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**State of Minnesota
In Court of Appeals**

JW on behalf of BRW, a minor child,

Appellant,

v.

287 Intermediate District; Independent School District #271,
a/k/a Bloomington Public Schools; and Adam Services, Inc.,

Respondents.

**BRIEF AND APPENDIX OF RESPONDENT
INDEPENDENT SCHOOL DISTRICT #271**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

- I. BASED ON THE FACTS OF RECORD, AS APPLIED TO MINNESOTA LAW,
IS RESPONDENT INDEPENDENT SCHOOL DISTRICT #271 ENTITLED TO
SUMMARY JUDGMENT?

Minn. Stat. § 466.03.

Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988).

P.L. v. Aubert, 545 N.W.2d 666 (Minn. 1996).

STATEMENT OF THE CASE AND FACTS

Appellant/Plaintiff JW on behalf of BRW, a minor child (B.R.W.), challenges the grant of summary judgment to Respondent/Defendant Independent School District #271 and Respondent/Defendant 287 Intermediate School District. (Appellant's Appendix [A] 1539.) B.R.W. also challenges the grant of partial summary judgment to Respondent/Defendant Adam Services, Inc. (*Id.*) The material facts with regard to Respondent/Defendant Independent School District #271 are as follows:¹

A. C.R. Was Placed in Hosterman's STRIVE Program With Accommodations Made for C.R.'s Special Needs During Transport.

Deitra Yarbro is a social worker for the Respondent/Defendant Independent School District #271, a/k/a Bloomington Public Schools (hereinafter Bloomington School District #271). (Yarbro Depo. p. 5; A. 182.) When C.R., then age 13, moved into Bloomington School District #271, Ms. Yarbro's job was to set up an individual education plan meeting where C.R.'s educational plan would be discussed and determined. (*Id.* at 8-9; A. 182-183; A. 202; A.967.) An individual education plan (IEP) is developed for students who have qualified for and meet the criteria for special education. The plan is prepared by an IEP team. (*Id.* at 9; A. 183, 203.)

¹ Unfortunately, Appellant B.R.W.'s brief will often cite to B.R.W.'s memorandum submitted to the district court and not to the evidence of record. The record cites in Independent School District #271's brief are to the record itself. In addition, at times, citations in B.R.W.'s brief do not support the brief's statements. For example, at pages 6-7 of B.R.W.'s brief, counsel discusses at length a discharge summary received from Lutheran Social Services. The pages of the record cited – A. 1253, 1269-70 and 1459-61 – do not refer to Lutheran Social Services and are not to any purported discharge summary.

C.R. is a ward of the state. (A. 202.) In February, 2005, C.R. moved into the Mount Olivet group transition home located in Bloomington School District #271. (Yarbro Depo. p. 8; A. 182.) Because C.R.'s special educational needs were best met by a program outside Bloomington School District #271, C.R. was referred to Independent School District #287 (School District #287) – the Hosterman Education Center. (A. 202; Yarbro Depo. pp. 10-12; A. 183; Taffe Depo. p. 10; A. 544; A. 960.) Pursuant to a Joint Powers Agreement with other school districts, School District #287 provides twenty-five Special Education Programs at nine different sites, including the Hosterman Education Center (Hosterman) located in New Hope. (A. 348.) Hosterman serves students with developmental cognitive disabilities as well as emotional behavioral disorders. (Taffe Depo. pp. 8-9; A. 543-544.) School District #287 does not provide transportation for students from their residence and to and from Hosterman. Transportation of each student to and from Hosterman is provided by the student's home school district. (A. 348-349.)

Two IEP meetings regarding C.R. were held. (Yarbro Depo. p. 14; A. 184.) Present at those IEP meetings, in addition to Ms. Yarbro, were C.R.'s guardian ad litem, C.R.'s guardian, a representative from Hennepin County and a representative from School District #287. Also present was Margaret Nelson, Mount Olivet's housing coordinator who is also C.R.'s appointed surrogate parent. (*Id.* at 17; A. 185; Taffe Depo. pp. 29-31; A. 549; A. 1247.) In addition, the IEP meetings were attended by Kaylee N. Taffe. Ms. Taffe is a developmentally cognitively disabled instructor and specializes in the area of students having multiple mental impairments. (Taffe Depo. pp. 5, 8-9; A. 543-544.)

She works for School District #287 Hosterman's STRIVE Program for intermediate middle schoolers. (*Id.* at 5; A. 543.)

At the IEP meetings, it was discussed if STRIVE was the appropriate placement for C.R. (*Id.* at 11; A. 544.) C.R.'s main disability is an emotional behavioral disorder (EBD). (*Id.* at 17; A. 546.) C.R. is a seventh grade student who was functioning academically at a third grade level. (A. 1313.) Discussed at those meetings was the fact that C.R. had a history of intimidating/assaultive behavior and that he had a history of sexually inappropriate behavior. (Yarbro Depo. pp. 12-13, 16-17; A. 183-185.) It was also discussed that C.R. should not be around children and needs adult supervision. (*Id.* at 17; A. 185.) C.R.'s legal guardian specifically discussed C.R.'s behavior while at Homme, a residential treatment center located in Wisconsin. (*Id.* at 13, 33-34; A. 184, 189, 200, 1308.) *See* Summary of Team Meeting ("At Homme [school in Wisconsin] [C.R.] became aggressive when he moved to older unit (but on younger unit sexual inappropriateness behavior occurred) but now at MORA for last 3 months he has had 0 aggression, 0 sexual inappropriateness.") (A. 200.)

At the IEP meetings, accommodation for C.R. on the school bus was also discussed. (Yarbro Depo, pp. 17-18; A. 185.) The discussion focused on whether a bus aide was needed. (*Id.*) C.R.'s guardian recommended that C.R. sit behind the driver on the bus. (Taffe Depo. p. 35; A. 550.) The ultimate decision of the IEP team was that an aide was not needed and the "[l]east restrictive would be [for C.R. to] sit by himself." (Yarbro Depo. p. 18; A. 185; A. 203.) C.R.'s IEP recommended that special seating be

given to C.R. and “if needed, a bus assistant will be present to help with behavioral issues.” (A. 970.)

If there is an aide assigned to a student on a bus, Bloomington School District #271 will not assign a second aide to that bus. (A. 898.) If there are several students going to the same destination, the students would be consolidated on a single bus so that only one bus aide is necessary. (*Id.*) The bus aide is expected to deal with all students on the bus, even if the aide was initially assigned to assist a specific child. (*Id.*) The cost of having multiple aides on one special education bus is prohibitive. The cost is \$1,658 per month for an aide to ride a bus containing five students. (*Id.*)

Based on the information available, and based on Ms. Yarbrow’s education, training and experience, the IEP team decided that the accommodation for busing information would not include information that C.R. had a history of acting out sexually, nor an instruction that he should not be allowed to be with children under age 12 without adult supervision. (A. 203.) This decision was based upon a number of factors which were carefully weighed, such as providing C.R. with an appropriate education in the least restrictive environment, information that C.R. did not have a criminal history relating to his history of acting out sexually, and information that he had not behaved in a sexually inappropriate manner for quite some time. The IEP team was also aware that an adult driver would always be present on the bus. (A. 204.) The decision was also based on student data confidentiality and privacy concerns. The IEP team concluded it was

inappropriate for people outside of the IEP team to know the reasoning for the accommodation. (*Id.*)

Judy Verplank is Bloomington School District #271's secretary for student services. Her job included student transportation needs. (Verplank Depo. p. 7-8; A. 156.) In setting up the transportation for special education students, a case manager would alert Ms. Verplank that a student needed special busing. They or the parents of the student would give her a transportation emergency form. Ms. Verplank would make sure the form was filled out correctly and she would fax it over to Bloomington School District #271's Transportation Department. After bus routing was determined, that emergency information was provided to the bus driver. (*Id.* at 8-9; A. 156-157.) The person at Transportation who would normally receive the Student Services Transportation Emergency Information form was Darwin Hauser or Claudia Karsten. (*Id.* at 9; A. 157.) Ms. Verplank herself did not have any contact with the bus drivers. (*Id.*)

After the decision was made regarding busing accommodation, Ms. Yarbro, as C.R.'s case manager, relayed the busing information to Judy Verplank. (Yarbro Depo. p. 20; A. 185.) Ms. Yarbro requested that Ms. Verplank add to C.R.'s Student Service Transportation Emergency Information form that C.R. should sit alone in the front seat. (A. 204.) While Ms. Yarbro relayed that C.R. was to sit alone in the front seat of the bus, she did not relay that C.R. had a history of inappropriate sexual actions. (*Id.* at 21; A. 186.) Ms. Yarbro explained:

Q. Any reason why you couldn't have relayed that information to her?

A. As the secretary receiving that, she would not need to know that. And as a team, we discussed confidentiality related to [C.R.].

