Supreme Court Case No. S188982
2nd Civil No. B217982

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

C.A., A MINIOR, ETC., ET AL.,

Plaintiff and Appellant,

vs.

William S. Hart Union High School District and
Golden Valley High School,

Defendants and Respondents

After a Decision by the Court of Appeal
Second Appellate District, Division 1, Case No. B217982
Los Angeles Superior Court Case No. PC 044428

APPLICATION TO FILE AMICUS CURIAE OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANT AND RESPONDENT AND PROPOSED AMICUS CURIAE BRIEF

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APPLICATION OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANT/RESPONDENT

TO: THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT

I. INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f), the Education Legal Alliance of the California School Boards Association ("Amicus Curiae") respectfully requests permission to file the accompanying amicus curiae brief ("Amicus Curiae Brief") in support of Defendant/ Respondent, William S. Hart Union High School District sued as itself and as Golden Valley High School ("Defendant"). Amicus Curiae will address why school districts cannot be vicariously liable for a school employee's alleged negligent hiring, retention and supervision of a co-worker. To this end, Amicus Curiae believes the following arguments will assist the Court in reaching a disposition in accordance with applicable state law, as well as sound policy: (1) the Legislature did not create a duty on the part of individual public employees with regard to hiring, retention or supervision of other employees as evidenced by Government Code section 820.2 which exempts public employees from liability for discretionary personnel decisions; (2) employment decisions involving hiring, retention and

supervision of school employees are exclusively school district governing board functions and are not attributable to individual employees; and,

(3) the case law relied upon by the Plaintiff does not support the expansion of liability to include vicarious liability for the alleged negligence of employees with regard to hiring, retention of supervision of co-employees.

II. INTEREST OF AMICUS CURIAE

The California School Boards Association ("CSBA") is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and advocates on behalf of school districts and county offices of education.

As part of CSBA, the Education Legal Alliance (the "Alliance") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The Alliance represents its members, just under 800 of the state's approximately 1,000 school districts and county offices of education, by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in litigation where the interests of public education are at stake.

In the instant case, Amicus Curiae represent the interests of its school district members. If the Plaintiff were to prevail on this appeal, each

member of the CSBA would be dramatically and negatively impacted by the expansion of public entity liability resulting from the recognition of vicarious liability for a public employee's negligent hiring, retention and supervision of a co-worker.

III. AMICUS CURIAE BRIEF WILL ASSIST THE COURT

Amicus Curiae have reviewed Respondent's briefs and are familiar with the questions involved in this case and the scope of their presentation. Amicus Curiae believes that its Amicus Curiae Brief will assist the Court in the following key ways: (1) by addressing relevant points of law and arguments not discussed in the briefs of either party; (2) further distinguishing and clarifying the case law relied upon by the Plaintiff.

IV. CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully request that the Court accept the accompanying Brief for filing in this case.

DATED: August 12, 2011

DANNIS WOLIVER KELLY
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By: _____
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PROPOSED AMICUS CURIAE BRIEF OF THE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF DEFENDANT/RESPONDENT

COMES NOW Amicus Curiae, the Education Legal Alliance of the California School Boards Association, to offer the following Argument regarding the above captioned matter.

I. INTRODUCTION

The Education Legal Alliance of the California School Boards Association ("Amicus Curiae") submits this amicus curiae brief in support of Defendant/Respondent William S. Hart Union High School District sued as itself and as Golden Valley High School ("Defendant"), pursuant to California Rules of Court, rule 8.520 ("Amicus Curiae Brief").

As part of California School Boards Association ("CSBA"), the Education Legal Alliance (the "Alliance") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. By submitting this Amicus Curiae Brief, CSBA asserts its vital interest in the outcome of this matter and in this Court's review of the issues raised by this action.

The law is well settled that a school district employee's molestation of a student is conduct outside the course and scope of employment with the school district and therefore no vicarious liability attaches. Plaintiff asks

this Court to make an end run of this rule of law to find that an employee of the school district has individual liability for negligent hiring, retention and supervision with regard to the same illegal conduct, conduct that is as a matter of law *outside the course and scope of employment*. Not only is there no statutory basis for such liability, Plaintiff seeks to expand the law to impose a duty where the Legislature has declined to do so. Indeed, the Legislature has expressly rejected the liability Plaintiff seeks to impose upon public entities and public employees.

