investigate plaintiffs' complaints, failing to take prompt and appropriate measures to curtail the activity after plaintiffs reported it and by retaliating against plaintiffs after they reported the inappropriate acts. (In the course of their preparation for trial and summary judgment, plaintiffs have recharacterized their claim against this defendant by alleging that it is liable to them because it ratified the unconstitutional actions of its subordinates, rather than because it took any unconstitutional actions or failed to take any such actions itself.)

The case is before the court on defendants' motions for summary judgment. I conclude that plaintiffs cannot proceed on their federal claims against defendant school district. They cannot show that this defendant ratified (that is, condoned or approved) the alleged wrongful touching so as to make it liable for defendant Mroz's alleged actions of violation of their equal protection rights or that it ratified any of the actions of the school administration. They cannot pursue claims of retaliation under the equal protection clause against either defendant because the right to equal protection does not include a right to be free from retaliation.

I conclude also that plaintiffs cannot proceed on their state law claim against defendant Mroz because they cannot show that he was not prejudiced by their failure to file timely notices of claim. However, they may proceed against him on their federal claim of violation of the equal protection clause. Assuming as I must for the purpose of deciding these motions for summary judgment that plaintiffs' allegations are true, I cannot say that no reasonable jury could find that defendant Mroz violated plaintiffs' rights to equal protection by touching them inappropriately. The determination of that issue depends on the evaluation of the witnesses' credibility and for that reason cannot be resolved on summary judgment.

UNDISPUTED FACTS

Plaintiffs are minors residing in Fall River, Wisconsin. During the times relevant to this suit, they attended school in Fall River. (They now attend high school in Columbus, Wisconsin.) Defendant Fall River School District is a body politic organized and operating under the laws of the state of Wisconsin. Defendant Jeffrey A. Mroz was the band director and a teacher at the Fall River School from 1971 until his retirement at the end of the 2002-03 school year.

Heidi Schmidt is administrator of the school district; Brad Johnsrud is the Fall River School principal; and Sandra Henney is the school's guidance counselor. Plaintiff Alanna

Mortensen's father Alan was a member of the Fall River School Board from April 2002 through June 2003.

A. Rachel Amato

Plaintiff Rachel Amato transferred into the Fall River School District for the 2000-2001 school year as a sixth grader and joined the school band as a percussion player. On October 24 or 25, 2001, at 7:00 p.m., her mother, Deanna Amato, called administrator Schmidt to inform her that Rachel had told her mother that defendant Mroz had been touching Rachel inappropriately, pressing himself against her, rubbing her shoulders and putting his hands in her lap. Deanna Amato said that Rachel had told her that defendant Mroz made an inappropriate comment while explaining the electric connection for one of the instruments. Apparently, he showed the students the "male end" and said it goes into the "female end." After receiving the telephone call, Schmidt directed principal Johnsrud to report Rachel's allegations to the Fall River Police Department.

Before receiving Mrs. Amato's complaint, neither Schmidt nor Johnsrud had received any complaints about defendant Mroz. Neither was aware of any complaints that had ever been made against him. Schmidt and Johnsrud met with Rachel and her parents at 7:30 a.m. on the morning after Mrs. Amato had talked to Schmidt. Among other things, Rachel told the group that defendant Mroz's comment about the male and female parts of an

electrical connection was the only inappropriate comment he had made that year. She told them that defendant kept the beat with male students by tapping them on the knee or thigh and she told them that he made her uncomfortable when doing such things as touching her on the outside of her thigh and upper leg while she was seated and playing the drums, standing behind her and brushing up against her or helping her with the musical rhythm while she was standing at the drums. (The parties dispute the exact details of Rachel's description of defendant Mroz's actions.) Rachel said that defendant Mroz's alleged conduct occurred during individual band lessons when she was mostly alone with him but occasionally when one or two other students were present.

Administrator Schmidt informed the Amatos that she would talk with defendant Mroz and then convene another meeting with them to discuss her findings. Rachel said that she wanted to stay in the band but did not want to have any more band lessons with defendant Mroz. Both Johnsrud and Schmidt agreed that Rachel would not go to any other band lessons with Mroz.

Immediately after meeting with the Amatos, Johnsrud and Schmidt met with defendant Mroz, who explained that he tried to help students learn rhythm in different ways, sometimes by physically playing the rhythm with the drummers by placing his hands over theirs. He explained that because Rachel was struggling as a drummer, he would step, say or clap the rhythm for her. If this did not work, he would tap her on the leg or shoulder

to mark the beat. At the end of the meeting, administrator Schmidt told defendant Mroz that he was not to have any physical contact with Rachel; she would not be having private lessons with him; and the district would accommodate her if her parents wanted her to have lessons with someone else. Defendant Mroz expressed concern that if Rachel did not take lessons she would have to play less challenging parts because the other students would advance beyond her skills. He explained that the "male-female" reference was a common term among carpenters, electricians and plumbers. Administrator Schmidt informed Mroz that the district would be conducting an investigation of Rachel's allegations against him.

Principal Johnsrud met with defendant Mroz again the next day to discuss Rachel's allegations. On October 29, 2001, he reviewed Mroz's personnel file and found no letters, complaints or other indiction of inappropriate conduct with students in the 31 years that defendant had been teaching. Also on October 29, Johnsrud met with a male band student, B.R., another drummer, to discuss his lessons with defendant Mroz. B.R. explained that when there was a new part to play or when he was having trouble, Mroz would stand behind him, reach around him and play the part with him and that Mroz would also demonstrate the beat of the music on B.R.'s thigh.

Another male band student, C.B., reported that defendant Mroz tapped on his thighs. Johnsrud interviewed a female band member, K.C., and learned that defendant Mroz would tap her on her shoulder to establish the beat or stand behind band members, hold onto their

hands and play the part with them. K.C. never felt uncomfortable with defendant. Johnsrud interviewed another female student, S.J., who plays the flute. S.J. explained that defendant Mroz would help illustrate the beat by tapping her on her leg or shoulder but that she felt comfortable working with Mroz. Plaintiff Alanna Mortensen told Johnsrud that when she was young, defendant Mroz would demonstrate a piece of music by standing behind the students, taking their hands and playing the part with them.

B.R., K.C. and S.J. told Johnsrud that defendant Mroz's actions did not make them feel uncomfortable in any way. Johnsrud's questions to the students were tailored to Rachel's complaints. He did not ask the students to demonstrate any touching or what they witnessed specifically with respect to any touching of Rachel.

After Johnsrud reported his findings, administrator Schmidt concluded that defendant Mroz's touching and other physical contact were not of a sexual nature but intended as an instructional technique.

