Illinois Official Reports

Appellate Court

***Reyes v. Board of Education of the City of Chicago*, 2019 IL App (1st) 180593**

Appellate Court Caption	FEDERICO REYES and ROSA REYES, Individually and as Plenary Guardians of S.R., a Legally Disabled Adult, Plaintiffs-Appellants, v. THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, a/k/a Chicago Public Schools; LISA RAGO, an Individual; LUBIRTHA SHARP, an Individual; LAIDLAW TRANSIT, INC., a Delaware Corporation; LAIDLAW INTERNATIONAL INC., a Delaware Corporation; VICTORIA LYNN, an Individual; and TRANSPAR TRANSPORTATION MANAGEMENT SERVICES, LLC, Defendants (The Board of Education of the City of Chicago, Lisa Rago, and Lubirtha Sharp, Defendants-Appellees).
District & No.	First District, Sixth Division Docket No. 1-18-0593
Filed	June 28, 2019
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 16-L-12555; the Hon. Kathy Flanagan, Judge, presiding.
Judgment	Affirmed in part and reversed in part. Cause remanded.
Counsel on Appeal	Bhavani Raveendran, of Romanucci & Blandin LLC, of Chicago, for appellants.

Stephen H. Pugh, Kathleen Pasulka-Brown, and Seth Mann Rosenberg, of Pugh, Jones & Johnson, P.C., of Chicago, for appellees.

Panel

JUSTICE CONNORS delivered the judgment of the court, with opinion.
Justices Cunningham and Harris concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiffs, Federico Reyes and Rosa Reyes, the parents and plenary guardians of S.R., appeal the circuit court's dismissal of their second amended complaint under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)). Defendants, the Board of Education of the City of Chicago (Board), also known as Chicago Public Schools (CPS), as well as Lisa Rago and Lubirtha Sharp, had asserted that plaintiffs' claims were barred by certain sections of the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/1-101 *et seq.* (West 2014)). On appeal, plaintiffs contend that the sections of the Act raised by defendants do not apply to plaintiffs' claims. Finding that the Act immunizes defendants for only some of plaintiffs' claims, we affirm in part, reverse in part, and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 The record reveals that A.V., a minor male student, sexually assaulted S.R., a disabled female student, on a special needs school bus on May 5, 2005. At the time, Sharp was the bus aide and Rago was S.R.'s teacher at the John Coonley School. Plaintiffs filed a lawsuit against defendants in 2009, but the matter was voluntarily dismissed on January 5, 2016. Plaintiffs re-filed the action on December 23, 2016, and filed a first amended complaint on May 11, 2017. Defendants moved to dismiss three counts of the first amended complaint under section 2-619(a)(9) of the Code.[1] In part, defendants contended that, under sections 2-103 and 2-205 of the Act (745 ILCS 10/2-103, 2-205 (West 2014)), they were immune from plaintiffs' claims that they failed to follow various laws and policies. Defendants further asserted that they were immune under section 4-102 of the Act (745 ILCS 10/4-102 (West 2014)) for any alleged failure to protect S.R. from sexual assault. Defendants also maintained that, under section 2-201 of the Act (745 ILCS 10/2-201 (West 2014)), they were broadly immunized for their policy decisions.

¶ 4 After plaintiffs filed a response, the court granted defendants' motion to dismiss without prejudice. In a written order, the court stated that to the extent that plaintiffs' claims "[were] based on the failure to follow, enforce, or enact any laws, policies or procedures," defendants were immune from liability under sections 2-103 and 2-205 of the Act. The court also

[1]The other counts pertained to defendants Laidlaw Transit, Inc., Laidlaw International, Inc., and Victoria Lynn, the bus driver, and are not at issue in this appeal.

characterized plaintiffs' claims as a failure to prevent and/or stop the alleged sexual abuse, which was in effect an allegation that defendants failed to provide police protection services and prevent a crime. Thus, section 4-102 of the Act immunized defendants as well. The court further found that plaintiffs' allegations with regard to defendants' decisions about student transportation, placement, and discipline all involved both the determination of policy and the exercise of discretion, which made defendants immune under section 2-201 of the Act. Plaintiffs were granted one opportunity to amend the pleading to allege claims outside the governing immunities.

¶ 5 On December 20, 2017, plaintiffs filed their second amended complaint, which is the complaint at issue in this appeal. Plaintiffs alleged in part as follows. Rago, the teacher for the special education/developmentally disabled class at S.R.'s school, and Sharp, the bus aide, both had the duty to supervise and protect the physical safety of students at Coonley School at all times. The Board was responsible for providing safe and effective bus transportation for qualified students, including those with special needs.

¶ 6 Plaintiffs described policies that were in place when S.R. was sexually assaulted. Under the Board's sibling transportation policy, a nonspecial needs student who was the sibling of a special needs student could be eligible to ride the special needs bus only upon written application and approval and under two conditions: (1) the Bureau of Student Transportation received and approved a written request for the nonspecial needs sibling to ride the special needs bus, and (2) the nonspecial needs sibling was allowed to ride the special needs bus only so long as the special needs sibling was a student at the school and continued to ride the special needs bus. According to the Coonley School principal, general education students who would be dropped off at the same address as a special needs student could ride the bus as long as the special needs student's parents filled out a form. On information and belief, the Board developed the sibling transportation policy, and only the chairman of the Board could change the policy about who could ride the special needs bus.

¶ 7 Plaintiffs also stated that the "Guidelines for Principals Served by CWAs/Bus Aides" required school bus aides to report any behavioral problems to the principal or his designee and to "insist that children wear a seat belt at all times when the bus is in motion." Also, CPS described the essential functions of bus aides as including fastening seat belts around students and referring misbehaving students to the school principal.