Amicus Curiae believes the following arguments will assist the Court in reaching a disposition in accordance with applicable state law, as well as sound policy: (1) the Legislature did not create a duty on the part of individual public employees with regard to hiring, retention or supervision of other employees as evidenced by Government Code section 820.2 which exempts public employees from liability for discretionary personnel decisions; (2) employment decisions involving hiring, retention and supervision of school employees are exclusively school district governing board functions and are not attributable to individual employees; and, (3) the case law relied upon by the Plaintiff does not support the expansion of liability to include vicarious liability for the alleged negligence of employees with regard to hiring, retention of supervision of co-employees.

As correctly pointed out by the Defendant in its Answer Brief, Plaintiff seeks to drastically expand the potential liability of school districts

and other public entities beyond the parameters contemplated and established by the California Legislature and existing case law. Plaintiff casts the theory as a duty with regard to students when in fact Plaintiff asks this Court to create a duty on the part of individual employees to take action related to conduct of other employees undertaken outside the scope of employment. Additionally, Plaintiff seeks to create an all-together new cause of action and source of personal liability for public and private sector employees: negligent hiring, retention and supervision of co-workers. Plaintiff's position, however, finds no support in existing case law or statutory authority.

II. STATEMENT OF THE CASE

A. FACTS AND PROCEDURAL HISTORY

Amicus Curiae hereby adopts and incorporates by reference the factual background and procedural history set forth in the Statement of The Case of Answer Brief On the Merits. (Answer Brief, pgs. 6-8.)

B. ISSUE PRESENTED

Amicus Curiae hereby adopts and incorporates by reference the "Issue Presented" set forth in Answer Brief On the Merits. (Answer Brief, pg. 1.)

III. ARGUMENT

Vicarious school district liability for negligent hiring, retention and supervision would result in the expansion of public entity liability well

beyond the scope contemplated by the Legislature. Under Government Code section 815, "Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." "This section abolishes all common law or judicially declared forms of liability for public entities . . . ." (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899 [citing the Legislative Committee Comment to Gov. Code, § 815].) As a result, "a public entity cannot be held liable for common law negligence." (*McCarty v. State of California Dept. of Transp.* (2008) 164 Cal.App.4th 955, 977.) "[T]he intent of the California Tort Claims Act is not to expand the right of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances." (*Williams v. Horvath* (1976) 16 Cal.3d 834, 838.)

The Court of Appeal determined that, as a matter of law, Plaintiff could not maintain a direct cause of action against the Defendant school district for negligently hiring, retaining or supervising the guidance counselor because there is no statutory basis for such a claim. The lower court also determined that the Defendant could not be vicariously liable for the conduct of the guidance counselor because the alleged acts or omissions of the counselor were clearly outside the scope of employment. Notably, the Plaintiff's current appeal does not to challenge the Court of Appeal's

holding on these two issues. Yet, Plaintiff asks this Court to find that some how individual employees have a duty with regard to the guidance counselor's illegal conduct – conduct undisputedly outside the course and scope of her employment with the District.

The lower court's holdings on both of these claims fall in line with the purpose of the Tort Claims Act to limit public entity liability to rigidly delineated circumstances. However, Plaintiff's cause of action for vicarious school district liability based on employees' alleged negligent hiring, supervision and retention of a co-worker is novel claim unsupported by statute or case law. The claim has been conjured by the Plaintiff in an attempt to skirt the statutory requirements and legislative intent behind the Tort Claims Act, and should be rejected by this Court.

Recognition of a claim for vicarious school district liability in this instance would undoubtedly open the flood gates of litigation against public entities. If Plaintiff's vicarious liability claim is recognized by this Court, as a matter of form, future plaintiffs will name department heads, and other supervisors in the individual capacity in every lawsuit. As a result, school districts and other public entities will be named and forced to litigate and defend countless claims on the basis of vicarious liability as an end run to the rule of law that school districts are not liable for the intentional misconduct of its employees.

