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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Counsel for the Appellee, the Hamilton Southeastern School Corporation, submits the following information in compliance with Circuit Rule 26.1:

1. The full name of every party that the attorney represents in the case:
The Hamilton Southeastern School Corporation.
2. If the party or amicus is a corporation:
 - i) Identify all its parent corporations, if any;
The Hamilton Southeastern School Corporation is a municipal corporation with no parent corporation.
 - ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:
As a municipal corporation, there are no stockholders.
3. The names of all law firms whose partners or associates have appeared for the party in the District Court or are expected to appear for the party in this Court:

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I. JURISDICTIONAL STATEMENT

The Appellants' jurisdictional statement is not complete and correct.¹ The Appellants are correct in noting that the District Court had jurisdiction over the federal claims (20 U.S.C. § 1681; 42 U.S.C. § 1983; and, 42 U.S.C. § 1988) pursuant to 20 U.S.C. § 1331. The Appellants also correctly note that the District Court had jurisdiction over the supplemental state claims pursuant to 28 U.S.C. § 1367(a). The Appellants are incorrect in noting that "the District Court lost their jurisdiction upon the dismissal of the Appellants' federal claims" This statement is incorrect. As discussed in detail later in this brief, at least one federal claim remains pending in the District Court against the Co-Defendant and thus the District Court retains jurisdiction of this matter regardless of the outcome of this appeal.

On October 19, 2007, the District Court granted the Defendant-Appellee, Hamilton Southeastern School Corporation's (hereinafter "School") motion for summary judgment. (D. # 131) Despite the fact that the October 19, 2007 Order was not a final order as issues remained relating to the Co-Defendant, Dmitri Alano, the Plaintiffs-Appellants made several abortive attempts to appeal this order. *See e.g.* Cause No. 07-3777 dismissed for jurisdictional reasons on January 9, 2008. The District Court

¹ Appellee's brief was being drafted when the court entered its order of May 15, 2008. That order struck Appellants' brief and required Appellants to file a new brief no later than May 22, 2008, containing a jurisdictional statement that complies with all of the requirements of Circuit Rule 28(a). This order also required the Appellee to file their brief by May 23, 2008, which will be prior to receiving the Appellants' revised brief. Therefore, portions of Appellee's Jurisdictional Statement and Section C of Appellee's argument may be moot as a result of the revised brief expected to be filed by the Appellants.

eventually issued an Order on December 28, 2007, granting the Plaintiffs-Appellants' Motion for Issuance of Final Order under Fed.R.Civ.P. 54(b). (D. # 146) Following the entry of this Order, on January 24, 2008, the Plaintiffs-Appellants filed another Notice of Appeal resulting in the present appeal. (D. # 151)

Pursuant to Circuit Rule 28(a)(3)(i) the School would note that a variety of state and federal claims remain pending in the District Court against the Co-Defendant, Dmitri Alano. The District Court's Order of October 19, 2007, made final on December 28, 2007, resolved all aspects of the litigation between the School and the Plaintiffs-Appellants. This would include the following claims:

- | | | |
|------------|------------------|---|
| Count I: | Federal Claim: | Title IX; |
| Count II: | State Law Claim: | Negligent Hiring/Retention/
Supervision; |
| Count III: | Federal Claim: | 14 th Amendment through
42 U.S.C. § 1983; |
| Count IV: | State Law Claim: | Assault & Battery; |
| Count V: | State Law Claim: | Negligence; |
| Count VI: | State Law Claim: | Intentional Infliction of Emotional
Distress; |
| Count VII: | State Law Claim: | Negligent Infliction of Emotional
Distress. |

However, the Co-Defendant, Mr. Alano, was also named in each of these seven (7) counts. According to the Complaint, the same facts regarding the sexual relationship between Mr. Alano and C.H. underlie each of these claims. Faced with similar summary judgment motions, the District Court granted summary judgment to the School on all seven counts (D. # 131, 146), and to Mr. Alano on Counts I and II. (D. # 132) However, Counts III through VII, including the 14th Amendment claim, remain

pending against Mr. Alano in the District Court and are presently stayed awaiting the results of this appeal. (D. # 148)

II. STATEMENT OF THE ISSUES

1. Whether the District Court erred in granting summary judgment to the Defendant, the Hamilton Southeastern Schools on the Title IX claims?

2. Whether the District Court erred in granting summary judgment to the Defendant, the Hamilton Southeastern Schools on the supplemental state law claims because it lost jurisdiction over those claims when it entered judgment on the Title IX claims?

3. Whether the District Court erred in granting summary judgment to the Defendant, the Hamilton Southeastern Schools on the supplemental state law claims?

III. STATEMENT OF THE CASE

This case involves the attempt of C.H. to hold the Hamilton Southeastern School Corporation liable for its failure to discover a sexual relationship with her former band teacher, Dmitri Alano, during her freshman and sophomore years of high school. The relationship began in 2001 and ended in early in 2002.

In the Complaint filed on May 6, 2005, C.H.², now twenty-two (22) years old, alleges that she had a sexual relationship with Mr. Alano, a music teacher at Hamilton

² The Complaint also names her now divorced parents, Sondra J. Hansen and William R. Hansen, as Plaintiffs both individually and in their representative capacities. Since C.H. is now twenty-two (22) years old, there is no need for a representative capacity claim. Moreover there is no merit to the claims presented in their individual capacities. Thus the District Court dismissed the parents' claims in their entirety. (App. 15) C.H. has not appealed that portion of the District Court's decision and therefore the parents' claims are gone forever, and they are not proper parties to this appeal.

Southeastern High School. According to C.H.'s deposition testimony, she and Mr. Alano took great pains to conceal their relationship from School administrators, her own parents, and indeed Mr. Alano's wife who was also a teacher. As C.H. testified in her deposition: "Q. As I understand your testimony today, you hid this from everybody, the school, your parents, everybody, correct? A. Yes." (Supp. App. 24) Although the relationship concluded in 2002, C.H. did not report the relationship to anyone nor did anyone suspect that such a relationship had existed until she disclosed it in early 2004 during an in-patient group therapy session at Fairbanks Hospital where she was being treated for multiple drug addictions after having been arrested on New Year's day for impaired driving under the influence of marijuana and cocaine. When her parents learned of the affair, they instituted criminal proceedings against Mr. Alano and filed this suit against Mr. Alano and the School.

As noted earlier, the Complaint presented seven identical claims against the School and Mr. Alano, including two federal claims (Title IX and § 1983) and five (5) state law claims (Negligent Hiring/Retention/Supervision, Assault & Battery, Negligence, and Negligent and Intentional Infliction of Emotional Distress). (D. # 1) Following the conclusion of discovery, on June 15, 2007, the School filed its motion for summary judgment and supporting materials seeking summary judgment on all seven claims. (D. # 92-98) On June 29, 2007, Mr. Alano filed his own motion for partial summary judgment seeking summary judgment on the Title IX claims and the Negligent Hiring/Retention/Supervision claims. (D. # 104) On July 16, 2007, C.H. filed

her response to the School's motion (D. # 105-108) and on August 7, 2008, the School filed its reply. (D. # 119)

On October 19, 2007, the District Court granted the School's motion for summary judgment. (D. # 131) On November 5, 2007, the Court granted Mr. Alano's motion for partial summary judgment dismissing Counts I and II, but leaving one federal claim and four state law claims pending in the District Court. (D. # 132) In response to these two orders C.H. filed a Notice of Appeal on November 16, 2007, seeking to appeal both orders. (D. # 135) This matter was assigned Cause No. 07-3777 by this Court and was eventually dismissed for jurisdictional reasons on January 9, 2008, because there was no final order. The District Court eventually issued an Order on December 28, 2007, granting the Plaintiffs-Appellants' Motion for Issuance of Final Order under Fed.R.Civ.P. 54(b) correcting the jurisdictional defect.³ (D. # 146) Following the entry of this Order, on January 24, 2008, the Plaintiffs-Appellants filed another Notice of Appeal resulting in the present appeal. (D. # 151)

At the present time, notwithstanding this appeal, this matter remains pending, albeit it stayed, in the District Court with respect to the five remaining claims against Mr. Alano, consisting of one federal claim and four state law claims. (D. # 147-148)

