FILED
6TH JUDICIAL CIRCUIT
23 JUL 10 2012
Linda S. Frank
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

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| JANE DOE-1, | |
| Plaintiff, | |
| -vs- | NO 2012 L 83 |
| JON A. JAMISON, ST. JOSEPH-OGDEN CHSD #305 BOARD OF DIRECTORS, CHAD UPHOFF, BRIAN BROOKS and JAMES M. ACKLIN | |
| Defendants | |

**DEFENDANTS ST. JOSEPH-OGDEN COMMUNITY HIGH SCHOOL DISTRICT 305 BOARD OF EDUCATION, CHAD UPHOFF, BRIAN BROOKS, AND JAMES ACKLIN'S MOTION PURSUANT TO SECTION 2-619.1 OF THE ILLINOIS CODE OF CIVIL PROCEDURE TO DISMISS COUNTS III-XIX**

Defendants, ST. JOSEPH-OGDEN COMMUNITY HIGH SCHOOL DISTRICT 305 BOARD OF EDUCATION (incorrectly named as "St. Joseph-Ogden CHSD #305 Board of Directors"), BRAD UPHOFF, BRIAN BROOKS, AND JAMES ACKLIN (hereinafter referred to as "District," by individual name or, collectively, as "Defendants") by their attorneys, Spesia & Ayers, and for their Motion to Dismiss Plaintiff's Complaint pursuant to Section 2-619.1 of the Illinois Code of Civil Procedure, state as follows:

I. **ARGUMENT**

Plaintiff has filed a 19 count Complaint against Defendant Jon Jamison and the Defendants, with 17 of those counts being brought against the Defendants. The Complaint alleges certain failures by the Defendants with respect to reporting sexual misconduct on the part Defendant Jamison, a former District employee. While these allegations claim that Jamison engaged in inappropriate conduct, the allegations also make it clear that the Defendants took all appropriate and responsible action with respect to any conduct of which they had notice, even in

the face of denial by the Plaintiff that she had been subjected to any inappropriate conduct by Jamison

As alleged, every one of Plaintiff's claims against the Defendants is subject to dismissal for failure to state a claim or on the basis of immunity provided to the Defendants by the Illinois Legislature, under the Illinois Local Governmental and Governmental Employees Tort Immunity Act (hereinafter ' Tort Immunity Act") and the Illinois School Code

## II PLAINTIFF'S CLAIMS MUST BE DISMISSED PURSUANT TO SECTION 2-615

### A Count III Must Be Dismissed Because No Claims of Respondeat Superior May Lie Against the District for Jamison's Alleged Misconduct

Count III is brought against the District under respondeat superior pursuant to the Illinois Hate Crime Statute, 720 ILCS 5/12-7 1 Plaintiff alleges Jamison committed batteries against Jane Doe-1 by hugging, kissing and caressing her and that he sexually harassed and abused her Plt 's Compl ¶ 29(l), Count III, ¶¶ 48-49 Under Illinois law, sexual misconduct is not within the scope of employment *Deloney v Board of Education of Thornton Township School District No 205*, 281 Ill App 3d 775, 784 (1st Dist 1996) Hugging, kissing, caressing, and sexually abusing a student does not further any purpose of the employer Such conduct can only be for the benefit of the employee and outside the scope of employment *Webb v Jewel Cos* , 137 Ill App 3d 1004, 1006-8 (1st Dist 1985) Therefore, Count III must be dismissed with prejudice

### B Plaintiff's Hate Crime Claim is Preempted by the Illinois Human Rights Act

The Illinois Human Rights Act, 775 ILCS 5/8-101, et al (hereinafter 'IHRA") provides 'Except as otherwise provided by law, **no court of this state shall have jurisdiction** over the subject of an alleged civil rights violation **other than as set forth in this Act** " 775 ILCS 5/8-111(D) (emphasis added) The IHRA further provides that sexual harassment by a secondary

education representative is a civil rights violation (775 ILCS 5/5A-102) and defines sexual harassment as

> any unwelcome sexual advances or requests for sexual favors made by [a] secondary education representative **to a student**, or any conduct of a sexual nature exhibited by [a] secondary education representative **toward a student**, when such conduct has the purpose of substantially interfering with the student's educational performance or creating an intimidating, hostile or offensive educational environment. 775 ILCS 5/5A-101(E)