¶ 8 Further, plaintiffs excerpted the CPS sexual harassment policy, which defined sexual harassment and outlined the procedure for addressing complaints. The sexual harassment policy stated that any person, such as a teacher, who receives a complaint "must refer it in writing, using the Sexual Harassment Information Form, to the Sexual Harassment Officer or designee no later than the end of the third business day following receipt of the complaint." The policy also provided that "[f]ailure to timely refer such complaints can be the basis for disciplinary action." Sworn policy statements, including one signed by Rago, required employees to sign off on the following: "I am required to report or cause a report to be made to the child abuse Hotline number whenever I have reasonable cause to believe a child known to me in my professional or official capacity may be abused or neglected."

¶ 9 Plaintiffs averred that A.V., who was not a student with physical or developmental disabilities and committed the assault, rode the special needs bus with his brother, allegedly under the sibling transportation policy. However, defendants did not receive, approve, or possess a written request from A.V.'s parents requesting that A.V. ride the bus with his brother,

and the Board did not approve or issue an authorization for A.V. to ride the bus or create a route sheet granting A.V. permission to ride the bus with his brother. A.V. was not listed on the bus route roster checked by Sharp that would have allowed him to ride the bus, and Sharp never reviewed an annual parent authorization form for A.V. Further, A.V.'s brother left the Coonley School and stopped riding the bus no later than November 7, 2004, which ended any eligibility A.V. had to ride the bus. On May 5, 2005, the date of the final assault, A.V. should not have been on the bus, and neither Sharp nor the principal had the discretion to continue to allow A.V. to ride the bus. Moreover, Sharp and the principal directly violated CPS policy by allowing A.V. to keep riding the bus for months after his brother was taken off the route, when a parent should have been notified within a week.

¶ 10 Plaintiffs further alleged that Sharp failed to keep A.V. seat-belted in his assigned seat on the special needs bus and allowed him to roam around the bus at will. Numerous times, Sharp slept on the bus while functioning as a bus aide. Another student observed Sharp asleep on the bus, falling off her seat, and with her eyes closed on multiple occasions. This student would wake up Sharp when Sharp had to help a student off the bus and observe Sharp fall asleep until the next location. S.R. observed that Sharp was asleep when A.V. touched S.R.'s buttocks and put a pencil in her vagina at least once before May 5, 2005. Sharp advised S.R. that "you don't touch that part," indicating her private areas, and was required to report the behavior problems caused by A.V. S.R. informed her father that Sharp was sleeping on the occasions she was abused. S.R.'s father was informed by a second bus driver that Sharp slept on his bus as well.

¶ 11 Plaintiffs further alleged the details of incidents that happened before May 5, 2005. Two or three months before that date, S.R. came home from school with her hair and clothes disheveled and complained to her parents that a boy named A.V. or Alejandro was pulling her hair and grabbing her breasts and buttocks on the bus. Shortly afterwards, S.R.'s parents met with Rago twice, stating that a boy named A.V. or Alejandro was sexually and physically assaulting and bullying S.R. by pushing and kicking her, trying to touch her breasts and buttocks, and pulling her hair and shirt. When S.R.'s father requested that Rago and the school stop A.V.'s behavior, Rago responded that she did not have a student named A.V. or Alejandro in her class and she did not supervise any such student. According to plaintiffs, Rago did not investigate or report plaintiffs' complaints to school officials, the authorities, or any governmental agencies. Plaintiffs alleged that, via her meetings with plaintiffs, Rago discovered and was suspicious about abuse and sexual assault and did not report it, despite policy and mandatory reporting requirements. Plaintiffs asserted that Rago did not have the discretion not to report complaints of sexual harassment.

¶ 12 After school on May 5, 2005, S.R. and A.V., along with other children, got on the special needs bus. There, A.V. again sexually and physically assaulted, battered, bullied, hit, restrained, and threatened S.R., including by pulling down her jeans and underpants and inserting his mouth and tongue into S.R.'s vagina and genitals. S.R.'s mother was waiting for S.R. to exit the bus at the designated bus stop when the bus arrived. After stopping the bus, the bus driver and Sharp called the Coonley School to inform the principal of the assault, battery, and bullying of S.R., but made no further calls to any other authorities appropriate to investigate under the Abused and Neglected Child Reporting Act (Reporting Act) (325 ILCS 5/1 *et seq.* (West 2014)). Eventually, the bus driver opened the door to the bus and asked S.R.'s mother to enter the bus because someone on the phone wanted to talk with her. Once S.R.'s mother was on the phone, the Coonley School secretary apologized for what happened and

stated that S.R. had been sexually and physically attacked, battered, and assaulted by A.V. S.R.'s mother looked to the back of the bus and saw S.R. pulling up her underpants and jeans. Ultimately, the Coonley School assistant principal called the police, A.V. was suspended, and the Board recommended that Sharp be terminated.

¶ 13 Count I of the complaint alleged willful and wanton conduct related to the Board and Rago and Sharp as agents. Count II alleged willful and wanton conduct against Rago and Sharp individually. In both counts, plaintiffs alleged in part that defendants committed one or more of the following willful and wanton acts and/or omissions in reckless or careless disregard for S.R.'s safety and welfare: (1) failed to investigate or report the complaints by S.R.'s father to Rago of the assaults, battery, and bullying; (2) failed to report to the child abuse Hotline number regarding the complaints of S.R.'s father to Rago; (3) failed to refer S.R.'s complaints in writing to the Board's sexual harassment officer or designee as required by Board policy; (4) failed to follow the Board's practices and procedures for investigating sexual and physical harassment, assault, battery, bullying, and other improper acts by one student against another student; (5) failed to take appropriate disciplinary and remedial action when they knew or should have known that Sharp was derelict in her duties; (6) failed to monitor A.V.'s activities on the bus, including allowing him to roam the bus without wearing a seat belt; (7) failed to keep A.V. seat-belted in his assigned seat, in violation of the Board's policies; (8) failed to report A.V.'s behavioral problems on the bus, in violation of the essential functions of a bus aide; (9) failed to remain awake and alert; (10) allowed A.V. on the bus without his name appearing on the roster; and (11) allowed A.V. to ride the bus in violation of the Board's sibling transportation policy. Plaintiffs asserted that as a direct and proximate cause of the aforementioned willful and wanton conduct, S.R. was sexually and physically assaulted, battered, and bullied by A.V. while on the bus and suffered severe and permanent injuries.