(Id.)

Likewise, C.R.'s IEP did not contain any information regarding a history of acting out inappropriately. (A. 335.) The IEP participants decided not to include such information after discussing confidentiality, the fact that C.R. had never been legally involved with anything related to his history, and there was documentation that there had been no inappropriate behavior for several months. (Yarbro Depo. pp. 27-30; A. 187-188.)

Initially, Ms. Verplank thought Ms. Yarbro may have mentioned to her that C.R. had been sexually inappropriate in the past, but later she acknowledged she is not sure that anything to that effect was told to her. (Verplank Depo. p. 24, 28-29; A. 160-162.) Ms. Verplank testified that if Ms. Yarbro had mentioned to her that C.R. had been sexually inappropriate in the past, it was her impression that information was confidential, and that is why sitting up in the front seat alone was the appropriate thing to put on the transportation form. (*Id.* at 26; A. 161.)

Based on the information provided her from Ms. Yarbro, and in the section for special transportation instructions, Ms. Verplank wrote on C.R.'s form "EBD" and "sit in front seat alone." (Verplank Depo. p. 14; A. 158; A. 341.)² On March 30, 2005, Verplank faxed the emergency information form on C.R. to the Transportation Department. (*Id.* at 10-12; A. 157.)

B. During the Regular School Year, C.R. Rode a Bus Operated by Adam Services, Inc.

Bloomington School District #271 employs approximately 110 to 120 bus drivers and has 14 school bus aides. (Engstrom Depo. p. 9; A. 464.) During the 2004/2005 school year, Bloomington School District #271 transported approximately 500 special needs children. (*Id.* at 36; A. 470.) All of Bloomington School District #271's bus drivers are trained on safety and are trained with regard to transporting special needs students. (*Id.* at 11-12; A. 464.) Generally, Bloomington School District #271 operates 35 special needs routes, with 7 to 10 of these routes contracted to other carriers. (*Id.* at 9; A. 464.) Of the routes that Bloomington School District #271 contracts out, most are with Defendant/Respondent Adam Services, Inc. (Adam). (*Id.* at 9; A. 464.)

² Actually, Ms. Verplank faxed over two emergency forms on C.R. in March. Earlier, on March 30, Ms. Yarbro provided initial information on C.R. and told Ms. Verplank to get it over to Transportation so they could begin routing and that she would give the rest of the information later. (Verplank Depo. p. 17; A. 159; A. 342.) Later in the day, Ms. Verplank received information to make the change to the form and add "sit in the front seat alone." (Verplank Depo. p. 18; A. 159; A. 341.) A third form was filled out and sent for the summer session. (Verplank Depo. pp. 19-20; A. 159; A. 343.)

Adam was assigned by Bloomington School District #271 the bus route involving Hosterman School. (*Id.* at 16; A. 465.) Since Adam would do the transportation, a copy of C.R.'s emergency form was provided to it. (*Id.* at 27; A. 468.)

Darwin Hauser is the transportation clerk at Bloomington School District #271 who does the routing for special education students. (Hauser Depo. p. 7; A. 169.) When Mr. Hauser receives the fax from Ms. Verplank containing the student information, he enters the student information into the routing software program and makes whatever changes are necessary for the routing of the student. (*Id.* at 10; A. 170.) This database contains the names, the emergency contact information, and any specific instructions regarding the student. (*Id.* at 11; A. 170.) With regard to C.R., the information would state the nature of C.R.'s disability as EBD and contain the instruction that C.R. was to "sit behind driver alone in the seat." (*Id.*) Mr. Hauser's responsibility was to transmit, either by facsimile or by hard copy, the information form to Adam. (*Id.* at 20; A. 172.)

The bus drivers can be informed of information on a student orally or they can be informed by way of the emergency form. (Engstrom Depo. p. 28; A. 468.) It was Mr. Engstrom's recollection that Adam was specifically informed that C.R. was to sit in the front seat alone. (*Id.* at 76; A. 480.)

The school buses that Adam operates are very small. (Sauer Depo. p. 9; A. 82; Lehman Depo. pp. 22-24; A. 103.) Adam transports only special needs students. (Lehman Depo. p. 13; A. 101.) The bus assigned to C.R. was Bus 219. It had 4 to 5 rows of seats, with a seat on each side. (Sauer Depo. pp. 9-10; A. 82.) Adam conducts its own

training for its drivers and aides. (Lehman Depo. pp. 10-13; A. 100-101.) It is the responsibility of Adam's bus driver to provide for the safety of the children while they are on the bus and that the drivers are obligated to follow any specific school regulations that are given to the drivers. (*Id.* at 20; A. 102.) If one of the drivers or bus assistants witnesses a sexual assault, he has a duty to report it. (*Id.* at 43; A. 108.) It is also the driver's responsibility to make and enforce reasonable rules on the bus. The bus driver cannot discipline a student, but he can submit a conduct report. (*Id.*)

C. A Bus Aide Was Present on the Transportation Provided to C.R. and B.R.W.

C.R. was assigned to Bus 219, operated by Adam, which would take him to and from Hosterman School. (Lehman Depo. p. 36; A. 106.) B.R.W., age 10, also lived in Bloomington School District #271 and attended Hosterman School. (A. 327.) Both C.R.'s and B.R.W.'s IEP manager at Hosterman was Kayleen Taffe. (A. 327, 335.) B.R.W.'s primary disability is autism spectrum disorder. (A. 327.) B.R.W. has had issues of aggression with other students. (A. 331.) B.R.W. also rode Bus 219. Bus 219's driver was Sid Sauer. (Sauer Depo. pp. 9-10; A. 82.) An aide was also assigned to this route. (*Id.* at 14; A. 83.)

Only 2 or 3 students other than B.R.W. and C.R. were transported on Bus 219. (Sauer Depo. p. 12; A. 82.) It took 30 to 40 minutes to drive the students to Hosterman in the morning and approximately the same amount of time on the return trip. (*Id.* at 14; A. 83.) There was always a bus aide present on the bus. (*Id.* at 14, A. 83.) Ms. Baggett

was an aide for the first 2 to 3 weeks that C.R. rode that bus, followed by Richard Bentley. (*Id.* at 15-16; A. 83.)

Typically, students would sit one student to each seat. (*Id.* at 51; A. 92.) And typically, the bus aide would either sit in the middle of the bus or the back of the bus. (*Id.* at 61; A. 95.) Mr. Sauer would rely, to a certain extent, on the bus aide to supervise and watch the students on the bus to make sure they were not doing anything inappropriate. (*Id.* at 62; A. 95.) In fact, supervision of students is the bus aide's primary job. (Lehman Depo. p. 49; A. 110.) However, because the buses were so small, bus drivers were also expected to keep watch. (*Id.*) If there was an incident on the bus, Mr. Sauer would write up an incident report which would be given to management at Adam. He did not give those incident reports to Bloomington School District #271. (Sauer Depo. p. 64; A. 95.) Mr. Sauer did not know if the bus aides received or ever reviewed the emergency slips on the students. (*Id.* at 25-26; A. 86.)

D. Adam's Bus Driver Was Informed That C.R. Should Sit Up Front.

Mr. Sauer recalled that on the first or second day that C.R. rode Bus 219, Mr. Sauer was informed by Margaret Nelson, C.R.'s surrogate parent, that C.R. was to sit up front in one of the front seats. (*Id.* at 27; A. 86.) Mr. Sauer testified:

- Q. Tell me how that discussion came about?
- A. She brought [C.R.] out to the bus and basically told me that.
- Q. What did she tell you again?
- A. That [C.R.] should sit in one of the front seats.

