IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DEANDRE SIMMS, a minor, by his next friend, CHRISTINE BAKER,	) C.A. No. 02C-07-043 JTV
Plaintiff,	)
v.	)
THE CHRISTINA SCHOOL DISTRICT, BOARD OF EDUCATION OF THE CHRISTINA SCHOOL DISTRICT, BRIAN CONNOR, SUSANNA LEE, individually and in her capacity as Director of the Margaret S. Sterck School for the Hearing Impaired; and EDWARD H. BOSSO, Jr., individually and in his official capacities as Principal and Director of the Margaret S. Sterck School for the Hearing Impaired,	)
Defendants.	)

Submitted: September 26, 2004
Decided: January 30, 2004

William D. Fletcher, Jr, Esq. and Noel E. Primos, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Plaintiff.

Jonathan L. Parshall, Esq., Murphy, Spadaro & Landon, Wilmington, Delaware. Attorney for Defendants Christina School District, Board of Education, Susanna Lee and Edward H. Bosso, Jr.

Upon Consideration of Defendant's
Motion for Summary Judgment
GRANTED

VAUGHN, Resident Judge

OPINION

Simms v. Christina School District, et al.
C.A. No. 02C-07-043 JTV
January 30, 2004

Defendants The Christina School District ("the School District"), Board of Education of the Christina School District ("the Board"), Susanna Lee ("Lee") and Edward H. Bosso, Jr. ("Bosso") have moved for summary judgment. The Christina School District operates the Margaret S. Sterck School for the Hearing Impaired ("the Sterck School") in Newark, Delaware. The motion raises issues concerning the liability of the School District and school officials for criminal sexual abuse which a school residential advisor committed against the plaintiff while he was a residential student at the school during the fall of 2000.

I. STANDARD OF REVIEW

Summary judgment is appropriate if, after viewing the record in the light most favorable to the non-moving party, the court finds no genuine issue of material fact.[1] However, if from the evidence produced, there is a reasonable indication that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law, summary judgment will not be granted.[2] When the facts permit a reasonable person to draw but one inference, the question becomes one for decision on summary judgment.[3] If an examination of the record reveals no genuine issue as to material facts, it is incumbent upon the court to grant

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[1] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. 1994).

[2] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962), *rev'd in part and aff'd in part*, 208 A.2d 495 (Del. 1965).

[3] *Frelick v. Homeopathic Hosp. Ass'n*, 150 A.2d 17 (Del. Super. 1959); *Wotten v. Kiger*, 226 A.2d 238 (Del. 1967).

summary judgment.[4] If the basic facts are not in dispute and point to only one justifiable conclusion, summary judgment is appropriate.[5] In discharging this function, the court must view the evidence in the light most favorable to the non-moving party. In so doing, the court will accept as established all undisputed factual assertions made by either party, and accept the non-movant's version of any disputed facts.[6]

II. THE FACTS

The Margaret S. Sterck School for the Hearing Impaired is Delaware's designated public educational institution for children with hearing impairments. It is operated by the Christina School District in Newark, Delaware.

The plaintiff, Deandre Simms, is an individual with severely impaired hearing who is also mentally impaired. Since age six, he has been cared for by his aunt, Christine Baker. From his early childhood until he was 16, he attended the Sterck School. The school has a dormitory for students who do not live within convenient commuting distance. The dormitory is divided into four sections: high school boys, high school girls, elementary boys and elementary girls. The high school boys' section has a living room, two bathrooms, two private bedrooms and a large bedroom with six beds. Deandre lived in Felton, Delaware. During the fall of 2000 he resided

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[4] *E.K. Geyser Co. v. Blue Rock Shopping Ctr., Inc.*, 229 A.2d 499 (Del. Super. 1967).

[5] *489.137 Square Feet of Land v. State ex rel. Price*, 259 A.2d 378 (Del. 1969).

[6] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

in the high school boys' dormitory during the week and went home on weekends. At that time, there were eight male high school students. There were two resident advisors for the eight boys, one of whom was Brian Connor ("Connor"), and a head resident advisor over both the boys and girls advisors.