As noted by the court in *Thorn v. City of Glendale*:

> [In] view of the exceedingly high cost of modern litigation, from the point of view of a defendant public entity, merely being named in a tort suit places it in a lose/lose situation. Except in those most rare instances permitting the recovery of attorney fees, the more procedural stages through which it must pass prior to vindication, the greater will be its "victorious losses." This problem is particularly acute for today's financially stressed governmental bodies. Consequently, if governmental bodies' immunity from respondeat superior liability is to be forfeited whenever a plaintiff's counsel elects to add a second count founded on the same facts, but conclusionally couched in terms of negligent supervision, even the limited protection they are now afforded will be essentially eviscerated.

(*Thorn v. City of Glendale* (1994) 28 Cal.App.4th 1379, 1385.) Amicus Curiae asks this Court to reject Plaintiff's attempt to expand school district liability as both legally unfounded and contrary to sound and established public policy.

A. SCHOOL DISTRICT EMPLOYEES CANNOT BE PERSONALLY LIABLE FOR NEGLIGENT HIRING, RETENTION OR SUPERVISION

As is discussed at length in the Defendant's Answer Brief on the Merits ("Answer Brief"), a public entity may only be vicariously liable for an employee's acts or omissions if the individual employee would also be personally liable for the same conduct. (Answer Brief, p. 10-12; Gov. Code, §§ 815.2, 820.) As Plaintiff states the issue, "[t]he plaintiff is seeking to impose liability on the entity based upon the negligent conduct of the employees who were responsible for the hiring, retention or

supervision of the unfit employee who directly injured the plaintiff." (Opening Brief, pp. 3-4.) However, Plaintiff's position fails as contrary to law.

Plaintiff has identified no published California authority in which a public or private employee has been held personally liable for negligently hiring, retaining or supervising a co-worker.[1] In addition to the arguments put forth in the Answer Brief disputing the Plaintiff's position, Amicus Curiae submits that not only is there no statutory basis for a negligence claim against individual employees, the Legislature has expressly rejected such liability. This is best evidenced by section 820.2 of the California Government Code and case law interpreting same, which provides that public employees are not liable for injury resulting from personnel decisions such as recommendations related to hiring, discipline or retention. Further, the ultimate decision to hire, retain, suspend or discipline a school employee is exclusively reserved for the governing board of the school district. As such, the individual employee has no independent duty with regard to personnel decisions.

Because a public employee cannot possibly be liable for the negligent hiring, retention or supervision of a co-worker, the Plaintiff's claim for vicarious liability against the Defendant school district fails.

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[1] Like the Defendant, Amicus Curiae has been unable to locate a published California case that held a public employee liable for negligently hiring, retaining or supervising a co-worker.

1. The Legislature Has Expressly Rejected Public Employee Liability For Acts or Omissions Related to Hiring, Rentention or Supervision

Plaintiff relies entirely upon Government Code section 820 to assert a duty on the part of a public employee with regard to hiring, retention and supervision. From there, Plaintiff asserts the school district is liable under section 815.2. However, Plaintiff ignores key language of section 820 as well as section 820.2 which preclude the duty Plaintiff asserts:

> (a) Except as otherwise provided by statute (*including Section 820.2*), a public employee is liable for injury caused by his act or omission to the same extent as a private person. . . .

(Emphasis added.) In other words, section 820 is subject to the limitations of Government Code section 820.2 which provides: "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." To the degree the public employee is immune, so too is the public entity. (Gov. Code, § 815.2, subd. (b).) A public entity's liability is dependent upon liability of the individual employee, so that if the employees' conduct is protected, such protection necessarily extends to the school district. (Gov. Code, § 815.2, subd. (b); *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1434.)

Plaintiff alleges "that employees of the William s. Hart Union High School District negligently hired, retained or supervised [the guidance

counselor] . . . ." However, the alleged acts or omissions against the Defendant school district's employees constitute discretionary personnel and employment "acts or omissions" that are not subject to liability pursuant to section 820.2.