(*Id.*)

Mr. Sauer did not ask her why C.R. was to sit in the front seat. (*Id.*) Mr. Sauer never relayed to the bus aides that C.R. should sit in the front of the bus. (*Id.* at 29; A. 87.)

Mr. Sauer admitted that he allowed C.R. to sit in other seats of the bus after he received that instruction. (*Id.* at 27; A. 86.) Mr. Sauer did not continue to follow the instruction to have C.R. sit up in front because “[C.R.] did nothing wrong on the bus and I felt it was punishment.” (*Id.* at 49; A. 92.)

Adam expects, however, that if a parent or guardian tells its driver to have a child sit alone in the front, this instruction will be followed. (Lehman Depo. pp. 58-59; A. 112.) The driver need not know why this request was made, but should follow the parent’s directive. (*Id.* at 59; A. 112.)

Mr. Sauer and his supervisor, Ms. Lehman, acknowledge that it is common for special education students, especially those with a diagnosis of EBD, to misbehave. (Sauer Depo. p. 47; A. 91; Lehman Depo. p. 56; A. 111.) Mr. Sauer knew that both B.R.W. and C.R. were identified as having the disability “EBD” because it was so stated on their respective transportation emergency information forms. (Emergency Information Forms; A. 341; Lehman Depo. p. 46; A. 109.) Mr. Sauer acknowledged that EBD behaviors can be everything from being aggressive to spitting at each other or hitting each other. (Sauer Depo. p. 47; A. 91.) This is one of the reasons that most of the time he will keep students separated and sitting in separate seats. (*Id.*)

E. B.R.W. Had a History of Bad Behavior On the Bus.

B.R.W. had an extensive history of misbehavior on Bus 219, having been written up for 14 different incidents. (Lehman Depo, pp. 57-58; A. 112; A. 124-140.)³ B.R.W.'s IEP had recommended the use of a bus assistant for B.R.W. "to help maintain the safety of students" (A. 978.) Both Mr. Sauer and his supervisor, Ms. Lehman, testified that B.R.W.'s bad behavior on the bus was such that keeping a special eye on B.R.W. was mandated. (Sauer Depo. p. 54; A. 93; Lehman Depo. p. 57; A. 112.) Mr. Sauer had a good relationship with B.R.W. and B.R.W. never expressed any complaints about anybody on the bus. (Sauer Depo. p. 59; A. 94.)

For a time period Mr. Sauer assigned B.R.W. to a seat in the front of the bus because of his behavior. (*Id.* at 53; A. 93.) Prior to the time C.R. rode the bus, Mr. Sauer recalled an incident where another student complained that B.R.W. was revealing his genitals. (*Id.* at 55; A. 93; A. 132-133.) Mr. Sauer investigated and wrote up the incident on December 10, 2004. (*Id.*)

F. Adam's Bus Driver and Aide Did Not Witness Sexual Contact Between C.R. and B.R.W.

C.R. began attending Hosterman on April 6, 2005, and rode Bus 219. (Sauer Depo. p. 16; A. 83.) Mr. Sauer recalls no inappropriate sexual contact or innuendo between C.R. and B.R.W. (*Id.* at 43-44; A. 90.)

³ Incidents involving B.R.W. include B.R.W. throwing a plastic dinosaur which belonged to another student out of the window; B.R.W. refusing to sit in his seat and keep his seatbelt buckled, and B.R.W. kicking or hitting other students. (A. 124-140.)

Ashley Baggett was Bus 219's aide from March 30 to April 13, 2005. (Baggett Depo. p. 13; A. 1487.) Ms. Baggett does not recall either C.R. or B.R.W. (*Id.* at 14; A. 1488.) Ms. Baggett would sit in the front of the bus but with her back toward the window and sideways so that she could see all the kids on the bus. (*Id.* at 22; A. 1496.) All students were required to wear seatbelts. (*Id.* at 30; A. 1505.) Ms. Baggett recalled that some kids were assigned certain seats, but she did not remember who was assigned a seat or where. (*Id.* at 25; A. 1499.) Ms. Baggett did not think that sexual contact between students could occur without her being able to see it. (*Id.* at 29; A. 1504.)⁴

Richard Bentley was the aide subsequently assigned to Bus 219. Mr. Bentley was not shown what was on C.R.'s emergency information card. (Bentley Depo. pp. 7-8; A. 324.) Mr. Bentley would sit one seat in front of C.R. and B.R.W. (*Id.* at 8; A. 324.) It was not routine for B.R.W. and C.R. to sit together. (*Id.* at 17; A. 326.) Mr. Bentley explained that B.R.W. would get on the bus in his pajamas. He would eat his breakfast on the bus and change into his school clothes. (*Id.* at 19-20; A. 326.)

Mr. Bentley also noticed no inappropriate conduct between C.R. and B.R.W. and heard no sexual innuendo. (*Id.* at 7-8; A. 324.) Mr. Bentley did not see B.R.W. and C.R. poking each other or hitting each other in any fashion. He would not have allowed such behavior. (*Id.* at 20; A. 326.) Mr. Bentley kept a close eye on C.R. because he liked to jump off the bus. (*Id.* at 18-19; A. 326.)

⁴ Mr. Sauer reported to Adam that he saw Ms. Baggett sleeping and wearing headphones. As a result, Ms. Baggett was taken off the bus and terminated. (Sauer Depo. pp. 18-20; A. 84.)

G. Bloomington School District #271 Provided Transportation for C.R. and B.R.W. to Hosterman for the Summer Season.

Bloomington School District #271 provided summer transportation to Hosterman, which session began on June 20, 2005. (Engstrom Depo. p. 40; A. 471; A. 897.) When Bloomington School District #271 transports special needs students, they also do so on small buses. The students are required to wear seatbelts. (*Id.* at 37-38; A. 471.) If there are instructions on the emergency contact form, in general, Bloomington School District #271 expects that the driver and bus aide will do what it says. (*Id.* at 46; A. 473.) Information needed on the students can be transmitted to the bus driver orally and by way of emergency form. (*Id.* at 28; A. 468.)

Eric Johnson was the summer school bus driver for Bus 419 which transported C.R. and B.R.W. (Johnson Depo. p. 7; A. 142.) Mr. Johnson has been trained in transporting children with special needs. (*Id.* at 13-14; A. 144.) Mr. Johnson states that he put C.R. in the front seat "since day one." (*Id.* at 15; A. 144.) Johnson testified he had received information from Bloomington School District #271 that C.R. was supposed to be in the front seat. (*Id.*) Mr. Johnson was not given a reason why. (*Id.* at 16; A. 144.) The bus driver was furnished C.R.'s emergency card that contained the instruction on C.R.'s seating. (Engstrom Depo. pp. 45-46; A. 473; A. 343.)

At the time that he transported B.R.W. and C.R., there were three children other than C.R. and B.R.W. on the bus. (Johnson Depo. p. 16; A. 144.) B.R.W. and C.R. always sat apart. (*Id.* at 23-24; A. 146.) Mr. Johnson explained: "Because on my routes,

I always put the children in their own seats. The children always sat in their own seats, they never sat together.” (*Id.* at 29; A. 148.)⁵

At all times, Andrew Boone rode the bus as the bus aide. Mr. Boone received special training from Bloomington School District #271 to work with special education students. (Boone Depo. p. 6; A. 838.) At the start of the summer session, Mr. Boone was told that C.R. must sit behind the bus driver. (*Id.* at 12-13; A. 839-840.) At no time did he observe C.R. and B.R.W. sitting together on the bus. (*Id.*) C.R. sat behind the driver and B.R.W. sat in the back. (*Id.* at 8; A. 838.) Mr. Boone would sit either in between or across from B.R.W. (*Id.*)

Brett Domstrand is a paraprofessional employed in the STRIVE program at Hosterman. (Domstrand Depo. p. 9; A. 1199.) His role would be to assist the main teacher in different activities, whether it be getting students ready for academics or bringing them through the hallways to whatever event the students were attending. (*Id.*) Mr. Domstrand worked at Hosterman in the summer of 2005. (*Id.*; A. 1200.) Mr. Domstrand testified that he knew C.R. would sit in the front seat of the bus. (*Id.* at 26; A. 1211.) While Mr. Domstrand cannot recall whether he told the bus driver that

⁵ When interviewed by the Minnesota Department of Education on September 6, 2005, Mr. Johnson explained that the accusation that C.R. was sexually acting out with B.R.W. on his bus was “bewildering” because “there was no um, activity at all and there was no contact at all with any of these children.” (A. 832.) Mr. Johnson said there was no “touching, talking, eye contact, nothing.” Mr. Johnson explained that on this particular bus it was a quiet route and “[t]hese kids did not talk to each other at all.” (A. 833.)