The alleged conduct in Count II is clearly governed by the IHRA thus, Count III for respondeat superior is preempted by the IHRA and must be dismissed

**C Counts IV Must Be Dismissed Because Plaintiff Does Not Factually Plead the Elements for an Intentional Infliction of Emotional Distress Claim**

Plaintiff's allegations fail to meet any of the pleading requirements for Intentional Infliction of Emotional Distress ("IIED") against Defendants Uphoff, Brooks, or Acklin To state a claim for IIED, a Plaintiff must allege

> 1) the defendant's conduct was extreme and outrageous, 2) the defendant either intended to inflict severe emotional distress or knew that there was a high probability that its conduct would do so, and 3) the defendant's conduct actually caused severe emotional distress *Welsh v Commonwealth Edison Co* , 306 Ill App 3d 148, 154 (4th Dist 1999) (citing *McGrath v Fahey*, 126 Ill 2d 78, 86, 533 N E 2d 806, 127 Ill Dec 724 (1988)

"Liability only attaches in circumstances where the defendant's conduct is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency '" *Id* (citing *Public Finance Corp v Davis*, 66 Ill 2d 85, 89-90, (1976))

Plaintiff alleges that the Defendants 1) "intentionally concealed" the alleged fact that complaints had been made against Jamison, 2) Defendants had a duty to make mandated reports to DCFS, and 3) that Defendants failed to make mandated reports regarding the Plaintiff Plt 's Compl Count IV ¶52 a-c None of these allegations support the claim that the Defendants' conduct was extreme and outrageous With respect to the alleged concealment of complaints

made against Jamison, the Plaintiff makes this allegation in a conclusory fashion Plt 's Compl Count IV ¶¶ 43, 50-54 Such a conclusion of fact is not admitted on a Motion to Dismiss *Towne v Libertyville*, 190 Ill App 3d 563, 566 (2d 1989) (citing *Payne v Mill Race Inn*, 152 Ill App 3d 269, 273(1987) Further, this conclusory allegation is belied by the Plaintiff's other allegations

To wit, Plaintiff alleges that Uphoff conducted an investigation regarding Jamison, after being informed by a teacher that a student and mother had told the teacher Jamison engaged in suspect conduct with a student (i e allowing the student to wear his hat, coat, sunglasses, blowing in her face, giving her a hug on the school bus, and texting/phoning the student) Plt's Compl ¶ 30-32 Plaintiff also alleges that Brooks investigated claims by a student's mother that Jamison friended students on My Space, had a telephone conversation with the Plaintiff, and flirted with female students in the lunchroom Plt 's Compl ¶ 36 Plaintiff further alleges 1) Brooks directed a Champaign County Resource Officer (police officer) to investigate, 2) that Brooks personally interviewed the mother and daughter who made the claims, and 3) that Brooks personally interviewed the Plaintiff regarding the reported conduct and was informed by the Plaintiff that there was no inappropriate conduct occurring Plt 's Compl ¶¶ 38-42 Plaintiff further alleges Brooks and Acklin met with Jamison concerning said allegations and took remedial action Plt 's Compl ¶ 41 a-d

These allegations do not even remotely suggest conduct that was anything but a concerned and thorough response to reports of behavior which did not indicate the sexual abuse of any student Finally, though Plaintiff alleges that she "suffered severe emotional distress" (Plt 's Compl Count IV ¶ 55), "[m]erely characterizing emotional distress [illegible]

sufficient "'*Welsh*, 306 Ill App 3d at 155-56 Therefore, Plaintiff's allegations fail to meet the all three pleading requirements for IIED

**D Count V Brought under Respondeat Superior Must Be Dismissed**

As argued in Paragraph C above, Plaintiff fails to state a claim for IIED against Defendants Acklin, Brooks, and Uphoff Therefore, Count V for IIED against the District under Respondeat Superior necessarily falls and must also be dismissed

**E Count VI for Negligent Hiring Must be Dismissed Because Plaintiff Fails to Allege Facts that the District Knew or Should have Known Jamison had a Particular Unfitness[1]**