On October 30, 2001, Schmidt and Johnsrud met with Mr. and Mrs. Amato to review the district's findings. Schmidt told the Amatos that defendant Mroz's reference to the "female" end of the electrical cord was a term used by electricians and was not intended to be sexual in nature, that Mroz had denied any sexual purpose when touching Rachel or other students and that he used touching as one of several instructional techniques to help students learn rhythm. Schmidt stated that Mroz would put his hands on the outside of

their arms, tap the beat with his hand on the student's thigh, knee or shoulder and pat students on the back when they do a good job. Schmidt told the Amatos that the administration had concluded that Mroz had not touched Rachel inappropriately in a sexual manner but that Schmidt had directed him not to have any physical contact with Rachel because she respected Rachel's feelings of discomfort and sensitivity to Mroz's instructional techniques. She told the Amatos that they should tell Rachel to let someone at school know whenever she felt uncomfortable and that she should talk to the guidance counselor about any concerns she had. Rachel was not present for the meeting.

On November 9, 2001, principal Johnsrud met with defendant Mroz to discuss additional concerns brought to Johnsrud's attention by two other female students about Mroz's touching them and making them feel uncomfortable. Neither of the girls told Johnsrud that they thought the touching was of a sexual nature. Johnsrud directed Mroz to avoid physical contact with all students and told him that a written document would be placed in his personnel file related to this matter. Defendant Mroz never touched Rachel or any other student again. The school district has not received any complaints of inappropriate touching occurring after November 2001.

Johnsrud spoke informally with two area school principals on November 14, 2001. They advised Johnsrud that teaching-by-touching was a common pedagogical technique in music education.

At some time, Rachel's mother called Katie Heintz of the Columbia County Department of Health and Human Services to tell her about Rachel's allegations. On November 13, 2001, Fall River Police Department Chief Brent Van Gysel met with Officer Jim McFarlane and Heintz to discuss Rachel's allegations. Also on November 13, 2001, Heintz and McFarlane interviewed Rachel at the police department.

During the interview, Rachel said that defendant Mroz would touch her on her waist and on her upper thigh and put his hand on the chair and then slip it onto her butt and brush against her when they were just standing there. (The parties dispute whether she said more than this about his conduct.) Rachel told McFarlane that defendant had touched her "on my butt," which she defined as a private area of her body. (The parties dispute whether she told administrator Schmidt in October that Mroz had touched her on her buttocks.) Rachel told McFarlane that she wanted to continue taking band in defendant Mroz's classes so long as other students were present. Despite this statement, Rachel dropped out of band that month. She joined it again in the ninth grade for the 2003-04 school year.

Officer McFarlane interviewed defendant Mroz on December 14, 2001. McFarlane concluded that not enough evidence existed to support an allegation that Mroz had acted inappropriately with Rachel. In reaching this conclusion, he relied "on the many inconsistencies in Rachel Amato's versions of the events and the fact that Jeffrey Mroz has absolutely no record of inappropriate behavior, both in his professional and personal life."

Curry Aff. ¶ 5, Exh. A, dkt. #26, at 7. The Fall River Police Department closed the case and took no further action.

B. Alanna Mortensen

Plaintiff Alanna Mortensen began band in fifth grade during the 1999-2000 school year. On October 30, 2001, she was interviewed by principal Johnsrud as part of his investigation into Rachel Amato's allegations against defendant Mroz. Alanna Mortensen described defendant Mroz's teaching techniques. (The parties dispute the contents of that description.) Alanna said that Mroz's touching depended on the instrument she was playing, such as the drum set or snare drum. She said that the touching occurred during band lessons in fifth grade and the beginning of sixth grade. After the interview, Alanna asked Rachel why they had been questioned. Rachel said it was because defendant Mroz had touched her inappropriately in band lessons and that it made her feel uncomfortable.

The next day, November 1, 2001, Alanna told her parents that defendant Mroz had touched her inappropriately. After talking with her parents and other students, Alanna concluded that defendant Mroz's touching was sexual in nature. However, she did not go back to principal Johnsrud and tell him that she believed that Mroz's touching had been sexual. Neither of her parents talked to anyone at the school district about Alanna's allegations, although it was common for Alanna's parents to call the school whenever she was

upset with a teacher. They never accused defendant Mroz of any form of harassment until November 2002.

After Alanna talked with her parents in November 2001, defendant Mroz did not touch her again. Other students informed the Fall River Police Department that defendant Mroz's teaching technique had changed and that he did not tap their legs anymore.

Alanna said that in fifth grade, defendant Mroz had told her she drummed "like a girl." Alanna had disagreements with defendant Mroz in band class during the 2001-02 school year. She said they were "just fighting, not getting along, argumentative with each other." On December 21, 2001, Henney met with Alanna, her father and defendant Mroz concerning a detention defendant had given her for a missed band lesson. (The parties dispute whether Alanna chose not to attend the band lesson after arrangements had been made for her to leave her Spanish class for this purpose or whether Alanna believed she had cancelled the band lessons.) The four of them agreed that Alanna would leave Spanish early to attend lessons as previously arranged but if she received a detention because she was not permitted to leave the Spanish class, she could take the detention slip to her Spanish teacher and the detention would be expunged. They agreed also that Alanna was to see Henney whenever she had a school-related problem. Principal Johnsrud was informed of the detentions for the missed band lessons.

On or about February 28, 2002, Alanna wrote a letter to Senator Herb Kohl for civics

class, complaining that defendant Mroz was harassing her. She did not send the letter.

In the third quarter of the 2001-02 school year, defendant Mroz gave Alanna a grade of C in band. On April 8, 2002, Mr. Mortensen, Alanna and a family advocate met with principal Johnsrud, Henney and defendant Mroz to discuss the grade. Alanna believed Mroz was treating her unfairly. She had been sick with mononucleosis and had missed many school days, but she said that defendant Mroz had told her that the absences would not affect her grade. Defendant Mroz explained that Alanna had not practiced enough; Mr. Mortensen said that he would make sure that Alanna practiced 30 minutes each night. The group talked about times that Alanna could come to the band room to check with defendant Mroz about her practicing. Alanna understood that she needed to attend band class and take lessons every week if she wanted to receive a good grade.

At the same meeting, Mr. Mortensen described Alanna's frustration about belittling comments that defendant Mroz had made to her. Defendant explained that the comments had been made a long time earlier and that he was not aware of any new complaints from Alanna. Principal Johnsrud confirmed with Alanna that she was comfortable talking with Henney and arranged for her to meet with Henney on a weekly basis if she wanted to discuss anything that was bothering her. (The parties dispute whether Alanna ever met with Henney during the 2001-02 school year.)

On May 2, 2002, Mrs. Mortensen e-mailed Henney to express her concern that

defendant Mroz was affecting Alanna's self-esteem. She added that she had suggested to Alanna that she meet with Henney that week and she thanked Henney for taking the time to make Alanna feel worthy. She e-mailed Henney five days later to ask her to sit in on Alanna's drum lesson because she was concerned that defendant Mroz might subject Alanna to unfair criticism. Henney sat in on one of the lessons. She told Mrs. Mortensen that Alanna was a good drummer but that she struggled to get through the lesson. She encouraged Mrs. Mortensen to keep Alanna practicing.