C.R. should sit alone in the front seat, he did know that C.R. sat in the front seat because he saw C.R. get in the bus and sit down. (*Id.*)

H. On July 14, 2005, Bloomington School District #271 Was Informed That C.R. Had Expressed a Sexual Interest in B.R.W.

On July 14, 2005, Engstrom, the Transportation Director of Bloomington School District #271, received a call from a staff member at the group home where C.R. resided. (A. 897.) He was informed that C.R. had expressed a sexual interest in one of the other students who was riding the bus with him. The other student was identified as B.R.W. (*Id.*) There was no school on July 15. July 16 and 17 were a Saturday and Sunday respectively. On July 18, prior to the start of the next school day, Engstrom spoke with school bus driver Johnson and told him to make certain the boys were separated on the school bus. This was the only conversation he had with Mr. Johnson. (*Id.*)

There was some confusion by Mr. Johnson in his deposition as to when he was told of an allegation of some sort of unorthodox activity involving B.R.W. and C.R. In his deposition, Johnson states Engstrom told him of "some sort of sexual activity" which discussion occurred "two weeks into the program." (Johnson Depo. p. 22; A. 146.) Johnson incorrectly states that this conversation occurred in the middle of June. (*Id.*) After viewing C.R.'s transportation emergency form for the summer program, Mr. Johnson determined the summer program did not begin until June 20, 2005, and that his conversation with Engstrom would have occurred in July, 2005. (Johnson Affidavit; A. 901.) Mr. Engstrom testified that this conversation with Mr. Johnson occurred on July 18. (A. 897.)

From Mr. Johnson's initial confusion as to dates, B.R.W. has tried to misconstrue Mr. Johnson's testimony to assert that somehow Mr. Engstrom was aware of alleged illicit activity between B.R.W. and C.R. prior to July 14, but did not report it.

(Appellant's Brief, pp. 15-16.) This is inaccurate.⁶ A full reading of Mr. Johnson's deposition, as well as his affidavit testimony, reveals Mr. Johnson was explaining that after the summer program started, he was approached by Mr. Engstrom prior to the beginning of the school day ("... before I started driving. You know, when I started driving the route.") and was told to keep the children separated. (Johnson Depo. p. 22; A. 146; A. 900-901.) Both Mr. Engstrom and Mr. Johnson stated they only spoke once with respect to these students. (A. 897, 900.)

Mr. Johnson also states that his memory was much better in the fall of 2005, when he spoke with Monica Brennan, the investigator with the Minnesota Department of Education. (A. 901.) In the recorded conversation he had with Ms. Brennan, Mr. Johnson explains that he could not state when this one conversation with Mr. Engstrom occurred, that it may have been in June or July, and it was probably during the second or third week of the summer session. (*Id.*; A. 833.) Upon subsequent review of C.R.'s summer school emergency transportation form, Mr. Johnson has testified that

⁶ B.R.W. however asserts in his Appellant's brief at page 5 that "[t]he last day that B.R.W. rode Bus 419 was July 18, 2005, when Hosterman discovered that there was inappropriate sexual conduct occurring between C.R. and B.R.W." and on page 6 that "Bloomington [School District #271] first learned that C.R. touched B.R.W. inappropriately on the school buses on or about July 18, 2005." Accordingly B.R.W. concedes that the first anyone knew of the alleged conduct at issue was in mid-July, 2005.

the summer school session began on June 20, 2005. (A. 901.) From this, he concludes that the conversation with Mr. Engstrom must have happened in July. (*Id.*) This is consistent with Mr. Engstrom first learning of any allegations of misconduct involving the two students on July 14. (A. 897.)

Mr. Domstrand, a paraprofessional employed at Hosterman, also recalls receiving information on July 18, 2005, that there had been some misconduct on the bus. Mr. Domstrand did not recall how he received that information. (Domstrand Depo. p. 27; A. 1212.) Mr. Domstrand, upon learning of the allegation, spoke with C.R. C.R. informed him that “there had been some touching going on on the bus.” (*Id.* at 31; A. 1216.) Mr. Domstrand had previously observed B.R.W. and C.R. together on school grounds and never saw them touch each other inappropriately. (*Id.* at 28; A. 1213.)

Ms. Taffe likewise did not see C.R. exhibiting any sexually inappropriate behavior while they were in the STRIVE program. At no time did she see C.R. do anything that even raised her concern that he might engage in such behavior. (Taffe Depo. p. 65; A. 558.)⁷

Upon receiving information regarding the alleged touching, Mr. Geraghty, the executive director of student services for Bloomington School District #271, immediately contacted Bloomington School District #271’s Transportation Department to make sure

⁷ On page 10 of Appellant’s brief, Appellant refers to a reevaluation of C.R. conducted by Hosterman on April 30, 2005. (A. 1309-1329.) There is no testimony that Bloomington School District #271 was involved in that reevaluation nor informed of the results. It should be noted that the report states “[C.R.] tends to seek out and favor adult attention rather than that of his classmates.” (A. 1311.)

that they were aware of the allegations and circumstances. (Geraghty Depo. pp. 11-12; A. 283.) Also contacted was the Minnesota Department of Education. (*Id.*) Within a couple of days, B.R.W. was assigned to different transportation. (Johnson Affidavit; A. 900-901.)

I. C.R. and B.R.W.'s Testimony Regarding Where They Sat on the Bus and the Behavior They Engaged in Is Not Consistent.

In the course of this litigation, both C.R. and B.R.W. have been deposed. Their testimony is not consistent.

1. B.R.W.'s testimony as to conduct on Adam Bus 219.

On Bus 219, B.R.W. states he always sat in back because the driver told him that was his seat, and every child on the bus had a seat to themselves. (B.R.W. Depo. pp. 17, 19; A. 586, 587.) B.R.W. testified there was always an aide on all his bus rides. (*Id.* at 48; A. 594.)

B.R.W. stated that he and C.R. played Yu-Gi-Oh twice on the bus. (*Id.* at 22; A. 588.)⁸ B.R.W. would sit in his assigned seat and C.R. would sit in the other back seat with the aisle in between them. (*Id.* at 23; A. 588.) Both wore their seatbelts. (*Id.*)

B.R.W. testified that it was while playing Yu-Gi-Oh, C.R. put his hand on B.R.W.'s penis. (*Id.* at 27; A. 589.) B.R.W. states it happened only when they played Yu-Gi-Oh. (*Id.*) According to B.R.W., C.R. reached over the aisle and unzipped his pants. (*Id.* at 28.) When B.R.W. asked C.R. to stop, he did. (*Id.* at 29-30.) B.R.W.

⁸ Yu-Gi-Oh is a card game. (B.R.W. Depo. p. 21; A. 587.)

claims he told the bus aide and Sid Sauer, the driver on the day it happened, that C.R. was doing nasty things. (*Id.* at 30-31; A. 590.) It never happened again. (*Id.*) He also claims he told his mother on the day it happened. (*Id.* at 32; A. 590.) B.R.W. states that after he told the bus driver, C.R. sat in the front seat for the rest of the school year. (*Id.* at 54-57; A. 596.)

2. B.R.W., who claims to not recall riding Bloomington School District #271 Bus 419, also states sexual contact occurred on that bus.

B.R.W. does not remember a bus driver named Eric nor riding Bus 419. (*Id.* at 57; A. 596.) B.R.W. states he did not ride a bus with a driver other than Sid. (*Id.*) B.R.W. also testified:

Q. All right. [B.R.W.], I know that you've told some people that you rode a bus during the summer after you rode on Sid's bus and that was Bus 419. Do you remember riding that bus?

