

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

May 5, 2020

Lyle W. Cayce
Clerk

No. 19-10803

IQBAL BHOMBAL, Individually and as next friend of Z. B., a minor; MARIE
BHOMBAL,

Plaintiffs - Appellants

v.

IRVING INDEPENDENT SCHOOL DISTRICT,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-2583

Before SOUTHWICK, COSTA, and DUNCAN, Circuit Judges.

PER CURIAM:*

Iqbal and Marie Bhombal, as the parents of their son, Z.B., appeal the dismissal of their claims under Title VI of the Civil Rights Act of 1964. The district court concluded the Bhombals failed to state a claim. We affirm.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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I.

We accept as true the facts alleged in the Bhombals' third amended complaint. Z.B. lived in Irving, Texas with his parents. He attended kindergarten through fifth grade at John Haley Elementary School ("Haley"), part of Irving Independent School District ("IISD"). "Z.B. and his family are Muslim. His father was born in India, and is now a U.S. citizen. His mother was born in Oregon, is Caucasian and converted to the Muslim faith."

Z.B. had a difficult time at Haley. Mr. Bhombal was summoned to school numerous times because of "small infractions" by Z.B. Z.B. was marked absent an unusual number of times during a single year, which the school explained was caused by a system error. Twice Z.B. was suspended from class field trips and allowed to go only if Mr. Bhombal came with him. School officials insisted that Z.B. be tested for ADHD, but he tested negative. Another time, the Bhombals had a meeting with Z.B.'s second-grade teacher because Z.B. drew a picture in red crayon which the teacher viewed as threatening. Mr. Bhombal complained to school officials multiple times that he believed Z.B. was being discriminated against for being "Muslim or Indian" or because of his "race, religion, or nationality."

There were particular problems with Z.B.'s first-grade teacher. One day, the teacher refused to let Z.B. go to the bathroom, causing Z.B. to defecate in his pants. Z.B. later¹ told Mr. Bhombal the teacher assaulted him and called him "stupid," "dumb," and an "idiot." During a school science night, Z.B. was playing with another student—the two were pretending a pencil was an airplane. Another student asked the teacher where Z.B. was, and the teacher "mumble[d]" that Z.B. was "over there practicing." Mr. Bhombal reported this

¹ Z.B. did not tell Mr. Bhombal this until he was in fourth grade. Mr. Bhombal immediately reported the incidents to school administrators.

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comment to the vice principal because he believed the teacher was referring to the 9/11 terrorist attacks.

The Bhombals' Islamic faith includes specific dietary guidelines. Mr. Bhombal brought lunch to Z.B. every day because the school did not serve halal food. Teachers and administrators questioned whether this was necessary and suggested that the food served by the school was "sufficient." Mr. Bhombal was told to stop bringing Z.B.'s lunch so Z.B. could learn to be independent. When Z.B. spilled his lunch one day, his teacher told him he would either eat "like a normal person" or "go hungry." Mr. Bhombal reported the incident to the vice principal. On a different occasion, a school official told Z.B. "he could either eat school food or starve to death."

There were also problems with other students. Z.B. sometimes came home with scratches or bruises. The gym teacher once broke up a fight between Z.B. and another student. Z.B. was once kicked in the face on the playground and another time was hit in the neck. Z.B. told his dad that other students asked if he was Muslim and challenged him to fight. When Z.B. defended himself, another boy's mother filed a police complaint against Z.B. Some students called Z.B. "Tally," short for "Taliban."

School officials also hinted that they believed Z.B. was being abused by his parents. A teacher once asked Mr. Bhombal "if Z.B. gets an erection." School officials asked Z.B. if his parents abused him, and Z.B. in turn asked his parents. The Bhombals allege that during the questioning, school officials made Z.B. touch his own genitals. There were reports made to state Child Protective Services ("CPS"), even though the investigations were all closed. One day a teacher told Mrs. Bhombal that if she had been any later to pick Z.B. up the teacher would have taken Z.B. to a CPS shelter. After one of the investigations, Mr. Bhombal met with school and IISD officials and then wrote

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to the school board to complain about “the discrimination his son and family were experiencing.”

Although its origin is unclear, there was also a rumor that Z.B. brought a bomb to school.² One student told his mom Z.B. had a bomb at school, and other students threatened to tell a teacher he did. Eventually, there was a meeting with school officials and the Bhombals, after which Z.B. was suspended for a day. Mr. Bhombal complained during the meeting that Z.B. was being targeted because of his race, religion, and ethnicity. School officials questioned Z.B. about the rumor both before and following the meeting, even though Mr. Bhombal told them not to question Z.B. without his parents. Z.B. was asked if Mr. Bhombal taught him to make a bomb. At a later meeting, Mr. Bhombal became angry at school officials because of the continued questioning, telling them that he believed this was only happening because Z.B. was “Muslim and/or from India.” Mr. Bhombal was subsequently banned from school property.