On May 8, 2002, Mrs. Mortensen e-mailed Henney to complain that Alanna's band lesson lasted only ten minutes, that Alanna thought defendant Mroz was distracted and that Mrs. Mortensen would not be sad to see Mroz leave. Henney responded to Mrs. Mortensen, encouraging her to step back from Alanna and trust Henney to look out for students at school. Henney said that Alanna was a smart, capable, good drummer and a beautiful young lady and that defendant Mroz was a fine teacher that had often "saved" a child that might otherwise have been lost. Mrs. Mortensen e-mailed Henney back to thank her for her caring words but added that she would not be stepping away from Alanna. Henney responded that she would continue to help Alanna if she could and that she had Alanna's best interests at heart. In June 2002, after Mrs. Mortensen said that Alanna felt "a bit uncomfortable being alone with Jeff," principal Johnsrud made special accommodations for summer band lessons for Alanna.

At no time during the Mortensens' 2001-02 meetings or e-mail correspondence with the school did Alanna or her parents say anything about any inappropriate touching by defendant Mroz. (Plaintiffs dispute this by saying that Alanna told Johnsrud in October 2001 that defendant Mroz's touching her made her feel uncomfortable and that Alanna complained of sexual harassment by defendant Mroz in her letter to Senator Kohl. This dispute does not change the fact that no one mentioned inappropriate touching during the meetings or in e-mail correspondence.)

When Alanna was in sixth grade, defendant Mroz said something about her not looking as if she missed many meals and touched her stomach. Alanna did not think that this touching was sexual in nature. She characterizes it as verbal harassment. She describes sexual harassment as "saying a comment to a person about how they look or that they want to have sex with them or touching them in sexual ways." She understands sexual harassment to be unwelcome touching directed toward a person's private parts.

Except for the comments described above, neither Alanna nor her parents made any complaints to Henney, Schmidt or Johnsrud about inappropriate touching by Mroz until the end of October 2002.

Although it is not clear from the proposed findings, it appears that Alanna had two confrontations with defendant Mroz in late October 2002, when Alanna was in seventh grade. In one, she was helping another drummer find the right measure on which to begin.

Defendant Mroz stopped the band and asked her why she had told the other student the wrong measure. Alanna denied starting on the wrong measure. She told defendant Mroz that she could not see the music because he was standing in front of it. She alleges that defendant Mroz told her that if she did not want to admit she was lying, she was not going to come back to band and was going to get a detention and that she responded, "Well, then I guess you will have to give me detention, because I'm not lying." (The parties dispute whether Alanna became argumentative, called defendant Mroz an old man and challenged his authority.)

Defendant Mroz conferred with Henney the same day to discuss an appropriate consequence for Alanna's disrespectful conduct. They agreed that Alanna's conduct warranted a restricted lunch, which defendant Mroz issued to Alanna. (The parties dispute whether the restricted lunch was a sanction for the incident or for Alanna's refusal to admit that she had lied when she said she could not see the music because defendant Mroz was standing in front of it.)

On October 30, 2002, Alanna left band class to see Henney because she was upset about what she thought was a detention slip. Henney told Alanna that it was a restricted lunch slip and that she agreed with defendant Mroz that the restriction was a proper consequence for Alanna's disrespectful statements.

After talking with Henney, Alanna called her father to tell him about the incident.

He came to the school immediately, went to the band room and walked in, although instruction was in progress. When defendant Mroz did not respond to his gestures, he yelled, "Napoleon!" and "Get over here, boy!" Mroz directed him to the office. Later defendant Mroz filed a report with the Fall River Police Department about Mr. Mortensen's conduct.

The same day, Mr. Mortensen left telephone messages on Henney's voice mail. In one, he said, "It's like me telling Mroz that if he doesn't admit that he belittled my daughter that I will beat him," and another in which he referred to the burning of witches. Administrator Schmidt wrote Mr. Mortensen on November 1, 2002, reprimanding him for interrupting student instruction, reminding him of the district's complaint procedures, telling him that he was to go to the high school office to make an appointment with a teacher when he had questions about his child and asking him to refrain from leaving inappropriate messages on teachers' answering machines. Alanna never served a restricted lunch for the October 2002 incidents.

Alanna and defendant Mroz had a number of disagreements and became angry with one another frequently. Alanna believed that defendant Mroz tried to make her feel dumb in front of the class and that on one occasion when he thought she was talking back to him, he called her up to the front of the class and screamed at her to leave. Alanna understood that defendant Mroz did not want students talking back to him and would sometimes yell

at them or give them detentions as a sanction for doing so. Alanna believed that defendant Mroz was trying to make her feel stupid because "he never called anybody up to the front of the class before for talking back to him and talking over the top and pointing down at them." Alanna was offended by Mroz's "bozo box," a box in which he put items that students had left in the band room and which he sometimes referred to as the "drummer box," although he used it for all students and all items.

Administrator Schmidt and principal Johnsrud met with defendant Mroz on October 31, 2002, to review the incidents with Alanna and her father. Defendant Mroz agreed that in the future, if the drummers played the wrong part, he would point it out to the entire percussion section and he would compliment Alanna when he could, but that if she talked back to him, he would administer his usual discipline.

C. Events Occurring after October 31, 2002

On November 1, 2002, principal Johnsrud met individually with three students who had witnessed the October 2002 incident with Alanna and defendant Mroz. Two of the student witnesses' accounts paralleled defendant Mroz's. Johnsrud concluded that defendant Mroz was not standing in Alanna's line of sight as she had said and that he did not force her to choose between admitting she had lied and receiving a consequence. A student interviewed by the Fall River Police Department said that Alanna was very argumentative

and prone to talking back sarcastically.

Alanna's father complained to Johnsrud on November 4, 2002, that defendant Mroz had made a sexual reference to a drum stick and a penis. (He says that he does not remember making such a complaint.) Alanna denied that any such remark was made. Mr. Mortensen told Johnsrud that defendant Mroz had had inappropriate contact with Alanna and that the family might pursue legal action against the school district. He said that he planned to talk to both the Office of Civil Rights and the district attorney's office. A few days later, he provided a packet of information to the Columbia County district attorney and asked for an investigation. The packet included a list of present and former students who allegedly had complaints about defendant Mroz. The district attorney asked the Fall River Police Department to investigate. Chief Van Gysel and Officer McFarlane interviewed Alanna and at least ten other persons.