'"Generally speaking, a discretionary act is one which requires the exercise of judgment or choice. Discretion has also been defined as meaning equitable decision of what is just and proper under the circumstances."' (*Kemmerer, supra*, 200 Cal.App.3d at 1437 [quoting *Burgdorf v. Funder* (1966) 246 Cal.App.2d 443, 448].) Universally, the acts of public employee supervisors related to the hiring, supervision, discipline and retention of co-workers, have been characterized by the courts as discretionary acts that are exempt from liability under section 820.2. (*Kemmerer, supra*, 200 Cal.App.3d 1426; *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 981; *Johnson v. State of California* (1968) 69 Cal.2d 782; *Nicole M. v. Martinez Unified School District* (N.D. Cal. 1997) 964 F.Supp. 1369; *Grosz v. Lassen Community College Dist.* (E.D. Cal. 2008) 572 F.Supp.2d 1199.)

In *Caldwell*, the superintendent brought an action for discrimination against individual board members who voted against renewal of his contract with the school district. This Court held "that votes by members of a school district's governing board whether to renew the superintendent's employment contract qualify as discretionary acts within the meaning of

section 820.2." (*Caldwell, supra,* 10 Cal.4th 972, 982.) Because the acts were discretionary, the plaintiff in *Caldwell* could not maintain claims against public employees for discrimination under the California Fair Employment and Housing Act. (*Id.* at 989.)

Further, in *Kemmerer*, the court held that the decision of the plaintiff's supervisors to recommend that the governing board institute disciplinary proceedings against the plaintiff was a policy decision involving the exercise of discretion exempt from liability. (*Kemmerer, supra*, 200 Cal.App.3d at 1437-1439.) The court found that such employment decisions involve the exercise of analysis and judgment as to what is just and proper under the circumstances, and is not a purely ministerial act. (*Id.*)

Here, Plaintiff alleges that an unidentified school district employee negligently hired, retained and supervised the guidance counselor. Under *Caldwell* and *Kemmerer*, employment decisions, including recommendations regarding the discipline and retention of school employees, necessarily involve the exercise of analysis and judgment in which a conscience balancing of risks takes place. (S*ee also Grosz v. Lassen Community College Dist., supra,* 572 F.Supp.2d at 1209, overruled on other grounds, [the alleged acts of the president and superintendent against school district employees, such as discipline at board meetings, reprimands, and decisions regarding job status were all "discretionary

employment actions" entitled to immunity under section 820.2].) These acts are considered discretionary and are accorded protection from liability under section 820.2. Thus, the Legislature has determined that school district employees are not subject to liability for acts or omissions related to the hiring, retention or supervision of employees; and therefore the school district had no liability for acts or omissions of its employees related to the guidance counselor. Plaintiff's claim of vicarious school district liability fails.

In *Nicole M. v. Martinez Unified School District*, a female junior high school student who was sexually harassed by male students at her school, alleged that the "[district] and [superintendent] negligently retained, trained, supervised, and disciplined [the principal] and other personnel; [and the district, superintendent and principal] negligently inflicted emotional distress on plaintiff." (*Nicole M. v. Martinez Unified School District , supra,* 964 F.Supp. at 1372.) The defendants argued that they were immune from the claims because the acts or omissions on which the claims were based – the superintendent's negligent retention, supervision, training and discipline of the school principal and other school personnel, and the failure to investigate plaintiff's claims of sexual harassment – were discretionary. (*Id.*) The court agreed, finding that "[d]ecisions by a school principal or superintendent to impose discipline on students and conduct investigations of complaints necessarily require the exercise of judgment or

choice, and accordingly are discretionary, rather than ministerial, acts. [citation omitted] As a result, neither [the principal] or [superintendent] are liable under plaintiff's fourth or fifth claims for those alleged acts or omissions . . . ." (*Id.*)

Nicole M. presents a factual situation nearly identical to the case at bar. In *Nicole M.* the plaintiff alleged that the principal's supervisors negligently retained, trained, supervised and disciplined the principal, which resulted in a student under the principal's control to suffer an injury. Here, Plaintiff alleges that an unidentified school employee negligently hired, retained and supervised the guidance counselor, which resulted in an injury to the Plaintiff. Like the supervisor in *Nicole M.*, here the alleged acts and omissions of an unidentified school district employee related to hiring, retaining and supervising the guidance counselor constitute discretionary acts entitled to immunity under section 820.2.