A. Hmm-um. No.

Q. Do you remember telling people that you rode a Bus 419 in the summer?

A. No.

(*Id.* at 58; A. 597.)

Nonetheless, later B.R.W. testified that he remembers telling people he was "touched" on Bus 419.

Q. I also know that you told some people that [C.R.] touched you on Bus 419. Do you remember telling people that?

A. Yes.

Q. What do you remember about that?

A. That they asked me what happened.

(*Id.* at 58; A. 597.)

B.R.W. testified that he thought C.R. touched him on Bus 419 as well and that this happened four times. (*Id.*) B.R.W. states that on Bus 419, he sat in the front seat and C.R. sat in the back. (*Id.*) But B.R.W. also states that C.R. would sit in the front seat on Bus 419 when he would touch him. (*Id.* at 60; A. 597.) B.R.W. testified:

Q. Where would [C.R.] be on Bus 419 when he would touch you?

A. In the front.

Q. Were you guys sitting in the same seat?

A. Yes.

...

Q. Okay. And you think that that happened four different times on Bus 419?

A. Yes.

Q. Where was the aide sitting when that would happen?

A. In the back.

Q. In the back, okay. Were there any other kids sitting around you when that would happen on Bus 419?

A. No.

Q. When you -- you said this happened in the front seat on 419?

A. Yes.

Q. Was it the front seat that was right behind the driver, or was it the front seat that was across the aisle from the driver?

A. Behind the bus driver.

(B.R.W. Depo. pp. 60-61; A. 597.)

B.R.W. testified that it was his impression that C.R. was trying to hide his behavior from the bus driver, the bus aide and the other kids on the bus. (*Id.* at 61-62; A. 598.)

B.R.W. asserts that C.R. never asked him to touch C.R.'s privates or put his hands in his pants. (*Id.* at 61; A. 597.) B.R.W. asserts that on Bus 419, C.R. never touched his privates with anything other than his hand. (*Id.*) B.R.W. claims he told the bus driver on 419 when C.R. touched him as well as his mother, but doesn't remember when he told them. He did not tell the bus aide. (*Id.* at 62; A. 598.)

3. C.R.'s testimony as to conduct on Bus 419.

At the time of the alleged incidents in question, C.R. was 13 years old. (A. 967.) C.R. knows he has brothers and sisters, but he does not know how many. He also does not know where his parents reside. (C.R. Depo. pp. 11-12; A. 869.) C.R. testified that he moved to Minnesota from Mississippi, but he is not sure where he lived in Mississippi. (*Id.* at 13; A. 870.) He is also not sure whether he attended any schools in Minnesota other than Hosterman. (*Id.* at 14; A. 870.)⁹

⁹ Actually, C.R.'s mother terminated parental rights in November, 2001. C.R. has lived in shelter care, a residential treatment facility in Iowa and then Homme School in Wisconsin. (A. 1308.)

C.R. remembers riding Bus 219, that the driver's name was Sid and that there was a bus aide on the bus, but he did not recall the man's name. (*Id.* at 15; A. 870.) In an earlier recorded statement, C.R. stated the aide was female. (A. 1020.) At his deposition, C.R. did not recall that during the school year there was a female bus aide. (C.R. Depo. p. 52; A. 879.)

C.R. states that sometimes he was told to sit behind the bus driver and sometimes he sat wherever he wanted. (*Id.* at 16; A. 870.) C.R. contradicts B.R.W.'s testimony and states he never sat in the back of the bus, nor did B.R.W. (*Id.*) C.R. testified that on Bus 219 B.R.W. usually sat in the middle of the bus and that C.R. would sit across from B.R.W. with the aisle in between them. (*Id.* at 18; A. 871.)

C.R. recalled that when he first sat on Bus 219, Margaret Nelson told the driver that he was to sit in the front seat. (*Id.* at 37; A. 876.) C.R. also testified that he recalled Margaret Nelson telling Eric Johnson, the bus driver for Bus 419, that he was to sit in the front seat. (*Id.* at 38; A. 876.) C.R. asserted that he targeted B.R.W. for the following reason:

Because he had came on the bus at one point in time with a pair of sweatpants and boxers, and on the first day that he had started riding that bus, and his – you could see through his pants and his boxers, you could see his privates. And he kept playing with himself. So I thought that was giving me urges.

(*Id.* at 39-40; A. 876.)

4. C.R.'s testimony as to his conduct on Bus 419.

C.R.'s testimony as to where he sat and where B.R.W. sat on Bus 419 is also in conflict. On the summer bus, C.R. recalled that initially he was told to sit in the front seat, but normally either sat in the second seat back from the front or tried to sit in the third seat where B.R.W. sat. (C.R. Depo. pp. 19, 38; A. 871, 876.) C.R. recalled that B.R.W. would sit across the aisle from him. (*Id.* at 19; A. 871.)

C.R. states he would try to reach over and touch B.R.W.'s private area when the aide was not paying attention. (*Id.* at 25-26; A. 873.) C.R. testified that he would reach over and pull down B.R.W.'s zipper and reach inside his zipper. (*Id.* at 27; A. 878.) When asked how many times that happened, he stated, "a lot." (*Id.*) He states that he says "a lot" because "I don't know a number." (*Id.*) C.R. asserts that B.R.W. put his penis in C.R.'s mouth while they sat in the front seat of the bus. (*Id.* at 32; A. 874.)

C.R. recalled that Drew, the summer bus aide, took his job seriously and he watched kids carefully. (*Id.* at 51; A. 879.) C.R. asserts the bus aide sat in the back seat when the touching occurred. (*Id.* at 32; A. 874.) In an earlier recorded statement, C.R. claimed not to know where the aide sat on the bus. (A. 1023.) C.R. also stated he would go to the back of the bus where the aide was not sitting. (A. 1025.) According to C.R. the other kids did not see him do anything and C.R. "would reach over and touch ['B.R.W.'s] leg and stuff like that and the bus, the aide wouldn't see it, the bus driver wouldn't see it." (*Id.*)

According to C.R., if Drew the bus aide saw something that he shouldn't do, Drew would say something. (C.R. Depo. p. 51; A. 879.) He also claims that it happened a few times when Drew would fall asleep on the bus. (*Id.* at 32-33; A. 874-875.) C.R. recalls that Eric, the bus driver, would look back at him in the mirror. (*Id.* at 52; A. 879.)

C.R. asserts he was hiding what he was doing with B.R.W. and did not want to get caught. (*Id.* at 33-34; A. 875.) C.R. claims that he never was caught making sexual contact with B.R.W. on either Bus 219 or Bus 419. (*Id.* at 46; A. 878.)

J. Lawsuit for Negligence Was Commenced.

In February 2006, C.R. pled guilty to criminal sexual conduct in the second degree. (A. 983, 985.) In December, 2006, B.R.W.'s mother brought this lawsuit against Bloomington School District #271, School District #287 and Adam. (A. 1.) The counts of the Complaint specifically addressed to Bloomington School District #271 are Counts II, V, VIII and X. (A. 7, 13, 19, 24.)

In Count II of the Complaint, it is asserted that Bloomington School District #271 was negligent because it "did not take adequate precautions such as notifying transportation staff on Bus 419 of C.R.'s prior inappropriate sexual misconduct toward younger children." (A. 8.) It was further alleged that Bloomington School District #271 had a duty to properly supervise B.R.W. and C.R., to ensure the safety of B.R.W., and had a duty to not allow B.R.W. to be sexually assaulted by C.R. (*Id.*) It is claimed that Bloomington School District #271 was negligent in the performance of its duties.

In Count V of the Complaint, entitled "Negligence Supervision," it is also asserted that Bloomington School District #271 "did not take adequate precautions such as notifying transportation staff on Bus 419 of C.R.'s prior inappropriate sexual misconduct toward younger children." (A. 14.) It is asserted that Bloomington School District #271 "failed to exercise ordinary care when supervising their employees, and that additional supervision would have prevented the sexual assaults from occurring." (*Id.*) Based on this breach of its duty of supervision, it is asserted that Bloomington School District #271 was negligent. (*Id.*)

In Count VIII, entitled "Defendant Independent School District 271 Respondeat Superior," it is again asserted that Bloomington School District #271 "did not take adequate precautions such as notifying transportation staff on Bus 419 of C.R.'s prior inappropriate sexual misconduct toward younger children." (A. 19-20.) It is alleged that "any employees of [Bloomington] School District 271, were at all relevant times, acting as agents of [Bloomington] School District 271 and were under [Bloomington] School District 271's direct supervision and control when they committed the negligent acts described in the complaint." (A. 20.) It is asserted that Bloomington School District #271 had a duty to properly supervise B.R.W. and C.R. and to ensure the safety of B.R.W. Bloomington School District #271 and its employees, individually and severally, are claimed to be negligent in the performance of their duties. (A. 21.)