Chief Van Gysel called Mr. Mortensen to make the appointment for Alanna's interview. He advised Mortensen that Katie Heintz from the Columbia County Health and Human Services Department would conduct the interview, along with Officer McFarlane. Mr. Mortensen said that he would videotape the interview and Alanna would record it on audio cassette. McFarlane believed that the taping, together with Mortensen's mention that he would ask for a follow-up investigation by the state Department of Criminal Investigation, was intended as intimidation. When McFarlane entered the room with

Heintz to interview Alanna, he noticed Mortensen going over documents in a three-ring binder. He believed that Mortensen was coaching Alanna. Mortensen provided Heintz and McFarlane copies of the binder.

Alanna told Heintz that when she had started band in fifth grade (1999-2000), defendant Mroz had tapped out rhythms on her upper thigh and that this had made her feel uncomfortable. She said that Mroz would stand behind her, place his arms under hers and play the drums while standing behind her. She said this made her feel uncomfortable because Mroz would graze her breasts. She said that she did not tell her parents about Mroz's actions because she did not know they were wrong. She told Heintz that defendant Mroz had never acted in a similar way toward her after fifth grade. She said that she had first told her parents about the actions at the end of sixth grade or the beginning of seventh grade. She told Heintz that she did not think any student was safe around Mroz and that he was "hanging around" only because he wanted more money for his retirement.

Alanna explained to McFarlane that she thought Mroz meant his actions toward her in fifth grade to be sexual now that she knew more about him. When asked what she knew about him, she said that he'd had sex with minors in the 1980's, specifically with a woman named Roseanne Tank. When asked why she believed that the two had had sex, she said that her mother had told her. She told McFarlane that defendant Mroz had never touched her breasts or attempted to do so but that the sides of his arms would graze her breasts as

he played drums with her.

After investigation, the Columbia County Health and Human Services Department determined that "there was no evidence of abuse and that the allegations could not be substantiated." Liddle Aff., Exh. C., dkt. #12, at 16. The Fall River Police Department finished its investigation but did not pursue the matter.

On November 5, 2002, Alanna's mother called Johnsrud. In the course of their conversation, she asked what would happen to Alanna's grade in band if she were to drop the class. He explained that ordinarily a student receives an F in that circumstance but that he would check into it. He met the same day with administrator Schmidt, defendant Mroz and Henney; they agreed that they would allow Alanna to drop band without a grade penalty. Johnsrud called Mrs. Mortensen back that afternoon to tell her of the decision.

Still later that afternoon, Mr. Mortensen spoke with principal Johnsrud to express his belief that defendant Mroz was retaliating against Alanna because she had given an affirmative response to Johnsrud when he was investigating Rachel Amato's claims against defendant Mroz. Mr. Mortensen said that he was concerned about defendant Mroz's charge that Alanna had lied, which he believed was retaliation, and that he was considering alternatives for Alanna's education.

On November 7, 2002, principal Johnsrud wrote the Mortensens to say that Alanna could drop band without a grade penalty and that he was removing the restricted lunch

penalty from her record. On November 11, 2002, a lawyer representing the Mortensens called Johnsrud to discuss possible solutions for Alanna rather than having her quit band. He indicated that the Mortensens agreed that Alanna was talking back to defendant Mroz and deserved some type of consequence for insubordination but they objected to any consequence for the charge of lying.

On November 11, 2002, Alanna's father asked Henney whether it would be necessary to transfer Alanna to the Columbus School District so she would not have to put up with harassment and a potential pedophile. Mr. Mortensen talked with administrator Schmidt the same day and told her he did not believe Fall River was a safe environment for Alanna and that he and his family were considering moving back to Green Bay. Schmidt wrote Mortensen the same day, encouraging him to give her any information he might have about children being at risk in the school building so she could investigate.

On November 12, 2002, principal Johnsrud conducted three separate student interviews in response to allegations from Alanna and her father that defendant Mroz had touched her inappropriately. One student reported that defendant Mroz had put his hands in her back pocket once but had never done it again and that she did not feel uncomfortable in band. Another said that when she was in sixth grade, defendant Mroz would stand behind her and pat her shoulder to keep the beat but that he never touched her in an inappropriate way.

On November 13, 2002, Alanna's father told administrator Schmidt of other students who allegedly had other complaints about defendant Mroz. On the same day, a group of Fall River teachers wrote to the school board to express concerns about Mr. Mortensen's unacceptable and inappropriate conduct at the school. They believed that it created an unsafe working environment, particularly in view of his official position on the school board. In response, the school board implemented a new visitors policy.

At some time in mid-November 2002 (the parties dispute the exact date), principal Johnsrud interviewed two more students from the list of names that Mr. Mortensen had given to the district attorney. One student said she had dropped band at the start of the 2001-02 school year because she wanted to have an extra study hall. She had received a detention from defendant Mroz for chewing gum in band. She denied that she had been chewing gum but she served her detention. Johnsrud interviewed another student, who said that defendant Mroz would tap on her leg, touch her stomach and tell her to use her "abs" and grab the waistband of her underwear when she was leaning over, which made her feel uncomfortable. However, she did not think that defendant Mroz had touched her in an inappropriate way. Another student told Johnsrud that she was concerned that the information about defendant Mroz was not true and that she was upset about the matter.

On November 13, 2002, administrator Schmidt and principal Johnsrud met with defendant Mroz to discuss Mr. Mortensen's allegations regarding inappropriate conduct with

the other students that Johnsrud had interviewed. Defendant Mroz denied the allegations of inappropriate touching of some of the students and presented his side of the story on other allegations.

On the same day, the school board held an executive closed session to allow the Mortensens and Amatos to talk to the board about various matters, including their appeal of defendant Mroz's restricted lunch sanction imposed on Alanna. The Amatos expressed their unhappiness that nothing had been done to defendant Mroz in 2001. Mr. Mortensen said that they were interested in having a "listening session" with the board. Alanna gave the board a letter, in which she said that defendant Mroz had called her a liar. The Mortensens raised the issue of retaliation, informed the board that they had retained an attorney, asked the district to tape defendant Mroz's classes for safety reasons and inquired how the district was going to deal with defendant Mroz. The board took no action at that time. Board president Ann Berg told the Amatos that any students who had complaints should put them in writing and follow the board's policies for discrimination and harassment by talking with guidance counselor Henney, principal Johnsrud and administrator Schmidt. She said that the board would take no further action without new information.

On November 18, 2002, Mrs. Amato wrote to principal Johnsrud and administrator Schmidt to ask for a copy of Rachel's discipline file containing all of the information related to her complaint against Mroz. Johnson told her that Rachel's cumulative file contained no

such information. (The parties dispute whether Johnsrud told Mrs. Amato that no such information existed in Rachel's *student* file but did exist in her *discipline* file and whether he promised to give her the papers from the second file but never did.)