To state a cause of action for negligent hiring, the Plaintiff must plead (1) that the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons, (2) that such particular unfitness was known or should have been known at the time of the employee's hiring or retention, and (3) that this particular unfitness proximately caused the plaintiff's injury *Van Horne v Muller*, 185 Ill 2d 299, 311 (1998) Plaintiff attempts to paraphrase in a conclusory fashion the pleading requirement that the District "knew or should have known" Jamison's unfitness for employment when it hired him Plt 's Compl Count VI ¶ 51 This is insufficient to state a claim *Welsh v Commonwealth Edison Co* , 306 Ill App 3d 148, 155 (1st Dist 1999) (citing *Knox College v Celotex Corp* , 88 Ill 2d 407, 423-27 (1981)) In fact, Plaintiff's non-conclusory allegations demonstrate that the District did not know of any particular unfitness in Jamison during his hiring or retention/rehiring

Specifically, Plaintiff alleges that two students and their mothers informed a teacher about certain conduct by Jamison in the 2006-2007 school year, allegedly involving a different

[1] Plaintiff seeks to state a claim for negligent hiring of Jamison in August of 2007 but confusingly bases her claim on Jamison's employment with the District in 2006-2007 Pl 's Compl ¶¶ 29, 52

student Plt 's Compl ¶¶ 30-31 The most significant conduct alleged was that Jamison hugged a female student on the bus Plt 's Compl ¶ 30 Plaintiff also alleges Uphoff investigated these allegations Plt 's Compl ¶ 32 Thereafter, in February of 2008; a mother of a student allegedly informed Brooks that her daughter had informed her that Jamison friended female students on MySpace, had a telephone conversation with the Plaintiff while she was in the bathroom, and flirted with female students in the lunchroom Plt 's Compl ¶36 a-c Afterward, Brooks is alleged to have interviewed the student, Jane Doe-7 Plt 's Compl ¶ 39 He is also alleged to have interviewed the Plaintiff, whose own pleading states that she denied to Brooks any inappropriate conduct on the part of Jamison Plt 's Compl ¶ 40

These allegations, which are Plaintiff's only non-conclusory allegations regarding what the District knew or should have known; simply fail to allege that District was informed in any way that Jamison was committing or would commit the acts he is alleged to have committed, or that it knew or should have known of such propensities when it hired him Therefore, Plaintiff's Negligent Hiring and Negligent Retention claims must fail-

**F Plaintiff Fails to State a Cause of Action for Negligent Supervision Because She Has Failed to Plead that the District Knew or Should Have Known that Jamison Had a Particular Unfitness that Created a Danger to Third Parties**

As argued in Paragraph E above, the Plaintiff fails to alleged anything to suggest the District knew or should have known about Jamison's having a particularly unfitness for his position that created a danger to the Plaintiff Therefore, her claim for Negligent Supervision against the District must fail As the First District has held,

> To succeed in an action for negligent supervision, the plaintiff must plead and prove that the employer knew or should have known that its employee had a particular unfitness for his position so as to create a danger of harm to third persons and that the employer's failure to safeguard the plaintiff against this particular unfitness proximately caused the plaintiff's injury *Platson v NSM, Am* ,

*Inc* , 322 Ill App 3d 138, 144 (1st Dist 2001) (Citing *Van Horne v Muller*, 185 Ill 2d 299, 313 (1998))

Plaintiff fails to so plead, and her negligent supervision claim must be dismissed

**G Count VIII For Negligent Retention Relies Solely On Conclusions of Fact and Law and Must, Therefore, Be Dismissed**

Plaintiff's relies on conclusions of fact and law to attempt to state her claim for Negligent Retention Illinois is a fact-pleading State, and **if, after deleting the conclusions that are pleaded, there are not sufficient allegations of fact to state a cause of action, the motion to dismiss must be granted** "*Towne v Libertyville*, 190 Ill App 3d 563, 567 (2d Dist 1989)

Plaintiff alleges that the District had knowledge "of **at least one** incident **in which one** of Jamison's students, parents, former students, former parents, former co-workers, **or** former supervisors complained about Jamison's behavior " Plt 's Compl Count VIII ¶ 50 These allegations are vague and wholly conclusory

Section 2-601 of the Illinois Code of Civil Procedure requires that "substantial allegations of fact are necessary to state a cause of action " *Bank of Lincolnwood v Comdisco, Inc* , 111 Ill App 3d 822, 826 (1st Dist 1982) To avoid dismissal, a complaint must "**plead facts which bring the claim within the legally recognized cause of action alleged** If it does not, the complaint must be dismissed *Tru-Link Fence Co v Reuben H Donnelley Corp* , 104 Ill App 3d 745, 748-49 (1st Dist 1982)