Connor is also hearing-impaired and graduated from the Sterck School. When he was at the school, he was a good student and senior class president. After he graduated, he attended Gallaudet University. While at Gallaudet, he worked at the Sterck School during the summers as a substitute. After he graduated from Gallaudet, he returned to the Sterck School where he worked from 1997 to August 2000 as a paraprofessional. At that time he was promoted to teacher and also became a residential advisor. As a residential advisor, he was responsible for the older male students who resided in the dormitory, including the plaintiff. The written job description for the position of residential advisor provided, among other things, that Mr. Connor was responsible for "[p]rovid[ing] a safe and orderly home-like environment for students," "[d]evelop[ing] and monitor[ing] behavior management systems," and "[d]evelop[ing] and implement[ing] programs to promote student growth (linguistic, social, emotional and intellectual)."

During the period that he served as residential advisor, Connor's immediate supervisor was Richard Gays, Coordinator for Statewide Services for the Hearing Impaired. At that time Mr. Gays was temporarily handling some of the responsibilities formerly handled by defendant Edward H. Bosso, Jr. He was doing so because defendant Susanna Lee, the former Director of the school, had retired in the summer of 2000, and Mr. Bosso had been promoted from Principal to Director.

Prior to his promotion, Bosso had supervised the residential advisors.

Connor's responsibility as a residential advisor for providing "a safe and orderly home-like environment," included counseling students about hygiene issues. As mentioned, the responsibilities of a residential advisor also included developing and implementing programs to promote student growth, although no specific programs had been established.

The staff of the school functions as a family and absentee parent for the residential students. The staff endeavors to do things the way students' families' want them done because the residential students spend more time at the school than at home.

In September 2000 Connor told the plaintiff that he wanted to teach him about sex. Beginning in early September, Connor touched the plaintiff's private parts every day while the plaintiff was at the school. This activity would occur each evening in the dormitory, either in the bedroom or in the bathroom, when no one else was around. During each of these daily incidents from September through early December, Connor would instruct the plaintiff to lower his pants or would pull the plaintiff's pants down himself and, wearing rubber gloves, masturbate the plaintiff until the plaintiff ejaculated. Connor would then clean up the evidence of this activity with paper towels. On two occasions, the activity occurred twice in one day. In order to ensure compliance with his demands, Connor threatened to give the plaintiff "restriction," a form of punishment, if he did not comply. He also told the plaintiff that the conduct was to be kept secret. The plaintiff was sick of this behavior and it was done against his will, but he was afraid to report the activity because he feared

he would be reprimanded by Connor.

When the plaintiff's guardian, Christine Baker, came to visit the plaintiff at the school in September 2000, the plaintiff was frantically attempting to communicate with her and indicating that Connor was "bothering" him and that he "hate[d] Connor." Ms. Baker asked Art Wolf, another residential advisor in the high school boys' dormitory area, why the plaintiff was so upset about Connor. Mr. Wolf responded that Connor was "a good guy" and told Baker not to worry about it.

Ms. Baker also observed changes in the plaintiff's behavior during the fall semester of 2000. Specifically, when he came home on weekends, he would exhibit an apathetic attitude and refuse to care for his hygiene. In addition, during the fall semester, the school nurse contacted Ms. Baker and commented about the plaintiff's altered behavior.

On Monday, December 4, 2000 Connor began another incident of abuse. He unzipped the plaintiff's pants and pulled them down to his knees. He then put on surgical gloves and stated to the plaintiff that he did so to prevent the spread of germs. Connor then began an act of masturbation on the plaintiff and also placed the plaintiff's hand on his, Connor's, private parts, outside of Connor's clothing.

After about ten minutes, the abuse was interrupted when another residential advisor, Ursula Shultz, entered the bedroom area. She could see the plaintiff and Connor but could not see what they were doing. Connor stopped and quickly walked toward Ms. Shultz and also waved his arms to indicate to the plaintiff to hide and pull up his pants. Connor told Shultz that nothing out of the ordinary had occurred. He told her that the plaintiff was upset about a cast on his arm and that he was wearing

rubber gloves because another student had wet himself and Connor had been helping him. Connor also stated that he had caught the plaintiff playing with his genitals and was counseling the plaintiff about why that behavior was not appropriate.

Shultz suspected that something was wrong and paged Bosso. He was in Dover but drove back to the school and met with Ms. Shultz at about 10:45 p.m. Mr. Bosso instructed Ms. Shultz to write a report about what she had seen.

The next morning, Bosso met with the plaintiff. After some hesitation, the plaintiff disclosed Connor's inappropriate behavior. When Connor arrived for work that day, Bosso handed him a letter relieving him of his duties and placing him on administrative leave. The police were contacted. Bosso assisted the police in interviewing the plaintiff and other students. Connor was arrested. After he was arrested, two other students who were not residents at the school came forward and reported that Connor inappropriately touched them while he baby-sat for them in their homes.