Mrs. Amato came to school on November 20, 2002. Chief Van Gysel happened to be in the building interviewing students. Mrs. Amato asked guidance counselor Henney whether Henney believed Rachel. Henney responded that she believed that Rachel believed the allegations she had made about defendant Mroz. Mrs. Amato left the building upset. Henney met with principal Johnsrud later that day. They determined that no follow-up was necessary. (The parties dispute whether Mrs. Amato provided Henney with any specific information about student harassment at this time.) Henney did not report the incident with Mrs. Amato to administrator Schmidt.

On November 22, 2002, Schmidt spoke with Steve Rupert, the former administrator of the school district, about defendant Mroz. Rupert said no student or parent had ever raised concerns about Mroz's use of tapping the beat on students or putting his arms around students to help them play drums and that he had had no reports of any inappropriate touching by Mroz.

On December 18, 2002, Mr. Mortensen distributed a letter from Rachel Amato to the school board in executive session. (He was a member of the board at the time.) In the letter, Rachel complained about defendant Mroz's conduct, about the lack of any action

against him and about her having been harassed by other students because of her complaint. She wrote that she felt let down by the school. The board took no action because Rachel was not Mortensen's daughter and no public notice had been given that there would be confidential discussion of student information in the executive session. Instead, President Berg interrupted Mortensen and collected all the information about Rachel.

Alanna left the Fall River School District on December 22, 2002 and was home schooled for the remainder of the academic year. On January 8, 2003, administrator Schmidt wrote the Mortensens to clarify the procedure they were to follow if they wished to file a sexual harassment complaint. The board concluded it had no reason to take any employment action against defendant Mroz.

On January 15, 2003, Mr. Mortensen addressed the school board meeting in executive session and redistributed the family letter handed out at the November 2002 board meeting plus a "List of Events of Harassment by Mr. Mroz." After the presentation and discussion, the board informed Mortensen that the administration had followed proper procedures and that the matter was resolved but that he and his family could file other complaints by following the district's policy. It told Mortensen that because no new charges against defendant Mroz were pending, it would wait for any new information from the district attorney before taking any additional action. The board found that the school district had conducted two internal investigations of the allegations against defendant Mroz

during the 2001-02 and 2002-03 school years and that administrator Schmidt had done an analysis of the documents, which included police reports, reports of student interviews, documented telephone calls, other letters and information and the Fall River Police Department investigation. The board noted the involvement of the Columbia County Human Services Department and the referral to the district attorney's office and concluded that there had been no showing of just cause to discipline defendant Mroz.

Neither administrator Schmidt nor principal Johnsrud was informed of any instance in which defendant Mroz called Rachel a liar in front of band class. Rachel believed that defendant Mroz was intimidating her when he threatened her with a "couple detentions" after she made the allegations against him, although he had threatened her with detention for talking with her friends before she came forward with her allegations. Rachel was aware that defendant Mroz used detention or restrictive lunch as a disciplinary penalty when a student missed a lesson.

Rachel never received a detention from defendant Mroz for any reason. Rachel complained that defendant Mroz had yelled at her many times. She admitted that he yelled at other students when they did things wrong such as not following his instructions.

On April 2, 2003, Mr. Amato telephoned principal Johnsrud to tell him that Mroz had bumped into Rachel's sister Miranda in the hallway and that defendant Mroz was going into both Rachel's and Miranda's classrooms. Johnsrud offered to call Mr. Amato back after

he had looked into his allegations but Amato said it was not necessary unless Johnsrud thought he should call.

Johnsrud learned from defendant Mroz that it was not uncommon for him to stop by or talk to other teachers. Defendant Mroz said that the bumping incident had occurred when he was coming back to the band room after fourth hour study hall and that he had almost collided with Miranda because he had not seen her coming. (The parties dispute the accuracy of Mroz's report of the incident.) Defendant Mroz offered to stay away from Miranda's and Rachel's classrooms during the third period. Principal Johnsrud said he did not think this was necessary because defendant's actions were not inappropriate. He interviewed the two teachers of the classes and determined that Mroz's visits were not disruptive. He concluded that Mroz had done nothing wrong.

On April 21, 2003, Special Agent Mark E. Banks of the Wisconsin Department of Justice, Division of Criminal Investigation, conducted interviews with both Rachel and Alanna regarding the allegations of improper touching. He asked Rachel Amato about any first hand knowledge of inappropriate actions by defendant Mroz. She told him that in sixth grade she and another girl had been walking into the practice room when defendant "smacked" both of them on their behinds. She told Banks about the alleged inappropriate touching by defendant Mroz and told him that she had never mentioned this to anyone until she told her mother when she was in seventh grade. She told him also that after she had

made the allegations, defendant Mroz had refused to let her "play the good instruments" and that some of the students in the school had said she had lied about defendant Mroz and that students were spreading nasty rumors about her. The Division of Criminal Investigation concluded the investigation of defendant Mroz and, as is its practice, turned the matter over to the county's district attorney, who informed defendant Mroz in May 2003 that he would not be charged.

On April 23, 2003, Mrs. Amato removed her daughters from the defendant school district for home schooling, saying that "Mroz is still around the girls. They were scared to be at school." On August 1, 2003, she called Henney to complain that Henney, administrator Schmidt and principal Johnsrud had not done their jobs of protecting student safety. She told Henney that Rachel and her sister Miranda would be coming back to the school and that Henney, Johnsrud and Schmidt should not go anywhere near them. Henney told Mrs. Amato that they could not guarantee that they could stay away from the girls because their jobs required them to move freely about the building.

Rachel spoke with principal Johnsrud on September 25, 2003, about problems she had been having with another female student since the spring of the preceding year, when she was in eighth grade. Rachel filled out a harassment complaint form against the student the next day. Johnsrud met with the alleged harasser, who denied making pejorative comments about Rachel. Johnsrud reviewed the harassment policy with her and told her to

avoid any further negative actions. He interviewed the teacher in whose class the incident had allegedly occurred; the teacher was unaware of any incident but agreed to be on the watch for future problems. In addition, he asked the new band teacher, Mr. Barker, to watch for further problems between the two students when they were in band class.

Johnsrud considered the Mroz matter investigated and resolved informally. However, on October 14, 2003, Rachel wrote to the district attorney, complaining that the school district had failed to do anything about defendant Mroz and the allegations of his inappropriate conduct with students.

On January 15, 2004, defendant Mroz played along with the pep band directed by the new band director. (The parties dispute whether Rachel was there.) Later that evening, Mrs. Amato called Barker to tell him about the earlier allegations about defendant Mroz and informing Barker that Rachel's attorney might contact him for a statement. The next morning, Barker talked with administrator Schmidt about the incident. He did not report any incident between Mroz and Rachel at the game. Schmidt agreed that defendant Mroz should be told not to play with the pep band at any other games. Principal Johnsrud told Mroz about the directive. On January 19, 2004, Barker told Rachel that defendant Mroz would not play with the pep band anymore and that her grade would not suffer for missing pep band on the preceding Friday. On January 26, 2004, Johnsrud wrote the Amatos about their concerns regarding defendant Mroz's playing in the pep band. He told them that

defendant Mroz would have no further connection with the band.