¶ 14 In count III, plaintiffs asserted a claim under a provision of the Rights of Married Persons Act, commonly referred to as the Family Expense Act (750 ILCS 65/15 (West 2014)).

¶ 15 The Board filed a motion to dismiss the second amended complaint under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)), contending that dismissal was warranted by the Act. Defendants asserted that plaintiffs' claims were barred by sections 2-103 and 2-205 of the Act (745 ILCS 10/2-103, 2-205 (West 2014)). Defendants maintained that section 4-102 of the Act (745 ILCS 10/4-102 (West 2014)) shielded them against all allegations that they failed to prevent or protect S.R. from criminal sexual assaults. Defendants further asserted that section 2-201 of the Act (745 ILCS 10/2-201 (West 2014)) barred plaintiffs' claims about transportation, placement, and discipline. In response, plaintiffs submitted copies of their first and second amended complaints.

¶ 16 In a written order, the court granted defendants' motion to dismiss with prejudice. The court found that "to the extent that the claims in counts I through III are based on the failure to follow, enforce, or enact any laws, policies, or procedures, the [d]efendants are absolutely immune from liability" under sections 2-205 and 2-103 of the Act. The court also found that defendants were absolutely immune under section 4-102 of the Act. The court stated that the crux of the allegations came down to defendants' failure to prevent and/or stop the alleged sexual abuse, and so the claims effectively alleged a failure to provide police protection services and the failure to prevent a crime. Lastly, defendants were immune under section 2-201 of the Act. The court maintained that most of the decisions at issue about student transportation, placement, and discipline all involved the determination of policy and the

exercise of discretion. The court noted that to the extent that plaintiffs alleged any ministerial decisions about the failure to report abuse or harassment or follow any mandated procedure, defendants would not be immune under section 2-201. However, those acts would still be immunized under sections 4-102, 2-103, and 2-205 of the Act. The court concluded that its finding was made under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) and there was no just reason to delay the enforcement or appeal of the order.

¶ 17 II. ANALYSIS

¶ 18 A. Preliminary Issues

¶ 19 Before we turn to the parties' arguments on appeal about tort immunity, we address two preliminary issues. We first note that plaintiffs' case citations do not comply with Illinois Supreme Court Rule 6 (eff. July 1, 2011), which requires parties to cite our state's official reporters (the Illinois Reports and Illinois Appellate Reports) for cases filed before July 1, 2011, and published in the Illinois Official Reports. Parties must use the public-domain citation for cases filed on or after July 1, 2011. *Id.* In both instances, citations to the North Eastern Reporter "may be added." *Id.* Here, the vast majority of plaintiffs' citations are only to the North Eastern Reporter and do not include citations to our official reporters. The Illinois Supreme Court Rules are not mere suggestions—they have the force of law and must be complied with. *Westfield Insurance Co. v. West Van Buren, LLC*, 2016 IL App (1st) 140862, ¶ 14. We advise counsel to follow the rules in the future.

¶ 20 As a second preliminary matter, both parties improperly cite or rely on orders entered in the first iteration of this matter, which was filed in 2009 and presided over by Judge O'Hara before it was voluntarily dismissed in January 2016. In footnotes, plaintiffs include certain findings from Judge O'Hara's orders that are allegedly supportive of their arguments on appeal. However, per plaintiffs' notice of appeal, we are not reviewing Judge O'Hara's orders. Moreover, Judge O'Hara's orders are not part of the common law record in this appeal and are only found in the appendix to plaintiffs' brief. Generally, a party may not rely on matters outside the record to support its position on appeal. *Oruta v. B.E.W.*, 2016 IL App (1st) 152735, ¶ 32. This court disregards materials that are not in the record, but are placed in an appendix. *Id.*

¶ 21 For their part, defendants assert that plaintiffs are collaterally estopped from challenging certain aspects of defendants' immunity based on one of Judge O'Hara's orders. Even putting aside that the order at issue is not in the record, defendants forfeited their collateral estoppel argument because they did not raise it in the circuit court. See *Dancor Construction, Inc. v. FXR Construction, Inc.*, 2016 IL App (2d) 150839, ¶ 60 (collateral estoppel is an affirmative defense that is forfeited if not pled). We do not express any opinion about the merits of Judge O'Hara's orders, and they are not part of our analysis.

¶ 22 B. Tort Immunity

¶ 23 Turning to the merits, plaintiffs seek to reverse the dismissal of their second amended complaint under section 2-619(a)(9) of the Code, which allows involuntary dismissal where "the claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014); *MidFirst Bank v. Riley*, 2018 IL App (1st) 171986, ¶ 17. A motion under section 2-619(a)(9) "admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and

asserts an affirmative matter outside the complaint bars or defeats the cause of action." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31. "Immunity under the Act is an affirmative matter properly raised in a section 2-619(a)(9) motion to dismiss." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). Once a defendant satisfies the initial burden of presenting affirmative matter, the burden shifts to the plaintiff "to establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven." (Internal quotation marks omitted.) *Betts v. City of Chicago*, 2013 IL App (1st) 123653, ¶ 14. All pleadings and supporting documents are interpreted in the light most favorable to the nonmoving party. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997). We review *de novo* an order granting or denying a motion to dismiss. *MidFirst Bank*, 2018 IL App (1st) 171986, ¶ 17.