The final count of the Complaint, Count X, alleges that School District #287, Bloomington School District #271 and Adam were engaged in a joint venture/joint enterprise. (A. 24.)

After conducting discovery, all Defendants sought summary judgment. (A. 53, 213, 365.) By Order dated March 7, 2008, the trial court granted the motion of all Defendants for summary judgment on the joint venture/joint enterprise claim. (A. 1533.) The dismissal of that claim is not the subject of Appellant B.R.W.'s brief and, therefore, that count is not before this Court. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. Ct. App. 1997), *rev. denied* (issues not briefed on appeal are waived).

The trial court also granted all Defendants motions for summary judgment on the negligent supervision claim and granted Bloomington School District #271 and School District #287 summary judgment on all counts. (A. 1533.) It denied summary judgment to Adam on the other counts. (*Id.*) Adam sought reconsideration, which was denied. (A. 1534, 1536, 1537.) By Order filed April 8, 2008, the trial court entered judgment pursuant to Rule 54.02 of the Minnesota Rules of Civil Procedure. (A. 1538.) B.R.W.'s appeal followed. (A. 1539.) Adam has filed a notice of review. (A. 1547.)

ARGUMENT

I. CLAIMS AGAINST BLOOMINGTON SCHOOL DISTRICT #271 ARE BARRED BY STATUTORY IMMUNITY, OFFICIAL IMMUNITY AND VICARIOUS OFFICIAL IMMUNITY.

A. Standard of Review.

On appeal from summary judgment, this Court must determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998). The court must view the evidence in a light most favorable to the nonmoving party. *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 673 (Minn. 2006). The applicability of immunity is a question of law, which this Court reviews de novo. *Johnson v. State*, 553 N.W.2d 40, 45 (Minn. 1996).

B. Statutory Immunity (Also Known as Governmental or Discretionary Immunity) Protects the School District From Tort Liability for a Claim Based on the “Performance or the Failure to Exercise or Perform a Discretionary Function or Duty Whether or Not the Discretion Is Abused.”

Minnesota law recognizes two types of immunity: statutory immunity (also known as governmental or discretionary immunity) and official immunity. *Janklow v. Minnesota Bd. of Exam’rs for Nursing Home Adm’rs*, 552 N.W.2d 711, 715 (Minn. 1996). Statutory immunity is legislatively created, while official immunity derives from the common law of sovereign immunity. *Id.*

Statutory immunity protects a governmental entity, such as a school district, from tort liability for a claim based on the “performance or the failure to exercise or perform a

discretionary function or duty, whether or not the discretion is abused.” Minn. Stat. § 466.03, subd. 6; Minn. Stat. § 466.01, subd. 1. The purpose of statutory immunity is to preserve the separation of powers by protecting executive and legislative policy decisions from judicial review through tort actions. *Nusbaum v. Blue Earth County*, 422 N.W.2d 713, 718 (Minn. 1988).

Courts are prohibited by the doctrine of statutory immunity from conducting an after-the-fact review which second guesses “certain policy-making activities [of a governmental entity] that are legislative or executive in nature.” *Nusbaum*, 422 N.W.2d at 718. If a governmental decision involves the type of political, social and economic considerations that lie at the center of discretionary action, including consideration of safety issues, financial burdens and possible legal consequences, it is not the role of the courts to second guess such policy decisions. *Watson by Hanson v. Metro. Transit Comm’n*, 553 N.W.2d 406, 412 (Minn. 1996), *reh’g denied*.

In determining what constitutes a discretionary function, the Minnesota Supreme Court has drawn a distinction between “planning level” conduct, which is protected by immunity, and “operational level” conduct, which is not protected. *Nusbaum*, 422 N.W.2d at 719.

Minnesota courts have repeatedly and consistently determined that decisions involving hiring, supervision and retention of employees are discretionary acts entitled to statutory immunity. *Gleason v. Metro. Council Transit Operations*, 563 N.W.2d 309, 320 (Minn. Ct. App. 1997), *aff’d in part* 582 N.W.2d 216 (Minn. 1988); *Oslin v. State*, 543

N.W.2d 408, 415-16 (Minn. Ct. App. 1996), *rev. denied*; *Johnson v. State*, 553 N.W.2d at 47 (Minn. 1996). The courts have likewise held that training of employees involves policy considerations and is thus protected by statutory immunity. *Watson*, 553 N.W.2d at 413.

C. Bloomington School District #271 Is Entitled to Statutory Immunity.

The count of negligent supervision against Bloomington School District #271 was properly dismissed. This count was subject to dismissal on two alternative grounds – statutory immunity and no *prima facie* case of negligent supervision. (A. 64; 66.) The district court, while not disagreeing that statutory immunity applied to the negligent supervision count, instead ruled on the alternative ground that “Plaintiffs have not presented evidence of failure to supervise.” (A. 1531.) On appeal this Court may affirm on any ground raised to the trial court. *Northway v. Whiting*, 436 N.W.2d 796, 798 (Minn. Ct. App. 1989). Bloomington School District #271 will address the application of immunity first.

1. Count V of Complaint is barred by doctrine of statutory immunity.

Count V of B.R.W.’s Complaint challenges Bloomington School District #271’s supervision of its employees. (A. 13-14.) Negligent supervision claims are premised on an employer’s duty to control its employees and prevent them from intentionally or negligently inflicting personal injury. *Johnson v. Peterson*, 734 N.W.2d 275, 277 (Minn. Ct. App. 2007); *M.L. v. Magnuson*, 531 N.W.2d 849, 858 (Minn. Ct. App. 1995). Liability for negligent supervision is predicated on some fault on the part of the employer.

This claim of fault necessarily implicates the employer's policy decisions. *Oslin*, 543 N.W.2d at 415.

The supervision needed of Bloomington School District #271's employees, and the supervision employed, is entitled to statutory immunity based on the recognition that such a claim is based on policy level activity. *Gleason*, 563 N.W.2d at 320; *see also Oslin*, 543 N.W.2d at 416 (determining that decisions on supervision and retention "were necessarily entwined in a layer of policy-making that exceeded the mere application of rules to facts"). *Johnson v. State*, 553 N.W.2d at 47 (supervision of parolees is a discretionary act subject to statute of immunity); *In re Alexandria Accident of Feb. 8, 1994*, 561 N.W.2d 543, 548 (Minn. Ct. App. 1997); *Fear v. Indep. Sch. Dist. 911*, 634 N.W.2d 204, 212 (Minn. Ct. App. 2001), *rev denied*; *see also Watson*, 553 N.W.2d at 413 (holding that training of employees was planning-level conduct protected by statute or immunity). Accordingly, any claim of negligent supervision is barred by the doctrine of statutory immunity.

2. Any claim of negligence premised on transportation accommodations needed for C.R. is barred by doctrine of statutory immunity.

Bloomington School District #271 determined the accommodation needed for C.R.'s transport to Hosterman School. Determination of the appropriate action to take under these circumstances is necessarily beset with policy making considerations. Such a determination involves safety issues, financial burdens, and possible legal consequences, which considerations lie at the center of discretionary action. (A. 203-204, 898, 1526.)

Watson, 553 N.W.2d at 412. Bloomington School District #271 is entitled to statutory immunity on any claim of negligence premised on the accommodation chosen. (A. 898, 204.)

D. Count II and Count VIII of the Complaint Are Barred by the Doctrine of Vicarious Official Immunity.

The decision of the employees of Bloomington School District #271 to not put C.R.'s history of sexual conduct on the transportation emergency form is protected by the doctrine of official immunity. (A. 1527-28.) Bloomington School District #271 is immune under the doctrine of vicarious official immunity.