D. Plaintiffs' Statements

On March 18, 2003, both Alanna and Rachel gave recorded statements to an investigator working for their lawyer at the time. Alanna said that although defendant Mroz had touched her physically in fifth grade about 20 to 30 times, he had never touched her after fifth grade. Rachel said that defendant Mroz had touched her "on her butt" and around her vaginal area and had come close to touching her breasts. She said that this had occurred in fifth grade and that it happened "pretty much . . . every day." Zylstra Aff., Exh. E, dkt. #33, at 4. She added that he had fondled her butt and thigh and had rubbed once or twice. Id. at 5.

In her deposition, Rachel testified that defendant Mroz engaged in the following conduct with her: smacking her on the butt, rubbing against her, putting his hands on her lower thighs close to her private area, wrapping one of his arms around her side, grabbing her side close to her butt, bringing her close to him and holding her against him, trying to get into her personal life, rubbing her shoulders and massaging them and reaching his fingers down toward her chest while doing it, grabbing her by the waist and holding her there when she would bend down, coming around her and grabbing her by the waist and pulling her toward him, grabbing onto her thighs and pulling her against his front, reaching around her

or sliding his hands through her armpits and grabbing her wrists and pressing himself against her, reaching between her arm and side and wrapping his own arm around her body area, putting his arms around the outside of her arms to assist her in playing, standing behind her and placing his hands on her upper inner thighs, massaging her shoulder with his fingers extended near her breasts, sitting next to her with one hand on the back of her chair and then moving his hand under the seat of the chair to touch her buttocks. Rachel had not remembered some of these actions when she filed her responses to defendants' interrogatories.

When Rachel was asked at her deposition whether she told Officer McFarlane or Columbia County social worker Heintz all of the ways that defendant Mroz had allegedly touched her, she said she had not because she did not remember all of them. However, she testified that she told Heintz and McFarlane everything she had told the school, which included all of the items in the preceding paragraph. She testified that defendant Mroz had touched her inappropriately in almost every band class in sixth and seventh grade and in every band lesson in seventh grade. The band classes occurred every other day; the lessons took place once a week and lasted between fifteen minutes and half an hour. She testified also that defendant Mroz had not touched her inappropriately after she met with administrator Schmidt and principal Johnsrud in October 2001, when she was in seventh grade.

When Alanna met with Heintz and McFarlane on November 21, 2002, she stated that defendant Mroz tapped her on the top of her thigh. At her deposition, she testified that defendant Mroz always tapped her on her inner thigh. She told Agent Banks in April 2003 that only Mroz's "inner arm and the biceps area of his arm" grazed her breasts, Liddle. Aff. Exh. D, dkt. #12, at 6. (This was consistent with what she told Officer McFarlane in November 2002.) At her deposition, she testified that defendant Mroz would slide his arms though hers and touch her breasts with his hands. She testified that she had told McFarlane and Heintz that Mroz had touched her breasts with his hands.

Neither Alanna nor Rachel ever objected to defendant Mroz's teaching techniques before October 2001.

E. Notices of Claim

Plaintiffs Alanna Mortensen and Rachel Amato filed notices of claim dated April 14, 2003 that did not identify any specific act or conduct that had occurred within 120 days of the date of the filing. Both plaintiffs testified in their depositions that all inappropriate touching stopped after October 2001 (as to Rachel) and between November 2000 and January 2001 (as to Alanna). In the notices, plaintiffs ask for damages for "pasted [sic] and future pain and suffering, emotional distress, interference with education, and psychological trauma in an amount claimed in excess of $50,000." Zylstra Aff., Exhs. G & H, dkt. #33.

By the time that the notices of claims were filed, plaintiffs and their parents had spoken to other students in the school and their parents about the allegations on a number of occasions.

OPINION

Although the facts section in this opinion is extensive, the legal issues are not complex. Plaintiffs have alleged violations of their rights to equal protection under 42 U.S.C. § 1983 and retaliation in violation of § 1983 against both defendants and battery in violation of Wisconsin law against defendant Mroz. Defendants have raised a number of defenses, including failure to state a claim on which relief may be granted and plaintiffs' failure to use the school district's anti-harassment policy. Defendant school district contends that it is immune from an award of punitive damages under either state or federal law, that it cannot be held liable for intentional acts of discrimination committed by its employee, that it is immune under state law for intentional acts of battery by an employee and that its liability is capped at $50,000. (It is not clear why defendant school district raised these latter two defenses when plaintiffs did not assert any state law tort claim against it in their complaint.) Defendant Mroz contends that plaintiffs' failure to comply with the state's notice of claim requirements bars their state tort claim against him. Plaintiffs do not deny that defendant school district is immune from liability for punitive damages under federal

law. Not surprisingly, in light of their not having made any state law claim against defendant, plaintiffs do not contend that defendant school district has any liability to them under state law.

A. Failure to State a Claim against Defendant School District

In their complaint, plaintiffs alleged that defendant school district had failed to prevent the improper touching by defendant Mroz, failed to take prompt and appropriate measures to curtail it after plaintiffs reported it, failed to conduct a full and impartial investigation and failed to take actions to protect plaintiffs. In their brief, however, they do not dwell on these allegations but argue instead that defendant school district is liable to plaintiffs because it ratified the actions of its subordinates when it listened to plaintiffs' complaints, reviewed the actions of the administration and took action that was based upon the administration's findings and conclusions. Plaintiffs have changed the nature of their claim against defendant school district since the filing of their complaint, presumably because they recognized that under Wisconsin law, neither administrator Schmidt nor principal Johnsrud can be characterized as a policymaker for defendant school district, that is, someone whose acts are attributed to defendant school board for the purpose of assessing liability, Gernetzke v. v. Kenosha Unified School District No. 1, 274 F.3d 464, 469 (7th Cir. 2001); Wis. Stat. § 120.13(b)(1). Plaintiffs' revised contention is that defendant school

district is liable to them because it ratified its subordinates' unconstitutional actions. (It is not clear whether plaintiffs' reference to "subordinates" includes administrator Schmidt and principal Johnsrud or refers just to defendant Mroz. I will assume it includes all three.)

A governmental body such as defendant school district may be liable under § 1983 for violations of an individual's civil rights in limited circumstances: (1) when an express governmental policy causes constitutional deprivation when it is enforced; (2) when civil rights are violated by a widespread but unwritten custom or usage with the force of law; or (3) when a person with final policymaking authority caused or ratified the constitutional injury. Simons v. Chicago B.O.E., 289 F.3d 488, 494 (7th Cir. 2002). Plaintiffs concede that their injuries were not the consequences of an express policy of defendant school district or the operation of any widespread, unwritten custom or usage with the force of law. As I have explained, they cannot argue that the school administrators or defendant Mroz were policymakers for defendant school district and caused their injury. Thus, they are left with only the ratification argument. Unfortunately for them, it provides no help.