³ C.H. actually took two bites at the apple, filing an earlier motion for order from the District Court on November 28, 2007, (D. # 142) which the Court executed on December 4, 2007, (D. # 143-144) but which was inadequate, leading to the late December filings to correct the continuing deficiencies. (D. # 145-146)

IV. STATEMENT OF THE FACTS

A. The Appellants.

The Plaintiff-Appellant in this action is C. H. She was born on June 27, 1986, and graduated from Hamilton Southeastern High School at the conclusion of the 2003-04 school year. (Supp. App. 002, 004)

C.H. is a troubled young lady with a long history of drug and alcohol abuse beginning in middle school long before she met Mr. Alano. She has made allegations of sexual and physical abuse including rape against a number of different individuals in addition to Mr. Alano, ranging from former boyfriends to co-workers. (Supp. App. 005-6, 19) Each of the individuals against whom she has made such allegations has denied them under oath. Justin Hise denied raping or abusing her in the 8th grade (Supp. App. 35) as did Ron Adams her boyfriend in the 9th and 10th grades (Supp. App. 11), as well as Mr. Alano. (Supp. App. 52)

C.H. has been diagnosed with a "borderline personality disorder" likely to suffer from "[d]istorted reality, confused fantasy with what actually occurred. Made up stories, been untruthful, been manipulative or been suggested into particular ways of thinking about things." (Supp. App. 58) C.H. first made allegations of an inappropriate relationship with her band teacher, Dmitri Alano, during group therapy while in an in-patient hospitalization on January 19, 2004, almost two years after she had last been involved with Mr. Alano as a student. (Supp. App. 020, 026).

B. The Appellee, the Hamilton Southeastern School Corporation.

The Hamilton Southeastern Schools is a public school corporation serving students in central Indiana, just north of Indianapolis. (Supp. App. 59) At all relevant times the Assistant Superintendent for Personnel, Dr. Richard Hogue, was in charge of hiring certified staff such as Mr. Alano as well as developing personnel policies and conducting staff training. (Supp. App. 67) Michael Niemiec has been the Band Director at Hamilton Southeastern High School since 1986. (Supp. App. 194)

1. The School's Non-Discrimination/Sexual Harassment Policies.

The School Board has adopted and complies with a variety of policies prohibiting sexual discrimination and sexual contact between teachers and students. Board Policy 2.1.1 specifically precludes sexual harassment, which is defined as “unwelcome sexual advances, requests for sexual favors, or other inappropriate verbal or physical conduct of a sexual nature when made by any employee to a student” (Supp. App. 89) This policy also contains a confidential reporting procedure for individuals who believe they have been the victim of inappropriate conduct. *Id.* Board Policy G2.5.1 entitled “Staff Ethics” states that “[a]ll employees must not: 1. Encourage or engage in any thing other than a professional relationship with students.” (Supp. App. 90)

Every year the School conducts sexual harassment training for its teachers during its opening day orientation. (Supp. App. 67) This training includes a discussion of the “Staff Ethics” policy prohibiting inappropriate contact between faculty and students.

(Supp. App. 67-68, 91-190) Mr. Alano testified that he received this training both as a new employee in 1998 and twice a year thereafter. (Supp. App. 43-44) He further testified that he knew that School policy prohibited both inappropriate conduct towards students and sexual relationships between teachers and students. (Supp. App. 44).

In addition to the training provided to teachers, the School also provides similar information to students both orally and in a Student Handbook that sets out the foregoing School policies. (Supp. App. 8, 21, 28-30) C.H. acknowledged receiving a copy of the Student Handbook and being familiar with the School policies prohibiting sexual harassment and the attendant reporting procedures. *Id.*

2. The School's Hiring Policies and Procedures.

In addition to the personal conduct policies, the School also has a policy and practice of checking references and conducting criminal background checks on all applicants for employment. (Supp. App. 61, 69, 80, 86, 87-88) Under this policy, when the School receives an application it is placed into a central office file to create a pool for vacancies. (Supp. App. 60) As vacancies occur the file is referenced, relevant applications are reviewed and an interview pool is created. *Id.* An interview team will then be formed which usually includes the principal of the building where the position is located. When the interviews are concluded the committee will recommend a candidate to the Central Office. (Supp. App. 61)

As part of this screening process the Central Office ensures that criminal background checks are made and appropriate references are checked on prospective employees consistent with the School's policies. (Supp. App. 61, 191). The "Intent to

Employ Document” has spaces to confirm that the criminal background checks, the sex offender checks, and the reference checks have been made. (Supp. App. 63, 69).

In 1998, when Mr. Alano was hired, Indiana required a limited criminal background check on teachers at the time they either received their licenses or when those licenses were renewed. Consequently School policy was that “[w]e accept the limited background check that the State requires for teacher licensing. So if the applicant or teacher has a valid Indiana license, they have had that check and no follow-up is needed.” (Supp. App. 61, 86). In addition to the criminal background check, the School also checks each applicant against a list of known sexual offenders. (Supp. App. 161). In 1998, when Mr. Alano was hired, that would have been the “Indiana Criminal Justice Institute Sex Register.” (Supp. App. 63, 80).

In conjunction with the criminal background check, the School also requires that personal and/or professional references also be checked on all prospective employees. (Supp. App. 62). The School’s “Intent to Employ” form requires the principal to list the references that were checked. (Supp. App. 63, 69).

At the conclusion of this process Dr. Hogue conducts a “final interview” with all prospective teachers and has on occasion, as the result of this final interview, rejected prospective hires. (Supp. App. 64-65) During these final interviews Dr. Hogue focuses on methodology rather than knowledge of subject matter. (Supp. App. 65). When he conducts these interviews he uses a “Behaviorally Directed Employment Selection Process” designed to test critical thinking by the applicants in a variety of different areas, including appropriate contact with students. (Supp. App. 65, 81-85, 192) Dr.

Hogue also has a special set of questions tailored to individuals involved in supervising extra-curricular activities such as coaches and band directors. *Id.* Within this set of questions is a subset of questions that are specifically designed to elicit the applicant's judgment on the boundaries of appropriate teacher/student conduct. (App 28, Supp. App. 66).

It is only after this entire process is completed and Dr. Hogue has reached a "comfort level" with the applicant, that that individual is recommended to the School Board which makes the ultimate hiring decision. (Supp. App. 66)

C. The Appellee, Dmitri Alano.

Dmitri Alano attended Butler University where he received a Bachelor in Music Education in 1987. (Supp. App. 37) Following his graduation from Butler, Mr. Alano was hired as the Director of Instrumental Music for grades 5-12 at Waldron Jr./Sr. High School in the Shelby Eastern Schools. (Supp. App. 37). Mr. Alano was the Band Director at Waldron Jr./Sr. High School from 1987 to 1998 when he was hired by the Hamilton Southeastern School Corporation as the Assistant Band Director at Hamilton Southeastern High School. (Supp. App. 38). Mr. Alano taught at Hamilton Southeastern High School until he was suspended on January 29, 2004 and later resigned as a consequence of his relationship with C.H. (Supp. App. 51).

D. Mr. Alano is Hired by the School.

While at Butler University, Mr. Alano played in a brass ensemble that promoted the University's music department. (Supp. App. 39) In the course of traveling to various schools around the state, the Butler ensemble performed at Hamilton

Southeastern High School and Mr. Alano met the Band Director there, Michael Niemiec. *Id.* After Mr. Alano graduated from Butler in 1987 the ensemble stayed together and “freelanced around the city.” (Supp. App. 39). In 1992 the ensemble lost its trombone player and “[a]fter auditioning a few players, we asked Mike to join our ensemble.” *Id.* Mr. Alano and Mr. Niemiec played in the ensemble, usually “Christmastime once a week at the mall” and for an occasional wedding. (App. 39) While they played together and might go out for a meal after a performance, they did not otherwise socialize together. (App. 39)

During the summer of 1994 Mr. Alano volunteered to assist Mr. Niemiec with the Hamilton Southeastern High School Marching Band and did so for the next four summers. (App. 39) By 1998 the high school had grown enough that there was room for an Assistant Band Director and Mr. Niemiec encouraged Mr. Alano to apply for the position. (App. 39)

On April 6, 1998, Mr. Alano applied for the position of Assistant Band Director at Hamilton Southeastern High School. (Supp. App. 40, 53-54) In addition to the application he also provided “resume, references, transcripts, all the required materials for an application.” *Id.* Included with these documents was a standard form from the School inquiring whether Mr. Alano had been investigated, resigned, charged with or otherwise been involved with any misconduct including specifically “sexual abuse” or “sexual contact with another person.” (App. 32-33). Mr. Alano answered that he had not been involved in any such misconduct. (Supp. App. 40).

Included within the references Mr. Alano provided to the School was a written reference from a Jim Jaros dated April 21, 1998. (App. 27, Supp. App. 64, 71-79) Mr. Jaros was the Principal at Waldron High School and as such was, at that time, Mr. Alano's direct supervisor. (Supp. App. 37) In his letter Principal Jaros provided a glowing reference for Mr. Alano:

Mr. Alano is a true professional in every way but his personal integrity is every bit as outstanding. He is very conscientious in all of his duties and is definitely a self-starter. Our band program is in very good shape financially due to the organization and work of Dmitri. Interest in his program is developed in the elementary school and fostered throughout junior and senior high school.

I consider Dmitri Alano to be among the top five percent of all teachers with whom I have had the pleasure to be associated. Therefore, I offer my highest endorsement for his ability to handle any assignment he feels qualified to pursue.

(App. 27, Supp. App. 64, 71-79).

Following the receipt of the application and related documents, Mr. Alano was interviewed by the Hamilton Southeastern High School Principal, Glen Nelson. (Supp. App. 40-41) Following that interview Mr. Nelson talked with Mr. Niemiec about Mr. Alano and also checked his references by calling an "assistant principal" at Waldron High School. (App. 27; Supp. App. 64) Following the interview and the background check, Principal Nelson decided to recommend Mr. Alano for the assistant band director position and filled out an "Intent to Employ" form. (Supp. App. 63-64, 70). As noted on the form, "[t]his form is to be completed and sent to Dr. Hogue any time a person is employed" *Id.*

Assistant Superintendent Hogue received the Intent to Employ form for Mr. Alano during the summer of 1998 and immediately noted that the reference check box had not been filled out, nor was the sex offender box checked. (App. 27) As a consequence, he immediately called Principal Nelson “and said, Glen, who are your references?” (App. 27). Principal Nelson responded that his first reference was Mr. Niemiec and “he called an assistant principal” at Waldron High School. *Id.* Because the assistant band director position was a “very high profile job”, Assistant Superintendent Hogue also called Mr. Niemiec. *Id.* When Assistant Superintendent Hogue talked with Mr. Niemiec, Mr. Niemiec indicated he had no reservations about hiring Mr. Alano and indicated that he had known Mr. Alano “Personally, professionally, and socially” for approximately ten years. (App. 27). Assistant Superintendent Hogue summarized the references as follows:

And so we called Mr. Niemiec. We talked to Mike Niemiec. And in addition to that, Glen told me in that conversation that he had called, and I do not remember the name, it has been too many years ago, but he called an assistant principal. In addition to that, I had gone through the materials in preparing my interview for Dmitri Alano and I might direct everyone’s attention to 4. And there is the letter that was generated in April of 1998 by Jim Jaros who was current, who was currently the principal at Waldron High School.

So we had his current principal’s letter. We had Mike Niemiec. And I might add Mike was hired by me as the band director for Hamilton Southeastern High School when I was principal at Hamilton Southeastern. And I worked with Mike for fifteen years or so at that time.

(App. 27). The Niemiec recommendation was very important to Assistant Superintendent Hogue since “one of the ways in which we stress to our building

principals that we want them to check people they know, references they can hold accountable. Mike Niemiec knew him well.” (App. 27)

Following this review of the references, the sex offender registry was checked by the Central Office, which at that time was the “Indiana Criminal Justice Institute Sex Register” and which was clear for Mr. Alano. (Supp. App. 63, 80) Mr. Alano also had a valid Indiana teaching license, which meant that he had passed a criminal background check by the State of Indiana as well. *Id.*

Finally, Assistant Superintendent Hogue personally interviewed Mr. Alano. Although he could not recall the specific questions he asked Mr. Alano, Assistant Superintendent Hogue testified that he did use the “Behaviorally Directed Employment Selection Process” designed to test critical thinking by the applicants, and he believed that he asked a question that specifically addressed inappropriate contact with students and that Mr. Alano answered appropriately. (App. 26, 28, Supp. App. 65-66, 81-85, 192) Following this interview Assistant Superintendent Hogue signed off on the Intent to Employ form and sent it to the School Board for final approval. (Supp. App. 70) Mr. Alano was employed effective July 1, 1998. (Supp. App. 61)

E. The Alleged Sexual Encounters.

During the 1998-99 and 1999-2000 school years, Mr. Alano was the Assistant Band Director at Hamilton Southeastern High School and taught classes without incident. During the 2000-01 school year, Ms. Hansen was a freshman at Hamilton Southeastern High School and was taking Beginning Instrumental Ensemble taught by Mr. Alano. (Supp. App. 195-196)

Over time C.H. has given wildly divergent versions of the number and nature of her encounters with Mr. Alano. Indeed a review of her various sworn statements and depositions indicates that she has never told the same version of facts twice. Throughout her deposition testimony she was unwilling or unable to explain these inconsistencies and instead resorted to simply stating that “I was just confused about the whole thing.” (Supp. App. 3)

Distilling her various tales down, it appears that she alleges that sometime after Christmas her freshman year she and Mr. Alano began engaging in sexual banter. (Supp. App. 7) This banter progressed to various forms of sexual contact that allegedly took place either in the band room, practice rooms, or in the band offices over the next year or so, concluding mid-way through her sophomore year. (Supp. App. 7-9, 12-16, 42)

In her deposition C.H. claimed that she eventually quit band because of the problems with Mr. Alano. (Supp. App. 17) She testified that she did so despite the fact that Mr. Alano was giving her good grades based on their sexual contacts. (Supp. App. 10) Indeed she claimed she got an A+ on her playing test. *Id.* However, her transcript shows that she actually got low grades, and indeed received an F on a final exam, an F on another playing test, and several C’s. (Supp. App. 47) She also claimed that Mr. Alano asked her to be an assistant or aide in band her junior year. (Supp. App. 17). Mr. Alano denied this. (Supp. App. 47)

However, this testimony that she received inflated grades based upon sexual conduct with Mr. Alano and then was forced to quit band is rebutted by an e-mail she

herself sent to Mr. Alano in her sophomore year. (Supp. App. 45-46, 55-56) In this e-mail dated September 29, 2001, C.H. stated that "I have basically given up on band." *Id.* The e-mail purports to give her reasons for quitting band and having nothing to do with a sexual relationship with Mr. Alano and the benefits of that relationship, but instead is focused on the fact that she was doing so poorly in band:

As I have said many times this year is going to be my last year for band. I'm not giving up on music though. I play the guitar too. Anyway. I figured that this would be my last year because I know I can get an A in here and because it is sort of a stress reliever from the normal school bulls**. But god I'm getting like a B- and I'm second chair when I think I could easily be first.

(Supp. App. 55-56)

After she quit band in May of 2002, according to C.H. nothing inappropriate happened after that. "Q. And your involvement with Mr. Alano stopped at the end of your sophomore year, correct? A. Yes. Q. All right. So your junior year there would have been no involvement with Mr. Alano? A. No." (Supp. App. 26)

F. C.H.'s Arrest and the Fairbanks Hospitalization.

Early in the morning of January 1, 2004, C.H. was pulled over by the police and arrested for driving under the influence. She tested positive for cocaine and marijuana. (Supp. App. 5) She was taken to the Hamilton County Juvenile Detention Facility and was eventually released to her parents. (Supp. App. 5) On January 4, 2004, her parents placed her at Fairbanks Hospital as an in-patient for treatment of her substance abuse problems. *Id.* When she was placed into Fairbanks Hospital "on several occasions, you [C.H.] were asked have you been sexually abused or physically abused in the process of

getting into Fairbanks and you denied that; is that correct? A. Yes.” (Supp. App. 5; parenthetical supplied) This despite the fact that at the time she believed that she had been raped by a former boyfriend in 8th grade (Supp. App. 5), physically abused by a different boyfriend in the 9th and 10th grades (Supp. App. 6), and “physically assaulted by or subject to misconduct by Dmitri Alano.” *Id.*

Although not admitting to any of the sexual or physical abuse, the Fairbanks records do reflect that C.H. admitted to extensive drug use including “three to four joints daily,” began using cocaine “one gram daily,” as well as experimentation with crack cocaine, Morphine, hallucinogens, and methamphetamine. (Supp. App. 22)

During her first group session, C.H. told the group that “she was tempted to use drugs last night and willing to sell her body for drugs to just get a line of cocaine.” (Supp. App. 22, 33) She also testified that during these group sessions, “her objective is to protect herself even at the expense of others.” (Supp. App. 22, 32).

On January 19, 2004, for the first time C.H. told someone else about the alleged inappropriate sexual conduct by Mr. Alano. “Q. Is this the first time you told anybody about your interaction with Mr. Alano? A. Yes.”⁴ (Supp. App. 020)) According to the therapist note:

Pt. Attended group and brought up the personal issue that she has had a lot of repressed abuse issues brought to her mind. Pt. Shared that her school band teacher had sex with her for 2 years, her manager forced

⁴ The first and only time C.H. told anyone from the School about her encounters was to her Art teacher, Mr. Gabbert, by telephone on February 15, 2005, after “you had already given one, maybe two statements to CPS, the police reports had all been made, so this was off and running, correct? A. Yes.” (Supp. App. 23)

himself on her for 2 months before they were both fired. Pt. Reports a lengthy history of sexual assault. Pt. Was tearful and felt victimized.

(Supp. App. 20, 27).

At the time she made this statement, C.H. believed that it was made in confidence and did not want it disclosed to anyone. (Supp. App. 21).

Q. When you reported this, did you believe that you did this in confidence to Ms. Coyle or did you do it with an understanding that she would report it to someone else?

A. I did it in confidence.

Q. All right. Did you expect her to tell your parents, for example?

A. No.

Q. In fact, you were upset when you found out she had told your parents, correct?

A. Yes.

Q. Were you upset that she had told the police?

A. Yes.

Q. Okay. Why?

A. Because I just --- it wasn't something I wanted known and I was ashamed of it.

Q. You took efforts to hide it?

A. Yes.

Q. You took efforts to hide it from your former boyfriend by hiding -- not having any journal entries about it?

A. Yes.

Q. You took efforts to hide it from your parents?

A. Yes.

Q. You took efforts to hide it from school officials?

A. Yes.

(Supp. App. 21)

Q. 2001. So you kept this in for four years, three and a half, four years, not told anybody?

A. Uh-huh.

Q. Why then [disclose it in therapy on January 19, 2004]?

A. I thought it was confidential.

Q. And you did not want it reported to anyone, correct?

A. No.

Q. School, police, anybody?

- A. No.
Q. Especially not your parents, I assume?
A. No.

(Supp. App. 22; parenthetical supplied).

Notwithstanding C.H.'s desire to hide the relationship, her therapist advised C.H.'s parents of the abuse allegations after the group therapy session. (Supp. App. 22)

V. SUMMARY OF THE ARGUMENT

The District Court properly entered summary judgment on C.H.'s Title IX claim under Delgado v. Stegall, 367 F.3d 668 (7th Cir. 2004) and Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998). Delgado and Gebser created a two part test for institutional liability under Title IX requiring evidence of both [1] actual knowledge and [2] deliberate indifference to the sexual harassment. In the present case C.H. concedes in her own brief that "HSE may not have had 'actual knowledge' of the relationships" thus dooming her Title IX claim under Delgado and Gebser. Moreover, C.H.'s argument for a "should have known standard" flies directly in the face of existing case law under Title IX.

The District Court did not err in retaining jurisdiction over and ruling on the supplemental state law claims against the School. C.H.'s argument that the District Court lost jurisdiction over the supplemental state law claims against the School when it granted summary judgment on the Title IX claims against it is simply misguided. C.H. apparently ignores the fact that while the District Court dismissed all the claims against the School, one federal claim and a variety of state claims remain pending in the District Court against Mr. Alano. This was, of course, the reason this Court dismissed the prior

appeal by C.H. as it was not a final order. Since at least one federal claim remains pending in the District Court against the Co-Defendant, Mr. Alano, 28 U.S.C. § 1367(c)(3) is simply inapplicable and C.H.'s argument makes no sense whatsoever. *See e.g. Williams Electronics Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007)

VI. ARGUMENT

A. **Standard of Review.**

This Court in *Lapka v. Chertoff*, 517 F.3d 974 (7th Cir. 2008) recently concisely set forth the standard of review in cases such as this:

Our standards of review are familiar. We review the district court's grant of a motion for summary judgment *de novo*. *Jackson v. County of Racine*, 474 F.3d 493, 498 (7th Cir. 2007). Summary judgment is appropriate only "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Shermer v. Illinois Dep't of Transp.*, 171 F.3d 475, 477 (7th Cir. 1999). We view the facts in the light most favorable to Lapka and draw all reasonable inferences in her favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Lapka, 517 F.3d at 981.

B. **The District Court properly entered summary judgment on the Title IX claims as there was no evidence of "actual knowledge" and "deliberate indifference."**

In its Order the District Court found that C.H. had failed in her burden "of creating a genuine issue of material fact that the school had actual knowledge of misconduct and was deliberately indifferent to it. Accordingly, the School is entitled to

summary judgment on the Title IX claim and that claim is **DISMISSED with prejudice.**"⁵ (App. 9)

C.H.'s brief on this issue is somewhat contradictory. C.H. first correctly acknowledges this Court's decision in Delgado v. Stegall, 367 F.3d 668 (7th Cir. 2004) and the Supreme Court's decision in Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998) "which held that when a suit by a person is for misconduct of a teacher, the plaintiff must prove actual notice of, and deliberate indifference by the appropriate institution's officials to the teachers' misconduct to hold the institution liable under Title IX." (C.H.'s Brief, p. 8)

However, having conceded that Gebser and Delgado create a two part test for institutional liability under Title IX with both [1] actual knowledge and [2] deliberate indifference, C.H. immediately does an about face and argues instead a simple negligence "should have known" standard. C.H. admits in her brief that she has no evidence that anyone at the School had "actual knowledge" either of her relationship with Mr. Alano or any other inappropriate relationship and instead argues simply that the School "should have known" about it. "While HSE may not have had 'actual knowledge' of the relationships, the information was right before them concerning

⁵ The District Court also dismissed the § 1983 claims against the School because they were preempted by Title IX *citing* Doe v. Smith, 470 F.3d 331, 339 (7th Cir. 2006) as well as the Title IX claims by C.H.'s parents *citing* Rowinsky v. Bryan Independent School District, 80 F.3d 1006, 1010 n. 4 (5th Cir. 1996). (App. 6) C.H. has not appealed those decisions and thus they are final notwithstanding somewhat paradoxical statements in her Brief to the contrary. As the District Court correctly noted, the failure to contest an issue before the trial court, or raise an issue on appeal or in her brief represents a waiver of those arguments. Witte v. Wisconsin Department of Corrections, 434 F.3d 1031, 1038 (7th Cir. 2006).

Harker, which should have been enough to elicit some concern over their students' safety"⁶ (C.H. Brief, p. 9)

The Supreme Court has specifically stated that the "should have known" standard is simply irrelevant to a Title IX analysis:

[In Gebser] we rejected the use of agency principles to impute liability to the district for the misconduct of its teachers. Likewise, we declined the invitation to impose liability under what amounted to a negligence standard-holding the district liable for its failure to react to teacher-student harassment of which it knew or should have known. Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge Liability arose ... from an official decision by the recipient not to remedy the violation.

Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 642 (1999)(parenthetical supplied).

In the present case C.H. has conceded in her own Brief, and indeed conceded at the District Court level, that she had absolutely no evidence of actual knowledge by any administrative level employee that Mr. Alano had ever engaged in any inappropriate relationships, much less the relationship with her. In Delgado this Court noted that "under the Supreme Court's formula, the plaintiff in a Title IX damages suit based on a teacher's behavior must prove actual knowledge of misconduct, not just actual knowledge of the risk of misconduct, and must also prove that the officials having that knowledge decided not to act on it." *Id.*, 367 F.3d at 672. Thus under Delgado, C.H.'s

⁶ It should be noted that these statements are also factually incorrect. C.H. introduced absolutely no evidence to the District Court that there was anything inappropriate about the relationship between Mr. Alano and his wife. Both Mr. Alano and his wife, the former Ms. Harker, testified that although they met while he was her teacher their relationship began after she had graduated and nothing inappropriate happened when they were in a teacher-student relationship. (App. 36, Supp. App. 48)

concession that “HSE may not have had ‘actual knowledge’” dooms her Title IX claims. (C.H. Brief, p. 9)

C.H. appears to be trying to bootstrap her claims on the distinction noted in Delgado that the “actual knowledge” requirement is not limited to knowledge of the specific sexual harassment against the plaintiff but may apply where a school has actual knowledge of other harassing acts against other individuals. This Court in Delgado recognized the simple and common sense proposition that “if for example, Stegall had been known to be a serial harasser [this] might well be found to have had a sufficient approximation to actual knowledge that Delgado would be harassed to satisfy the Supreme Court’s standard.” *Id.*, 367 F.3d at 672.

However, even applying the standard suggested by C.H., she still cannot meet her burden of showing “actual knowledge” under the Delgado case since she cannot and has not pointed to a single instance of “prior complaints by other students” against Mr. Alano much less that the School was deliberately indifferent to such complaints. As in Delgado: “But Stegall was not known by anyone in the university administration, such as Dean Butterworth, to be harassing other students. To repeat, Delgado attaches no weight to the ten-year-old episode, which would in any event be only weak evidence that Stegall’s current students were at so high a risk of being harassed by him that university officials’ knowledge of the earlier episode would make them reckless for having failed to take steps to prevent a recurrence.” *Id.*, 367 F.3d at 672. *See also Escue v. Northern OK College*, 450 F.3d 1146, 1155, 1158 (10th Cir. 2006)(“NOC [the school] simply did not have the requisite knowledge based on prior complaints to believe that

Mr. Finton presented a substantial risk of abuse or harassment to students. ... For the reasons explained above, we AFFIRM the district court's grant of summary judgment to NOC."); Johnson v. Clovis Unified School Dist., Slip Copy, 2007 WL 1456062 * 4 (E.D.Cal. 2007)("Here, there is no allegation of actual knowledge by Lincoln's principal or any other CUSD official. That Lincoln's principal had sufficient knowledge from which a reasonable principal with proper training should have known about sexual harassment is not sufficient. Such an allegation only amounts to negligence. Because the complaint fails to contain allegations that Defendant CUSD had actual knowledge of Nieto's conduct, the complaint does not contain all necessary elements for a Title IX claim against Defendant CUSD. Thus, Defendant CUSD is entitled to judgment as a matter of law on the Title IX claim because even taking the complaint's allegations as true, the complaint fails to meet all requirements for a Title IX claim against a school district.")

As a consequence of the foregoing and C.H.'s own admission that the School lacked "actual knowledge" of Mr. Alano's alleged conduct, the District Court did not err in granting the School summary judgment under Delgado on C.H.'s Title IX claim.

- C. Irregardless of the outcome of this appeal, the District Court retains original jurisdiction of the remaining federal and state claims against the Co-Defendant, Dmitri Alano, and thus the "presumption" regarding the dismissal of supplemental state law claims does not apply.**

The second argument presented in C.H.'s brief makes little sense. C.H. argues that the District Court should not have ruled on the merits of the state law claims after it granted summary judgment on the Title IX claim as against the School. She argues that

the District Court lost jurisdiction over the supplemental state law claims against the School when it granted summary judgment on the Title IX claims against it. (C.H.'s Brief, p. 10-11)

There are at least two fatal flaws in C.H.'s argument. First, it is true that "[u]nder 28 U.S.C. § 1367(c)(3), a district court need not exercise jurisdiction over state law claims if 'the district court has dismissed all claims over which it has original jurisdiction.'" (C.H.'s Brief, p. 11) However, it is not true, as C.H. apparently believes, that the "district court has dismissed all claims over which it has original jurisdiction." In fact just the opposite.

As noted in her own jurisdictional statement, "[t]he United States District Court had jurisdiction of the federal claims in this cause pursuant to 28 U.S.C. § 1331 as the case was brought in part pursuant to Title IX ... § 1983 ... § 1988." (C.H.'s Brief, p. 1) As C.H. also notes in her brief the Title IX, § 1983, and the § 1988 claims which form the basis of federal jurisdiction were pled against the School and the individual Defendant, Mr. Alano. *Id.*, p. 2. While the District Court dismissed all claims, state and federal, against the School, one federal claim and a variety of state claims remain pending in the District Court against Mr. Alano. This was, of course, the reason this Court dismissed the prior appeal by C.H. as it was not a final order. *See* Cause No. 07-3777 dismissed for jurisdictional reasons on January 9, 2008. Since at least one federal claim remains pending in the District Court against the Co-Defendant, Mr. Alano, 28 U.S.C. § 1367(c)(3) is simply inapplicable and C.H.'s argument makes no sense whatsoever. *See e.g. Williams Electronics Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007)(Noting

that “the presumption is inapplicable to this case. For while some of the federal claims (the Sherman Act claim and some of the RICO claims) did fall out of the case before trial, other RICO claims were tried, along with some of the state law claims”)

Second, even if the District Court had granted summary judgment on all federal claims against the School and Mr. Alano, the District Court would still have had the discretion to resolve the supplemental state law claims as well because “substantial federal judicial resources have already been expended on the resolution of the supplemental claims; and [] it is obvious how the claims should be decided.” Garrity, 479 F.3d at 907.

As a consequence of the foregoing, the jurisdictional argument with respect to the supplemental state law claims is meritless.

D. The District Court properly entered summary judgment on the supplemental state law claims of Negligent Hiring, Retention, and Supervision based on the fact that C.H. failed to present any evidence that the “School knew that Alano had a habit of misconduct.”

1. Application of the “knew” standard.

The District Court entered summary judgment on C.H.’s supplemental state law claims of negligent hiring/retention/supervision based on the fact that C.H. failed in her burden to present any evidence “to demonstrate that the School knew that Alano had a habit of misconduct.” (App. 9) On appeal, C.H. does not argue that there was indeed such evidence; to the contrary, she concedes that there is no such evidence. Instead C.H. argues that the “knew” standard used by the District Court was erroneous

and that the District Court should have used instead a “knew or should have known” standard. (C.H. Brief, p. 13)

The problem with C.H.’s argument is that she provides no legal support for her theory in this context. It is interesting to note that C.H. did not espouse this position before the District Court. Indeed in her briefing to the District Court, C.H. specifically acknowledged that the “knew” standard was the appropriate test: “In order to prevail on this theory, the plaintiff must show that the defendant negligently hired or retained an employee who the **defendant knew** was in the habit of misconducting himself.” (D. # 107; Plaintiffs’ Brief, p. 41; emphasis supplied) C.H. made this statement before the District Court because this is indeed the standard Indiana applies to these types of claims. *See e.g. Susan O’Halloran Levinson v. Citizens National Bank of Evansville*, 644 N.E.2d 1264, 1269 (Ind.App. 1994)(“In order to prevail on this theory, the plaintiff must show that the defendant employer negligently retained an employee who the defendant knew was in the habit of misconducting himself.”); *Briggs v. Finley*, 631 N.E.2d 959, 966-67 (Ind.App.1994)(Negligent retention plaintiff must show the employer “knows the employee is in the habit of misconducting himself in a manner dangerous to others.”) *Levinson v. Citizens Nat’l Bank of Evansville*, 644 N.E.2d 1264, 1269 (Ind.App. 1994)(“In order to prevail on this theory, the plaintiff must show that the defendant employer negligently retained an employee who the Defendant knew was in the habit of misconducting himself.”)

Another Indiana District Court recently addressed this same issue applying Indiana law in *Chivers v. Central Noble Community Schools*, 423 F.Supp.2d 835

(N.D.Ind. 2006). Like the present case, Chivers also involved allegations of inappropriate conduct between a teacher and a student. Noting that Indiana recognizes the tort of negligent hiring and retention, the Court then stated that in order “[t]o prevail on this theory, the plaintiff must show that the defendant employer negligently retained an employee **knowing** that the employee was in the habit of misconducting himself.” *Id.*, 423 F.Supp. at 855 (emphasis supplied). The Court granted summary judgment for the school on the negligent hiring/retention claims because the plaintiff failed to produce any evidence that the School was ever placed on actual or constructive notice of the teacher’s misconduct. *Id.*

Although not cited or mentioned anywhere in C.H.’s Brief, there is one Indiana case that does mention a “should have known” standard in a case like this. In Grzan v. Charter Hospital, 702 N.E.2d 786 (Ind.App. 1998) a hospital mental health counselor developed a sexual relationship with a patient. In denying the hospital’s motion for summary judgment on a negligent retention/supervision claim the court found that the patient had presented evidence that “[m]embers of the staff ... and patients were aware of this rumored inappropriate personal relationship. ... We find this evidence to be sufficient to raise a question of fact about whether Charter knew or should have known of Greer’s improper sexual conduct with Grzan.” *Id.*, 702 N.E.2d at 793. Thus although the court used the words “knew or should have known” the evidence actually presented to the court indicated that staff members had actual notice of the inappropriate conduct such that a duty of further inquiry existed despite the fact that those individuals did not actually witness the acts themselves.

In the present case there is no such evidence of actual knowledge. As the District Court found and C.H. does not contest, there was absolutely no evidence that anyone at the School knew or suspected that this particular relationship existed. C.H. concedes as much and instead seeks to meet the knowledge requirement by arguing that because other School employees knew that Mr. Alano was married to a former student, Julie Harker Alano, this meant that the School therefore “knew” that Mr. Alano had a history of engaging in inappropriate relationships with his students. (C.H. Brief, p. 14) This proposition makes little sense.

First, the undisputed evidence in the record clearly demonstrated that while Mr. Alano was indeed married to a former student, their romantic relationship began after Ms. Alano’s graduation from high school. Both Mr. and Mrs. Alano testified that absolutely nothing improper took place while they were in a teacher-student relationship. (App 36, Supp. App. 48)

Second, this is not the type of knowledge necessary to meet the applicable standard. In Chivers the Court discussed this precise issue. The student in that case sought to meet the knowledge requirement by presenting evidence of “unsubstantiated rumor of previous misconduct” by the teacher, and that the teacher “Gillespie was previously warned for communicating with a student, Sandy Price, via the internet” thus the school “should have known” about his habit of misconducting himself. *Id.*, 423 F.Supp. at 856. Judge Springmann found that under Indiana law this was insufficient to create a factual dispute precluding summary judgment. In doing so she summarized Indiana law noting that the type of evidence necessary to overcome summary judgment

would be evidence that “the defendants had engaged in prior incidents of known harassment.” *Id.*

The Plaintiff’s allegation of an unsubstantiated rumor of previous misconduct and her argument of an inadequate response to her own complaint do not support a claim for negligent retention and supervision of an employee who was known to be in the habit of misconducting himself. In the two cases cited by Chivers in support of her claim for negligent retention and supervision, the defendants had engaged in prior incidents of known harassment. In Chontos v. Rhea, 29 F.Supp. 2d 931 (N.D. Ind. 1998), by the time the incidents involving the plaintiff occurred, the harasser had established a pattern of behavior that was not addressed by the university, despite a previous warning to him that future behavior could result in being fired. *Id.* at 935-37 (noting that before the incident with the plaintiff, the defendant had gained a reputation for making females uncomfortable in his presence and patting them on the buttocks, stalked a female graduate student and physically assaulted her in her home, touched a high school girl on the buttocks then invited her to his office, and been the subject of special scheduling and furniture arrangements designed to diminish his opportunity to bother females).

In *Matheny v. Reid Hospital & Health Care Services, Inc.*, 2002 WL 655702, at *11 (S.D.Ind. Mar.12, 2002), an unpublished opinion, the court denied summary judgment on the plaintiff’s negligent retention claim when it found that the plaintiff raised genuine issues with respect to the appropriateness of the defendant’s response to her complaints of harassment, especially “in light of the multiple, prior complaints regarding [the alleged harasser’s] similar conduct.” In discussing the employer’s liability under Title VII, the court found that “[a] reasonable trier of fact could find that [the employer’s] response was inappropriate

given [the harasser's] history and [the employer's] knowledge that he had made inappropriate comments to other women as well as his recent unwelcome and inappropriate touching of [the plaintiff]." *Id.* at *8.

Chivers, 423 F.Supp. at 856. Since there were no prior complaints of sexual harassment against the teacher, Judge Springmann held that "Gillespie's conduct was not foreseeable, the Defendants cannot be held liable under the tort of negligent retention or supervision and Count II is dismissed." *Id.*

Under this standard, the mere fact that Mr. Alano was married to a former student is, as a matter of law, insufficient to constitute actual knowledge that Mr. Alano had a habit of misconducting himself with current students. This is particularly so when the undisputed evidence in the record is that there was never anything inappropriate or improper in the relationship between Mr. and Mrs. Alano while she was a student. See Gates v. Unified School Dist. No. 449 of Leavenworth County, Kan., 996 F.2d 1035 (19th Cir. 1993). The Gates case involved similar facts with a student seeking to hold the school liable for failing to respond to a consensual relationship between a teacher and a student. In Doe v. Benicia Unified School Dist., 206 F.Supp.2d 1048 (E.D.Cal. 2002) the court summarized the facts and the holding by the 10th Circuit in Gates:

The principal had previously noted in the teacher's evaluation that he should not travel to attend activities with students. *Id.* at 1039. **Further, the principal knew that the teacher married one of his former students when she turned 18 years of age.** *Id.* The superintendent also informed the principal of other "rumors or innuendo." *Id.* Finally, the principal knew that the assaulted student was infatuated with the teacher, and that the teacher encouraged her. *Id.* at 1042. However, the court determined that this evidence was insufficient to "support a finding that [the

principal] had any notice of sexual misconduct by [the teacher]" for purposes of establishing a constitutional violation. *Id.* at 1042.

Doe, 206 F.Supp.2d at 1054 *quoting* Gates, 996 F.2d at 139, 1042 (emphasis supplied).

Relying on the Gates decision, the court in Doe also granted the school summary judgment in a teacher/student sexual molestation claim finding there was no notice.

Based on the foregoing cases, C.H.'s argument that the District Court applied the wrong standard to the negligent hiring/retention/supervision claims is without legal support.

2. Negligent Hiring.

In addition to the "knew" issue, in her brief C.H. also specifically argues that the negligent hiring claim should have survived summary judgment based on the Indiana Court of Appeals decision in Interim Healthcare of Fort Wayne, Inc. v. Moyer, 746 N.E.2d 429, 436 (Ind.App. 2001). *See* C.H.'s Brief, p. 13-15.

In making this argument C.H. does not dispute that the School had a policy regarding reference and background checks and that it followed that policy. She also does not dispute that the School contacted Mr. Alano's former employers prior to hiring him and received a glowing evaluation from them. C.H. further does not dispute that the School personally contacted Mr. Alano's former principal, current friends, and other individuals, all of whom gave unqualified recommendations for Mr. Alano. Nor does she contend that any additional background checking would have revealed anything further. Instead, she argues that the School should have asked: "Did you or have you, had a sexual relationship with a former student; Did you have a sexual or physical

relationship with your teacher.” (C.H. Brief, p. 14) It is not entirely clear why asking or having these questions answered would have made any difference. It is undisputed that at the time he was hired Mr. Alano was required to sign a statement from the School inquiring whether he had been investigated, resigned, charged with or otherwise been involved with any misconduct including specifically “sexual abuse” or “sexual contact with another person.” (App, 32-33, Supp. App. 40) Mr. Alano signed this statement denying any such conduct. *Id.* Thus speculating on what could have been asked but was not is wholly irrelevant. The evidence is undisputed that he was indeed asked these questions at the time he was hired, and he denied any such conduct.

Under Moyer, in order to survive summary judgment, a plaintiff must present some evidence showing that the employer failed to take some affirmative act, such as checking references and the plaintiff must “come forward with contrary evidence about whether [the employer’s] purported failure to call certain recent employers led to the [plaintiffs’] injuries.” *Id.*, 746 N.E.2d at 436-437 (parenthetical supplied).

As noted above, and discussed in some detail in the factual portion of this brief, C.H. simply cannot meet either prong of Moyer. The type of evidence necessary to survive summary judgment involves causation, *i.e.* that had the employer checked the reference or taken some other action, it would have discovered something negative about the employee:

[T]he Moyers were required to come forward with contrary evidence about whether Interim’s purported failure to call certain recent employers led to the Moyers’ injuries. *See Warner Trucking, Inc. v. Carolina Cas. Ins. Co.*, 686 N.E.2d 102, 104 (Ind.1997). The Moyers did so by including two affidavits from employees of Your Friends and Neighbors, Inc., Baral’s

most recent employer. These former co-workers recounted several unusual incidents, including two deaths, involving Baral's care of patients. For instance, one individual with autism, having no history of seizures, suffered a seizure under Baral's sole care and later stated to the Baral's co-worker, "Michele not hit me so hard."

Id., 746 N.E.2d at 436-437 (Baker, J. concurring).

In the present case C.H. failed to present any evidence on the relevant issue. There is absolutely no evidence that the school failed to call or check a reference, indeed quite the opposite.⁷ Mr. Alano received what can only be called a "glowing" reference from his only prior school employer. (App. 27, Supp. App. 71-79) As a consequence, the District Court properly applied the relevant standard from Moyer in entering judgment in the School's favor on the negligent hiring claims.

E. The District Court properly entered summary judgment on the supplemental state law claims of *respondeat superior* and non-delegable duty as Indiana has specifically rejected a non-delegable duty in the School context, and the undisputed evidence showed that Mr. Alano, to the extent he may have acted, did so beyond the course and scope of his employment.

The District Court granted summary judgment on C.H.'s *respondeat superior* claims because "the Court concludes that Alano's actions were not furthering the School's interests and, consequently, were not within the scope of his employment;

⁷ This factor differentiates the present case from the language cited by the Plaintiffs in Moyer regarding jury questions. (C.H.'s Brief, p. 41-42) The negligent hiring issue in Moyer only became a jury question once it was demonstrated that the employer had failed to call a reference and that the reference would have provided adverse information. Under these circumstances the "extent of Interim's duty to inquire and whether Interim breached its duty are questions for a jury to determine." Moyer, 746 N.E.2d at 436.

therefore, the School is not vicariously liable for Alano's actions."⁸ (App. 14) The District Court rejected the non-delegable duty argument noting that this would "make the school strictly liable. This would be directly contrary to the notion that schools are not the insurers of the safety of children and are not strictly liable for injuries." *Id.*

1. Indiana Courts have clearly and unequivocally rejected the application of a non-delegable duty in the school context.

With respect to the non-delegable duty issue, C.H. argues that the "common carrier" exception creating a non-delegable duty recognized in Stropes v. Heritage House Childrens Ctr., 547 N.E.2d 244 (Ind. 1989) should extend to school children and schools. (C.H.'s Brief, p. 17-19) In making this argument, C.H. notes that "[a] review of recent case law does not suggest that this question has been answered." *Id.*, p. 18. With all due respect to C.H.'s counsel, this is simply untrue. Every case to address this issue has specifically held that Schools have not assumed a non-delegable duty to the children entrusted to their care. The leading case in this regard remains the Indiana Supreme Court's opinion in Miller v. Griesel, 308 N.E.2d 701 (Ind. 1974) where it held that the common law of this State recognizes a duty on the part of school personnel to exercise ordinary and reasonable care for the safety of the children under this authority.

⁸ The District Court also found that C.H. had made legally inconsistent allegations by trying to hold the School liable for Mr. Alano's actions under a *respondeat superior* theory while at the same time trying to hold Mr. Alano individually liable for his actions. "This dual pleading against both the School and Alano personally for the same actions is inconsistent with Indiana law that a plaintiff may not sue both a government employee in a personal capacity and the governmental entity for acts committed within the scope of employment." (App. 12; citations omitted) This argument is not addressed in C.H.'s Brief and provides independent grounds for affirming summary judgment on the *respondeat superior* claims.

... It should be emphasized here, however, that schools are not intended to be insurers of the safety of their pupils, nor are they strictly liable for any injuries that may occur to them." *Id.*, 308 N.E.2d 706-707.⁹

This Court specifically rejected the application of the non-delegable duty in the school context in Smith v. Metropolitan School Dist. of Perry Township, 128 F.3d 1014, 1029–1030 (7th Cir. 1997) noting that *respondeat superior* liability in this context effectively makes schools insurers of the safety of students contrary to settled Indiana law in that it “would create liability for the School District and School Board even if they acted without notice of the alleged harassment; even if they had no reason to know of the harassment; and even if they acted entirely reasonably. ‘[I]n virtually every case in which a teacher harasses, seduces, or sexually abuses a student,’ the teacher’s status as a teacher often enables the teacher to abuse the student, so liability would arise under § 219(2)(d) because the servant was ‘aided in accomplishing the tort by the existence of the agency relationship.’” *Id.*, 128 F.3d at 1029–1030.

⁹ The Indiana Supreme Court and the lower courts have continually reaffirmed this proposition. *See e.g.* Beckett v. Clinton Prairie School Corp., 504 N.E.2d 552, 554 (Ind. 1987) (“While expressly noting that schools are not intended to be insurers of the safety of their pupils, nor are they strictly liable for any injuries that may occur to them, this Court in *Miller* held that the appropriate standard is whether a defendant exercised his duty with the level of care of an ordinary prudent person under the same or similar circumstances.”); Mangold ex rel. Mangold v. Indiana Dept. of Natural Resources, 756 N.E.2d 970, 974 (Ind. 2001) (“[T]his Court emphasized that schools are neither insurers of their pupils’ safety nor strictly liable for any injuries that may occur to them.”) Doe v. Lafayette School Corporation, 846 N.E.2d 691, 698 (Ind.App. 2006) *trans. denied* (“However, we also emphasize that ‘schools are not intended to be insurers of the safety of their pupils, nor are they strictly liable for any injuries that may occur to them.’”); Wickey v. Sparks, 642 N.E.2d 262, 267 (Ind.App. 1994); Klobuchar v. Purdue University, 553 N.E.2d 169, 172 (Ind.App. 1990).

Both this Court and Indiana courts have clearly and unequivocally rejected the proposition of strict liability in the school context, and to the extent C.H. argues otherwise, she is simply wrong.

2. Indiana Courts have repeatedly granted summary judgment with respect to respondeat superior claims such as those presented by C.H. as sexual conduct with students is clearly outside the course and scope of employment of school teachers.

C.H. next argues that the District Court erred in granting summary judgment on the supplemental state law *respondeat superior* claim because, she argues, Indiana law makes the question of “[w]hether the employee’s conduct is within or outside the scope of their respective employment is an issue to be resolved by a jury.” (C.H.’s Brief, p. 15)

The first problem with this argument is that it is simply incorrect. Indeed the case cited by C.H. in support of this proposition, City of Fort Wayne v. Moore, 706 N.E.2d 604 (Ind.App. 1999) in fact granted summary judgment on a course and cope claim noting that notwithstanding the fact that the police officer used his police powers to effectuate a traffic stop, “it is apparent that Stanford’s conduct was sufficiently divorced in time, place and purpose from his employment duties so as not to impose liability upon the City.” *Id.*, 706 N.E.2d at 608. *See also* Dillman v. Great Dane Trailers, 649 N.E.2d 665, 668 (Ind.App. 1995).

The second problem involves the fact that the legal fiction that is the doctrine of *respondeat superior* has its most difficult conceptual moments where, as here, a plaintiff seeks to use it to impute liability to an employer for the criminal actions of an employee that have little or no association with the job for which the employee was hired other

than the fact that the job brought the employee into contact with the victim. This is particularly so where the theory is invoked to impose liability in the context of a sexual assault which, in almost all circumstances, can hardly be said to be “related to the service for which he was employed, and motivated to an extent by [his employer’s] interests.” Stropes, 547 N.E.2d at 249 (parenthetical supplied).