¶ 24 Plaintiffs contend that counts I through III should not have been dismissed because defendants are not immune under sections 2-205, 2-103, 4-102, and 2-201 of the Act. As background, the Act was intended to protect local public entities and public employees from liability resulting from the operation of government. *Ware v. City of Chicago*, 375 Ill. App. 3d 574, 577-78 (2007). The purpose "was to ensure that public funds were not dissipated by private damage awards." *Id.* at 578. Under the Act, local governmental entities are liable in tort, but this liability is limited "with an extensive list of immunities based on specific government functions." *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill. 2d 466, 471 (2001). Because the immunities operate as an affirmative defense, the governmental entity bears the burden of properly raising and proving their immunity. *Van Meter*, 207 Ill. 2d at 370. If no immunity provision applies, the governmental entity is liable in tort to the same extent as a private party. *Salvi v. Village of Lake Zurich*, 2016 IL App (2d) 150249, ¶ 38.

¶ 25 The Illinois Constitution of 1970 (Ill. Const. 1970, art. XIII, § 4) reserved for the legislature the ultimate authority to determine whether local government units were immune from tort liability. *Anthony v. City of Chicago*, 382 Ill. App. 3d 983, 987-88 (2008). "[T]he Act governs whether and in what situations local governmental units are immune from civil liability." *Harrison*, 197 Ill. 2d at 471. Thus, determining whether defendants are immune requires us to interpret the language of the Act. *Monson v. City of Danville*, 2018 IL 122486, ¶ 14. Our primary objective is to ascertain and give effect to the legislature's intent, with the plain and ordinary meaning of the statutory language serving as the most reliable indicator of that intent. *Id.* Because it is in derogation of the common law, the Act is strictly construed against the governmental entity. *Green v. Chicago Board of Education*, 407 Ill. App. 3d 721, 726 (2011).

¶ 26 1. Section 2-205

¶ 27 We consider each immunity at issue in turn, beginning with the immunity granted by section 2-205 of the Act (745 ILCS 10/2-205 (West 2014)). That section states that "[a] public employee is not liable for an injury caused by his adoption of, or failure to adopt, an enactment, or by his failure to enforce any law." 745 ILCS 10/2-205 (West 2014). Plaintiffs contend that section 2-205 does not immunize Rago and Sharp for failing to enforce three policies—the guidelines for principals served by CWAs/bus aides (guidelines for principals), the sibling

transportation policy, and the sexual harassment policy[2]—and the Reporting Act. We first consider the three policies, which plaintiffs assert do not carry the force of law within the meaning of the Act.

¶ 28 Defendants assert that various definitions indicate that Board policies qualify as "any law" under section 2-205. Defendants note that under the Act, "law" includes "enactment" (745 ILCS 10/1-205 (West 2014)) and "enactment" means "a constitutional provision, statute, ordinance or regulation" (745 ILCS 10/1-203 (West 2014)). Acknowledging that the Act does not define "ordinance," defendants turn to the dictionary definition, stating that an ordinance includes "[a] rule established by authority; a permanent rule of action" (The Law Dictionary, https://www.thelawdictionary.org/ordinance/ (last visited June 17, 2019) [https://perma.cc/38J5-GCJJ]) or "an authoritative decree or direction" (Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/ordinance (last visited June 17, 2019) [https://perma.cc/E4EY-NC3B]). Further, the School Code allows the Board to establish "by-laws, rules and regulations, which shall have the force of ordinances." 105 ILCS 5/34-19 (West 2014). Connecting these definitions, defendants contend that the policies are rules established by the Board and are authoritative decrees, directing the actions of Board employees. Thus, the policies are "ordinances," which fall within the Act's definitions of "enactment" and therefore "law." Defendants also note that the Act defines "regulation" as "a rule, regulation, order or standard, having the force of law, adopted by *** a local public entity pursuant to authority vested by constitution, statute or ordinance." 745 ILCS 10/1-208 (West 2014). Defendants assert that this definition reflects the breadth of dictates the legislature intended to be treated as "law" under section 2-205.

¶ 29 We are not persuaded that "any law" under section 2-205 includes the three policies at issue. It is unclear whether section 2-205 applies to policies generally. None of the definitions above include the word "policy." Further, the definition of "policy" indicates that a policy differs from an ordinance. A municipal ordinance "has the force of law over the community in which it is adopted and, within the corporate limits, operates as effectively as a law passed by the legislature." *City of Chicago v. Roman*, 184 Ill. 2d 504, 511 (1998). In contrast, Black's Law Dictionary defines policy as "[t]he general principles by which a government is guided in its management of public affairs." Black's Law Dictionary 1178 (7th ed. 1999). "Policy" is also defined as "a definite course or method of action selected *** to guide and determine present and future decisions" and "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/policy (last visited June 17, 2019) [https://perma.cc/5HGJ-J47R]. These definitions indicate that a policy does not necessarily prescribe a mandatory course of conduct, unlike an ordinance or regulation as defined above.