As a matter of law, no school employee can be liable for personnel decisions related to the hiring, retention and supervision of a co-worker. Plaintiff's attempt to expand school district liability to include vicarious liability for allegedly negligent personnel related decisions stands contrary to law and contrary to public policy designed to limit public entity liability and to preclude claims against the employee or the school district employer. (Gov. Code, §§ 815.2(b); 820.2.)

2. Decisions Involving Hiring, Retention and Suspension of School Employees are Exclusively School Board Functions

The statutory framework governing the hiring, retention and supervision of school district employees leaves no room for personal liability for individual employees. Personnel decisions are exclusively reserved for the governing board of the school district, not the individual employee. The official public body is vested with the authority to make ultimate personnel decisions; employees in their individual capacities do not possess the authority to hire, retain, discipline, suspend or terminate other public employees. Moreover, employment decisions are subject to a myriad of statutory requirements as well as collective bargaining provisions that further distance individual employees from employment decisions affecting other employees. Because individual employees do not possess this ultimate authority, they cannot possibly be personally liable for the negligent hiring, retention or supervision of co-workers. As such, the Plaintiff's claim of vicarious liability against the Defendant school district is unsustainable.

The hiring and assignment of certificated school employees, like guidance counselors, is controlled by the governing board of a school district. (Ed. Code, §§ 44830 et seq.; *see also* Ed. Code, § 41401 [classifying counselors as certificated employees].) Various provisions of the Education Code as well as case law demonstrate that the governing

board of a school district, not the individual employees, control essential personnel decisions. (*See e.g.*, Ed. Code, § 35020 [the governing board of each school district is responsible for fixing and prescribing the duties to be performed by all school employees]; *Thompson v. Modesto City High Sch. Dist.* (1977) 19 Cal. 3d 620, 623 [school districts in the normal course of administration have broad powers to reassign their permanent employees to different positions].)

In addition to authority over basic hiring decisions, the governing board of a school district, not the individual employees of the district, is responsible for determining whether an employee or prospective employee has been convicted of sexual offenses and whether they should be hired and/or retained in light of such conviction or designation as a sexual psychopath. (Ed. Code, §§ 44836(a)(1) ["The *governing board* of a school district shall not employ or retain in employment persons in public school service who have been convicted, or who have been convicted following a plea of nolo contender to charges, of any sex offenses . . . ."] [emphasis added], § 44837 ["*Governing boards* of school districts shall not employ or retain in employment any person in public school service who has been determined to be a sexual psychopath . . . ."].)[2] The fact that many provisions of the Education Code refer to "school district" or

[2] Plaintiff has not expressly alleged in the Complaint that the guidance counselor was convicted of any sexual offense at the time she was hired.

"superintendent" rather than the "governing board" renders the specific reference to the "governing board" in this context particularly meaningful.

Similarly, employment actions in response to wrongful conduct are governed by the Education Code. (Ed. Code, §§ 44930 et seq.) Under this statutory scheme, only the governing board is vested with the authority to suspend, dismiss or reinstate school employees. (Ed. Code, §§ 44932, 44934, 44938, 44939, 44940, 44943, 44946, 44948.) It is worth noting that in the context of the suspension and termination of certificated employees, it is the governing board's employment decisions that are subject to review through hearing procedures and may be ultimately overturned by the Commission on Professional Competence. (Ed. Code, §§ 44934, 44944.) This further demonstrates that individual employees are not afforded the right or duty to make employment decisions. Nowhere does the Education Code impose a duty upon the school district employees to take particular actions related to other employees. Instead, statutory law expressly exempts public employees from such liability reflecting a Legislative determination that no such duty exists. (Gov. Code, § 820.2.)

The statutory scheme set forth in the Education Code establishes that the governing board of a school district maintains control over personnel decisions within the district. Despite the fact that individual district employees possess no authority to make the determination of whether to hire, retain or suspend co-workers, Plaintiff argues that individual

employees should nonetheless be held liable for negligently hiring, retaining and supervising co-workers. This leap of logic finds no support in the statutory framework of the Education Code or in California case law.