1. Official immunity protects individual, professional judgment.

In identifying the precise governmental conduct at issue the Court must turn to the allegations of B.R.W.'s Complaint. *Gleason*, 582 N.W.2d at 219. As set out in B.R.W.'s Complaint, the assertion is that Bloomington School District #271 should have notified its transportation staff on Bus 419 (the summer bus) of C.R.'s prior sexual misconduct. (Complaint ¶ 31; A. 8; Complaint ¶ 62; A. 14; Complaint ¶ 97, A. 20.) That same allegation is contained in every count against Bloomington School District #271 and is the cornerstone of the Complaint. (Complaint ¶ 31; A. 7; Complaint ¶ 62; A. 14; Complaint ¶ 97; A. 20.)

Based on the allegations of the Complaint, and as the trial court correctly recognized, the conduct at issue was the decision of Bloomington School District #271 to not disclose C.R.'s history of sexual conduct on his transportation emergency form. (A. 1526-27.)

As the record reflects, Ms. Yarbrow, as part of C.R.'s IEP team, made the decision to not disclose C.R.'s prior sexual history to the bus transportation department. Such a decision was based on the exercise of her professional judgment in the carrying out of her duties. (A. 203-204.) Her decision is protected by official immunity and Bloomington School District #271 is protected by vicarious official immunity. Therefore the Complaint against Bloomington School District #271 was properly dismissed.

The common law doctrine of official immunity protects public officials. Official immunity establishes that "a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of willful or malicious wrong." *Elwood v. Rice County*, 423 N.W.2d 671, 677 (Minn. 1988). The purpose of official immunity is to avoid judicial scrutiny where public officials exercise independent judgment. *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992). As government employees, they are "accorded near complete immunity for their actions in the course of their official duties, so long as they do not exceed the discretion granted them by law." *Janklow*, 552 N.W.2d at 716.

"Official immunity protects individual, professional judgment (wherein the judgment necessarily reflects the factors of a situation and the professional goal)." *Janklow*, 552 N.W.2d at 716. Official immunity is primarily intended to "insure that the threat of potential liability does not unduly inhibit the exercise of discretion required of public officers in the discharge of their duties." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991), quoting *Holmquist v. State*, 425 N.W.2d 230, 231 (Minn. 1988), *reh'g*

denied. Official immunity “protects against not only right decisions with unfortunate results but wrong decisions with bad results.” *Olson v. Ramsey County*, 509 N.W.2d 368, 372 (Minn. 1993).

Official immunity involves the kind of discretion which is exercised at an operational, rather than policymaking, level and requires something more than the performance of merely ministerial duties. *Elwood*, 423 N.W.2d at 677. The Minnesota Supreme Court has defined a ministerial duty as “absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.” *Johnson v. State*, 553 N.W.2d at 46.

Minnesota courts have held in a host of situations that a governmental employee’s decisions are protected by official immunity. *See, e.g., S.W. v. Spring Lake Park Sch. Dist. #16*, 592 N.W.2d 840 (Minn. Ct. App. 1999), *aff’d without opinion*, 606 N.W.2d 61 (Minn. 2000) (response to and investigation of an unknown adult visitor to school protected by official immunity); *Anderson v. Anoka-Hennepin Sch. Dist. #11*, 678 N.W.2d 651 (Minn. 2004) (decision by teacher to not use safety guard on delta table saw protected by official immunity); *Killen v. Independent Sch. Dist. No. 706*, 547 N.W.2d 113, 117 (Minn. Ct. App. 1996), *rev. denied* (guidance counselor’s response to suicidal threats of a student protected by official immunity); *Olson v. Ramsey County*, 509 N.W.2d 368 (Minn. 1993) (protective services plan prepared by a social worker protected by official immunity); *S.L.D. v. Krantz*, 498 N.W.2d 47, 52 (Minn. Ct. App. 1993)

(decision of social workers regarding whether or not an allegation of abuse should be reported under the mandatory reporting law protected by official immunity).

2. Ms. Yarbrow's decision to not disclose specific information on C.R.'s transportation form is protected by the doctrine of official immunity.

The decision of Bloomington School District #271, through Ms. Yarbrow and the IEP team, to not disclose specific information regarding C.R.'s history of sexual behavior is protected by the doctrine of official immunity. It involved the exercise of professional judgment and was certainly not a merely a ministerial duty involving the mere execution of a specific duty arising from fixed and designated facts.¹⁰

Ms. Yarbrow additionally explained that she and the IEP team did not pass on information regarding C.R.'s past conduct, in part, because of confidentiality and privacy concerns. (A. 204.) What cannot be ignored is that information regarding C.R.'s past is private data which may not be disclosed by Bloomington School District #271. The school is a political subdivision of the State of Minnesota and is subject to the terms of Minnesota's Government Data Practices Act. Minn. Stat. § 136D.21 and § 13.01, *et seq.* "Educational data" is expansively defined as "data on individuals maintained by a public

¹⁰ This Court's unpublished decision in *Moses v. Minneapolis Pub. Schools*, 1998 W.L. 846546 (Minn. Ct. App. 1998), does not support B.R.W.'s position. (A. 1471.) Unpublished decisions are not precedential. Minn. Stat. § 480A.08, subd. 3; *Vlahos v. R&I Const. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004). In *Moses*, a teacher failed to follow an IEP. (A. 1471.) Here Yarbrow was creating the IEP. Moreover, as the trial court recognized, the "specific recommendations and guidelines" in the IEP were that: (1) C.R. was to be monitored at all times; and (2) special seating will be given the child on the bus and if needed a bus assistant will be present. (A. 1528.) Monitoring is a task that requires constant discretion and decision making. Official immunity applies.

educational agency or institution or by a person acting for the agency or institution which relates to a student.” Minn. Stat. § 13.32, subd. 1 (emphasis added). Educational data is private data on individuals. Minn. Stat. § 13.32, subd. 3. Educational data may only be disclosed to persons other than the individual subject to the data “pursuant to a valid court order.” Minn. Stat. § 13.32, subd. 3(b); *Scott v. Minneapolis Pub. Sch., Special Dist. No. 1*, 2006 WL 997721 (Minn. Ct. App. 2006) (Respondent’s Appendix [R.A.] 1) (school district is charged with the statutory duty to establish appropriate security safeguards for all records containing data on individuals). Even if Yarbro’s decision which was based, in part, on confidentiality concerns is considered wrong, discretionary immunity still applies. *Olson*, 509 N.W.2d at 372. Official immunity protects even wrong decisions with bad results. *Id.*

In the present case, B.R.W. did not specifically name any Bloomington School District #271 employees as defendants. However, from the allegations of the Complaint, it is clear that Ms. Yarbro’s actions, through C.R.’s IEP team, are at issue. Because she is afforded immunity for her decisions, Bloomington School District #271, as a matter of public policy, is also afforded vicarious official immunity.

3. Bloomington School District #271 is to be afforded vicarious official immunity.

Where a governmental employee or agent is protected by official immunity, the governmental entity will not be called on to indemnify that individual, nor will the governmental entity be liable under the doctrine of respondeat superior. *Watson*, 553 N.W.2d at 415; *Pletan*, 494 N.W.2d at 42. If the governmental employee is afforded

immunity for a discretionary act, as a matter of public policy, the employing entity is also entitled to vicarious official immunity. *S.L.D.*, 498 N.W.2d at 51, citing *Pletan*, 494 N.W.2d at 42.

Since the purpose of official immunity is to avoid judicial scrutiny where public officials must exercise independent judgment, the threat of liability against the employer would unduly influence a governmental employee in the exercise of his judgment. Therefore, if the employee is immune from liability, so will the employer be held immune. *Olson*, 509 N.W.2d at 372. It “serves to avoid chilling the [employee’s] exercise of his independent judgment by allowing him to act without fearing that his conduct may eventually be subject to review by the judiciary and may expose his employer to civil liability.” *Ireland v. Crow’s Nest Yachts, Inc.*, 552 N.W.2d 269, 274 (Minn. Ct. App. 1996).