¶ 30 As to the three policies here, we do not have sufficient context for how they were put into effect, which prevents us from concluding that each policy is a law under the Act. The full texts of the guidelines for principals and sibling transportation policy are not in the record. The complaint does not state what entity created the guidelines for principals and what exactly the guidelines are, such as a policy, set of rules, or just suggestions. Further, the complaint does

[2]It is unclear whether the "guidelines for principals served by CWAs/bus aides" is technically a policy. To be consistent with the terms used by the parties, we collectively refer to the three matters as policies.

not allege that the guidelines for principals and sibling transportation policy were established under section 34-19 of the School Code (105 ILCS 5/34-19 (West 2014)) and so could be considered "by-laws, rules and regulations" that "have the force of ordinances." The complaint only states that "[u]pon information and belief, the Board *** developed the Sibling Transportation Policy that governed the actions of CPS providing rides to siblings and the bus aides," which does not resolve whether the sibling transportation policy has the force of an ordinance or law. Under section 2-619(a)(9) of the Code, the affirmative matter must be apparent on the face of the complaint or the motion must be supported by affidavits or certain other evidentiary materials. *Reynolds*, 2013 IL App (4th) 120139, ¶ 37. Here, based on the complaint and the record, we cannot conclude that the guidelines for principals and sibling transportation policy qualify as "any law" under section 2-205 of the Act. See also *Doe v. Board of Education of the City of Chicago*, No. 18 C 3201, 2019 WL 414667, at *8 (N.D. Ill. Feb. 1, 2019) (where complaint did not explicitly allege that the defendant board of education failed to enforce either any "by-laws, rules or regulations" established under section 34-19 of the School Code (105 ILCS 5/34-19 (West 2016)) and alleged only that the defendant violated "BOE policies," the defendant failed to meet its burden that it was protected from liability under the Act); *Morris v. Union Pacific R.R. Co.*, 2015 IL App (5th) 140622, ¶ 51 n.1 (Illinois courts may follow the same reasoning as an unpublished federal decision if persuasive).

¶ 31 As for the sexual harassment policy, we are also not convinced that it qualifies as "any law" under section 2-205 of the Act. Not everything passed by the Board is a law under the Act. In *Albert v. Board of Education of the City of Chicago*, 2014 IL App (1st) 123544, ¶¶ 43-44, the court found that the "Student Code of Conduct," which was adopted by the Board, was not a "law" within the meaning of section 2-202 of the Act. Section 2-202 of the Act, which is not at issue here, states that "[a] public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." 745 ILCS 10/2-202 (West 2014). Viewing all provisions of the Act as a whole (see *In re Detention of Lieberman*, 201 Ill. 2d 300, 308 (2002)), the same principle stated in *Albert* applies here. Even if the Board adopted the sexual harassment policy, that does not necessarily make it a law. Further, the complaint does not state that the policy was adopted by the Board or otherwise describe its origin. While the record contains a copy of a sexual harassment policy, it appears to be a recommendation that the Board adopt certain amendments to the policy, rather than a final version that the Board passed. Thus, the document in the record does not resolve the question of whether the policy is a law. Strictly construing the Act, and based on the complaint and the record, we do not find that the sexual harassment policy is a "law" under section 2-205 of the Act.

¶ 32 In reaching this conclusion, we are not persuaded by the Board's reliance on *Doe v. Village of Schaumburg*, 2011 IL App (1st) 093300. Defendants assert that the sexual harassment policy and guidelines for principals imposed the same duties on Sharp and Rago as the Reporting Act and the safety belt policy in the Chicago Municipal Code. Defendants state that in *Doe*, the court found that where a statute and contractual agreement gave rise to the same duty, the defendants were immune for failing to enforce the contractual agreement. We disagree with this reading of *Doe*. There, the contractual agreement provided for certain acts in accordance with a specific section of the School Code. *Doe*, 2011 IL App (1st) 093300, ¶ 5. And, the plaintiffs' complaints "alleged that [the] defendants did not follow the mandates of the School Code." *Id.* ¶ 17. Here, plaintiffs' complaint did not allege that any of the three policies fell

under or were in accordance with a specific provision of a statute. *Doe* does not indicate that defendants are immune under section 2-205 of the Act. We conclude that section 2-205 of the Act does not apply and does not bar plaintiffs' claims that Rago and Sharp failed to enforce the sibling transportation policy, guidelines for principals, and sexual harassment policy.

¶ 33 We next consider whether section 2-205 bars plaintiffs' claim that Rago and Sharp failed to enforce the Reporting Act. As a statute, the Reporting Act is a "law" under the Act. Plaintiffs assert that section 2-205 does not apply to their claim because the provision only immunizes public employees who fail to instruct their subordinates to adopt, enact, or enforce a law, which does not describe Rago and Sharp.

¶ 34 Initially, defendants assert that we should strike plaintiffs' argument because it is grossly misleading and hinders analysis and review. According to defendants, plaintiffs add and rely on language about instructing subordinates that does not appear in the statute. Defendants' assertion is misplaced. Other than the citation problems we noted above, plaintiffs' argument does not violate the Illinois Supreme Court Rules. Rule 341(h)(7) requires the argument portion of a brief to "contain the contentions of the appellant and the reasons therefor, with citations of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). Plaintiffs' argument about whether section 2-205 of the Act immunizes the failure to enforce the Reporting Act provides reasons why the section should not apply, supported by citations to case law (though only to the North Eastern Reporter). Striking portions of plaintiffs' brief because defendants disagree with plaintiffs' argument would be wholly improper.