Further, the disparity between the authority school employees possess over their co-worker's employment status as compared to the authority they possess over students, highlights that the Legislature did not intend to create a duty with regard to supervision of co-employees, invalidating Plaintiff's effort to create a duty by extension of the district's special relationship to its students. While the Education Code provides individual employees with no authority to hire, retain or suspend co-workers, the Code does provides school employees with physical control over the conduct of students. Pursuant to Education Code section 44807:

> Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess. A teacher, vice principal, principal, or any other certificated employee of a school district shall not be subject to criminal prosecution or criminal penalties for the exercise during the performance of his duties, of the same degree of physical control over a pupil that a parent would be legally privileged to exercise . . . .

This authority to physically control the conduct of students falls in line with the recognized duty of school employees to supervise and protect students from the harmful conduct of other students. As discussed at length in Plaintiff's Opening Brief and Reply Brief, and acknowledged in Defendant's Answering Brief, certain school employees have a duty to

supervise and protect students from the harmful conduct of other students. This duty necessitates that school employees have the authority to physically control the conduct of students. Without that authority, school employees would not have the means to protect students from the harmful conduct of other students. What Plaintiff fails to cite is any authority imposing similar rights or duties as between employees.

Plaintiff relies upon the duty to protect students from other students to expand the duties of school employees to include a duty to protect students from the conduct of co-workers. However, Plaintiff fails to acknowledge that school employees are not vested with authority to act upon that purported duty. If an individual school employee does not have the authority to hire, retain, or suspend a co-worker, that employee cannot possibly be liable for negligently hiring, retaining or supervising a co-worker. Additionally, the lack of authority over personnel decisions provided by the Legislature to school employees reflects the absence of a duty to protect students from the actions of other employees, as well as the absence of personal liability for negligent hiring, retention and supervision of co-workers. The Legislature's enactment of the exemption from liability for personnel related actions further establishes that employees do not hold the duty asserted by Plaintiff. (Gov. Code, § 820.2.)

In the past, this Court has considered and rejected the notion of personal liability for employment decisions in the private sector. In the

context of the California Fair Employment and House Authority, non-employer individuals cannot be held liable for discrimination or retaliation claims. (*Reno v. Baird* (1998) 18 Cal.4th 640; *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158.) In holding that liability did not extend to individual employees on retaliation claims, this Court considered that individual liability would constrain supervisors' ability to make personnel decisions because they would be concerned about their personal exposure to a lawsuit. (*Jones, supra*, 42 Cal.4th at 1164-1167.) Additionally, because management decisions are often made collectively by a group of people, imposing liability on the corporate whole rather than each individual who participated in the collective decision is more sensible. (*Id.* At 1167 [*citing Reno, supra*, 18 Cal.4th at 662].) While not directly on point, the policy reasons and rational used in *Jones* and *Reno* to reject the imposition of liability on non-employer individuals applies directly to the issue at bar.

In the public sector, the Court has expressly held that the exemption from liability set forth in Government Code section 820.2 applied to claims that public employees violated the Fair Employment and Housing Act. (*Caldwell, supra,* 10 Cal.4th 972.)

Because personnel decisions related to the hiring, retention and discipline of school employees rests with the governing board of the school district, an individual employee cannot be personally liable for negligently

hiring, retaining or supervising a co-worker. Consequently, the Defendant school district cannot be vicariously liable under section 815.2 of the Government Code.

B. THE AUTHORITIES CITIED BY THE PLAINTIFF DO NOT SUPPORT THE IMPOSITION OF LIABILITY

The authorities relied upon by the Plaintiff throughout its Opening Brief and Reply Brief do not support the view that public employees may be held personally liable for negligent hiring, retention and supervision of co-workers. While the authorities cited by the Plaintiff generally recognize a special relationship between school employees and students and, in some instances, impose personal liability on the school employees for their failure to protect students from the harmful conduct of other students, no opinion cited by Plaintiff imposes personal liability on a public or private employee for their negligent hiring, retention or supervision of a co-worker. In the school district context, no statutory or case authority holds that the special relationship between a school district and its students creates a duty on the part of employees with regard to hiring, retention, or supervision of other employees.

In his Reply Brief, Plaintiff includes a survey of the case law he feels most supports his arguments. Plaintiff, however, fails to recognize or address several distinctions in the cases cited that render them inapplicable to the case at bar. It is also worth noting that a district or its employees

would be hard pressed to foresee risk of harm from conduct that is, as a matter of law, outside the course and scope of employment. (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1010 [sheriff's sexually harassing conduct toward other employees "fell outside the scope of his employment" citing *John R. v. Oakland Unified School District* (1989) 48 Cal.3d 438.)

