Case No. 83557

In the Supreme Court of Nevada

CLARK COUNTY SCHOOL DISTRICT,
Appellant,

vs.

ETHAN BRYAN; and NOLAN HAIRR,
Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable NANCY ALLF, District Judge
District Court Case No. A-14-700018-C

APPELLANT'S APPENDIX
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2022, I submitted the foregoing "Appellant's Appendix" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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September 15, 2011 email about the stabbing of Nolan, did not directly inform Nolan's parents herself.

C. Aimee Hairr's September 22, 2011 phone conversation with Vice Principal DePiazza and September 23, 2011 phone call with Counselor Halpin

On or about September 21, 2011, while Mary Bryan and Nolan's mother Aimee Hairr were at a birthday party for another of Mary's children, Mary casually asked Aimee about the school's response to the September 15, 2011 email. Aimee responded that she had received no communication from the school, and that she had no knowledge or information about the bullying of her son occurring in Mr. Beasley's band class.

After talking to Mary, Nolan's parents then confronted him about the bullying. Nolan verified the veracity of the substance of the contents of the September 15, 2011 email. He also admitted to the stabbing incident.

On September 22, 2011, Nolan's mother made several phone calls to various school officials in an attempt to contact the school regarding the September 15, 2011 email about the stabbing of their son. She left several messages for different school officials. Finally, Aimee Hairr was able to reach Vice Principal DePiazza, and had a phone conversation with him in which she described the September 15, 2011 email, and the stabbing, including the comment by CL that he did it to see if Nolan was a girl.

Mr. DePiazza told Aimee Hairr that there were a few options for Nolan, all involving Nolan either transferring out of band class into another class at Greenspun, or transferring out of Greenspun to a different school entirely.

Aimee found these so-called solutions to be both inadequate and inappropriate because if anyone were to be moved, it should be the perpetrator of the bullying who assaulted her son not the victim, Nolan.

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Vice Principal DePiazza denied that he ever had a phone conversation with Aimee Hairr. According to his version of events, some time in either September or October 2011 (he could not remember when) there was a meeting in his office attended by Aimee Hairr, Dean Cheryl Winn and possibly Nolan Hairr. Mr. DePiazza claimed that while there was some generalized discussion about the "situation" in the band room, nothing specific about the stabbing or the September 15, 2011 email was ever mentioned. Neither Aimee Hairr, Nolan Hairr nor Cheryl Winn corroborated Mr. DePiazza's version of events about this supposed meeting, or even that it took place.

On or about September 23, 2011, Mrs. Hairr received a return phone call from counselor John Halpin. Aimee knew Mr. Halpin because she was his dental hygienist. Mr. Halpin told her he had received this September 15, 2011 email and was aware of its contents. He said he had previously spoken to Nolan and would do so again to make sure that Nolan made a formal complaint about the stabbing to the Dean. He said he believed that Dean Winn knew about it, but wanted to make sure.

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Later that day, Nolan met with Mr. Halpin. Both agreed that the counselor wanted Nolan to go to the Dean's office to fill out an incident report. Mr. Halpin said that he accompanied Nolan to Ms. Winn's office, while Nolan said he was sent there and went by himself. Mr. Halpin also said that since the Dean was not in the office, he left a message for Dean Winn with Harriet Clark, her secretary, recounting the stabbing incident and the bullying. He gave that message to the Dean's secretary with instructions to relay that message to Dean Winn. The Dean did not report receiving Mr. Halpin's message from her secretary.

Nolan, still trying to "tough it out" and not make more trouble for himself by complaining and thereby risking further retaliation, wrote a bland and rather innocuous version of what he was enduring in band class. He did not mention the stabbing nor the homophobic, sexually-oriented slurs.

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Dean Winn said she could not remember whether she met with Nolan on or after September 22, 2011. Nolan said that no such meeting took place on or after September 22, 2011. Aimee Hairr said she never had a meeting with Dean Winn.

Dean Winn said testified did not learn of the stabbing incident until the following year, February 2012.

D. Mary Bryan's October 19, 2011 email to school officials and October 19, 2011 meeting with Dean Winn

On or about October 19, 2011, Mary Bryan noticed that Ethan had come home from school with scratches on his leg. When she confronted him about the scratches, he told her that at the end of band class, while Mr. Beasley was out of the room, one of the bullies who was behind Ethan, removed a rubber stopper out of a piece of his trombone and started hitting Ethan in the legs with the remaining sharp piece of the instrument.

Upon questioning by his parents, Ethan also disclosed that CL and DM continued to make lewd sexual comments including calling both Ethan and Nolan gay, faggots and other similar names, and also talked about Ethan and Nolan jerking each other off and otherwise engaging in homosexual acts with each other.

Ethan's parents, enraged that this was going on -- particularly after the September 15, 2011 email -- decided to confront school officials. On October 19, 2011 Mary Bryant sent a second email addressed to Principal McKay, Mr. Beasley, and Mr. Halpin, describing the continuing bullying and also the hitting scratching of Ethan's leg.

Mr. and Mrs. Bryan met with Dean Winn at the Dean's office on October 19, 2011. They described the bullying endured by both Ethan and Nolan, specifically mentioning the physical assaults as well as the vile homophobic slurs that both boys were subjected to by CL and DM. The Bryans made it clear that they would not tolerate a continuation of this bullying.

Dean Winn denied the occurrence of this meeting. She also denied that she knew anything about the, emails, the physical assaults and the homophobic slurs in October 2011. She said she only learned of the October 19, 2011 email the following year, in February 2012.

E. The October 19, 2011 Administrator's meeting where John Halpin informed Principal McKay and Vice Principal DePiazza of Mary Bryan's emails

Mr. Halpin, who was a recipient of the October 19, 2011 email, said he forwarded that email to Dean Winn to make sure she was aware of the situation. Dean Winn denied having received the October 19, 2011 email from Mr. Halpin.

Also on October 19, 2011, Mr. Halpin attended a weekly administrators meeting. Principal McKay and Vice Principal DePiazza were at that meeting. Dean Winn, who was a regular participant in those weekly meetings, did not attend that day.

Mr. Halpin said that he reported on the bullying that was occurring in Mr. Beasley's band class in considerable detail to both Principal McKay and Vice Principal DePiazza. He also stated that everyone at that meeting knew about the two emails that had been sent by Mary Bryan. He also made it clear that the two assaults were perpetrated by the same two bullies against the same two bullied students. Mr. Halpin specifically recalled Principal McKay telling Vice Principal DePiazza to take care of the matter.

Dr. McKay stated his recollections from the October 19, 2011, administrators meeting differently. McKay recalled Mr. Halpin bringing up the subject of bullying in Mr. Beasley's class, but without mentioning many specifics. For reasons he did not disclose, McKay stated that he really was not interested in the details of such matters and left it to his subordinates to address the issue.

Dr. McKay stated that he told Mr. DePiazza and Mr. Halpin to handle the situation. Dr. McKay also stated that he subsequently did not ask the Vice Principal about how the investigation was going or what DePiazza had found out until February 2012.

Principal McKay only took action in February 2012 because it was then that he was ordered by his supervisor at the district level and the Assistant Superintendent to investigate the bullying of Ethan and Nolan.

Vice Principal DePiazza stated a vague memory of the October 19, 2011 administrative meeting. He recalled that there may have been some discussion about bullying but didn't really remember much. His position was that he definitely did not remember being told by Dr. McKay to conduct an investigation into the bullying reports on October 19, 2011.

Principal McKay stated that in 2011 while he never asked his Vice Principal about the bullying investigation, he did, at some point, have a casual discussion with Dean Winn about the matter. He asked her how the investigation was going. Dean Winn replied that she was having trouble getting corroborating statements from other students.

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Dean Winn's testimony contradicted the Principal's statements by claiming that she did not undertake any investigation of the bullying because she was specifically told by Dr. McKay that it was all being handled by Vice Principal DePiazza. Dr. McKay testified that Dean Winn told him she was investigating by trying to get statements from other students.

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F. Although by October 19, 2011, all members of the Greenspun Junior High School administration were aware of physical, and discriminatory bullying that Ethan and Nolan were experiencing, no investigation was conducted until February 2012, after both boys had left the school.

Although the school officials all pointed fingers at each other, the one thing that they all agreed upon is that contrary to Nevada statutes, no investigation of the reports of bullying, described in the September 15, 2011, and October 19, 2011 emails from Mary Bryan and the September 22, 2011 phone conversation between Aimee Hairr and Vice Principal DePiazza, the September 23, 2011 phone conversation between Aimee Hairr and Mr. Halpin, and the October 19, 2011 meeting between Mr. and Mrs. Bryan and Dean Winn, ever occurred in 2011.

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Throughout the rest of 2011, the bullying of Ethan and Nolan by CL and DM continued out of the sight of Mr. Beasley.

Ethan and Nolan continued to employ the strategy of trying to ignore the problem, feeling that any further complaints would just lead to greater retaliation.

When Ethan and Nolan came back to Greenspun for in January 2012, their resolve began to waver. Each boy tried to avoid band class or even school altogether. Ethan feigned illness, and even tried to make himself sick by eating cardboard. Nolan would hang out in the library or in the halls. By the middle of January, both boys had essentially stopped going to school in order to avoid further bullying.

In January 2012, Ethan Bryan was prevented from attempting to commit suicide by drinking household chemicals, because of a fortuitous intervention from his mother. Ethan's parents refused to send him back to Greenspun after that.

On or around January 21, 2012 Nolan had, what his mother described as something close to a breakdown because of the bullying that he and others were enduring at Greenspun. Mrs. Hairr decided to pull Nolan out of the school at that time. She also made a report to the police.

By early February 2012, both Ethan and Nolan had been removed from Greenspun Jr. High School.

Subsequent to the removal of Ethan and Nolan from Greenspun, and also subsequent to the filing of the police report, Principal McKay, on or about February 7, 2012, was contacted by officials from the school district, specifically his direct supervisor Andre Long and the Assistant Superintendent Jolene Wallace. He was ordered by Ms. Wallace to conduct an investigation into the bullying of Ethan Bryan and Nolan Hairr.

Because he was ordered by his superiors to investigate, Principal McKay directed Vice Principal DePiazza to conduct a "second" investigation.

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This was, in fact, the only investigation done at Greenspun into the bullying of Ethan and Nolan. At trial, no one from the school or the school district testified to seeing any results of any earlier investigation. Nor was any evidence obtained from any earlier investigation introduced. Contrary to the responsibilities under Nevada law, no investigation ever took place while Ethan and Nolan were attending Greenspun Junior High School.

IV. Conclusions of Law

A. The Evidence and Testimony at Trial shows a Title IX Violation.

1. Title IX Standards

Section 901(a) of Title IX provides, "No 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 USC § 1681(a). Based on the receipt of federal funds, CCSD is subject to Title IX requirements. 20 USC § 1681(a). Under Title IX, student on student harassment and bullying based upon perceived sexual orientation is actionable.

For liability under Title IX for student on student sexual harassment: (1) the school district "must exercise substantial control over both the harasser and the context in which the known harassment occurs", (2) the plaintiff must suffer "sexual harassment ... that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school", (3) the school district must have "actual knowledge of the harassment", and (4) the school district's "deliberate indifference subjects its students to harassment". *Reese v. Jefferson School District No, 14J*, 208 F.3d 736, 739 (9th Cir. 2000) (*quoting Davis*, 526 U.S. 629, 119 S. Ct. 1661, 1675 (1999)). *See also, Henkle v. Gregory*, 150 F.Supp.2d 1067, 1077-1078 (D. Nev. 2001). The Ninth Circuit defines deliberate indifference as "the conscious or reckless disregard of the consequences of one's acts or omissions," *Henkle v.*

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Gregory, 150 F.Supp. 2d 1067,1077-78 (D. Nev. 2001); See also 9th Cir. Civ. Jury Instr. 11.3.5 (1997)(*citing Redman v. County of San Diego*, 942 F.2d 1435, 1442 (9th Cir. 1991), *cert. denied,* 502 U.S. 1074 (1992). A Plaintiff bringing a claim under Title IX must prove his or her claim by a preponderance of the evidence. Whether conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships," *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998).

In the instant case, the testimony at trial showed that: 1) Greenspun Junior High School exercised substantial control over both the students involved in the bullying and the context in which the harassment occurred; 2) both Ethan and Nolan were bullied at school; 3) the harassment they endured was sexual in nature; 4) the harassment was so severe, pervasive, and objectively offensive that it deprived Ethan and Nolan of access to the educational opportunities and benefits provided by the school; 5) the appropriate school officials had actual knowledge of the bullying and sexual discrimination suffered by Ethan and Nolan; and, 6) the appropriate school officials demonstrated deliberate indifference to the bullying endured by Ethan and Nolan.

2. Ethan and Nolan were bullied in Mr. Beasley's band class.

Ethan and Nolan were bullied in Mr. Beasley's band class by two other students. They were not only called names, but both were physically assaulted by the bullies. On September 13, 2011, CL stabbed Nolan in the groin with a pencil during Mr. Beasley's band class. On October 18, 2011 Ethan was physically assaulted by one of the bullies at the end of band class by having his legs hit and scratched with a trombone from which the rubber stopper had been removed.

3. The bullying was sexual in nature.

From the very beginning of the school year Nolan was called names such as "faggot, fucking fat faggot, fucking faggot, gay, gay boyfriend, cunt." This began when he was 11 years old at the beginning of sixth grade. Nolan was a small child who had blonde hair down to his shoulders.

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While Ethan had been bullied by CL and DM from the beginning of the school year, their comments had started off being directed at his size and weight, after the stabbing incident, the bullies also began directing their homophobic slurs against Ethan as well. The bullies continuously taunted Ethan and Nolan with homophobic slurs and innuendo, and specifically made statements concerning homosexual relations and explicit sexual acts between Ethan and Nolan in vile and graphic terms.

4. The bullying of Ethan and Nolan was severe, pervasive, and objectively unreasonable, and deprived them of significant educational opportunities.

The nature of the bullying was severe, pervasive, and objectively unreasonable. It involved verbal abuse of a sexual and homophobic nature beginning from the start of the school year and only ceased when Ethan and Nolan were forced to stop attending Greenspun. Both boys suffered so severely from the bullying that they did whatever they could to not attend school in order to avoid the bullying. In January 2012, Ethan feigned illness in order to stay home from school. He would eat paper in order to make himself sick. For Ethan, the bullying was so severe and pervasive that he saw suicide as his only way out. Fortunately, he was prevented from doing so by his mother's intervention. At that point, she was forced to take him out of Greenspun.

In January 2012, Nolan stopped going to band class in order to avoid the bullying by CL. Nolan then had a breakdown due to the constant bullying that forced his parents also to remove him from Greenspun. The creation of a sufficiently hostile environment forced Ethan and Nolan's parents to remove them from Greenspun Jr. High School and thus deprived them of educational opportunities.

The severity of the hostile environment forced both Nolan and Ethan to quit Greenspun to escape both verbal and sometimes physical harassment from CL and DM that school officials were aware of, and allowed to continue. This was clearly a loss of educational opportunity.

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5. Appropriate school officials had actual notice of the existence and the discriminatory nature of the bullying.

Appropriate school officials had notice of the existence and nature of the bullying suffered by Ethan and Nolan. *See*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

> [I]n cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

524 U.S. at 290.

The Court in *Warren v. Reading Sch. Dist.*, 278 F.3d 163 (3rd Cir. 2002) stated that the school principal was the appropriate person for Title IX purposes, while in *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999) the Court considered an individual who exercises substantial control, for Title IX purposes, to be anyone with the authority to take remedial action. Several Greenspun personnel had authority to take remedial disciplinary actions when appropriate, including, band teacher Beasley, Principal McKay, Vice Principal DePiazza, and Dean Winn. Both Mr. Beasley and Mr. Halpin admitted to receiving Mary Bryan's September 15, 2011 and October 19, 2011 emails.

Five separate contacts by Ethan or Nolan's parents to Greenspun personnel put the school on actual notice of the verbal, physical and sexual nature of the bullying. On September 15, 2011, Mary Bryan sent an email to Dr. McKay, Mr. Halpin and Mr. Beasley concerning the stabbing of Nolan. On September 22, Aimee Hairr spoke to Mr. DePiazza about the general bullying and the assault on her son. She spoke to Mr. Halpin by phone the next day.

On October 19, 2011, Mary Bryan sent another email to Dr. McKay, Mr. Halpin and Mr. Beasley, this time regarding the assault on Ethan. The same day, she and her husband met with Dean Winn to discuss the bullying of Ethan and Nolan, and particularly about its sexual,

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homophobic nature. All of these parental contacts gave the school actual notice to appropriate persons of the existence and nature of the bullying of both Ethan and Nolan.

6. Greenspun school officials acted with deliberate indifference for Title IX violation purposes.

Deliberate indifference is "the conscious or reckless disregard of the consequences of one's acts or omissions." *Henkle v. Gregory,* 150 F. Supp. 2d at 1078. Deliberate indifference occurs where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000). It must, at a minimum, "cause students to undergo harassment or make them liable or vulnerable to it." *Id.*, *citing Davis*, 526 U.S. at 645. "[I]f an institution either fails to act, or acts in a way which could not have reasonably been expected to remedy the violation, then the institution is liable for what amounts to an official decision not to end discrimination." *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274, 290 (1998); *See, Jane Doe A v. Green*, 298 F. Supp.2d 1025, 1035 (D. Nev. 2004). Greenspun officials' failure to take further action once they received actual notice of the bullying and its nature showed deliberate indifference. *See, Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130, 1136 (9th Cir. 2003), *Vance v. Spencer County Public School Dist.*, 231 F.3d 253 (6th Cir. 2000).

Even though NRS 3.88.1351 (1) requires that once a report of bullying is received, the Principal or his or her designee begin an immediate investigation, no investigation, much less one conforming to statute, was ever undertaken in 2011. The only time an investigation occurred was in February 2012, when it was ordered by the District. This, however, occurred well after both Ethan and Nolan had been removed from Greenspun, and a police report had been filed. This constituted deliberate indifference on the part of school officials who had actual notice of the physical and homophobic bullying to which Ethan and Nolan were subjected.

B. The Evidence and Testimony at Trial shows a Substantive Due Process Violation.

Under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Due Process Clause of the United States Constitution does not require state actors to

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protect private citizens from harm inflicted by other private citizens. *DeShaney,* however, is inapplicable because of the state created danger exception.

1. Plaintiffs had a constitutionally protected interest in their safety and in their education.

State law can create a liberty or property interest. *Vitek v Jones*, 445 U.S. 480 (1980); *Carlo v. City of Chino*, 105 F.3d 493 (9th Cir. 1997). The Supreme Court stated in *Goss v. Lopez*, 419 U.S. 565, 576 (1975), that a student's right to a public education is a property interest protected by the Due Process Clause. See also, *Henry A. v. Willden*, 678 F.3d 991 (9th Cir. 2012).

2. Defendant acted with deliberate indifference for substantive due process violation purposes.

The "state-created danger exception" — when "the state affirmatively places the Plaintiff in danger by acting with 'deliberate indifference' to a 'known and obvious danger," is manifested here. The standard for deliberate indifference does not vary between Title IX and 42 USC 1983 cases. *Doe A. v. Green*, 298 F.Supp.2d 1025, 1035 (D.Nev., 2004) see also *Willden, supra.* Deliberate indifference consists of deliberate action or deliberate inaction. *Wereb v. Maui County*, 727 F.Supp.2d 898, 921 (D. Haw., 2010) citing, *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir., 2006); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

In other cases, Defendants have been "charged with knowledge" of unconstitutional conditions when they persistently violated a statutory duty to inquire about such conditions and to be responsible for them. *Wright v. McMann*, 460 F.2d 126 (2nd Cir. 1972); *United States ex rel. Larkins v. Oswald,* 510 F.2d 583 (2nd Cir. 1975); *Doe v. N.Y.C. Dep't of Soc. Servs.*, 649 F.2d 134 (2nd Cir. 1981). The failure to investigate the reported physical, sexual, and other verbal bullying, in the face of clear statutory mandates to do so is significant evidence of an overall posture of deliberate indifference toward Ethan's and Nolan's welfare.

3. CCSD is subject to *Monell* liability.

In *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005), the Ninth Circuit stated that there are three distinct alternative theories of municipal liability, by showing: (1) a

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longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity; (2) that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision; or (3) that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate. *See also, Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

Liability can be established by the existence of a government policy or custom that leads to a constitutional deprivation. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 694 (1978); *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 983 (9th Cir. 2002); *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000). The other two theories of municipal liability attach when a final policymaker for the government acts in a manner that can fairly be said to represent official action. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986).

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Liability may attach either when the final policymaker is a final policymaking authority who made the allegedly unconstitutional action, or when that action is ratified, or delegated to a subordinate. *Menotti*, 409 F.3d at 1147; *Ulrich*, 308 F.3d at 984-85. A policy includes "a course of action tailored to a particular situation and not intended to control decisions in later situations." *Pembaur*, 475 U.S. at 481. When determining whether an individual has final policymaking authority, the pertinent query is whether he or she has authority "in a particular area, or on a particular issue." *McMillian v. Monroe County*, 520 U.S. 781 (1997). The individual must be in a position of authority to the extent that a final decision by that person may appropriately be attributed to the District. *Lytle v. Carl*, 382 F.3d 978, 983 (9th Cir. 2004); *see also, Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999). A government entity can be liable for an isolated constitutional violation. *Id.*

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Principals can act as final policymakers for the purposes of *Monell* liability with respect to student discipline issues. *Williams v. Fulton Cnty. Sch. Dist.*, 181 F. Supp. 3d 1089, 1126-27 (N.D. Ga. 2016), *citing*, *Holloman v. Harland*, 370 F.3d 1252, 1293 (11th Cir. 2004); *see also*, *Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982); *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263, 268 (N.D.N.Y. 2000), *citing Luce v. Board of Educ.*, 2 A.D.2d 502, 505, 157 N.Y.S.2d 123, 127 (3d Dep't 1956), *aff'd*, 3 N.Y.2d 792, 143 N.E.2d 797, 164 N.Y.S.2d 43 (1957).

4. NRS 388.1351(2) specifically tasks the school Principal with responsibility for investigating reports of bullying.

The question of whether a particular individual has policymaking authority is a question of state law. *Pembaur, supra,* 475 U.S. at 483; *St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988); *Lytle,* 382 F.3d at 982-83. NRS 388.1351(2) required that once a report of bullying is received, the Principal or his or her designee shall initiate an investigation not later than one day after receiving notice of the violation, and that the investigation must be completed within 10 days after the date on which the investigation is initiated.

The legislature explicitly gave a statutory mandate to investigate reports of bullying in school to the school "Principal or his or her designee." There is absolutely no legislative authority for the CCSD to designate somebody else at the District level to override the delegation of responsibility and authority. Thus, under the NRS 388.1351(2), because the final policymaker relating to the failure of Principal McKay or any of his designees to conduct the requisite investigation on the reports of the bullying of Ethan and Nolan, was the Principal himself, Defendant CCSD is liable for the substantive due process violation under *Monell*.

V. Damages

In its June 29, 2017 Decision and Order, the Court ruled that "Plaintiffs are entitled to a judgment for all damages sought under these two claims asserted in the Complaint, and proven at trial." On April 6, 2016, Discovery Commissioner Bulla denied Defendants' Motion to Compel

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Damages Categories and Calculations, thus allowing these calculations to be determined by the Court at trial. The Discovery Commissioner's Report and Recommendations were affirmed and adopted by the Court. Plaintiffs Mary Bryan and Aimee Hairr testified that their out of pocket expenses for schooling for Ethan and Nolan outside of CCSD is approximately ten thousand dollars ($10,000) per year starting in eighth grade, or approximately fifty thousand dollars ($50,000) total for each child to date.

Beyond these out of pocket expenses both Ethan and Nolan suffered from physical attacks and relentless homophobic slurs. A seminal Nevada case can serve as a guideline for damages in similar school bullying cases. In *Henkel*, (150 F. Supp. 2d at 1069), "during school hours and on school property, he endured constant harassment, assaults, intimidation, and discrimination by other students because he is gay and male and school officials, after being notified of the continuous harassment, failed to take any action." The Washoe County School District agreed to pay Mr. Henkel four hundred, fifty-one thousand ($451,000) dollars as damages. Using *Henkel* as a guidepost, the $451,000 award in 2001 would be equivalent to approximately $625,000 in today's dollars. Therefore, awards of six hundred thousand dollars ($600,000), apiece to each Plaintiff, Mary Bryan on behalf of Ethan Bryan and Aimee Hairr on behalf of Nolan Hairr, is appropriate.

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VI. Judgment

Judgment is hereby entered in favor of Plaintiffs Mary Bryan on behalf of Ethan Bryan and Aimee Hairr on behalf of Nolan Hairr, and against Defendant Clark County School District on the Title IX and Substantive Due Process claims. It is further ordered that Defendant shall pay to each Plaintiff, Ethan Bryan and Nolan Hairr, the sum of ~~six~~ two NMA hundred thousand dollars ~~($600,000)~~ $200,000.00 NMA for physical and emotional distress damages and costs for alternative schooling. These awards are exclusive of any costs or attorneys fees accrued.

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Dated this 20 day of July 2007

Nancy L. Allf

NANCY L. ALLF
District Court Judge

Respectfully submitted by:

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Attorneys for Plaintiffs, Mary Bryan, Ethan Bryan, Aimee Hairr and Nolan Hairr

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CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed I caused the foregoing document to be electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail and/or by email to:

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Karen Lawrence
Judicial Executive Assistant

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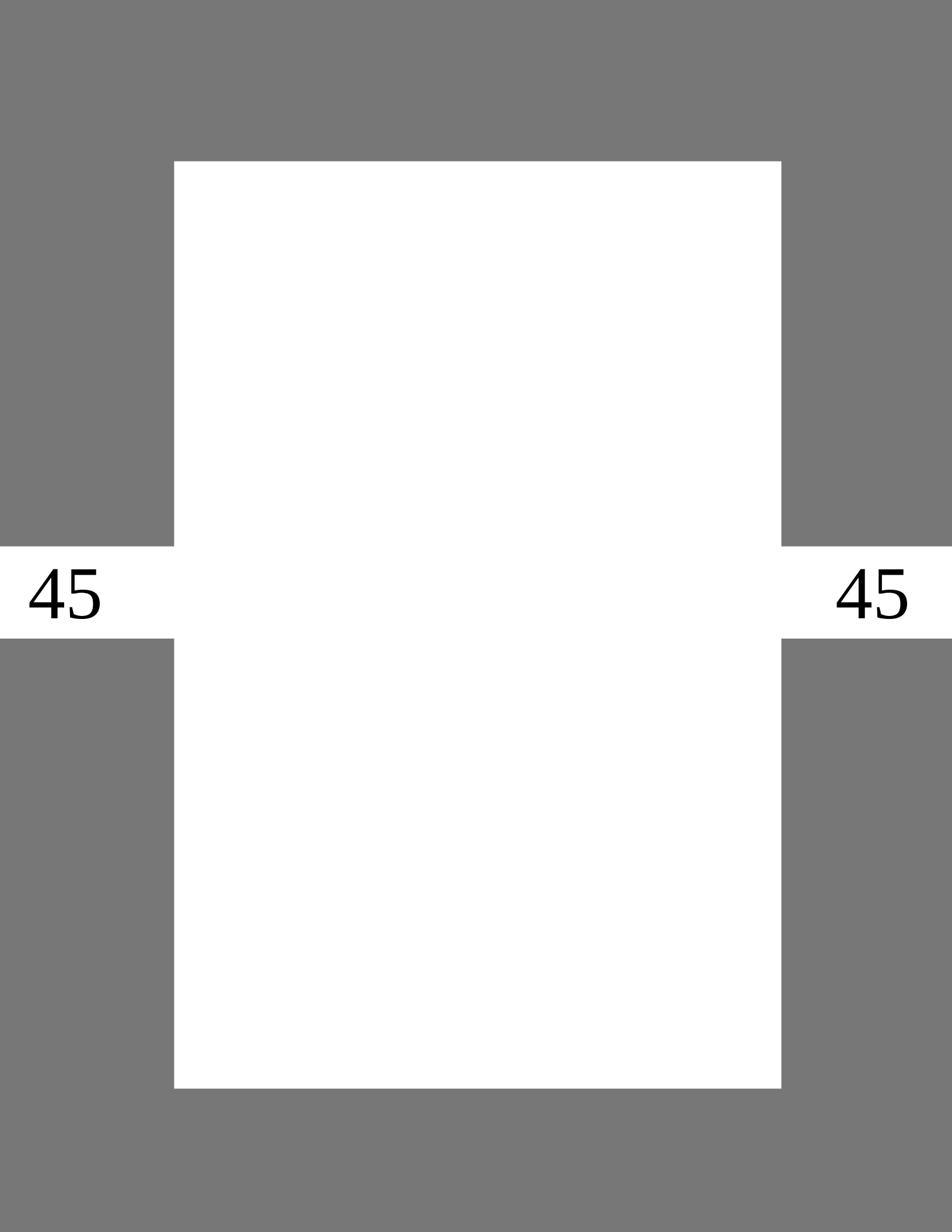
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Attorneys for Defendants Clark County School District (CCSD)

DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD); PRINCIPAL WARREN P. MCKAY, in his individual and official capacity as principal of GJHS; LEONARD DEPIAZZA, in his individual and official capacity as assistant principal at GJHS; CHERYL WINN, in her individual and official capacity as Dean at GJHS; JOHN HALPIN, in his individual and official capacity as counselor at GJHS; ROBERT BEASLEY, in his individual and official capacity as instructor at GJHS,

Defendants.

Case No. A-14-700018-C

Dept. No. XXVII

CASE APPEAL STATEMENT

CASE APPEAL STATEMENT

1. Name of appellants filing this case appeal statement:

Defendant Clark County School District

2. Identify the judge issuing the decision, judgment, or order appealed from:

The Honorable Nancy L. Allf

3. Identify each appellant and the name and address of counsel for each appellant:

Attorneys for Appellant Clark County School District

Daniel F. Polsenberg
Dan R. Waite
Brian D. Blakley
Abraham G. Smith
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

Attorneys for Respondents Mary Bryan, Ethan Bryan, Aimee Hairr and Nolan Hairr

Allen Lichtenstein
ALLEN LICHTENSTEIN, LTD.
3315 Russell Road, No. 222
Las Vegas, Nevada 89120
(702) 433-2666

John Houston Scott
SCOTT LAW FIRM
1388 Sutter Street, Suite 715
San Francisco, California 94109
(415) 561-9601

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

John Houston Scott is not licensed to practice in Nevada. A copy of the minute order granting him permission to appear is attached hereto as Exhibit A.

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6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Retained counsel

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Retained counsel

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

N/A

9. Indicate the date the proceedings commenced in the district court, *e.g.*, date complaint, indictment, information, or petition was filed:

"Complaint," filed April 29, 2014

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This action arises under Title IX and 42 U.S.C. § 1983, based on allegations that two junior high school students bullied plaintiffs on the basis of sex. After a bench trial, the district court entered a decision in favor of plaintiffs, ruling that CCSD violated Title IX and that plaintiffs' substantive due process rights guaranteed by the Fourteenth Amendment were violated. Defendant appeals from the decision and judgment.

11. Indicate whether the case has previously been the subject of an appeal or an original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding.

N/A

12. Indicate whether this appeal involves child custody or visitation:

This case does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

Undersigned counsel is not aware of any circumstances that make settlement impossible.

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Las Vegas, NV 89169-5996

Dated this 23rd day of August, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

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Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to Nev.R.Civ. Rule 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this day, I caused a true and correct copy of the "Case Appeal Statement" to be filed, via the Court's E-Filing System, and served on all interested parties via U.S. Mail, postage pre-paid and courtesy email.

Allen Lichtenstein, Esq.
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(Admitted Pro Hac Vice)

Dated this 23rd day of August, 2017

/s/ Luz Horvath
An Employee of Lewis Roca Rothgerber Christie LLP

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EXHIBIT A

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EXHIBIT A

A-14-700018-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	July 07, 2015

A-14-700018-C Mary Bryan, Plaintiff(s)
vs.
Clark County School District, et al, Defendant(s)

July 07, 2015 **3:00 AM** **Motion to Associate Counsel**

HEARD BY: Allf, Nancy **COURTROOM:**

COURT CLERK: Nicole McDevitt

RECORDER:

REPORTER:

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PARTIES PRESENT:

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JOURNAL ENTRIES

- COURT FINDS after review that Plaintiffs Mary Bryan and Aimee Hairr filed a Motion to Associate Counsel, John H. Scott, Esq. on June 4, 2015, with a hearing set for Chambers Calendar on July 7, 2015. COURT FURTHER FINDS after review the Motion is in compliance with SCR 42 and no opposition has been filed.

COURT ORDERS for good cause appearing and pursuant to EDCR 2.20 (e), failure to file an opposition may be construed as an admission that the motion is meritorious and a consent to granting the same, Plaintiffs Motion to Associate Counsel GRANTED; Hearing on CHAMBERS CALENDAR on July 7, 2015 is VACATED; Movant to prepare the appropriate Order.

CLERK'S NOTE: A copy of this minute order was faxed to: Allen Lichtenstein (702-433-9591) and Dan R. Waite, Esq. (702-949-8398)

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Attorneys for Defendants Clark County School District (CCSD)

DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD); PRINCIPAL WARREN P. MCKAY, in his individual and official capacity as principal of GJHS; LEONARD DEPIAZZA, in his individual and official capacity as assistant principal at GJHS; CHERYL WINN, in her individual and official capacity as Dean at GJHS; JOHN HALPIN, in his individual and official capacity as counselor at GJHS; ROBERT BEASLEY, in his individual and official capacity as instructor at GJHS,

Defendants.

Case No. A-14-700018-C

Dept. No. XXVII

CCSD'S OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

Hearing Date: September 13, 2017
Hearing Time: 9:00 a.m.

Case Number: A-14-700018-C

INTRODUCTION

Plaintiffs' demand for nearly $700,000 in attorney fees is beyond excessive. Section 1988 does not permit an award of the highest conceivable hourly rate for every vaguely-described task counsel performed. Rather, it permits a reasonable award of attorney fees at local market rates.

Under § 1988, the Court performs two calculations to determine a reasonable award. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 433-438 (1983). First, it calculates the lodestar, by multiplying the hourly rate for similarly experienced local attorneys in similar cases by the number of hours "reasonably expended" in the litigation. *Id.*; *Blum v. Stenson*, 465 U.S. 886, 897 (1984). Second, after the lodestar is calculated, the court determines if the plaintiffs achieved only "partial or limited success." If they did, the court adjusts the lodestar downward as directed by *Hensley* and its progeny. *See, e.g.*, 461 U.S. at 436; *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 901-906 (9th Cir. 1995).

When performing these calculations, the Court is free to either: (1) make line-by-line cuts to the time records; or, (2) as is commonly done, reduce the award on an appropriate percentage basis. *E.g.*, *Schwarz*, 73 F.3d at 905. As the Supreme Court recently explained, "[t]he essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." *Fox v. Vice*, 563 U.S. 826, 838 (2011) (citing *Hensley*). Thus, "trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Id.*

Reasonably calculated, the lodestar is $214,854

Here, plaintiffs' lodestar calculation is so unreasonable that its only conceivable purpose is to anchor the Court to such a high number that even a large reduction more than fairly compensates plaintiffs' counsel. Such manipulation should not be rewarded.

First, plaintiffs demand hourly rates that are more than double the prevailing Nevada rate for similarly experienced lawyers in civil rights cases. *Infra* Part I.A.

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And plaintiffs fall far short of meeting their burden to establish otherwise. Thus, the Court should reduce the requested hourly rates to the prevailing Las Vegas market rate of $250.00.

Second, the Court should cut counsel's claimed hours by at least 20%. Their time records seek compensation for numerous duplicative, needless tasks and other non-compensable work. *Infra* Part I.B. Moreover, many of their time entries are so vague that the *Hensley*-required reasonableness analysis is impossible. *Infra* Parts I.B.3-6. Similarly, it is clear that Attorney Lichtenstein recorded many of his time entries long after the events they describe. *Infra* Part I.B.5. Such non-contemporaneous entries are inherently unreliable. As a result of the non-compensable time and deficient records, a modest hours reduction of at least 20% is more than reasonable. Indeed, courts regularly cut much more under similar circumstances. Accordingly, the lodestar should be calculated as follows:

Attorney	Nevada Hourly Rate	Hours	20% Hours Reduction	Total
Lichtenstein	$250.00	690.77	.80	$138,154
Scott	$250.00	383.50	.80	$76,700

Under the partial-success rule, the Lodestar should be reduced by 20%

Then, *Hensley*'s "partial-success" rule requires adjusting the lodestar downward by at least 20%. *Infra* Part II. Specifically, the lodestar should be reduced by 5% for work performed on the unsuccessful, "unrelated" claim against the Nevada Equal Rights Commission.

Likewise, the lodestar should be reduced by another 15% due to plaintiffs' "partial success" in this litigation. Among other things, they prevailed against only 1 of 20 defendants named in the original Complaint (only 1 of 15 defendants named in the First Amended Complaint); they lost on 4 of their 6 claims; failed to obtain any of the declaratory, injunctive, or punitive relief they sought; and were awarded only

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33% of the compensatory award they requested. Indeed, their victory was partial at best, meaning a 15% adjustment is more than appropriate. Thus, the total fee award should be calculated by multiplying the lodestar figure by 80%:

Attorney	Lodestar	20% "Partial Success" reduction	Total
Lichtenstein	$138,154	.80	$110,523.20
Scott	$76,700	.80	$61,360.00

Finally, the Court should reject plaintiffs' argument that the "complex" nature of this case justifies their proposed, excessive award. This case was not complex at all. *Infra* Part III. It did not require a single expert, and—until this motion—plaintiffs themselves described it as "garden variety." Thus, the combined fee award for Attorneys Lichtenstein and Scott should not exceed $171,883.20.

ARGUMENT

I. THE LODESTAR CALCULATION DEMANDS A SIGNIFICANT REDUCTION IN THE REQUESTED FEE AWARD

In Title IX and § 1983 actions, the Court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (emphasis added). To determine a "reasonable attorney's fee," the Court begins with a lodestar calculation. *Hensley*, 461 U.S. at 433; *Blum v. Stenson*, 465 U.S. 886, 897 (1984). This requires the Court to multiply a reasonable hourly rate for the services performed by the number of hours reasonably expended in the litigation. *Id.* This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. *Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939. The party seeking fees bears the burden of supporting the hours allegedly worked and the hourly rates claimed. *Id.*

Here, the requested hourly rates are beyond excessive and inadequately supported. Indeed, plaintiffs claim too much and prove too little. Moreover, plaintiffs

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seek fees for duplicative and otherwise non-compensable tasks, and many of the time entries are so vague that the required reasonableness analysis is impossible. Thus, to calculate the lodestar, the Court should cut counsel's proposed, astronomical rates (which they have never charged in Nevada), to the prevailing Nevada rate. Then, it should cut the claimed hours by at least 20%.

A. The Requested Hourly Rates Should Be Significantly Reduced

The first lodestar step is to determine the attorneys' reasonable hourly rates "according to the prevailing market rates in the relevant community[.]" *Blum,* 465 U.S. at 895-96 & n.11 (1984). This is the rate commonly charged in the local legal community. *Id.* Here, Attorneys Lichtenstein and Scott hope for hourly rates of $600.00 and $650.00 respectively. (Mot. at 24). This is more than double the "prevailing market rate" for Las Vegas litigators with similar experience and reputations. In fact, the prevailing Las Vegas rates for similar attorneys in similar civil rights cases is $250.00. *Infra* Part I.A.2. Further, the requested rates are inadequately supported. Plaintiffs' lawyers have never charged paying clients such excessive rates in Nevada, and they submitted no evidence suggesting they ever could. Moreover, even their single, supportive declaration suggests that the proposed fee award is excessive.

1. The proposed rates are more than double the prevailing Las Vegas rates for similarly experienced litigators

Plaintiffs agree that, to determine a reasonable hourly rate, the Court must determine "what the lawyer would receive if he were selling his services in the market rather than being paid by court order." (Mot. at 16:7-9 (quoting *Continental Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) (Posner, J.)). Simply put, "[t]he reasonable hourly rate is the rate a paying client would be willing to pay." *Arbor Hill v. Cty. of Albany*, 522 F.3d 182, 190 (2d Cir. 2008). Accordingly, in this case, the

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Court must determine what hourly rate these attorneys could actually charge a Las Vegas client for the services they performed here. Certainly, they could not charge (and have not charged) a Las Vegas litigant an hourly rate of $600.00 or $650.00.

Recent federal cases surveying Nevada rates demonstrate that the "prevailing rate" for partners with 20-40 years of experience ranges from $250.00–$375.00. *E.g.*, *Home Gambling Network, Inc. v. Piche*, 2015 WL 1734928, at *10–11 (D. Nev. Apr. 16, 2015) (surveying Nevada cases and awarding, for example, $268.00 for a litigation attorney with "20+ years" of experience; $361.71 for a specialist in complex patent and IP litigation with "30+ years" of experience; and $95.00 for a "newly licensed" attorney); *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 2017 WL 44942, at *1 (D. Nev. Jan. 4, 2017) (surveying Nevada cases and awarding $325 for partners and $250 for associates); *Dentino v. Moiharwin Diversified Corp.*, 2017 WL 187146, at *2 (D. Nev. Jan. 17, 2017) (surveying Nevada cases and awarding $350 for partners; $250 for associates; and $125 for paralegals); *Chemeon Surface Tech., LLC v. Metalast Int'l, Inc.*, 2017 WL 2434296, at *1 (D. Nev. June 5, 2017) (surveying Nevada cases and awarding $375 for a partner; $250 for an associate; and $125 for a paralegal).

For example, Nevada's U.S. District Court recently awarded 27-year attorney—and current Lieutenant Governor—Mark Hutchison an hourly rate of **$268.00**. *Home Gambling Network,* 2015 WL 1734928, at *10–11. Relevant to this case, Lt. Governor Hutchison (1) graduated from law school in 1990, the same year as Attorney Lichtenstein; (2) is a named partner at a major Las Vegas law firm; and (3) specializes in, among other things, constitutional litigation.[1] Indeed, Lt. Governor Hutchison has at least as much experience as Attorney Lichtenstein, and he was awarded $268.00—less than half the rate (approximately 45%) of the $600 rate Attorney Lichtenstein proposes here.

[1] *See* http://www.hutchlegal.com/attorney/mark-a-hutchison

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2. The prevailing Las Vegas rate for a 27-year attorney in a bullying-based civil rights case is $250.00

Further, and relevant to this exact case, defense attorney Dan Waite charged and collected an hourly rate of **$250.00**, as CCSD's co-lead counsel. (Waite Decl., at ¶ 9, Ex. 1). This reflects the hourly rate Las Vegas clients will actually pay for a 27-year litigator to handle a civil rights case like this one.

Like Attorney Lichtenstein and Lt. Governor Hutchison, Attorney Waite graduated from law school in 1990. (*Id.* ¶ 3). And, like them, he has over 27 years of local litigation experience (*Id.* ¶¶ 4-6). Moreover, he (1) is the former managing partner of Lewis Roca Rothgerber Christie's Las Vegas Office; (2) holds an "AV/Preeminent Attorney" rating by Martindale-Hubbell; and (3) has been included in several editions of *The Best Lawyers in America.* (*Id.* ¶¶ 7-8).

Currently, he serves as co-lead counsel on this case and in the only other Las Vegas civil rights cases arising from allegations of student-on-student bullying. (*Id.* ¶ 10). Not surprisingly, he charges the same $250.00 hourly rate in both cases (*id.* ¶ 11), because it reflects what the market will bear for such civil rights work.

Simply put, Attorney Waite has at least as much experience as Attorney Lichtenstein, both temporally and with respect to bullying civil-rights cases. For Attorney Waite's services, the Las Vegas market bore an hourly-rate of less than 42% of the rate Attorney Lichtenstein proposes. Further, unlike Attorney Lichtenstein's $600.00 dream rate, Attorney Waite's $250.00 billed-and-collected rate reflects what similarly-experienced Las Vegas litigators, with similar accolades, can actually charge a paying client, in a case like this one. Thus, according to plaintiffs' own argument, the $250.00 rate exemplifies the "reasonable hourly rate," because it reflects what a 27-year Las Vegas lawyer would "'receive if he were selling his services in the market rather than being paid by court order.'" (Mot. at 16:7-9 (quoting *Continental Sec. Litig.*, 962 F.2d at 568). Indeed, Attorney Waite's rate

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demonstrates, with precision, the prevailing Las Vegas rate for a litigator with 27 years of experience in a bullying civil rights case.

Moreover, courts are appropriately skeptical when, as here, a fee applicant's hoped-for rate is materially higher than the hourly rate charged by opposing counsel. *See, e.g.*, *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1190 (1st Cir. 1996). For this reason, "the court is entitled to rely upon its own knowledge of attorney's fees in its surrounding area in arriving at a reasonable hourly rate, as well as the defense attorneys' rates." *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1190 (1st Cir. 1996) (emphasis added). Here, when compared to Attorney Waite's Las Vegas rate, plaintiffs' counsel demands rates that are 158% and 161% higher. This is beyond excessive.

3. Attorney Lichtenstein has never charged such excessive rates, and he failed to meet his evidentiary burden

Attorney Lichtenstein bore the burden of proving that an attorney of his reputation and experience could actually collect $600.00 an hour in Las Vegas. Faced with this burden, he did not even try to argue—let alone prove—that he has ever charged—much less collected—such an astronomical rate. This further confirms that the rate is unreasonable. Worse, however, Attorney Lichtenstein did not even try to identify a single, similarly-situated Nevada lawyer who charges $600.00 for this kind of civil rights work. Thus, he fell far short of satisfying his evidentiary burden.

4. Even if Attorney Scott has charged his proposed rate in San Francisco, he did not and could not charge such an excessive rate in Las Vegas

Unlike Attorney Lichtenstein, Attorney Scott attempts to substantiate his claimed rate, but his evidence is inadequate and irrelevant. Specifically, he asserts—in his declaration—that he was once awarded a San Francisco rate of $725.00. (Scott Decl., at ¶25). This, however, is irrelevant here in Las Vegas.

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First, the fee award Attorney Scott cites is supported by several nonparty declarations and federal decisions stating that $725.00 is a customary San Francisco rate for similarly experienced lawyers. (J. Scott Decl., Ex. C, *A.D. v. State of California Highway Patrol,* 2013 WL 6199577, at *6 (N.D. Cal. Nov. 27, 2013)). But a customary San Francisco rate is not a customary Las Vegas rate. Instead, as demonstrated above, $250.00 is a customary Las Vegas rate for similarly experienced attorneys litigating similar civil rights cases. *Supra* part I.A.2.

The Las Vegas market simply does not support rates nearly as high as those charged in San Francisco. In fact, the very order Attorney Scott cites makes clear that Bay Area rates are so high that even Washington D.C. rates are not comparable. *Id.* (rejecting a "formulaic attorneys' fees schedule used in the District of Columbia"). Here, the controlling "community" is not San Francisco; it is Las Vegas, *Blum,* 465 U.S. at 895-96 & n.11, and the customary rate for this kind of work in Las Vegas is $250.00. Thus, Attorney Scott's prior San Francisco fee award is irrelevant, and he has failed to carry his burden to establish that Las Vegas would support a $650 rate.

5. The attorneys refuse to disclose the hourly rates they actually contemplated at the outset of the case

Further, none of plaintiffs' attorneys attached their retainer agreement with plaintiffs. These agreements presumably include a standard termination provision that requires the payment of a specified hourly-rate, for past work, in the event that plaintiffs terminate the representation prior to completion. Virtually all contingency agreements include some provision of this kind. Had Attorneys Lichtenstein and Scott attached their retainer agreements here, the Court could see exactly what hourly rates they proposed charging for their services at the outset of the representation. Unfortunately, they denied the Court the benefit of such evidence. This signals that they never contemplated charging (and plaintiffs never contemplated paying) the excessive rates they now propose to the Court. Likewise, it demonstrates that they can offer no evidence that actually supports such rates.

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Accordingly, the Court should reduce their proposed hourly rates to the $250.00 rate that this market will actually bare. Any higher rate both lacks evidentiary support and contradicts the overwhelming evidence that $250.00 is the prevailing Las Vegas market rate for attorneys with similar reputations, accolades, and experience.

6. The single nonparty declaration proves that the hourly rate should be slashed

Even Mr. Dewitt's declaration, offered in support of Attorney Lichtenstein's proposed rate,[2] confirms that the proposed rates are excessive. Specifically, Mr. Dewitt—who holds himself out as a civil rights specialist—states that during his 44 years of litigating civil rights lawsuits he has been awarded a total of approximately $1 million in fees. (Dewitt Decl., Mot. Ex. 3, at ¶ 8). That is, with all of his numerous civil rights victories combined, Mr. Dewitt has been awarded just 30% more than the nearly $700,000 award that plaintiffs now seek for this single civil rights case. This confirms that the proposed award—for a three-year case litigated almost exclusively by two attorneys—is excessive.[3]

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[2] Notably, Attorney Scott declined to provide a nonparty declaration in support of his rate. Typically, on a motion of fees, the applicant supports his hourly rate with a declaration or affidavit from a nonparty lawyer in the community. *See, e.g.*, *Browne v. Am. Honda Motor Co.*, 2010 WL 9499073, at *6 (C.D. Cal. Oct. 5, 2010) (collecting cases)

[3] Still, the Court should strike Mr. Dewitt's declaration, as his own statements reveal he cannot provide a reliable estimate of fees for prosecuting a civil rights action in Las Vegas. As an initial matter, Mr. DeWitt is clearly biased. As a long-time attorney for the adult/erotic entertainment industry, he once described "local governments in particular" (encompassing entities like CCSD) as "arrogant, self-righteous assholes . . . . I enjoy suing them." (*See* Adult Video News, Q&A, March 2007, Ex. 5). Given his predisposed, dim view of government entities, like CCSD, it is unlikely that he is a neutral arbiter of fair and reasonable attorney rates in this case.

Further, Mr. DeWitt does not have the requisite local experience to opine on Las Vegas rates. He did not start providing legal services in Nevada until 2007, and he did not join the Nevada legal community until 2012 (when he moved to Nevada). In fact, a review of the Eighth Judicial District Court's website reveals that he has only ever appeared in 15 cases. Surely, appearing in 15 cases does not make a new Nevada attorney an "expert" on hourly rates for Nevada attorneys. Moreover, Mr. Dewitt does not cite one case where a Nevada judge awarded him anywhere near the exorbitant rate he describes here.

7. The proposed rates for junior attorneys and volunteers should be cut from the calculation or largely reduced

The proposed rates for plaintiffs' junior attorneys should be proportionately reduced, if not completely cut.

For example, Attorney Pratt's proposed rate is entirely unsubstantiated. Plaintiffs have offered no evidence—no declaration, no affidavit, nothing—to support it. Thus, plaintiffs have failed to carry their evidentiary burden, and her rate and hours should be cut from the calculation entirely. But even if the Court disagrees, it should—at the very least—cut her unsubstantiated, proposed rate to the prevailing $250.00 Las Vegas rate. Anything more lacks any evidentiary basis.

Likewise, Intern/Attorney Morgan's unsubstantiated rate should be cut from the calculation, as it lacks any evidentiary support. Moreover, Ms. Morgan was either a volunteer student intern or a first-year lawyer at the ACLU when she worked on this case. To the extent she worked as a volunteer, she should not win any legal fees. And during the time she worked as a first-year lawyer, she should be awarded no more than the $95.00 prevailing Las Vegas rate for "newly licensed attorney[s]." *See, e.g.*, *Home Gambling Network*, 2015 WL 1734928, at *10 (awarding an hourly rate of $95.00 for a "newly licensed attorney").

Likewise, the unsubstantiated $2,537.50 fee request for the other undisclosed volunteer interns should be cut entirely. Plaintiffs do not even try to substantiate their proposed rate for these unidentified interns. Likewise, they have cited nothing that would justify a fee award for interns who voluntarily assisted the ACLU with this case.

8. The Court should cut or exclude the proposed rates

Based on the forgoing, if the Court exercises its discretion to award fees in this contingency case, it should calculate that award using the $250.00 rate for Attorneys Scott and Lichtenstein. Similarly, to the extent the Court grants any award to Attorney Pratt or Intern/Attorney Morgan, despite the lack of any substantiating

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evidence, it should use the $250.00 rate for Attorney Pratt and the $95.00 rate for Intern/Attorney Morgan (but only for the hours she worked as non-volunteer lawyer).

B. Due to Duplicative Work, Non-Compensable Tasks, and Deficient Records, the Court Should Cut the Claimed Hours By at Least 20%

During the second lodestar step, the Court calculates "the number of hours reasonably expended in litigation." *Hensley*, 461 U.S. at 433 (emphasis added). Here again, the fee applicant bears the evidentiary burden and must prove all hours claimed. *Id.* "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Id.*

As *Hensley* explains, the Court "should exclude from this initial fee calculation hours that were not 'reasonably expended'" and cut hours that reflect poor 'billing judgment.'" *Id.* That is, the Court should "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Id.*

Here, Attorneys Lichtenstein and Scott claim 1165.52 hours. (Mot. at 24). As demonstrated below, however, many of these hours: (1) result from duplicative or otherwise needless work, such as one of them preparing for and sitting through a deposition taken entirely by the other; (2) seek compensation for non-compensable tasks, such as media interviews; (3) are so vaguely described that it is impossible to determine whether they were "reasonably expended" in the litigation; (4) consist of "block billing," which makes it impossible to determine how much time was spent on a particular task; or (5) were not recorded in reliable, contemporaneous time entries. To account for this non-compensable time and the deficient records, the Court should reduce the hours claimed by 20%.

1. Hours claimed for duplicative work must be cut

Duplicative work must be excluded from the lodestar. *E.g.*, *Herrington v. Cty. of Sonoma*, 883 F.2d 739, 747 (9th Cir. 1989). As the Ninth Circuit taught, "courts

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ought to examine with skepticism claims that several lawyers were needed to perform a task . . . ." *Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1286 (9th Cir. 2004) (internal citations omitted).

Here, many of plaintiffs' claimed hours are duplicative or otherwise unreasonable. For example, Attorney Lichtenstein claims a total of 24.45 hours—for a total fee of $14,670—to accompany Attorney Scott to Dean Winn and Principal McKay's depositions, where he did not ask a single question.[4] (*See generally* Winn Depo, Ex. 2; McKay Depo, Ex. 3). That is, Attorney Lichtenstein proposes that CCSD pay him $14,670 for the time he spent "prepar[ing]" for and sitting through two depositions that Attorney Scott took. And this is beyond the $15,892 Attorney Scott intends to charge for the same 24.45 hours. Given Attorney Lichtenstein's requested rate of $600/hr and Attorney Scott's requested rate of $650/hr, plaintiffs want CCSD to pay a combined $1,250 for every hour that one of their attorneys spent preparing to listen to a deposition taken by the other attorney.

These "listening" hours are duplicative and excessive. They resulted from either (1) an experienced attorney's decision to voluntarily listen to another experienced attorney take a deposition; or (2) intentionally inefficient duplication of effort. In either case, the hours were not "reasonably expended" in advancing this case. And this is just a single example.

Quite simply, Attorneys Lichtenstein and Scott hold themselves out as experienced civil rights lawyers, and they should be able to take depositions by themselves. The Court should reduce their claimed hours accordingly.[5]

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[4] Specifically, Attorney Lichtenstein claims 6.05 hours for November 1, 2015, and gives the following description: "Preparation for deposition; telephone conference with clients; meeting with John Scott." (Mot., Ex. 2, Attachment 1, at 7-8). Then, for the next day—November 2—he claims 10.5 hours, with the following description: "Preparation for McKay deposition; McKay deposition; confer with John Scott." (*Id.* at 8). Then, for November 3, he claims an additional 7.90 hours, with this description: "Winn Deposition; confer with John Scott." (*Id.* at 8).

[5] Plaintiffs may argue that Attorney Lichtenstein was required to attend the depositions taken by Attorney Scott since Attorney Scott was only admitted *pro hac vice*. However, pursuant to SCR 42(14)(b), local counsel's presence is not required except "at all motions, pre-trials, or any matters in open court." There is no requirement that local counsel be present at depositions.

2. The hours for "media discussions" must be cut

Hours devoted to media relations and press conferences are not compensable. (*See, e.g.*, Mot. Ex. 2., Attachment 3, at 3-4 (claiming hours for, among other things, emails "regarding press conference timeline" (Apr. 28, 2014), "meeting with KNPR" (May 27, 2014), and "media discussions regarding the case" (July 11, 2014)).

Indeed, it is well settled that "an award of attorneys' fees should not include amounts for contact with the media." *Agster v. Maricopa County*, 486 F. Supp. 2d 1005, 1016 (D. Ariz. 2007) (citing *Gates v. Gomez*, 60 F.3d 525, 535 (9th Cir. 1995) ("These are the kinds of activities that attorneys generally do at their own expense.")); *accord Rum Creek Coal Sales, Inc v. Caperton*, 31 F.3d 169, 176 (4th Cir. 1994) (1988 claim for fees); *Gratz v. Bollinger*, 353 F. Supp. 2d 929, 941-42 (E.D. Mich. 2005); *Alfonso v. Aufiero*, 66 F. Supp. 2d 183, 193 (D. Mass. 1999); *Knight v. Alabama*, 824 F. Supp. 1022, 1033 (N.D. Ala. 1993).

As one court noted: "Billing for time spent contacting the media is highly inappropriate. It takes a lot of *chutzpah* to not only participate in such media contact during the litigation, but to bill for it." *Blakey v. Continental Airlines,* 2 F. Supp. 2d 598, 604-05 (D. N.J. 1998). Accordingly, these hours must be cut.

3. Many of the claimed hours are so inadequately and vaguely described that the required reasonableness analysis is impossible, and a reduction is necessary

Many of the claimed time entries are so lacking in detail that it is impossible to determine whether the described tasks were reasonable and necessary. Indeed, these entries are so deficient that the Court cannot determine whether the hours were "reasonably expended" or reflect "poor billing judgment." *Hensley*, 461 U.S. at 434. These hours must be cut. *E.g.*, *id.* at 437 (holding that an application for attorney's fees must be supported by billing records that enable the reviewing court to easily identify the hours reasonably expended); *Neil v. Comm'r of Soc. Sec.*, 495 F. App'x 845, 847 (9th Cir. 2012) (The district court appropriately cut time "that was vague and inadequately explained."); *Parrish v. Sollecito*, 280 F. Supp. 2d 145, 171

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(S.D.N.Y. 2003)("The time records submitted in support of an application for attorney's fees must be sufficiently detailed to determine the reasonableness of the hours claimed for any given task."); *see also, e.g.*, *Luciano v. Olsten Corp.*, 109 F.3d 111, 116 (2d Cir. 1997) (The court must be able to examine "the particular hours expended by counsel with a view to the value of the work product of the specific expenditures to the client's case.").

For example, Attorneys Scott and Lichtenstein claim fees for numerous attorney-to-attorney calls and emails, but their time entries provide no indication what they discussed or how their conversations advanced—or even related to—this case. Instead, these entries merely note that a conversation took place or an email was sent:

Att'y	Date	Task	Hours
AL	5/27/15	Telephone conference with John Scott	0.30
JS		Telephone conference with Allen Lichtenstein	0.30
AL	8/13/15	Telephone conference with John Scott	0.40
AL	8/17/15	Telephone conference with John Scott	0.20
AL	10/16/15	Telephone conference with John Scott	0.50
AL	10/29/15	Email to John Scott; telephone conference with John Scott	0.80
AL	10/30/15	Emails to John Scott	0.30
JS		Emails with Allen Lichtenstein; travel to Las Vegas for depositions	5.20
AL	11/1/15	Preparation for deposition; telephone conference with clients; meeting with John Scott	0.30
JS		Prep for depositions; telephone conference with clients; meet with Allen	6.50
AL	11/4/15	Telephone conference with John Scott	0.30
JS		Telephone conference with Allen Lichtenstein; object information from clients	1.30
AL	11/6/15	Telephone conference with John Scott	0.30
JS		Telephone conference with Allen Lichtenstein; emails from clients re verdicts in similar cases	0.70
AL	11/10/15	Telephone conference with John Scott	0.40
AL	11/15/15	Email from John Scott	0.80
AL	11/16/15	Telephone conference with John Scott	0.50
JS		Telephone conference with Allen Lichtenstein	0.50

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AL	11/24/15	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	12/1/15	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	12/4/15	Telephone conference with John Scott	0.50
JS		Telephone conference with Allen Lichtenstein	0.50
AL	12/11/15	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	12/20/15	Telephone conference with John Scott	0.30
JS		Telephone conference with Allen Lichtenstein	0.30
AL	12/22/15	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	1/4/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	1/5/16	Telephone conference with John Scott	0.30
AL	1/25/16	Meeting with John Scott	1.80
AL	1/29/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein; review supplemental disclosures	0.50
AL	2/1/16	Emails and telephone conference with John Scott	0.60
JS		Multiple emails; telephone conference with Allen Lichtenstein	0.60
AL	2/2/16	Emails and telephone conference with John Scott	0.40
JS		Multiple emails; review information from clients; telephone conference with Allen Lichtenstein	1.20
JS	2/3/16	Telephone conference with Allen Lichtenstein	0.20
JS	2/12/16	Telephone conference with Allen Lichtenstein	0.20
AL	2/16/16	Telephone conference with John Scott	0.50
JS		Telephone conference with Allen Lichtenstein	0.50
AL	2/17/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	2/24/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
JS	2/26/16	Telephone conference with Allen Lichtenstein	0.30
AL	3/8/16	Emails and telephone conference with John Scott	0.60
JS		Multiple emails; telephone conference with Allen Lichtenstein	0.60
AL	3/15/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20

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AL	3/16/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	3/18/16	Telephone conference with John Scott	0.30
JS		Telephone conference with Allen Lichtenstein; email from Allen; prep for Winn deposition	3.30
JS	3/29/16	Telephone conference with Allen Lichtenstein; opposition to MSJ	5.50
AL	4/2/16	Emails from John Scott	0.20
JS		Multiple emails	0.30
AL	4/11/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	4/13/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
JS	4/19/16	Telephone conference with Allen Lichtenstein	1.80
JS	4/21/16	Telephone conference with Allen Lichtenstein	0.50
AL	4/28/16	Telephone conference with and emails from John Scott	0.50
JS		Telephone conference with Allen Lichtenstein; multiple emails	0.50
AL	5/4/16	Emails from John Scott	0.30
JS		Multiple emails	0.30
AL	5/5/16	Emails and telephone conference with John Scott	0.50
JS		Multiple emails; telephone conference with Allen Lichtenstein	0.50
AL	5/6/16	Emails from John Scott	0.40
JS		Multiple emails	0.40
AL	5/9/16	Emails and telephone conference with John Scott	0.40
JS		Multiple emails; telephone conference with Allen Lichtenstein	0.40
AL	5/10/16	Emails from John Scott	0.30
JS		Multiple emails	0.30
JS	5/13/16	Telephone conference with Allen Lichtenstein; multiple emails	0.50
JS	5/17/16	Telephone conference with Allen Lichtenstein	0.20
AL	5/18/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	7/26/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	8/5/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20

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AL	8/24/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	8/30/16	Email from John Scott	0.20
JS	8/31/16	Email; telephone conference with Allen Lichtenstein	0.50
AL	10/16/16	Multiple emails and telephone conference with John Scott	0.80
JS		Telephone conference with Allen Lichtenstein; multiple emails	0.80
AL	10/19/16	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	10/24/16	Telephone conference with John Scott and multiple emails	1.80
AL	10/27/16	Telephone conference with John Scott	0.50
AL	10/28/16	Conference call and emails with John Scott	2.30
JS		Conference calls; multiple emails; trial preparation	4.50
AL	11/1/16	Telephone conference with John Scott	0.40
JS		Telephone conference with Allen Lichtenstein	0.40
AL	11/2/16	Emails from John Scott	0.40
JS	11/3/16	Telephone conference with Allen Lichtenstein	0.20
JS	1/3/17	Telephone conference with Allen Lichtenstein	0.20
AL	1/10/17	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	2/14/17	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	2/22/17	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	2/23/17	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	4/7/17	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	4/13/17	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	4/17/17	Emails and telephone conference with John Scott	0.30
JS	4/20/17	Telephone conference with Allen Lichtenstein	0.20
AL	4/21/17	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	5/9/17	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20

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JS	5/23/17	Telephone conference with Allen Lichtenstein	0.20
JS	5/24/17	Review emails; telephone conference with Allen Lichtenstein	0.50
AL	6/22/17	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	7/10/17	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20
AL	7/13/17	Telephone conference with John Scott	0.20
JS		Telephone conference with Allen Lichtenstein	0.20

This single sample alone reflects 72 hours of attorney time—and fees in excess of $45,000—for unexplained calls or emails. From the face of these time records, it is impossible for the court to determine whether the calls and emails were "necessary" and "reasonably expended." *Hensley*, 461 U.S. at 433-34. Indeed, from these records—the only evidence provided—it is impossible to know what the lawyers spoke about. Thus, it is impossible to know whether some or all of the explained calls or emails were reasonably billed or whether some reflect "poor billing judgment." *Id.* Therefore, because these entries do not permit the Court to undertake the required reasonableness analysis, they fail to evidence time "reasonably expended" in this litigation and must be cut.

Importantly, where counsel's calls and emails had a litigation purpose, they specified that purpose in their time entries. (*E.g.*, Mot. Ex. 1, Attachment B, Pg. 5 (specifying the purpose of some calls but not others); Ex. 2, Attachment 1, at Pgs. 7-10 (same)). This suggests that where—as above—counsel did not specify any purpose for their calls and emails, it was because those calls and emails served no purpose in advancing the litigation. Indeed, Attorneys Scott and Lichtenstein could never reasonably expect a client to actually pay for such sparsely detailed time entries at the combined rate of $1,250 per hour. Even less, they cannot compel their opponents to pay for such vague time entries that contain absolutely no information to determine whether the attorney conferences were reasonable and necessary.

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All of this confirms that the hours for vaguely-described or unexplained calls and emails must be cut.

4. Both attorneys cannot bill for a single, attorney-to-attorney phone call

Even where an attorney-to-attorney conference is adequately explained, only one attorney can charge for it. *E.g.*, *Barrella v. Vill. of Freeport*, 56 F. Supp. 3d 169, 175 (E.D.N.Y. 2014) (Courts "grant fees for intra-office conferences, provided they are . . . justified and no more than one attorney bills."); *In re Bennett Funding Group, Inc.*, 213 B.R. 234, 245 (Bankr. N.D.N.Y. 1997); *In re Euromotorsport Racing, Inc.*, 2000 WL 33963797, at *5 (Bankr. S.D. Ind. June 13, 2000) ("For most intraoffice conferences, only one attorney should be compensated for her or his time."); *see also*, *e.g.*, *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 949 (9th Cir. 2007) ("[T]he district court did not err in finding the intra-office conferences to be unnecessary and duplicative."). Therefore, any time Attorneys Lichtenstein and Scott both bill for the same attorney-to-attorney conversation, one attorney's hours should be cut.

5. Attorney Lichtenstein's reconstructed time records are unreliable and require a reduction

Attorney Lichtenstein did not record his time contemporaneously and, instead, recreated many entries long after the facts described. As a result, his time records are inherently unreliable and require a significant reduction. *E.g.*, *Hensley*, 461 U.S. at 40 n.13 (The district court properly reduced an attorney's claimed hours by 30% to account, in part, for his failure to keep contemporaneous time records); *Joe Hand Promotions, Inc. v. White*, 2011 WL 6749061, at *2 (N.D. Cal. Dec. 6, 2011) ("Because the billing records were not created contemporaneously, the Court finds that they are inherently less reliable."); *Heller v. D.C.*, 832 F. Supp. 2d 32, 50 (D.D.C. 2011) (cutting the claimed hours by 10% where the attorneys failed to keep contemporaneous records and reconstructed their time); *Lehr v. City of Sacramento*, 2013 WL 1326546, 9 (E.D. Cal., 2013) (cutting the claimed fees by 10% because "the reliability of such reconstructed billing records is inherently suspect"); *Roy v. Lohr*,

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2014 WL 12564091, at *5 (D. Ariz. Aug. 8, 2014) (cutting 30% for "reconstructed billing"); *see also Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (allowing a reduction for counsel's failure to keep contemporaneous records).

Indeed, it is well settled that, "after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982). Thus, "[a]ttorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney." *Id.*

Here, Attorney Lichtenstein used a timekeeping software called TimeSlips to record his time,[6] and his time records consist of a TimeSlips printout. This TimeSlips printout includes sequential slip identification numbers ("Slip ID numbers"), which reveal every entry that was not contemporaneously entered and help estimate the length of the delay.

The Delaware Court of Chancery recently explained how this Slip ID feature works and how it reveals back-dated, non-contemporaneous time entries. *See Dore v. Sweports, Ltd.*, 2017 WL 415469, at *16 (Del. Ch. Jan. 31, 2017). First, TimeSlips assigns a Slip ID number to each time entry. The Slip ID number cannot be changed once it has been assigned. *Id.* When time entries are recorded contemporaneously, they bear increasing Slip ID numbers. *Id.*

However, higher Slip ID numbers sandwiched between lower Slip ID numbers show that time was not entered contemporaneously. *Id.* With this system, the larger the jump in Slip ID numbers, the longer the attorney waited before entering the time. *Id.*

Here, many of Attorney Lichtenstein's entries show large jumps in Slip ID numbers during short spans of time. This confirms that many of them were recorded long after the events they purport to describe. In fact, a review of his records reveals

[6] Lichtenstein Email, Aug. 11, 2017, Ex. 4.

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Slip ID numbers that progress in a completely chaotic, non-sequential order. While contemporaneous entries would show increasing Slip ID numbers, his are all over the map. The following example illustrates just one set of jumps in his Slip ID numbers, but it demonstrates the "sandwich effect" and shows he went back and recorded time long after the fact:

Date	Slip ID
3/2/16	2867
3/7/16	2868
3/8/16	**3004**
3/9/16	**3005**
3/10/16	**3006**
3/14/16	**3007**
3/15/16	**3008**
3/16/16	**3009**
3/18/16	**3010**
3/21/16	2869
3/23/16	2870
3/24/16	2871
3/25/16	2872
3/27/16	2873
3/28/16	2874
3/29/16	2875
3/30/16	2876
3/31/16	2877
4/1/16	2878
4/2/16	**3011**
4/11/16	**3012**
4/13/16	**3013**
4/19/16	2879

Here, the entries in the 2000 range were presumably contemporaneous, but the sandwiched entries in the 3000 range were entered weeks or months later. And this trend occurs repeatedly throughout Attorney Lichtenstein's records. Had he recorded his entries contemporaneously, the Slip ID numbers would increase from day to day. Thus, the large jumps and falls confirm that his time was entered later. Such reconstructed records are not reliable, and they require a significant percentage cut. *See Hensley*, 461 U.S. at 40 n.13.

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6. Block billing prevents the Court from determining whether time was reasonably expended and requires a further reduction

Many of the time entries reflect "block billing," in which the amount of time spent on each discrete task is not identified. Instead, multiple, undifferentiated tasks are lumped into a single entry.

Block billing prohibits meaningful review of the time spent on each discrete task within the "block." *Yeager v. Bowlin*, 2010 WL 1689225, at *1 (E.D. Cal. Apr. 26, 2010) (collecting cases). Indeed, it "hides accountability" and makes it nearly impossible to determine reasonableness. *Id.* Thus, it forces the court to take a "shot in the dark" and "guess whether the hours expended were reasonable, which is precisely the opposite of the methodical calculations the lodestar method requires." *Id.*

While block billing is not barred per se, the California State Bar's Committee on Mandatory Fee Arbitration has concluded that block billing encourages bill padding, as it "may increase time by 10% to 30%."[7] Thus, courts generally approve a significant reduction for block-billed hours.*See, e.g., Monolithic Power Sys., Inc. v. O2 Micro Intern., Ltd.,* 726 F.3d 1359, 1369 (Fed. Cir. 2013) (approving award of only 25% of requested fees from block-billed entries); *McAfee v. Boczar*, 738 F.3d 81, 90 (4th Cir. 2013) (reducing hours claimed by two attorneys by 10% each, because they had used "block billing"); *Torres-Rivera v. O'Neill–Cancel*, 524 F.3d 331, 340 (1st Cir.2008) (approving 15% global reduction in fee request due to block billing).

By way of example, Attorneys Lichtenstein and Scott block-billed the following entries:

Att'y	Date	Block-Billed Tasks	Hours	Fee Request
JS	10/29/15	Telephone conference with Allen Lichtenstein; email from Allen prep for Winn deposition	3.5	$2,275
JS	11/1/15	Prep for depositions; telephone conference with clients; meet with Allen	6.5	$4,225

[7] *See* The State Bar of California Committee on Mandatory Fee Arbitration, Arbitration Advisory 03–01 (2003).

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JS	1/24/16	Travel to Las Vegas; meet with Allen L and clients; prep for depositions	9.0	$5,850
AL	2/3/16	Preparation for Mary Bryan deposition; teleconference with John Scott	3.9	$2,340
JS	3/28/16	Revise and expand statement of facts in opposition to MSJ; prep declaration and review exhibits	6.0	$3,900
AL	3/28/16	Research failure to comply with statutory duties and draft brief; telephone conference with John Scott	6.5	$3,900
JS	3/29/16	Telephone conference with Allen Lichtenstein; opposition to MSJ	5.5	$3,575
JS	3/30/16	Multiple emails; telephone conference with Allen Lichtenstein; review and revise opposition to MSJ	4.2	$2,730
AL	3/30/16	Draft brief; emails and telephone conference with John Scott	8.4	$5,040
AL	3/31/16	Draft, edit brief	9.2	$5,520
AL	4/1/2016	Finalized and filed Plaintiffs' Opposition to Defendants' Summary Judgment Motion; emails and telephone conferences with John Scott	9.3	$5,580
JS	10/28/16	Conference calls; multiple emails; trial preparation	4.5	$2,925
AL	3/20/17	Finalized and filed Plaintiffs' closing Argument brief; telephone conference with John Scott	10.3	$6,180

Again, these are only examples, but they reflect counsel's block-billing practice. They illustrate how counsel lumped several tasks together without disclosing the amount of time spent on any particular activity. This "hides accountability" and makes the *Hensley*-required reasonableness analysis impossible. *E.g.*, *Yeager*, 2010 WL 1689225, at *1. Because of this practice, an additional reduction to the number of hours claimed is warranted.

7. The hours claimed should be reduced by at least 20%

In sum, under step 2 of the lodestar calculation, the requested hours should be reduced by at least 20%. This reflects a reasonable reduction for duplicative work, other non-compensable work, entries lacking the detail necessary for a reasonableness determination, a failure to keep contemporaneous records, and block billing. As demonstrated above, courts regularly impose significantly larger reductions under similar circumstances. Indeed, the numerous defects in counsel's records are not mere technicalities. Rather, they (1) reflect non-billable time and (2) make it impossible for the Court to determine whether many of the hours were

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"reasonably expended" or reflect "poor billing judgment." *Hensley*, 461 U.S. at 433-34. Thus, an hours reduction of at least 20% is imminently reasonable.

II. *HENSLEY'S* PARTIAL-SUCCESS STANDARD DEMANDS A 20% DOWNWARD ADJUSTMENT

After calculating the lodestar, the Court next "adjust[s] for other considerations, such as extent of success." *Gregory v. Cty. of Sacramento*, 168 F. App'x 189, 191 (9th Cir. 2006) (citing *Hensley*, 461 U.S. at 440). In fact, "the extent of a plaintiff's success is a *crucial* factor in determining the proper amount of an award of attorney fees under 42 U.S.C. § 1988." *Hensley*, 461 U.S. at 440 (emphasis added). A "fully compensatory fee" is appropriate only where "a plaintiff obtained excellent results." *Id.* at 435. Thus, where—as here—the plaintiffs achieved only "partial or limited success," the calculated lodestar figure must be adjusted downward. *Id.*; *see also, e.g.*, *Dannenberg v. Valadez*, 338 F.3d 1070, 1075 (9th Cir. 2003) (reversing an attorney fee award where the district court did not make a downward adjustment based on plaintiff's "degree of success").

A. Plaintiffs Achieved "Partial or Limited Success," Not an "Excellent" Result

Here, plaintiffs' success was "partial or limited" at best. They ultimately prevailed on just 2 of their 6 original claims and against only 1 of the 20 original defendants (i.e., they did not prevail in any manner against 19 of the original defendants). Additionally, they did not win any of the declaratory judgments, injunctions, or punitive relief they sought. (*See* Original Compl., Apr. 29, 2014, at 33-34; Errata to First Am. Compl., Nov. 17, 2014, at 35). Then, following trial, this Court cut their request for $1.2 million in compensatory damages by 66% to $400,000 ($200,000 per boy). This reflects "limited success."

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1. Plaintiffs originally asserted 6 claims against 20 defendants, and sought prospective and punitive relief

When these two plaintiffs brought this case, they each asserted 6 causes of action against 20 different defendants. (*See* Original Compl., Apr. 29, 2014, at 33-34). They also sought the following declaratory and injunctive relief:

> Wherefore Plaintiffs respectfully requests this Court:
>
> **a.** Enter an order declaring CCSD Defendants' conduct in violation of Chapter 392 of N.R.S. Pupils, and CCSD Policies;
>
> **b.** Enter an order declaring CCSD Defendants' conduct in violation of the Equal Protection Clause of the Nevada Constitution, Art, 4, § 21.
>
> **c.** Enter and order declaring CCSD Defendants' conduct in violation of the substantive due process under the Fourteenth Amendment of the U. S. Constitution;
>
> **d.** Enter an order declaring CCSD Defendants' conduct in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution;
>
> **e.** Enter a permanent injunction, on proper motion, requiring Defendant CCSD to develop and administer a new policy around discrimination, harassment, and assault, and to ensure proper and equal implementation
>
> * * *
>
> **h.** Enter an order declaring NERC Defendants' conduct in violation of the Nevada APA, as an unreasonable delay amounting to arbitrary or capricious agency action or an abuse of discretion;
>
> **i.** Enter an injunction requiring NERC to expeditiously process this investigation of public accommodation discrimination in the public school setting;

(Original Compl., Apr. 29, 2014, at 33-34). In a later complaint, they consolidated their requests for declaratory and injunctive relief and included a new request for punitive damages. (Errata to First Am. Compl., Nov. 17, 2014, at 35).

2. Plaintiffs lost 4 of their claims, 19 defendants, and their request for punitive damages

Before trial, 4 of the 6 claims and 19 of the 20 defendants were dismissed. Likewise, plaintiffs lost their request for punitive damages. (Order, July 22, 2016, at

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4). Indeed, by the time plaintiffs brought this case to trial, it consisted of 2 claims against CCSD only. Thus, before plaintiffs even called a witness, their success had already been severely limited.

3. At trial, plaintiffs failed to win any of the prospective relief they requested, and the Court awarded just 33% of the damages they sought

Then, during trial, plaintiffs failed to win any of the declaratory judgments or injunctions they sought throughout this case. Instead, out of all the remedies they sought, they were awarded only compensatory damages.[8] And even then, they sought $1.2 million and the Court awarded a mere 33% of that figure.[9]

4. Plaintiffs achieved "partial or limited success"

Plaintiffs did not prevail against 19 of the original 20 defendants. Further, since they sought $1.2 million to be made whole, an award of just $400,000 is not an "excellent result"; rather, it is a "partial or limited success," at the very most. And plaintiffs' failure to win any of the prospective relief they sought only confirms this conclusion. Therefore, under *Hensley*, a downward adjustment is necessary.

B. Under *Hensley's* Two-Step Test, a Downward Adjustment is Necessary

In *Hensley*, the Supreme Court established a two-step framework for calculating a downward adjustment where, as here, the prevailing party obtained "partial or limited success." *Hensley*, 461 U.S. at 435.

1. A modest, 5% reduction is necessary under step 1 of the Hensley *"partial success" analysis*

During the first step, the Court identifies all claims that were both unsuccessful and unrelated to the successful claims. *Id.* Then it is excludes all claimed hours associated with those unsuccessful, unrelated claims. *Id.*; *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995) (collecting numerous cases).

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8 Findings of Fact, Conclusions of Law, and Judgment, Jul. 20, 2017, at 21:21-28.
9 *Id.*

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Under this standard, an unsuccessful claim is "unrelated" to the successful claims, if it does not share a "common core of facts," *Schwarz*, 73 F.3d 895, 901, such that it could have been asserted in a separate lawsuit. *E.g.*, *Hensley*, 461 U.S. at 435; *Hernandez v. City of Vancouver*, 2014 WL 5471996, at *3 (W.D. Wash. Oct. 29, 2014) (reducing the lodestar by 15% for unrelated, unsuccessful claims); *Vialpando v. Johanns*, 619 F. Supp. 2d 1107, 1127 (D. Colo. 2008) (reducing the lodestar by 70% for unrelated, unsuccessful claims). As the *Hensley* Court taught, "[t]he congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Id.*

Here, plaintiffs' claim against the Nevada Equal Rights Commission (the "NERC Claim") could have been maintained in a separate lawsuit, and it is therefore an "unrelated" and "unsuccessful" claim, for which a downward adjustment is necessary. With the NERC claim, plaintiffs alleged that NERC arbitrarily and capriciously failed to take appropriate action in response to the public accommodations complaint they filed with NERC. (Original Compl., Apr. 29, 2014, at ¶ 169-176). Thus, it was not a compulsory claim and does not share a "common core of facts" with the successful claims. Therefore, it requires a step-1 reduction.

However, plaintiffs time records are not separated by individual claims, meaning that the Court cannot easily identify and cut the fees associated with the NERC litigation. Fortunately, the *Hensley* Court anticipated such circumstances and provides a straightforward solution. Specifically, under *Hensley*, "the court 'may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.'" *Schwarz*, 73 F.3d at 901 (quoting *Hensley*, 461 U.S. at 436). So, where—as here—it is difficult to identify and exclude the hours specifically associated with the unrelated claim, courts routinely apply an appropriate, across-the-board percentage reduction. *See, e.g.*, *Hernandez*, 2014 WL 5471996, at *3 (W.D. Wash. Oct. 29, 2014) (15% across-the-board reduction);

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Vialpando, 619 F. Supp. 2d at 1127 (D. Colo. 2008) (70% across-the-board reduction); *Schwarz*, F.3d at 901 (9th Cir. 1995) (affirming a 25% across-the-board reduction and collecting cases affirming reductions as high as 50%).

Here, the Court should do the same. Specifically, the Court should impose a modest downward adjustment of at least 5%. In light of the much larger reductions often imposed under these circumstances, a 5% reduction is more than reasonable. *See, e.g.*, *Schwarz*, F.3d at 901; *Hernandez*, 2014 WL 5471996, at *3; *Vialpando*, 619 F. Supp. 2d at 1127.

2. A 15% reduction is necessary under step 2 of the Hensley *"partial success" analysis*

During the second step, the court "reduce[s] the award if 'the relief, however significant, is limited in comparison to the scope of the litigation as a whole.'" *McAfee v. Boczar*, 738 F.3d 81, 92 (4th Cir. 2013) (quoting *Hensley*, 461 U.S. at 439-40) (reducing a fee award by 2/3 where the district court failed to make a downward adjustment for the plaintiff's limited success); *Sundaram v. Villanti*, 174 F. App'x 368, 370 (9th Cir. 2006) (affirming a 50% downward adjustment based on the plaintiff's limited success); *Gregory*, 168 F. App'x at 189 (9th Cir. 2006) (adjusting the a lodestar amount of $145,512.50 down to $50,000 as a result of plaintiffs' limited success). Under this step, a "fully compensatory fee" is appropriate only if the client obtained "excellent results." *E.g.*, *Hensley*, 461 U.S. at 435. In contrast, when a party achieves "only partial or limited success," a downward adjustment is appropriate. *Id.* at 40.

In fact, "the Supreme Court has recognized that the extent of a plaintiff's success is 'the most critical factor' in determining a reasonable attorney's fee under 42 U.S.C. § 1988." *McAfee*, 738 F.3d at 92 (quoting *Hensley*, 461 U.S. at 439-40) (emphasis added). "Though Congress intended § 1988 fee awards to be 'adequate to attract competent counsel,' it also wanted to avoid 'producing windfalls to attorneys.'"

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Id. (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 580 (1986) (alternations incorporated) (emphasis added).

Accordingly, when considering the extent of the relief obtained, the Court must compare the relief sought to the relief actually awarded. *Id.* Indeed, this is the "primary consideration." *Farrar v. Hobby,* 506 U.S. 103, 114 (1992) (The Court "is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought."); *accord Gregory*, 168 F. App'x at 189. For example, where a plaintiff seeks punitive damages, but fails to obtain them, that failure evidences "limited success" and weighs toward a reduction. *McAfee*, 738 F.3d at 93-94.

Likewise, it does not matter whether the failed claim or theory was dismissed before trial. *Schwarz*, 73 F.3d at 902-03. Quite simply, a claim is unsuccessful "where the plaintiff has failed to prevail on it," regardless of when or why that failure occurred. *Id.* (quoting *Hensley*, 461 U.S. at 440).

Here, plaintiffs failed to prevail on 100% of their claims against 95% (19/20) of the original defendants. Moreover, 2/3 of their claims against CCSD did not survive summary judgment. These "unsuccessful" claims alone establish "limited success." *See id.*

And more importantly, the "primary consideration," which requires comparing the relief sought with the relief obtained, reveals that plaintiffs failed to obtain the vast bulk of what they sought. They did not obtain the declaratory and injunctive relief they sought, and they did not obtain the punitive damages they sought. This confirms that their success was limited, and it weighs toward a downward reduction, *id.* at 902-03. Finally, the Court is required to compare the $1,200,000 request for compensatory damages to the $400,000 actually awarded. Without question, this demonstrates a "partial or limited success," rather than an "excellent result." Thus, under *Hensley*, a "partial success" reduction is warranted. And compared to the much larger reductions frequently imposed, a modest adjustment of just 15% is more than

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reasonable. *E.g.*, *McAfee*, 738 F.3d at 92 (imposing a 2/3 reduction); *Sundaram*, 174 F. App'x at 370 (affirming a 50% reduction); *Gregory*, 168 F. App'x at 189 (nearly 2/3 reduction).

III. THIS CASE WAS NOT COMPLEX

Plaintiffs seem to suggest that the Court should grant the full requested award—and thereby overlook the astronomical claimed rates, deficient records, non-compensable time entries, and their limited success—because this case was "complex." (Mot. at 20-21). But the case wasn't "complex" at all. Rather, it consisted of applying well-settled civil rights law to a set of disputed facts. It did not require any consulting experts or any testifying experts. Likewise, it did not implicate any medical damages or other "complex" damages. In fact, neither party ever sought to deem it "complex" under Rule 16.1(f), which applies to cases "that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Instead, plaintiffs repeatedly described their damages as "garden variety" and emphasized that they were not complex. (*E.g.*, Response to Mot. to Compel Rule 35 Exam, Jan. 19, 2016, at 3-5). Thus, plaintiffs' after-the-fact complexity argument fails.

IV. PLAINTIFFS' MOTION FOR COSTS IS ADDRESSED IN THE MOTION TO RETAX

Plaintiffs also move for costs. However, these issues are already addressed in CCSD's motion to retax cost, which is scheduled to be heard on September 6, 2017. Thus, CCSD will not burden the Court by rearguing costs here.

CONCLUSION

For the forgoing reasons, the requested hourly rates should be reduced to the local Las Vegas rate of $250.00, and the number of hours claimed should be reduced by 20%. This yields a lodestar of $214,854.

Then, under *Hensley*, the Court should make a 5% downward adjustment for plaintiffs' unrelated NERC claim, and a 15% downward adjustment for their "partial success." Therefore, plaintiffs total fee award should not exceed: $171,883.20.

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Dated this 28th day of August, 2017

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Brian D. Blakley*

DANIEL F. POLSENBERG (SBN 2376)
DAN R. WAITE (SBN 4078)
BRIAN D. BLAKLEY (SBN 13074)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to Nev.R.Civ. Rule 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this day, I caused a true and correct copy of "CCSD's Opposition to Motion for Attorneys' Fees and Costs" to be filed, via the Court's E-Filing System, and served on all interested parties via U.S. Mail, postage pre-paid and courtesy email.

Allen Lichtenstein, Esq.
Staci Pratt, Esq.
ALLEN LICHTENSTEIN ATTORNEY AT LAW, LTD.
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Attorneys for Plaintiffs
(Admitted Pro Hac Vice)

Dated this 28th day of August, 2017

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

Lewis Roca ROTHGERBER CHRISTIE
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EXHIBIT 1

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EXHIBIT 1

DECLARATION OF DAN R. WAITE IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS FEES AND COSTS

I, Dan R. Waite, declare, under the penalty of perjury and the laws of the State of Nevada and the United States of America, as follows:

1. I am over the age of 18, competent and willing to testify in Court. I have personal knowledge of the facts and circumstances set forth in this declaration. As to those matters stated on information and belief, I believe them to be true.

2. I am an attorney at the law firm of Lewis Roca Rothgerber Christie LLP, and I represent the Clark County School District ("CCSD") in this case.

3. I graduated *magna cum laude* from Brigham Young University's J. Reuben Clark Law School in the spring of 1990.

4. I obtained my Nevada law license in 1990, and I have practiced exclusively in Nevada since that time.

5. My practice has always focused primarily on litigation.

6. I have litigated hundreds of cases in Nevada's Eighth Judicial District Court and more than one hundred cases in the U.S. District Court for the District of Nevada.

7. I am the former managing partner (2011-2017) of Lewis Roca Rothgerber Christie's Las Vegas Office.

8. I hold an "AV/Preeminent Attorney" rating by Martindale-Hubbell, and I have been listed in several editions of *The Best Lawyers in America*.

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9. Throughout this case, I served as CCSD's co-lead counsel and, from commencement to present, have charged and collected an hourly rate of $250.00.

10. I also serve as CCSD's co-lead counsel in the only other civil rights case arising out of allegations of student-on-student bullying asserted against CCSD.

11. Throughout that case, I have also charged and collected an hourly rate of $250.00.

Dated this August 28th, 2017

DAN R. WAITE

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EXHIBIT 2

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EXHIBIT 2

DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIR, mother of NOLAN HAIRR, Plaintiffs, vs. CLARK COUNTY SCHOOL DISTRICT (CCSD); Pat Skorkowsky, in his official capacity as CCSD superintendent; CCSD BOARD OF SCHOOL TRUSTEES; Erin A. Cranor, Linda E. Young, Patrice Tew, Stavan Corbett, Carolyn Edwards, Chris Garvey, Deanna Wright, in their official capacities as CCSD BOARD OF SCHOOL TRUSTEES, GREENSPUN JUNIOR HIGH SCHOOL (GJHS); Principal Warren P. McKay, in his individual capacity as principal of GJHS;....	)	CASE NO. A-14-700018-C

VIDEO DEPOSITION OF CHERYL WINN
Taken at the Law Offices of Lewis Roca Rothgerber
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

Tuesday, November 3, 2015
10:12 A.M.

Reported by: Angela Campagna, CCR #495

Leonard DePiazza, in his individual and official capacity as assistant principal at GJHS; Cheryl Winn, in her individual and official capacity as Dean at GJHS; John Halpin, in his individual and official capacity as counselor at GJHS; Robert Beasley, in his individual and official capacity as instructor at GJHS;

Defendants.

DEPOSITION OF CHERYL WINN
Taken at the Law Offices of Lewis Roca Rothgerber
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

Tuesday, November 3, 2015
10:12 a.m.

Reported by: Angela Campagna, CCR #495

APPEARANCES:

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Also present: Lora Henrickson
Videographer

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EXHIBIT 3

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EXHIBIT 3

DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIR, mother of NOLAN HAIRR,	)	
Plaintiffs,	)	
vs.	)	CASE NO. A-14-700018-C
CLARK COUNTY SCHOOL DISTRICT (CCSD); Pat Skorkowsky, in his official capacity as CCSD superintendent; CCSD BOARD OF SCHOOL TRUSTEES; Erin A. Cranor, Linda E. Young, Patrice Tew, Stavan Corbett, Carolyn Edwards, Chris Garvey, Deanna Wright, in their official capacities as CCSD BOARD OF SCHOOL TRUSTEES, GREENSPUN JUNIOR HIGH SCHOOL (GJHS); Principal Warren P. McKay, in his individual capacity as principal of GJHS;	)	
	)....	

VIDEO DEPOSITION OF WARREN MCKAY
Taken at the Law Offices of Lewis Roca Rothgerber
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

Monday, November 2, 2015
10:14 A.M.

Reported by: Angela Campagna, CCR #495

Leonard DePiazza, in his individual and official capacity as assistant principal at GJHS; Cheryl Winn, in her individual and official capacity as Dean at GJHS; John Halpin, in his individual and official capacity as counselor at GJHS; Robert Beasley, in his individual and official capacity as instructor at GJHS;

Defendants.

DEPOSITION OF WARREN MCKAY
Taken at the Law Offices of Lewis Roca Rothgerber
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

Monday, November 2, 2015
10:14 a.m.

Reported by: Angela Campagna, CCR #495

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Also present: Irina Van De Pol
Videographer

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EXHIBIT 4

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EXHIBIT 4

Blakley, Brian

From: Waite, Dan R.
Sent: Friday, August 11, 2017 4:15 PM
To: Blakley, Brian
Subject: FW: Bryan v CCSD Notice of Mortion

-----Original Message-----
From: Allen Lichtenstein [mailto:allaw@lvcoxmail.com]
Sent: Friday, August 11, 2017 4:14 PM
To: Waite, Dan R.
Subject: RE: Bryan v CCSD Notice of Mortion

I use Timeslips.

Allen

Allen Lichtenstein
Attorney at Law, Ltd.
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Las Vegas, NV 89120
(702) 433-2666 phone
(702) 433-9591 fax

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On Fri, Aug 11, 2017 at 1:54 PM, Waite, Dan R. wrote:

> Thanks Allen; we'll calendar our response from yesterday. On a
> related note, what is the time entry system/software you used for the
> Ex. 1 to your declaration?
>
> Dan
>
> Dan R. Waite
> Partner
> 702.474.2638 office
>
> 702.216.6177 fax
> dwaite@lrrc.com
> _____

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>
>
>
>
>
>
> -----Original Message-----
> From: Allen Lichtenstein [mailto:allaw@lvcoxmail.com]
> Sent: Thursday, August 10, 2017 1:36 PM
> To: Polsenberg, Daniel F.; Waite, Dan R.
> Subject: Bryan v CCSD Notice of Mortion
>
>
>
> Allen Lichtenstein
> Attorney at Law, Ltd.
> 3315 Russell Road, No. 222
> Las Vegas, NV 89120
> (702) 433-2666 phone
> (702) 433-9591 fax
>
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> destroy any hard copies of it and notify the sender by return e-mail.
>
> _____
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> Electronic Communications Privacy Act, 18 U.S.C. §2510-2521.

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EXHIBIT 5

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EXHIBIT 5

Legal Q&A With Clyde DeWitt

Clyde DeWitt has been defending the adult industry for nearly three decades, *doing his job with aplomb and a great deal of personal relish, whether in court, at trade shows or other speaking events, in print, or while dealing with clients. DeWitt's been* AVN*'s legal columnist for more than 15 years, and* AVN Online*'s since its birth. His monthly columns not only educate; they entertain —and that's no small feat, considering the subject matter could be exceptionally arid in less-capable hands.*

Albeit the consummate professional, DeWitt still is passionate, especially about legal ethics and the right of adults to consume adult entertainment.

Tall, adroit, and urbane, DeWitt has been described as "the Will Rogers of porn." Those who've had the pleasure of knowing him outside the courtroom, though, say it's his homespun drollness, candor, and charm that make him most memorable.

You've often been mistaken for a Californian because you've been in California for so long. What's the real story?
Actually, I was raised in Chicago, and I'm still a die-hard Cubs and Bears fan. One of my pastimes is reading about 20th century Chicago. Anything you want to know about Sam Giancana or Richard J. Daley, just ask.

You spent some time early in your career in Texas, didn't you?
My law degree is from the University of Houston, and I also have a master's from the school of business there. After that, I was a prosecutor for seven years in the Harris County district attorney's office [in Houston].

What made you "switch sides"?
I was general counsel to the district attorney for my last couple of years there—the guy who defends the DA when he gets sued. Texas had a new obscenity statute in 1979, and an armada of attorneys filed lawsuits challenging it. I won and [adult industry attorney] John Weston lost, so he hired me.

You've been representing adult entertainment ever since?
I've been representing the adult entertainment industry since 1980, when I left the DA's office. Here's how long I've been doing this: I hired Greg Piccionelli in the early 1990s, when he was still in law school. That's how *he* got into this business.

What made you choose a career in law?
My grandfather was a lawyer in Chicago, but I never thought about being an attorney. I was always goofing around with electronics, and I assumed I would go into electrical engineering, which was my undergraduate major. Then I started working with engineers, and I was socially incompatible with them. They listened to Muzak, and I listened to Led Zeppelin; they spent their spare time at church socials, and I was out in Grant Park yelling, "The whole world's watching!" at the 1968 Democratic Convention. So, I went to law school to get away from engineers—but it turned out that my electrical engineering degree became useful when the computer age set in. I knew what a kilobyte was long before anyone had a personal computer.

How much of your practice is adult?
One hundred percent of my clients are in adult entertainment. I've defended obscenity cases, sued copyright infringers, drafted and negotiated contracts, corporate issues, leases, employment law—you name it.

As a former prosecutor, what surprised you the most about "the other side"?
I represented a guy who had a bunch of adult bookstores in Houston. He totally cured me of any misconceptions I might have had about the adult industry; he came from a good family—I even represented his mother. I since have met many genuinely good people in the industry—although, as the late Paul Wisner once said to me, "The industry is not without its scoundrels," and he was right. I've tried to avoid them.

What is most challenging about representing the adult industry?
Politicians, and local governments in particular, possess all the bad characteristics they ascribe to the adult industry. Although I have many more adjectives for them, "arrogant, self-righteous assholes" is a good start. I enjoy suing them.

What do you find most enjoyable about representing the adult industry?
The people—let's face it: They're having fun doing what they're doing, and it rubs off.

How will the Democratic takeover in Congress affect the adult industry?
George W. Bush now has Chief Justice John Roberts and Associate Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. If Justice John P. Stevens retires or dies, and the Senate remains in the hands of the Democrats, it likely will prevent another Scalia on the bench, which is what Bush wants. However, I don't see too much impact on legislation. The addition of "obscenity" to the Racketeer Influenced and Corrupt Organizations Act, 2257, and the Child Protection and Obscenity Enforcement Act of 1988 all occurred under a Democratic Congress.

What current and future challenges face adult webmasters?
The biggest challenge is preventing underage users from consuming adult material. If the industry can't figure out a way to do it, the government is going to respond in its typically oversimplified way: throwing people in jail.

What advice would you give to the adult industry?
"Keep your ear to the ground, especially legally. The world is changing so fast that things can easily sneak up on you."

—KATHEE BREWER

q&a

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RPLY
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Attorneys for Defendants Clark County School District (CCSD)

DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD); et al.,

Defendants.

Case No. A-14-700018-C

Dept. No. XXVII

CCSDS' REPLY IN SUPPORT OF MOTION TO RETAX MEMORANDUM OF COSTS AND DISBURSEMENTS

Date of Hearing: September 6, 2017

Time of Hearing: 9:00 a.m.

INTRODUCTION

Plaintiffs concede that many of the costs they initially sought in their Memorandum of Costs and Disbursements should not be awarded and have eliminated them from their present request. Those abandoned costs will not be addressed in this reply. However, even the revised request is flawed. More specifically, plaintiffs fail to cure or address deficiencies raised in the Motion regarding specific cost items. For the following reasons, **plaintiffs' revised request of $20,672.32 should be reduced to $11,311.77.**

REPLY ARGUMENT

A. The In-House "Copies and Faxes" Are Still Not Properly Documented And Cannot Be Awarded

Plaintiffs' response to the Motion (the "Opposition") simply says that "[t]he supporting documentation for in house copies and faxes can be found in the attached Exhibit 2." Opp. at 1:26-27. That's it—there's no explanation and no effort to "substantiat[e] the reason for each copy" as required by Nevada law. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015); *accord, Village Builders 96 LP v. U.S. Laboratories, Inc.*, 121 Nev. 261, 277-78, 112 P.3d 1092, 1093 (2005) (prevailing party has burden to "substantiate the reason for the copy" even "when the overall amount is obviously reasonable"). Further, several problems exist regarding Exhibit 2.

First, there is no verifying affidavit regarding any of the documents included within Exhibit 2. That is, the "Verified Memorandum of Costs and Disbursements" is just that—a *verified* memo. Mr. Lichtenstein submitted his sworn declaration that the documents attached to that original Memo "are true and correct" to the best of his knowledge and belief and that such were "necessarily incurred and paid in this action." (Memo of Costs at 3:8-9). There is no such verification of the documents attached as Exhibit 2 to plaintiffs' Opposition, as required by NRS 18.110(1).

Second, Exhibit 2 reveals support for a mere 405 copies. Yet, 405 copies would never support a request for $808.60 in copy charges. It appears the bulk of plaintiffs' request is for in-house "printing"—i.e., presumably printing from a computer to printer. However, NRS 18.005, which must be "strictly construed,"[1] does not mention such in-house printing costs, presumably because they are considered a part of "routine office overhead." *Bergmann v. Boyce*, 109 Nev. 670, 681, 856 P.2d 560, 567 (1993).

[1] *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 971 P.2d 383 (1998).

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Third, the Exhibit 2 documentation still does not identify the per-copy charge and, while the documentation has hand-written interlineations reflecting dollar amounts, there is no (1) verification of who made the interlineations, (2) explanation of how such amounts were calculated, or (3) what the copies were for. As a single example, the newly-produced documentation shows that on December 7, 2015, there was a charge of $210.40 for 27 color copies, 237 black-and-white copies, and the printing of 788 pages; however, there is no explanation regarding how much was charged for each color/black-and-white copy or for each printed page, or why a total of 1,052 copies/prints were needed on that date. A review of the court's docket reveals no filing (large or small) from plaintiffs on or near that date. Further, plaintiffs made no large discovery production on or shortly after December 7, 2015. The reason for this 1,052-page copy/print job is simply unexplained and unascertainable without more information from plaintiffs.

Without the foregoing information, "there is no way [the court can] determine[] whether the cost [is] reasonable or necessary." *Cadle*, 345 P.3d at 1055. Despite numerous opportunities and prompts, plaintiffs still have not identified (1) how much plaintiffs' counsel charged for each in-house color copy, (2) how much was charged for each in-house black-and-white copy, and (3) why the copies were necessary. Having failed their burden, plaintiffs' request for an award of $808.60 for "in office" photocopy charges must be disallowed. *See Cadle*, 345 P.3d at 1054 (the memo of costs fails to "substantiat[e] the reason for each copy").

B. Plaintiffs Cannot Recover For More Than One Copy of Each Deposition

The Motion noted that plaintiffs sought $6,063.51 in additional deposition related costs without any supporting documentation. (Mot. at 3:22-4:19). The Motion also noted that many of these expenses appeared to be for

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duplicate copies of deposition transcripts, even though NRS 18.005(2) authorized only "one copy of each deposition." In plaintiffs' response, they provide new documentation (Ex. 4) and simply state that "Depositions [International] utilized a Reporter and a Videographer." (Opp. at 2:27). This scant explanation is deficient for many reasons.

First, the only videotaped depositions were Warren McKay, Cheryl Winn and Deanna Wright (i.e., no videography at depositions of Robert Beasley, John Halpin and Andre Long). Second, NRS 18.005 makes no provision for the recovery of both a reporter and videographer's fees. Third, plaintiffs have failed to identify which of the duplicate fees are for the reporter and which are for the videographer (and the invoices do not distinguish). Fourth, neither of the three video depositions were necessary or used at trial or in any motion (and Deanna Wright was not a trial witness in any format, i.e., neither live, video or transcript). Thus, plaintiffs should recover only one fee per deposition and, failing to distinguish which fees were for the reporter and which were for the videographers, plaintiffs should recover the lesser amount billed for each deposition. Accordingly, the amounts requested by plaintiffs should be allowed or denied as follows:

	Allowed	Disallowed
Beasley, Robert	$46.00	$533.00
Halpin, John	$325.76	$589.50
Long, Andre	$556.83	$947.50
McKay, Warren	$137.00	$877.98
		$1,534.68
Winn, Cheryl	$151.00	$928.73
		$1,590.00
Wright, Deanna	$19.46	$51.00
		$416.15
		$603.42
TOTAL	$1,236.05 (allowed)	$8,071.96 (denied)

C. Plaintiffs Cannot Recover for Unexplained FedEx Charges

In the Motion (at p. 7), CCSD challenged $2,014.20 of travel expenses

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related to plaintiffs' choice to hire out-of-state co-counsel. In the Opposition, plaintiffs conceded (and therefore removed from their request) all but two FedEx charges of $32.49 and $115.11. Even though the Motion invited an explanation, the Opposition failed to explain what was shipped by FedEx to Mr. Lichtenstein, the purpose of the shipment, or why such could not have been scanned and sent electronically or placed on a thumb drive and shipped for a fraction of the cost.

Regarding the charge of $32.49, the supporting "shipment receipt" has a handwritten note on it as follows: "Bryan/Hairr—exhibits to Allen's Declaration regarding the 'Motion to Disqualify'." Several problems exist with this charge.

First, plaintiffs have not offered information regarding (a) who wrote this note, or (b) whether it accurately recites what was shipped. Thus, the note by itself is inadmissible hearsay.

Second, even if the notation is admissible and accurate, plaintiffs withdrew their Motion to Disqualify before it even went to a hearing. (*See* Notice of Vacating Hearing (filed 5/16/16)). A meritless motion to disqualify counsel that was filed and quickly withdrawn is neither reasonable nor necessary and any associated costs are not recoverable.

Third, plaintiffs' Opposition failed to address CCSD's argument (at 7, n.1) that the $32.49 is merely an "estimated" shipping charge. As such, it is not evidence of any actual charge.

Fourth, again assuming *arguendo* the notation is accurate, the exhibits to the Motion to Disqualify consisted of (a) a copy of certain provisions from NRS 388, (b) two emails from Mary Bryan to defendants, and (c) various deposition excerpts. Mr. Lichtenstein already had all of these documents. Obviously, it was neither reasonable nor necessary for Mr. Scott to send Mr. Lichtenstein documents he already had or to send them via overnight delivery

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11 days before the motion was filed. *Indeed, it takes a lot of* chutzpah *for plaintiffs to ask CCSD to pay the cost for a California attorney to ship a copy of Nevada statutes to a Nevada attorney*. No wonder plaintiffs never explained what this cost was for—even so, it should be viewed as an example of the unreasonable and unnecessary kinds of expenses that permeate plaintiffs' request for undocumented or unexplained expenses.[2] Although this one is "only" $32.49, there is no reason to believe plaintiffs were any more candid with the larger costs.

Regarding the charge of $115.11, there is absolutely no explanation regarding what was sent, why it was sent via FedEx Priority Overnight, or why the contents (if papers) could not have been scanned and sent electronically (or downloaded to a thumb drive and shipped for a fraction of the cost). In short, despite CCSD challenging this expense, plaintiffs offer absolutely no explanation. Without this information, it is impossible to determine whether the charge was reasonable and necessary, and must therefore be denied.

D. Plaintiffs Cannot Recover For Office Overhead Expenses

Section G of the Motion challenged a combined $266.37 in charges for binders, tabs, binding materials, a CD, and scanning documents to PDF. The Opposition implicitly concedes CCSD's authorities (as it must) that "routine office overhead" is not recoverable. *Bermannn v. Boyce*, 109 Nev. 670, 681, 856 P.2d 560, 567 (1993). Further, the Opposition does not dispute that these materials are reusable. The Opposition merely rejects the characterization as

[2] Furthermore, if the shipment truly consisted of the exhibits to the Motion to Disqualify, such were a mere 61 pages. Thus, even if Mr. Lichtenstein didn't have a copy of these documents, there is absolutely no reason 61 pages could not have been scanned and sent via email attachments. Indeed, since filings occur electronically in the Eighth Judicial District Court, the 61 pages of paper sent to Mr. Lichtenstein via FedEx overnight presumably had to be converted by Mr. Lichtenstein to an electronic form before filing. Such begs the question why weren't they transmitted to Mr. Lichtenstein in electronic form to begin with. Whatever plaintiffs reasons, CCSD should not be required to pay this unreasonable and unnecessary expense.

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routine office overhead and suggests the expenses are authorized by NRS 18.005(12) and (14). (Opp. at 214-22).

NRS 18.005(14) allows "reasonable costs for postage" and these charges have nothing to do with postage.

Further, NRS 18.005(12) allows "reasonable costs for photocopies" but says nothing about the binders those copies are placed into (or the tabs separating the copies), presumably because the binders and tabs themselves are part of routine office overhead. Only two of the six expenses challenged here even mention "copying." While plaintiffs are correct that copy costs are recoverable *when explained and substantiated as reasonable and necessary*, they have not even attempted to explain, let alone demonstrate, what the copies were for or why the charges were reasonable and necessary.

Even if explained and demonstrated as reasonable and necessary, the supporting documentation shows that the portion of the charges attributed to photocopying is $70.98 (as reflected on the receipt for $92.95) and $26.65 (as reflected on the receipt for $34.22). Thus, of the requested $266.37, plaintiffs would be entitled to recover, at most, only $97.63, and only if the Court accepts that no explanation need be given for what the copies were used for (despite *Village Builders* and numerous other Nevada cases to the contrary).

E. Plaintiffs Cannot Recover Expenses Necessitated By Their Claim Against The NERC, and Other Unexplained Expenses

Section H of the Motion challenged $75.47 in costs that were not explained. The Opposition attempts to explain these costs as "items that reflect providing Plaintiffs' disclosures to Defendants during discovery." (Opp. at 2:23-24). This explanation reveals several problems.

First, the first 100 pages of plaintiffs' initial disclosures (out of a total of 136 pages) are for materials that plaintiffs themselves describe as "NERC MATERIAL ETHAN BRYAN" and "NERC MATERIAL NOLAN HAIRR."

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(*See* Ex. A, attached).[3] Clearly, plaintiffs did not prevail against the NERC and eventually voluntarily dismissed them when plaintiffs filed their First Amended Complaint. The Opposition concedes plaintiffs cannot recover for NERC-related expenses as it indicates: "Costs for serving NERC have been removed." (Opp. at 2:12). Thus, there is no basis to award copying costs associated with the first 100 pages of its initial disclosures.

Second, plaintiffs' initial disclosures included a section for "MEDIA ARTICLES." (Ex. A). It is entirely unclear why plaintiffs gathered, copied and disclosed seven pages of media articles about the filing of this lawsuit. Even more surprising, plaintiffs are trying to recover costs associated with copying these media articles. None of the articles were ever used in a motion, deposition, hearing or trial. Copying them was neither reasonable nor necessary.

If anything, plaintiffs are entitled to only the 28-page portion of their initial disclosures under the heading of "BRYAN EMAIL COMMUNICATION WITH CCSD." At a cost of 10 cents a page, such amounts to $2.80. The remainder of the $75.47 charge must be disallowed.

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[3] Plaintiffs' initial disclosures consist of four parts, separated by a slip sheet, as follows: (1) "NERC MATERIAL ETHAN BRYAN" (Bates numbers 1-52), (2) "NERC MATERIAL NOLAN HAIRR" (Bates numbers 53-100), (3) "BRYAN HAIR COMMUNICATION WITH CCSD" (Bates numbers 101-128), and (4) "MEDIA ARTICLES" (Bates numbers 129-136). The four slip sheets (Bates numbers, 1, 53, 101 and 129) are attached in the exhibit.

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CONCLUSION

Based on the foregoing and the Opposition's elimination of several expenses, plaintiffs costs and disbursements should be retaxed and disallowed *except* the following items and amounts:

8/22/2014	Hearing transcript	$60.00
6/19/2015	Copying initial disclosures	$2.80
11/16/2015	Depo transcript of Deanna Wright	$19.46
12/22/2015	Deposition of Nolan Hairr	$1,183.05
1/5/2016	Deposition of CL	$372.80
1/6/2016	Deposition of Aimee Hairr	$960.58
1/13/2016	Deposition of DM	$379.30
1/21/2016	Deposition of Ethan Bryan	$1,138.50
1/25/2016	Deposition of Leonard DePiazza	$815.00
1/27/2016	Deposition of John Halpin	$325.76
1/28/2016	Deposition of Andre Long	$556.83
2/5/2016	Deposition of Mary Bryan	$1,031.40
2/16/2016	Deposition of Heath Hairr	$160.00
2/16/2016	Deposition of Gina Abbaduto	$607.25
2/19/2016	Deposition of Asheesh Dewan	$135.95
2/19/2016	Deposition of Edmond Faro	$182.10
2/24/2016	Deposition of Dennis Moore	$236.35
4/21/2016	Efile transactions for Mary Bryan	$280.50
4/29/2016	Lewis Roca transcript fee	$90.14
11/9/2016	Depo transcript of Robert Beasley	$46.00
11/9/2016	Depo transcript of Cheryl Winn	$151.00
11/9/2016	Depo transcript of Warren McKay	$137.00
11/15/2016	District Court transcript of trial	$440.00
11/28/2016	Court reporter deposit and service	$2,000.00
		$11,311.77

DATED this 29th day of August, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: _____

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CERTIFICATE OF SERVICE

Pursuant to Nev.R.Civ. Rule 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this day, I caused a true and correct copy of ***CCSDs' Reply In Support of Motion to Retax Memorandum of Costs and Disbursements*** to be filed, via the Court's E-Filing System, DAP/Wiznet, and served on all interested parties via U.S. Mail, postage pre-paid.

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DATED this 29th day of August, 2017.

An Employee of Lewis Roca Rothgerber Christie LLP

Lewis Roca ROTHGERBER CHRISTIE
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Exhibit A

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Exhibit A

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NERC MATERIAL ETHAN BRYAN

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NERC MATERIAL NOLAN HAIRR

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BRYAN EMAIL COMMUNICATION WITH CCSD

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MEDIA ARTICLES

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, Plaintiff(s), vs. CLARK COUNTY SCHOOL DISTRICT, et al., Defendant(s).	CASE NO. A-14-700018-C DEPT. NO. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, SEPTEMBER 6, 2017

TRANSCRIPT OF PROCEEDINGS RE:
CLARK COUNTY SCHOOL DISTRICT'S MOTION TO RETAX MEMORANDUM OF COSTS AND DISBURSEMENTS

****

APPEARANCES:

For the Plaintiff(s): ALLEN K. LICHTENSTEIN, ESQ.

For the Defendant(s): BRIAN D. BLAKLEY, ESQ.

RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER
TRANSCRIBED BY: SHAWNA ORTEGA, CET-562

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LAS VEGAS, NEVADA, WEDNESDAY, SEPTEMBER 6, 2017

[Proceedings commenced at 8:56 a.m.]

MR. BLAKLEY: Good morning, Your Honor. Brian Blakley for the Clark County School District.

THE COURT: Thank you.

MR. LICHTENSTEIN: Good morning, Your Honor. Allen Lichtenstein for Plaintiffs.

THE COURT: Thank you.

This is the Clark County School District's Motion to retax the cost and disbursements.

Mr. Blakley.

MR. BLAKLEY: Good morning, Your Honor.

Unless the court would prefer me to go through each set of costs line by line, I'm going to kind of group them into large categories.

THE COURT: That's fine.

MR. BLAKLEY: So we can move quickly.

THE COURT: That's how we did it, too.

MR. BLAKLEY: Okay. Perfect. And just two quick starting points. I just want to reemphasize that the Nevada Supreme Court has been absolutely clear on how strictly NRS 18.005 is to be construed. So if it's not on the list there, it can't be reimbursed.

And second, we ask the court to not assume that just because Plaintiffs have now dropped their request for costs from 24,000 down to 20,000, that that $20,000 in costs is either appropriately documented or explained in such

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a way that the court can do its work under *Cadle* and *Village Builders* and determine whether each cost was reasonable or necessary.

Now, turning first to the biggest chunk of cost that -- that's left for dispute after the reply, these are the six that -- what I'll call the unexplained undocumented additional cost associated with the six depositions.

So Plaintiffs in their memo for cost -- or memo of costs has listed out six depositions. And each one has several costs next to it. Some have two, some have three, four. And they're unexplained. So in the motion we said, look, the statute is extremely clear on this. NRS 18.005 says, look, they get reporter's fee for one copy of each deposition. In response, Plaintiffs come back and say, well, these extra charges were for a transcript and videography. There's several problems with that.

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First of all, we're talking six depositions, but only three were videotaped. Videos were never shown at trial, videos were never cited. So we've got a question about whether they're reasonably necessary first. But there's no explanation, no -- not even an attempt to explain how they're reasonably necessary. So the court again can't do its work under *Cadle* and *Village Builders* to determine, you know, whether these are appropriate.

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But -- but there's a bigger issue than that. The statute says you get one copy. You either get a -- or you get a transcript. And with that, it says it's got to be a reporter's fee. Now, we know that not all videographers are certified court reporters. We've got a court reporter in the room and the -- the good folks that come in and take the video, we don't know whether they're certified. Most cases they're not. But if -- even if they are here, we don't have any evidence that that's the case.

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So now you've got the School District being asked to pay A, as to the certified court reporter for a transcript, and a videographer to take a video. Statute just doesn't provide for that. So we believe those costs need to be disallowed.

Now, when you look at the motion -- or the memo of costs, we've got a bunch of different unexplained costs. Well, because we don't know which cost goes with what, we're left to assume that they're entitled to the -- to the lowest cost. When -- when you've got a deposition with three costs next to it and they don't differentiate what each cost is for, the court can't do its work and determine, you know, which one is necessary and reasonable until we know which is which. And since we don't know here, our position is the court's got to go with the -- the lowest cost. And if the court does that, it's got to cut a total of, let's see, total of $8,071.96 off the cost alone. And that's just for those six depositions.

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Again, of those six, only three were videotaped. One for Dean Wynn, one for Principal McKay, and one for Trustee Deanna Wright. The court didn't even hear from Trustee Deanna Wright at trial. That again weighs towards the reasonable and necessary analysis.

THE COURT: Well, it doesn't mean it was unreasonable to take her deposition.