Defendant Mroz is the alleged wrongdoer in this action. For the purpose of discussion, I will assume that he engaged in the conduct attributed to him by plaintiffs, that is, excessive touching of both plaintiffs, touching Rachel near her vaginal area, massaging her shoulders near her breasts, touching her breasts, touching her buttocks, pulling her toward

him, pressing up against her, etc. In order to impose liability on defendant school district, plaintiffs must show that its policymaking officials (the school board members) ratified defendant Mroz's conduct. However, nothing in the undisputed facts suggests that they did. They did not ratify defendant Mroz's conduct when they chose not to undertake any further investigation of defendant Mroz or to discipline him. When they made that decision, they did so because the investigations of the allegations had uncovered no evidence to support plaintiffs' reports. Even if that decision was incorrect or based upon investigations that were incomplete, as plaintiffs allege, it cannot be characterized as a ratification of inappropriate sexual contact by a teacher.

To hold municipalities liable for the existence of an abusive policy by ratification, plaintiffs must be able to show that the municipal policymakers have condoned or approved the policy and, in essence, adopted it as their own. Baskin v. City of Des Plaines, 138 F.3d 701, 705 (7th Cir. 1998). Mere failure to correct or eliminate improper conduct is not enough; plaintiffs have to show that the policymakers were deliberately or recklessly indifferent to complaints about the conduct before they can prove that a municipality has adopted the conduct as an official policy. Id.; see also Gernetzske, 274 F.3d at 469 (holding school district not liable under § 1983 when it refused to direct school principal to allow symbol of Christian cross in school-sponsored mural; refusal to grant relief to persons challenging the decision was not ratification of the decision).

To the extent that plaintiffs are alleging that defendant school district ratified an investigation that amounted to a violation of plaintiffs' constitutional rights, they would have to show, at a minimum, that the school board members knew that the administration's investigation was so deficient as to amount to no investigation at all and were deliberately indifferent to that knowledge. Plaintiffs have not made such a showing. Therefore, defendant school district is entitled to summary judgment on plaintiffs' claim that this defendant violated their right to equal protection. Because I am granting summary judgment on the ground that plaintiffs cannot show that defendant school district would be liable to them for any of the alleged acts of defendant Mroz or for any allegedly unconstitutional acts of administrator Schmidt or principal Johnsrud, it is not necessary to discuss defendant's contention that plaintiffs' failure to follow the school district's well established anti-harassment procedures bars them from suing this defendant for a violation of their rights.

B. Failure to State a Claim against Defendant Mroz

The equal protection clause protects persons from invidious discrimination by the government. To prevail on a claim of invidious discrimination, a plaintiff must prove that a governmental defendant treated her differently from others who were similarly situated and did so intentionally because of her membership in a class (such as females) and the discrimination did not "bear a close and substantial relationship to important governmental

objectives." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979). Plaintiffs have alleged that defendant Mroz subjected them to inappropriate touching and that he did not subject the male students in band to similar touching.

In response, defendants begin by characterizing the touching as sexual harassment to be evaluated under the standards of Title VII of the Civil Rights Act of 1964. It is true that the Court of Appeals for the Seventh Circuit has treated constitutional claims of equal protection relating to sexual harassment in the workplace as equivalent to Title VII claims, e.g., Hildebrandt v. Illinois Dept. of Natural Resources, 347 F.3d 1014, 1036-37 (7th Cir. 2003), and has required the plaintiffs in such cases to show that the defendant's behavior was so severe or pervasive as to create an abusive working environment. E.g., Robinson v. Sappington, 351 F.3d 317, 328 (7th Cir. 2003). However, I am not persuaded that the workplace approach is appropriate for a claim by minors that their teacher subjected them to improper physical contact. Rather, the inquiry should be the basic one employed in equal protection cases: did defendant Mroz treat plaintiffs differently from the male band students and if so, did he do so intentionally because of their gender? (It is unnecessary to discuss the third prong because defendant could never show that any governmental objective would be served by the alleged discriminatory touching.)

Defendant Mroz argues that plaintiffs themselves have admitted that he had physical contact with both the male and female band students to help them recognize the beat and

to help them understand how to manipulate their instruments. Relying on this admission, he argues that plaintiffs have no actionable claim of a denial of equal protection.

Defendant's argument seems to be predicated on his view of the facts, which is that his only physical contact with students consisted of tapping their legs or shoulders to mark the beat and putting his arms around theirs to show them how to hold and play their instruments. However, plaintiffs have testified that defendant Mroz touched them in other ways, such as massaging their shoulders, feeling their buttocks, pressing up against Rachel inappropriately, sliding his hand up their inner thighs close to the vaginal area or touching his hands to their breasts, and that this other touching was sexual in nature. Although the evidence of such touching is hotly disputed, it is sufficient to survive a motion for summary judgment. Until a jury determines the nature of defendant Mroz's touching, I cannot say as a matter of law that it was not gender-based. If the jury agrees with defendant that it was limited to the same kind of tapping and hand-guiding that he engaged in with other students, both male and female, then it did not amount to unequal treatment. On the other hand, if the jury agrees with plaintiffs that his touching of them was sexual in nature, defendant would find it difficult to persuade a jury that the touching was not intentional gender discrimination.

Defendant Mroz's motion for summary judgment on this claim must be denied.

C. Retaliation Claims

Although plaintiffs assert a right under the equal protection clause to be free from retaliation, such a right cannot be found in the clause. Boyd v. Illinois State Police, 384 F.3d 888, 898 (7th Cir. 2004) (citing Grossbaum v. Indianapolis-Marion County Bldg. Auth., 100 F.3d 1287, 1296 n.8 (7th Cir. 1996)("We do not imply, however, that retaliation claims arise under the Equal Protection Clause. That clause does not establish a general right to be free from retaliation."); Gray v. Lacke, 885 F.2d 399, 414 (7th Cir.1989) ("Gray's right to be free from retaliation for protesting sexual harassment and sex discrimination is a right created by Title VII, not the equal protection clause."). Plaintiffs have a right under the First Amendment or Title VII to be free from retaliation for their exercise of their rights under either provision; they have no such right under the equal protection clause. Defendants are entitled to summary judgment on plaintiffs' retaliation claims.

D. State Law Battery Claim

Both plaintiffs have sued defendant Mroz for tortious battery under state law. In order to bring such a suit, they are required to comply with the state's notice of claim statute, Wis. Stat. § 893.80, which makes timely written notice of a claim against a governmental subdivision and its employees a prerequisite to a legal action. Although failure to comply with the notice of claim provision cannot bar a federal cause of action, Felder v.