As Count VIII relies on conclusory allegations of fact and law, it should be dismissed

**H Plaintiff Fails State a Claim for Premises Liability Because She Alleges No Condition of the Premises Themselves as Causing her Injury**

For liability to attach under a Premises Liability theory, the injury must generally arise from the condition of the premises *Lawson v City of Chicago*, 278 Ill App 3d 628, 640 (1st Dist 1996) Plaintiff, however, alleges a dangerous condition existed by virtue of Jamison's

isolating "female students on bus trips and/or during practice" and his having engaged in prior acts of "sexual harassment and/or grooming and/or sexual abuse" of students " Plt 's Compl Count IX ¶ 50 These are allegations of conduct, not condition *Lewis v Spagnolo*, 186 Ill 2d 198, 233 (1999) Moreover, as set forth above, Plaintiff's allegations simply do not support a claim that the District knew of a 'condition" related to the conduct alleged Therefore, Count IX must be dismissed

**I There is No Private Right of Action under the Abused and Neglected Child Reporting Act or at Common Law**

Counts IV through VII, X through XIII, and XVI through XVIII are brought against the various Defendants based on an alleged failure to report Jamison's conduct under the Abused and Neglected Child Reporting Act ("ANCRA"), 325 ILCS 5/1 et al However, there is no private right of action for a violation of the ANCRA *Varela v St Elizabeth s Hospital of Chicago, Inc* , 372 Ill App 3d 714, 719 (1st Dist 2006) (citing *Doe 1 v North Central Behavioral Health Systems, Inc* , 352 Ill App 3d 284, 286-88 (3d Dist 2004)) Further, as the First District observed in *Varela*, it would be illogical to allow Plaintiffs to proceed, regardless of the legislature's intent, by styling their Reporting Act claim as a common law claim *Valera*, 372 Ill App 3d at 723 Therefore, a claim may not be brought in Illinois for violation of the ANCRA

**1 Counts X – XIII Must Be Dismissed as They Are Brought Wholly under a Failure to Report Theory**

Plaintiff brings Counts X and XII against Defendants Uphoff, Brooks, and Acklin for "Negligence – Ministerial Act Mandated Reporting" and "Willful and Wanton Mandated Reporting Failures " These Counts are brought wholly based on alleged violations of mandated reporting duties Plt 's Compl Count X ¶¶ 1-55, Count XII ¶¶ 1-55 Counts XI and XIII are brought against the District under Respondeat Superior for the alleged violations of mandated

reporting duties Plt 's Compl Count XI 28, Count XIII, 31 As these claims rest solely on alleged violations of reporting duties under the ANCRA; they must be dismissed with prejudice

**2 Plaintiff's Conspiracy Counts Must Be Dismissed Because They Are Predicated on Violation of the ANCRA**

Plaintiff brings Count XVI against Defendants Uphoff and Acklin, and Count XVII against Defendants Brooks and Acklin for "Conspiracy to Violate Mandated Reporting Act" Plt 's Compl 35-38 These counts are wholly based on alleged violations of mandated reporting duties, and conspiracies to shirk those duties Plt 's Compl 35-38 Count XVIII is brought against the District under Respondeat Superior Plt 's Compl 39 As each of these claims rely solely on alleged violations of ANCRA reporting duties; they must be dismissed with prejudice

**3 Count IV - VII Should Be Dismissed Because They Rely on Non-Reporting under the ANCRA**

Plaintiff's claims for IIED, against Defendants Uphoff, Brooks and Acklin, and the District, under respondeat superior, and "Negligent-Hiring (Ministerial Act Regarding Prior Complaints of Jamison's Conduct)" and "Negligent Supervision," against the District, must be dismissed because these claims rely on allegations that these Defendants failed to make reports mandated the ANCRA Plt 's Compl 13-20 These claims ignore Illinois law, which clearly states that there is no private right of action under the ANCRA, as is fully argued above Therefore, Counts IV-VII must be dismissed against all Defendants with prejudice

**J Plaintiff's Willful and Wanton Counts Must be Dismissed because there is no Separate Cause of Action for Willful and Wanton in Illinois**