MR. BLAKLEY: Oh. Oh, certainly. And we don't dispute it was unreasonable to take her deposition at all. The question is was it reasonable or -- would it be reasonable to charge CCSD, you know, some-odd thousand dollars to videotape her deposition? I get strategically that there are many times where it's appropriate or maybe strategically a good idea to take a video deposition. And perhaps that was the case here. But with no explanation as to that, the court can't

make that determination.

So that's our primary concern. The other -- the other costs are admittedly much smaller. But for example, we've got an $808 charge for what I'll call home office printing. I understand that lawyers have to work things up on their computer and print them off. The problem is the statute doesn't provide for print jobs. It does, admittedly, provide for photocopying. But it doesn't say anything about printing things off at home.

Now, the court might see that as a distinction without a difference. And candidly, I could understand that if it -- if it does. The bigger problem here is of these 405 sheets of paper that were printed off, not one of them is explained. We don't know what was printed, we don't know why it was printed. So the court, again, can't determine whether it was reasonably necessary.

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More important than that, though, you've got $808 to print 405 sheets of paper. That works out to almost $2 for each printed page. I don't know any entity in Nevada that charges folks $2 to print out a piece of paper. Maybe I'm naive, but I certainly haven't seen anything in my experience that -- where you'd have to go pay $2 to print off a sheet of paper. And without any more explanation here, we think it would be inappropriate to award them $2 per printed page.

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You've got other costs, like unexplained FedEx charges, charges to send Nevada statutes from California to here to be scanned and then filed electronically, things that just obviously aren't reasonably necessary, along with the NERC charges and so forth. We're not -- we're not NERC, they didn't prevail against NERC. We're not obligated to pay the cost of litigating against NERC. You know, they -- they tried to do that here on the cost side and on the fees side. I understand now that they've removed the cost for serving NERC.

But as far as their initial disclosure of 100 pages of NERC-related paperwork, I don't know what that was for. But clearly they voluntarily dismissed NERC from the action, so we can't have those costs assessed against us.

Thank you so much, Your Honor.

THE COURT: Thank you.

Mr. Lichtenstein.

MR. LICHTENSTEIN: Thank you, Your Honor.

Just very briefly, the biggest question are the Depo International. These are the depositions mentioned. Three were video -- used videographers. This wasn't an area where we were running up costs. These were witnesses that we thought were exceedingly necessary. It's kind of ironic in a way that he mentions Deanna Wright. After all, she wasn't used at trial. If you look at all of the depositions they took, and it's listed as in those costs, there are half a dozen people that they took depositions of never used at trial. That's pretty normal, because you don't know until you depose somebody how useful they are.

So we have the documentation. Initially there were some pages missing. We supplemented that. And there's no basis for saying that these particular deposition charges were unreasonable. They're not saying they didn't take place, they're not saying wasn't -- weren't used. And at trial, obviously, deposition testimony was used to impeach several of the witnesses that -- that they're talking about.

The NERC issue is -- is kind of an interesting one, because the -- the charges for NERC were to provide the material disclosure in terms of what happened with that. Even though we did not end up suing NERC, because

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that was resolved out of court, if we had withheld that information and not disclosed it, my guess is they'd be screaming bloody murder about failure to disclose information.

The other issue, and -- and this one kind of hits home a little bit, is the scanning of -- of documents. For exhibits, for disclosures, and their argument was, well, that's overhead cost, because any lawyer in this day and age can handle large documents for scanning. After all, they can.

I'll be honest, I can't. I don't have the equipment for that. That is stuff that had to go out. And both printing and scanning is -- now, again, the statute doesn't talk about scanning, because it predated that particular technology. But it's certainly a necessary cost.

Now, when they first filed their motion, we looked through it and said, okay, here are things that are reasonably not reimbursable. But for the rest of it, that is.

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Now, also Defendants, for some reason, have two different figures. One in their Motion to Retax, one in their reply. They've made no explanation how they made that particular decision.

The court has all of the records and all of the explanations and we'll just leave it to the court to determine which ones are appropriate and which ones are not.

THE COURT: Thank you, Mr. Lichtenstein.

And the reply, please.

MR. BLAKLEY: Very quickly.

Just want to address two points. First, the two different figures. I appreciate Mr. Lichtenstein bringing that up. The reason we have two different

figures is because when they first filed the motion, there was hardly any documentation to look at. So we gave them the benefit of the doubt where we could. Then when we got the additional documentation with the opposition, we realized, oh, it was actually less that they actually charged for things -- they submitted receipts and you finally look at the receipts and you say, oh, only a portion of this receipt is for photocopying. And then there's some other charges of -- we have no idea what they are or whether they're even related to this case. So once we actually saw the evidence, then we saw, oh, okay, then our prior assumptions won't work.

And that underscores the point here: Why these documents are necessary, why the statute requires them, why the supreme courts require them. Many cases again we still don't have those documents, so the court's still forced to take a shot in the dark, just like we were. And as Attorney Lichtenstein pointed out, taking shots in the dark leads to inconsistent results.

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The second point, I just want to go back to the videography for just a second. Attorney Lichtenstein start -- or Mr. Lichtenstein started with, you know, that they weren't running up costs. I'm certainly not accusing him of running up costs. My heavens, we took more depositions than we wanted to, and I get it. But we're not seeking to have anyone pay for those depositions. We paid for them.

And the more important question -- or issue is it's not whether there was running up costs or whether it was reasonable or necessary, it is whether the statute provides for a videographer and a court reporter to -- to record a deposition transcript. It only says a videographer.

And then the next step the court says -- or the court has to ask,

well, was it reasonable? Even if the statute provided for it, was it reasonable and necessary? And if it was, they haven't explained why it was reasonable or necessary to do the video. Sure, it was necessary and reasonable to take Warren McKay's deposition. Nobody disputes that. Sure, it was perhaps reasonable and necessary to take Trustee Wright's deposition, no one disputes that.

The question is was it reasonable and necessary to try to charge us an additional thousand dollars to have a videographer there. If it was, they haven't explained it. So you've got the statutory problem and the lack of explanation. Both are required by the Nevada Supreme Court.

Thank you, Your Honor.

THE COURT: Thank you both.

This is the Motion -- the defendant's Motion to Retax the Memorandum of Costs and Disbursements matter submitted. And this is the ruling of the court.

The -- from the original amount sought on the memorandum of costs, the plaintiffs didn't dispute some of the objections, and that related to $4,160.58. So the memorandum of costs is reduced by that amount due to the failure -- to -- of the opposition to object to that reduction.

The other disputed costs, then, relate to copying charges and deposition fees. $808.60 is sought for copying fees. Unfortunately, I don't have the detail to allow that. That's required under *Cadle Company vs. Woods & Erickson;* $808.60 additionally will be disallowed.

With regard to the deposition-related costs, I am sustaining the objection, but only to the extent of $404.46. That would be for the duplicate Beasley transcript, the duplicate Wright transcripts, the duplicate McKay

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transcripts, and the duplicate Winn transcripts. I'm denying the objection with regard to the videographer, because I find them to be very helpful at the time of trial, if necessary, because a transcript itself is very sterile, and the court needs to be able to determine the -- the witnesses' testimony based upon their -- their comportment and demeanor as of the time they're testifying.

I'm also disallowing $32.49 and $115.11 for FedEx shipments. I'm also disallowing the 50 -- I'm sorry, other costs, $75.47 with regard to the media-related copies, because I don't see that that's allowable under the statute.

So if my math is correct, that will take the fee down -- I'm sorry, the costs requested down to $19,236.19, which is the 20,672.32 less $1,436.13.

So the -- the motion is granted in part and a partial reduction is granted. The memorandum costs will be reduced to the amount of $19,236.19.

So, Mr. Blakley to prepare the order. Make sure Mr. Lichtenstein has the ability to review and approve the form.

MR. BLAKLEY: Absolutely.

THE COURT: You may reference the findings by reference, if you choose. However you choose to prepare the order is fine.

MR. BLAKLEY: Thank you, Your Honor.

THE COURT: Thank you both.

MR. LICHTENSTEIN: Just one --

THE COURT: Yes.

MR. LICHTENSTEIN: -- housekeeping kind of question, because in our Motion for Fees, we also add other costs --

THE COURT: I'm glad you brought that up. Because you've got two hearings coming up.

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MR. BLAKLEY: Yes.

THE COURT: You have the 13th and the 20th. I would prepare to do them both at one time, if that's all right with you all.

MR. BLAKLEY: And we have an issue with the 20th. We were actually about to submit a letter to the court today. I needed to run it past Mr. Lichtenstein. We initially submitted our Motion to Stay pending appeal.

THE COURT: Right.

MR. BLAKLEY: Then we submitted an amending -- an amended version --

THE COURT: I saw that.

MR. BLAKLEY: -- of that motion, and we've got two hearings. Unless you disagree, we can -- we're fine with moving or taking the 20th hearing off calendar, because the amended motion is scheduled to be heard, is it --

THE COURT: October 4th.

MR. BLAKLEY: -- October 4th.

THE COURT: And that's -- yeah. So with regard -- are you comfortable with doing the Motion to Stay and the Motion for Fees and Costs both on October 4th?

MR. BLAKLEY: We would probably prefer two separate hearings.

THE COURT: Two separate hearings?

MR. LICHTENSTEIN: Yes. And --

THE COURT: All right.

MR. LICHTENSTEIN: -- one of the reasons for that is --

THE COURT: That's fine.

MR. LICHTENSTEIN: -- since it's sent by the supreme court to the

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settlement program, we'd like to know where things would stand, at least in terms of the fees, before we start talking settlement.

THE COURT: All right. Do you have any -- any schedule yet on your settlement conference at the supreme court?

MR. BLAKLEY: I have not seen --

MR. LICHTENSTEIN: On the settlement judge --

MR. BLAKLEY: -- the date.

MR. LICHTENSTEIN: -- gave us dates to choose to talk about this. And the latest one I think was the 28th of September. So --

MR. BLAKLEY: I believe that's correct.

MR. LICHTENSTEIN: -- that's why going to October 4th might be a problem.

THE COURT: Well, they would like to have the motions argued separately.

MR. LICHTENSTEIN: I beg pardon?

THE COURT: Did -- did I hear --

MR. BLAKLEY: We would like to have the motions argued separately.

MR. LICHTENSTEIN: Yeah.

MR. BLAKLEY: I could --

THE COURT: Certainly separately. But do you object to having them on the same day?

MR. BLAKLEY: I don't believe so. That's one thing I'd like to check with the client on. But I think that -- I think that would be fine.

THE COURT: What I'm going to do today is vacate the hearing on the Motion for Attorney's Fees and Costs on September 13th and set it out till October

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the 4th at 9:00 a.m. The first Motion to Stay is vacated and not reset on September 20th, 2017.

If the parties stipulate with regard to additional dates or other dates, you certainly have the right to do that.

MR. BLAKLEY: And, Your Honor, can you just repeat when the Motion to Stay is?

THE COURT: October 4th at 9:00 a.m.

MR. BLAKLEY: Okay.

THE COURT: I vacated the first motion that's on September 20th and the Motion for Attorney's Fees and Costs is continued until October 4th at 9:00 a.m., subject, of course, to any stipulation the parties may have with regard to the scheduling of both motions.

Okay. And thank --

MR. BLAKLEY: Thank you, Your Honor.

MR. LICHTENSTEIN: All right. Thank you.

THE COURT: Thank you both.

[Proceeding concluded at 9:12 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Shawna Ortega, CET*562

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD); *et al.*,

Defendants.

Case No. A-14-700018-C

Dept. No. XXVII

NOTICE OF ENTRY OF "ORDER ON CCSD'S MOTION TO RETAX MEMORANDUM OF COSTS AND DISBURSEMENTS"

Date of Hearing: September 6, 2017

Time of Hearing: 9:00 a.m.

Please take notice that on the 15th day of September, 2017, an "Order on CCSD's Motion to Retax Memorandum of Costs and Disbursements" was entered in this case. A copy of the order is attached.

Dated, this 19th of September, 2017

Lewis Roca Rothgerber Christie LLP

By: */s/ Brian Blakley*
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Dan R. Waite (SBN 4078)
Brian D. Blakley (SBN 13074)
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Las Vegas, NV 89169-5996
Attorneys for CCSD

CERTIFICATE OF SERVICE

I certify that on September 19, 2017, I served the foregoing "Notice of Entry of Order on CCSD's Motion to Retax Memorandum of Costs and Disbursements" through the Court's electronic filing system, by U.S. Mail, postage prepaid, and by courtesy e-mail to the following counsel:

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD); *et al.*,

Defendants.

Case No. A-14-700018-C

Dept. No. XXVII

ORDER ON CCSD'S MOTION TO RETAX MEMORANDUM OF COSTS AND DISBURSEMENTS

Date of Hearing: September 6, 2017

Time of Hearing: 9:00 a.m.

On September 6, 2017, the Court heard argument on CCSD's motion to retax memorandum of costs and disbursements. Plaintiffs were represented by Allen K. Lichtenstein, and CCSD was represented by Brian D. Blakley. Based on the papers and pleadings on file and counsels' arguments, the Court now rules as follows:

1. The motion is GRANTED IN PART and DENIED IN PART, as specified below.
2. The Court disallows the $4,160.58 in costs that plaintiffs expressly abandoned in their opposition brief and revised memorandum of costs.

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Case Number: A-14-700018-C

3. The Court disallows $808.60 in printing costs, because these costs are not adequately explained in the memorandum of costs and supporting documentation.
4. The Court disallows $404.46 in unexplained, duplicative deposition costs.[1]
5. The Court finds that videotaped depositions can be useful at trial and that videography costs are reimbursable under NRS 18.005(2). Accordingly, the costs for videographers' fees are allowed.[2]
6. The Court disallows $75.47 in costs for media-related copies, as these costs were neither reasonable nor necessary to prosecute this case.
7. The Court disallows $32.49 and $115.11 in FedEx costs, as these costs are neither adequately explained, reasonable, nor necessary.

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[1] For clarity, the Court disallows the following deposition costs, which total $404.46:

Deponent	Cost
R. Beasley	$46.00
W. McKay	$137.00
C. Winn	$151.00
D. Wright	$19.46
D. Wright	$51.00

[2] For clarity, the Court allows the following deposition (court reporter and videographer) costs, which total $8,903.55:

Deponent	Cost 1	Cost 2
R. Beasley (not videotaped)	$533.00	--
J. Halpin (not videotaped)	$325.76	$589.50
A. Long (not videotaped)	$556.83	$947.50
W. McKay (videotaped)	$877.98	$1,534.68
C. Winn (videotaped)	$928.73	$1,590.00
D. Wright (videotaped)	$416.15	$603.42

8. In total, the Court disallows $5,596.71 of the $24,832.90 in costs that plaintiffs sought in their original memorandum of costs.
9. Therefore, after subtracting the disallowed costs, the Court finds that plaintiffs are entitled to $19,236.19 in costs.

IT IS SO ORDERED

Dated: September 15, 2017

NANCY L. ALLF
District Court Judge

Respectfully submitted by:
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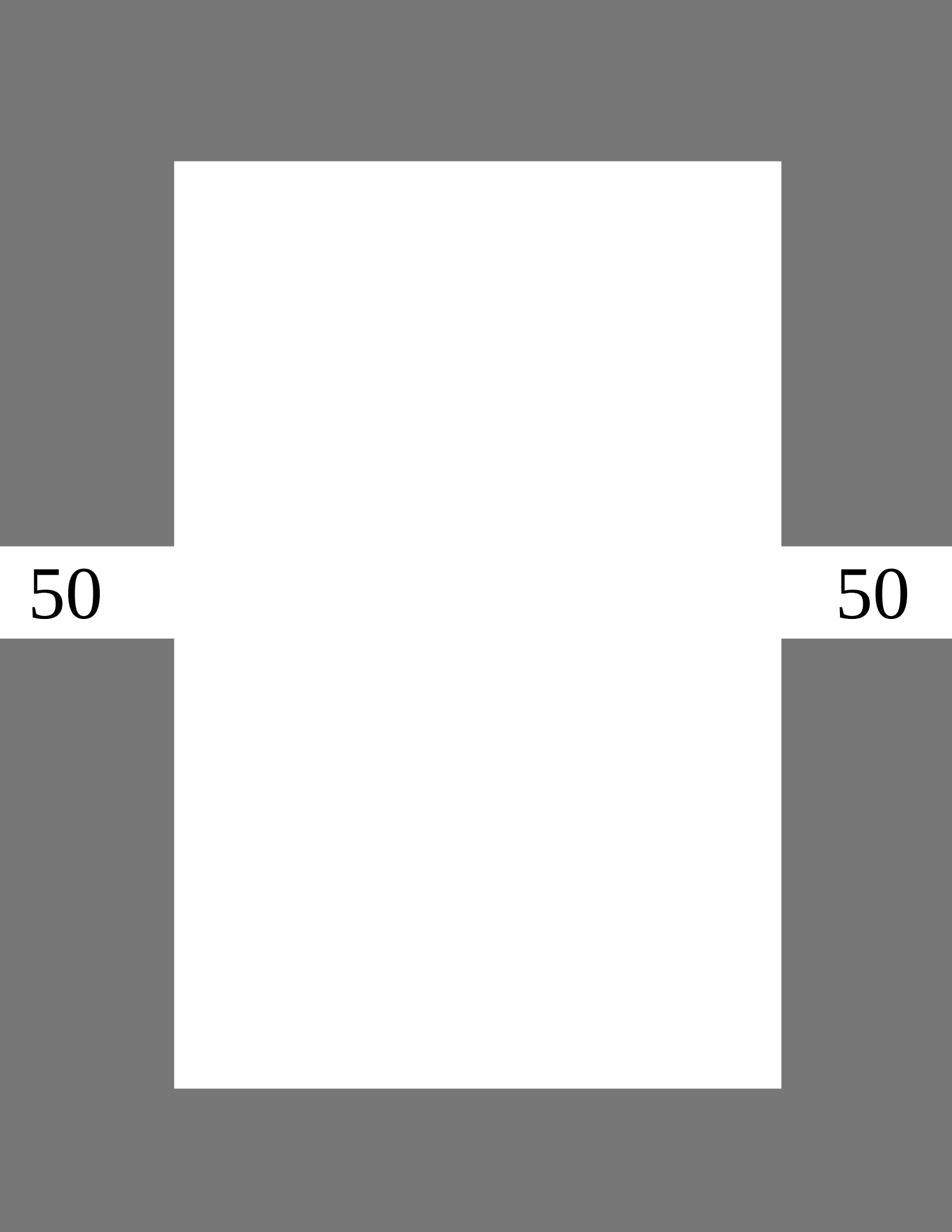
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DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD),

Defendant.

Case No. A-14-700018-C

Dept. No. XXVII

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS FEES AND COSTS

Come now Plaintiffs, by and through the undersigned attorneys, and file this Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Attorneys Fees and Costs, based on all pleadings and papers on file herein, and the Memorandum of Law attached hereto, and any further argument and evidence as may be presented at hearing.

Dated this 27th day of September 2017

Respectfully submitted by:

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Plaintiffs have moved for fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act) 42 U. S. C. § 1988. Congress passed this Act "as a means of securing enforcement of civil rights laws by ensuring that lawyers would be willing to take civil rights cases. *Evans v. Jeff D.*, 475 U.S. 717, 748-49 (1986) "[A] plaintiff who obtains relief in a private lawsuit "'does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance." *Id.*, at 749. The purpose of these fee shifting standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights. *Id.*

By creating Section 1988, Congress realized that civil rights cases are distinct from the ordinary private contractor tort case, in that the vindication of civil rights goes well beyond the interests of just the parties involved, but serves also the public interest. *See, Bouvia v. Cty. of L.A.*, 195 Cal. App. 3d 1075, 241 Cal. Rptr. 239 (1987).

> The [private attorney general fee shifting]doctrine itself rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of fees, private actions to enforce such important policies will, as a practical matter, frequently be infeasible. Because plaintiffs are encouraged to assert their civil rights, attorney's fees are appropriate even if the successful party was represented by public interest lawyers and did not actually incur any legal expense.

195 Cal. App. 3d at 1082, 241 Cal. Rptr. at 243. Thus, a substantial fee award is a mechanism to attract high quality legal representation for cases that may otherwise be economically impossible.

In Plaintiffs' Motion for Fees and Costs, Plaintiffs set forth a lodestar amount comprised of the number of hours spent on this case multiplied by the reasonable hourly fee. *See, Hensley v. Eckerhart*, 461 US. 424, 433 (1983). "A 'strong presumption' exists that the lodestar figure

represents a 'reasonable fee,' and therefore, it should only be enhanced or reduced in 'rare and exceptional cases.'" *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 n.4 (9th Cir. 2000), *citing Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, (1986); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000). ("The lodestar amount is presumptively the reasonable fee amount."); *Herbst v. Humana Health Ins.*, 105 Nev. 586, 590, 781 P.2d 762, 764 (1989) ("There is a strong presumption that the lodestar rate is reasonable.")

Attached to Plaintiffs' August 9, 2017 Motion was documentation supporting a total fee request of $694,071.25. CCSD's Opposition seeks to reduce this amount by approximately 75%.

> [T]he requested hourly rates should be reduced to the local Las Vegas rate of $250.00, and the number of hours claimed should be reduced by 20%. This yields a lodestar of $214,854.
>
> Then, under *Hensley*, the Court should make a 5% downward adjustment for plaintiffs' unrelated NERC claim, and a 15% downward adjustment for their "partial success." Therefore, plaintiffs total fee award should not exceed: $171,883.20.

Opposition brief, at 30.

Thus, Defendant CCSD essentially requests that this Court reduce Plaintiffs' fee award by 20% because it claims Plaintiffs' achieved only partial success. The District also argues that attorneys John H. Scott and Allen Lichtenstein (in his capacity as a private attorney after July 31, 2014) should receive a billing rate of $250 an hour, that no work by any attorney at the ACLUN, including Mr. Lichtenstein, be compensated at all, nor should any work by Staci Pratt be compensated at all, whether at the ACLUN or as a private attorney. Finally, CCSD requests another across the board 20% reduction in the number of hours claimed. Such a reduction is improper. See, *Gonzalez v. City of Maywood*, 729 F.3d 1196 (9th Cir. 2013).

> "[T]he district court can impose a small reduction, no greater than 10 percent—a '**haircut**'—based on its exercise of discretion and without a more specific explanation." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). In all other cases, however, the district court must explain why it chose to cut the

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> number of hours or the lodestar by the specific percentage it did. *See, e.g., Schwarz v. Sec'y of Health and Human Servs.*,73 F.3d 895, 899-900, 906 (9th Cir. 1995).

729 F.3d at 1203.

Here, despite the District's arguments to the contrary, Plaintiffs achieved complete success, which constitutes excellent results. Plaintiffs' attorneys' hourly rates are reasonable, as were the number of hours spent. In other words, there is no justification for any reduction of the lodestar figure presented in Plaintiffs' Motion.

In the Motion for Fees and Costs, Plaintiff noted how all four factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), that the Nevada Supreme Court listed to be considered in "establishing the value of counsel services": (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived. These all favor Plaintiffs' position. In their Opposition brief, Defendants failed to address the Nevada Supreme Court's *Brunzell* test.

II. Argument

When determining a reasonable fee award under a federal fee-shifting statute, a district court must first calculate the lodestar by multiplying the number of hours reasonably expended, by the reasonable hourly rate. *Carter v. Caleb Brett LLC*, 741 F.3d 1071, 1073 (9th Cir. 2014); *citing, Van Skike v. Dir., Office of Workers' Comp. Programs*, 557 F.3d 1041, 1046 (9th Cir. 2009); and *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 955 (9th Cir. 2007).

A. The Twelve Kerr Factors Favor Plaintiffs.

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In applying a federal fee shifting statute, such as 42 U.S.C. § 1988, the Ninth Circuit requires that courts reach attorneys' fee decisions by considering some or all of twelve relevant criteria set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975). C*arter* 741 F.3d at 1073 (9th Cir. 2014); *citing Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988). In calculating the lodestar figure, the court must consider the relevant *Kerr* factors. *Fischer v. SJB-P.D. Inc.*, 214 F.3d at 1119 n.3.

The twelve *Kerr* factors apply in the instant case as follows:

1. The Time and Labor Required

The time and labor required in this case was set forth and documented in the exhibits attached to Plaintiffs' Motion for Fees and Costs. The Court is well aware of the nature of this case, the extensive briefing as well as the five day trial that occurred. Defendants argue for a 20% reduction in the hours calculated. They do not claim the work was not done nor required.

2. The Novelty and Difficulty of the Questions Involved

This case was both novel and difficult as it involved several issues of federal civil rights and constitutional law. This was the first instance of a successful lawsuit against the Clark County School District for failing to adequately address student on student bullying in school. Defendants' position was, from the beginning, that such a lawsuit could not be legally sustainable. That argument alone, as well as others proffered by Defendants made this a novel and difficult case.

3. The Skill Requisite to Perform the Legal Service Properly

Defendants did not question the skill and performance of Plaintiffs' counsel in providing legal services to their clients. It should be noted that at the conclusion of the trial, the Court itself took notice of the skill of all counsel involved in the case. Thus, not only did Plaintiffs' counsel have to demonstrate a high level of skill and performance, they had to do so while opposing highly skilled and competent lawyers for Defendants.

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4. The Preclusion of Other Employment by the Attorney due to Acceptance of the Case

Both Mr. Scott and Mr. Lichtenstein are sole practitioners. While working on this contingency case for the past several years did not totally preclude them from taking on any other legal work, it necessarily limited the amount of that other work they could take on.

5. The Customary Fee

Defendants argue that the hourly billing rate for both Mr. Scott and Mr. Lichtenstein is excessive. Defendants' opposition also chides Plaintiffs for refusing to produce the Retainer agreement Plaintiffs' counsel had with Plaintiffs. That Agreement, attached as Exhibit 1, shows that the billing rates of both Mr. Scott and Mr. Lichtenstein are within the range set forth in that Agreement.

6. Whether the Fee is Fixed or Contingent

This was a pure contingency fee case. Thus, Plaintiffs' attorneys receive nothing in compensation in the absence of a favorable verdict at trial. In contrast, Defendants attorneys' compensation was guaranteed and not dependent on the outcome of the case.

The existence of a contingent fee arrangement is also an element to consider in analyzing fee petitions under *Kerr. Chalmers v. Los Angeles*, 796 F.2d 1205, 1211 (9th Cir. 1986); *Hamner v. Rios*, 769 F.2d 1404, 1407-09 (9th Cir. 1985); *Allen v. Shalala*, 48 F.3d 456, 458 (9th Cir. 1995); *Quesada v. Thomason*, 850 F.2d 537 (9th Cir. 1988).

> [C]ourts have understood the sixth factor as supporting increases in the lodestar because the contingent nature of the fee agreement creates inherent risks of non-payment. *See, e.g.*, (1984) *Blum v. Stenson*, 465 U.S. 886, 902-04 (1984)(Brennan, J., concurring); *Clark v. City of Los Angeles*, 803 F.2d 987, 991 (9th Cir. 1986). Under this theory, **the existence of a contingent-fee agreement might justify increasing the lodestar, though it could never justify decreasing the lodestar.**

850 F.2d 537, 540 (9th Cir. 1988)(emphasis added)

7. Time Limitations Imposed by the Client or the Circumstances

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There were no particular time limitations imposed by either the clients or the circumstances

8. The Amount Involved and the Results Obtained

Despite Defendants' protestations to the contrary, Plaintiffs received excellent results. Plaintiffs prevailed on both the Title IX and Substantive Due Process claims based on the finding of deliberate indifference on the part of school officials. Plaintiffs believed that the Court, as finder of fact, was best positioned to set the amount of damages due Plaintiffs. The Court awarded each Plaintiff the sum of $200,000 as fair compensation.

Defendants argue that because Plaintiffs did not prevail on all of its legal theories, they did not achieve excellent results. This argument is contrary to well established law. All of the hours set forth in Plaintiffs' Motion involve the same set of facts. In order for hours to be exempt from inclusion in the fee calculation, those hours must involve both different theories of law and different facts. *Herbst, supra*, 105 Nev. at 591, 781 P.2d at, 765. Defendants did not and could not argue that the claims against the school district and its agents involved claims based on different facts. Plaintiffs received excellent results.

9. The Experience, Reputation, and Ability of the Attorneys

As set forth in Plaintiffs' Motion, both Mr. Scott and Mr. Lichtenstein have had decades of litigating complex federal civil rights and constitutional issues. (See Declarations of John H. Scott and Allen Lichtenstein, attached to Plaintiffs' Motion for Fees and Costs, and incorporated herein by reference.) Mr. Scott graduated from Golden Gate University School of Law in June 1976. He is admitted to practice in the State of California, the United States District Court for the Northern District of California, United States District Court for the Central District of California, the United States District Court for the Eastern District of California, the United States District Court for the

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Southern District of California, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States.

John H. Scott has been a member of the Bar for 40 years. In that time he has been involved in over 250 cases spanning the broad spectrum of civil rights and constitutional law, including extensive experience litigating against public entities, including over 150 cases in the Northern District of California and 60 cases in the Ninth Circuit. He has tried over 150 cases to verdict, and has argued in the Ninth Circuit Court of Appeals over 40 times. For most of Mr. Scott's career he has specialized in civil rights litigation with an emphasis on Section 1983 (42 U.S.C. § 1983) actions. He has also lectured, written, and consulted about civil rights litigation.

His forty years of practice as a civil rights attorney has also involved numerous Section 1983 cases that were based in whole, or in part, on a theory of "deliberate indifference." This often arose in custodial type situations where children, patients or inmates were dependent upon state actors for their safety and well-being. The common theme was a statutory and/or constitutional duty to protect someone from a known risk of serious harm.

Allen Lichtenstein has been practicing law in Nevada for 27 years, focusing on civil rights and constitutional (mostly First and Fourteenth Amendment) cases. He has a law degree from the Benjamin Cardozo School of Law (1990) and a Ph.D. from Florida State University (1978). In addition to his private law practice, he served as the General Counsel for the American Civil Liberties Union of Nevada from 1997 to 2014.

Allen Lichtenstein has litigated dozens of cases involving civil rights and constitutional issues on both the District Court and appellate levels, and has litigated and argued civil rights cases in Nevada State Courts, including the Nevada Supreme Court, and in Federal Courts including the Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

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Thus, the high level of experience, reputation, and ability of both Mr. Scott and Mr. Lichtenstein is unquestionable. They are, in fact, the exact types of lawyers that the fee shifting provisions of Section 1988 was designed to attract.

10. The "Undesirability" of the Case

As noted above, this is, to the best of Plaintiffs' knowledge, the first time that a Plaintiff successfully sued CCSD for failure to adequately address student on student bullying in school. Moreover, as also noted above, the case was taken on a contingency fee basis. Thus, the task of taking on a difficult case involving unchartered waters without any assurance of any payment whatsoever made this a problematic case to take.

11. The Nature and Length of the Professional Relationship with the Client

Neither Mr. Scott nor Mr. Lichtenstein had ever had any contact with Plaintiffs prior to this case. Nor does either have any professional relationship with any of the Plaintiffs that extends beyond this particular case. There is no ongoing legal representation with them as there is between Defendants' counsel and CCSD. Thus, there was no discounted rate that Plaintiffs' attorneys provided to Plaintiffs due to volume of work or any ongoing relationship.

12. Awards in Similar Cases

Because this is the first case where Plaintiffs successfully sued CCSD for failure to adequately address student on student bullying occurring at school, there are no cases directly on point for comparison. Fee awards in other civil rights cases, while useful in comparison, are limited by the fact that few if any went to trial. Even so, however, Defendants' suggestion that the proper hourly rate is $250 per hour is belied even by their own examples, which show $250 per hour to be appropriate for associates, but not for accomplished attorneys with decades of experience in complex civil rights cases.

B. Plaintiffs Obtained Excellent Results.

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Defendants argue that the Court should reduce Plaintiffs' lodestar fee request by approximately 75%. They argue that a reduction of the lodestar is in order because Plaintiffs did not succeed or get excellent results. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley, supra,* 461 U.S. at 435.

> Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.

Id.

Nonetheless, Defendant asserts that because Plaintiffs failed to prevail on every contention raised in the lawsuit, the lodestar amount should be reduced.

1. Under *Hensley*, Plaintiffs Success was Total not Partial.

Defendant argues for a 20% reduction in the lodestar because of Plaintiffs limited success.

> Here, plaintiffs' success was "partial or limited" at best. They ultimately prevailed on just 2 of their 6 original claims and against only 1 of the 20 original defendants (i.e., they did not prevail in any manner against 19 of the original defendants). Additionally, they did not win any of the declaratory judgments, injunctions, or punitive relief they sought. (*See* Original Compl., Apr. 29, 2014, at 33- 34; Errata to First Am. Compl., Nov. 17, 2014, at 35). Then, following trial, this Court cut their request for $1.2 million in compensatory damages by 66% to $400,000 ($200,000 per boy). This reflects "limited success."

Opposition at 24.

Defendant's position is incorrect as a matter of law. The Supreme Court in *Hensley*, rejected the approach taken by the District in favor of one that looks at the success of the attorneys as a whole.

> It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall

> relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

461 U.S. at 435.

Similarly, the Nevada Supreme Court, in *Herbst v. Humana Health Ins.*, 105 Nev. at 781, stated that if the claims in question revolved around a common core of facts, none of the hours expended are exempt.

> [W]here the plaintiff's claims involve a common core of facts he is entitled to attorney's fees even for the work performed on his unsuccessful claims. It is only where a plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims that he should not be entitled to attorney's fees for work done on the unsuccessful claims.

105 Nev. at 591, 781 P.2d at 765, *citing Hensley*, 461 U.S. at 435. *See also, Webb v. Sloan*, 330 F.3d 1158, 1168-69 (9th Cir. 2003).

> In *Schwarz v. Secretary of Health & Human Services*, 73 F.3d 895, 902-03 (9th Cir. 1995), we examined our cases concerning "relatedness" in fee awards. We acknowledged that the test for relatedness of claims is not precise. *Id.* at 903. However, we offered some guidance, explaining that "the focus is to be on whether the unsuccessful and successful claims arose out of the same 'course of conduct.' If they didn't, they are unrelated under *Hensley*." *Id.* We explained that claims are *unrelated* if the successful and unsuccessful claims are "distinctly different" *both* legally *and* factually. *Id.* at 901, 902. Again echoing *Hensley*, we reasoned that such hours are excludable because work on such distinctly different claims "cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" *Id.* at 901 (quoting *Hensley*, 461 U.S. at 435 (internal quotation marks omitted)). We cited cases in which we asked "whether it is likely that some of the work performed in connection with the unsuccessful claim also aided the work done on the merits of the successful claim." *Id.* at 903 (brackets and internal quotation marks omitted). Ultimately, however, we reaffirmed that the focus is on whether the claims arose out of a common course of conduct. *Id.* In short, claims may be related if **either the facts *or* the legal theories are the same.**

330 F.3d at 1168-69(emphasis added).

2. Plaintiffs Received All of the Relief Requested.

a. All of Plaintiffs' Claims were Based on the Same Set of Facts.

CCSD argues that all but one of the Defendants, except the District itself, ended up being dismissed from the case, therefore showing only partial success. This argument, however, shows

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nothing of the sort. All of the Defendants listed in Plaintiffs' October 10, 2014 Amended Complaint were either agents of CCSD or the District itself. All of the claims for relief are based on the exact same facts. Although Plaintiffs proffered several different legal theories, that alone is not a proper basis for reducing the lodestar in light of the claims being made on the same facts. Unrelated claims are only those that are both factually *and* legally distinct. *Ibrahim v. United States Dep't of Homeland Sec.*, 835 F.3d 1048, 1062 (9th Cir. 2016), *citing Webb*, 330 F.3d at 1168. In *Cabrales v. Cty. of L.A.*, 935 F.2d 1050 (9th Cir. 1991), the Court noted that the measure of success is the end result of the litigation.

> Rare, indeed, is the litigant who doesn't lose some skirmishes on the way to winning the war. Lawsuits usually involve many reasonably disputed issues and a lawyer who takes on only those battles he is certain of winning is probably not serving his client vigorously enough; losing is part of winning.

935 F.2d at 1053. Here, despite the winnowing of claims and Defendants during the course of proceedings, Plaintiffs obtained the relief they were seeking, thus providing excellent results.

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In their Opposition brief, CCSD did not even argue that any of the claims made against the CCSD Defendants are **both legally and factually distinct**. Therefore, Plaintiffs' success against the District on the Title IX and Substantive Due Process claims, due to the Court's ruling that school personnel exhibited deliberate indifference to known dangers that Nolan and Ethan were continuing to face, did not result in partial success, but instead, complete success, or in other words, excellent results.

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b. A 5% Reduction in the Lodestar Based on Claims Against NERC is Unsupported.

Defendant also argues that there should be a 5% reduction in the lodestar based on claims against the Nevada Commission on Equal Rights (NERC). These claims appeared only in the April 29, 2014 original Complaint, and concerned whether NERC had jurisdiction over bullying incidents occurring in public schools, because public schools are considered a place of public

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accommodation. The jurisdictional issue had been resolved out of court prior to the October 10, 2014 filing of Plaintiffs' Amended Complaint. All work related to any claims against NERC took place prior to July 31, 2014 when the ACLUN was still representing Plaintiffs. All of the hours spent by ACLUN attorneys on the Complaint involving NERC were either part of the general pattern of facts concerning the bullying of Ethan and Nolan, or were not submitted for reimbursement in Plaintiffs' Fee Motion.

Moreover, the request for a 5% reduction of the total lodestar based on unspecified hours involving the NERC jurisdictional issue is puzzling. The total fees claimed for the ACLUN, as shown on page 24 of Plaintiffs' Motion amount to $19,356.25 which is approximately 2.8% of the total requested fee amount by Plaintiffs. Thus, even if the Court were to accept Defendants' contentions and exempt all 70.45 hours claimed by the ACLUN as being solely involved with the NERC jurisdictional issues in the original Complaint, that 2.8% of the lodestar still does not justify Defendants' request for an across-the-board 5% reduction in the lodestar. Defendants are using the NERC excuse to not only exempt, from the lodestar, all of the hours of work done at the ACLU, but work by private attorneys after July 31, 2014, by which time, NERC was no longer a part of the case.

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c. Defendant's Claim that Plaintiffs did not Receive Declaratory or Injunctive Relief is Incorrect.

Defendants also argue that Plaintiffs were only partially successful because they did not receive declaratory and injunctive relief. As noted above, to the extent that this relief related to NERC, such matters were resolved out of court prior to the filing of Plaintiffs' Amended Complaint. As for Defendant CCSD, it cannot be seriously argued that the Court did not provide declaratory relief to Plaintiffs in its June 29, 2017 Order.

COURT ORDERS for good cause appearing and after review, Defendant CCSD violated Title IX of the Civil Rights Act.

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> COURT FURTHER ORDERS for good cause appearing and after review, violated Plaintiffs' substantive due process rights as guaranteed by the Fourteenth Amendment to the United States constitution pursuant to 42 U.S.C. § 1983.
>
> COURT FURTHER ORDERS for good cause appearing and after review Judgment shall be entered in favor of Plaintiffs Mary Bryan, on behalf of Ethan Bryan, and Aimee Hairr, on behalf of Nolan Hairr.

June 29, 2017 Order, at 2-3. This declaration is undoubtedly clear and unambiguous.

Defendant also argues that Plaintiffs received a damage award that was only one third of what they sought. This is untrue. Throughout the course of this lawsuit, Plaintiffs requested damage relief in an amount that the Court would deem fair and reasonable. In fact, CCSD vehemently objected to Plaintiffs not seeking a specified damage amount but leaving the question instead to the discretion of the Court. This does not show partial success.

d. The Damages Awarded to Plaintiffs do not Show Only Partial Success.

Defendants' reliance on *McAfee v. Boczar*, 738 F.3d 81 (4th Cir. 2013), for their argument that the Court should not grant a fee award greater than the Plaintiffs' damage award is misplaced. While noting that in *Riverside v. Rivera*, 477 U.S. 561 (1986) a fee award that was seven times the damage award was proper, the *McAfee* Court rejected as disproportionate, a fee award that was more than 100 times the damage award of $3000.

> The Supreme Court has rejected the proposition that a § 1988 fee award must invariably be proportionate to the amount of damages a civil rights plaintiff actually recovers. *See Riverside v. Rivera*, 477 U.S. 561, 574 (1986). In *Rivera*, the Court affirmed an attorney's fee award of $245,456, which was slightly in excess of seven times the plaintiff's recovery of compensatory and punitive damages, amounting to $33,350. *See id*. at 565-67. In this case, however, we cannot ignore the pronounced disproportionality between the verdict for less than $3000, and the fee award more than 100 times that amount.

McAfee v. Boczar, 738 F.3d 81, 94 (4th Cir. 2013). No such "pronounced disproportionality"

exists here. Plaintiffs' requested lodestar amount of $694,071.25 is only 1.7 times the damage award of $400,000.00, thus falling well within the *McAfee* standards.

C. Plaintiffs' Rates were Reasonable.

CSSD's Opposition brief argues that the proper rates for Plaintiffs' attorneys in this case, John H. Scott, and Allen Lichtenstein (as a private attorney) is $250 per hour. Devoid of explanation, Defendant also urges the Court to completely eliminate the hours accrued prior to July 31, 2014, by the ACLUN, including the hours for work done by Allen Lichtenstein and Staci Pratt. Defendant also urges no compensation for Ms. Pratt as a private attorney.

1. Plaintiffs' Retainer Agreement Shows a Usual Fee of $650-$750.

On page 8 of their Opposition brief, CCSD claims that Plaintiffs' "attorneys refused to disclose the hourly rates they actually contemplated at the outset of the case." Obviously, there is no such refusal nor does Defendant's assertion that Plaintiffs can offer no evidence that actually supports the rates claimed, have any basis in fact. A copy of the signed Retainer Agreement is attached as Exhibit 1. Page 1 of that Agreement states the following:

> 3. FEES FOR LEGAL SERVICES.
> Attorneys' fees in matters of this nature are negotiable and not set by law.
> You have been informed and acknowledge that the Attorneys' usual hourly legal fees for cases with similar issues to yours are as follows: $650-$750 for partners; $375-$450 for associates; $250 for contract lawyers; and, $75 for paralegals.

Clearly, the $650 per hour rate for John H. Scott and the $600 per hour rate for Allen Lichtenstein are actually at the lower end, in Mr. Scott's case, and below the stated range, in Mr. Lichtenstein's case. While not dispositive in and of itself, Plaintiffs' Retainer Agreement indicates that counsel disclosed a $650-$750 per hour usual hourly rate for similar civil rights cases. CCSD's assertion that Plaintiffs' counsel somehow conjured up their normal hourly rates for this fee motion is belied by the plain language of the 2015 document itself. The Court in *Quesada v. Thomason*, 850 F.2d 537, 541 (9th Cir. 1988) *citing Johnson v. Georgia Highway*

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Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974), stated that "the fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case.").

2. The Waite Declaration Does Not Set a Standard Fee of $250 Per Hour.

Dan Waite's Declaration stated that he charged $250 per hour in this case. No mention was made of Mr. Polsenberg's rate. It is also important to note that Mr. Waite did not claim that this is his normal hourly rate for clients. Nor did he produce a copy of any Retainer Agreement that CCSD had with Lewis Roca Rothgerber and Christie, LLP. Thus, we do not have any information as to whether the District received a discounted rate because of the volume of the work that Lewis, Roca, Rothgerber and Christie, LLP does for it.

This question of the "the nature and length of the professional relationship with the client," is important as *Kerr* factor No. 11. *Kerr,* 526 F.2d at 70. In a March 13, 2017 article by Jackie Valley of the Nevada Independent, entitled "Complicated cases trigger steep hike in school district's legal expenses," (Exhibit 2), amounts paid by CCSD for legal work by Lewis Roca Rothgerber for the years 2013 through 2015, (the last three years data were shown for), are: 2013-- $250,388.39; 2014-- $300,545.85; 2015-- $1,315,511.62. Clearly this indicates an ongoing relationship between the District and the law firm. It also strongly suggests the possibility of a discounted rate based on volume. Under these circumstances, Mr. Waite's assertion that his rate for this case was $250 an hour so therefore attorneys for Plaintiffs, the prevailing party, should be capped at $250 per hour as well, is clearly untenable.

In *Costa v. Comm'r of SSA*, 690 F.3d 1132 (9th Cir. 2012) the Court rejected a policy of setting a flat rate of $250 per hour on civil rights cases.

> In *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008), we also rejected the district court's method of determining a reasonable hourly rate. We said that the district court "erred by applying what appears to be a de facto policy of awarding a rate of $250 an hour to civil rights cases." *Id*. at 1115. We then explained,

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> "[d]istrict judges can certainly consider the fees awarded by other judges in the same locality in similar cases. But adopting a court-wide policy—even an informal one—of 'holding the line' on fees at a certain level goes well beyond the discretion of the district court." *Id.*

690 F.3d at 1136

The Ninth Circuit in *Moreno,* noted that the District Court, "has pretty much held the line at $250 [an hour] for the past ten years."

> The court also erred by applying what appears to be a de facto policy of awarding a rate of $ 250 an hour to civil rights cases. At the fees hearing, the district court noted that "300 an hour is a fairly big step for me, and I think for the court generally" and that "the court has pretty much held the line at 250 [an hour] for the past ten years." While the district court's final fee order does not reiterate this reasoning, an effort to adhere to this de facto policy probably influenced the final rate awarded, which was $ 250 an hour.

534 F.3d at 1115.

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It should be noted that *Moreno* was a 2008 case. Thus, the $250 per hour rate established 10 years before that would mean that was considered the appropriate rate back in 1998. It is clearly inappropriate now.

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3. Comparable Rates Show Plaintiffs' Rates are Reasonable.

Citing *Gisbrecht v. Barnhart*, 535 U.S. 789 808 (2002), the Court in *Ellick v. Barnhart*, 445 F. Supp. 2d. 1166, 1172 n. 18 (C.D. Cal. 2006) noted that, "[t]he hours spent by counsel representing the claimant and counsel's "normal hourly billing charge for noncontingent-fee cases" may aid "the court's assessment of the reasonableness of the fee yielded by the fee agreement." Courts may look to comparable hourly rates in the area for guidance on granting fee awards. *Pierce v. Underwood*, 487 U.S. 552 (1988).

> A "reasonable" hourly rate cannot be determined with exactitude according to some preset formulation accounting for the nature and complexity of every type of case. Therefore, courts often assume that an attorney's normal hourly rate is reasonable, or, in the case of public interest counsel, a reasonable rate is generally the rate

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> charged by an attorney of like "skill, experience and reputation." *Blum* v. *Stenson*, 465 U.S. 886, 895, n. 11 (1984).

487 U.S. at 581.

In a recent Las Vegas case *Nike, Inc. v. Fujian Bestwinn China Indus. Co.*, No. 2:16-cv-00311-APG-VCF, 2017 U.S. Dist. LEXIS 93397 at *1 (D. Nev. June 16, 2017), Federal District Court Judge Gordon approved of billing rates for the prevailing party based on skill and experience.

> The fees Nike seeks are reasonable and justified. I have considered the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P. 2d 31, 33 (Nev. 1969) and in Local Rule 54-14. Nike's lawyers are skilled intellectual property attorneys with significant experience and an excellent rating. Their hourly rates of $455, $325, $235, and $240 are reasonable for lawyers with their respective qualifications in this area of the law.

2017 U.S. Dist. LEXIS 93397 at *1; *see also, Mayweather v. Wine Bistro*, No. 2:13-cv-210-JAD-VCF, 2014 U.S. Dist. LEXIS 168718 at *3 (D. Nev. Dec. 4, 2014) (finding $295 and $675 reasonable hourly fees in Las Vegas in 2014) adopting Doc 58, Magistrate's Report at 16); *Marrocco v. Hill*, 291 F.R.D. 586, 589 (D. Nev. 2013) (finding hourly rates between $375 and $400 reasonable in Las Vegas in 2013); *Liberty Media Holdings, LLC v. FF Magnat Ltd.*, No. 2:12-cv-01057-GMN-RJJ, 2012 U.S. Dist. LEXIS 124808, at *14 (D. Nev. Sep. 4, 2012) ($400-$500 for partners and $325 for associates was reasonable for Las Vegas legal market in 2012); *Interim Capital, LLC v. Herr Law Grp., Ltd.*, No. 2:09-CV-01606-KJD-LRL, 2012 U.S. Dist. LEXIS 116137, at *3 (D. Nev. Aug. 15, 2012) (finding $495-$550 to be a usual and customary billing rate for partners and $180 per hours for paralegals, in 2012). Even the cases cited by CCSD fail to support Defendant's argument that Plaintiffs' counsel should receive fees at a rate of $250 per hour. Instead they show that $250 per hour may be an appropriate rate for associates.

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4. The Fact that Plaintiffs' Attorneys Took this Case on a Pure Contingency fee is an Important Factor (No. 6) Under a *Kerr* Analysis.

The uncertainty surrounding the contingency fee arrangement is a necessary factor to be considered in the Court's consideration of Plaintiffs' fee petition. See, *Moreno v. City of Sacramento*.

> It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning.

534 F.3d at 1112.

In *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 840-41 (9th Cir. 1982), the Ninth Circuit utilized what it called a "blended" approach, which began by looking at the first factor in the lodestar approach, "hours spent," with the "time and labor required" element of as set forth in *Kerr*. The *Moore* Court then considered other factors from *Kerr,* specifically, quality or contingency considerations in order to set a proper hourly rate.

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D. Plaintiffs' Hours Were Reasonable.

The Court in *Moreno v. City of Sacramento*, stated that the Court should assume that the attorneys are in the best situation to determine how many hours of work were required for a case in which they prevailed.

> By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.

534 F.3d at 1112.

The *Moreno* Court added that a district court can impose a reduction of up to 10 percent—a "haircut"—based purely on the exercise of its discretion and without more specific explanation. *Id*. But where the district court had cut the number of hours by twenty to twenty-five percent it

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was required to provide more specific explanation than its view that "the amount of time plaintiff's counsel spent was 'excessive.'" *Moreno*. at 1112-13. Defendant's proposed cuts in hours of 20% are unjustified.

1. There was No Unnecessary Duplication.

CCSD objects to certain depositions attended by both Mr. Scott and Mr. Lichtenstein. However, the attendance of two attorneys at a single deposition is not unreasonable as a matter of law. *See Rees v. GE,* 144 F. Supp. 2d 138, 141 (N.D.N.Y. 2001) (holding in age discrimination case where two attorneys attended depositions on behalf of four plaintiffs that "in light of the complexity of this case and the fact that [the prevailing plaintiff] was suing . . . a large company with significant resources at its disposal, the use of two attorneys was not unnecessary or unreasonable"); *See also, Coffey v. Dobbs Int'l Servs., Inc.*, 5 F. Supp. 2d 79, 86 (N.D.N.Y. 1998), *rev'd on other grounds*, 170 F.3d 323 (2d Cir. 1999) ; *Meacham v. Knolls Atomic Power Lab.*, 185 F. Supp. 2d 193 (N.D.N.Y. 2002) *rev'd on other grounds* 544 U.S. 957 (2005).

> The attendance of two attorneys for plaintiffs at depositions appears to have been limited to such important witnesses as only one attorney generally attended depositions for plaintiffs. In the circumstances of this case, it was not unreasonable for two attorneys to attend those particular depositions. Accordingly, the hours claimed by plaintiffs' counsel will not be reduced in these instances.

185 F. Supp. 2d at 240.

The Ninth Circuit has recognized that sometimes "the vicissitudes of the litigation process" will require lawyers to duplicate tasks. *Costa v. Comm'r of SSA*, 690 F.3d 1132, 1135-36 (9th Cir. 2012) citing *Moreno* at 1113. "Findings of duplicative work should not become a shortcut for reducing an award without identifying just why the requested fee was excessive and by how much." *Id.*

> [N]ecessary duplication--based on the vicissitudes of the litigation process--cannot be a legitimate basis for a fee reduction. It is only where the lawyer does *unnecessarily* duplicative work that the court may legitimately cut the hours.

Moreno 534 F.3d at 1113.

On page 19 of the Opposition brief, CCSD cites several cases for the proposition that only one attorney can bill for an intra-office phone call. However, in the instant case, none of the entries cited involve any intra-office phone calls. These involved Mr. Scott in San Francisco, and Mr. Lichtenstein in Las Vegas. In *Relente v. Viator, Inc.*, No. 12-cv-05868-JD, 2015 U.S. Dist. LEXIS 75295, at *7 (N.D. Cal. June 9, 2015), the Court noted that: adequate representation may require this type of communication , and therefore attorneys billing for it is legitimate.

> In a number of places, Viator alleges that the mere fact that Sitkin and ROCK communicated is unnecessarily duplicative. *See, e.g.*, Comparison at 1 ("Meet with co-counsel regarding legal strategy"); 2 ("debrief ROCK re above"), 7 ("Phone call with co-counsel regarding strategy."). But it is obvious that co-counsel will have to communicate with one another to provide adequate representation.

2015 U.S. Dist. LEXIS 75295, at *6-7.

All of the hours listed by Plaintiffs' counsel were necessary, including the various meetings and phone calls. They were neither excessive or duplicative.

2. Mr. Lichtenstein's Bill Itemization was Proper.

On page 20 of their Opposition, Defendants state that:

> Here, Attorney Lichtenstein used a timekeeping software called TimeSlips to record his time, and his time records consist of a TimeSlips printout. This TimeSlips printout includes sequential slip identification numbers ("Slip ID numbers"), which reveal every entry that was not contemporaneously entered and help estimate the length of the delay.

This attempt at a "gotcha" moment, however, is unavailing to Defendants. They conflate two separate actions: 1) of the recording by Mr. Lichtenstein, of his hours, in writing on paper documents designed for that purpose, and 2) the entry of the information contained on those documents into the Timeslip computer program by a member of Mr. Lichtenstein's office staff. These are clearly two separate operations done by two separate people. Mr. Lichtenstein's written

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time entries are entered into the computer program by staff at the time that bills need to go out to various clients. The slip numbers referred to by CCSD are not separated by client. Rather, each Timeslip entry is given a consecutive number, regardless of which client that entry pertains to.

In a contingency fee case, such as the instant one, unlike the one where there is monthly billing, the entry of billing information into the program creates less of a time pressure, because no bill will go out until the end of the case, and then only upon a motion for fees. In short, the sequencing of Timeslip entries does not reflect Defendants' assertion that the billing was re-created, as when and in what order the billing information was entered into the computer program does not reflect when that information was first created. Defendants' argument is fallacious.

3. There was No Lack of Clarity.

CCSD argues for an across-the-board reduction in the lodestar due to what it considers vague time entries. Recently, the Ninth Circuit noted that prevailing counsel are not required to record in great detail how each minute of their time was expended, as long as the attorneys have satisfactorily identified the general subject matter of their time expenditures. *Pollinator Stewardship Council v. United States EPA*, No. 13-72346, 2017 U.S. App. LEXIS 13343, at *22 (9th Cir. June 27, 2017), *citing Fischer v. SJB-P.D. Inc.*, 214 F.3d at 1121; and *Hensley*, 461 U.S. at 437 n. 12).

In *Berberena v. Coler*, 753 F.2d 629 (7th Cir. 1985), the Seventh Circuit noted that even if a time entry might be considered vague when viewed in isolation, when looked at in context such entries provide sufficient clarity for the Court to ascertain its purpose.

> The district court specifically found that reductions because of vagueness would not be appropriate and that the documentation of time spent upon the case was adequate to sustain the plaintiffs' fee request. Although the court did not elaborate its reasons beyond stating that its conclusions were based on a "review of time sheets", our own review of the time sheets convinces us that the district court did not clearly abuse its discretion. The entries that the defendants single out, although vague when read in isolation, are not impermissibly vague when viewed in the context of the surrounding documentation. For example, the entry listed as "notes

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> of meeting" follows an entry for the same date identifying a three-hour meeting to discuss settlement with opposing counsel. The challenged entry obviously refers to the memorializing of the three-hour meeting. Taken in context, it is sufficient to identify the substance of the work done, and thus comports with the Supreme Court's observation that an attorney "is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." *Hensley v. Eckerhart*, 461 U.S. 424, 76 L. Ed. 2d 40, 53 n. 12, 103 S. Ct. 1933 (1983). We find the time sheets adequate to support the district court's award.

753 F.2d at 634.

Such is the situation here. Any vagueness or lack of clarity contained within any entry can be clearly remedied by viewing that entry within the context of the activities going on at the time, as shown by surrounding entries. In short, there is no basis for the Court to reduce Plaintiffs recorded hours.

E. Plaintiffs are Entitled to Fees in Connection to this Reply.

Work performed on a motion for fees under 42 U.S.C. § 1988 is compensable. *D'Emanuele v. Montgomery Ward & Co*., 904 F.2d 1379, 1387 (9th Cir. 1990); *In re Nucorp Energy*, 764 F.2d 655, 660 (9th Cir. 1985). Plaintiffs are entitled to attorney fees for the time spent preparing this Reply brief, in the amount of $15,060.00 for a total lodestar for fees of $709,131.25 as set forth in the attached Declaration of Allen Lichtenstein.

F. Costs

Costs were awarded in the amount of $19,236.19 in this Court's September 6, 2017 Order.

III. Conclusion

For all these reasons, Plaintiffs should receive the fee award reflected in their lodestar calculations, of $694,071.25, as set forth in the August 9, 2017 Motion, plus additional hours spent on this Reply, by Allen Lichtenstein, of $15,060.00 resulting in a total final lodestar of $709,131.25 for fees.

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Dated this 27th day of September 2017,

Respectfully submitted by:

/s/Allen Lichtenstein
Allen Lichtenstein
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Tel: 415-561.9601
john@scottlawfirm.net

Attorneys for Plaintiffs, Mary Bryan, Ethan Bryan, Aimee Hairr and Nolan Hairr

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CERTIFICATE OF SERVICE

I hereby certify that I served the following Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Fees and Costs via Court's electronic filing and service system and/or United States Mail and/or e-mail on the 27th day of September 2017, to:

Dan Polsenberg
Dan Waite
Lewis Rocha Rothgerber Christie
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, NV 89169-5996

DPolsenberg@lrrc.com
DWaite@lrrc.com

/s/ Allen Lichtenstein

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john@scottlawfirm.net

Attorneys for Plaintiffs, Mary Bryan, Ethan Bryan, Aimee Hairr and Nolan Hairr

DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR, Plaintiffs, vs. CLARK COUNTY SCHOOL DISTRICT (CCSD Defendant .	Case No. A-14-700018-C Dept. No. XXVII **DECLARATION OF ALLEN LICHTENSTEIN** Department: XXVII Date of Hearing: 10/4/17 Time of Hearing: 9:00am

Allen Lichtenstein, declares under perjury pursuant to the laws of Nevada as follows:

1. I am an attorney licensed to practice law in the State of Nevada.

2. I have personal knowledge of the matters set forth herein, except for those matters known on information and belief, and for those matters, I believe them to be true.

3. The following fee amounts represent work done by me in preparation of Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for fees and costs.

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Allen Lichtenstein rate-$600 per hr, hrs.-25.10; total for Reply--$15,060.00

4. These fees were calculated by my normal procedure of writing down the amount of time spent on each task, and giving those written documents to my office staff for entry into the Timeslips computer program, which then calculated the totals.

5. Attached Exhibit 1 is a true copy of the Retainer Agreement that Mr. Scott and I made with Plaintiffs in this case.

I affirm that the foregoing is true and correct, and this Declaration is executed under penalty of perjury this 27th day of September, 2017 in Las Vegas, Nevada.

Allen Lichtenstein

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Selection Criteria

Slip.Selection	Include: 3086; 3087; 3088; 3089; 3090; 3091
Slip.Classification	Open
Clie.Selection	Include: Bryan and Hairr

Rate Info - identifies rate source and level

Slip ID / Dates and Time / Posting Status / Description		Timekeeper / Activity / Client / Reference	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
3086	TIME	Allen	4.70	600.00	2820.00
9/2/2017		document draft	0.00	T	
WIP		Bryan and Hairr	0.00		
Research and draft fee reply brief			0.00		
3087	TIME	Allen	5.90	600.00	3540.00
9/3/2017		document draft	0.00	T	
WIP		Bryan and Hairr	0.00		
Continued draft of reply brief			0.00		
3088	TIME	Allen	5.30	600.00	3180.00
9/4/2017		research	0.00	T	
WIP		Bryan and Hairr	0.00		
Continued research and draft fee reply			0.00		
3089	TIME	Allen	7.70	600.00	4620.00
9/5/2017		research	0.00	T	
WIP		Bryan and Hairr	0.00		
Continued research and draft fee reply			0.00		
3090	TIME	Allen	1.00	600.00	600.00
9/27/2017		hearing	0.00	T	
WIP		Bryan and Hairr	0.00		
Hearing Re: Motion to Retax costs			0.00		
3091	TIME	Allen	0.50	600.00	300.00
9/27/2017		editing	0.00	T	
WIP		Bryan and Hairr	0.00		
Final edit of reply brief			0.00		
Grand Total					
		Billable	25.10		15060.00
		Unbillable	0.00		0.00
		Total	25.10		15060.00

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EXHIBIT 1

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ATTORNEY-CLIENT
CONTINGENCY-FEE AGREEMENT

This is the written attorney-client fee agreement between the Scott Law Firm and Allen Lichtenstein, Ltd., collectively referred to as the ("Attorneys"), and **Mary Bryan and Amy Hairr** regarding civil claims against the **Clark County School District (CCSD) et. al, (case No. A-14-700018-C)** under the terms and conditions described below.

1. SCOPE OF SERVICES.

You are retaining Attorneys to pursue civil claims against the **Clark County School District (CCSD) et. al, (case No. A-14-700018-C).** We are not obligated to represent you on any appeal or in any proceedings designed to execute on a judgment, without such additional compensation as may be agreed upon in a separate agreement.

We will provide legal services reasonably required to represent you for this scope of services. We will take reasonable steps to keep you informed of progress and to respond to your inquiries. You agree we may associate with other counsel in this case subject to the terms and conditions set forth herein. We do not provide tax advice.

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2. CLIENTS' DUTIES & RESPONSIBILITIES.

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You agree to be truthful with us, to cooperate, to keep your Attorneys informed of developments, to abide by this Agreement, and to keep us advised of your current address, telephone number and whereabouts. You further agree to be truthful and cooperative with us. Misstatements, omissions of facts, concealment of evidence or documents, and other similar acts by you will be deemed a breach of this Agreement. You represent that all facts within your knowledge that are material to these matters have been disclosed or will be disclosed upon your discovery of such facts. You agree to provide us with the names of known witnesses, and their contact data if known to you; and, copies of relevant documents. If we present matters to you for decision, after a reasonable length of time, you must make the decision. You understand Attorneys are relying upon your representations to undertake this Agreement.

3. FEES FOR LEGAL SERVICES.

Attorneys' fees in matters of this nature are negotiable and not set by law.

You have been informed and acknowledge that the Attorneys' usual hourly legal fees for cases with similar issues to yours are as follows: $650-$750 for partners; $375-$450 for associates; $250 for contract lawyers; and, $75 for paralegals. Under the terms of this Agreement, we will provide legal services to you relative to this matter based on the following.

Client acknowledges that he has been advised by Attorneys that any contingency fee is negotiable and is not set by law. Bearing this in mind, Client agrees to pay to Attorneys, only upon the actual recovery of a monetary settlement payment or a money

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judgment in this case (collectively "monetary recovery"), a contingency fee of forty percent (40%) of the total monetary recovery.

Outstanding litigation costs and expenses and any liens asserted against the total monetary recovery will be deducted from Clients' percentage of any total monetary recovery. Clients agree that the Attorneys have a lien in an amount as set forth above on any monetary recovery to assure payment of the Attorneys' fee and Litigation Costs. Clients expressly assigns to Attorneys the amount as set forth above of Attorney's fees and Litigation Costs and Expenses from any monetary recovery.

If the Attorneys also obtain an attorneys' fee award from the Court based on their time working on the case, then the Attorneys shall be entitled to retain the Attorneys' fee award and the contingency fee. If a structured or installment settlement or judgment is accepted by you or ordered by a court, then the Attorneys' fees and Litigation Costs and Expenses shall be distributed as described above figured on the present value of the gross settlement and is payable at the time of the settlement at the discretion of the Attorneys.

In the event that Clients do not receive an award of damages, either by court order or settlement, Clients shall have no obligation to pay Attorney's fees.

4. LITIGATION COSTS & EXPENSES.

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You agree that you will pay your Attorneys, from your share of any recovery for **all** costs and expenses associated with these services. These may include: process servers fees, filing fees or other fees fixed by law or assessed by courts or other agencies, court reporters' fees, experts fees, travel expenses including transportation, meals, lodging and all other costs of any necessary out-of-town travel by Attorneys' personnel, investigations, long distance telephone calls, messenger and other delivery fees, in-office photocopying at the rate of twenty cents ($0.20) per page, parking and other similar items. You have also been advised that to prosecute your case the Attorneys may recommend you engage consultants or experts. All Litigation costs and expenses must be paid by you out of your recovery.

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5. PREVAILING PARTY MAY SEEK PAYMENT OF COSTS FROM OTHER SIDE.

Clients understand and agree that if they do not prevail, a court *may* order the Clients to pay all or part of the litigation costs and expenses requested by the Defendants.

If the Clients prevail and the Attorneys are able to recover any of the Clients' Litigation Costs and Expenses, any amount paid by Defendants will be credited to Clients' account or refunded to Clients if the Attorneys have already been paid in full.

6. APPROVAL NECESSARY FOR SETTLEMENT.

The Attorneys will not make any settlement or compromise of any nature of any of the Clients' claims without your prior approval. The Clients retain the absolute right to accept or

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reject any settlement. You agree not to make any settlement or compromise of any of your claims without prior notice to your Attorneys.

7. ATTORNEYS' LIEN.

If you have any outstanding balance with your Attorneys, you grant Attorneys a lien to any property that you recover in this action equal to the value of that balance. Such lien is set forth in NRS 18.015. The attorneys' lien will be for all sums due and owing to your attorneys at the conclusion of services. This lien will attach to any recovery you may obtain, whether by verdict, judgment or settlement.

8. DISCHARGE AND WITHDRAWAL.

Clients may discharge Attorneys at any time for any reason.

Attorneys may withdraw with Clients' consent or for good cause. Good cause includes Clients' breach of this contract, Clients' misrepresentation or failure to disclose material facts, Clients' refusal to cooperate with Attorneys or follow Attorneys' advice on a material matter, Clients' failure to pay fees and costs in a regular and timely manner and any other fact or circumstance that would render Attorneys' continuing representation unlawful or unethical.

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Notwithstanding Attorneys' withdrawal or Clients' notice of discharge, and without regard to the reasons for the withdrawal or discharge, Clients will remain obligated to pay Attorneys for all costs and fees incurred prior to the termination and, in the event that there is any net recovery obtained by Clients after conclusion of Attorneys services, Clients remain obligated to pay Attorneys for all services rendered, as set forth above, to the date of discharge.

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9. FEE DISPUTE AND ARBITRATION.

In the event that any dispute arises between Attorneys and Clients with respect to any claim of professional negligence, Attorneys and Clients both agree that the dispute shall be submitted to binding arbitration in Las Vegas, Nevada.

10. GOVERNING LAW.

This agreement shall be governed by and construed according to Nevada law.

11. ENTIRE AGREEMENT.

This agreement contains the entire agreement of the parties. Any changes to any terms of this Agreement must be in writing and signed by the parties to the Agreement.

12. MODIFICATION BY SUBSEQUENT AGREEMENT.

This Agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them.

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13. **RIGHT TO REVIEW BY INDEPENDENT COUNSEL.**

The Attorneys advised you that you have the right to have this Agreement reviewed by independent counsel and encourages you to seek such review.

14. **NO GUARANTEE.**

Nothing in this agreement and nothing in Attorneys' statements to Clients will be construed as a promise or guarantee about the Clients' case outcome. Attorneys make no such promises or guarantees. Attorneys' comments are only expressions of opinion.

I HAVE READ, UNDERSTAND AND AGREE TO THE FOREGOING TERMS AND PROVISIONS GOVERNING THE LEGAL SERVICES TO BE PROVIDED BY AND THE PAYMENT OF FEES AND COSTS. I ACKNOWLEDGE THAT BEFORE SIGNING THIS AGREEMENT I AM ENTITLED, AND HAVE BEEN GIVEN A REASONABLE OPPORTUNITY, TO SEEK THE ADVICE OF INDEPENDENT COUNSEL.

Dated: 10/19, 2015

John Houston Scott
Scott Law Firm

Dated: 10/19, 2015

Allen Lichtenstein
Allen Lichtenstein, Attorney at Law, Ltd.

Dated: _____, 2015

Mary Bryan

Dated: 04/24/15 2015

Aimee Hair

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13. **RIGHT TO REVIEW BY INDEPENDENT COUNSEL.**

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Dated: 10/19, 2015

John Houston Scott
Scott Law Firm

Dated: 10/19, 2015

Allen Lichtenstein
Allen Lichtenstein, Attorney at Law, Ltd.

Dated: April 8, 2015

Mary Bryan

Dated: _____, 2015

Aimee Hair

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EXHIBIT 2

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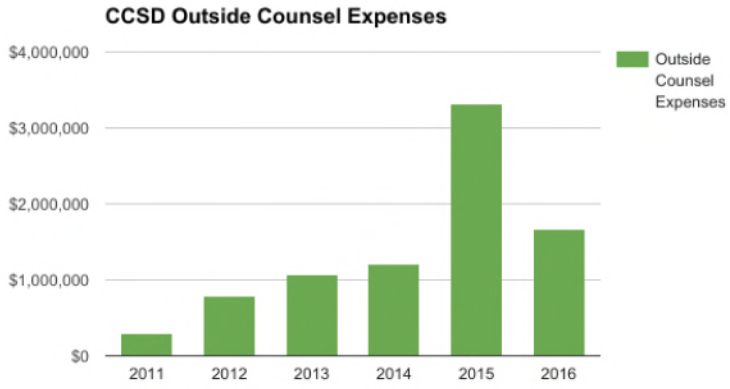
The Clark County School District administrative offices on Monday, Jan 16, 2017. Photo by Sam Morris.

Defending itself against complicated, high-stakes lawsuits has caused the Clark County School District's outside legal expenses to soar in recent years, topping $3.3 million in 2015, according to records obtained by *The Nevada Independent*.

The school district spent just shy of $300,000 in 2011 for legal counsel provided by outside firms. That figure increased tenfold over the next few years, reaching $3,307,301 in 2015.

The good news for taxpayers: Outside legal expenses appear to have dropped last year. Through Nov. 10 of 2016, the district had spent $1,660,231 for outside legal counsel, said Carlos McDade, the district's general counsel. The full amount for last year was not readily available.



Note: Last year's expenses only include money spent from Jan. 1 through Nov. 10, 2016

"As you can guess, there's no control over which cases are filed against us," McDade said Friday. "The cases that we've had since 2012 have become increasingly more complicated."

Some of the lawsuits against the district involved multiple employees and, because the district and employees had different interests to defend, the cases required the use of both internal and external lawyers to represent defendants, McDade said. The district's Office of the General Counsel contains 10 attorneys, and staffing has not changed despite bigger and more complicated litigation in recent years, he said.

One of the cases involving multiple employees was related to a 2009 drunken-driving accident that killed 24-year-old Angela Peterson. Kevin Miranda, the 18-year-old who was driving the vehicle that struck Peterson's car, had been drinking alcohol with employees of the school district's police department prior to the crash.

The victim's family sued the Clark County School District Police Department and several employees, triggering a civil case that wasn't fully resolved until last year. *The Review-Journal* reported (http://www.reviewjournal.com/news/las-vegas/school-police-officers-reach-settlement-admit-roles-fatal-2009-crash)that the school district paid $75,000 to the family as part of its settlement.

In recent years, the district also has been hit with other high-profile lawsuits related to allegations of bullying, staff misconduct with students and discrimination against employees, McDade said. The plaintiffs have sought — or are seeking — multimillion-dollar judgments in some cases; other cases are in federal court, where there is no limit on liability, he said.

"That makes the case more difficult to defend," McDade said, explaining the need for outside legal help. "There's more at stake."

The school district retained legal assistance from 10 law firms from 2011 through 2015. All the firms provided the district with discounted government rates and attorneys who live locally to work on the cases, McDade said. Those firms include, among others, Greenberg Traurig, Kolesar & Leatham, and Lewis Roca Rothgerber Christie.

Most litigation against the school district ends in a settlement rather than heading to a trial, McDade said. And when cases are frivolous, the district generally has success getting judges to dismiss them before they rack up steep legal expenses, he said.

To prevent litigation, the nation's fifth-largest school district has mandatory staff training each year on a variety of topics, such as driver safety, proper conduct with students, how to report bullying and civil rights, McDade said.

Despite the district's best efforts to prevent situations that could prompt litigation, new lawsuits inevitably find their way to McDade's office each year, he said. It's the nature of the beast for an organization — charged with educating more than 320,000 students — that has 41,000-some employees and thousands of vehicles under its purview, McDade said.

"Most of those employees come to work every day and do a great job taking care of the kids," McDade. "What my office does is deal with the few people who create litigation for us."

Money from the district's general fund covers expenses for outside legal help, he said.

Firm Name	2011	2012	2013	2014	2015
Declues Burkett & Thompson	90,784.60	82,708.16	0.00	0.00	0.00
Greenberg Traurig	179,880.33	354,568.50	386,906.70	243,854.09	514,330.07
Kolesar Leatham	5,668.50	37,272.80	243,788.37	320,767.36	686,789.90
Lewis Roca Rothgerber	0.00	0.00	250,388.39	300,545.85	1,315,511.62
Littler Mendelson	0.00	2,937.50	52,642.60	295,981.13	350,755.87
Marquis and Aurbach	0.00	0.00	0.00	0.00	0.00
J. Chip Siegel	0.00	0.00	0.00	0.00	0.00
Wharton Aldhizer and Weaver	0.00	0.00	0.00	0.00	0.00
Michael G. Chapman	6,006.37	20,418.76	45,894.98	19,850.81	84,191.01
Fisher & Phillips, LLP	17,550.15	299,234.94	94,024.90	4,760.00	79,098.85
Hogan Lovells	0.00	0.00	0.00	24,340.54	47,692.74
Brustein & Manasevit, PLCC	0.00	0.00	0.00	0.00	375.00
Alverson, Taylor, Mortensen & Sanders	0.00	0.00	0.00	6,005.38	228,556.09
TOTAL	$299,889.95	$797,140.66	$1,073,645.94	1,216,105.16	$3,307,301.15

Updated: 3/7/17

Caption: The Clark County School District administrative offices on Monday, Jan 16, 2017. Photo by Sam Morris.

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Steven D. Grierson
CLERK OF THE COURT

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Attorneys for Defendants Clark County School District

DISTRICT COURT
CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT,

Defendant.

Case No. A700018

Dept. No. 27

NOTICE OF ENTRY OF ORDER GRANTING STAY OF EXECUTION PENDING APPEAL

NOTICE IS GIVEN that an Order Granting Stay of Execution Pending Appeal was entered on November 7, 2017. A copy of said Order is attached hereto.

Dated this 8th of November, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: *Dan R. Waite*
DANIEL F. POLSENBERG (SBN 2376)
DAN R. WAITE (SBN 4078)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

Attorneys for Defendant

002152

Case Number: A-14-700018-C

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this day, I caused a true and correct copy of "Notice of Entry of Order Granting Stay of Execution Pending Appeal" to be filed, via the Court's E-Filing System, and served on all interested parties via U.S. Mail, postage pre-paid and by courtesy e-mail to the following counsel:

Allen Lichtenstein, Esq.
Staci Pratt, Esq.
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Attorneys for Plaintiffs

John Houston Scott, Esq.
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john@scottlawfirm.net
Attorneys for Plaintiffs
(Admitted Pro Hac Vice)

Dated this 8th day of November, 2017

/s/Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

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EXHIBIT A

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EXHIBIT A

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Steven D. Grierson
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Attorneys for Defendant Clark County School District

DISTRICT COURT
CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR, Plaintiffs, vs. CLARK COUNTY SCHOOL DISTRICT, Defendants.	Case No. A700018 Dept. No. 27 **ORDER GRANTING STAY OF EXECUTION PENDING APPEAL**

This Court grants defendant Clark County School District a stay of execution of the judgment and the collateral awards of costs and attorney fees pending appeal. This Court concludes that CCSD falls under NRCP Rule 62(e) as a governmental agency and is entitled to stay without the necessity of a supersedeas bond. The Court elects, however, to grant the stay pursuant to its discretionary powers described in *Nelson v. Heer,* 121 Nev. 832, 122 P.3d 1252 (2005). As such, if there is a material change in CCSD's circumstances, plaintiffs may by motion request the court to reassess the conditions of the stay.

Dated: ~~October~~ NOV. 2, 2017.

Nancy L ALLF
NANCY L. ALLF
District Judge

AE

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Case Number: A-14-700018-C

Respectfully Submitted By:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: _____

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Approved as to form and content:

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR, Plaintiffs, vs. CLARK COUNTY SCHOOL DISTRICT (CCSD Defendant .	Case No. A-14-700018-C Dept. No. XXVII **NOTICE OF ENTRY OF ORDER**

TO: ALL INTERESTED PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD

Please take notice that an Order Re: Plaintiffs' Motion for Attorney's Fees was entered in this case, a copy of which is attached..

Dated this 20th day of November 2017,

Respectfully submitted by:

/s/Allen Lichtenstein
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Attorneys for Plaintiffs, Mary Bryan, Ethan Bryan, Aimee Hairr and Nolan Hairr

CERTIFICATE OF SERVICE

I hereby certify that I served the following Notice of Findings of Fact, Conclusions of Law and Judgment in Favor of Plaintiffs via Court's electronic filing and service system and/or United States Mail and/or e-mail on the November 20, 2017, to:

Dan Waite
Lewis Rocha Rothgerber Christie
3993 Howard Hughes Pkwy., Suite 600
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DWaite@lrrc.com

/s/ Allen Lichtenstein

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Attorneys for Plaintiffs, Mary Bryan, Ethan Bryan, Aimee Hairr and Nolan Hairr

DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD

Defendant .

Case No. A-14-700018-C

Dept. No. XXVII

ORDER RE: PLAINTIFFS' MOTION FOR ATTORNEY'S FEES

Date of Hearing: 10-4-17

Time of Hearing: 9:00am

A hearing was held on October 4, 2017 presided by the Hon. Judge Nancy Allf, in Dept. 27, on Plaintiffs' Motion For Attorney's Fees. Dan Polsenberg, Esq, and Dan Waite, Esq. represented the Defendant, and Allen Lichtenstein represented the Plaintiffs. The Court granted fees to Plaintiffs, pursuant to 42 U.S.C 1988, in the following amounts.

	rate per hr.	hrs expended	total
Fees for John H. Scott:	$450	350.00	$157,500.00
Fees for Allen Lichtenstein: (as a private attorney)	$450	650.00	$292,500.00

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Case Number: A-14-700018-C

Staci Pratt (as a private attorney)	$450	20.80	$ 9,360.00 NLA $11,058.75
Fees for the ACLUN	var	47.75	~~$14,298.75~~ AE
~~Lichtenstein~~	~~$450~~	~~7.2~~ NLA	~~$3,240.00~~ AE e
Pratt	$450	8.6	$3,870.00
Morgan	$225	31.95	$7,188.75
Total fees			NLA $470,413.75 ~~$473,658.75~~ e AE

WHEREFORE, Plaintiffs having prevailed in this case, Plaintiffs are hereby awarded attorney's fees in the amount of $470,413.75 AE NLA ~~$473,658.75~~ e set forth above.

Dated this 14 day of November 2017.

Nancy Allf
Nancy Allf,
District Court Judge, Department 27
AE

Respectfully submitted by:

/s/Allen Lichtenstein
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Attorneys for Defendants Clark County School District (CCSD)

DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD); PRINCIPAL WARREN P. MCKAY, in his individual and official capacity as principal of GJHS; LEONARD DEPIAZZA, in his individual and official capacity as assistant principal at GJHS; CHERYL WINN, in her individual and official capacity as Dean at GJHS; JOHN HALPIN, in his individual and official capacity as counselor at GJHS; ROBERT BEASLEY, in his individual and official capacity as instructor at GJHS,

Defendants.

Case No. A-14-700018-C

Dept. No. XXVII

AMENDED NOTICE OF APPEAL

Please take notice that defendant Clark County School District hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;
2. "Decision and Order," filed on June 29, 2017 (Exhibit A);

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3. "Findings of Fact, Conclusions of Law and Judgment in Favor of Plaintiffs," filed July 20, 2017, notice of entry of which was served electronically on August 15, 2017 (Exhibit B);

4. "Order Re: Plaintiffs' Motion for Attorney's Fees," filed November 16, 2017, notice of entry of which was served electronically on November 20, 2017 (Exhibit C); and

5. All rulings and interlocutory orders made appealable by any of the foregoing.

Dated this 22nd day of November, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
DANIEL F. POLSENBERG (SBN 2376)
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this day, I caused a true and correct copy of the "Amended Notice of Appeal" to be filed, via the Court's E-Filing System, and served on all interested parties via U.S. Mail, postage pre-paid and courtesy email.

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Staci Pratt, Esq.
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(Admitted Pro Hac Vice)

Dated this 22nd day of November, 2017

/s/ Luz Horvath
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Lewis Roca ROTHGERBER CHRISTIE

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EXHIBIT A

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EXHIBIT A

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06/29/2017
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ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * * *

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

v.

CLARK COUNTY SCHOOL DISTRICT (CCSD); Pat Skorkowsky, in his official capacity as CCSD superintendent; CCSD BOARD OF SCHOOL TRUSTEES; Erin A. Cranor, Linda E. Young, Patrice Tew, Stavan Corbett, Carolyn Edwards, Chris Garvey, Deanna Wright, in their official capacities as CCSD BOARD OF SCHOOL TRUSTEES; GREENSPUN JUNIOR HIGH SCHOOL (GJHS); Principal Warren P. McKay, in his individual and official capacity as principal of GJHS; Leonard DePiazza, in his individual and official capacity as assistant principal at GJHS; Cheryl Winn, in her individual and official capacity as Dean at GJHS; John Halpin, in his individual and official capacity as counselor at GJHS; Robert Beasley, in his individual and official capacity as instructor at GJHS;

Defendants.

CASE NO: A-14-700018

DEPARTMENT 27

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DECISION AND ORDER

This case arises under Title IX and 42 U.S.C. § 1983, based on allegations that two students (C.L. and D.M.) verbally and physically mistreated Ethan Bryan and Nolan Hairr, sons of the Plaintiffs, based on sex, as defined by Title IX. On November 15, 2016, a five-day bench trial commenced in Department 27 before the Honorable Judge Nancy L. Allf. Allen Lichtenstein, Esq. and John Houston Scott, Esq. appeared for and on behalf of Plaintiffs Mary Bryan ("Mrs. Bryan") and Aimee Hairr ("Mrs. Hairr"),

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(collectively "Plaintiffs"). Daniel Polsenberg, Esq., Dan Waite, Esq., and Brian D. Blakley, Esq. appeared for and on behalf of Defendant Clark County School District (CCSD), ("Defendant").

At trial, Plaintiffs' case was narrowed to two separate claims for relief—(1) a violation of Title IX of the Civil Rights Act, and (2) a violation of Plaintiffs' substantive due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983. To prevail, the claims require a showing that the Defendant was aware of the bullying and that CCSD officials, who were required to respond to reports of bullying pursuant to NRS Chapter 388, failed to act in manner that equates to deliberate indifference.

The Court having heard arguments of counsel, testimony, and being fully briefed on the matter finds as follows:

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BACKGROUND

Ethan Bryan and Nolan Hairr entered the sixth grade at Greenspun Jr. High School in August of 2011. Both students were enrolled in Mr. Beasley's third period band class in the trombone section. Nolan, eleven years old, reported being small for his age and wore long blonde hair. From almost the outset of their enrollment, both boys began to be bullied by C.L. and D.M. On numerous occasions, C.L. and D.M. taunted Nolan with homophobic slurs and sexual expletives, touching, pulling, and running their fingers through Nolan's hair and blowing in his face. Nolan reported the behavior by filling out a complaint report at the Dean's office. However, at this time, Nolan did not mention the homophobic and sexual content of the slurs that he was enduring and a subsequent meeting with Dean Winn did not proffer resolution.

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On or about September 13, 2011, C.L., who was sitting next to Nolan in band class, reached over and stabbed Nolan in the groin with the sharpened end of the pencil (the "September 13th Incident"). C.L. remarked that he did so to see if Nolan was a girl and also referred to Nolan as a tattletale. Nolan took the tattletale reference as a sign that the stabbing was, at least in part, retaliation for Nolan filing a complaint report.

On or about September 15, 2011, while Nolan was at Ethan's house, Mrs. Bryan overheard Ethan and Nolan talking about an issue that took place at school. After Nolan went home, Mrs. Bryan questioned Ethan about what the two boys had been discussing. In response, Ethan described to his mother the incident where C.L. stabbed Nolan in the groin and about the overall bullying occurring in Mr. Beasley's band class. This conversation sparked a series of complaints and reports that is the foundation for the claims asserted against CCSD.

The first parental complaint occurred via email on September 15, 2011 ("September 15th Email") from Mrs. Bryan, addressed to Nolan's band teacher, Mr. Beasley, Counselor Halpin, and Principal McKay—all of whom where mandatory reporters under N.R.S. § 388.1351. The September 15th Email identified C.L. and D.M. by name and described the physical assaults and verbal abuse. Both Mr. Beasley and Counselor Halpin acknowledged receiving the September 15, 2011 Email. However, Principal McKay's email address was incorrect, so he did not receive the original complaint contained within the September 15th Email. While Mr. Beasley and Counselor Halpin admitted that neither of them followed up on the September 15th Email, this Court does not find this failure alone deliberately indifferent. However, actual knowledge of the bullying was triggered upon the receipt of the September 15th Email.

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In response to the September 15th Email, Mr. Beasley changed the arrangements in the trombone section of his band class so that Nolan sat in front of C.L. and not next to him. Mr. Beasley made this decision without consulting with anyone else, especially Principal McKay.

Like Nolan, Ethan was also subjected to bullying by C.L. and D.M. After the September 13th Incident, the bullying escalated where C.L. and D.M. taunted him about his weight and made homophobic slurs and vile and graphic innuendos concerning sexual relations between Ethan and Nolan.

The second parental complaint occurred on September 22, 2011 from Mrs. Hairr, via a telephone conversation with Vice Principal DePiazza. During this conversation, Mrs. Hairr told Vice Principal DePiazza about the stabbing of Nolan's genitals by another student in band class.

On or about October 19, 2011, Ethan told his mother that C.L. and D.M. had removed the rubber stopper out of a piece of his trombone and repeatedly hit Ethan in the legs with the remaining sharp piece of the instrument leaving scratch marks on his legs. Ethan also informed his mother that C.L. and D.M. continued to make lewd sexual comments including calling both Ethan and Nolan "gay," "faggots," and made references about the two boys engaging in gay sex together.

On or about October 19, 2011, Mrs. Bryan sent a second email ("October 19th Email") addressed to the same three individuals as the September 15th Email. Mr. Beasley and Counselor Halpin both acknowledged receipt of this email, but because it was addressed to the same email addresses, Principal McKay did not receive it. Later that day, on October 19, 2011, Mrs. Bryan and her husband went to the school where they

met with Dean Winn for approximately one hour to discuss the bullying, specifically the physical assaults and homophobic slurs.

On or about October 19, 2011, Counselor Halpin attended a weekly administrators meeting with Principal McKay and Vice Principal DePiazza. Counselor Halpin testified that he reported the bullying that was occurring in Mr. Beasley's band class in considerable detail and disclosed the September 15th Email and the October 19th Email. Counselor Halpin specifically recalled Principal McKay directing Vice Principal DePiazza to take care of the matter. Principal McKay testified that he was not interested in the details of such matters and left it to his subordinates to address the issue. Principal McKay further testified that he did not follow up with Vice Principal DePiazza about how the investigation was going or what the investigation uncovered until February 2012. All of the school officials had conflicting testimony about who was tasked with the investigation into the bullying, but all testified that no investigation into the bullying was conducted until February 2012.

The bullying and harassment continued throughout the fall and into early 2012. Both boys avoided band class and school altogether. Ethan faked illness to avoid class and Nolan would try to avoid C.L. and D.M. by lingering in the halls and in the library. By the middle of January, both boys had almost completely stopped going to school altogether to avoid the continuous bullying.

Mrs. Bryan pulled Ethan out of Greenspun Jr. High in January 2012 after Ethan contemplated suicide. On or about January 21, 2012, Mrs. Hair pulled Nolan out of Greenspun Jr. High after Nolan had an emotional breakdown because of the bullying. Mrs. Hair filed a police report, reporting the bullying and harassment.

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On or about February 7, 2012, Mrs. Bryan and Mrs. Hairr removed the boys from Greenspun Jr. High. Subsequently, Assistant Superintendent Jolene Wallace and Principal McKay's direct supervisor, ordered Principal McKay to conduct an investigation into the bullying of Ethan and Nolan. This is the only investigation that took place into the bullying of the Ethan and Nolan.

DISCUSSION

A. Legal Standard - Title IX of the Civil Rights Act

Title IX of the Civil Rights Act of 1964 provides, in part, "[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). A school district in receipt of federal funds is liable for monetary damages for violations of Title IX. *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 642, 119 S. Ct. 1661, 1671, 143 L. Ed. 2d 839 (1999) ("we concluded that *Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute.").

In *Reese v. Jefferson School District No. 14J*, the Ninth Circuit adopted the framework set out in *Davis* and set forth four requirements for imposition of school district liability under Title IX for student-student sexual harassment: (1) the school district "must exercise substantial control over both the harasser and the context in which the known harassment occurs," (2) the plaintiff must suffer "sexual harassment ... that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school," (3) the school district must have "actual knowledge of the harassment," and (4) the school district's

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"deliberate indifference subjects its students to harassment." 208 F.3d 736, 739 (9th Cir. 2000) (quoting *Davis*, 119 S. Ct. 1661, 1675 (1999)).

The Ninth Circuit defines deliberate indifference as "the conscious or reckless disregard of the consequences of ones acts or omissions." *Henkle v. Gregory,* 150 F. Supp. 2d 1067, 1077–78 (D. Nev. 2001); *See also* 9th Cir. Civ. Jury Instr. 11.3.5 (1997) (citing *Redman v. County of San Diego*, 942 F.2d 1435, 1442 (9th Cir.1991), cert. denied, 502 U.S. 1074, 112 S.Ct. 972, 117 L.Ed.2d 137 (1992)). A plaintiff bringing a claim under Title IX must prove her claim by a preponderance of the evidence.

B. Legal Standard - 42 U.S.C. § 1983

A student's right to a public education is a property interest protected by the Due Process Clause. *Goss v. Lopez*, 419 U.S. 565, 573, 95 S. Ct. 729, 735, 42 L. Ed. 2d 725 (1975) ("Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education . . ."). As a general matter, the Fourteenth Amendment to the United States Constitution does not "require[ ] the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Dep't of Social Servs.,* 489 U.S. 189, 195, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In fact, "the Fourteenth Amendment's Due Process Clause . . . does not confer any affirmative right to governmental aid and typically does not impose a duty on the state to protect individuals from third parties." *Henry A. v. Willden,* 678 F.3d 991, 998 (9th Cir.2012) (quotations and citation omitted).

This rule, however, is subject to two specific exceptions; (1) the special relationship exception, and (2) the state-created danger exception. *Id.* at 998. Under the special relationship exception, the government may be liable for its failure to protect if a "special relationship" exists between it and the plaintiff such that the government has

assumed "some responsibility for the plaintiff's safety and well-being." *Id.* Under the state-created danger exception, the government may be liable for its failure to protect where "the state affirmatively places the plaintiff in danger by acting with 'deliberate indifference' to a 'known and obvious danger[.]' " *Id.* In determining whether the state-created exception applies, the Court assesses: "(1) whether any affirmative actions of the official placed the individual in danger he otherwise would not have faced; (2) whether the danger was known or obvious; and (3) whether the officer acted with deliberate indifference to that danger." *Id.* at 1002. Under either exception, the government's failure to protect renders it liable under a § 1983 claim. *Id.*

C. Nevada law mandates public school officials to report bullying and harassment

Nevada Revised Statute § 388.135 provide that:

> "[a] member of the board of trustees of a school district, any employee of the board of trustees, including, without limitation, an administrator, *principal, teacher or other staff member . . . or any pupil shall not* engage in bullying or cyber-bullying on the premises of any public school, at an activity sponsored by a public school or on any school bus."

(Emphasis added).

Furthermore, Nevada Revised Statute § 388.1351(1) provides that:

> "[a] teacher . . . principal . . . or other staff member who witnesses a violation of NRS 388.135 or receives information that a violation of NRS 388.135 has occurred *shall* report the violation to the principal . . . as soon as

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> practicable, but not later than a time during the same day on which [they] witnessed the violation or received information regarding the occurrence of a violation."

(Emphasis added).

Nevada statutes make it clear that any public school employee who either witnesses bullying or is informed that bullying has occurred or is occurring, is obligated by statute to report the bullying to the principal of the public school. Upon information that bullying has occurred or is occurring, Nevada Revised Statute § 388.1351(2) mandate that "the principal or designee *shall* immediately take any necessary action to stop the bullying . . . and ensure the safety and well-being of the reported victim or victims . . . and shall begin an investigation into the report." N.R.S. § 388.1351(1)(2). (emphasis added).

D. CCSD Officials' conduct was deliberately indifferent.

Through the testimony presented at trial, Plaintiffs have satisfied the four requirements of the Davis framework for imposition of school district liability under Title IX for student-student sexual harassment. First, CCSD, as a public high school, exercised substantial control over both the harassers and the context in which the known harassments occurs. In this case, C.L. and D.M. engaged in excessive and continuous homophobic slurs and sexual expletives directed at Nolan and Ethan in the band class classroom. C.L. and D.M.'s daily references to Nolan and Ethan as "faggot, fucking fat faggot, fucking faggot, gay, gay boyfriend, and cunt" were so severe, pervasive, and objectively offensive that it deprived the boys of access to school's educational opportunities and benefits available to students. Testimony revealed that the bullying was so severe that the boys had to avoid going to band class altogether just to avoid the

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victimization. Moreover, Ethan contemplated suicide as a result of months of bullying and harassment, and Nolan had an emotional breakdown—both of these events triggered the parents to withdraw their children from Greenspun Jr. High. Nolan and Ethan were unable to take advantage of the educational opportunities provided by the school and being accessed by students not subjected to bullying and harassment.

The third requirement of the Davis framework requires the school to have actual knowledge of the harassment. There were three separate parental complaints, all of which should have prompted a mandatory investigation under N.R.S. § 388.1351(1)(2). The September 15th Email, October 19th Email, and the October 19th meeting with Dean Winn, each put the school officials responsible for reporting the information to the Principal McKay on notice that bullying had occurred and was continuing to occur on campus. Counselor Halpin, Mr. Beasley, and Dean Winn all failed to immediately report the complaints to Principal McKay. Notwithstanding, Counselor Halpin did inform Principal McKay of the complaints and the bullying at the October 19th administrative meeting and yet CCSD offered zero evidence to indicate that an investigation was ever conducted in 2011.

The fourth requirement of the Davis framework requires the school to have acted with "deliberate indifference" that subjects its students to the harassment. As federal funding recipients, CCSD officials had a duty under Title IX, and under Nevada law, to follow up and investigate any reports of bullying and harassment occurring on school property. CCSD's failure to conduct any type of investigation after three separate complaints of bullying and an administrative meeting discussing the bullying, constitutes at the very least, reckless disregard of the consequences of it acts or omissions. Accordingly, CCSD's failure to timely investigate and take any type of remedial action

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constitutes deliberate indifference. This deliberate indifference was the causation that led to the escalation of the bullying and harassment endured by the Plaintiffs' children. Therefore, Plaintiffs have proven their Title IX claim by a preponderance of the evidence submitted at trial.

E. CCSD created the dangerous environment

CCSD's deliberate indifference to the numerous complaints of bullying forced Nolan and Ethan to remain in a known and obviously dangerous environment, which further subjected them to severe and pervasive bullying and harassment that was objectively offensive. For CCSD to be liable under the state-created exception, this Court asked: (1) whether any affirmative actions of the official placed the individual in danger he otherwise would not have faced; (2) whether the danger was known or obvious; and (3) whether the officer acted with deliberate indifference to that danger." *Henry A.* at 1002. This Court finds in the affirmative to all three inquires.

Here, the first inquiry does not require CCSD to do more than "expose the plaintiff to a danger that already existed." *Id.* To the contrary, a test such as this would render the state-created doctrine futile. In *Henry A.*, the Ninth Circuit explained that "by its very nature, the doctrine only applies in situations where the plaintiff was directly harmed *by a third party*—a danger that, in every case, could be said to have 'already existed.' " *Id.* (internal citations omitted). It follows that to be liable under the state-created exception, CCSD was not required to take an affirmative action that made the bullying and harassment worse. Instead it was CCSD's failure to take affirmative action that subjected Nolan and Ethan to further bullying and harassment. Thus, this Court finds the first inquiry is satisfied.

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The second and third inquiries are more easily ascertainable in this case. CCSD knew of the danger because of the three separate parental complaints from the Plaintiffs. Complaints CCSD officials admitted to receiving and testified that they did not inform Principal McKay. Each of the complaints gave CCSD officials sufficient details necessary to put them on notice of the dangers Nolan and Ethan were exposed to. Finally, as stated above, CCSD's failure to conduct any type of investigation after three separate complaints of bullying and an administrative meeting discussing the bullying, constitutes deliberate indifference.

Accordingly, the Plaintiffs have proven their 42 U.S.C. § 1983 claim by a preponderance of the evidence submitted at trial. Nolan and Ethan had a constitutional right to a public education, and CCSD is liable under 42 U.S.C. § 1983 for its failure to protect Nolan and Ethan by acting with deliberate indifference to the known dangers that existed in Mr. Beasley's band class. CCSD's deliberate indifference deprived Nolan and Ethan of these educational rights secured by Fourteenth Amendment Due Process Clause of the United States Constitution.

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CONCLUSION

COURT ORDERS for good cause appearing and after review, Defendant CCSD violated Title IX of the Civil Rights Act.

COURT FURTHER ORDERS for good cause appearing and after review, violated Plaintiffs' substantive due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983.

COURT FURTHER ORDERS for good cause appearing and after review Judgment shall be entered in favor of Plaintiffs Mary Bryan, on behalf of Ethan Bryan,

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and Aimee Hairr, on behalf of Nolan Hairr. Plaintiffs are entitled to a judgment for all damages sought under these two claims asserted in the Complaint, and proven at trial.

COURT FURTHER ORDERS for good cause appearing and after review that Plaintiffs shall prepare Findings of Fact, Conclusions of Law and a Judgment consistent with this Decision, and submit it the Court for review. They may include all factual findings contained in Plaintiffs' post trial briefs. At the time of submission to the Court, copies shall be transmitted to Defendant's counsel.

Dated: June 27, 2017

Nancy Allf

NANCY ALLF
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed I caused the foregoing document to be electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail and/or by email to:

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EXHIBIT B

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EXHIBIT B

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR, Plaintiffs, vs. CLARK COUNTY SCHOOL DISTRICT (CCSD Defendant .	Case No. A-14-700018-C Dept. No. XXVII **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN FAVOR OF PLAINTIFFS**

TO: ALL INTERESTED PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD

Please take notice that Findings of Fact, Conclusions of Law and Judgment in Favor of Plaintiffs were entered in this case, a copy of which is attached..

Dated this 15th day of August 2017,

Respectfully submitted by:

/s/Allen Lichtenstein

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CERTIFICATE OF SERVICE

I hereby certify that I served the following Notice of Findings of Fact, Conclusions of Law and Judgment in Favor of Plaintiffs via Court's electronic filing and service system and/or United States Mail and/or e-mail on the 15th day of August 2017, to:

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/s/ Allen Lichtenstein

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR, Plaintiffs, vs. CLARK COUNTY SCHOOL DISTRICT (CCSD Defendant .	Case No. A-14-700018-C Dept. No. XXVII **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT IN FAVOR OF PLAINTIFFS**

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I. Introduction

On June 29, 2017, the Court issued its Decision and Order in favor of Plaintiffs Ethan Bryan and Nolan Hairr and against Defendant Clark County School District (CCSD) on the claims that Defendant violated Plaintiffs' rights under Title IX, 20 USC § 1681(A) and Plaintiffs' rights to Substantive Due Process under the Fourteenth Amendment to the United States Constitution and pursuant to 42 U.S.C. 1983. The Court also ruled that, "Plaintiffs are entitled to a judgment for all damages sought under these two claims asserted in the Complaint, and proven at trial."

II. Procedural History

Plaintiffs filed their Amended Complaint on October 10, 2014 against Defendants: Clark County School District (CCSD), Pat Skorkowsky, in his official capacity as CCSD

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Superintendent; CCSD Board of School Trustees; Erin A. Cranor, Linda E. Young, Patrice Tew, Stavan Corbett, Carolyn Edwards, Chris Garvey, Deanna Wright, in their official capacities as CCSD Board of School Trustees, Greenspun Jr. High School (GJHS); Principal Warren P. McKay, in his individual and official capacity as principal of GJHS; Leonard DePiazza, in his individual and official capacity as assistant principal at GJHS; Cheryl Winn, in her individual and official capacity as Dean at GJHS; John Halpin, in his individual and official capacity as counselor at GJHS; Robert Beasley, in his individual and official capacity as instructor at GJHS. The Amended Complaint listed five claims for relief: 1) Negligence; 2) Negligence Per Se; 3) Violation of Title IX; 4) Violation of the Right to Equal Protection; 5) Violation of Substantive Due Process.

In its February 5, 2015 Order, the Court Dismissed Plaintiffs' Claims for Relief No. 1, Negligence, and No. 2, Negligence Per Se. Plaintiffs abandoned their Fourth Claim for Relief, Equal Protection, leaving the Third Claim for Relief, Title IX, and Fifth Claim for Relief, Substantive Due Process, for trial. Defendants filed their Answer on February 25, 2015.

On March 1, 2016, Defendants filed a Motion for Summary Judgment, which was granted in part and denied in part by the Court in its July 22, 2016 Order. The Court denied Defendants' Motion to dismiss Plaintiffs' Title IX claim against Defendant CCSD. It dismissed the 42 USC 1983 Equal Protection claims, which had been abandoned by Plaintiffs. The Court granted Defendants' Motion to dismiss all Defendants except CCSD from the 42 USC 1983 Substantive Due Process claim. Overall, the Court ruled the two remaining claims against CCSD, 1) Title IX; and 2) Substantive Due Process would proceed to trial.

On or about March 20, 2016, Discovery Commissioner Bulla denied Defendants' Motion to Compel Damages Categories and Calculations, allowing such calculations to be determined by

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the Court at trial. The Discovery Commissioner's Report and Recommendations were affirmed and adopted by the Court on April 6, 2016.

On August 5, 2016, Defendant CCSD filed a Motion for Partial Reconsideration, or in the Alternative, Motion for Relief Pursuant to NRCP 59(E), 60(A) and 60(B), or Motion in Limiting. On October 26, 2016 the Court denied Defendant's Motion.

On November 15, 2016, a five-day bench trial was held in Department 27 before the Honorable Judge Nancy L. Allf. Allen Lichtenstein, Esq. and John Houston Scott, Esq. appeared for and on behalf of Plaintiffs Mary Bryan ("Mrs. Bryan") and Aimee Hairr ("Mrs. Hairr"), (collectively Plaintiffs"). Daniel Polsenberg, Esq., Dan Waite, Esq., and Brian D. Blakley, Esq. appeared for and on behalf of Defendant CCSD, ("Defendant") on the Title IX and 42 USC 1983 Substitute Due Process claims. Testimony was given by: Nolan Hairr, Ethan Bryan, Aimee Hairr, Mary Bryan, Principal Warren McKay, Vice Principal Leonard DePiazza, Dean Cheryl Winn, Counselor John Halpin and band teacher Robert Beasely. Although neither one of the alleged bullies testified , CL's deposition was introduced into evidence. (For privacy purposes, only the initials of CL and DM are used.)

Closing arguments were done via written briefs. Briefing was completed on May 26, 2017. On June 29, 2017, the Court issued its Decision and Order, concluding that Defendant CCSD violated both Title IX of the Civil Rights Act and also violated Plaintiffs' Substantive Due Process rights as guaranteed by the Fourteenth Amendment to the United States Constitution pursuant to 42 USC 1983. The Court further ordered that after review, "Judgment shall be entered in favor of Plaintiffs Mary Bryan, on behalf of Ethan Bryan and Aimee Hairr on behalf of Nolan Hairr, and that Plaintiffs are entitled to a judgment for all damages sought under these two claims asserted in the Complaint, and proven at trial."

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III. Findings of Fact

A. Ethan Bryan and Nolan Hairr started being bullied almost from the time they began attending Greenspun Jr. High School.

In late August 2011, two friends, Ethan Bryan and Nolan Hairr began sixth grade at Greenspun Jr. High School. Both Ethan and Nolan enrolled in Mr. Beasley's third period band class in the trombone section.

Almost from the beginning of the school year, Ethan and Nolan began to be bullied by two other trombone students, CL and DM. In sixth grade, at age 11, Nolan was small for his age with long blonde hair. CL and DM taunted him with names like gay and faggot, and called him a girl. CL also touched, pulled, ran his fingers through Nolan's hair and blew in Nolan's face.

Nolan, following what he believed was proper procedure, went to the Dean's office and filled out a complaint report. He was, however, too embarrassed to mention the homophobic and sexual content of the slurs that he was enduring. Nolan was subsequently called into the Dean's office and met with Dean Winn. He did not feel that she was either sympathetic or even interested, and therefore was reluctant to discuss the homophobic sexually-oriented nature of the bullying.

Within a day or two of Nolan's meeting with the Dean, on or about September 13, 2011, CL, who was sitting next to Nolan in band class, reached over and stabbed Nolan in the groin with the sharpened end of the pencil. CL said he wanted to see if Nolan was a girl, and also referred to Nolan as a tattletale. Nolan took the tattletale reference as a sign that the stabbing was, at least in part, retaliation for Nolan complaining about the bullying. Because of this fear of retaliation, Nolan decided not to tell any adults about any further bullying directed at him, and instead, to endure the torment in silence.

A day or two after the stabbing incident, while Nolan was at Ethan's house, Ethan's mother, Mary Bryan overheard Ethan and Nolan talking about some problem taking place at school. After Nolan had gone home, Mary Bryan confronted her son and questioned him

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concerning what Ethan and Nolan had been discussing. Ethan described to his mother the incident where CL stabbed Nolan in the groin with a pencil, and about the overall bullying occurring in Mr. Beasley's band class.

B. Mary Bryan's September 15, 2011 email

In response, Mary Bryan decided to contact the school officials to report the bullying in general and the stabbing in particular.

On September 15, 2011, she attempted to telephone Greenspun Principal Warren P. McKay. However, she could not reach him by telephone and was only able to talk to a junior high student volunteer. Mary did not want to leave such a sensitive message with a junior high student and was not transferred to Principal McKay's voicemail. Mary then decided she would email the Principal and got an email address for him from the student volunteer.

On September 15, 2011, Mary Bryan sent an email to three people: 1) Principal Warren McKay; 2) band teacher Robert Beasley; and 3) school counselor John Halpin, complaining about the bullying and specifically about the stabbing. Both Mr. Beasley and Mr. Halpin acknowledged receiving the September 15, 2011 email from Mary Bryan. Principal McKay said he did not receive it because the email address for him (which Mary Bryan obtained from his own office) was incorrect.

Both Mr. Beasley and Mr. Halpin were, in 2011, mandatory reporters who were required to report any information concerning bullying, to either the Principal or one of his designees, pursuant to NRS 3.88.1351 (1). In 2011, Principal McKay's designees at Greenspun were Vice Principal Leonard DePiazza and Dean Cheryl Winn.

Neither Mr. Beasley nor Mr. Halpin fulfilled their statutory duty to report Mary Bryan's September 15, 2011 email concerning bullying, explaining that because they saw Principal

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McKay's name in the address line, they assumed, without verifying, that Dr. McKay, and through him Vice Principal DePiazza and Dean Winn were aware of the situation.

These assumptions by Mr. Beasley and Mr. Halpin were incorrect. Moreover, by relying on their assumptions, rather than adhering to the statutory requirement to report any information concerning bullying they received, they both violated the explicit requirements of NRS 388.1351(1).

In response to the September 15, 2011 email, Mr. Beasley changed the seating arrangements in the trombone section of his class. While before, Nolan had been sitting next to Connor, after the change, Nolan set directly in front of CL.

While Mr. Beasley attempted to keep an eye on both bullies and the bullied students, he admitted that he was unable to constantly watch them and still teach his class. Mr. Beasley said that he made the decisions concerning the seating arrangements on his own without consultation with anyone else. This testimony conflicted with that of Dean Winn, who stated that she was involved in the decision.

The bullying continued. For Ethan Bryan, at the beginning of the school year, most of the taunts at him by CL and DM had to do with his size. He was large for his age and overweight.

After the incident where CL stabbed Ethan's friend Nolan with a pencil, the bullying of Ethan began to change. It not only escalated but also shifted from being mostly about his size and weight to also involve homophobic slurs and vile and graphic innuendos concerning sexual relations between Ethan and Nolan.

Like his friend Nolan, Ethan also chose not to report the bullying that he was enduring for fear of retaliation, and lack of any real interest on the part of Greenspun school officials. Mary Bryan, believing that the school would contact Nolan's parents after Mary sent them the

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September 15, 2011 email about the stabbing of Nolan, did not directly inform Nolan's parents herself.

C. Aimee Hairr's September 22, 2011 phone conversation with Vice Principal DePiazza and September 23, 2011 phone call with Counselor Halpin

On or about September 21, 2011, while Mary Bryan and Nolan's mother Aimee Hairr were at a birthday party for another of Mary's children, Mary casually asked Aimee about the school's response to the September 15, 2011 email. Aimee responded that she had received no communication from the school, and that she had no knowledge or information about the bullying of her son occurring in Mr. Beasley's band class.

After talking to Mary, Nolan's parents then confronted him about the bullying. Nolan verified the veracity of the substance of the contents of the September 15, 2011 email. He also admitted to the stabbing incident.

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On September 22, 2011, Nolan's mother made several phone calls to various school officials in an attempt to contact the school regarding the September 15, 2011 email about the stabbing of their son. She left several messages for different school officials. Finally, Aimee Hairr was able to reach Vice Principal DePiazza, and had a phone conversation with him in which she described the September 15, 2011 email, and the stabbing, including the comment by CL that he did it to see if Nolan was a girl.

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Mr. DePiazza told Aimee Hairr that there were a few options for Nolan, all involving Nolan either transferring out of band class into another class at Greenspun, or transferring out of Greenspun to a different school entirely.

Aimee found these so-called solutions to be both inadequate and inappropriate because if anyone were to be moved, it should be the perpetrator of the bullying who assaulted her son not the victim, Nolan.

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Vice Principal DePiazza denied that he ever had a phone conversation with Aimee Hairr. According to his version of events, some time in either September or October 2011 (he could not remember when) there was a meeting in his office attended by Aimee Hairr, Dean Cheryl Winn and possibly Nolan Hairr. Mr. DePiazza claimed that while there was some generalized discussion about the "situation" in the band room, nothing specific about the stabbing or the September 15, 2011 email was ever mentioned. Neither Aimee Hairr, Nolan Hairr nor Cheryl Winn corroborated Mr. DePiazza's version of events about this supposed meeting, or even that it took place.

On or about September 23, 2011, Mrs. Hairr received a return phone call from counselor John Halpin. Aimee knew Mr. Halpin because she was his dental hygienist. Mr. Halpin told her he had received this September 15, 2011 email and was aware of its contents. He said he had previously spoken to Nolan and would do so again to make sure that Nolan made a formal complaint about the stabbing to the Dean. He said he believed that Dean Winn knew about it, but wanted to make sure.

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Later that day, Nolan met with Mr. Halpin. Both agreed that the counselor wanted Nolan to go to the Dean's office to fill out an incident report. Mr. Halpin said that he accompanied Nolan to Ms. Winn's office, while Nolan said he was sent there and went by himself. Mr. Halpin also said that since the Dean was not in the office, he left a message for Dean Winn with Harriet Clark, her secretary, recounting the stabbing incident and the bullying. He gave that message to the Dean's secretary with instructions to relay that message to Dean Winn. The Dean did not report receiving Mr. Halpin's message from her secretary.

Nolan, still trying to "tough it out" and not make more trouble for himself by complaining and thereby risking further retaliation, wrote a bland and rather innocuous version of what he was enduring in band class. He did not mention the stabbing nor the homophobic, sexually-oriented slurs.

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Dean Winn said she could not remember whether she met with Nolan on or after September 22, 2011. Nolan said that no such meeting took place on or after September 22, 2011. Aimee Hairr said she never had a meeting with Dean Winn.

Dean Winn said testified did not learn of the stabbing incident until the following year, February 2012.

D. Mary Bryan's October 19, 2011 email to school officials and October 19, 2011 meeting with Dean Winn

On or about October 19, 2011, Mary Bryan noticed that Ethan had come home from school with scratches on his leg. When she confronted him about the scratches, he told her that at the end of band class, while Mr. Beasley was out of the room, one of the bullies who was behind Ethan, removed a rubber stopper out of a piece of his trombone and started hitting Ethan in the legs with the remaining sharp piece of the instrument.

Upon questioning by his parents, Ethan also disclosed that CL and DM continued to make lewd sexual comments including calling both Ethan and Nolan gay, faggots and other similar names, and also talked about Ethan and Nolan jerking each other off and otherwise engaging in homosexual acts with each other.

Ethan's parents, enraged that this was going on -- particularly after the September 15, 2011 email -- decided to confront school officials. On October 19, 2011 Mary Bryant sent a second email addressed to Principal McKay, Mr. Beasley, and Mr. Halpin, describing the continuing bullying and also the hitting scratching of Ethan's leg.

Mr. and Mrs. Bryan met with Dean Winn at the Dean's office on October 19, 2011. They described the bullying endured by both Ethan and Nolan, specifically mentioning the physical assaults as well as the vile homophobic slurs that both boys were subjected to by CL and DM. The Bryans made it clear that they would not tolerate a continuation of this bullying.

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Dean Winn denied the occurrence of this meeting. She also denied that she knew anything about the, emails, the physical assaults and the homophobic slurs in October 2011. She said she only learned of the October 19, 2011 email the following year, in February 2012.

E. The October 19, 2011 Administrator's meeting where John Halpin informed Principal McKay and Vice Principal DePiazza of Mary Bryan's emails

Mr. Halpin, who was a recipient of the October 19, 2011 email, said he forwarded that email to Dean Winn to make sure she was aware of the situation. Dean Winn denied having received the October 19, 2011 email from Mr. Halpin.

Also on October 19, 2011, Mr. Halpin attended a weekly administrators meeting. Principal McKay and Vice Principal DePiazza were at that meeting. Dean Winn, who was a regular participant in those weekly meetings, did not attend that day.

Mr. Halpin said that he reported on the bullying that was occurring in Mr. Beasley's band class in considerable detail to both Principal McKay and Vice Principal DePiazza. He also stated that everyone at that meeting knew about the two emails that had been sent by Mary Bryan. He also made it clear that the two assaults were perpetrated by the same two bullies against the same two bullied students. Mr. Halpin specifically recalled Principal McKay telling Vice Principal DePiazza to take care of the matter.

Dr. McKay stated his recollections from the October 19, 2011, administrators meeting differently. McKay recalled Mr. Halpin bringing up the subject of bullying in Mr. Beasley's class, but without mentioning many specifics. For reasons he did not disclose, McKay stated that he really was not interested in the details of such matters and left it to his subordinates to address the issue.

Dr. McKay stated that he told Mr. DePiazza and Mr. Halpin to handle the situation. Dr. McKay also stated that he subsequently did not ask the Vice Principal about how the investigation was going or what DePiazza had found out until February 2012.

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Principal McKay only took action in February 2012 because it was then that he was ordered by his supervisor at the district level and the Assistant Superintendent to investigate the bullying of Ethan and Nolan.

Vice Principal DePiazza stated a vague memory of the October 19, 2011 administrative meeting. He recalled that there may have been some discussion about bullying but didn't really remember much. His position was that he definitely did not remember being told by Dr. McKay to conduct an investigation into the bullying reports on October 19, 2011.

Principal McKay stated that in 2011 while he never asked his Vice Principal about the bullying investigation, he did, at some point, have a casual discussion with Dean Winn about the matter. He asked her how the investigation was going. Dean Winn replied that she was having trouble getting corroborating statements from other students.

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Dean Winn's testimony contradicted the Principal's statements by claiming that she did not undertake any investigation of the bullying because she was specifically told by Dr. McKay that it was all being handled by Vice Principal DePiazza. Dr. McKay testified that Dean Winn told him she was investigating by trying to get statements from other students.

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F. Although by October 19, 2011, all members of the Greenspun Junior High School administration were aware of physical, and discriminatory bullying that Ethan and Nolan were experiencing, no investigation was conducted until February 2012, after both boys had left the school.

Although the school officials all pointed fingers at each other, the one thing that they all agreed upon is that contrary to Nevada statutes, no investigation of the reports of bullying, described in the September 15, 2011, and October 19, 2011 emails from Mary Bryan and the September 22, 2011 phone conversation between Aimee Hairr and Vice Principal DePiazza, the September 23, 2011 phone conversation between Aimee Hairr and Mr. Halpin, and the October 19, 2011 meeting between Mr. and Mrs. Bryan and Dean Winn, ever occurred in 2011.

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Throughout the rest of 2011, the bullying of Ethan and Nolan by CL and DM continued out of the sight of Mr. Beasley.

Ethan and Nolan continued to employ the strategy of trying to ignore the problem, feeling that any further complaints would just lead to greater retaliation.

When Ethan and Nolan came back to Greenspun for in January 2012, their resolve began to waver. Each boy tried to avoid band class or even school altogether. Ethan feigned illness, and even tried to make himself sick by eating cardboard. Nolan would hang out in the library or in the halls. By the middle of January, both boys had essentially stopped going to school in order to avoid further bullying.

In January 2012, Ethan Bryan was prevented from attempting to commit suicide by drinking household chemicals, because of a fortuitous intervention from his mother. Ethan's parents refused to send him back to Greenspun after that.

On or around January 21, 2012 Nolan had, what his mother described as something close to a breakdown because of the bullying that he and others were enduring at Greenspun. Mrs. Hairr decided to pull Nolan out of the school at that time. She also made a report to the police.

By early February 2012, both Ethan and Nolan had been removed from Greenspun Jr. High School.

Subsequent to the removal of Ethan and Nolan from Greenspun, and also subsequent to the filing of the police report, Principal McKay, on or about February 7, 2012, was contacted by officials from the school district, specifically his direct supervisor Andre Long and the Assistant Superintendent Jolene Wallace. He was ordered by Ms. Wallace to conduct an investigation into the bullying of Ethan Bryan and Nolan Hairr.

Because he was ordered by his superiors to investigate, Principal McKay directed Vice Principal DePiazza to conduct a "second" investigation.

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This was, in fact, the only investigation done at Greenspun into the bullying of Ethan and Nolan. At trial, no one from the school or the school district testified to seeing any results of any earlier investigation. Nor was any evidence obtained from any earlier investigation introduced. Contrary to the responsibilities under Nevada law, no investigation ever took place while Ethan and Nolan were attending Greenspun Junior High School.

IV. Conclusions of Law

A. The Evidence and Testimony at Trial shows a Title IX Violation.

1. Title IX Standards

Section 901(a) of Title IX provides, "No 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 USC § 1681(a). Based on the receipt of federal funds, CCSD is subject to Title IX requirements. 20 USC § 1681(a). Under Title IX, student on student harassment and bullying based upon perceived sexual orientation is actionable.

For liability under Title IX for student on student sexual harassment: (1) the school district "must exercise substantial control over both the harasser and the context in which the known harassment occurs", (2) the plaintiff must suffer "sexual harassment ... that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school", (3) the school district must have "actual knowledge of the harassment", and (4) the school district's "deliberate indifference subjects its students to harassment". *Reese v. Jefferson School District No, 14J*, 208 F.3d 736, 739 (9th Cir. 2000) (*quoting Davis*, 526 U.S. 629, 119 S. Ct. 1661, 1675 (1999)). *See also, Henkle v. Gregory*, 150 F.Supp.2d 1067, 1077-1078 (D. Nev. 2001). The Ninth Circuit defines deliberate indifference as "the conscious or reckless disregard of the consequences of one's acts or omissions," *Henkle v,*

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Gregory, 150 F.Supp. 2d 1067,1077-78 (D. Nev. 2001); See also 9th Cir. Civ. Jury Instr. 11.3.5 (1997)(*citing Redman v. County of San Diego*, 942 F.2d 1435, 1442 (9th Cir. 1991), *cert. denied,* 502 U.S. 1074 (1992). A Plaintiff bringing a claim under Title IX must prove his or her claim by a preponderance of the evidence. Whether conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships," *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998).

In the instant case, the testimony at trial showed that: 1) Greenspun Junior High School exercised substantial control over both the students involved in the bullying and the context in which the harassment occurred; 2) both Ethan and Nolan were bullied at school; 3) the harassment they endured was sexual in nature; 4) the harassment was so severe, pervasive, and objectively offensive that it deprived Ethan and Nolan of access to the educational opportunities and benefits provided by the school; 5) the appropriate school officials had actual knowledge of the bullying and sexual discrimination suffered by Ethan and Nolan; and, 6) the appropriate school officials demonstrated deliberate indifference to the bullying endured by Ethan and Nolan.

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2. Ethan and Nolan were bullied in Mr. Beasley's band class.

Ethan and Nolan were bullied in Mr. Beasley's band class by two other students. They were not only called names, but both were physically assaulted by the bullies. On September 13, 2011, CL stabbed Nolan in the groin with a pencil during Mr. Beasley's band class. On October 18, 2011 Ethan was physically assaulted by one of the bullies at the end of band class by having his legs hit and scratched with a trombone from which the rubber stopper had been removed.

3. The bullying was sexual in nature.

From the very beginning of the school year Nolan was called names such as "faggot, fucking fat faggot, fucking faggot, gay, gay boyfriend, cunt." This began when he was 11 years old at the beginning of sixth grade. Nolan was a small child who had blonde hair down to his shoulders.

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While Ethan had been bullied by CL and DM from the beginning of the school year, their comments had started off being directed at his size and weight, after the stabbing incident, the bullies also began directing their homophobic slurs against Ethan as well. The bullies continuously taunted Ethan and Nolan with homophobic slurs and innuendo, and specifically made statements concerning homosexual relations and explicit sexual acts between Ethan and Nolan in vile and graphic terms.

4. The bullying of Ethan and Nolan was severe, pervasive, and objectively unreasonable, and deprived them of significant educational opportunities.

The nature of the bullying was severe, pervasive, and objectively unreasonable. It involved verbal abuse of a sexual and homophobic nature beginning from the start of the school year and only ceased when Ethan and Nolan were forced to stop attending Greenspun. Both boys suffered so severely from the bullying that they did whatever they could to not attend school in order to avoid the bullying. In January 2012, Ethan feigned illness in order to stay home from school. He would eat paper in order to make himself sick. For Ethan, the bullying was so severe and pervasive that he saw suicide as his only way out. Fortunately, he was prevented from doing so by his mother's intervention. At that point, she was forced to take him out of Greenspun.

In January 2012, Nolan stopped going to band class in order to avoid the bullying by CL. Nolan then had a breakdown due to the constant bullying that forced his parents also to remove him from Greenspun. The creation of a sufficiently hostile environment forced Ethan and Nolan's parents to remove them from Greenspun Jr. High School and thus deprived them of educational opportunities.

The severity of the hostile environment forced both Nolan and Ethan to quit Greenspun to escape both verbal and sometimes physical harassment from CL and DM that school officials were aware of, and allowed to continue. This was clearly a loss of educational opportunity.

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5. Appropriate school officials had actual notice of the existence and the discriminatory nature of the bullying.

Appropriate school officials had notice of the existence and nature of the bullying suffered by Ethan and Nolan. *See*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

> [I]n cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

524 U.S. at 290.

The Court in *Warren v. Reading Sch. Dist.*, 278 F.3d 163 (3rd Cir. 2002) stated that the school principal was the appropriate person for Title IX purposes, while in *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999) the Court considered an individual who exercises substantial control, for Title IX purposes, to be anyone with the authority to take remedial action. Several Greenspun personnel had authority to take remedial disciplinary actions when appropriate, including, band teacher Beasley, Principal McKay, Vice Principal DePiazza, and Dean Winn. Both Mr. Beasley and Mr. Halpin admitted to receiving Mary Bryan's September 15, 2011 and October 19, 2011 emails.

Five separate contacts by Ethan or Nolan's parents to Greenspun personnel put the school on actual notice of the verbal, physical and sexual nature of the bullying. On September 15, 2011, Mary Bryan sent an email to Dr. McKay, Mr. Halpin and Mr. Beasley concerning the stabbing of Nolan. On September 22, Aimee Hairr spoke to Mr. DePiazza about the general bullying and the assault on her son. She spoke to Mr. Halpin by phone the next day.

On October 19, 2011, Mary Bryan sent another email to Dr. McKay, Mr. Halpin and Mr. Beasley, this time regarding the assault on Ethan. The same day, she and her husband met with Dean Winn to discuss the bullying of Ethan and Nolan, and particularly about its sexual,

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homophobic nature. All of these parental contacts gave the school actual notice to appropriate persons of the existence and nature of the bullying of both Ethan and Nolan.

6. Greenspun school officials acted with deliberate indifference for Title IX violation purposes.

Deliberate indifference is "the conscious or reckless disregard of the consequences of one's acts or omissions." *Henkle v. Gregory,* 150 F. Supp. 2d at 1078. Deliberate indifference occurs where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000). It must, at a minimum, "cause students to undergo harassment or make them liable or vulnerable to it." *Id.*, *citing Davis*, 526 U.S. at 645. "[I]f an institution either fails to act, or acts in a way which could not have reasonably been expected to remedy the violation, then the institution is liable for what amounts to an official decision not to end discrimination." *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274, 290 (1998); *See, Jane Doe A v. Green*, 298 F. Supp.2d 1025, 1035 (D. Nev. 2004). Greenspun officials' failure to take further action once they received actual notice of the bullying and its nature showed deliberate indifference. *See, Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130, 1136 (9th Cir. 2003), *Vance v. Spencer County Public School Dist.*, 231 F.3d 253 (6th Cir. 2000).

Even though NRS 3.88.1351 (1) requires that once a report of bullying is received, the Principal or his or her designee begin an immediate investigation, no investigation, much less one conforming to statute, was ever undertaken in 2011. The only time an investigation occurred was in February 2012, when it was ordered by the District. This, however, occurred well after both Ethan and Nolan had been removed from Greenspun, and a police report had been filed. This constituted deliberate indifference on the part of school officials who had actual notice of the physical and homophobic bullying to which Ethan and Nolan were subjected.

B. The Evidence and Testimony at Trial shows a Substantive Due Process Violation.

Under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Due Process Clause of the United States Constitution does not require state actors to

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protect private citizens from harm inflicted by other private citizens. *DeShaney,* however, is inapplicable because of the state created danger exception.

1. Plaintiffs had a constitutionally protected interest in their safety and in their education.

State law can create a liberty or property interest. *Vitek v Jones*, 445 U.S. 480 (1980); *Carlo v. City of Chino*, 105 F.3d 493 (9th Cir. 1997). The Supreme Court stated in *Goss v. Lopez*, 419 U.S. 565, 576 (1975), that a student's right to a public education is a property interest protected by the Due Process Clause. See also, *Henry A. v. Willden*, 678 F.3d 991 (9th Cir. 2012).

2. Defendant acted with deliberate indifference for substantive due process violation purposes.

The "state-created danger exception" — when "the state affirmatively places the Plaintiff in danger by acting with 'deliberate indifference' to a 'known and obvious danger," is manifested here. The standard for deliberate indifference does not vary between Title IX and 42 USC 1983 cases. *Doe A. v. Green*, 298 F.Supp.2d 1025, 1035 (D.Nev., 2004) see also *Willden, supra.* Deliberate indifference consists of deliberate action or deliberate inaction. *Wereb v. Maui County*, 727 F.Supp.2d 898, 921 (D. Haw., 2010) citing, *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir., 2006); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

In other cases, Defendants have been "charged with knowledge" of unconstitutional conditions when they persistently violated a statutory duty to inquire about such conditions and to be responsible for them. *Wright v. McMann*, 460 F.2d 126 (2nd Cir. 1972); *United States ex rel. Larkins v. Oswald,* 510 F.2d 583 (2nd Cir. 1975); *Doe v. N.Y.C. Dep't of Soc. Servs.*, 649 F.2d 134 (2nd Cir. 1981). The failure to investigate the reported physical, sexual, and other verbal bullying, in the face of clear statutory mandates to do so is significant evidence of an overall posture of deliberate indifference toward Ethan's and Nolan's welfare.

3. CCSD is subject to *Monell* liability.

In *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005), the Ninth Circuit stated that there are three distinct alternative theories of municipal liability, by showing: (1) a

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longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity; (2) that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision; or (3) that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate. *See also, Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

Liability can be established by the existence of a government policy or custom that leads to a constitutional deprivation. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 694 (1978); *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 983 (9th Cir. 2002); *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000). The other two theories of municipal liability attach when a final policymaker for the government acts in a manner that can fairly be said to represent official action. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986).

Liability may attach either when the final policymaker is a final policymaking authority who made the allegedly unconstitutional action, or when that action is ratified, or delegated to a subordinate. *Menotti*, 409 F.3d at 1147; *Ulrich*, 308 F.3d at 984-85. A policy includes "a course of action tailored to a particular situation and not intended to control decisions in later situations." *Pembaur*, 475 U.S. at 481. When determining whether an individual has final policymaking authority, the pertinent query is whether he or she has authority "in a particular area, or on a particular issue." *McMillian v. Monroe County*, 520 U.S. 781 (1997). The individual must be in a position of authority to the extent that a final decision by that person may appropriately be attributed to the District. *Lytle v. Carl*, 382 F.3d 978, 983 (9th Cir. 2004); *see also, Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999). A government entity can be liable for an isolated constitutional violation. *Id.*

Principals can act as final policymakers for the purposes of *Monell* liability with respect to student discipline issues. *Williams v. Fulton Cnty. Sch. Dist.*, 181 F. Supp. 3d 1089, 1126-27 (N.D. Ga. 2016), *citing*, *Holloman v. Harland*, 370 F.3d 1252, 1293 (11th Cir. 2004); *see also*, *Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982); *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263, 268 (N.D.N.Y. 2000), *citing Luce v. Board of Educ.*, 2 A.D.2d 502, 505, 157 N.Y.S.2d 123, 127 (3d Dep't 1956), *aff'd*, 3 N.Y.2d 792, 143 N.E.2d 797, 164 N.Y.S.2d 43 (1957).

4. NRS 388.1351(2) specifically tasks the school Principal with responsibility for investigating reports of bullying.

The question of whether a particular individual has policymaking authority is a question of state law. *Pembaur, supra,* 475 U.S. at 483; *St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988); *Lytle,* 382 F.3d at 982-83. NRS 388.1351(2) required that once a report of bullying is received, the Principal or his or her designee shall initiate an investigation not later than one day after receiving notice of the violation, and that the investigation must be completed within 10 days after the date on which the investigation is initiated.

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The legislature explicitly gave a statutory mandate to investigate reports of bullying in school to the school "Principal or his or her designee." There is absolutely no legislative authority for the CCSD to designate somebody else at the District level to override the delegation of responsibility and authority. Thus, under the NRS 388.1351(2), because the final policymaker relating to the failure of Principal McKay or any of his designees to conduct the requisite investigation on the reports of the bullying of Ethan and Nolan, was the Principal himself, Defendant CCSD is liable for the substantive due process violation under *Monell*.

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V. Damages

In its June 29, 2017 Decision and Order, the Court ruled that "Plaintiffs are entitled to a judgment for all damages sought under these two claims asserted in the Complaint, and proven at trial." On April 6, 2016, Discovery Commissioner Bulla denied Defendants' Motion to Compel

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Damages Categories and Calculations, thus allowing these calculations to be determined by the Court at trial. The Discovery Commissioner's Report and Recommendations were affirmed and adopted by the Court. Plaintiffs Mary Bryan and Aimee Hairr testified that their out of pocket expenses for schooling for Ethan and Nolan outside of CCSD is approximately ten thousand dollars ($10,000) per year starting in eighth grade, or approximately fifty thousand dollars ($50,000) total for each child to date.

Beyond these out of pocket expenses both Ethan and Nolan suffered from physical attacks and relentless homophobic slurs. A seminal Nevada case can serve as a guideline for damages in similar school bullying cases. In *Henkel*, (150 F. Supp. 2d at 1069), "during school hours and on school property, he endured constant harassment, assaults, intimidation, and discrimination by other students because he is gay and male and school officials, after being notified of the continuous harassment, failed to take any action." The Washoe County School District agreed to pay Mr. Henkel four hundred, fifty-one thousand ($451,000) dollars as damages. Using *Henkel* as a guidepost, the $451,000 award in 2001 would be equivalent to approximately $625,000 in today's dollars. Therefore, awards of six hundred thousand dollars ($600,000), apiece to each Plaintiff, Mary Bryan on behalf of Ethan Bryan and Aimee Hairr on behalf of Nolan Hairr, is appropriate.

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VI. Judgment

Judgment is hereby entered in favor of Plaintiffs Mary Bryan on behalf of Ethan Bryan and Aimee Hairr on behalf of Nolan Hairr, and against Defendant Clark County School District on the Title IX and Substantive Due Process claims. It is further ordered that Defendant shall pay to each Plaintiff, Ethan Bryan and Nolan Hairr, the sum of ~~six~~ two NMA hundred thousand dollars ~~($600,000)~~ $200,000.00 NMA for physical and emotional distress damages and costs for alternative schooling. These awards are exclusive of any costs or attorneys fees accrued.

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Dated this 20 day of July 2007

Nancy L. Allf

NANCY L. ALLF
District Court Judge

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed I caused the foregoing document to be electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail and/or by email to:

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Karen Lawrence
Judicial Executive Assistant

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EXHIBIT C

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EXHIBIT C

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD

Defendant .

Case No. A-14-700018-C

Dept. No. XXVII

NOTICE OF ENTRY OF ORDER

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TO: ALL INTERESTED PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD

Please take notice that an Order Re: Plaintiffs' Motion for Attorney's Fees was entered in this case, a copy of which is attached..

Dated this 20th day of November 2017,

Respectfully submitted by:

/s/Allen Lichtenstein
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Attorneys for Plaintiffs, Mary Bryan, Ethan Bryan, Aimee Hairr and Nolan Hairr

CERTIFICATE OF SERVICE

I hereby certify that I served the following Notice of Findings of Fact, Conclusions of Law and Judgment in Favor of Plaintiffs via Court's electronic filing and service system and/or United States Mail and/or e-mail on the November 20, 2017, to:

Dan Waite
Lewis Rocha Rothgerber Christie
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/s/ Allen Lichtenstein

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD

Defendant .

Case No. A-14-700018-C

Dept. No. XXVII

ORDER RE: PLAINTIFFS' MOTION FOR ATTORNEY'S FEES

Date of Hearing: 10-4-17

Time of Hearing: 9:00am

A hearing was held on October 4, 2017 presided by the Hon. Judge Nancy Allf, in Dept. 27, on Plaintiffs' Motion For Attorney's Fees. Dan Polsenberg, Esq, and Dan Waite, Esq. represented the Defendant, and Allen Lichtenstein represented the Plaintiffs. The Court granted fees to Plaintiffs, pursuant to 42 U.S.C 1988, in the following amounts.

	rate per hr.	hrs expended	total
Fees for John H. Scott:	$450	350.00	$157,500.00
Fees for Allen Lichtenstein: (as a private attorney)	$450	650.00	$292,500.00

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Case Number: A-14-700018-C

Staci Pratt (as a private attorney)	$450	20.80	NLA	$ 9,360.00
Fees for the ACLUN	var	47.75	$11,058.75	~~$14,298.75~~ e AE
~~Lichtenstein~~	~~$450~~	~~7.2~~	NLA	~~$3,240.00~~ e AE
Pratt	$450	8.6		$3,870.00
Morgan	$225	31.95		$7,188.75
Total fees			NLA $470,413.75	~~$473,658.75~~ e AE

WHEREFORE, Plaintiffs having prevailed in this case, Plaintiffs are hereby awarded attorney's fees in the amount of $470,413.75 AE NLA ~~$473,658.75~~ e set forth above.

Dated this 14 day of November 2017.

Nancy Allf

Nancy Allf,
District Court Judge, Department 27

AE

Respectfully submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD); PRINCIPAL WARREN P. MCKAY, in his individual and official capacity as principal of GJHS; LEONARD DEPIAZZA, in his individual and official capacity as assistant principal at GJHS; CHERYL WINN, in her individual and official capacity as Dean at GJHS; JOHN HALPIN, in his individual and official capacity as counselor at GJHS; ROBERT BEASLEY, in his individual and official capacity as instructor at GJHS,

Defendants.

Case No. A-14-700018-C

Dept. No. XXVII

AMENDED CASE APPEAL STATEMENT

AMENDED CASE APPEAL STATEMENT

1. Name of appellants filing this case appeal statement:

Defendant Clark County School District

2. Identify the judge issuing the decision, judgment, or order appealed from:

The Honorable Nancy L. Allf

3. Identify each appellant and the name and address of counsel for each appellant:

Attorneys for Appellant Clark County School District

Daniel F. Polsenberg
Dan R. Waite
Brian D. Blakley
Abraham G. Smith
LEWIS ROCA ROTHGERBER CHRISTIE LLP
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Las Vegas, Nevada 89169
(702) 949-8200

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

Attorneys for Respondents Mary Bryan, Ethan Bryan, Aimee Hairr and Nolan Hairr

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5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

John Houston Scott is not licensed to practice in Nevada. A copy of the minute order granting him permission to appear is attached hereto as Exhibit A.

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Lewis Roca ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Retained counsel

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Retained counsel

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

N/A

9. Indicate the date the proceedings commenced in the district court, *e.g.*, date complaint, indictment, information, or petition was filed:

"Complaint," filed April 29, 2014

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This action arises under Title IX and 42 U.S.C. § 1983, based on allegations that two junior high school students bullied plaintiffs on the basis of sex. After a bench trial, the district court entered a decision in favor of plaintiffs, ruling that CCSD violated Title IX and that plaintiffs' substantive due process rights guaranteed by the Fourteenth Amendment were violated. Defendant appealed from the decision and judgment on August 23, 2017. Defendant now appeals the attorneys' fees award.

11. Indicate whether the case has previously been the subject of an appeal or an original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding.

N/A

12. Indicate whether this appeal involves child custody or visitation:

This case does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

The parties attended a settlement conference on November 17, 2017.

Lewis Roca ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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Dated this 22nd day of November, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
DAN R. WAITE (SBN 4078)
BRIAN D. BLAKLEY (SBN 13074)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to Nev.R.Civ. Rule 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this day, I caused a true and correct copy of the "Amended Case Appeal Statement" to be filed, via the Court's E-Filing System, and served on all interested parties via U.S. Mail, postage pre-paid and courtesy email.

Allen Lichtenstein, Esq.
Staci Pratt, Esq.
ALLEN LICHTENSTEIN ATTORNEY AT LAW, LTD.
3315 Russell Road, No. 222
Las Vegas, Nevada 89120
allaw@lvcoxmail.com
Attorneys for Plaintiffs

John Houston Scott, Esq.
SCOTT LAW FIRM
1388 Sutter Street, Suite 715
San Francisco, CA 94109
john@scottlawfirm.net
Attorneys for Plaintiffs
(Admitted Pro Hac Vice)

Dated this 22nd day of November, 2017

/s/ Luz Horvath
An Employee of Lewis Roca Rothgerber Christie LLP

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Lewis Roca ROTHGERBER CHRISTIE

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EXHIBIT A

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EXHIBIT A

A-14-700018-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	July 07, 2015

A-14-700018-C Mary Bryan, Plaintiff(s)
vs.
Clark County School District, et al, Defendant(s)

July 07, 2015 **3:00 AM** **Motion to Associate Counsel**

HEARD BY: Allf, Nancy **COURTROOM:**

COURT CLERK: Nicole McDevitt

RECORDER:

REPORTER:

PARTIES PRESENT:

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JOURNAL ENTRIES

- COURT FINDS after review that Plaintiffs Mary Bryan and Aimee Hairr filed a Motion to Associate Counsel, John H. Scott, Esq. on June 4, 2015, with a hearing set for Chambers Calendar on July 7, 2015. COURT FURTHER FINDS after review the Motion is in compliance with SCR 42 and no opposition has been filed.

COURT ORDERS for good cause appearing and pursuant to EDCR 2.20 (e), failure to file an opposition may be construed as an admission that the motion is meritorious and a consent to granting the same, Plaintiffs Motion to Associate Counsel GRANTED; Hearing on CHAMBERS CALENDAR on July 7, 2015 is VACATED; Movant to prepare the appropriate Order.

CLERK'S NOTE: A copy of this minute order was faxed to: Allen Lichtenstein (702-433-9591) and Dan R. Waite, Esq. (702-949-8398)

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CLARK COUNTY SCHOOL DISTRICT POLICY

P-5137

SAFE AND RESPECTFUL LEARNING ENVIRONMENT: BULLYING AND CYBERBULLYING

I. Introduction

The Clark County School District is committed to providing a safe, secure, and respectful learning environment for all students and employees in all District facilities, school buildings, school buses, on school grounds, and at school-sponsored activities. Bullying, cyberbullying, harassment, and intimidation have a harmful social, physical, psychological, and academic impact on victims, bystanders, and even the bullies themselves. The school district strives to consistently and vigorously address bullying, cyberbullying, harassment, and intimidation so that there is no disruption to the learning environment and learning process.

II. Definitions

A. Bullying is a deliberate or intentional behavior using words or actions intended to cause fear, intimidation, or harm. Bullying may be repeated behavior and involves an imbalance of power. The behavior may be motivated by an actual or perceived distinguishing characteristic, such as, but not limited to: age, national origin, race, ethnicity, religion, gender, gender identity, sexual orientation, physical attributes, physical or mental ability or disability, and social, economic, or family status.

Bullying behavior can be:

1. Indirect (such as spreading cruel rumors, intimidation through gestures, social exclusion, or sending insulting messages or pictures) as defined by NRS 388.122.

2. Physical (such as assault, hitting, punching, kicking, theft, or threatening behavior).

3. Power Imbalance – when someone takes power over someone else.

   a. Physical imbalance – a stronger, more physically dominant individual usurps authority over a smaller, less strong individual.

   b. Psychological Imbalance – intellect or social status determines dominance.

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PLAINTIFFS' TRIAL EXHIBIT 3
Case No: A-14-700018-C
Date Entered:_____
By: _____, Deputy Clerk

CCSDDEF000256

4. Punitive – aimed at hurting or punishing targeted individuals.

5. Repetitive – a repeated, even systematic act over time.

6. Verbal (such as threatening or intimidating language, teasing or name calling, or racist remark). (As defined by Anti-Defamation League, 2003. Human Rights Campaign Foundation, 2012. New York City Department of Education. Olweus Bullying Prevention Group, 2007. Operation Respect, 2005. Talbot County Public Schools, Easton, M.D. U.S. Department of Health and Human Services, Human Resources and Services Administration. Wisconsin Department of Public Instruction.)

B. Cyberbullying means bullying through the use of "electronic communication." "Electronic communication" means the communication of written, verbal, or pictorial information through electronic devices, including, but without limitation, telephones, cellular phones, computers, or any similar means of communication as defined by NRS 388.123 and 388.124.

C. Harassment is a willful act which is written, verbal, or physical, or a course of conduct that is not otherwise authorized by law and is highly offensive to a reasonable person. Harassment is intended to cause or actually causes another person to suffer serious emotional distress; places a person in reasonable fear of harm or serious emotional distress; and/or creates an environment which is hostile to a pupil or employee as defined by NRS 388.125.

D. Intimidation is a willful act which is written, verbal, or physical, or a course of conduct that is not otherwise authorized by law and is highly offensive to a reasonable person. Intimidation poses a threat of immediate harm or actually inflicts harm to another person or to the property of another person; places a person in reasonable fear of harm or serious emotional distress; or creates an environment which is hostile to a pupil or employee as defined by NRS 388.129.

III. Prohibition

Bullying and/or cyberbullying behavior are prohibited. This includes, but is not limited to, going to and from school and any activity under school supervision.

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IV. Requirements and Methods for Reporting Violations of NRS 388.135

A. The Clark County School District shall assure that any person who believes that he or she has been a victim/target of bullying, cyberbullying, harassment, and/or intimidation as defined by NRS 388.122, 388.123, 388.124, 388.125, and/or NRS 388.129 by any or all individuals as specified by NRS 388.135 be encouraged and instructed to adhere to the following reporting mechanism:

1. Students: It is the policy of the Clark County School District to encourage students who are victims/targets of bullying, cyberbullying, harassment, and/or intimidation and students who have first-hand knowledge of such bullying, cyberbullying, harassment, and/or intimidation to report such claims. Students should report any incident(s) to a teacher, counselor, or a school administrator. (Reference 5141.2 regarding Discipline: Harassment) Students are also encouraged to report knowledge of such bullying, cyberbullying, harassment, and/or intimidation via the CCSD "Say No to Bullying" Web site that allows individuals to anonymously report unlawful activities.

2. Employees: Any Clark County School District employee who witnesses, overhears, or receives a report, formal or informal, written or oral, of bullying, cyberbullying, harassment, and/or intimidation at school, at a school-sponsored event, or on a school bus, shall report it to the principal or the principal's designee.

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V. Professional Development

The Clark County School District will provide for the appropriate training of all administrators, principals, teachers, and all other personnel employed by the District as prescribed by this policy under the heading "Professional Development."

A. The Superintendent shall develop methods of discussing the meaning and substance of this policy with staff in order to help prevent harassment.

B. In addition to informing staff and students about the policy, the Superintendent shall develop a plan, including requirements and procedures, to assure that the following professional development be provided to all administrators, principals, teachers, and other personnel employed by the Board of Trustees of the Clark County School District:

1. Awareness concerning the various types of bullying, cyberbullying, harassment, and/or intimidation; how the bullying, cyberbullying,

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harassment, and/or intimidation manifests itself; and the devastating emotional and educational consequences of bullying, cyberbullying, harassment, and/or intimidation.

2. Training in the appropriate methods to facilitate positive human relations without the use of bullying, cyberbullying, harassment, and/or intimidation so that pupils and employees may realize their full academic and personal potential.

3. Methods to improve the school environment in a manner that will facilitate positive human relations.

4. Methods to teach skills so that pupils and employees are able to replace inappropriate behaviors with positive behaviors.

VI. Disclosure and Public Reporting

A. The policy will be distributed annually to all students enrolled in the School District, their parents and/or guardians and employees. It will also be made available to organizations in the community having cooperative agreements with the schools. The School District will also provide a copy of the policy to any person who requests it.

B. Records will be maintained on the number and types of reports made, and sanctions imposed for incidents found to be in violation of the Bullying Policy.

C. An annual summary report shall be prepared and presented to the School Board, which includes trends in bullying behavior and recommendations on how to further reduce bullying behavior. The annual report will be available to the public.

D. Consequences of violating this policy are addressed in NRS 388.121 to 388.139, inclusive, unless the context otherwise requires, the words and terms defined in NRS 388.122 to 388.129, inclusive, have the meanings ascribed to them in those sections. (Added to NRS by 2001, 1928; A 2005, 705; 2009, 687; 2011, 2244)

Review Responsibility:	Office of the Superintendent, Equity and Diversity Education Department
Adopted:	[5137: 7/13/06]
Revised:	(3/11/10; 7/12/12)

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CLARK COUNTY SCHOOL DISTRICT REGULATION

5141.2

DISCIPLINE: HARASSMENT

I. Discriminatory Harassment

A. Harassment is any verbal, visual, or physical conduct that is sufficiently severe, persistent or pervasive that it adversely affects, or has the purpose or logical consequence of interfering with the student's educational program or creates an intimidating, hostile, or offensive school atmosphere. Harassment, whether it is by students, staff, or third parties in the school community, is strictly prohibited, and will subject the perpetrator to disciplinary action. Harassment, regardless of its basis, is prohibited.

B. In determining whether the conduct is sufficiently severe, persistent, or pervasive, the conduct should be considered from both a subjective and objective perspective of reasonableness, in light of all relevant circumstances. For example, the following circumstances, among others, may be considered: the degree to which the conduct affected one or more students' education, the type, frequency and duration of the conduct, the identity and relationship between the alleged harasser and the subject of the harassment, the number of individuals involved, and the age and status of the alleged harasser and the target of the harassment.

C. Prohibited sexual harassment may include, but is not limited to, unwelcome sexual advances, requests for sexual favors and other verbal, visual, or physical conduct of a sexual nature from students, peers, or any other person on school property or at a school sponsored event when:

1. Submission to the conduct is explicitly or implicitly made a term or condition of an individual's employment, academic status, or education, or as a basis for academic or employment decisions affecting the individual, or is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the school; or

2. The conduct is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an educational program or to create an intimidating, hostile, or offensive educational or work environment.

D. Although certain individual acts may be sufficiently egregious to constitute harassment by themselves, harassment typically consists of a pattern of behavior. The more distinct the pattern, the stronger the evidence of an

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intent to harass. Behavior that continues after an individual is informed of its offensiveness may also constitute evidence of an intent to harass.

E. While many types of conduct may show evidence of harassment, common types include, but are not limited to: unwanted touching, blocking a person's normal movements, threats, slurs, epithets, verbal abuse, derogatory comments, drawings, pictures, or gestures, unwelcome jokes, teasing, or propositions, graphic comments about an individual's body, spreading rumors about a person, purposefully limiting a person's access to educational tools, displaying sexually suggestive objects in the educational environment, or any act of retaliation against an individual who reports a violation of the district's sexual harassment policy or who participates in the investigations of a sexual harassment complaint. Retaliatory behavior against any complainant or any participant in the complaint process is prohibited and is considered to be a type of harassment.

F. The expression of ideas or attitudes that some may find offensive is not, by itself, harassment, and is constitutionally protected. Harassing behavior, however, is not protected simply because it occurs in the form of verbal or written expression. Additionally, certain conduct may create a hostile school environment even though a person targeted for that conduct does not complain. Conversely, conduct which a reasonable person would not find offensive may not be the basis of harassment.

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II. Grievance Complaint Procedure

A. It is the principal's responsibility to take actions as necessary to protect students and district personnel from harassment by students or staff.

B. Any student, male or female, who feels that he/she is a victim of harassment should immediately contact his/her teacher and/or principal, unless the principal or teacher is believed to be part of the harassment, in which case contact should be made with the appropriate assistant regional superintendent.

C. Any district employee who receives a harassment complaint from a student or observes harassing conduct shall notify the principal. The principal shall ensure that the complaint is promptly and appropriately investigated, and will ensure that there is an opportunity to present witnesses and other evidence. If the investigation is not conducted promptly, the appropriate assistant regional superintendent should be contacted.

D. Retaliatory behavior against any complainant or any participant in the complaint process is prohibited.

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E. Harassment in any form against students by either a student or a district employee is grounds for severe disciplinary action. For students, it may be the basis for suspension/expulsion in accordance with the existing disciplinary procedures. For staff, it may result in disciplinary action up to and including dismissal.

F. The principal shall take appropriate actions to reinforce this regulation. These actions should include the following:

1. Remove vulgar or offensive graffiti, pictures, or objects.
2. Provide staff in-service on the policy.
3. Provide proper notification to students.
4. Conduct an investigation into allegations using the procedures set forth in Regulation 4110.
5. Refer the incident to the school police, if appropriate.
6. Take immediate and appropriate disciplinary or remedial action as needed.
7. Take appropriate follow-up actions in an attempt to ensure there are no further incidents or retaliation.
8. Inform parties of the disposition of the complaint.

III. Notification of Students and District Employees

A copy of this policy shall be:

A. Included in the notifications that are sent to parents/guardians and district employees at the beginning of each school year.

B. Displayed in a prominent location in each school or work site. The grievance complaint procedures should be written in language appropriate to the age of students.

C. Provided as part of any orientation program conducted for students and district employees.

D. Published in any school or district publication that sets forth the school or district's comprehensive rules, regulations, procedures, and standards of conduct.

Review Responsibility: Instructional Division
Adopted: 4/23/98
Pol Gov Rev: 6/28/01

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Date: September 15, 2011 10:32:15 PM PDT
To: rbeasley@interact.ccsd.net, johnhalo@interact.ccsd.net, warrenmckay@interact.ccsd.net
Subject: Concerned Parent

Dear Mr Beasley,

My name is Mary Bryan, the mother of Ethan Bryan. It has been brought to my attention that there are two boys who are in your third period band class who have been harassing and bullying fellow students. My son told me that his friend Nolan Hairr has been bullied in class and it is unacceptable. The boys names' are [redacted] and [redacted]. They pull his hair everyday, have been elbowing him and have gone so far as to stab him in his genitals with a pencil. This cannot be tolerated. I have given my son permission to defend himself and his best friend against these bullies, even if it means physically moving these boys away from them in order to feel safe. Please move [redacted] and [redacted] to a different area so that our children can learn properly and have constructive school experiences and do not have to deal with these two boys. They are good kids who do not have to put up with this for a minute longer. Nolan is afraid to notify an adult for fear of retaliation. I trust that you will take this matter as seriously as I have.

Thank you,

<Fwd: Concerned Parent.eml>

On Oct 19, 2011, at 8:19 AM, MARY BRYAN wrote:

Sent from my iPad

Begin forwarded message:

From: MARY BRYAN <mommabryan@me.com>
Date: October 19, 2011 4:32:15 AM PDT
To: "warrenmckay@interact.ccsd.net" <warrenmckay@interact.ccsd.net>, "johnhalo@interact.ccsd.net" <johnhalo@interact.ccsd.net>, "MKPanik@interact.ccsd.net" <MKPanik@interact.ccsd.net>, "JMG937@interact.ccsd.net" <JMG937@interact.ccsd.net>
Subject: Very Concerned Parent

Hello, My name is Mary Bryan, I wrote to you all a few weeks ago asking for help to resolve an issue of bullying at school, regarding my son, Ethan Bryan, and another boy, Nolan Hairr, in Mr Beasley's band class. As I mentioned before in my previous email, there seems to be two boys, "[redacted]" and "[redacted]" who have some behavioral issues in class. They interrupt class and defy the teacher on a regular basis, often resulting in the teacher having to stop teaching class to ask them to behave. My biggest problem with these two boys is that [redacted], who sits right next to my son now, (despite me asking the teacher that these kids not sit near my son or Nolan) is continuing with the bullying and name calling has now turned his efforts toward Ethan.

Yesterday in class, he hit Ethan repeatedly in the legs with a piece of his trombone telling him to get out of the chair. Ethan did not get up so he then began hitting him harder and calling him a "Big Fat Ass".

He deliberately does this when the teacher is not looking. I am quite sure that Mr Beasley does not want to spend his time policing the children but I will not have my son tolerate this. Ethan is fond of Mr Beasley and with the exception of the boys' interruptions, he is really enjoying band. He does not have to put up with being assaulted at school in any form. Ethan is an excellent student

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CCSDDEF000001

PLAINTIFFS' TRIAL EXHIBIT 4
Case No: A-14-700018-C
Date Entered:_____
By: _____, Deputy Clerk

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Greenspun Junior High School

Chronological of Behavior

Hairr, Nolan Michael [redacted]
1615 Hennepin Dr
Henderson NV 89014 (702) 378-1265

Grade	Sex	Ethnic	Sp ED	Beh Plan	Birthdate	Withdrew Date
6	M	A TOR	54	☐	[redacted]	2/1/12

☐ 504 ☐ ELL ☐ Magnet ☐ For Exch

Date	*Event*	*Administrator*	*Incident(s)*
9/13/11	Tardy Sweep Pd 01 School Campus at 937 Greenspun, Barbara & Hank J.H.S.	Cheryl Winn, Dean of Students	Tardies
9/22/11	Tardy Sweep Pd 01 School Campus at 937 Greenspun, Barbara & Hank J.H.S.	Cheryl Winn, Dean of Students	Tardies
9/22/11	Other/Not Discipline am Classroom at 937 Greenspun, Barbara & Hank J.H.S.	Cheryl Winn, Dean of Students	Victim Statement

COMMENTS: Nolan reported to the dean that [redacted] is calling him names, messing with his hair, kicking his band instrument and blowing in his face. Nolan's mother also contacted administration that [redacted] continues to bother Nolan in band after Mr. Beasley talked to him about his behavior. Mr. Beasley reassigned [redacted] in the seating chart. Dean Winn will meet with [redacted] and his parent to discuss the issue.

What day? could have been 9/22/11

Did not do on investigation

10/24/11	Tardy Sweep Pd 01 School Campus at 937 Greenspun, Barbara & Hank J.H.S.	Cheryl Winn, Dean of Students	Tardies

DEANS' DETENTION: 1 Day for Tardies

An "R" after student's grade indicates retention in grade due to credit deficiency.