With regard to the December 4 incident, Gays testified in a deposition that it would have been normal for a residential advisor to be sitting on a student's bed and having a conversation with him; that it would have been normal for a residential advisor to be counseling a student in the bedroom area, that is, giving the student advice, direction or guidance; and that it would have been normal for a residential advisor to be discussing hygiene issues with a student in the bedroom.

Connor believed that Gays completed a written evaluation of his, Connor's, performance during October or November 2000. On that occasion, Gays spent the day observing and evaluating. Gays believed that he had probably done a written

evaluation on Connor between August and December, but he could not remember it. He could not remember what was contained in the evaluation. An evaluation included a pre-observation conference, an observation and a post-observation conference. A written form would be generated at the pre-observation conference. The observation included observing Connor interacting with the students in the dormitory. Gays' practice was to keep the pre-observation form in a file which he kept in his custody, and to destroy the form after the staff member left the school because there was no longer any use for it. He destroyed Connor's pre-observation form after Connor left the school in connection with his arrest on criminal charges for his conduct toward the plaintiff and others. The formal evaluation would be sent to the district office. A new employee would be evaluated three times, once in the fall, once in the winter, and then in the spring.

Gays' responsibility for evaluating residential advisors at the time was temporary because the school was short an administrator. That responsibility came to an end in late 2000 or early 2001 because a new Dean of Students was appointed. When that occurred, Gays destroyed all the files on residential advisors which he had because, according to his testimony, it was personal information which he didn't need anymore.

During the course of discovery in this case, the school's files were searched for Gays' evaluation of Connor or any other paper relating to the evaluation, but no documents could be found. Evaluations for other residential advisors could be found, however. They include one prepared on June 11, 2002 for observation periods on May 4, 2001 and March 14, 2002; one dated June 11, 2001 for an observation period

on June 4, 2001; one dated November 27, 2000 for an observation on November 15, 2000; one dated April 9, 2001 for an observation period on March 29, 2001; one dated May 22, 2001 for an observation on May 17, 2001; a second one dated June 11, 2001 for observation periods on May 4, 2001 and March 14, 2002; one dated April 11, 2001 for an observation on April 3, 2001; one undated for an observation on June 6, 2001; one dated November 21, 2000 for an observation on November 9, 2000; an undated one for an observation on March 22, 2001; one dated May 24, 2001 for an observation on May 21, 2001; and one dated June 14, 2001 for observations on November 9, 2000, March 22, 2001 and May 21, 2001. They are signed by both the evaluator and the employee evaluated.

Connor had no criminal record prior to his arrest for his actions toward the plaintiff.

III. DISCUSSION

The complaint in this case is set forth in 12 counts. They are described here only insofar as they relate to the moving defendants. Counts one through five seek judgment against the School District and its Board of Education based upon vicarious liability for Connor's conduct for, respectively, assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress and invasion of privacy. Count six seeks judgment against the School District, the Board, Bosso and defendant Susanna Lee based upon negligence in the hiring of Connor. Count seven seeks judgment against the School District, the Board, Bosso and Lee for negligent supervision of Connor. Count eight seeks judgment against the School District and the Board for violations of 42 U.S.C. § 1983. Count nine of the complaint seeks

judgment against Lee and Bosso for violations of 42 U.S.C. § 1983. Count 10 seeks judgment against the School District, the Board, Lee and Bosso for violations of the plaintiff's rights under the equal protection clause of the 14th Amendment to the United States Constitution. Count 11 seeks judgment against the School District, the Board, Lee and Bosso for violations of the plaintiff's rights under the due process clause of the 14th Amendment to the United States Constitution. The plaintiff agrees that the equal protection and due process claims are subsumed within the § 1983 claims and need not be separately addressed. Count 12 seeks judgment against the School District, the Board, Lee and Bosso for violations of Title IX, 20 U.S.C. § 1681 *et. seq.*

The moving defendants seek summary judgment as to all counts.

A. Vicarious Liability.

An employer's liability for torts committed by an employee is discussed in the case of *Draper v. Olivere Paving & Construction Co.*[7] An employer is liable "only when those torts are committed by the servant within the scope of his employment which, theoretically at least, means that they were committed in furtherance of the master's business."[8] It makes no difference whether the employee's tortious conduct is negligent or intentional.[9]

Draper provides the following guidance concerning the phrase "scope of

[7] 181 A.2d 565, 569 (Del. 1962).