¶ 35 Turning to the merits of plaintiffs' actual argument, in support of their contention that section 2-205 only immunizes public employees who instruct subordinates, plaintiffs rely on *Emulsicoat, Inc. v. City of Hoopeston*, 99 Ill. App. 3d 835 (1981). There, the court stated that while "section 2-202 [of the Act] is aimed at the direct action of the employee, *** section 2-205 is aimed at the decisional action of others." *Id.* at 841. The court added that immunity applies under section 2-205 if the action "were [the defendants'] decision to be carried out by others." *Id.*; see also *Glenn v. City of Chicago*, 256 Ill. App. 3d 825, 841, 843 (1993) (finding that section 2-205 immunized municipal defendants for enacting and implementing a personnel rule and citing *Emulsicoat*'s statement that decisional acts are immunized under section 2-205). Further, it has been found that section 2-205 "specifically states that a legislative body is not liable for an injury caused by the legislative process." *Carter v. City of Elmwood*, 162 Ill. App. 3d 235, 237 (1987); see also *Oxford Bank & Trust v. Village of La Grange*, 879 F. Supp. 2d 954, 965 (N.D. Ill. 2012) (section 2-205 has been "interpreted by the Illinois courts to provide absolute immunity to local public officials for injuries caused by their participation in the legislative process" (citing *Carter*, 162 Ill. App. 3d at 237)).

¶ 36 Section 2-205 has been applied to immunize defendants for their decisions that affect others, but that is not the only circumstance where the section applies. In *Doe*, 2011 IL App (1st) 093300, ¶ 17, the court found that the defendants were immune under section 2-205 for failing to follow the mandates of the School Code. The court stated that "[t]he failure to follow the provisions of a statute is, in essence, the failure to enforce the statute." *Id.* In applying section 2-205, the court did not distinguish between direct and decisional acts. Further, we cannot escape the plain language of section 2-205, which does not limit its use to public employees who make a decision that others will carry out. Section 2-205 of the Act applies

and bars plaintiffs' claim that Rago and Sharp failed to enforce the Reporting Act.

¶ 37 2. Section 2-103

¶ 38 Next, plaintiffs contend that the Board is not immune under section 2-103 of the Act, which states that "[a] local public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." 745 ILCS 10/2-103 (West 2014). As with their arguments about section 2-205, plaintiffs assert that section 2-103 of the Act does not immunize the Board for failing to enforce three policies—the sibling transportation policy, the guidelines for principals, and the sexual harassment policy—and the Reporting Act. We agree with plaintiffs that section 2-103 does not apply to the Board's failure to enforce the three policies because they are not laws under the Act, as we concluded above.

¶ 39 The next issue is whether section 2-103 immunizes the Board for failing to enforce the Reporting Act. Plaintiffs argue that section 2-103 does not apply where, as here, a governmental entity fails to follow a law that it had undertaken to comply with. Plaintiffs state that they alleged that the Board informed and required employees to swear in writing to follow the Reporting Act, which demonstrates that at the time of S.R.'s injury, the Board was enforcing the statute.

¶ 40 Section 2-103 immunizes "strictly the passivity of nonenforcement." *Salvi*, 2016 IL App (2d) 150249, ¶ 43. Thus, section 2-103 applies "[w]hen a complaint alleges that public employees were doing nothing at the time of an injury." *Pouk v. Village of Romeoville*, 405 Ill. App. 3d 194, 198 (2010). However, section 2-103 is not limited to situations "involving a total failure to take any steps to enforce the law." *Anthony*, 382 Ill. App. 3d at 993. Section 2-103 applies even when a governmental entity took action at some earlier time, but failed to act at all when the injury occurred. See *Pouk*, 405 Ill. App. 3d at 198 (where the complaint alleged that the defendants undertook enforcement of an ordinance five or six months before the injury occurred, but "were doing nothing to enforce the ordinance" at the time of the injury, section 2-103 immunized defendants' conduct).

¶ 41 Here, the allegations in plaintiffs' complaint fall squarely within section 2-103. Plaintiffs alleged that the Board took some prior action to enforce the Reporting Act, but that Rago and Sharp failed to act accordingly when S.R. was assaulted. In their complaint, plaintiffs stated that sworn policy statements, including one signed by Rago, required CPS employees to sign off on the following: "I am required to report or cause a report to be made to the child abuse Hotline number whenever I have reasonable cause to believe a child known to me in my professional or official capacity may be abused or neglected." Plaintiffs further stated that after S.R.'s parents met with Rago, she did not investigate or report their complaints, despite having "discovered abuse." As for Sharp, plaintiffs alleged that after the incident on May 5, 2005, Sharp and the bus driver informed the principal of the assault, but "made no further calls to any other authorities appropriate to investigate per their duties under the [Reporting Act]." That employees were required to acknowledge their responsibilities under the Reporting Act, indicating that defendants undertook enforcement of the statute, is not dispositive. The question is what defendants were doing when S.R. was assaulted, which was alleged to be nothing and so triggers immunity under section 2-103 of the Act. See *Anthony*, 382 Ill. App. 3d at 992-93 (although the plaintiffs alleged that the city actively enforced the law before an incident at a nightclub where the injuries occurred, including by obtaining court orders to shut down a floor of the nightclub and monitoring the premises, plaintiffs did not allege that the

injuries occurred while anyone was in the course of putting into effect any law; instead, "the complaints allege that the [c]ity's course of action was over and the [c]ity was doing nothing," and so the city was immune under section 2-103). Section 2-103 of the Act applies and bars plaintiffs' claim that the Board failed to enforce the Reporting Act.

¶ 42 3. Section 4-102

¶ 43 Next, plaintiffs contend that defendants are not immune under section 4-102 of the Act, which states:

> "Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals." 745 ILCS 10/4-102 (West 2014).

Plaintiffs argue that the willful and wanton acts alleged in their complaint that led to the sexual assault did not constitute police protection service. According to plaintiffs, their allegations demonstrate that Rago's and Sharp's willful and wanton failure to perform their basic job duties caused S.R.'s injury. Plaintiffs also assert that defendants are not immune under section 4-102 just because a final criminal act caused the injury.