In *M.W. v. Panama Buena Vista Union Sch. Dist.* (2003) 110 Cal.App.4th 508, an eighth grade special education student filed suit against a school district after he was sodomized by another student in the school bathroom. The court recognized that there existed a special relationship between a school district and its students resulting in the imposition of an affirmative duty to protect its students from other students. The court noted that "[t]he purpose of the law requiring supervision of students on school property is *to regulate students' conduct* 'so as to prevent disorderly and dangerous practices which are likely to result in physical injury to immature scholars.'" (*Id.* at 517-518 [emphasis added].) Importantly, the court in *M.W.* couched its recognition of the district's duty to supervise students' conduct on "the foreseeability of harm to special education students." (*Id.* at 521.) Here, there is no allegation that Plaintiff is a special education student. Further, the duty recognized in *M.W.* is the duty of *the district* to supervise and protect against student on student conduct that could result injury. *M.W.* does not discuss or acknowledge a

duty for school employees to protect students from the conduct of other school employees.

In *Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal.4th 1066, a student who had been molested by a school administrator brought an action against the defendant school district alleging that the defendant failed to divulge the administrator's history of sexual molestations in a recommendation letter written to the student's school. The court determined that the writer of a letter of recommendation owed to prospective employers and third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury. (*Id.*) However, the duty recognized here is a general duty that does not arise out of any special relationship. *Randi W.* does not support an action for individual employee liability for negligent supervision of a co-worker.

In *John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, the court concluded that a school district could not be held liable under respondeat superior for its employees' sexual offenses. Plaintiff relies heavily on dicta from the court that "[a]lthough it is unquestionably important to encourage both the careful selection of these employees and the close monitoring of their conduct, such concerns are, we think, better addressed by holding school districts to the exercise of due care in such

matters and subjecting them to liability only for their own direct negligence in that regard." As discussed in the Answer Brief, the portion of the opinion relied upon by the Plaintiff was joined by two of the seven justices, and constitutes dicta of the court. Further, as noted by the court below and undisputed by Plaintiff, no statute allows for a direct action for negligent hiring or supervision practices against a public entity. Nor does this language suggest individual employees have the duty to control or otherwise take action as to the conduct of other employees. Therefore, this dicta *John R.* is unpersuasive and irrelevant to the issue at bar.

Leger v. Stockton Unified Sch. Dist. (1988) 202 Cal.App.3d 1448, involved a suit from a student against his school, principal and wrestling coach for failing to protect him from attack by a nonstudent in a high school restroom. Like *M.W., supra*, the duty discussed in *Leger* is limited to supervision of the student and is based on the school employees' authority to control student conduct – not the supervision of a co-worker.

In *Virginia G. v. ABC Unified Sch. Dist.* (1993) 15 Cal.App.4th 1848, the court held that a teacher's conduct in molesting a student could not be imputed to the District. However, the court noted that "if individual District employees responsible for hiring and/or supervising teachers knew or should have known of [the teacher's] prior sexual misconduct toward students, and thus, that he posed a reasonable foreseeable risk of harm to

students under his supervision . . . the employees owed a duty to protect the student from such harm."

While the *Virginia G.* court cites *John R., supra*, and *Leger, supra,* for this proposition, neither case extends the generally recognized duty to supervise students to include supervision of co-workers. Nor does either case impose liability on school employees for negligent hiring or supervision of co-workers. Further, the *Virginia G.* Court included no analysis of Government Code section 820.2 regarding employee immunity for discretionary acts; nor did it contemplate the lack of authority for an individual school employee to hire, retain, discipline or suspend a co-worker. Instead, the *Virginia G.* Court made its leap without careful analysis, citation to relevant authority, or consideration of policy. (*See de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 254 [concluding that "Virginia G.'s reliance on the John R. dicta was erroneous and should not be perpetuated.].) Therefore, little, if any, weight should be accorded to this dicta in *Virginia G.*