[8] *Id.*

[9] *Id.*

employment:"

> The phrase, "scope of employment," is at best indefinite. It is nothing more than a convenient means of defining those tortious acts of the servant not ordered by the master for which the policy of the law imposes liability upon the master. The phrase, itself, contains no guide for its application. However, it certainly includes acts of the servant so closely connected with what he is employed to do, so fairly incidental to it, that they are to be regarded as methods elected by the servant, even though improper, of carrying out the master's business. *(citation omitted)* In different language, but we think with the same meaning, the *Restatement* would impose liability upon the master for his servant's intended tortious harm "if the act was not unexpectable in view of the duties of the servant." *Restatement of Agency (2nd), § 245.*
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> The problem of determining whether or not a particular tortious act was one performed within the scope of the servant's employment for which the master consequently is liable is one which, of necessity, can be answered only in the light of the particular circumstances of the case under consideration. The question is ordinarily one for decision by the jury, unless the contrary is so clearly indicated by the facts that the court should decide it as a matter of law.[10]

In *Draper,* the court approved the *Restatement of Agency (2d), § 228* , which reads as follows:

> (1) Conduct of a servant is within the scope of employment

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[10] *Id.*

> if, but only if:
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> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master; and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
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> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Restatement § 229 sets forth a number of factors which should be considered in determining whether or not unauthorized conduct is within the scope of employment. They include such factors as whether or not the act is one commonly done by such servants; the time, place and purpose of the act; whether or not the act is outside the enterprise of the master; whether or not the master has reason to expect that such an act will be done; the similarity in quality of the act done to the act authorized; the extent of departure from the normal method of accomplishing an authorized result; and whether or not the act is seriously criminal.

In *Draper* the employer had a contract for the reconstruction of a street. The employee was operating a road grader on the shoulder of the road. He became involved in an argument with a motorist because he believed the motorist had ignored

signs and barricades. The argument escalated to an assault in which the employee cut the motorist severely in the neck with a corkscrew. The court held that a grant of summary judgment in favor of the employer was not proper because a jury could find that the employee was acting within the scope of his employment when he cut the motorist's neck. As support for its decision, the court cited numerous decisions from other jurisdictions involving various physical assaults committed by employees while they were on the job. The court stated, however, that the questions involved were "close ones."[11]

The plaintiff contends that the unlawful sexual contact which occurred in this case was within Connor's scope of employment. He contends that Connor was responsible for providing a safe, orderly and home-like environment for the plaintiff; developing and implementing programs for student growth, including social and emotional growth; serving in a family, absentee parent relationship with the plaintiff; and counseling the plaintiff concerning hygiene issues. The plaintiff contends that there is evidence that Connor told the plaintiff he wanted to teach the plaintiff about sex before engaging in the abusive activity and that a jury could conclude that the unlawful sexual contact was a method chosen by Connor, though improper, of serving as a surrogate parent to the plaintiff, counseling the plaintiff, and teaching the plaintiff about social, emotional and hygiene issues – duties that were certainly a part of his responsibilities as a residential advisor at the school. Connor himself testified, the plaintiff reasons, that on December 4, 2000 when he was caught abusing the

[11] *Id*. at 571.

plaintiff, he explained to Shultz that he had found the plaintiff playing with his genitals and was counseling him that this was inappropriate activity – conduct not far removed from teaching the plaintiff about sex, which was the explanation given by Connor to the plaintiff for the abusive conduct.

In support of his position, the plaintiff mentions the case of *Screpesi v. Draper-King Cole, Inc.*[12] In that case the employee, a truck driver, became involved in a fight with another motorist when both pulled their vehicles off the roadway. The court reasoned that it is foreseeable that a truck driver may assault another driver as a result of a dispute arising out of work-related driving and that a jury could find that there was "no break in the driving and the assault."[13] The court reasoned that the facts were similar to those in *Draper* and denied a defendant's motion for summary judgment. The plaintiff contends that, similarly, in this case a jury could find that Connor was acting to advance the school's interests when he sexually abused the plaintiff, even though the methods chosen by him were improper; that a jury could find that Connor believed he was teaching the plaintiff about sex when he was performing his abusive conduct; and that a jury could find that Connor's December 4 conduct flowed naturally from his alleged counseling of the plaintiff that "playing with himself" was improper.

The plaintiff also mentions the Indiana case of *Stropes v. Heritage House*

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[12] 1996 WL 769344 (Del. Super.).