Casey, 487 U.S. 131, 134 (1988), it does bar state causes of action brought in the same suit. Id. Both the notice of injury and the notice of claim components of the statute must be satisfied. The notice of injury gives the government a chance to investigate and evaluate the potential claim; the notice of claim gives the government an opportunity to effect compromise without suit. Vanstone v. Town of Delafield, 191 Wis. 2d 586, 593, 530 N.W.2d 16 (Ct. App. 1995).

Plaintiffs argue that defendant Mroz cannot raise any challenge to the notices of claim because he did not adequately plead the defense in his answer to the complaint. Defendant Mroz alleged the following in his answer:

> AS TO CONDITIONS PRECEDENT
>
> 17. Answering paragraph 701, denies upon information and belief that all conditions precedent have been performed or occurred in that plaintiffs failed to comply with Wis. Stat. 893.80.

Citing Fed. R. Civ. P. 9(c) ("A denial of performance or occurrence shall be made specifically and with particularity."), plaintiffs contend that defendant Mroz's general denial is insufficient because it does not identify defendant's specific objections to the notice of claim, that is, whether its deficiency was its untimeliness, its lack of proper service, its incompleteness or something else. Plaintiffs' contention is unpersuasive. Defendant Mroz's denial is stated with particularity; it identifies the statute at issue, thereby alerting plaintiffs to the possibility of deficiencies in their notices of claim. This is sufficient to meet the

requirements of Rule 9(c).

Section 893.80(1) has two parts. Subsection (a) relates to the time for filing the notice of injury. It requires that "written notice of the circumstances of the claim" must be served upon the municipality *and* the employee "within 120 days of the happening of the event giving rise to the claim." Failure to comply with subsection (a) will not bar action on a claim if (1) the municipality had actual notice of the claim and (2) "the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial" to the municipality or the defendant employee. Subsection (b) requires that the notice contain the address of the claimant and an itemized statement of the relief sought. It contains no lack of prejudice exception. Fritsch v. St. Croix Central School District, 183 Wis. 2d 336, 343, 515 N.W.2d 328 (Ct. App. 1994).

Plaintiffs filed their notices on April 14, 2003, almost 18 months after any alleged incidence of improper touching, and they did not specify the amount of their damages except that they were "in excess of $50,000." Defendant Mroz argues that the untimely filing and the inadequate identification of the damages sought makes the notices insufficient as a matter of law.

Subsection (b)'s requirement of a stated dollar amount is intended to give the municipality a meaningful and knowledgeable opportunity to settle the claim. Figgs v. City of Milwaukee, 121 Wis. 2d 44, 54, 357 N.W.2d 548 (1984). The dollar amount set out in

plaintiffs' notices of claim coincided with the maximum award that they could obtain in a suit against defendants. Wis. Stat. § 893.80(3) (capping damages at $50,000 in suits against governmental subdivisions and their employees for acts done in their official capacity or in the course of their agency or employment). This was adequate to give defendant school district the "meaningful and knowledgeable opportunity to settle the claim" that the Wisconsin Supreme Court requires. Defendant's only argument of inadequacy is grounded on the possibility that the school district could waive the limit if it wished. Such a possibility is so remote in this case that it would have made no sense for plaintiffs to have identified any amount over $50,000 for their state law claim.

It is a closer question whether plaintiffs met the requirements of subsection (a), which requires timely filing of a notice of claim. They did not file the notices until more than a year after the last date on which they allege they were subjected to any inappropriate touching, which was November 2001 at the latest. Therefore, the notices are untimely unless plaintiffs can prove that the school district had actual notice within 120 days of the happening of the last event and that the delay has not been prejudicial to defendant Mroz. On the first point, plaintiffs say only that defendant school district had actual notice of Rachel's claim in 2001. They say nothing about actual notice of Alanna's claim. I conclude from this omission that they do not contest defendant's contention that he did not receive adequate notice of her claim.

Defendant contends that whenever actual notice was given, he was prejudiced. In October 2001, he and defendant school district thought that the only problem was that Rachel felt uncomfortable about his tapping her leg and wrapping his arms around hers to help her with her drumming. In 2001, defendant Mroz knew of *Rachel's* "identity, the events for which [he] may be liable, and the type of damage alleged to have been suffered." Plts.' Br., dkt. #47, at 8-9. Had he realized then that the allegations would expand to include sexual touching, he and defendant school district could have taken many more steps to gather and preserve evidence, such as interviewing defendant's entire class, taping the class, taping interviews with the children and establishing with more precision the nature and extent of the alleged touching. Plaintiffs dispute defendant's contention, asserting that defendant Mroz knew everything he needed to know because Rachel's mother told administrator Schmidt in a telephone call on October 25, 2001 that defendant Mroz had rubbed Rachel's shoulders, pressed himself against her, put his hands in her lap and touched her close to her crotch, Zylstra Aff., Exh. A, dkt. #33, and that at a meeting the following day, Rachel described other actions by defendant, such as pulling her with his thigh back into him, putting his hands on her chest and giving her a shoulder rub with his fingers extended.

There is some merit in plaintiffs' arguments. Defendants had opportunities and motivation to gather and record evidence as soon as Rachel and her mother made their

allegations. However, it was not entirely clear that Rachel was objecting to more than the usual touching that defendant Mroz engaged in with his students to help them learn the beat and the proper way to hold and play their instruments. As he argues, had he known he would be subject to allegations of sexual touching, he would have made careful notes and recorded what he could remember at the time. Learning of potential litigation years after the alleged incidents left him at a severe disadvantage because his memory for the events of 2000 and 2001 would have faded in the meantime. Moreover, as defendants have pointed out and as anyone would imagine, the rumor mill at the middle school was operating at full tilt. How easy would it be for impressionable adolescents to say what they knew of their own knowledge and what they knew from others about events that had occurred two or three years earlier? I am persuaded that plaintiffs have not met their burden of showing that defendant Mroz was not prejudiced by their failure to file timely notices of claim. Therefore, I will grant defendant Mroz's motion for summary judgment as to plaintiffs' state law battery claim.

ORDER

IT IS ORDERED that defendant Fall River School District's motion for summary judgment is GRANTED as to plaintiffs Jane Doe's (Rachel Amato's) and Jane Roe's (Alanna Mortensen's) claims of violation of equal protection against this defendant and this

defendant is DISMISSED from this lawsuit; defendant Jeffrey A. Mroz's motion for summary judgment is GRANTED as to plaintiffs' state law battery claim and as to their claim of retaliation under the equal protection clause; it is DENIED as to plaintiffs' claim of violation of equal protection grounded on gender-based inappropriate physical touching of plaintiffs.

Entered this 20th day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge