App. 1

United States Court of Appeals
for the Eighth Circuit

No. 20-1772

KD, Parent, Natural Guardian and Next Friend of minor LD; JD, Parent, Natural Guardian and Next Friend of minor LD

Plaintiffs - Appellants

v.

Douglas County School District No. 001, also known as Omaha Public Schools; Daniel Bartels

Defendants - Appellees

Joe Doe; Jane Doe

Defendants

Brian Robeson

Defendant - Appellee

Appeal from United States District Court
for the District of Nebraska - Omaha

Submitted: March 18, 2021
Filed: June 16, 2021

Before SHEPHERD, ERICKSON, and KOBES, Circuit Judges.

SHEPHERD, Circuit Judge.

This case arises from the sexual abuse of LD (a 13-year-old, female 7th-grade student) by her male Douglas County Nebraska Public School District teacher, Brian Robeson. After Robeson was convicted of first-degree sexual assault, KD and JD, LD's parents, brought this action against the Douglas County Nebraska Public School District (the District); Robeson; Daniel Bartels, the school principal; and Joe and Jane Doe. The district court[1] granted summary judgment in favor of the District and Bartels; entered a default judgment against Robeson; denied KD and JD's request for a jury trial on the issue of damages against Robeson; and awarded damages of $1,249,540.41 against Robeson. KD and JD now appeal: the district court's grant of summary judgment; the order denying their request for a jury trial on the issue of damages against Robeson; and the amount of damages. Having jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

I.

From August 14, 2013, to May 22, 2015, LD attended 7th and 8th grade at Alfonza Davis Middle School in Douglas County. During her 7th-grade year,

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[1] The Honorable Laurie Smith Camp, United States District Judge for the District of Nebraska, now deceased.

LD was a student in Robeson's algebra and "Take Flight" classes.

In April 2014, a school staff member notified Bartels that Robeson was mentoring LD, one-on-one, in his classroom. All mentorship relationships within the District were facilitated by the TeamMates program, and this program required same-sex mentor-mentee pairings. At this time, Bartels informed Robeson that Robeson could not mentor LD without permission from LD's parents and without acceptance into the TeamMates program. Robeson subsequently emailed JD, LD's mother, providing updates about his mentorship of LD and requesting that JD and KD, LD's father, sign the requisite TeamMates program paperwork permitting Robeson to continue mentoring LD into LD's 8th grade year. Robeson included Bartels on this email. At the beginning of LD's 8th grade year (in the fall of 2014), Bartels asked Robeson if Robeson had been accepted into the TeamMates program, to which Robeson responded that he had been accepted. At some point, LD's parents gave consent for Robeson to have lunchtime meetings with LD, and Bartels instructed Robeson that all meetings with LD were to take place in the administrative offices.

In late April 2014, Robeson attended a school-sponsored, weekend field trip. While on that field trip, Robeson emailed Bartels and attached photographs of himself with students. LD was included in those photographs. Below the email containing photographs were pages of dialogue between Robeson and LD in which Robeson expressed his affection for LD. Robeson

used language such as "sweetheart" and "Sunshine," and Robeson told LD, "I've never had a student mean this much to me." However, at this time, Bartels only noted the field trip photographs and did not notice the email chain containing dialogue between Robeson and LD.

In the fall of 2014, Jennie Meyer, a school employee, noticed LD (then an 8th grader) and several friends visiting the 7th-grade floor on which Robeson taught. Meyer reported this to the administration. Bartels responded by contacting JD, LD's mother, to let her know that LD was visiting Robeson's floor. On a separate occasion, Meyer found LD in Robeson's classroom, alone with Robeson and crying. At this time, Meyer made a second report to the administration. In response, the assistant principal visited Robeson's classroom and asked Robeson why he was alone with LD and why LD was crying. Robeson indicated that everything was okay, and LD continued to her next class. In November 2014, Bartels noticed LD and Robeson alone in Robeson's classroom eating lunch. Bartels stopped and asked the pair what they were doing, to which they responded that they were conducting a mentoring session. Bartels reminded them that all mentoring sessions were to take place in the administrative offices. Later that afternoon, Bartels met with Robeson individually and again reminded him that any mentoring sessions must take place in the administrative offices.

Later that school year, the school counselor told Bartels that a coach saw Robeson tie LD's shoe in the school hallway with other coaches and students

present. When Bartels confronted Robeson about this, Robeson denied tying LD's shoe. Then, in March 2015, Bartels found an anonymous note in his school mailbox which read: "I find it curious that LD is absent on the same day as Mr. Robeson." Bartels showed this note to the assistant principal, but because neither administrator could determine who the note's author was, Bartels threw the note away. Nevertheless, Bartels called KD to determine the reason for LD's absence. KD indicated that LD was ill and at home for the day.

In April 2015, Bartels received a report from Chantalle Galbraith, a paraprofessional at the school, indicating that Robeson had grabbed LD's phone from the back pocket of her pants in the presence of other students and coaches. Bartels had recently hosted a professional development program with the school's faculty and staff in which he discussed the impropriety of possessing student property. When Galbraith voiced concern about Robeson grabbing LD's phone, she indicated that this was a violation of the professional development lesson Bartels had recently taught. When Bartels asked Robeson about this, Robeson admitted that he had grabbed LD's phone; Bartels warned Robeson against engaging in this type of behavior with students. Later that spring, Galbraith found LD and Robeson eating together in Robeson's classroom with the lights dimmed. After Galbraith reported this to Bartels, Bartels immediately dispatched the school's security officer to the classroom. However, when the officer arrived, the classroom appeared to be empty. Regardless, Bartels later met with Robeson, admonished

Robeson for this behavior, and counseled Robeson regarding appropriate interactions with students.

In May 2015, a teacher and the school counselor copied Bartels on an email chain in which they expressed their concern about the amount of time that Robeson was spending with LD. The counselor agreed to call KD and JD to offer additional resources for difficulties LD was experiencing with her friendships and to alert them of the attention Robeson was giving LD. That same month, the teacher also sent a photo of Robeson hugging another student for a prolonged period of time. In response, Bartels thanked the teacher and indicated that if she believed Robeson was engaging in inappropriate sexual conduct with students, she should report Robeson to Child Protective Services (CPS). The teacher reported Robeson to CPS, and in her report, she expressed concern about Robeson's behavior toward LD. Specifically, the teacher described witnessing Robeson "poking [LD] in the stomach in a hallway as well as touching her shoulder as if he was giving her a massage." CPS indicated that it would forward the report to the Omaha Police Department. The District's human resources department instructed Bartels to meet with Robeson to discuss the expectations of Robeson's employment, including his behavior towards students. Bartels met with Robeson in June of 2015. Then, in December 2015, the District was notified of Robeson's arrest for his sexual assault of LD. At that time, the District terminated Robeson's employment contract, deferred its then-ongoing investigation of Robeson (for conduct unrelated to LD) to the police

department, and delivered a letter to Robeson evidencing the termination of his employment.

KD and JD (Appellants) filed a complaint with the district court, naming the District, Bartels, Robeson, and Joe and Jane Doe as defendants. Appellants brought six claims: (1) a 20 U.S.C. § 1681 (Title IX) claim against the District; (2) a 42 U.S.C. § 1983 claim against Bartels, Robeson, and Joe and Jane Doe; (3) a Nebraska Political Subdivisions Tort Claims Act claim against the District, Bartels, and Joe and Jane Doe; (4) a battery claim against Robeson; (5) an intentional infliction of emotional distress claim against Robeson; (6) and an aiding and abetting intentional infliction of emotional distress claim against Bartels and Joe and Jane Doe.[2] Appellants included a jury trial demand. After discovery, the District and Bartels each moved for summary judgment, and the district court granted both motions. Robeson failed to enter his appearance in the case, and the district court entered a default judgment against Robeson. The district court held a damages hearing, absent a jury, and awarded Appellants $1,249,540.41 in damages against Robeson.

II.

Appellants first argue that the district court erred in granting the District's and Bartels's summary

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[2] The district court dismissed Appellants' claims against the Doe defendants because Appellants failed to name those defendants. Appellants do not appeal this dismissal, and therefore we do not address Appellants' claims against the Doe defendants.

judgment motions. "We review *de novo* a district court order granting summary judgment, viewing the evidence in the light most favorable to the non-moving party, and drawing all reasonable inferences in their favor." K.C. v. Mayo, 983 F.3d 365, 368 (8th Cir. 2020). Summary judgment is appropriate where no genuine dispute of material fact exists. See Turner v. XTO Energy, Inc., 989 F.3d 625, 627 (8th Cir. 2021); Fed. R. Civ. P. 56(a). "To avoid summary judgment, the non-movant must make a sufficient showing on every essential element of its claim on which it bears the burden of proof." P.H. v. Sch. Dist. of Kan. City, 265 F.3d 653, 658 (8th Cir. 2001) (citation omitted).

A.

Title IX, subject to several exceptions which are inapplicable here, prohibits discrimination on the basis of sex in educational programs or activities receiving Federal financial assistance. 20 U.S.C. § 1681. Discrimination on the basis of sex encompasses sexual harassment of a student by a teacher. Du Bois v. Bd. of Regents of Univ. of Minn., 987 F.3d 1199, 1203 (8th Cir. 2021) (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281-82 (1998)). Further, Title IX creates a private right of action that the United States Supreme Court and this Court have long recognized. See, e.g., Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 639 (1999); Wolfe v. Fayetteville Sch. Dist., 648 F.3d 860, 864 (8th Cir. 2011). However:

> a private plaintiff is not entitled to damages under Title IX for a teacher's sexual harassment unless an official of the grant recipient with authority to address harassment complaints had actual notice of the teacher's alleged misconduct, and the official's inadequate response amounted to deliberate indifference to the discrimination.

Cox v. Sugg, 484 F.3d 1062, 1067 (8th Cir. 2007) (citing Gebser, 524 U.S. at 29092).[3]

Relatedly, a supervisory school administrator may be held liable for a Title IX violation pursuant to 42 U.S.C. § 1983. K.C., 983 F.3d at 368. "Where, as here, the complaint involves allegations against school officials brought under both Title IX and § 1983, 'our [C]ourt has held that an official in these circumstances must have "actual notice" of the alleged "sexual harassment" or "sexual abuse" to meet the standard for liability.' " Id. (citations omitted); see also Doe v. Flaherty, 623 F.3d 577, 584 (8th Cir. 2010) ("Where both the Title IX and the § 1983 action allege discrimination by the same policymaking official and are premised on the same facts, Cox[, 484 F.3d 1062] adopted comparable notice standards to prevent the § 1983 action from trumping 'the Supreme Court's careful crafting of the implied statutory damage action under Title IX.' . . . Accordingly, our [C]ourt has held that an official in

[3] The Supreme Court has previously identified school principals as persons with the authority to address harassment complaints, see, e.g., Plamp v. Mitchell Sch. Dist., 565 F.3d 450, 457 (8th Cir. 2009), and here the parties do not dispute that Bartels had such authority.

these circumstances must have 'actual notice' of the alleged 'sexual harassment' or 'sexual abuse.' " (citation omitted)).

The actual notice standard is quite onerous, and favoritism towards the student; inordinate time spent with the student; unprofessional conduct towards the student; and vague complaints about the teacher's behavior toward the student (which do not *expressly* allege sexual abuse of that student) fall short of creating actual notice. See, e.g., Gebser, 524 U.S. at 291 (finding that "a complaint from parents of other students charging only that [the teacher] had made inappropriate comments during class . . . was plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student"); Flaherty, 623 F.3d at 585 (finding that "inappropriate" and "suggestive" text messages could not impute actual notice because the messages "did not go so far as to suggest actual sexual conduct or sexual abuse"); P.H., 265 F.3d at 659 (explaining that without reports of sexual contact or suspected sexual contact between teacher and student, the teacher's "conduct of spending too much time with [the student] causing [the student] to be absent from or tardy to classes" did not establish actual notice of ongoing sexual abuse). Therefore, in order to survive the District's and Bartels's motions for summary judgment, Appellants needed to present "a genuine issue as to whether [Bartels] had actual notice of sexual abuse or harassment

and failed to adequately respond." See K.C., 983 F.3d at 368.[4]

Although Robeson's abuse of LD was unquestionably despicable, Appellants failed to present any evidence that Bartels had actual notice of that abuse, making summary judgment appropriate. See id. Bartels received complaints from faculty and staff members about LD visiting Robeson's floor; LD alone with Robeson in his classroom at lunch time; Robeson tying LD's shoelace in the hallway; Robeson and LD being absent from school on the same day; Robeson grabbing LD's phone out of the back pocket of her pants; and the amount of time that Robeson and LD were spending together. However, none of these complaints alleged sexual abuse. See, e.g., Flaherty, 623 F.3d at 585. Further, even when Bartels "investigated" complaints that he received, his investigation did not actually place him on notice of Robeson's sexual abuse of LD. For example, in response to a complaint that LD and Robeson were eating lunch in Robeson's classroom with the lights dimmed, Bartels sent the school's security officer to the classroom. When the officer arrived, however, the classroom appeared to be empty. Similarly, in response to a complaint that Robeson and LD were absent from

[4] Appellants support their Title IX argument with the contention that because Bartels had actual notice, the District also had actual notice. Appellants do not contend that other District employees with the authority to address harassment complaints had actual notice. As a result, our inquiry for Appellants' Title IX and § 1983 claims is a singular one: whether a genuine issue of fact exists as to whether Bartels had actual notice of Robeson's misconduct. See K.C., 983 F.3d at 368.

school on the same day, Bartels contacted LD's father, who assured Bartels that LD was ill and at home.

Appellants also point to the District's personnel policies, directing us to a specific provision which requires a "prompt, adequate, reliable, thorough, and impartial investigation" where the District "knows or reasonably should know about possible harassment." However, to find the District and Bartels liable under Title IX and § 1983, respectively, based on such a provision would allow the District to transform this Court's and the Supreme Court's actual notice standard into one of mere negligence (i.e., "knows or reasonably should know") simply through its policies. Doe v. Dardanelle Sch. Dist., 928 F.3d 722, 725 (8th Cir. 2019) (explaining that such claims cannot be predicated on mere negligence). After a careful review of the record, we find that the record fails to support Appellants' claim that Bartels had actual notice of Robeson's abuse of LD, and we need not reach the deliberate indifference prong. Therefore, summary judgment in favor of the District (on Appellants' Title IX claim) and in favor of Bartels (on Appellants' § 1983 claim) was appropriate.[5]

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[5] The district court found that Appellants' claim against Bartels was against him in his official, rather than individual, capacity. We agree. "This [C]ourt has held that, in order to sue a public official in his or her individual capacity, a plaintiff must expressly and unambiguously state so in the pleadings, otherwise, it will be assumed that the defendant is sued only in his or her official capacity." Alexander v. Hedback, 718 F.3d 762, 766 n.4 (8th Cir. 2013) (citation omitted). Here, Appellants did not "expressly and unambiguously" name Bartels in his individual capacity; instead,

B.

Next, the district court did not err by granting summary judgment in favor of the District and Bartels on Appellants' Nebraska Political Subdivisions Tort Claims Act (the PSTCA) claim. "Under the PSTCA, a political subdivision has no liability for the torts of its officers, agents, or employees, 'except to the extent, and only to the extent, provided by the [PSTCA].' " Edwards v. Douglas Cnty., 953 N.W.2d 744, 750 (Neb. 2021) (alteration in original) (citation omitted). In Nebraska, "[t]he [PSTCA] is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees," Jessen v. Malhotra, 665 N.W.2d 586, 590 (Neb. 2003), because it "allows a limited waiver of a political subdivision's sovereign immunity with respect to certain, but not all, types of tort actions," Rutledge v. City of Kimball, 935 N.W.2d 746, 750 (Neb. 2019). However, the PSTCA sets forth a list of claims that are "excepted" from the PSTCA's waiver of sovereign immunity, and where a plaintiff attempts to bring one of those claims against a political subdivision, that political subdivision is immune from suit. Rutledge, 935 N.W.2d at 750. One exception, which the district court found was present in this case, is

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Appellants' complaint identifies Bartels as "an administrator" who "at all relevant times" was "act[ing] as Principal." R. Doc. 1, at 5. Further, "because Title IX only prohibits discrimination by federal grant recipients, a supervisory school official may not be sued in his individual capacity, either directly under Title IX or under § 1983 based upon a violation of Title IX." Cox, 484 F.3d at 1066. Therefore, we treat Appellants' § 1983 claim against Bartels as being against Bartels in his official capacity.

"sometimes referred to as the 'intentional torts exception.'" Id. (citation omitted). Whether this "intentional torts" exception applies is a jurisdictional question which we must decide before moving to the nonjurisdictional merits of Appellants' PSTCA claim. Lambert v. Lincoln Pub. Schs., 945 N.W.2d 84, 89 (Neb. 2020).[6]

"[W]hen a tort claim against the government seeks to recover damages for personal injury or death stemming from an assault, the claim necessarily 'arises out of assault' and is barred by the intentional tort [exception] under the PSTCA." Edwards, 953 N.W.2d at 756. In Edwards, the plaintiff brought a claim against the county for its failure to promptly dispatch first responders via its 911 service which, the plaintiff alleged, allowed her to be sexually assaulted. See generally id. The Nebraska Supreme Court held that the county was immune because despite the plaintiff's "artful pleading," her sexual assault was an intentional tort to which the PSTCA's intentional tort exception applied. Id. at 757. Similarly, here, the District and Bartels are immune from tort liability under the PSTCA because Appellants' claim against them arises out of Robeson's sexual assault of LD. This sexual assault, like the assault examined in Edwards, is an intentional tort to which the PSTCA's intentional tort

[6] The district court found that the "discretionary function" exception also applied because the District's and Bartels's decisions on which Appellants' claims are premised were discretionary functions. R. Doc. 170, at 25. However, because we find that the "intentional torts" exception applies here, rendering the District and Bartels immune from suit, we need not address this second possible exception.

exception applies. Therefore, summary judgment in favor of the District and of Bartels was appropriate.

C.

Finally, the district court did not err in granting summary judgment in favor of Bartels on Appellants' aiding and abetting intentional infliction of emotional distress claim. Under Nebraska law, to establish a claim for intentional infliction of emotional distress, a plaintiff must demonstrate:

> (1) intentional or reckless conduct (2) that was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.

Roth v. Wiese, 716 N.W.2d 419, 431 (Neb. 2006). Further, provided there is an underlying, actionable tort, see, e.g., Salem Grain Co. v. Consol. Grain & Barge Co., 900 N.W.2d 909, 924 (Neb. 2017), civil abetting liability arises for "one who counsels, commands, directs, advises, assists, or aids and abets another individual in commission of a wrongful act or tort," see, e.g., Bergman v. Anderson, 411 N.W.2d 336, 340 (Neb. 1987). The Nebraska Supreme Court employs the same lenient aiding and abetting standard in civil tort claims as it does in criminal actions: "mere encouragement or assistance" is sufficient to impose liability. Bergman, 411 N.W.2d at 341.

Appellants brought an intentional infliction of emotional distress claim against Robeson, and after Robeson failed to enter an appearance or otherwise defend the claim, the district court entered a default judgment against him. We accept as true, without deciding, Appellants' claim that Robeson committed the tort of intentional infliction of emotional distress. See, e.g., Salem Grain Co., 900 N.W.2d at 924 (requiring an underlying, actionable tort). However, Appellants have presented no evidence that Bartels "encourage[d] or assist[ed]" Robeson's abuse of LD. See Bergman, 411 N.W.2d at 341. To the contrary, Bartels met with Robeson to express his concern about Robeson's behavior; required Robeson and LD to meet in the administrative offices, rather than in Robeson's classroom, for all mentoring sessions; contacted LD's mother when he learned that, as an 8th grader, LD was visiting the 7th-grade floor on which Robeson taught; contacted LD's father when he learned that LD and Robeson were absent on the same day; directed a school security officer to visit Robeson's classroom after receiving a report that LD and Robeson were eating in the room with the lights dimmed; and directed concerned faculty members to CPS after advising them that, if they suspected abuse, they should report that abuse. Nothing in the record, even when viewed in the light most favorable to Appellants, indicates that Bartels encouraged or assisted Robeson in inflicting emotional distress on LD. Therefore, the district court did not err in granting summary judgment.

III.

Appellants moved for a default judgment after Robeson failed to file an answer or other responsive pleading in the case, and in that motion, Appellants renewed their jury demand. After entering a default judgment against Robeson, the district court held a hearing on the issue of damages without empaneling a jury. The district court then awarded damages totaling $1,249,540.41 to Appellants. Appellants now argue that the district court erred by denying their jury demand on the issue of damages. "Whether a party has a right to trial by jury in federal court is a question of law subject to de novo review." Ind. Lumberrnens Mut. Ins. Co. v. Timberland Pallet & Lumber Co., 195 F.3d 368, 374 (8th Cir. 1999).

Appellants argue that they had a right to a jury trial on the issue of damages following the default judgment under both Federal Rule of Civil Procedure 55(b)(2) and the Seventh Amendment. However, Rule 55(b)(2) merely preserves "any federal statutory right to a jury trial," Fed. R. Civ. P. 55(b)(2), and Appellants do not direct this Court to any federal statute creating such a right. Moreover, we have previously explained that "[i]t is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly." Stephenson v. El-Batrawi, 524 F.3d 907, 915 (8th Cir. 2008) (citation omitted). Rule 55(b)(2) entrusts the district court with the discretion to decide if a hearing on

the issue of damages is necessary following default judgment, and nothing in Rule 55(b)(2) mandates that a jury determine the amount of damages, should the district court elect to hold a hearing. See Fed. R. Civ. P. 55(b)(2).

Appellants also argue that the Seventh Amendment supplies this right, explaining that their battery claim against Robeson is of the type of claim heard by a jury at common law. See U.S. Const. amend. VII (preserving the right to trial by jury for "[s]uits at common law, where the value in controversy shall exceed twenty dollars"). Even accepting that the underlying battery claim is of the type heard by a jury at common law, we find that nothing in the Seventh Amendment's language provides for a right to a jury trial on the issue of damages following a default judgment. Appellants direct us to Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433 (1830), and Brown v. Van Braam, 3 U.S. (3 Dall.) 344 (1797), in which the Supreme Court analyzed the Seventh Amendment, elaborating on its parameters. However, we find nothing in this case law to suggest that a Seventh Amendment right to a jury on the issue of damages following a default judgment exists.

Further, our sister circuits have uniformly found that no right to a jury trial on the amount of damages following entry of default judgment exists. See, e.g., Olcott v. Del. Flood Co., 327 F.3d 1115, 1124 (10th Cir. 2003); Sells v. Berry, 24 F. App'x 568, 571-72 (7th Cir. 2001) (per curiam); Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc., 982 F.2d 686, 692 n.15 (1st Cir. 1993); Dierschke v. O'Cheskey (In re

Dierschke), 975 F.2d 181, 185 (5th Cir. 1992); Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1414 (9th Cir. 1990); cf. KCI USA, Inc. v. Healthcare Essentials, Inc., 801 F. App'x 928, 936-37 (6th Cir. 2020) (cautioning that default judgments infringe upon a litigant's Seventh Amendment right and thus should be entered sparingly); Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 503-04 (4th Cir. 1977) (same).

Therefore, after a searching review of the Federal Rules of Civil Procedure, the Seventh Amendment, the Supreme Court's and this Court's jurisprudence, and our sister circuits' decisions on this issue, we join many of those circuits in finding that no right to a jury trial on the issue of damages following a default judgment exists. And because we find that this right does not exist, we also find that the district court did not err.

IV.

Finally, Appellants allege that the district court erred by awarding $1,249,540.41 in damages because, according to Appellants, that award was "inadequate." Appellants' Br. 51. The amount of damages awarded is a finding of fact, so our review of that award in a non jury case is subject to a "clearly erroneous" standard of review. See Gonzalez v. United States, 681 F.3d 949, 952 (8th Cir. 2012); see also Webb v. Arresting Officers, 749 F.2d 500, 501 (8th Cir. 1984) ("[W]e continue to adhere to the view that the inadequacy or excessiveness of an award is basically a matter for the trial court. We have intervened only in those rare situations where we are pressed to conclude that there is 'plain injustice' or

a 'monstrous' or 'shocking' result." (citation omitted)). This is an exacting standard, and we will not reverse the district court unless we are "left with the definite and firm conviction that a mistake has been committed." United States v. Dock, 967 F.3d 903, 905 (8th Cir. 2020) (citation omitted).

Appellants have not offered anything that leaves us with a "definite and firm conviction" that the district court made a mistake in its damage award. See id. Appellants rely primarily on out-of-circuit and unpublished cases, and they do not cite anything in the record indicating the award was inadequate. Appellants point to evidence that LD will need therapy throughout her life, as well as to the "risks for difficulties in adult relationships, parent-child relationships, and other interactions" LD will face in adulthood. Appellants' Br. 51. We accept Appellants' position that Robeson's abuse may have a lasting effect on LD, but absent any explanation as to how or why the district court's damage award was clearly erroneous, we will not upend that award. Therefore, we find that the district court did not err. Additionally, for the reasons discussed supra Section III., we do not find persuasive Appellants' argument that the district court erred because the issue of damages "should have been determined by a jury." Appellants' Br. 51.

V.

For the reasons discussed above, we affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KD, PARENT, NATURAL GUARDIAN AND NEXT FRIEND OF LD; AND JD, PARENT, NATURAL GUARDIAN AND NEXT FRIEND OF LD; **Plaintiffs,** **vs.** **DOUGLAS COUNTY SCHOOL DISTRICT NO. 001, DANIEL BARTELS, BRIAN ROBESON, JOE DOE, AND JANE DOE,** **Defendants.**	**8:17CV285** **MEMORANDUM AND ORDER** (Filed Nov. 1, 2019)

This matter is before the Court on the Motions for Summary Judgment filed by Defendant Douglas County Public School District No. 001, a/k/a Omaha Public Schools (OPS), ECF No. 124, and Defendant Daniel Bartels, ECF No. 132. Also before the Court are Plaintiffs' Motion in Limine, ECF No. 148, and Defendants' Joint Objection to the Magistrate Judge's Preliminary Pretrial Order, ECF No. 167. The Motions for Summary Judgment will be granted and the Motion in Limine and Objection will be denied as moot.

BACKGROUND

The following facts are those stated in the parties' briefs, supported by pinpoint citations to admissible evidence in the record, in compliance with NECivR 56.1[1] and Federal Rule of Civil Procedure 56. The Court has also drawn from the parties' joint statement of uncontroverted facts.

I. The Parties

Plaintiff LD was a student in her 7th and 8th Grade years in OPS at Alfonza Davis Middle School ("Davis Middle School") from August 14, 2013, through May 22, 2015. The 2013-14 school year was the first year that Davis Middle School was open. LD attended Marian High School beginning in the fall semester 2015 as a freshman and graduated with honors in May 2019. At Marian High School, LD was a member of the National Honor Society, Mu Alpha Theta Math Society, the Quill & Scroll journalism honorary society, and

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[1] *See* NECivR 56.1(b)(1):

> The party opposing a summary judgment motion should include in its brief a concise response to the moving party's statement of material facts. The response should address each numbered paragraph in the movant's statement and, in the case of any disagreement, contain pinpoint references to affidavits, pleadings, discovery responses, deposition testimony (by page and line), or other materials upon which the opposing party relies. Properly referenced material facts in the movant's statement are considered admitted unless controverted in the opposing party's response.

participated in various clubs and sports. Plaintiffs KD and JD are LD's parents. MD is LD's older sister and was three grades ahead of LD in school. ND is LD's younger sister.

OPS is a political subdivision and school district. Daniel Bartels is an administrator employed by OPS and during the relevant time was Principal of Davis Middle School.

Defendant Brian Robeson was formerly employed by OPS and taught at Davis Middle School. OPS interviewed Robeson and received satisfactory written references for him before he was hired. Robeson disclosed on his application that he had a DUI, which did not disqualify him from teaching, because he was not being hired to drive students.[2] Before hiring Robeson, OPS checked the child abuse registry, which showed no entries for Robeson, and checked for criminal background through a private agency. By 2006, Robeson had a Master of Science Degree in Elementary Education with a concentration in math and science.

Robeson taught from August 2003 to 2013 at OPS's Prairie Wind Elementary School and received satisfactory evaluations. He taught sixth grade for several years. In 2013, he transferred from Prairie Wind Elementary to Davis Middle School, because Prairie Wind Elementary was eliminating its 6th Grade. After

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[2] At OPS, criminal convictions were not a bar to employment, but were considered only in relation to specific job requirements. A DUI was not an automatic basis for termination of a teacher as long as he or she fulfilled the duties of the job.

transferring, Robeson taught 7th Grade pre-algebra and algebra, and a "Take Flight Class." Bartels did not know Robeson until he was assigned to teach at Davis Middle School. Robeson's classroom was Room 150, which was the first classroom in the 7th Grade wing of the school. In 2013-14, Robeson taught algebra to LD. She was also in Robeson's "Take Flight Class." Robeson was not LD's teacher in 2014-15 when she was in 8th Grade.

II. Overview of OPS Policies

The OPS Board of Education (BOE) has the power to hire, suspend and terminate teachers. Neb. Rev. Stat. § 79-827. In order to exercise its rights and duties, the BOE prepared and published policies and regulations covering organization, policies, and procedures of the school system. OPS had policies in effect for the 2013-15 school years which prohibited sexual harassment and provided a complaint system for the reporting of sexual harassment.

During the relevant time, no formal OPS policies prohibited teachers from hugging students or being alone in a classroom with a student. Yet OPS had specific policies related to employee-to-student harassment, teacher boundaries, reporting of suspected child abuse, and educator misconduct. These policies were included in several publications distributed to principals, teachers, and other employees.

OPS had a specific policy regarding teacher boundaries, independent of the employee-to-student

harassment policy, including guidelines for electronic communication, romantic relationships, gift giving, special treatment, and other signs of grooming. The policy made clear that students cannot consent to such conduct. In the 2013-14 school year, OPS implemented district-wide training for all staff regarding prevention of adult sexual misconduct and reporting of child abuse and neglect. OPS refreshed the training annually.

The OPS Department of Student and Community Services periodically issued "Intercommunications Memos" to Principals, Assistant Principals, Deans of Students, Counselors, and others regarding "Reporting of Abuse and Neglect," which also included procedures for reporting harassment and abuse. Recipients were instructed to review the reporting procedures with all staff. For the 2014-15 and 2015-16 school years, OPS distributed a "Principal Packet" to all district principals. The Principal Packet included a memo with flow charts for the reporting of harassment. Principals were to review the procedures in a staff meeting at the beginning of each school year.

The Davis Middle School Student Handbooks for 2013-14 and 2014-15 included a definition of sexual harassment. The Handbooks also described the process for reporting sexual harassment by an employee or visitor, the options and process for reporting abuse and neglect, and the phone number for the Assistant Superintendent for Student and Family Services. The policies applied to all school-sponsored activities on or off campus, and included an explanation of

confidentiality, a prohibition of retaliation, and an appeal process.

The parties agree that the OPS superintendent had primary responsibility for enforcing school policies for teachers. The superintendent delegated that responsibility to OPS Human Resources and school principals, depending on the situation and the context. Principals enforced policies with the support of Human Resources. Bartels considered it his job to investigate reports of misconduct and to use his discretion and skills as a principal to determine whether reports were substantiated.

III. Reports of Robeson's Behavior During the 2013-14 School Year

In August 2013, Counselor Jen Walker reported to Bartels that staff members, herself included, witnessed Robeson hugging many students, male and female. Bartels Dep. 57:24–58:16, 58:20–62:1, ECF No. 128-1. Bartels responded by coaching Robeson on proper interactions with students, including a physical demonstration of how to use a side hug and high five. Bartels Dep. 40:19 – 41:5, ECF No. 128-1.

Later in the 2013-14 school year, teacher Christine Jurgens spoke to Bartels about Robeson giving prolonged hugs to students, not including LD. Jurgens stated that she and Bartels together once observed Robeson give a prolonged hug. Jurgens Dep. 50:24–53:7, ECF No. 128-5. Bartels responded by having a

discussion with Robeson which stopped the hugging for a few days.

LD transferred from the Westside School District to OPS for her 7th Grade year. She had been reluctant to attend Davis Middle School because she would miss her friends. She was randomly assigned to Robeson's "Take Flight Class" in 7th Grade and was transferred from pre-algebra to algebra as a result of placement testing and her parents' request. Robeson was the only algebra teacher at Davis Middle School. Robeson knew LD and her family because they attended the same church.

On April 23, 2014, Bartels was informed that Robeson was mentoring LD in his classroom. Bartels told Robeson to stop immediately and explained that Robeson needed to seek permission from LD's parents. Robeson told Bartels that LD's parents wanted Robeson to mentor her. At some point, LD's parents gave permission for Robeson to have lunchtime meetings with LD outside the classroom. The lunches were to take place somewhere in the administrative office area.

IV. Reports of Robeson's Behavior During the 2014-15 School Year

Early in September 2014, Instructional Facilitator Jennie Meyer reported that LD, now in 8th Grade, and several of her friends were going to the 7th Grade floor. Later in the fall of 2014, Meyer reported that she saw LD in Robeson's classroom with the door open. Because

LD was crying, Assistant Principal Amy Ellis went to the classroom and inquired why LD was at that location and why she was crying. Robeson responded that LD was okay and on her way to class. Ellis suggested that LD see a counselor, but LD went on to her class.

On October 20, 2014, LD spoke to Walker about the way counselor Chris Johnson looked at her. Later, Walker spoke to Bartels and to LD's mother to address the situation. Bartels visited with Johnson.

In November 2014, Bartels walked by Robeson's classroom and observed Robeson and LD eating lunch in his classroom with the door open. Bartels asked them what they were doing, and both responded they were having lunch and doing their mentoring. Bartels reminded them that mentoring needed to take place in the administrative office. Later that day, Bartels met with Robeson and reminded him that it was his responsibility as a mentor to make sure mentoring occurred in the office, and not his classroom. Later that semester, Bartels gave permission for the mentoring to take place in the conference room next to the principal's office, provided that the door was open and both Robeson and LD could be viewed from the hallway.

Sometime in late winter of the 2014-15 school year, likely February 2015, Walker, informed Bartels that a coach[3] saw Robeson tie LD's shoe in the hallway by the girl's locker room when other athletes and

[3] The coach did not want to be identified and Walker did not give the coach's name.

coaches were present. Bartels asked Robeson about the incident and he denied it happened.

On March 4, 2015, an unsigned handwritten note was left in Bartels's mailbox. It said, paraphrased, "I find it curious that LD is absent on the same day as Mr. Robeson." Bartels Dep. 82:25–83:18, ECF No. 128-1. Bartels discussed the note with Assistant Principal Amy Ellis but they could not identify the author from the handwriting. The note was discarded. On the same day, Bartels called LD's father to verify LD's absence. LD's father informed Bartels that LD was home ill.

In April 2015, paraprofessional Chantalle Galbraith reported that she saw Robeson grab LD's phone from her back pocket. Galbraith was concerned because staff had just received training about possessing student property. Bartels asked Robeson to explain what happened. Robeson's report was consistent with Galbraith's. Bartels warned Robeson not to engage in that type of conduct.

Later in the spring of 2015, Galbraith saw Robeson hug[4] LD in the hallway and saw him eating lunch with LD in his classroom, with the door closed and lights dim. In response, Bartels instructed the security

[4] Plaintiffs' statement of this incident implies that Gailbraith saw LD and Robeson hugging in Robeson's darkened classroom. Defendants do not dispute this account in their joint reply but the Plaintiffs' description is unsupported. The lone reference to this fact is "SOF 127" but Statement of Fact 127 is inconsistent with Plaintiffs' characterization. It states that Gailbraith witnessed a hug outside the classroom. Gailbrath's deposition does not support Plaintiffs' statement.

guard to walk by Robeson's classroom. The security guard reported that no one was in the classroom. Nevertheless, Bartels advised Robeson that his conduct was inappropriate and counseled him about proper interactions with students.

On May 1, 2015, Rebecca Stichler, special education resource teacher, emailed Walker, stating: "I am concerned with [LD] and the amount of time that she is spending with Mr. Robeson, her mentor. I am thinking if she needs this much support from him, she should be receiving support or help beside what he can offer her. I meant to catch you earlier." ECF No. 127-21; Bartels Dep. 253:24 – 254:7, ECF No. 128-1. Walker responded later that day, stating: "I agree that is a concern. I have worked with her a little bit on some friendship issues but have not seen her lately. I will call [LD's] family and offer some additional resources." ECF No. 127-21. Bartels was copied on Walker's response. Walker also informed Bartels that she had noticed LD in Robeson's classroom and in the hallway outside that room very frequently in the week before May 1, 2015. Bartels understood that Walker contacted LD's parents to discuss the activity. Bartels Dep. 22:12–23:1, 42:14–19, ECF No. 128-1.

Friday, May 22, 2015, was the last day of school for students and the day before Memorial Day weekend. On that day, Stichler observed Robeson touch female students and saw him give a "full frontal" hug, chest to chest, with both arms around a female student's body, for approximately 60 seconds. Robeson also kissed a female student on her head. Stichler reported her

observations to Bartels. That night, Bartels emailed Stichler, thanking her for sharing her concerns and stated "In addition, if you believe there is wrong doing you probably need to call cps [Child Protective Services] let me know if you do so I can do what I need to do with the information. ECF Nos. 127-23, 127-24. Stichler contacted CPS about the hug and also reported "other behaviors I have seen this school year between [Robeson] and one female student in particular, [LD]. . . . I have observed him poking her in the stomach in a hallway as well as touching her shoulder as if he was giving her a massage. The two spend quite a bit of time together." ECF No. 127-28. CPS told Stichler they would forward her report to the Omaha Police Department (OPD).

On May 26, 2015, Bartels spoke to Robeson and informed him that he had a picture of him hugging a student taken on May 22, 2015. Robeson said he was going to talk to Stichler about it. Bartels advised Robeson not to talk to Stichler. Robeson told Bartels that the student was crying, and she wanted a hug from him after school. Bartels told him that was inappropriate, and he needed to give a side hug if any hug at all. Later that day, Bartels notified Robeson that the incident had been reported to OPS Human Resources. Bartels also admonished Robeson for attempting to confront Stichler.

OPS Human Resources investigated Robeson for the May 2015 hugging incident. That department concluded that Robeson showed inappropriate behavior and needed to have expectations set for him. OPS did

not contact the student involved or any parents. OPD and CPS decided not to investigate the incident. OPS Human Resources instructed Bartels to complete an employee consultation conference with Robeson and set specific expectations. Bartels conducted the conference on June 2, 2015.

V. Reports During the 2015 School Year and Robeson's Arrest

On December 5, 2015, Jurgens reported to Bartels that Robeson appeared to be sending excessive emails to a former student, MB, a current 9th grader at Northwest High School, using OPS email. Bartels called Shawn Hall at OPS Human Resources and reported that a teacher had seen many emails between Robeson and a former student. On December 7, 2015, Shawn Hall had the OPS IT department pull emails between Robeson and the former student and reviewed them. On December 8, 2015, Hall informed Bartels there would be an HR response to the emails and that he would be working with Chief Human Resources Officer Charles Wakefield.

Hall reviewed over 100 emails between Robeson and MB from August 18 through November 17, 2015. The emails were sent during the school day. Most were mundane, but Robeson used several terms that Human Resources deemed inappropriate including "sweetheart" or "atta baby." Robeson also stated that he missed MB, and said, "I am here for you whenever and however you need me to be . . . always" and "[y]ou

need more entertainment in your life." On or about December 11, 2015, Hall and Kevin Johnson met with Robeson and his union representative to discuss the emails as a violation of Board Policy. Robeson was instructed to cease sending such emails.

The second quarter of the 2015-16 school year ended December 18, 2015, and the winter break began on December 21, 2015. OPS Human Resources was in the process of considering further disciplinary action against Robeson when, on December 29, 2015, OPS was notified of Robeson's arrest for sexual assault of LD. On or about December 30, 2015, OPS cancelled Robeson's teaching contract. On the same day, OPS hand-delivered a letter informing Robeson of the recommendation of cancellation and informing him of his rights. After the arrest, OPS deferred its investigation of Robeson to OPD and supported them in their investigation.

On January 1, 2016, Bartels printed an email dated April 21, 2014, from Robeson. When printing out the email, Bartels discovered five pages of dialogue between Robeson and LD. Bartels did not notice the dialogue at the time he initially received the email because he viewed it on his phone and thought it contained only two pictures from a field trip Robeson took with students on Saturday, April 21, 2014. Bartels received the email from Robeson in response to Bartels's request for pictures of the field trip.

VI. Robeson's Sexual Harassment of LD

LD hid her relationship with Robeson and was not aware of anyone else having any knowledge of their sexual relationship. LD did not report Robeson to anyone at Davis Middle School. Neither LD nor her parents ever contacted Bartels regarding any concerns about Robeson.

The physical relationship between Robeson and LD began in September 2014 when they had their first kiss at a creek near LD's home on a teacher work day when students were out of school. Most of the sexual activity between Robeson and LD occurred during LD's 8th Grade year. The two would meet during lunch several times a week in Robeson's classroom. Much of the activity occurred in a corner of the classroom near a cupboard that was tall enough to obscure LD if someone came into the classroom.

The sexual activity continued into the summer between LD's 8th Grade year and her high school freshman year, and into fall of 2015, after she entered high school. To hide her relationship with Robeson, LD used multiple email addresses and often changed passwords so her mother did not know them. LD deleted messages right after she sent them. LD hid her relationship with Robeson from her sisters and from people at school.

Robeson's conduct toward LD was discovered on December 27, 2015, when he was caught inside the residence of KD and JD. This led to Robeson's arrest and conviction for first degree sexual assault. Robeson is

presently serving a 40-year sentence of incarceration in the Nebraska Penal and Correctional Complex.

STANDARD OF REVIEW

"Summary judgment is proper 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Cottrell v. Am. Family Mut. Ins. Co., S.I.*, 930 F.3d 969, 971 (8th Cir. 2019) (quoting *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc)); *see also* Fed. R. Civ. P. 56(c) ("'A party asserting the fact cannot be or is genuinely disputed must support the assertion by: citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations[,] . . . admissions, interrogatory answers, or other materials. . . .'"). A genuine issue of material fact arises "if each party has supplied some evidence that is sufficient for a reasonable jury to return a verdict for the nonmoving party". *Cottrell*, at 930 F.3d at 971 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"The moving party bears the burden of showing 'that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law.'" *Vandewarker v. Cont'l Res., Inc.*, 917 F.3d 626, 629 (8th Cir. 2019) (quoting Fed. R. Civ. P. 56(a)). The moving party can satisfy its burden in two ways: (1) by producing evidence negating an essential element of the

nonparty's case; or (2) "by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *Bedford v. Doe*, 880 F.3d 993, 996 (8th Cir. 2018) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

In response to the moving party's showing, the nonmoving party must produce evidentiary materials of "specific facts showing the presence of a genuine issue for trial." *Id.* (quoting *Torgerson*, 643 F.3d at 1042). "The nonmoving party must do more than raise some metaphysical doubt about the material facts and cannot rest on mere denials or allegations." *Id.* (citing *Torgerson*, 643 F.3d at 1042; *Gibson v. Am. Greetings Corp.*, 670 F.3d 844, 853 (8th Cir. 2012)); *see also Dick v. Dickinson State Univ.*, 826 F.3d 1054, 1061 (8th Cir. 2016) ("[T]here must be more than 'the mere existence of *some* alleged factual dispute' between the parties in order to overcome summary judgment.") (emphasis in original) (quoting *Vacca v. Viacom Broad. of Mo., Inc.*, 875 F.2d 1337, 1339 (8th Cir. 1989)).

"At summary judgment, the court's function is not to weigh the evidence and determine the truth of the matter itself, but to determine whether there is a genuine issue for trial." *Smith v. Kilgore*, 926 F.3d 479, 483 (8th Cir. 2019) (quoting *Schilf v. Eli Lilly & Co.*, 687 F.3d 947, 948 (8th Cir. 2012)); *see also Bedford*, 880 F.3d at 996 ("A principal purpose of the summary-judgment procedure 'is to isolate and dispose of factually unsupported claims or defenses. . . .' ") (quoting *Celotex*, 477 U.S. at 323–24). Accordingly, in reviewing a motion for summary judgment, the Court will "view[ ] the record

in the light most favorable to [the nonmoving party] and draw[ ] all reasonable inferences in [that party's] favor." *Hanson ex rel. Layton v. Best*, 915 F.3d 543, 547 (8th Cir. 2019) (quoting *Krout v. Goemmer*, 583 F.3d 557, 564 (8th Cir. 2009)). " 'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial,' and summary judgment is appropriate." *Vandewarker*, 917 F.3d at 629 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

DISCUSSION

Plaintiffs assert six claims for relief: (1) violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et. seq.* ("Title IX") against OPS; (2) violation of constitutional rights under 42 U.S.C. § 1983 against Bartels and Robeson; (3) negligence against OPS and Bartels under the Nebraska Political Subdivisions Tort Claims Act ("NPSTCA"), Neb. Rev. Stat. § 13-901 *et. seq.*; (4) battery against Robeson; (5) intentional infliction of emotional distress against Robeson; and (6) aiding and abetting intentional infliction of emotional distress against Bartels. The matters before the Court are the Title IX claim against OPS; the § 1983 claims against Bartels; the negligence claim against OPS and Bartels; and the aiding and abetting claim against Bartels.[5]

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[5] Plaintiffs' claims against the Doe Defendants will be dismissed because Plaintiffs have not filed an amended complaint

I. Title IX

The Supreme Court has recognized an implied private right of action under Title IX and "a school district can be held liable in damages in cases involving a teacher's sexual harassment of a student." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280-81 (1998) (citation omitted). Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a). To succeed on their Title IX claim, Plaintiffs must prove that OPS was "(1) deliberately indifferent (2) to known acts of discrimination (3) which occur[red] under its control." *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057 (8th Cir. 2017) (citing *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. 2003)). Here, the third element is met because a teacher who sexually harasses a student is deemed to be under the school district's control. *See Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643 (1999). However, a school district is not liable for "damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference." *Gebser*, 524 U.S. at 292-293. Plaintiffs have not produced enough evidence to raise a genuine issue of material fact as to the elements of actual knowledge and deliberate indifference.

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identifying the Doe Defendants. Robeson has not entered an appearance.

A. Actual Knowledge of Acts of Harassment

The "actual knowledge" element has a "credibility component" and a "severity component." *See Thomas v. Bd. of Trustees of the Nebraska State Colleges*, No. 8:12-CV-412, 2015 WL 4546712, at *10 (D. Neb. July 28, 2015), aff'd, 667 F. App'x 560 (8th Cir. 2016). Under the credibility component, actual knowledge of harassment cannot be established by rumors, familiar behavior, prior investigations, and vague complaints. *See Doe v. Flaherty*, 623 F.3d 577, 585 (8th Cir. 2010); *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 457 (8th Cir. 2009); *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 780 (8th Cir. 2001).

In *Doe v. Flaherty*, the Eighth Circuit granted summary judgment to the school, finding insufficient evidence of actual knowledge of a sexual relationship between a teacher and student. 623 F.3d at 585-586. A minor student (Doe) engaged in a sexual relationship with the school's basketball coach (Smith). *Id.* at 580. School administrators knew of previous parental complaints that Smith sent inappropriate text messages to female students and that he specifically sent messages to Doe.[6] *Id.* at 585. The superintendent also learned that Doe may have had a crush on Smith and spent time with Smith in the gym. *Id.* at 581, 585. The school

[6] The text messages included the statements "Are you drunk yet?" and "OMG you look good today." *Id.* at 585. Even though there was some dispute as to whether the teacher, Smith, sent the messages at issue, the court concluded that even the most suggestive texts failed to provide notice of sexual conduct or abuse. *Id.*

principal also was told that "something was going on" with Doe and Smith. *Id.* at 585.

The court concluded that this evidence was insufficient to suggest a substantial risk of sexual misconduct. *Id.* The content of the messages did not suggest sexual conduct or sexual abuse. *Id.* The "vague inquiry" about "something" going on was insufficient to give actual notice to the principal of Smith's sexual abuse. *Id.* None of the evidence implied physical contact between Smith and Doe, and a reasonable investigation uncovered no evidence to substantiate the suspicions. *Id.* Thus, the court concluded that "[g]iven the stringent standard for supervisory liability in this context, we conclude that no reasonable jury could find actual notice on those alleged facts." *Id.*; *see also Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 780 (8th Cir. 2001) (no actual knowledge where school district "was aware of rumors, investigations, and student statements, but did not possess any conclusive proof" of actual molestation while employed).

Similarly, in *P.H. v. Sch. Dist. of Kansas City, Missouri*, 265 F.3d 653, 662 (8th Cir. 2001), a teacher (Hopkins) and minor student (P.H.) had a two-year sexual relationship, both on and off school grounds. *Id.* at 662. Other teachers complained to school administrators that Hopkins was spending an inordinate amount of time with P.H., resulting in absences, tardiness, and failing grades. *Id.* at 659, 662. The school also received complaints that Hopkins showed favoritism to some students, including P.H. *Id.* at 662-63. When the principal confronted Hopkins about the complaints,

Hopkins explained that P.H. was involved in many of the activities he oversaw, so he naturally spent more time with her than other students. *Id.* P.H. also hid the relationship and did not complain about sexual misconduct until the relationship ended. *Id.* at 660. The court found that, while Hopkins's actions and excessive time spent with P.H. were "cause for concern," *id.* at 659, the evidence was insufficient to establish actual knowledge of sexual misconduct under Title IX. *Id.* at 663.

Here, Plaintiffs claim Bartels and OPS had actual knowledge of Robeson's sexual misconduct based on 14 individual complaints. Some of those complaints, however, did not involve LD. For example, Plaintiffs allege that in 2013 and 2014, several teachers observed Robeson hugging male and female students, some for prolonged periods of time; and in February 2015, paraprofessional Keri McCoy reported to Bartels that she saw girls congregating near Robeson's classroom. None of these reports involved LD and they were not sufficient to give actual notice of sexual harassment. Other complaints were not reported to Bartels or OPS. For example, in April 2014, Robeson participated in a Saturday field trip to the Millard Airport with his Take Flight Class students. There, he kissed LD's forehead while they were participating in a group hug with several female students. LD Dep. 168:3-17, ECF No. 127-2. At a Glo Run activity in May 2014, LD's mother witnessed Robeson pick LD up, throw her onto his shoulder, and cross a finish line. KD Dep. 87:14-88:6, ECF No. 127-33. These complaints did not provide actual

notice of sexual harassment because there is no evidence they were reported to Bartels or any other OPS official.

According to Plaintiffs, Bartels received specific reports about the following instances of Robeson's behavior toward LD.

- In April 2014, Bartels learned Robeson was mentoring LD in his classroom during lunch breaks.
- On several occasions in September 2014, instructional facilitator Jennie Meyer observed LD leave the 8th Grade floor to meet Robeson in his classroom during passing periods.
- In February 2015, staff reported to Bartels that Robeson tied LD's shoelace in the hallway near the girl's locker room.
- On March 4, 2015, Bartels received an unsigned, handwritten note that read, "I find it curious that LD is absent on the same day as Mr. Robeson."
- On May 1, 2015, special education resource teacher Rebecca Stichler emailed school counselor Jennifer Walker stating she was concerned with the amount of time LD spent with Robeson.

None of these reports or complaints gave actual notice of sexual abuse. Like the evidence in *Flaherty* and *P.H.*, these complaints did not suggest there was physical contact between Robeson and LD. Like the "vague inquiry" in *Flaherty*, the unsigned, unsubstantiated note about a curious observation was insufficient to confer actual notice. Like the facts in *P.H.*, complaints about excessive amounts of time or

favoritism are insufficient to confer actual notice. And like the victim in *P.H.*, LD hid her relationship about Robeson and did not report sexual misconduct until Robeson was arrested. While Robeson's actions and excessive attention were cause for concern, the evidence was insufficient to establish actual knowledge of sexual misconduct for purposes of Title IX.

Plaintiffs also suggest that Bartels had notice of the relationship between LD and Robeson due to Robeson's email of April 21, 2014. Bartels asked Robeson to send photos of a field trip, and Robeson complied. Attached to the photos were several pages of text messages between Robeson and LD. In the messages, Robeson lamented that he would not move grades with LD; he spoke of their "relationship;" and he told her that he planned to see her at least once a week in the next school year. While Bartels admitted that the messages would be cause for alarm, it is undisputed that Bartels did not see the messages when Robeson sent the email and did not read them until after Robeson had been arrested. Moreover, although the messages were highly inappropriate, like the inappropriate messages in *Flaherty*, the content of the messages did not describe sexual conduct or abuse. Accordingly, the unread messages were insufficient to convey actual knowledge.

B. Deliberate Indifference

A response to reports of actual harassment demonstrates deliberate indifference only when the

response is clearly unreasonable. *Davis*, 526 U.S. at 648; *see also Gebser*, 524 U.S. at 290 (equating deliberate indifference standard under Title IX to deliberate indifference standard under 28 U.S.C. § 1983). Deliberate indifference is "stringent standard of fault that cannot be predicated upon mere negligence." *Flaherty*, 623 F.3d at 584 (citing *Shrum*, 249 F.3d at 780) (internal quotation marks omitted).

When assessing deliberate indifference under Title IX, courts must examine the adequacy of the response in light of the "seriousness and credibility of the compliant that puts school officials on notice." *Doe v. Gooden*, 214 F.3d 952, 955 (8th Cir. 2000). "Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference." *Doe on Behalf of Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998). A response is not deliberately indifferent unless it amounts to "an official decision by [school officials] not to remedy the violation." *Gebser*, 524 U.S. at 290. For example, in *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 610 (8th Cir. 1999), OPS, through one of its principals, became aware of a sexual relationship between a teacher and student. The court concluded that OPS and the principal did not act with deliberate indifference because they did not "turn a blind eye and do nothing." *Id.* Instead, they investigated the allegations and initiated termination proceedings "once they obtained conclusive proof of that relationship." *Id.* Accordingly, OPS and the principal were entitled to judgment as a matter of law. *Id.*

Similarly, in this case, OPS and Bartels did not turn a blind eye to the allegations against Robeson. When Galbraith reported that she saw Robeson grab LD's phone from her back pocket, Bartels responded by investigating and warning Robeson not to engage in that type of conduct. Bartels Dep. 105:6-107:3, ECF No. 128-1. When Galbraith witnessed Robeson hug[7] LD in the hallway and saw Robeson eating lunch with LD in his classroom, with the door closed and lights dim, Bartels responded by investigating whether LD and Robeson were in the classroom. Although no one was in the classroom at the time of the security check, Bartels advised Robeson that such conduct was inappropriate. In light of the facts he knew at the time, Bartels's response was not deliberately indifferent.

Bartels also did not act with deliberate indifference to generalized reports of Robeson's relationship with LD. When Stichler expressed concern via email to Walker about the amount of time Robeson spent with LD, Bartels was copied on Walker's response that she would contact LD's parents to discuss the activity. Bartels Dep. 22:12 – 23:1, 42:14–19, ECF No. 128-1.

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[7] Plaintiffs' statement of this incident implies that Gailbraith saw LD and Robeson hugging in Robeson's darkened classroom. Defendants do not dispute this account in their joint reply but the Plaintiffs' description is unsupported. The lone factual reference to this fact is "SOF 127" but Statement of Fact 127 is inconsistent with Plaintiffs' characterization. It states that Gailbraith witnessed a hug outside the classroom. Gailbrath's deposition does not support Plaintiffs' statement.

Bartels received notice of Stichler and Walker's concerns and of their plans to resolve them.

When Stichler observed Robeson inappropriately touching female students and giving a hug to a female student, Bartels advised Stichler to consider contacting child protective services. Stichler contacted CPS, and CPS declined to investigate. OPS responded by requiring Robeson to go through counseling and discipline. Based on facts known at the time, the response was not deliberately indifferent.

In sum, there is no evidence that Bartels or OPS knew the nature of Robeson's misconduct or responded with deliberate indifference. Accordingly, OPS is entitled to judgment as a matter of law on Plaintiffs' Title IX claims.

II. Claims Against Bartels Under § 1983

Suits against school officials in their official capacity are treated as suits against the school district itself. *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 609 (8th Cir. 1999). "[I]n order to sue a public official in his or her individual capacity, a plaintiff must expressly and unambiguously state so in the pleadings, otherwise, it will be assumed that the defendant is sued only in his or her official capacity." *Alexander v. Hedback*, 718 F.3d 762, 766 n.4 (8th Cir. 2013) (*citing Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999)).

Plaintiffs' § 1983 claims no not expressly or unambiguously state that Bartels is sued in his individual capacity. Plaintiffs' second claim alleges Bartels violated LD's constitutional rights to due process, including the "right to be free from deliberate indifference" of Bartels and others "about reports of sexual harassment by a public school teacher against a student based on her gender." Complaint ¶¶ 20.4, 50, ECF No. 1. In paragraph 52, Plaintiffs "request relief as authorized by 42 U.S.C. §§ 1983, 1988" and "seek general and special damages against the individuals sued." However, Plaintiffs fail to expressly indicate, in either the caption or elsewhere, whether Bartels is being sued in his individual capacity.

Even if the Complaint could be construed as a suit against Bartels in his individual capacity, the § 1983 claim must be dismissed. Under Eighth Circuit precedent, "[a] supervisory school official may not be sued in his individual capacity, either directly under Title IX or under § 1983 based upon a violation of Title IX." *Cox v. Sugg*, 484 F.3d 1062, 1066 (8th Cir. 2007); *see also Jenkins v. Univ. of Minnesota*, 131 F. Supp. 3d 860, 878 (D. Minn. 2015), *aff'd*, 838 F.3d 938 (8th Cir. 2016). Although pled under § 1983, the Complaint relies expressly on Title IX's standard of proof. *See* Complaint ¶¶ 20.1, 20.4, 23, ECF No. 1 (alleging violations under § 1983 based on "deliberate indifference by public school administrators about reports of sexual harassment."). Further, because Plaintiffs' § 1983 claims are based on the alleged Title IX violations, they must be examined under the same standard as Title IX. *See Doe*

v. Flaherty, 623 F.3d 577, 583 (8th Cir. 2010). Thus, Plaintiffs' § 1983 claims must be dismissed for the same reasons that their Title IX claims will be dismissed.

III. Political Subdivisions Tort Claims Act

The Nebraska Political Subdivisions Tort Claims Act (NPSTCA), Neb. Rev. St. § 13-901 *et seq.*, waives immunity of political subdivisions, in part, for negligent acts of their employees. *Doe v. Omaha Pub. Sch. Dist.*, 727 N.W.2d 447, 453 (Neb. 2007). Political subdivisions retain their sovereign immunity with respect to several listed exceptions in § 13-910. "If a political subdivision proves that a plaintiff's claim comes within an exception pursuant to § 13-910, then the claim fails based on sovereign immunity, and the political subdivision is not liable. *Omaha Pub. Sch. Dist.*, 727 N.W.2d at 454. Two exceptions bar Plaintiffs' claims in this case: the intentional torts exception and the discretionary function exception.

A. Intentional Torts Exception

Public employers do not waive immunity for claims "arising out of" intentional torts, including assault or battery. *See* § 13-910(7). Plaintiffs seek to avoid the intentional tort exception by pleading their negligence claims as claims for negligent supervision and retention. In analyzing statutory language from the Nebraska State Tort Claims Act, Neb. Rev. Stat. § 81-8,219, materially identical to § 13-910(7), the

Nebraska Supreme Court stated that "[w]here the plaintiff's tort claim is based on the mere fact of government employment (such as a respondeat superior claim) or on the employment relationship between the intentional tort-feasor and the government (such as a negligent supervision or negligent hiring claim), the exception . . . applies and the State is immune from suit." *Johnson v. State*, 700 N.W.2d 620, 625 (Neb. 2005) (internal citation omitted). To permit otherwise, would "frustrate the purposes of the exception." *Id.* (quoting *Sheridan v. United States*, 487 U.S. 392, 406–07 (1988) (Kennedy, J., concurring in judgment)).

Although pled as claims for negligent supervision and retention, Plaintiffs' negligence claims arise out of Robeson's sexual assault. Plaintiffs' primary allegations are that OPS failed to recognize signs that Robeson was a sexual predator, and his continued employment allowed him to engage in a sexual relationship with a minor student. OPS's liability in this matter is based on the employment relationship between Robeson and OPS. Plaintiffs' claims regarding LD's sexual assault therefore arise out of the employment relationship between Robeson and OPS and are barred by the NPSTCA.

B. Discretionary Function Exception

Under the discretionary function exception, "a plaintiff may not recover for a claim 'based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of

the political subdivision or an employee of the political subdivision, whether or not the discretion is abused.'" *Larson by Larson v. Miller*, 76 F.3d 1446, 1456 (8th Cir. 1996) (quoting Neb. Rev. Stat. § 13-910(2)). "The purpose of the discretionary function exception is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Doe v. Omaha Public School Dist.*, 727 N.W.2d 447, 456-57 (Neb. 2007). The discretionary function exception applies to "basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions." *Id.* at 457. Nebraska courts use a two-step analysis when determining the applicability of the discretionary function exception. *Id.* at 457. The court first must consider whether the action is a matter of choice for the employee. *Id.* If the court concludes the action involves an element of judgment, the court then determines "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.*

Applying Nebraska law, the court in *Larson* concluded that decisions to "investigate, hire, fire, and retain" employees are generally discretionary decisions, and held a school district's decision to relocate and then terminate an employee that allegedly sexually abused a student fell within the discretionary function exception to the PSTCA. 76 F.3d at 1457. The Eighth Circuit recognized that an official's duty to report under the Nebraska child abuse-reporting statute was discretionary, not ministerial. *Id.* The court reasoned

that whether "'reasonable cause' exists within the meaning of the statute requires an exercise of discretion and personal judgment, which takes the matter out of the realm of a ministerial act." *Id.* (quoting Neb. Rev. Stat. § 28-711); *see also K.B. v. Waddle*, 764 F.3d 821, 825 (8th Cir. 2014) (stating that duty under child abuse-reporting statute was discretionary and noting an official's exercise of poor judgment still does not negate discretionary nature of act).

The decisions of OPS and Bartels that led to Plaintiffs' claims were discretionary functions. The undisputed facts show that OPS delegated responsibility for enforcing school policies to principals, depending on the situation and context. Bartels used his discretion to evaluate each situation reported, to decide what investigation would occur, and to respond with any discipline warranted. He and other OPS administrators were required to make choices, using their judgment, and such discretionary functions are not to be second guessed through the medium of tort under the NPSTCA.

IV. Aiding and Abetting Intentional Infliction of Emotional Distress

Plaintiffs allege that Bartels aided and abetted Robeson in intentionally inflicting emotional distress on LD. To the extent such a claim is not barred by the NPSTCA, Plaintiffs have failed to show that Bartels aided or abetted Robeson's actions. Under Nebraska law, the standard for civil aiding and abetting is the

same as the standard for criminal aiding and abetting. Generally, "one who counsels, commands, directs, advises, assists, or aids and abets another individual in the commission of a wrongful act or tort is responsible to the injured party for the entire loss or damage." *Bergman v. Anderson*, 411 N.W.2d 336, 340 (Neb. 1987) (approving civil aiding and abetting jury instructions adapted from jury instructions meant for criminal aiding and abetting). "Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that the accused wishes to bring about, in furtherance of a common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed." *State v. Foster*, 242 N.W.2d 876, 879 (Neb. 1976).

Here, no facts suggest that Bartels ever intentionally encouraged or intentionally helped Robeson inflict emotional distress on LD. Accordingly, the claim for aiding and abetting intentional infliction of emotional distress will be dismissed.

CONCLUSION

The Plaintiffs have not come forward with evidence raising any genuine issues of material fact as to whether Bartels or OPS were aware of the nature of Robeson's sexual misconduct. Nor have Plaintiffs presented evidence that Bartels or OPS were indifferent to what they knew. Finally, OPS and Bartels are not liable under Nebraska tort law.

IT IS ORDERED:

1. The Motions for Summary Judgment filed by Defendant Douglas County Public School District No. 001, a/k/a Omaha Public Schools (OPS), ECF No. 124, and Defendant Daniel Bartels, ECF No. 132, are granted;

2. All claims against the Doe Defendants, OPS, and Daniel Bartels are dismissed, with prejudice,

3. All other pending motions and objections are denied as moot; and

4. The Clerk of Court is directed to remove the Doe Defendants, OPS, and Bartels from the case caption.

Dated this 1st day of November 2019.

BY THE COURT:

s/Laurie Smith Camp
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KD, Parent, Natural Guardian and Next Friend of LD; and JD, Parent, Natural Guardian and Next Friend of LD; **Plaintiffs,** **vs.** **BRIAN ROBESON** **Defendant.**	**8:17CV285** **MEMORANDUM AND ORDER** (Filed Feb. 20, 2020)

This matter is before the Court on the Plaintiffs' Motion for Default Judgment, ECF No. 176. The Motion will be granted as to liability and the Court will confer with Plaintiffs' counsel to schedule a hearing before the Court on the issue of damages.

BACKGROUND

Plaintiffs filed this action on August 2, 2017, against Defendants Douglas County Public School District No. 001, a/k/a Omaha Public Schools (OPS), Daniel Bartels, and Brian Robeson. ECF No. 1. Summonses were issued August 3, 2017. ECF No. 8, Page ID 59. Robeson was served with a summons and a return of service was filed on August 9, 2017. ECF No. 12 Page ID 65. Proof of service on Robeson was filed with this Court on August 9, 2017. The Court dismissed OPS and Bartels on November 1, 2020. Though Robeson

gave a deposition at the Lincoln Correctional Center, he failed to answer or otherwise plead.

Robeson was formerly employed by OPS. From August 2003 to 2013, he was assigned to OPS's Prairie Wind Elementary School, teaching sixth grade for several of those years. In 2013, he transferred to Davis Middle School, because Prairie Wind Elementary was eliminating its 6th Grade. After transferring, Robeson taught 7th Grade pre-algebra and algebra, and "Take Flight Class." In 2013-14, Robeson taught algebra to LD. She was also in Robeson's "Take Flight Class." Robeson was not LD's teacher in 2014-15 when she was in 8th Grade.

Robeson began a sexual relationship with LD in September 2014 which continued into the summer between LD's 8th Grade year and her high school freshman year. Robeson's conduct was discovered on December 27, 2015, when he was caught inside the residence of KD and JD. This led to Robeson's arrest and conviction for first degree sexual assault. Robeson is presently serving a 40-year sentence in the Nebraska Penal and Correctional Complex.

As a result of Robeson's sexual assault of LD, LD suffered several injuries requiring medical care. LD suffered physical harm and psychological injury. Her psychological injury includes post-traumatic stress disorder (PTSD); damage to her ability to trust and carry on healthy, intimate relationships; interference with normal brain development; and permanent depression and anxiety. As a result of her injuries, she

has suffered special damages including expenses for physical medical examinations, psychological examinations, psychiatric examinations, and therapy. Plaintiffs expect these treatments to be required for the rest of LD's life. KD and JD have also sustained general damages for intentionally inflicted emotional distress.

STANDARD OF REVIEW

"The Federal Rules of Civil Procedure commit the entry of a default judgment against a party to the sound discretion of the trial court." *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653, 661 (8th Cir. 2015) (quoting *FTC v. Packers Brand Meats, Inc.*, 562 F.2d 9, 10 (8th Cir. 1977)) (per curiam). It is "appropriate for a district court to enter a default judgment when a party fails to appropriately respond in a timely manner." *Marshall v. Baggett*, 616 F.3d 849, 852 (8th Cir. 2010) (citing *Inman v. Am. Home Furniture Placement, Inc.*, 120 F.3d 117, 119 (8th Cir. 1997)). "Upon default, the factual allegations of a complaint (except those relating to the amount of damages) are taken as true, but 'it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.'" *Murray v. Lene*, 595 F.3d 868, 871 (8th Cir. 2010) (quoting 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2688 (3d ed 1998)).

DISCUSSION

Plaintiffs asserted claims against Robeson for battery and intentional infliction of emotional distress. They also sued Robeson for violation of LD's constitutional rights under 42 U.S.C. § 1983. They now request a hearing to determine the amount of damages, asserting that evidence of her damages is not amenable to presentation on paper. The Court will first review the legitimacy of LD's claims against Robeson and then consider how to determine damages.

I. Robeson's Liability

To state a legitimate battery claim, Plaintiffs must plead facts alleging that Robeson had physical contact with LD "without consent or justification." *Kant v. Altayar*, 704 N.W.2d 537, 540 (Neb. 2005). To state a legitimate claim for intentional infliction of emotional distress, Plaintiffs must allege facts showing (1) intentional or reckless conduct, (2) the conduct was "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community," and (3) the conduct caused "emotional distress so severe that no reasonable person should be expected to endure it." *Id.* (citing *Gall v. Great Western Sugar* Co., 363 N.W.2d 373 (Neb. 1985)). "The same wrongful conduct may support a civil action based on a theory of battery as well as an action based upon the independent tort of intentional infliction of emotional distress." *Id.*

The Complaint states legitimate causes of action with respect to both torts. Plaintiffs alleged that Robeson sexually assaulted LD—his 8th grade student—on an unknown number of occasions. LD could not consent to Robeson's sexual contact. Further, Plaintiffs have pled that Robeson's conduct was outrageous and caused LD and her family severe emotional distress.

Under § 1983, Plaintiffs must assert facts that "the conduct complained of was performed under color of state law and that the conduct deprived [Plaintiffs] of rights, privileges, or immunities secured by the Constitution or Federal law." *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999). The Eighth Circuit has found due process violations when state actors have sexually abused individuals. *Id.* Specifically, the Eighth Circuit has held that a student states a legitimate claim when she alleges that her teacher "deprived her of her constitutionally protected substantive right to be free from such bodily harm and sexual molestation and abuse as secured by the Due Process and/or Equal Protection Clauses of the 14th Amendment to the U.S. Constitution." *Id.* This is the precise nature of Plaintiffs' § 1983 claims. Accordingly, Plaintiffs have stated a legitimate cause of action under § 1983 for purposes of default judgment.

II. Assessment of Damages

Having determined that Plaintiffs stated legitimate causes of action against Robeson, the Court must determine the amount of damages. Rule 55(b)(2) of the

Federal Rules of Civil Procedure states that the Court "may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to" conduct an accounting, determine the amount of damages, establish the truth of any allegation by evidence, or investigate any other matter. Plaintiffs assert that documentary presentation of the injuries suffered by a sexual assault victim does not allow the decisionmaker to conduct a meaningful evaluation of the evidence and injury. Accordingly, Plaintiffs request a hearing with live testimony. Plaintiffs further request that "their right to trial by jury be respected on the issue of damages." Pl. Br. at 4, ECF No. 179, PageID 3601.

A. Right to Jury Trial After Default Judgment

Plaintiffs cite no authority for their proposition that they have a constitutional right to a jury trial on the issue of damages after a default. The Eighth Circuit has not considered this issue; however, most circuits that have addressed the issue have held the Seventh Amendment right to jury trial does not survive default. *See Olcott v. Delaware Flood Co.*, 327 F.3d 1115, 1124 (10th Cir. 2003) *cert. denied*, 540 U.S. 1089, (2003) ("Defendants do not have a constitutional right to a jury trial following entry of default"); *Sells v. Berry*, 24 F. App'x 568, 571 (7th Cir. 2001); *Graham v. Malone Freight Lines, Inc.*, 314 F.3d 7, 16 (1st Cir. 1999); *Matter of Dierschke*, 975 F.2d 181, 185 (5th Cir. 1992) ("It is also 'clear . . . that in a default case neither the plaintiff

nor the defendant has a constitutional right to a jury trial on the issue of damages' ") (quoting 5 James W. Moore, et. al., Moore's Federal Practice § 38.19(3) (1992)); *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990). *See also Parlier v. Casteen*, No. 5:14CV00085, 2016 WL 3032692, at *2, n. 2 (W.D.N.C. May 26, 2016); *Raines v. Hollingsworth*, No. CIV. 08-1016-KES, 2009 WL 3233430, at *17 (D.S.D. Sept. 28, 2009).

Federal Rule of Civil Procedure 55(b)(2) provides that courts can conduct hearings to determine the amount of damages after default judgment, "preserving any federal statutory right to a jury trial." Fed. R. Civ. P. 55(b)(2). Despite the reference to a "federal statutory right to a jury trial," courts and scholars interpret the text to apply only to the unusual situation where a statute specifically preserves the right to a jury trial after default judgment. *Manno v. Tennessee Prod. Ctr., Inc.*, 657 F. Supp. 2d 425, 430 (S.D.N.Y. 2009); *Benz v. Skiba, Skiba & Glomski*, 164 F.R.D. 115, 116 (D. Me. 1995); 10 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2688 (4th ed. 2019).

The Advisory Committee notes make clear that the reference to jury trial in Rule 55 applies only to statutes that specifically require jury trials after default. The notes state that this clause "preserves 28 U.S.C. § 1874 and similar statutes." Notes of Advisory Committee on Rules, 1937 Adoption, Note to Subdivision (b). Section 1874 provides that in certain types of collection actions there is a right to jury trial after

default. Unlike § 1874, 42 U.S.C. § 1983 does not specifically preserve the right to a jury trial after default. Accordingly, there is no statutory or constitutional right to a jury trial on the issue of damages in this case.

B. Nature of Hearing on Damages

Although Plaintiffs do not have a right to a jury trial on the issue of damages, courts have discretion to order a jury trial as to damages after default judgment if it appears to be the best way to assess damages. *Armeni v. Transunion LLC, Inc.*, No. 3:15-CV-00066, 2016 WL 7046839, at *3 (W.D. Va. Dec. 2, 2016); *Lumbermen's Mut. Cas.* Co. *v. Holiday Vehicle Leasing Inc.*, No. 02CIV.137(LAK)(MHD), 2003 WL 1797888, at *2 (S.D.N.Y. Apr. 4, 2003); *Benz*, 164 F.R.D. at 117; *Gill v. Stolow*, 18 F.R.D. 508, 510 (S.D.N.Y. 1955), *rev'd on other grounds*, 240 F.2d 669 (2d Cir. 1957) ("[I]t is no doubt within my discretion to order a jury trial on this issue . . . "); Wright & Miller § 2688 ("[T]he court may order a jury trial as to damages in a default situation if it seems to be the best means of assessing damages.").

Here, the Court concludes that judicial economy, responsible stewardship of juror resources, and all other factors weigh in favor of a hearing on the issue of damages before the Court without a jury.[1]

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[1] The Court acknowledges that other courts have, in their discretion convened a jury for the purposes of determining damages. *See Armeni*, 2016 WL 7046839, at *4; *Ault v. Baker*, No. 4:12-CV00228-KGB, 2013 WL 1247647, at *10 (E.D. Ark. Mar. 27,

Accordingly,

IT IS ORDERED:

1. The Motion for Default Judgment, ECF No. 176, is granted as to liability; and

2. The Court will confer with counsel for Plaintiffs to schedule a hearing on the issue of damages before the Court.

Dated this 20th day of February 2020.

BY THE COURT:

s/Laurie Smith Camp
Senior United States District Judge

2013). However, in these cases, the defendants appeared after entry of default and demonstrated an intent to defend against the plaintiffs' claims for damages. Robeson has shown no intention of defending against Plaintiffs' claims for damages.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KD, Parent, Natural Guardian and Next Friend of LD; and JD, Parent, Natural Guardian and Next Friend of LD; **Plaintiffs,** **vs.** **BRIAN ROBESON** **Defendant.**	**8:17CV285** **MEMORANDUM AND ORDER** (Filed Mar. 18, 2020)

This matter is before the Court on Plaintiffs' Motion for Default Judgment, ECF No. 176, on the issue of damages. In the Memorandum and Order dated February 20, 2020, ECF No. 180, the Court granted Plaintiffs' Motion for Default Judgment. On March 9, 2020, Plaintiffs appeared before the Court to present evidence on the issue of damages. At the hearing on damages, Plaintiffs presented testimony from KD, JD, LD, Dr. Kevin Ray Piske, and Father David Martin Korth. The Court also received into evidence Exhibit 206 and took judicial notice of evidence already electronically filed in the record.[1]

[1] At the hearing, Plaintiffs' counsel represented that, except for Exhibit 206, the evidence presented at the hearing corresponded to evidence presented during summary judgment proceedings. Further review revealed that the evidence presented at the hearing did not correspond to the evidence at summary

DISCUSSION

"When a default judgment is entered on a claim for an indefinite or uncertain amount of damages, facts alleged in the complaint are taken as true, except facts relating to the amount of damages, which must be proved in a supplemental hearing or proceeding." *Everyday Learning Corp. v. Larson*, 242 F.3d 815, 818 (8th Cir. 2001). Plaintiffs bear the burden of establishing damages "to a reasonable degree of certainty." *See id.* Plaintiffs have presented evidence of general and special damages[2] and the Court has reviewed Plaintiffs' evidence under this standard.

General Damages

Plaintiff LD's testimony established that she suffered significant damages because of Robeson's conduct. LD's testimony was corroborated by the testimony of the other witnesses. After reviewing the evidence in the record and comparing jury verdicts in similar cases, the Court concludes that LD is entitled to general damages in the amount of $1,000,000.00.

Special Damages

Plaintiffs have submitted proof of LD's future special damages. At the evidentiary hearing, Plaintiffs

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judgment proceedings, though it appears some of the documents have been filed with the Court.

[2] Plaintiffs' Complaint also made a request for punitive damages under 42 U.S.C. § 1983 but Plaintiffs have not presented any argument or request for punitive damages at this stage.

introduced the Declaration of S. Ryan Greenwood, Exhibit 206, which detailed Plaintiffs' request for LD's future mental health treatment. Plaintiffs' calculation of the cost of future mental health treatment considered the projected inflation rate and discounted the total amount to present value. The Court has reviewed the calculation and concludes that Plaintiffs' request is reasonable. Accordingly, Plaintiffs are awarded special damages in the amount of $249,540.41.

The Court cannot determine the amount of the Plaintiffs' damages for LD's past medical or mental health treatment or any other special damages. Although Plaintiffs have referred to expenses for past treatments, Plaintiffs have not submitted invoices or any documents providing a partial or comprehensive summary of LD's care. At the hearing, Plaintiffs presented testimony of the cost of therapy for KD and JD, but counsel for Plaintiffs made clear that they were not seeking special damages for anyone other than LD. Instead, such testimony was meant to show the "full insult" to the entire family. KD also testified that the family's annual deductible and co-pay expenses were about $5,000, but KD was not sure whether the family actually paid that amount each year and there was no evidence of actual medical expenses for LD. Plaintiffs have not attempted to provide any evidence of LD's past medical expenses "to a reasonable degree of certainty." *See Everyday Learning*, 242 F.3d at 818. Accordingly, the Court cannot enter a special damages award for these expenses.

IT IS ORDERED:

1. Default judgment is entered in favor of Plaintiffs and against Defendant Brian Robeson in the amount of $1,249,540.41; and

2. A separate judgment will be entered.

Dated this 18th day of March, 2020.

BY THE COURT:

s/Laurie Smith Camp
Senior United States District Judge