[13] *Id.*

Childrens Center of Shelbyville, Inc.[14] The employee in that case was a nurse's aide who worked at a facility which cared for people placed there as wards of the state. The employee's duties included feeding, bathing, changing the bedding and clothing of residents, and monitoring their comfort and safety. The victim was a fourteen-year-old ward who suffered from cerebral palsy and severe mental retardation. One day the employee entered the victim's room to change his bedding and clothes for the day. After the employee stripped off the sheets, he got into bed with the victim and performed oral and anal sex upon him. The employee then finished changing the victim's clothes. The court held that a jury could find that the sexual assault was within the scope of the employee's duties. The factual similarity between that case and this one should, the plaintiff, argues, lead to denial of the motion for summary judgment in this case as well.

The plaintiff also mentions the case of *Wilson v. Joma, Inc.*,[15] which contains a discussion of the "dual purpose" rule. Under that rule, an act done in part to serve the purpose of the employer and in part to serve the purpose of the employee may be found to be within the scope of employment if the employer's business actuates the employee to any appreciable extent.[16] No "nice inquiry" will be undertaken to attempt to separate the two.[17] The fact that the employee acts primarily to benefit

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[14] 547 N.E.2d 244 (Ind. 1989).

[15] 537 A.2d 187 (Del. 1988).

[16] *Id.* at 189.

[17] *Id.*

himself does not take the act outside the scope of his employment.[18] Under that rule, the plaintiff, contends a jury question exists as to whether the plaintiff was acting within the scope of his employment.

In *Draper*, *Screpesi*, and *Stropes*, the assaults occurred in the context of employment related activity. In *Stropes*, the court noted that the episode of sexual assault began and ended with the performance of fully authorized acts. This case, however, is distinguishable. This case involves continuous sexual abuse which does not occur in the context of otherwise authorized acts. While Connor was clearly taking advantage of his position as a residential advisor during work hours and at the workplace, no employment related activity was even remotely taking place when Connor was sexually abusing the plaintiff. The plaintiff's effort to cast Connor's conduct as being a choice by him of a method, although improper, of carrying out the purpose of advising the plaintiff about sexual or hygiene matters, is unpersuasive. In my opinion, no reasonable juror could accept that argument. I conclude that a jury could not find that Connor's continuous sexual abuse of the plaintiff was actuated, at all, by a purpose to serve his employer, or that his misconduct was, in any way, expectable by his employer.

In the alternative, the plaintiff contends that the School District and the Board can be vicariously liable under *Restatement* § 219(2). That provision reads, in relevant part, as follows:

> A master is not subject to liability for the torts of his

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[18] *Id.*

> servants acting outside the scope of their employment, unless:
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> (c) the conduct violated a non-delegable duty of the master.

The theory is that by taking the plaintiff in as a residential student, the School District assumed a non-delegable duty to be responsible for his care and safety, and that Connor violated this duty by taking advantage of his position of trust and authority to commit the abuse. The plaintiff offers no Delaware authority, however, for the proposition that a School District should be held liable under this concept for torts of its employees which are outside the scope of their employment. I decline to extend liability to the School District or its Board on this basis.

B. Negligent Hiring/Supervision.

An employer is liable for negligent hiring or supervision where the employer is negligent in giving improper or ambiguous orders or in failing to make proper regulations, or in the employment of improper persons involving risk of harm to others, or in the supervision of the employee's activity.[19] Negligence is based upon a failure to exercise the care that a reasonably prudent person would exercise under the circumstances.[20]

Where, as here, the defendant is a public school district or the employee of a

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[19] *Knerr v. Gilpin, Van Trump & Montgomery, Inc.*, 1998 WL 40009 (Del. Super.); *Restatement of Agency (2d), § 213.*

[20] *Robelen Piano Company v. Di Fonzo*, 169 A.2d 240, 244 (Del. 1961).

school district, the State Tort Claims Act grants immunity from liability for acts done in good faith which involve the exercise of discretion, unless the act is done with gross or wanton negligence.[21] Discretionary acts are those which require some determination or implementation which allows a choice of methods, or, differently stated, those where there is no hard and fast rule as to a course of conduct.[22] Ministerial acts, by contrast, are those which a person performs in a prescribed manner without regard to his own judgment concerning the act to be done.[23] A particular act may be ministerial even though the position which the employee holds is one which involves the exercise of discretion.[24] Whether an employee's duties are ministerial or discretionary is normally a question of law.[25] Applying these principles to the conduct involved here, I think it clear that the decision to hire Connor as a residential advisor was discretionary. It is less clear that the supervision of Connor was discretionary, rather than ministerial. It would seem that under some circumstances the supervision of one employee by another may be ministerial. In this case, however, where there does not seem to be any hard and fast rule concerning the manner in which Gays was to supervise Connor as a residential advisor, I am persuaded that the supervision of Connor was also discretionary. Gross negligence

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[21] 10 *Del. C.* § 4001, 4003.