¶ 44 "Section 4-102 of the Act immunizes local public entities and public employees for failing to: (1) establish a police department; (2) otherwise provide police protection; or, if police protection is provided, (3) provide adequate police protection service." *Payne v. City of Chicago*, 2014 IL App (1st) 123010, ¶ 27. Here, section 4-102 does not apply because plaintiffs did not allege that defendants failed to do any of the above. As noted by plaintiffs, *Doe v. Chicago Board of Education*, 213 Ill. 2d 19 (2004), is directly on point. There, a student was assaulted by a fellow passenger while riding to school on a bus that was normally supervised by an attendant, but was not on the day of the assault. *Id.* at 22. The plaintiff's complaint alleged that the knowing failure to provide a bus attendant under the circumstances was willful and wanton conduct that proximately caused the student's injury. *Id.* In considering whether section 4-102 applied, the court stated that "immunity attaches only if providing a bus attendant constitutes providing police protection service." *Id.* at 25. The focus is "the purpose of providing the attendant, rather than the conduct causing the injury." *Id.* at 27. Ultimately, the court found that the attendant "functions like a teacher or a hall monitor whose very presence may prevent unsafe activity of untoward behavior" and there was no indication that the attendant "was a sworn police officer or had any authority to restrain or arrest a passenger." *Id.* Because the plaintiff did not allege that the defendant was providing a police protection service by furnishing a bus attendant, section 4-102 immunity did not apply. *Id.*

¶ 45 Following *Doe*, we consider the purpose of the teacher and bus aide. In their complaint, plaintiffs alleged that Rago had a duty to supervise and protect the physical safety of students at the school. Plaintiffs did not allege anything in their complaint that indicates that Rago also provided services performed by police personnel, such as "weapons detection, traffic control, and crowd security and control." *Id.* at 26. Further, "[a] teacher acts as a peacekeeper and a monitor of student behavior." *Id.* at 27. As for Sharp, plaintiffs alleged that she also had a duty to supervise and protect students' physical safety. According to the complaint, CPS describes the essential function of bus aides to include fastening seat belts around students and referring misbehaving students to the school principal. The record includes a job description for a bus

aide, which lists as "Characteristics of the Class" the following: "Under immediate supervision, assists students riding on school buses en route to and from school; and performs related duties as required." The "Essential Functions" are:

> "Assists students entering and exiting school buses, lifts physically disabled students onto and off school buses, fastens various types of seat belts around students as a precautionary measure, maintains order and discipline on school buses, refers misbehaved students to school principal for disciplinary action, completes routing lists and related transportation forms for the purpose of communicating sequence of bus stops."

The desired "Knowledge, Abilities, and Skill" consists of "General knowledge of the behavior patterns of school aged children"; "Ability to lift children on and off buses; ability to maintain an orderly environment on buses"; and "Skill in communicating with school aged children."

¶ 46 As in *Doe*, 213 Ill. 2d at 27, the bus aide here functions "like a teacher or a hall monitor whose very presence may prevent unsafe activity or untoward behavior." Sharp was tasked with managing student behavior and physically assisting students with getting on and off the bus. Nothing in plaintiffs' complaint suggests that Sharp functioned as police personnel. Overall, plaintiffs did not allege that defendants failed to provide police protection or provide adequate police protection, and so section 4-102 does not apply and does not bar plaintiffs' claims.

¶ 47 4. Section 3-108

¶ 48 Defendants contend that, to the extent that plaintiffs' claims are based on allegations about inadequate supervision, section 3-108 of the Act (745 ILCS 10/3-108 (West 2014)) applies and supports dismissal. We will not address section 3-108 of the Act because defendants did not raise the matter below. Governmental tort immunity under the Act must be raised and pled as an affirmative defense or it is forfeited, even if the evidence supports the existence or appropriateness of the defense. *Martin v. Chicago Housing Authority*, 264 Ill. App. 3d 1063, 1075 (1994). Defendants did not raise section 3-108 in their motions to dismiss and so the matter is forfeited. See also *Dobias v. Oak Park & River Forest High School District 200*, 2016 IL App (1st) 152205, ¶ 118 n.2 (declining to address whether the action was barred by a section of the Act because, even though this court may affirm the judgment on any basis in the record, the issue had not been fully developed in the record); *Doe v. Dimovski*, 336 Ill. App. 3d 292, 300 (2003) (the defendant forfeited the issue of whether it was immune under section 24-24 of the School Code because the issue was not raised in the motion to dismiss).

¶ 49 5. Section 2-201

¶ 50 Lastly, plaintiffs contend that defendants are not immune under section 2-201 of the Act, which states: "Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2014). Plaintiffs argue that none of the acts at issue were discretionary or required someone to weigh competing interests to make a policy decision. Plaintiffs also assert that Rago's and Sharp's failures to report the sexual assault allegations was not discretionary under either the Board's sexual harassment policy or the Reporting Act.

¶ 51 "Section 2-201 extends the most significant protection afforded to public employees under the Act." *Van Meter*, 207 Ill. 2d at 370. A defendant claiming immunity under section 2-201 must prove the employee either held a position involving the determination of policy or a position involving the exercise of discretion. *Monson*, 2018 IL 122486, ¶ 29. The defendant must also "establish that the act or omission giving rise to the injuries was both a determination of policy and an exercise of discretion." *Id.* Policy decisions are those that require a governmental entity to balance competing interests and make a judgment call as to what solution will best serve those interests. *Van Meter*, 207 Ill. 2d at 379. Discretionary acts are " 'unique to a particular public office.' " *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 343 (1998) (quoting *Snyder v. Curran Township*, 167 Ill. 2d 466, 474 (1995)). Discretion " 'connotes a conscious decision.' " *Monson*, 2018 IL 122486, ¶ 33 (quoting *Corning v. East Oakland Township*, 283 Ill. App. 3d 765, 768 (1996)). As an example, "a public entity claiming immunity for an alleged failure to repair a defective condition must present sufficient evidence that it made a conscious decision not to perform the repair. The failure to do so is fatal to the claim." *Id.* In contrast to discretionary acts, ministerial acts are " '[performed] on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act.' " *Harinek*, 181 Ill. 2d at 343 (quoting *Snyder*, 167 Ill. 2d at 474). Whether an act is discretionary under the Act is a question of law to be decided by a court. *Monson*, 2018 IL 122486, ¶ 31.