Counts XII-XV are brought as independent claims for Willful and Wanton conduct [2] These claims must be dismissed, there is no separate cause of action for Willful and Wanton in Illinois As the First District held in *Sparks v Starks*, 367 Ill App 3d 834 (1st Dist 2006)

[2] Plaintiff has alleged Counts XII and XIII in addition to nearly identical counts brought under a label of Negligence in Counts X and XI Plt 's Compl 26-28

"Illinois courts have consistently held that there is no separate and independent tort of willful and wanton misconduct in the common law of this state." *Id* at 837 (citing *Ziarko v Soo Line R R Co*, 161 Ill 2d 267, 274 (1994)). Therefore, these counts must be dismissed with prejudice

**K There is No Cause of Action in Illinois for "State Created Danger"**

There is no cause of action in Illinois for "state-create danger." A state-created danger" is an exception to a federal due process claim. As the Seventh Circuit has explained, the Due Process Clause of the federal Constitution generally does not require an affirmative duty on the part of the state to protect individuals against third parties. *Buchanan-Moore v County of Milwaukee*, 570 F 3d 824, 827 (7th Cir 2009) (citing *Monfils v Taylor*, 165 F 3d 511, 516 (7th Cir 1998), *King v East St Louis School Dist*, 496 F 3d 812, 817-18 (7th Cir 2007)). An exception to this principal is the "state-created danger rule." *Id* at 827 (citing *Monfils*, 165 F 3d at 516). Plaintiff has attempted to plead and exception to a federal due process claim without pleading a federal due process claim. Moreover, the "state-created danger" exception requires conduct that "shocks the conscience." *Jackson v Indian Prairie Sch Dist* 204, 653 F 3d 647, 654 (7th Cir 2011). As alleged, nowhere does the conduct of the Defendants rise to that level. Therefore, Count XIX must be dismissed.

## III PLAINTIFF'S CLAIMS SHOULD BE DISMISSED PURSUANT TO SECTION 2-619 OF THE ILLINOIS CODE OF CIVIL PROCEDURE

**A Section 2-201 of the Tort Immunity Act Provides Absolute Immunity to the Defendants with Respect to Plaintiff's Mandated Reporting Claims and Negligent Hiring and Supervision Claims**

Section 2-201 of the Tort Immunity Act provides that

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though

The immunity conferred on District employees pursuant to Section 2-201 is extended to the District under Section 2-109, which provides that "A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable " *Id* Therefore, where a public employee is exercising discretion in determining policy, neither the employee nor the local public entity will be liable for injuries resulting from discretionary acts *Bloomingdale v C D G Enters* , 196 Ill 2d 484, 496 (2001)

**1 Defendants Are Immune from Claims Related to the ANCRA Pursuant to Section 2-201**[3]

Counts IV through VII, X through XIII, and XVI through XVIII are brought against the various Defendants based on an alleged failure to report Jamison's conduct under the ANCRA Plt''s Compl 13-20, 26-31, 35-39 Reporting under the ANCRA is an act requiring discretion, and the Defendants have immunity under Section 2-201 of the Tort Immunity Act, 745 ILCS 10/1-101 (hereinafter "Tort Immunity Act") Plaintiff predicates the foregoing claims on allegations that Defendants violated a duty to report abuse under the ANCRA Plt 's Compl Count IV ¶ 52, Count V ¶¶ 1-49, Count VI ¶¶ 1-59, Count VII ¶¶ 1-53, Count X ¶¶ 1-55, Count XI ¶¶ 1- 49, Count XII ¶¶ 1-55, Count XIII ¶¶ 1-49, Count XVI ¶¶ 1-54, Count XVII ¶¶ 1-51, and Count XVIII ¶¶ 1-49 The allegations make it clear that any employee with authority to act would necessarily have had to determine policy, and exercise discretion in determining the proper course of action *Harinek v 161 N Clark St Ltd Pshp* ,181 Ill 2d 335 (1998), *McGurk v Lincolnway Community Sch Dist No 210*, 287 Ill App 3d 1059 (3rd Dist 1997), *Courson v Danville Sch Dist* ,333 Ill App 3d 86, 90 (4th Dist 2002), *Arteman v Clinton Cmty Unit Sch Dist No 15*, 198 Ill 2d 475 (2002) (overruled on other grounds, *Murray v Chi Youth Ctr* , 224 Ill 2d 213, 230 (2007))