[22] *Scarborough v. Alexis I. DuPont High Sch.,* 1986 Del. Super. LEXIS 1343, *6.

[23] *Id.*

[24] *Id.*

[25] *Martin v. State of Delaware*, 2001 Del. Super. LEXIS 22, *18.

is based upon an extreme departure from the ordinary standard of care.[26]

The plaintiff contends that a jury could find the School District, the Board, Bosso and Lee liable for hiring Connor as a residential advisor because he had no training as a residential advisor. However, there is no evidence in the record to indicate that such training programs exist or that any residential advisors at any public or private school have undergone such training. There is no evidence in the record from which a jury could assess whether there is, or is not, a pool of trained, hearing-impaired, residential advisor applicants from which the Sterck School could have selected. Nor is there any evidence in the record from which a jury can assess whether it would have made any difference to the outcome if Connor had, in fact, received formal training as a residential advisor. Furthermore, there is no evidence in the record from which a trier of fact could infer that the defendants had any reason to believe that Connor would sexually abuse a resident student.

In fact, based upon the record presented in this case, Connor would seem to have been a logical choice for the position of residential advisor. He had been a student at the school himself, serving as president of his senior class. He then graduated from Gallaudet University, a well-known college for the hearing-impaired. He worked at the Sterck School in the summers. Nothing in his background suggested that he was unfit to be a residential advisor.

I conclude that the evidence is insufficient to support a jury finding, even under a simple negligence standard, that the defendants were negligent in hiring Connor.

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[26] *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990).

The plaintiff contends that a jury could find that the defendants were negligent, or grossly negligent, in supervising Connor because they did not monitor Connor's activities to prevent his illegal conduct, there was no adequate response when the plaintiff's guardian questioned Art Wolf about the plaintiff's dislike of Connor, and the defendants did not provide for student feedback about residential advisors as part of the evaluation process. They also contend that there is evidence that Connor's evaluation documents were intentionally destroyed. This fact, they contend, gives rise to an inference that the content of the documents would have been unfavorable to the defendants. This latter point refers to the principle that where a litigant intentionally suppresses or destroys pertinent evidence, an inference arises that such evidence would be unfavorable to his case.[27]

How the defendants failed to monitor Connor's activities, however, is not explained. Ms. Baker's inquiry of Art Wolf in September was not such as to alert Wolf that Connor was sexually abusing the plaintiff. Nothing in the record suggests that it is negligent to conduct an evaluation of a residential advisor without student input. As to Gays' destruction of his pre-observation form and the district's inability to find the written evaluation, there is no indication that the documents contained any pertinent evidence, that is, evidence that suggested that Connor was abusing the plaintiff. The record does show that when school officials became aware of what Connor was doing, they acted immediately to remove him from the school environment.

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[27] *Collins v. Throckmorton*, 425 A.2d 146 (Del. 1980).

I conclude that the evidence is insufficient to support a jury finding, even under a simple negligence standard, that the defendants were negligent in supervising Connor.

C. 42 U.S.C. § 1983/ Title IX.

In order for the defendants to be liable under 42 U.S.C. § 1983, the evidence must support a finding that they, with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused the plaintiff constitutional harm.[28] The evidence does not support such a finding.

In order for the defendants to be liable under Title IX, the evidence must support a finding that a school official who at a minimum had authority to institute corrective measures on the school's behalf had actual knowledge of and was deliberately indifferent to Connor's misconduct.[29] The evidence does not support such a finding. In addition, the individual defendants cannot be liable under Title IX.[30]

CONCLUSION

For the foregoing reasons, the defendants motion for summary judgment is ***granted***.

IT IS SO ORDERED.

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[28] *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 725 (3rd Cir. 1989).

[29] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

[30] *Nelson v. Temple University*, 20 F. Supp. 633 (E.D. Pa. 1996).

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January 30, 2004

/s/ James T. Vaughn, Jr.
Resident Judge

oc: Prothonotary
cc: Order Distribution
File