4. No conduct on the part of Bloomington School District #271 was malicious or willful.

If an act is discretionary, official immunity attaches unless the conduct is malicious or willful. *See Bailey v. City of St. Paul*, 678 N.W.2d 697, 700-01 (Minn. Ct. App. 2004), *rev. denied* (noting that public officials performing discretionary actions in the course of their official duties are protected by official immunity unless those acts are malicious or willful). Malice “means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right.” *Rico*, 472 N.W.2d at 107. Here, the actions of Bloomington School District #271 did not constitute a willful or malicious wrong.

B.R.W. does not contend that Ms. Yarbrow's action or decision constitutes willful or malicious conduct. B.R.W. instead asserts that Bloomington School Dist. #271 is guilty of willful or malicious behavior because "Johnson stated that Engstrom, in June of 2005, informed him that C.R. and B.R.W. had inappropriate sexual relations while on Hosterman grounds" and "Engstrom did not report that behavior" or "inform any other person." (Appellant's Brief p. 43.) As the record reflects there is no basis in fact for such assertions. (See discussion of record at pages 17-19 of this brief.)

There is no testimony of record that anyone was aware of this alleged conduct between C.R. and B.R.W. until Engstrom was so informed by a staff person at the group home where C.R. resided. (A. 897.) This occurred on July 14, 2005. (*Id.*) Contrary to B.R.W.'s assertion in his brief, there never was any allegation by anyone that "C.R. and B.R.W. had inappropriate sexual relations while on Hosterman grounds." (Appellant's Brief, p. 43.) Moreover, Engstrom was assistant transportation director for Bloomington School District #271. (Engstrom Depo. p. 8; A. 843.) If such conduct had occurred on Hosterman grounds, Hosterman would be the first to know, not Bloomington School District #271.

Engstrom unequivocally testified that he was informed in mid-July 2005 of some activity between B.R.W. and C.R. (A. 897.) His information came from the group home where C.R. resided. (*Id.*) Engstrom then discussed with Johnson the allegation and made sure the boys were separated on the bus. (*Id.*) The record, read as a whole, is clear that Johnson was initially confused as to the date he and Engstrom had their one discussion,

which confusion was eliminated when Johnson reviewed C.R.'s transportation form which shows the summer session did not begin until June 20, 2005. The record does not support a conclusion of malice based on Johnson's inability to recall in his deposition the date of his one discussion with Engstrom.

The record also does not support that Bloomington School District #271 violated its own policy with regard to emergency forms on the bus. Even assuming B.R.W.'s assertion that for two weeks the form was absent, that is not willful or malicious behavior. Both Johnson and the aide were well aware of the information contained on that emergency form from the first day of summer school. Both Johnson and his aide testified that from day one of the summer session C.R. sat alone in the front seat of the bus. The record contains no evidence of willful or malicious conduct.

II. BLOOMINGTON SCHOOL DISTRICT #271 IS NOT NEGLIGENT AS A MATTER OF LAW.

A. Claim of Negligent Supervision Cannot Proceed Based on the Record Before This Court.

As previously stated, the district court dismissed the negligent supervision count of the Complaint on the alternative ground that "Plaintiffs have not presented evidence of failure to supervise." (A. 1531.) As the district court held, at best, B.R.W. asserts the bus driver and his aide were not provided information as to C.R.'s sexual history. But "[p]roviding such information is not an act of supervision meant to guard against wrongful conduct, such as monitoring the employee or providing performance feedback."

(*Id.*) There are no facts presented that Bloomington School District #271 failed to properly supervise its employees.

Moreover, and as previously stated, a negligent supervision claim under Minnesota law must be premised on an employer's duty to control employees and prevent them from intentionally or negligently inflicting personal injury. *Johnson v. Peterson*, 734 N.W.2d at 277. Here no Bloomington School District #271 employee intentionally or negligently inflicted personal injury on B.R.W. Any alleged personal injury was inflicted on B.R.W. by C.R. Therefore summary judgment was properly granted dismissing the negligent supervision count.

B. Claim of Negligence Based on Bus Driver and Aides Conduct Must Be Dismissed.

The focus now by B.R.W. is on the purported seating of C.R. on the summer bus. Based on B.R.W.'s brief to this Court, it now appears "the conduct of allowing C.R. to sit anywhere he wanted to" on the summer bus is the sole basis of his negligence action against Bloomington School District #271. (Appellant's Brief, p. 40.) In fact, B.R.W. now disavows the allegations of his Complaint and asserts it is completely irrelevant what Bloomington School District #271 decided to disclose regarding C.R.'s history of sexual misconduct on the emergency form. (Appellant's Brief, p. 41.) B.R.W. asserts that because C.R. testified that he did not always sit alone in the front seat of the bus, Johnson, and therefore Bloomington School District #271, through vicarious liability, is negligent and summary judgment is to be denied.

Assuming for purposes of summary judgment that sexual contact somehow occurred between B.R.W. and C.R. on a Bloomington School District #271 bus, that fact, in and of itself, does not support negligence. "Negligence is not presumed from the result." *Johnson v. Arndt*, 186 Minn. 253, 243 N.W. 67, 69 (1932).

The Minnesota Supreme Court has held that a school district cannot be held liable for actions that are not foreseeable when reasonable measures of supervision are employed and there is adequate consideration being given for the safety and welfare of the students. *P.L. v. Aubert*, 545 N.W.2d 666, 668 (Minn. 1996). Where, as here, the issue of foreseeability is clear, the Court as a matter of law should decide it. *Foss v. Kincade*, 746 N.W.2d 912, 916 (Minn. Ct. App. 2008).

B.R.W. and C.R. were transported on a very small bus consisting of a few rows of seats. The bus carried no more than three other special education students. It is the unequivocal testimony of Johnson and the aide that no conduct, sexual or otherwise, was observed to take place between B.R.W. and C.R. on the school bus. The IEP team's decision that C.R. was to sit alone in the front seat was the least restrictive accommodation, and the more restrictive accommodation that a bus assistant would be assigned to the bus was viewed as not necessary. (Yarbro Depo. pp. 18-20; A. 185.) In fact, a bus assistant was assigned to the bus. (A. 898.) So regardless of whether Johnson required or did not require at all times that C.R. sit in the front seat alone, it is undisputed Bloomington School District #271 did, in fact, employ the more restrictive protection of

an adult bus aide to supervise B.R.W. and C.R. during their transportation to and from Hosterman. (A. 898.)

There are no facts presented to indicate that C.R. was at risk to engage in sexually inappropriate conduct while being supervised by two adults. In fact no one -- the two bus drivers, the three bus aides or the teachers and assistants at Hosterman -- observed any unusual or intimate behavior between C.R. and B.R.W. While Bloomington School District #271 and the Adam bus drivers and aides were not informed of any propensity by C.R. to engage in sexual activities, all were aware that C.R. and B.R.W. had EBD and all were charged with supervising the students on the bus. They saw nothing, as did all the adults who supervised B.R.W. and C.R. The alleged sexual assaults could not have been reasonably anticipated under the circumstances that existed at the time of their alleged occurrence. Given the undisputed facts of record, there is no evidence to suggest that the alleged sexual assaults were reasonably foreseeable given the presence of the adult bus driver and bus aide who were always present to supervise B.R.W. and C.R.

B.R.W. has failed to present any facts that C.R. presented a risk to B.R.W. or any other student while being supervised by two adults on a small bus which contained, at most, four students other than C.R. Under these circumstances, Bloomington School District #271 is entitled to summary judgment on the sole ground of negligence now asserted by B.R.W.

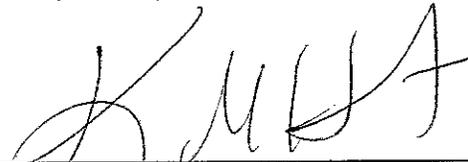
CONCLUSION

Respondent Bloomington School District #271 respectfully requests that the grant of summary judgment to it be affirmed.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: June 6, 2008

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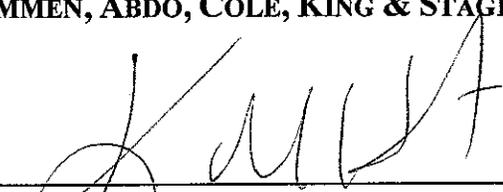
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 10,712 words. This brief was prepared using Word Perfect 10.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

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