¶ 52 Plaintiffs focus on whether section 2-201 immunity applies to the following acts or omissions: Sharp's failure to follow the sibling transportation policy by allowing A.V. to ride the bus after his brother stopped doing so, Sharp's failure to follow the guidelines for principals by allowing A.V. to not wear a seat belt and roam the bus, Sharp's failure to stay awake and supervise the bus, and Rago and Sharp's failures to report sexual assault allegations under the sexual harassment policy and the Reporting Act. We have already determined that Rago, Sharp, and the Board are immune under sections 2-205 and 2-103 of the Act for failing to enforce the Reporting Act, and so we will not address whether they would also be immune under section 2-201. Our analysis will group the remaining acts and omissions into two categories: (1) Sharp's failure to follow the sibling transportation policy, failure to follow the guidelines for principals, and failure to stay awake and supervise the bus; and (2) Rago and Sharp's failure to report abuse under the sexual harassment policy.

¶ 53 Whether an act is discretionary "escapes precise formulation and should be made on a case-by-case basis in light of the particular facts and circumstances." *Id.* ¶ 29. Here, the Board has not met its burden to show that Sharp determined policy and exercised discretion in failing to follow the sibling transportation policy, follow the guidelines for principals, and stay awake and supervise the bus. We do not know whether the decision to allow A.V. to keep riding the bus after his sibling left the school was a "conscious decision," making it discretionary, or an oversight, since the record does not include any facts about how the decision was made. See *Courson ex rel. Courson v. Danville School District No. 118*, 333 Ill. App. 3d 86, 88 (2002) (act or omission could be neither discretionary nor ministerial, but simply an oversight for which there would be no immunity). We also do not have any facts about Sharp's reasons for letting A.V. not wear a seat belt and roam the bus, which would reveal whether Sharp's acts were a conscious choice and a reflection that Sharp made a judgment call. Based on the missing information, we cannot determine whether section 2-201 immunity applies to the failures to follow the sibling transportation policy and the guidelines for principals served by CWAs/bus

aides. See *Doe v. White*, 627 F. Supp. 2d 905, 923-24 (C.D. Ill. 2009) (not applying section 2-201 immunity on a motion to dismiss where questions remained about whether all the actions were discretionary or some were ministerial and there was no evidence about what competing interests were balanced). Where facts necessary to sustain the defense are not apparent on the face of the complaint and not supported by affidavits or other materials in the record, a defendant is not entitled to dismissal as a matter of law. See *Monson*, 2018 IL 122486, ¶ 31 n.1. That being the case here, defendants are not entitled to a dismissal under section 2-201 of the Act for the acts and omissions related to the sibling transportation policy and the guidelines for principals.

¶ 54 As for failing to stay awake and supervise the bus, we cannot see how falling asleep on the job and thus not performing any duties could be a decision where Sharp balanced competing interests and made a judgment call. That conduct is not immunized under section 2-201 of the Act.

¶ 55 Turning to the sexual harassment policy, we are also unable to determine whether the act of reporting complaints is discretionary or ministerial. The sexual harassment policy as alleged in the complaint provides that a teacher who receives a sexual harassment complaint "must refer it in writing, using the Sexual Harassment Information Form, to the Sexual Harassment Officer or designee no later than the end of the third business day following receipt of the complaint." Although this language appears mandatory, we reiterate that ministerial acts are made " 'in obedience to the mandate of legal authority.' " *Harinek*, 181 Ill. 2d at 343 (quoting *Snyder*, 167 Ill. 2d at 474). It is unclear whether the sexual harassment policy qualifies as "legal authority." Again, the complaint is silent on this issue, and the version of the policy in the record appears to be a draft. At the same time, we do not have evidence of any competing interests Rago balanced in not reporting the complaint she received from S.R.'s parents, whether she made a judgment call, and whether not reporting was an oversight or conscious decision. To the extent that plaintiffs alleged that Sharp failed to report complaints under the sexual harassment policy, we also do not have any evidence of the competing interests at play and whether Sharp made a judgment call to not report or if not reporting was an oversight. But see *Harrison*, 197 Ill. 2d at 474 (principal made a policy decision when he refused a student's request for an early dismissal where the principal had to consider the circumstances surrounding the request, including the weather, road conditions, and the student's safety, as well as interests that included the student's desire to leave early before the weather worsened and the school's interest in an orderly dismissal). On the record before us, defendants have not shown that section 2-201 immunity applies and bars plaintiffs' claim that defendants failed to follow the sexual harassment policy.

¶ 56 III. CONCLUSION

¶ 57 We conclude that sections 2-205 and 2-103 of the Act apply and bar plaintiffs' claims that defendants failed to enforce the Reporting Act, but do not apply to plaintiffs' claims that defendants failed to enforce the sibling transportation policy, guidelines for principals, and sexual harassment policy. Further, sections 4-102 and 2-201 of the Act do not bar plaintiffs' claims.

¶ 58 For the foregoing reasons, the judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

¶ 59 Affirmed in part and reversed in part.

¶ 60 Cause remanded.