In Stropes a nursing home obtained summary judgment because the trial court found that “the act of committing a sexual assault was as a matter of law, outside the scope of Robert Griffin’s employment.” *Id.*, 547 N.E.2d at 246. The Indiana Court of Appeals affirmed. The Indiana Supreme Court overturned that decision rejecting “[a] blanket rule holding all sexual attacks outside the scope of employment” because such a rule “would draw an unprincipled distinction between such assaults and other types of crimes which employees may commit.” *Id.* Instead the Court looked to “how the employment relates in the context in which the commission of the wrongful act arose.” *Id.*, 547 N.E.2d at 249.

Applying this rule in the context of a sexual assault, the Court considered the fact that the employee who committed the assault was a nurse’s aide who was “authorized to undress David Stropes and to touch his genitals and other parts of his body when bathing him and changing his clothes.” Stropes, 547 N.E.2d at 249. Based upon the fact that the employee was authorized to undress and touch the victim’s nude body the Indiana Supreme Court found that “[t]he nature of the acts were, at the very least, sufficiently associated with Griffin’s authorized duties to escape dismissal on summary judgment.” *Id.* at 250.

Based on the distinction drawn in Stropes Indiana Courts (both State and Federal) have followed this bright line test in the context of sexual assault and molestation cases. On one side of the line are cases where the employee is authorized, as part of his job, to disrobe and/or physically touch the naked body of the victim as in Stropes. If the employee is authorized to undertake such acts and then goes beyond that limited authority to engage in clearly unauthorized and criminal sexual acts, summary judgment is inappropriate and the case goes to the jury on the issue of whether the “actions were ‘at least for a time, authorized by his employer, related to the service for which he was employed, and motivated to an extent by [his employer’s] interests.” Stropes, 547 N.E.2d at 250 quoting Gomez v. Adams, 462 N.E.2d 212, 223 (Ind.App. 1984). Cases on this side of the line include Stropes and Southport Little League v. Vaughn, 734 N.E.2d 261, 271 (Ind.App. 2000)(Little league equipment manager was responsible for “fitting the youth’s uniforms” and “was clearly authorized to assist the youths in dressing and undressing”, thus *respondeat superior* claim went to the jury.)

The Indiana Court of Appeals in Konkle v. Henson, 672 N.E.2d 450 (Ind.App. 1996) specifically acknowledged this line, noting that the key factor in Stropes surviving summary judgment was the fact that the employee’s “authorized acts ... involved touching the unclothed body of the patient.” *Id.* at 457.

On the other side of this line are cases where the employee is not authorized to disrobe the victim or touch the victim’s unclothed body. These cases include Doe v. Lafayette School Corporation, 846 N.E.2d 691, 701 (Ind.App. 2006)(granting summary

judgment on *respondeat superior* noting that, “simply because Cole used LSC’s equipment and facilities to initiate a relationship with Doe, his acts did not necessarily fall within his scope of employment.”); Konkle (summary judgment granted where minister gave a female parishioner a Bible and then sexually molested her as he had no authority to disrobe or touch her unclothed body); L.N.K. v. St. Mary’s Medical Center, 785 N.E.2d 303 (Ind.App. 2003)(when psychiatric patient was sexually molested by an aide during outpatient treatment, summary judgment granted on *respondeat superior* claim as aide had little authority over outpatient); Smith v. Metropolitan School Dist. of Perry Township, 128 F.3d 1014 (7th Cir. 1997)(summary judgment affirmed *respondeat superior* claim in relationship between teacher and student).

In the present case it is undisputed that Mr. Alano was never authorized to touch C.H. or any other students’ unclothed body or their private parts. Nor was he ever authorized to disrobe a student or himself. Indeed C.H. herself during her deposition admitted that he was not acting in the course and scope of his employment when he had sex with her:

- Q. Now, throughout the complaint, and I’m confused about this, throughout the complaint – an example of this occurs at Page 8. It states, if you look at Page 8, paragraph 7, “while performing his duties for the defendant and within the course and scope of his employment,” do you see that?
- A. Yes.
- Q. Are you contending that it’s within the course and scope of a teacher’s employment to have sex with students?
- A. No.
- Q. And, in fact, I suspect that’s why Paragraph 8 says Alano’s actions were outside the scope of his employment?
- A. Yes.

- Q. So far as you're concerned, all the actions he took were outside the scope of his employment?
- A. Yes.

(Supp. App. 25-26). Mr. Alano himself testified that it would never be part of a teacher's job in general or his job to "touch a student's either breasts or groin area," "disrobe a student," "kiss or fondle a student," "engage in oral sex with a student," "engage in intercourse with a student," "finger a student," "remove their own genitals and place it on a student's head," or to "give/receive oral sex with/from a student." (Supp. App. 49-50)

As a consequence of these factors the present case falls squarely within the second line of cases, L.N.K., Konkle, and Doe and the District Court did not err in relying on these cases to grant the School's motion for summary judgment on the *respondeat superior* claims.

C.H. invokes the Indiana Supreme Court's decision in Bushong v. Williamson, 790 N.E.2d 467 (Ind. 2003) in attempting to overcome the foregoing argument noting that "[t]he similarity of the facts in this case and Bushong therefore would preclude summary judgment" (C.H.'s Brief, p. 17) C.H.'s reliance on Bushong is misplaced as she overlooks a key distinguishing factor. In Bushong the parties agreed that the teacher was acting in the course and scope of his employment when he spanked the child on the legs and buttocks. "In opposition to Williamson's motion for summary judgment, the Bushongs tendered their own affidavits along with other evidentiary materials. However, other than insisting that Williamson's conduct was criminal, a point that is not dispositive, none of the materials raised a genuine issue of material fact

as to whether Williamson was acting in the scope of employment when he struck Jonathan. In essence the Bushongs conceded this point in their Notice of Tort Claims and supplemented this concession by their interrogatory answers.” *Id.*, 790 N.E.2d at 473-474.

In fact, Indiana Courts have specifically recognized that school teachers are authorized and acting within the scope of their duties when they administer corporal punishment to students as was done in Bushong. See e.g. State v. Fettig, 2008 Ind. App. LEXIS 724 (Ind.App. 2008)(noting that teachers have a statutory and common law right in Indiana to administer discipline to students including corporal punishment). Because the teacher was authorized to administer discipline and did so during class it is no surprise that the parties in Bushong agreed the teacher was acting in the course and scope of employment when administering this discipline. It is quite a stretch to argue that the present case involving what both C.H. and Mr. Alano acknowledge are clearly unauthorized acts¹⁰ is somehow analogous to Bushong which involved the clearly authorized act of student discipline.¹¹

¹⁰ In her Brief C.H. states that “[o]f course it goes without saying that battering a student or having non-consensual sex with a student is an unauthorized act.” (C.H.’s Brief, p. 16)

¹¹ It should also be noted that the Indiana Supreme Court has accepted transfer in the case of Barnett v. Clark, 877 N.E.2d 839 (Ind.App. 2007) with oral argument set for May 22, 2008. There is a significant chance that the Indiana Supreme Court will clarify the application of Stropes in this decision.

The District Court correctly determined, as a matter of law, that Mr. Alano's actions were outside the course and scope of his employment with the School such that the *respondeat superior* doctrine did not apply.

VII. CONCLUSION

The District Court properly entered summary judgment in the Defendant-Appellee's favor, and the Plaintiffs-Appellants have failed to meet their burden of demonstrating that this decision was reversible error.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE
PROCEDURE 32(a)(7)(B)**

I hereby certify, pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B), that the foregoing brief complies with the type volume limitations of Rule 32(a)(7)(B). The brief contains 11,288 words based upon the count of the word processing system used to prepare the brief, MS Word XP.

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief of Defendants-Appellees were mailed, via United States Mail, to Sarah Graziano, Esq. and John D. Hensley, Esq. of Hensley & Associates, 426 East New York Street, Indianapolis, Indiana 46202, on this _____ day of May, 2008.

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