CCSDDEF000091

PLAINTIFFS' TRIAL EXHIBIT 5
Case No: A-14-700018-C
Date Entered:_____
By: _____, Deputy Clerk

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Greenspun Junior High School

Chronological of Behavior

Hairr, Nolan Michael - [redacted]
1615 Hennepin Dr
Henderson NV 89014 **(702) 378-1285**

Grade	Sex	Ethnic	Sp ED	Beh Plan	Birthdate	Withdraw Date
6	M	A	54	☐	[redacted]	2/1/12

TOR

☐ 504 ☐ ELL ☐ Magnet ☐ For Exch

Date	*Event*	*Administrator*	*Incident(s)*
10/31/11	Tardy Sweep Pd 01 School Campus at 937 Greenspun, Barbara & Hank J.H.S.	Cheryl Winn, Dean of Students	Tardies
1/24/12	Tardy Sweep Pd 01 School Campus at 937 Greenspun, Barbara & Hank J.H.S.	Cheryl Winn, Dean of Students	Tardies

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An "R" after student's grade indicates retention in grade due to credit deficiency.

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Date: September 15, 2011 10:32:15 PM PDT
To: rdbeasley@interact.ccsd.net, johnhain@interact.ccsd.net, warrenmckay@interact.ccsd.net
Subject: Concerned Parent

Dear Mr Beasley,

My name is Mary Bryan, the mother of Ethan Bryan. It has been brought to my attention that there are two boys who are in your third period band class who have been harassing and bullying fellow students. My son told me that his friend Nolan Hairr has been bullied in class and it is unacceptable. The boys names' are [redacted] and [redacted]. They pull his hair everyday, have been elbowing him and have gone so far as to stab him in his genitals with a pencil. This cannot be tolerated. I have given my son permission to defend himself and his best friend against these bullies, even if it means physically moving these boys away from them in order to feel safe. Please move [redacted] and [redacted] to a different area so that our children can learn properly and have constructive school experiences and do not have to deal with these two boys. They are good kids who do not have to put up with this for a minute longer. Nolan is afraid to notify an adult for fear of retaliation. I trust that you will take this matter as seriously as I have.

Thank you,

<Fwd: Concerned Parent.eml>

On Oct 19, 2011, at 8:19 AM, MARY BRYAN wrote:

Sent from my iPad

Begin forwarded message:

From: MARY BRYAN <mommabryan@me.com>
Date: October 19, 2011 4:32:15 AM PDT
To: "warrenmckay@interact.ccsd.net" <warrenmckay@interact.ccsd.net>, "johnhain@interact.ccsd.net" <johnhain@interact.ccsd.net>, "MKPaulk@interact.ccsd.net" <MKPaulk@interact.ccsd.net>, "JMG937@interact.ccsd.net" <JMG937@interact.ccsd.net>
Subject: Very Concerned Parent

Hello, My name is Mary Bryan, I wrote to you all a few weeks ago asking for help to resolve an issue of bullying at school, regarding my son, Ethan Bryan, and another boy, Nolan Hairr, in Mr Beasley's band class. As I mentioned before in my previous email, there seems to be two boys, "[redacted]" and "[redacted]" who have some behavioral issues in class. They interrupt class and defy the teacher on a regular basis, often resulting in the teacher having to stop teaching class to ask them to behave. My biggest problem with these two boys is that [redacted] who sits right next to my son now, (despite me asking the teacher that these kids not sit near my son or Nolan) is continuing with the bullying and name calling has now turned his efforts toward Ethan.

Yesterday in class, he hit Ethan repeatedly in the legs with a piece of his trombone telling him to get out of the chair. Ethan did not get up so he then began hitting him harder and calling him a "Big Fat Ass".

He deliberately does this when the teacher is not looking. I am quite sure that Mr Beasley does not want to spend his time policing the children but I will not have my son tolerate this. Ethan is fond of Mr Beasley and with the exception of the boys' interruptions, he is really enjoying band. He does not have to put up with being assaulted at school in any form. Ethan is an excellent student

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CCSDDEF000001

PLAINTIFFS' TRIAL EXHIBIT 8
Case No: A-14-700018-C
Date Entered:_____
By: _____, Deputy Clerk

and has NEVER had any type of problems like this at school. Even though his size is deceiving, he is very gentle and not quick to react to antagonism. He loves school and loves to learn and be social. Even if my opinion is somewhat biased, I know he is an asset to your school. He is a happy, loving child and I cannot sit back and allow his positive outlook and good spirit to be taken away by these children and the lack of action by administration when we asked for help.
We do not advocate fighting or hitting of any sort which is why Ethan is so disturbed by this.

Our son is twice the size of this "bully" so he is not afraid of [redacted] in fact, he is actually more worried about getting in trouble with the staff at Greenspun and disappointing his teachers [redacted] get into a physical altercation while defending himself from this boy. He is a big, strong boy who will have no problem physically defending himself, but it is not in his nature to hit and fight, which is why it has gone on this far. I have asked for support from the school to no avail and we are very frustrated parents. I cannot believe that we are actually teaching our son how to physically protect himself and physically take things into his own hands but we have no choice.

We tried to go about things appropriately, by asking that our son not have to sit near these bullies, but the matter was not taken as seriously as I am taking it. Nolan was moved up a few seats but Ethan was moved even closer and now sits right next to [redacted], leaving him plenty of time and opportunity to continue to say rude and vile things. Ethan has even said that the words he tries to ignore but being hit is really bothering him. If it happens again, Ethan has been given instruction to defend himself, and we have reassured him that he will not be in trouble for defending himself, especially after telling adults about the situation has not helped.

I do understand that kids say unkind things and that learning to let things roll off your shoulder is an important life lesson but having to tolerate continuous, relentless insults and being physically assaulted by the same two boys day in and day out is no lesson I want my son or any one's child to learn. It ALL bothers me, and words are often worse than the physical assault and it HAS to stop! We DO NOT want our son to fight or have to put his hands on another child but we do not want him anywhere near this boy. If physically harming the other children in class isn't enough to have [redacted] removed from that class, please tell me what is.

We cannot allow him to be hit at school and relentlessly teased and not be able to do anything about it. We will come down to the school personally to help resolve this matter. We have been Greenspun parents for a few years now and have had only good experiences and have had nothing but good things to say about the school, and I am sure your staff doesn't advocate bullying but it is happening and because it wasn't taken care of properly, it has now escalated.

We look forward to meeting with staff at Greenspun to resolve this matter,

Sincerely,
Kyle & Mary Bryan

Sent from my iPad

10/20 Met w/Dean
Kids were videotaping (Dipazza) (on phone)

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GREENSPUN JUNIOR HIGH
VOLUNTARY INCIDENT REPORT

☐ Witness ☒ Victim ☐ Other

Your Name: Nolan Hairr Student Number: [redacted] Grade: 6th

Victim (s): Nolan Hairr Grade: 6th

Where did this take place? In Music with Beasly, D RM # 602

Date: 9-20-11 Time: Unsure

Who was involved? If you don't know their names, tell what each looks like and what each was wearing.

1. [redacted] Grade 6th
2. _____ Grade _____
3. _____ Grade _____

Name other people who saw this incident. Eathn Bryan

Tell in your own words what happened. He was messing with my hair, kicking the instrument and also blowing air in my face. He called me ductebill dave and another kid Phil the Fail.

Sign your name Nolan Hairr Date 9-22-11

(Students do not write below this line)

PLAINTIFFS' TRIAL EXHIBIT 9
Case No: A-14-700018-C
Date Entered: _____
By: _____, Deputy Clerk

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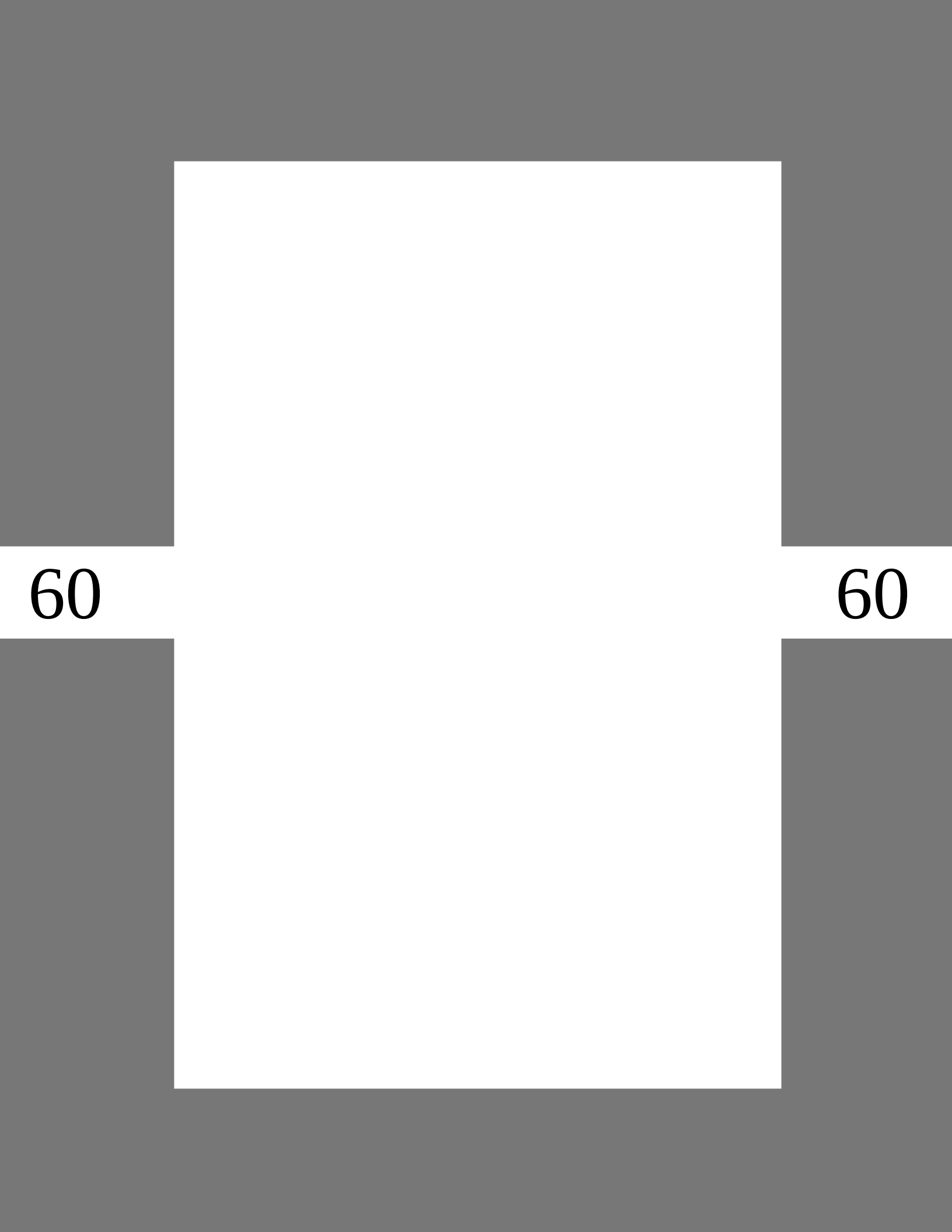
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GREENSPUN JUNIOR HIGH
VOLUNTARY INCIDENT REPORT

☐ Witness ● Victim ☐ Other

Your Name: Ethan Bryan Student Number: [redacted] Grade: 6

Victim (s): Ethan Bryan Grade: Sixth

Where did this take place? Band room

Date: 10/18/11 Time: 3rd Period

Who was involved? If you don't know their names, tell what each looks like and what each was wearing.

1. [redacted] Grade 6
2. _____ Grade _____
3. _____ Grade _____

Name other people who saw this incident. None

Tell in your own words what happened. I had apparently sat where [redacted] wanted to place his instrument, while he wasn't there. When he returned he started hitting me with his trombone. Then the teacher walked in and he immediatly stopped.

Sign your name Ethan Bryan Date 10/19/11

(Students do not write below this line)

Exhibit C
Witness: E. Bryan
Date: 1/21/16
Peggy S. Elias, RPR, CSR 274

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61

From: MARY BRYAN <mommabryan@gmail.com>
Subject: VERY CONCERNED PARENTS !!!
Date: February 7, 2012 3:43:23 AM PST
To: johnhalp@interact.ccsd.net, rdbeasley@interact.ccsd.net, JMG937@interact.ccsd.net, MKPanik@interact.ccsd.net, amathews@interact.ccsd.net, jmihelcic@interact.ccsd.net, ckwinn@interact.ccsd.net, mchristian.interact@ccsd.net, warremmckay@interact.ccsd.net, wpmckay@interact@ccsd.net, Aimee Hair <aimee1313@cox.net>, lawrence.c.foster@accenture.com, MARY BRYAN <mommabryan@gmail.com>

Dear Mr Halpin, Mrs Winn, Mr DePiazza, Dr McKay and others,

I received your phone call in regards to Ethan Bryan and the bullying situation which has never been resolved. I, as you have noticed, am very saddened and disgusted with the management -- actually, lack of management, of the issues that were brought to ALL of your attention last fall. The first email is dated September 15, 2 days after Nolan Hairr was lewdly assaulted both physically and verbally. After Ethan and Nolan had to listen to these two boys call them gay and use sexually explicit words, Nolan had a pencil intentionally jammed into his genitals by [redacted] I reported this all of you (teacher, counselors, and principal) via email on September 1, 2011. I sent the email within hours of hearing of this heinous act assuming and trusting that the staff at your school were not only educators but trusted protectors of all of our children. I also was of the understanding that teachers and school officials were required by law to report such a lewd and disturbing sexual assault on a child's genitals to law enforcement and at the very least to his parents. (My first grader had a rock thrown at him at school leaving a red mark on his head and I was notified by the school nurse that day that they had checked him out and gave him a little TLC and an ice pack and that they would handle the other child appropriately.)

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I spoke with Nolan's mother about a week after the incident and was shocked to find out that no one from the school had called her. It was then that I told her of the assault on her son and the very next morning, she and her husband went for a meeting at the school.

Ethan told me that [redacted] and [redacted] were told to sit elsewhere but he was pretty sure that the boys knew that they had told about what happened to Nolan. I saw Mr Beasley at Open House, he acknowledged that he got the email and I thanked him for separating the boys and for looking into this situation. I assumed someone would do an investigation and the matter would be taken care of. But, nothing had changed, the boys were still relentlessly harassing our children and now in retaliation. It then escalated and it began to carry on outside of the band room and into passing period and the lunch room.

Ethan came home from school on October 18 with scratches all over his legs and a broken spirit. Too ill to go down to the school, I sent another email to notify you of the physical assault on Ethan. [redacted] took his trombone apart and used the inner part of the trombone that is sharp to hit and scratch Ethan, leaving bloody scratches on his legs. I was livid that this boy is even allowed to sit anywhere near my son. In the Email I let you know that the situation was getting out of control. This time reaching out to the dean and counselors from every grade as well,

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hoping somebody would step up so that our children would feel safe.

I called the school on October 20 at 10:52 am asking for a meeting to get this resolved. I was told by Mr Halpin that my emails would be forwarded onto the dean. My husband and I then met with her and were told that she would take care of things and that there were serious consequences for acts of retaliation, and that there were "progressive disciplinary actions" that that would be taken, although she could not tell us what the disciplinary actions for these boys would be, she assured us she would take care of things. But at the same time, she explained that she had over 1800 students and it was at times overwhelming because she was the only dean. I then offered to help out when I could.

I have since volunteered on numerous occasions, trying to be part of the solution. My health does not always permit me to volunteer for these things but I try to get to the school to monitor lunch time activities and whatever else may need to be done when I can.

Ethan was changing and I could see he wasn't nearly as happy as he normally was. He hated going to school. Often said he was sick when he wasn't. I asked him what was going on and he would say everything "fine". I knew it was not "fine"! After asking and asking he finally said that he was being video taped in the lunch room and the boys said that they were going to post it on You Tube with the faggots and fat kids.

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I called the next day, December 13 at 10:42 am to speak with the dean to put a stop to this and confiscate the phone. Ethan did NOT have to deal with this. I was making myself sick with the fury I felt for this nonsense!! I spoke with Harriet, she told me that the dean had already left for the lunch room but she would call someone to make sure someone knew of this. She was very polite and compassionate when I spoke with her. Ethan told me that Mr DePiazza came to him that day at lunch and asked him if he was ok. He said he was ok, so Mr DePiazza walked away. He did not confiscate any phones or even address the matter with him. He did say that there were other times when Mr Halp asked him if he was ok at lunch.

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I had heard of more stories involving these same two bullies. Ethan witnessed [redacted] grab another boys genitals as a bullying tactic and there was an incident in which [redacted] pulled a Santa hat off of a student passing by which resulted in [redacted] slapping this boy repeatedly. Ethan and Nolan witnessed this and were just as disturbed watching this poor boy get bullied as they were about getting bullied themselves.

I went to the dean on December 16, while I was volunteering at the school and asked her about this incident , she knew of it and said she would ask the boys to make statements as to what happened. I then inquired about how these boys are still is allowed to wreak havoc without real consequence, or at least enough consequence to instill that **"bullying is not tolerated at**

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Greenspun". They apparently weren't getting the message.

And still all along our boys are being tormented on nearly a daily basis. Ethan was called gay and fat and worthless, over and over and over and over. [redacted] often told Ethan to move out of the chair he is sitting in often calling him disgusting names and saying vulgar things that my son actually had never heard of but he knew what the implication was and that it was humiliating and disgusting. Ethan was still concerned about doing the right thing and not being sent to the deans office himself so he did his best to ignore them. All the while these boys were never removed from their class, until very recently [redacted] apparently was moved to Art class instead of band for punishment. God be with the kids he sits next to in Art class.

Ethan and Nolan did not and still do not understand how "report a bully" back fired on them nor do I.

Ethan's demeanor was changing negatively, but he began telling me that things were "fine" even when they weren't. The boys didn't want to upset Mrs. Hairr or myself because unfortunately and ironically we are both suffering from the same serious chronic health condition that at times leave us debilitated. Our children, at this young age, know the effects of stress and worry on us. 2/14 This facade kept up until one day Ethan couldn't take it anymore and broke, he told me that he did not want to live anymore.!!!! He had been holding all of this in. I was, and am still horrified at the thought of my son--- the boy who loved school and loves to read and was trying to win the Accelerated Reader award, the boy who loved being a part of the Greenspun band and learning about music, the Robotics club team member, and lover of life and God and his family, seriously did not want to be alive because of two mean, vulgar, lewd, disturbed boys who sought pleasure in hurting others. I immediatley took Ethan to the doctor not knowing how to handle the immense pain our boy was in. I don't believe kids that speak of disgusting sexually explicit things and hurt others for fun are very happy people, but it does not give them the right to hurt others. Maybe these kids come from homes that could benefit from intervention as well.

I wish that you all would have told us the truth , that you were in fact INCAPABLE of providing a "Safe and Respectful Learning Environment" for our children - as your policy reads, so that we could have taken them out of your school sooner. I am in no way trained as an educator or trained in how to handle a bully situation so we relied on you and spent too much time waiting for the problem to be solved by people I assumed, and was told, could and would handle it. We trusted the school and the administration at the price of our children's well being.

And, I hope that your lack of action in the case of the lewd assault on Nolan Hairr was not because he is a boy. Shame on all of you who ignored this criminal act that I notified you of last September. If a little girl had a pencil jammed into her genitals, it would be considered horrific. It is no less humiliating or hurtful an act to lewdly assault a boy. In talking with other parents, we have heard that our children are not the only ones subjected to [redacted] assaults. I have heard of other instances he has slapped other boys' butts and has grabbed their genitalia as a bullying

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tactic. He pretended to high five or give a knuckle hand shake and when they raise up their hand, he grabs their genitals. Ethan has witnessed this done to one other child and is very disturbed by all of it. I only hope they are brave enough to come forward as this type of act is so uncomfortable, and humiliating for these poor children to speak about. I had to do plenty of digging with the help of a counselor to get at what little information I have.

We have felt very alone in all of this, struggling with how to handle it. We have gone from telling Ethan to ignore what they say, because these boys are probably just troubled and he is better off than they are because he doesn't need to hurt other people to feel empowered-- to teaching him how to physically take things into his own hands, and hit these boys back when they assault him to protect himself or Nolan because nobody was helping us at the school. But Ethan, even when we did instructed him to fight, and gave him permission to hit back, refused to stoop to their level. He doesn't have the fight in him. He just wanted to be away from all that stress and hurt and did not want to have to deal with this anymore!

Ethan and Nolan are great kids and have been removed from Greenspun in order to provide safety for them- both physically and emotionally. But, if something is not done about those who are intended to provide a safe environment for our kids, your school will continue to be riddled with bullies. Most of which will go unreported because the kids are getting the message that nothing will be done to help them. I believe that the children who witnessed the bullying in 3rd period band know that nothing changed after it was reported. I find this to be very sad considering that you all have some AMAZING teachers and great programs that are being tainted by the lack of discipline.

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Ethan and Nolan will truly miss their teachers and studies at Greenspun. They had some really great academic experiences but the constant worry about the physical and verbal assaults were too much. I would think that with all the signs and anti - bullying talk campaigns, these matters would have been taken seriously. I know of 2 children who have already taken their own lives in the Clark County School District this year as a result of bullying. I was not about to let my son be another.

Many children could have been spared the bullying and lewd physical assaults had this matter had been taken seriously and handled appropriately after it was first reported on September 15, 2011. I have enclosed the emails I sent last fall.

002235

From: MARY BRYAN <mommabryan@me.com>

62

Year
(2012-2013)

Haire, Nolan
2-8-12
My bullying expirience at Greenspun JHS

It started about a week after school started, [redacted] would poke/jab me with pencils and his finger. He would also touch my hair. It was kind of wierd, and it bothered me. I would ask him repeatidly to stop, I asked my band teacher (Mr. Beasley) where this would occur was Band class, third period, if I could move seats. I moved the next week. But what bothered me to a point where I didn't want to go to school was when he stabbed me in my genitalls. The date was Sept. 13, 2011. Even though I moved it would still continue. He also started to call me names like "Duckbill dave", or, "Faggot boy". I eventually told my parents and they reported it immediatly. I was called up to the front office and told the 6th grade counseler, Mr. Halpin, everything. A week or two later I was called up to the office again. This time I told the dean. Even though it had ceased in band, he would still call me names, and/or bump into me as we left the band room. I told my parents but this time they didn't report it,...

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they took me out of school. I was super glad that I wouldn't have to put up with anymore harrasment. I started Ek academy not soon after and I feel in a safer, more friendly enviornment. I hope though that it doesn't happen to someone else. Because, well, I'm only 11 and I hope that it will end. Thank You.

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Year
(2012-2013)

Haine, Nolan
2-8-12
My bullying experience at Greensboro JHS

It started about a week after school started. [redacted] would poke/jab me with pencils and his finger. He would also touch my hair. It was kind of wierd, and it bothered me. I would ask him repeatidly to stop. I asked my band teacher (Mr. Beasley) where this would occur was Band class, third period, if I could move seats. I moved the next week. But what bothered me to a point where I didn't want to go to school was when he stubbed me in my genitalls. The date was Sept. 13, 2011. Even though I moved it would still continue. He also started to call me names like "Duckbill dave", or "Faggot boy". I eventually told my parents and they reported it immediatly. I was called up to the front office and told the 6th grade counseler, Mr. Halpin, everything. A week or two later I was called up to the office again. This time I told the dean. Even though it had ceased in band, he would still call me names, and/or bump into me as we left the band room. I told my parents but this time they didn't report it,...

they took me out of school. I was super glad that I wouldn't have to put up with anymore harrasment. I started EK academy not soon after and I feel in a safer, more friendly enviornment. I hope though that it doesn't happen to someone else. Because, well I'm only 11 and I hope that it will end. Thank You.

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(Bryan, Ethan) Grades
Wed, Nov 21, 2012 02:14 PM Page: 1

Last Name	First Name	Middle Name	Grd	Gen	Student ID
Bryan	Ethan	Garrett	06	M	[redacted]

Show All Data | Show Marks Only

01	01	1046000O	Comp Literacy 6	McNabb, S.	B	O	N	1	C	B	P	O		6		
02	02	1024000O	Reading 6	Austin, D.	A	O		1	A	A	A	O		5		
03	03	1047000O	Beg Band 6-8	Beasley, D.	A	O		1	B	A	A	O		5		
04	04	1042010O	Math Acc 6	Christian, M.	A	O	N	1	A	A	A	S	D	4		
05	05	1080000O	Science 6	Mihelcic, J.	A	O		1	B	B	A	O		4		
06	06	1022010O	English Acc 6	Matthews, A.	B	S	N	1	C	A	B	N	D	4		

GPA 0.000

[redacted] Close

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Exhibit A
Witness: E. Bryan
Date: 1/21/16
Peggy S. Elias, RPR, CSR 274

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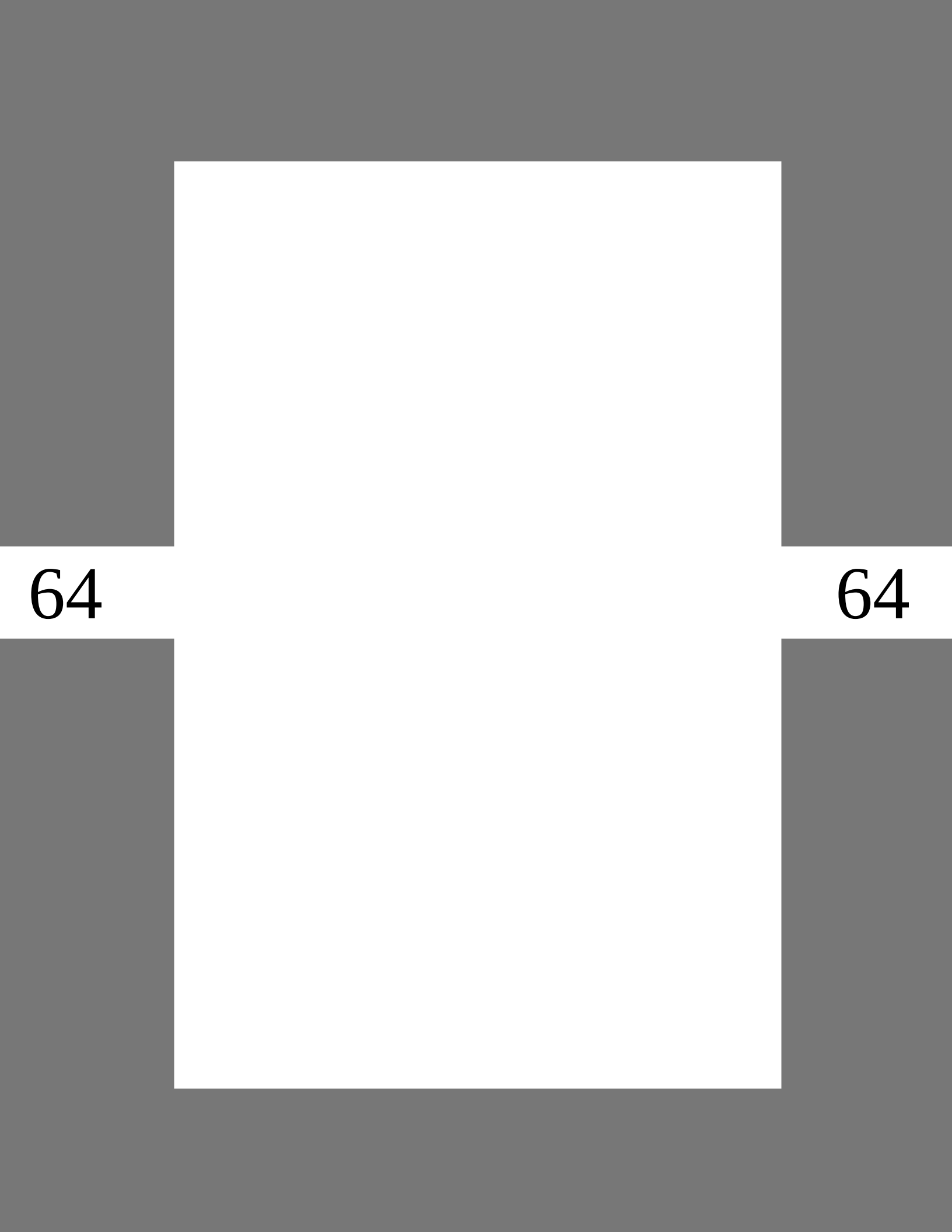
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(Hairr, Nolan) **Grades**

Wed, Nov 21, 2012 02:15 PM Page: 1

Last Name	First Name	Middle Name	Grd	Gen	Student ID
Hairr	Nolan	Michael	06	M	[redacted]

Show All Data | Show Marks Only

01	01	10460000	Comp Literacy 6	McNabb, S.	B	O	N	4		B	B	P	O		11			
02	02	10800000	Science 6	Badal, A.	A	O	N	2		A	B	A	O	N	7			
03	03	10470000	Beg Band 6-8	Beasley, D.	A	O		2		B	A	A	O		7			
04	04	10420100	Math Acc 6	Christian, M.	B	O	N	1		B	B	B	O	K	4			
05	05	10240000	Reading 6	Austin, D.	A	O				A	A	A	O		4			
06	06	10220100	English Acc 6	Matthews, A.	B	S	D			C	B	C	S	N	4			

GPA 0.000

Close

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CLERK OF THE COURT

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john@scottlawfirm.net

Attorneys for Plaintiffs, Mary Bryan, Ethan Bryan, Aimee Hairr and Nolan Hairr

DISTRICT COURT

CLARK COUNTY, NEVADA

002242

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

v.

CLARK COUNTY SCHOOL DISTRICT (CCSD); Pat Skorkowsky, in his official capacity as CCSD superintendent; CCSD BOARD OF SCHOOL TRUSTEES; Erin A. Cranor, Linda E. Young, Patrice Tew, Stavan Corbett, Carolyn Edwards, Chris Garvey, Deanna Wright, in their official capacities as CCSD BOARD OF SCHOOL TRUSTEES; GREENSPUN JUNIOR HIGH SCHOOL (GJHS); Principal Warren P. McKay, in his individual and official capacity as principal of GJHS; Leonard DePiazza, in his individual and official capacity as assistant principal at GJHS; Cheryl Winn, in her individual and official

Case No. A-14-700018-C

Dept. No. XXVII

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL A RULE 35 EXAMINATION

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capacity as Dean at GJHS; John Halpin, in his individual and official capacity as counselor at GJHS; Robert Beasley, in his individual and official capacity as instructor at GJHS;

Defendants.

Defendants' Motion to Compel psychiatric evaluations of Plaintiff's Nolan Hairr and Ethan Bryan must necessarily fail because the criteria needed for an order to undergo such examination have not been met in the slightest. NRCP 35(a) reads as follows:

> RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS
>
> (a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

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As the Nevada Supreme Court has not addressed the issue, Nevada Courts "may consult the interpretation of a federal counterpart to a Nevada Rule of Civil Procedure as persuasive authority." *Humphries v. Eighth Judicial Dist. Court of State*, 312 P.3d 484, 488 n.1 (Nev. 2013), *citing Coury v. Robison*, 115 Nev. 84, 91 n.4, 976 P.2d 518, 522 n.4 (1999). The Court in *Turner v. Imperial Stores*, 161 F.R.D. 89 (S.D. Cal. 1995) noted that a party who moves for a Rule 35 examination must show that the other party has actually placed the issue of that party's mental or physical state in controversy. *Id.* at 91, citing *Schlagenhauf v. Holder*, 379 U.S. 104 (1964):

> In *Schlagenhauf v. Holder*, 379 U.S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234 (1964), the Supreme Court noted that, unlike the rules pertaining to the permissible scope of other forms of discovery such as interrogatories and production of documents -- which require only that the information sought be "relevant to the subject matter

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involved in the pending action," and that discovery devices not be used in bad faith so as to cause undue "annoyance, embarrassment, or oppression," -- Rule 35 contains a "restriction" that the matter be "in controversy," and also requires that the movant affirmatively demonstrate "good cause." *Id.* at 117, citing F.R.C.P. 26(b) and 30(b). The Court went on to state that HN3 the "in controversy" and "good cause" requirements of Rule 35,

> . . . are not met by mere conclusory allegations of the pleadings--nor by mere relevance to the case--but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. *Id.* at 118.

The *Schlagenhauf* Court concluded that:

> Rule 35, therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of "in controversy" and "good cause," which requirements . . . are necessarily related. *Id.* at 118-19.

Turner v. Imperial Stores, 161 F.R.D. at 91.

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"To establish that the other party's mental condition is 'in controversy' within the meaning of Rule 35, the moving party must show more than that the party in question has brought a "garden-variety" claim for damages for emotional distress. *Turner,* 161 F.R.D. at 97. *See also, Preston v. City of Oakland*, No. 14-cv-02022 NC, 2015 U.S. Dist. LEXIS 10642, at * 2 (N.D. Cal. Jan. 28, 2015). *Schlagenhauf* requires discriminating application by the trial judge, in deciding "as an initial matter in every case," whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements. 379 U.S. at 118. Courts will order plaintiffs to undergo mental examinations where the cases involve, **in addition to a claim of emotional distress**, one or more of the following: 1) a cause of action for intentional or negligent infliction of emotional distress; 2) an allegation of a specific mental or psychiatric injury

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or disorder; 3) a claim of unusually severe emotional distress; 4) plaintiff's offer of expert testimony to support a claim of emotional distress; and/or 5) plaintiff's concession that his or her mental condition is "in controversy" within the meaning of Rule 35(a). *Turner*, 161 F.R.D. at 95. *See also, Ford v. Contra Costa Cty.*, 179 F.R.D. 579, 579-80 (N.D. Cal. 1998); *Preston v. Oakland, supra.*; *Said v. Cty. of San Diego*, No. 12 cv 2437 GPC(RBB), 2014 U.S. Dist. LEXIS 158065, at *4-5 (S.D. Cal. Nov. 7, 2014). As seen above, "[a]lthough the Ninth Circuit has not addressed this requirement, several district courts have applied the test adopted in *Turner*. *Hernandez v. Simpson*, No. ED CV 13-2296-CBM (SPx), 2014 U.S. Dist. LEXIS 119040, at *4-5 (C.D. Cal. Aug. 18, 2014) (collecting cases).

In the instant case, none of the *Turner* factors support CCSD's Motion. Defendants acknowledge that "plaintiffs have not made a claim for intentional or negligent infliction of emotional distress, nor offered expert testimony on emotional damages." Motion at p. 6. A number of courts have specifically held that even a claim of emotional distress, without more, is not sufficient to place plaintiff's mental condition in controversy." *Turner,* 161 F.R.D. at 95. Here, there isn't even such a claim.

As for the second factor, there is no allegation of a specific mental or psychiatric injury or disorder. On page 6, Defendants cite depression. Yet even a cursory review of Plaintiffs' Amended Complaint shows that depression was mentioned only twice, and both times in the past tense, referring to what Ethan and Nolan were experiencing while they were being bullied at Greenspun Junior High School. See, Amended Complaint, Par. 56 ("Ethan admitted that he felt terrible and depressed . . .), and Par. 61 ("Plaintiffs were depressed and no longer wanted to attend school."). Nothing in the Amended Complaint refers to either Ethan's or Nolan's present mental state. It is

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simply not part of the case.

Furthermore, Plaintiffs have not made a claim of unusually severe emotional distress. While clearly both boys suffered emotional distress back in 2011, until they left Greenspun in January/February 2012, no claim is made based on their current mental status. While Defendants may " believe that plaintiffs will argue for more than 'garden variety' emotional distress," (Motion at p. 6), such is not the case. See, attached Declaration of Allen Lichtenstein.

Plaintiff's do not make any offer of expert testimony to support a claim of emotional distress (See, attached Declaration of Allen Lichtenstein, nor do they concede that Ethan and Nolan's mental condition is "in controversy" within the meaning of Rule 35(a). Again, it is important for the Court to note that Plaintiff's have never raised the issue of either boy's current mental condition. That has all come from Defendants. Thus, because Defendants cannot meet a single one of the *Turner* factors, their Motion to Compel a Rule 35 psychiatric evaluation should be denied.

Dated this 19th day of January 2016

Respectfully submitted by:

/s/ Allen Lichtenstein
Allen Lichtenstein (State Bar No. 3992)
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Attorneys for Plaintiffs, Mary Bryan, Ethan Bryan,Aimee Hairr and Nolan Hairr

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CERTIFICATE OF SERVICE

I hereby certify that I served the following with the foregoing Response via United States Mail and/or e-mail on the 19th day of October 2015.

Matthew W. Park
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, NV 89169-5996

Mpark@LRRLaw.com

/s/ Allen Lichtenstein

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DECLARATION OF ALLEN LICHTENSTEIN

Allen Lichtenstein hereby makes the following declaration under penalty of perjury:

1. I am an attorney licensed to practice in the state of Nevada. I currently represent all Plaintiffs in the case of *Bryan v. Clark County School District* (Case No. A-14-700018-C).

2. The October 10, 2014 Amended Complaint contains no claim for relief for intentional or negligent infliction of emotional distress.

3. Plaintiffs have not and do not intend to raise the current mental condition of either Plaintiff Ethan Bryan or Plaintiff Nolan Hairr in this case.

4. Plaintiffs have not and do not intend to use as witnesses any medical or mental health expert nor any treating physician or therapist. Nor have they or do they intend to present any medical or mental health records as evidence.

5. The current state of either Plaintiff Ethan Bryan or Plaintiff Nolan Hairr is not "in controversy" in this case.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated this 19th day of January 2016.

/s/ Allen Lichtenstein

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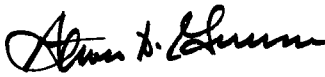

CLERK OF THE COURT

NOTC
Daniel F. Polsenberg (State Bar No. 2376)
Dan R. Waite (State Bar No. 4078)
Matthew W. Park (State Bar No. 12062)
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DWaite@lrrc.com
BBlakley@lrrc.com

Attorneys for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Plaintiffs,

vs.

CLARK COUNTY SCHOOL DISTRICT (CCSD); *et al.*,

Defendants.

Case No. A-14-700018-C

Dept. No. XXVII

DEFENDANT'S NOTICE OF DESIGNATION OF DEPOSITION TESTIMONY FOR TRIAL

Defendant Clark County School District ("CCSD") hereby submits its Designation of Deposition Testimony for Trial for persons it has been unable to serve with a trial subpoena after making a reasonable effort, under NRCP 32(a)(3)(D), and persons served but who may be unlikely to comply with the subpoena.

DESIGNATION OF C.L.'s DEPOSITION

An affidavit of service for C.L. is attached hereto as **Exhibit A**. A true and correct copy of C.L.'s deposition testimony is attached hereto as **Exhibit B**. A sealed and original copy of C.L.'s deposition testimony is being

concurrently delivered to the Court's chambers. CCSD's testimony designations are as follows:

P. 29:8–46:17.

P. 50:17–51:9.

P. 63:1–64:12.

P. 72:16–74:24.

P. 83:1–6.

DESIGNATION OF DR. EDMUND FARO'S DEPOSITION

An affidavit of service for Dr. Faro is attached hereto as **Exhibit C**. A true and correct copy of Dr. Faro deposition testimony is attached hereto as **Exhibit D**. A sealed and original copy of Dr. Faro's deposition testimony is being concurrently delivered to the Court's chambers. While Dr. Faro has been served, it is possible that he will not comply with the subpoena based on the undersigned's past experience subpoenaing doctors for trial. Accordingly, CCSD's testimony designations are as follows:

P. 8:9-11.

P. 13:17-34:5 (including deposition exhibit A).

Defendant reserves the right to use deposition testimony of any witness who has been deposed in this case for impeachment or rebuttal. Defendant reserves the right to call any of these individuals live if they can be reached and served prior to their scheduled testimony. Defendant further reserves the right to supplement or amend these designations prior to or during trial, including based upon any rulings of the Court or any other Court decisions that affect the scope of evidence in this trial. Defendant also reserves the right to introduce deposition testimony of witnesses designated as live trial witnesses by Plaintiffs, but not called during Plaintiffs' case in chief. Defendant also reserves the right to introduce testimony of witnesses designated by Plaintiff. Defendant reserves the right to add additional

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