[3] While Defendants deny they violated the ANCRA, even if Plaintiff's allegations are taken as true, Defendants would still be afforded immunity pursuant to Section 2-201 of the Tort Immunity Act

Courts in Illinois have held that the reporting of child abuse is required of school personnel who have a "reasonable cause to believe" a child is abused under that Act *Doe v Dimovski*, 336 Ill App 3d 292, 296 (2d Dist 2003) As the Northern District of Illinois has explained and held, determining "reasonable cause" is an exercise of discretion, trigging immunity pursuant to Section 2-201 As the court stated,

> *Dimovski* acknowledges that the Reporting Act requires allegations of sexual harassment to be "credible " Therefore, a school official must determine whether a report of sexual abuse is credible This determination of credibility necessarily requires the exercise of discretion *Peck v W Aurora Sch Dist 129*, 2006 U S Dist LEXIS 67145, *20 (N D Ill Aug 30, 2006)

In the instant case, Defendants were clearly in a position which required them to determine policy and exercise discretion With respect to Uphoff, certain conduct was allegedly reported to a teacher by two students Plt 's Compl ¶ 30 Uphoff investigated these allegations Plt 's Compl ¶¶ 31-32 Yet none of the conduct of which Uphoff is alleged to have been aware (Plt 's Compl ¶¶ 30-32) meets the definition of an 'abused" child (See definition of "abused child" at 325 ILCS 5/3) The same is true with respect to Brooks It is alleged only that he was informed that Jamison had student friends on MySpace, had a telephone conversation with the Plaintiff, and flirted with students in the lunchroom Plt 's Compl ¶ 36 None of this approaches reportable conduct Nevertheless, Brooks is alleged to have investigated, instructed a school resource officer to also investigate, interviewed the student and mother who made the allegations, and interviewed the Plaintiff, who denied any inappropriate conduct was occurring Plt 's Compl ¶¶ 36-40 Brooks and Acklin are then alleged to have met with Jamison and instructed him to curtail any questionable conduct Plt 's Compl ¶ 41 As alleged, Uphoff, Brooks, and Acklin were confronted with non-reportable conduct, which required the determination of policy and exercise of discretion

In light of the above, Defendants clearly have immunity pursuant to Section 2-201 of the Tort Immunity Act for Counts IV through VII, X through XIII, and XVI through XVIII, and the District is likewise immune pursuant to Section 2-109

### 2 The District is Immune from Plaintiff's Negligent Hiring and Negligent Retention Claims Pursuant to Section 2-201

The decision to hire or not to hire is an inherently discretionary act, for which local public entities are provided immunity under Section 2-201 of the Tort Immunity Act *Johnson v Mers*, 279 Ill App 3d 372, 380 (2d Dist 1996) Therefore, Counts VI and VIII for Negligent Hiring and Negligent Retention, respectively, should be dismissed with prejudice

### B The District has Immunity from Plaintiff's Premises Liability Claim Pursuant to 745 ILCS 10/3-102 of the Tort Immunity Act

Section 3-102(a) of the Tort Immunity Act, 745 ILCS 10/1-101 et seq , provides

> [A] local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.

As Plaintiff has not alleged a condition related to the maintenance of the premises, the District is immune from Plaintiff's claim for injuries under her premises liability theory

### C. Section 3-108 of the Tort Immunity Act Provides Immunity to the District in Count VII for Negligent Supervision[4]

[4] Insofar as Plaintiff's claims are predicated on negligence, Defendants are also entitled to immunity pursuant to Section 24-24 of the Illinois School Code, 105 ILCS 5/24-24, which confers in loco parentis status on school employees *Kobylanski v Chicago Board of Education*, 63 Ill 2d 165, 172 (1976) As the Illinois Supreme Court held in *Kobylanski*, teachers and other certificated educational employees are immune from suits for negligence that arises from matters relating to the discipline in and conduct of the schools and school children *Id* at 173

Section 745 ILCS 10/3-108 of the Tort Immunity Act provides that, absent willful and wanton conduct, neither a local public entity, nor a public employee who undertakes to supervise an activity is liable for an injury §3-108(a) Plaintiff alleges Jamison engaged in conduct due to the District's alleged breach of its duty to supervise Plt 's Compl Count VII ¶¶1-53 As this clearly falls under the rubric of supervision and Plaintiff has alleged negligence, Count VII must be dismissed