Finally, *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, involved a wrongful death action against a school district and teachers for failing to provide adequate supervision when a student was killed by another student during lunch while "slap boxing." The court recognized a duty to "supervise at all times the conduct of children on the school grounds and to enforce those rules and regulations to their protection." (*Id.*

at 747 [citations omitted].) Similar to *M.W.*, the duty recognized in *Dailey* is not a duty to protect children from all potential harm or supervise co-workers who are in charge of supervising student conduct, but to supervise and protect students from other students. Further, the employees found to be personally liable in *Dailey* were the head of the physical education department and another teacher within that department, both of whom admittedly were directly responsible for supervising the plaintiff. Here, there is no indication or allegation that the unidentified supervisor of the Counselor was responsible for the supervision of students or Plaintiff in particular. More importantly, this case does not stand for a general proposition that school employees owe a duty to students to protect them from the acts or omissions of other school employees.

While the authorities cited by the Plaintiff generally recognize a duty owed by the school district and certain school employees to students, the duty recognized is to supervise and protect students from the harmful conduct of other students as stems from statutory obligations. No opinion cited by Plaintiff imposes (or supports the imposition of) personal liability on a school employee for their negligent hiring or supervision of a fellow employee.

Further, the Plaintiff fails to explain how the special relationship between the district and the student functions to expand the duties of school employees. As noted by the Court of Appeal, while a special relationship

between the Defendant school district and student exists, that special relationship does not create liability in the absence of a statutory basis for direct liability against the district. Because the existence of a special relationship does not create liability for the school district, it stands to reason that a special relationship that exists between the student and district cannot create liability for an individual employee.

C. THE POLICY OF THE TORT CLAIMS ACT SUPPORTS A HEIGHTENED PLEADING STANDARD

On the thinnest of allegations, Plaintiff seeks to bring the District into litigation on the grounds that unidentified employee(s) of the District knew or should have known of an unspecified history of sexual misconduct by the guidance counselor. In addition to the lack of legal basis for the claim, Plaintiff offers no *facts* to support these contentions. Amicus Curiae submits that in light of the intent of the California Tort Claims Act to "confine potential governmental liability to rigidly delineated circumstances" and the acknowledged fact that for a public entity, "merely being named in a tort suit places it in a lose/lose situation," plaintiffs must do more than offer template language to initiate litigation against a public entity. (*Williams v. Horvath, supra,* 16 Cal.3d at 838; *Thorn v. City of Glendale, supra,* 28 Cal.App.4th at 1385.)

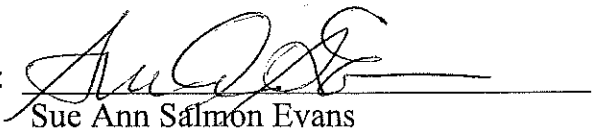
A pleading standard must be imposed that serves not only to give notice to school district defendants of the specific conduct against which

they must defend, but also to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect defendants from the harm that comes from being subject to charges of misconduct, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis. (*See*, *McCann v. Bank of America* (2011) 191 Cal.App.4th 897, 909 re policy behind heightened pleading standard.)

IV. CONCLUSION

Based on the foregoing, Amicus Curiae urge the Court to affirm the holding of the Court of Appeal in its entirety. Expansion of liability as proposed is contrary to both law and the sound public policy.

DATED: August 12, 2011 DANNIS WOLIVER KELLY

By: 

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c) of the California Rules of Court, this Amicus Curiae Brief Of The Education Legal Alliance Of The California School Boards Association In Support Of Defendant/Respondent its was produced using 13-point Roman type including footnotes and contains approximately 7,931 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: August 12, 2011

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 301 East Ocean Boulevard, Suite 1750, Long Beach, CA 90802.

On the date set forth below I served the foregoing document described as **APPLICATION TO FILE AMICUS CURIAE OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANT AND RESPONDENT AND PROPOSED AMICUS CURIAE BRIEF** on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **(VIA U.S. MAIL)** I caused such document to be placed in the U.S. Mail at Long Beach, California with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

☐ **(VIA OVERNIGHT MAIL)** I caused such envelope to be deposited at an authorized "drop off" box on that same day with delivery fees fully provided for at 301 East Ocean Boulevard, Suite 1750, Long Beach, CA 90802, in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing August 12, 2011 at Long Beach, California.

Ila Friend

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