In response to one of the school fights and an ensuing police investigation, Mr. Bhombal filed a “hate crime complaint” with the IISD superintendent. The district investigated, but Mr. Bhombal was not given a copy of the investigation even though he asked for one. Mr. Bhombal then filed a complaint with the Office of Civil Rights about racial and religious discrimination. The Bhombals took Z.B. and his younger sister out of IISD the following school year.

The Bhombals sued IISD and Principal Lindsey Sanders in her individual capacity. They alleged violations of the Fourth, Fifth, and

² The Bhombals’ second amended complaint alleged that Z.B. himself told other students that he had a bomb in his lunchbox. This allegation was removed from the third amended complaint.

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Fourteenth Amendments to the Constitution and racial and religious discrimination and retaliation in violation of Title VI of the Civil Rights Act of 1964. They also brought a Texas state law claim for intentional infliction of emotional distress. The district court eventually dismissed the Bhombals' third amended complaint with prejudice. The court concluded that the Bhombals failed to allege that Z.B. was discriminated against because of his race or national origin, or that IISD retaliated against Z.B. because of a protected activity. The court declined to consider the Bhombals' allegations of religious discrimination because such claims are not cognizable under Title VI. Further, the court concluded that the allegations regarding race or national original discrimination "do not rise above the level of mere speculation." Even if the allegations were more than speculation, the court also concluded the complaint failed to allege IISD officials were aware of the discrimination and responded with deliberate indifference. The court also dismissed the Bhombals' § 1983 claims. The Bhombals timely appealed. Before this court, they challenge only the dismissal of their Title VI claims.

II.

We review dismissal under Rule 12(b)(6) *de novo*. *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019). "To survive a motion to dismiss, a complaint must contain sufficient factual matter which, when taken as true, states a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted) (quoting *Innova Hosp. San Antonio, Ltd. v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 726 (5th Cir. 2018)). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). We do not require "detailed factual allegations," but the facts alleged "must be enough to

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raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

III.

Section 601 of Title VI of the Civil Rights Act of 1964 provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d; *see also Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 407–08 (5th Cir. 2015). The statute “prohibits only intentional discrimination.” *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); *see also Fennell*, 804 F.3d at 408.

The Bhombals advance three basic claims under Title VI. First, they claim IISD was deliberately indifferent to intentional discrimination by Haley employees based on Z.B.’s national origin and race. Second, they assert IISD was deliberately indifferent to student-on-student discrimination against Z.B. Third, they bring a retaliation claim. The district court determined the complaint failed to plausibly allege a claim under any of the three theories. We address each in turn, ultimately agreeing with the district court.

A.

We begin with the Bhombals’ claim of IISD’s deliberate indifference to intentional race or national origin discrimination by Haley employees. Because the Bhombals do not allege a discriminatory policy by IISD, they must plausibly allege that an “appropriate person” in the district—*i.e.*, someone who could take corrective measures—had “actual knowledge” of intentional discrimination yet responded with “deliberate indifference.” *See Gebser v. Lago*

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Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).³ We agree with the district court that the Bhombals' complaint fails to meet these standards.

First, the complaint does not plausibly claim IISD officials responded with “deliberate indifference” to alleged race or national origin discrimination. Most of the Bhombals' allegations about Haley staff behavior do not even connect the problematic incidents to Z.B.'s race or national origin.⁴ Thus, it is impossible to infer that the district actually knew about race or national origin discrimination by Haley employees and yet was deliberately indifferent to it. *See, e.g., Gebser*, 524 U.S. at 290 (explaining a claim “presupposes that an official who is advised of a [Title VI] violation refuses to take action”). To be sure, with respect to a few of the allegations—such as the repeated phone calls to the Bhombals about “small infractions,” the exclusion of Z.B. from field trips unless accompanied by his father, or the “over there practicing” comment—the complaint asserts that Mr. Bhombal told school officials he believed there was discrimination based on Z.B.'s “race, religion or nationality.” But alleging school officials were told of Mr. Bhombal's subjective beliefs is not the same thing as alleging IISD had actual knowledge of racial discrimination and was deliberately indifferent. Allegations of subjective views, without supporting factual allegations, fail to give rise to an inference of intentional discrimination, much less to an inference of deliberate indifference to discrimination. *See Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000).

³ Although *Gebser* was a Title IX case, the Supreme Court's Title IX analysis “directly informs” the Title IV analysis. *Fennell*, 804 F.3d at 408 (citation omitted); *see generally Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (explaining “Congress modeled Title IX after Title VI”).

⁴ This includes allegations that Z.B. was not allowed to use the restroom; the “red crayon” incident; that school staff “made Z.B. touch his penis;” that a teacher once “intimate[d]” that Mr. Bhombal may be molesting Z.B.; and the alleged assaults by a teacher.

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Second, as noted, many of the same incidents are not even alleged to have been motivated by Z.B.'s race or national origin. *See Gebser*, 524 U.S. at 290. For instance, allegations that Z.B. was once not allowed to use the restroom or that school officials suspected Z.B. was being molested—while certainly troubling—have no plausible link to discrimination based on Z.B.'s race or national origin. The closest the complaint comes are allegations that school officials questioned the necessity of Z.B.'s lunch being brought to him each day because of his religious beliefs. But there are no allegations that this questioning arose from discrimination as opposed to a desire to avoid the disruption of having Mr. Bhombal personally bring Z.B.'s lunch each day rather than sending it with him.⁵ But even assuming discriminatory motives lay behind the questioning, Title VI does not authorize claims for religious discrimination. *See* 42 U.S.C. § 2000d (prohibiting discrimination based on “race, color, or national origin”). And even putting all that to one side, the complaint again does not plausibly allege that IISD officials had actual knowledge of the incident and yet were deliberately indifferent to it.

We therefore agree with the district court that the Bhombals' complaint did not plausibly allege a Title VI claim founded on Haley employees' intentional race or national origin discrimination against Z.B.

B.

The Bhombals also allege a student-on-student discrimination claim. To prevail on such a claim under Title VI, a plaintiff must allege that “(1) the harassment was ‘so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school[,]” that “the district (2) had actual knowledge,” that it

⁵ In fact, the complaint itself alleges that school officials encouraged Mr. Bhombal to stop bringing Z.B.'s lunch every day “so he could learn to be independent.”

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“(3) had ‘control over the harasser and the environment in which the harassment occurs,’” and that it “(4) was deliberately indifferent.” *Fennell*, 804 F.3d at 410 (quoting *Davis*, 526 U.S. at 644). Failure to plausibly allege any of the four elements would be fatal to the Bhombals’ claim.

Again, the complaint fails to plausibly allege that IISD was deliberately indifferent. In *Davis v. Monroe Cty. Bd. of Educ.*, the Supreme Court explained that school administrators require flexibility in disciplining students, and courts should not second-guess such decisions. 526 U.S. 629, 648 (1999). Showing negligence is not enough to establish liability. *Fennell*, 804 F.3d at 410. Rather, “funding recipients [should be] deemed ‘deliberately indifferent’ to acts of student-on-student harassment only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.” *Davis*, 526 U.S. at 648. So long as officials “respond[] reasonably to a risk of harm,” even if the harm occurs anyway, there will not be Title VI liability. *Fennell*, 804 F.3d at 410 (quoting *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000)).

It goes without saying that IISD could not have been deliberately indifferent to student harassment it was unaware of. And for the harassment IISD allegedly knew about, its responses were not so unreasonable as to rise to the level of deliberate indifference. For example, when Z.B. fought with another student in gym class, a school employee intervened. IISD investigated Mr. Bhombal’s “hate crime complaint,” even if it did not share the outcome of the investigation. Similarly, when students threatened to report that Z.B. had a bomb in his lunchbox, or called Z.B. “Tally,” school officials took steps to investigate, including questioning Z.B. multiple times about the incident. Staff also met with Z.B. and his parents. While some of the responses by school officials during the investigation may be open to criticism, we cannot say that the school’s response was so unreasonable as to qualify as deliberate

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indifference. *See Davis*, 526 U.S. at 648. The complaint thus fails to allege that IISD was deliberately indifferent to those instances of harassment.

C.

Last we address the Bhombals' retaliation claim. Other courts have recognized claims for retaliation under Title VI. *See Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003); *Whitfield v. Notre Dame Middle Sch.*, 412 F. App'x 517, 522 (3d Cir. 2011). Assuming, without deciding, that such a claim is available, we conclude that the Bhombals have failed to plausibly allege it here. The Bhombals must demonstrate "(1) that [Z.B.] engaged in a protected activity; (2) that [IISD] took a material adverse . . . action against [him], and (3) that a causal connection existed between the protected activity and the adverse action." *Peters*, 327 F.3d at 320.⁶

The complaint fails to plausibly allege retaliation against Z.B. The Bhombals allege that "the district retaliated against Plaintiff because his parents came to the school and advocated on his behalf." But this conclusory allegation, devoid of factual support, is not enough to give rise to a reasonable inference of retaliation. *See Iqbal*, 556 U.S. at 678 (pleading tendering "naked assertion[s]" without "further factual development" insufficient).

* * *

The treatment allegedly endured by Z.B. and his family, which we must accept as true for purposes of this appeal, is troubling. But not all troubling

⁶ The Bhombals' third amended complaint brought claims only by "Z.B. by his next friends and parents," alleging violations of "the various rights of Z.B." The Bhombals also represented to the district court that Mr. Bhombal was only "suing in his representative capacity for his son Z.B. not in his individual capacity." Therefore, to the extent the Bhombals now assert on appeal their own individual rights, their arguments fail. We need not decide the question of whether they would have standing to bring their own claims under Title VI because the operative complaint makes clear that the only rights at issue in this action are Z.B.'s. Therefore, the only question we confront here is whether *Z.B.* was retaliated against because of a protected activity.

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behavior is actionable under Title VI, and the Bhombals have failed to plausibly state a claim for relief under that statute. *See Twombly*, 550 U.S. at 570. The district court's judgment is AFFIRMED.