Plaintiff has inserted a rote allegation of "Willful and Wanton" into Count VII (Plt 's Compl Count VII ¶53) in an obvious effort to defeat District immunity under Section 3-108 This is insufficient to alleged conduct that is willful and wanton

"A willful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others "

*Tyerina v Evans*, 150 Ill App 3d 288, 291 (2d 1986) (citing *O'Brien v Township High School District 214*, 83 Ill 2d 462, 469 (1980)) "When the plaintiff is alleging that the defendant engaged in willful and wanton conduct, such conduct must be shown **through well-pled facts, and not by merely labeling the conduct willful and wanton** " *Thurman v Champaign Park Dist* , 2011 Ill App LEXIS 820, *6 (4th Dist , August 10, 2011) (citing *Winfrey v Chicago Park District*, 274 Ill App 3d 939, 943 (1995)) (emphasis added)

As argued in Section II C above, Defendants clearly responded to reports of conduct on the part of Jamison and took remedial action § II C *supra* Therefore, there is no conduct alleged that rises to the level of willful and wanton to defeat immunity under Section 3-108

**D. Plaintiff's Claims Fail and Must Be Dismissed Where They Allege Conduct on the Part of Defendants Who Were Not Employed with the District.**

Defendant Uphoff's employment with the District ended July 30, 2007. Defendant Brooks was not hired as the principal of St. Joseph-Ogden High School until August 7, 2007[5]. Defendant Acklin was not employed as superintendent for the District until July 1, 2007. (See affidavits of Chad Uphoff, Brian Brooks, and James M. Acklin attached as Group Exhibit "A".) Insofar as Plaintiff's allegations and claims are related to dates during which these Defendants were not employed by the District, they must be dismissed.

Specifically, Count XVI must be dismissed as it alleges a conspiracy between Acklin and Uphoff for a time when Acklin was not employed by the District. Plt.'s Compl. Count XVI ¶ 49. See Affidavit of James M. Acklin, Exhibit "A." Count XVIII must likewise be dismissed, as it relies on Count XVI to bring a claim in Respondeat Superior against the District.

Count XIV includes allegations against Uphoff, Brooks, and Acklin for a time periods during which they were not, respectively, employed by the District. Plt.'s Compl. Count XIV. ¶¶ 49-56. Counts X and XII rely on an allegation that Acklin did not make a mandated report in the 2006-2007 school year. Plt.'s Compl. Count X ¶ 51(b), Count XII ¶ 50(b). Defendant Acklin was not employed with the District at that time. Exhibit "A."

Moreover, in the *"Facts Relating to JANE DOE-1"* section of Plaintiff's Complaint, it is alleged, in a conclusory fashion, that Defendants Brooks and Acklin had actual knowledge of conduct reported in the 2006-2007 school year. Plt.'s Compl. ¶ 33. Yet Acklin was not employed by the District, and Brooks was a teacher, not the principal during that time. See Affidavits of Brian Brooks and James Acklin, Group Exhibit "A." Additionally, Defendant Uphoff is alleged to have 1) failed to investigate, 2) failed to make mandated reports, and 3) concealed reports

[5] Prior to his employment as principal, Brooks was employed by the District as a teacher, from August of 2003. Exhibit "A."

after he was no longer employed as principal of St Joseph-Ogden High School Plt 's Compl ¶¶ 42-43, see Affidavit of Chad Uphoff, Exhibit "A " These "Facts Relating to JANE DOE-1" allegations are incorporated into every one of Plaintiff's claims Therefore, insofar as Plaintiff's claims against the Defendants rely in these allegations, they must be dismissed

WHEREFORE, Defendants ST JOSEPH-OGDEN COMMUNITY HIGH SCHOOL DISTRICT 305 BOARD OF EDUCATION, BRAD UPHOFF, BRIAN BROOKS, AND JAMES ACKLIN pray this Court enter an Order Pursuant Section 2-619 1 of the Illinois Code of Civil Procedure dismissing Counts III – XIX with prejudice, and granting any other relieve this Court deems just

Respectfully Submitted,

SPESIA & AYERS

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