IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES and CHERIE BOSTIC and JENNIFER BOSTIC,	)	
Plaintiffs,	)	
v.	)	Case No. 01-0261 KAJ
THE SMYRNA SCHOOL DISTRICT, THE SMYRNA BOARD OF EDUCATION, SMYRNA HIGH SCHOOL, CLARENCE E. LLOYD, IN HIS INDIVIDUAL and OFFICIAL CAPACITIES, ANTHONY E. SOLIGO, IN HIS INDIVIDUAL and OFFICIAL CAPACITIES, JOHN SMITH, IN HIS INDIVIDUAL and OFFICIAL CAPACITIES, and EVELYN SMITH	)	
Defendants.	)	

MEMORANDUM OPINION

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Wilmington, Delaware
February 24, 2003

JORDAN, District Judge

Before the Court is a Motion for Summary Judgment (Docket Item ["D.I."] 55) filed by the Smyrna School District, the Smyrna Board of Education, Smyrna High School,[1] Clarence E. Lloyd ("Lloyd"), individually and in his official capacity as Principal of Smyrna High School, and Anthony E. Soligo ("Soligo"), individually and in his official capacity as Associate Principal of Smyrna High School.[2] The Complaint in the case alleges that the defendants violated the rights of plaintiff Jennifer Bostic ("Bostic") under Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 *et seq.* ("Title IX"), as well as her rights under 42 U.S.C. § 1983 ("§1983") and state common law. (D.I. 24 at ¶ 2.) Bostic's parents also claim that they are entitled to recover from the defendants under state tort law principles. (D.I. 74 at 38.) For the reasons set forth herein, and except as otherwise noted, the School Defendants' Motion for Summary Judgment is denied.

I. STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 provides that summary judgment shall be entered if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "[T]he availability of summary judgment turn[s]

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[1] The Smyrna School District, the Smyrna Board of Education, and Smyrna High School are collectively referred to herein as the "Institutional Defendants."

[2] The Institutional Defendants and Lloyd and Soligo are collectively referred to herein as the "School Defendants."

on whether a proper jury question ... [has been] presented." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* In making that determination, the Court is required to believe the non-moving parties' evidence and draw all inferences from the evidence in the non-moving parties' favor. *Id.* at 255; *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992). Nevertheless, the party bearing the burden of persuasion in the litigation, must, in opposing a summary judgment motion, "identify those facts of record which would contradict the facts identified by the movant." *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.,* 311 F.3d 226, 233 (3d Cir. 2002) (internal quotes omitted).

As is required in reviewing a motion for summary judgment, the following rendition of facts is based largely on the evidence cited by the plaintiffs and inferences therefrom.[3] Nothing herein should be construed as reflecting the Court's own view of the facts or the manner in which the case should be decided by a jury upon a fully developed record.

II. BACKGROUND

In the Spring of 1999, Bostic was fifteen years old and a sophomore at Smyrna High School. She was also a member of the school's track team, which was coached by defendant John Smith ("Smith"). (D.I. 56 at 3; D.I. 74 at 3.) Bostic became infatuated with Smith and Smith returned her attentions. Eventually an illicit sexual

[3] Citations are generally to the parties' summary judgment briefs, which are thoroughly documented with references to deposition testimony taken in discovery and other evidence.

relationship developed between them. (*See id.*) By all accounts, the relationship included numerous sexual encounters during and after the school day. The relationship continued for over a year, until the late Spring of 2000. (*See* D.I. 56 at 9; D.I. 74 at 3.)

It is uncontested that many of Bostic's and Smith's sexual liasons occurred on school property, both during the school year and during the Summer vacation break of 1999. (*See* D.I. 56 at 3-4; D.I. 74 at 3.) Smith has admitted under oath that he had sex with Bostic numerous times at various locations at the school, including the track team's equipment shed, the faculty bathroom, and the computer room adjacent to the classroom where his own wife worked as a teacher at the school. (D.I. 74 at 5.) The relationship was sufficiently flagrant that it became a topic of discussion among students (*see* D.I. 74 at 28-29) and generated reports that reached Principal Lloyd and Associate Principal Soligo from concerned teachers.[4] (*See* D.I. 74 at 13-15.) Smith's wife also found Bostic and Smith in compromising circumstances and reported them to Lloyd. (*Id*. at 17.)

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[4] For example, a Mr. Feldman, the football coach at the high school and a social studies teacher, heard numerous rumors from students about inappropriate conduct between Smith and Bostic and he personally witnessed the two of them together in a hallway standing so close to each other that he at first thought they were a student couple, not an adult with a student. (D.I. 74 at 13.) In October or November of 1999, Mr. Feldman made two reports to an Associate Principal at the school, not Soligo, who in turn reported the information to Lloyd. (*Id.*) No one from the school or district administration followed up with Mr. Feldman about the concerns he had expressed. (*See id.)* A Mrs. Kay Vendrick, an English teacher, also heard several rumors from students about the relationship between Smith and Bostic, as well as about a sexual relationship between Smith and another student. (*Id.* at 15.) She too personally witnessed Smith and Bostic on several occasions having close, personal contact in the hallways in a way that indicated a romantic relationship. (*Id.*) She stated that the behavior "really stood out" and that, in her 29 years of experience teaching at the high school, she had never witnessed anything like it. (*Id.*) She complained directly to Soligo about it. (*See id.*) She testified that Smith's behavior towards Bostic was the subject of comment among teachers at the school. (*Id.* at 16) She told another Associate Principal, not Soligo, of a report she'd received from her son, a student at the school, that Smith was having sexual relations with another student. (*Id.*) That Associate Principal stated that he had spoken with Lloyd about her concerns. (*See id.*) Other than the Associate Principal's assuring her that the situation was being handled, no one from the school or district administration followed up with her about the concerns she had expressed. (*See id.*)

Bostic's parents became very concerned about the unusually close relationship they observed between their daughter and her coach. (*Id.* at 7; D.I. 56 at 5.) In September of 1999, Mr. Bostic went to the high school and personally described to Lloyd the things which caused them such concern. (D.I. 74 at 7.) Among other things, Mr. Bostic told of his daughter and Smith going with a group of other students to a movie and then returning late, without the other students. (*Id.*) He further described how he and his wife had found their daughter and Smith alone, at night, sweating, in a parked car with steamed-up windows. (*Id*.; D.I. 56 at 5.) Sometime after his conversation with Mr. Bostic, Lloyd called Smith into his office and, in the presence of Soligo and the school's athletic director, discussed with Smith the allegations made by Mr. Bostic. (D.I. 56 at 5; D.I. 74 at 9.) Smith admitted to being alone at night with Bostic in a parked car. (*Id.*) He said that he was discussing his marital problems with Bostic. (*Id.*) He acknowledged that the conduct he was admitting to was inappropriate. *(Id.*) Lloyd warned Smith that being alone with a student at night in a parked car was inappropriate and created the appearance of impropriety. (D.I. 74 at 11.) He told Smith to avoid improper contact with students. (*Id.*) Soligo warned Smith that he should "minimize contact" with Bostic. (*Id.*)

Other than those warnings, and a later discussion in which Lloyd told Smith not to have one-on-one contact with Bostic (*id.* at 14), no one from the high school or the school district took remedial action or took any steps to further investigate the relationship between Smith and Bostic. (*See id.* at 10-11.) Apparently, they did not speak to Bostic; they did not speak to other members of the track team or to the team's assistant coach or to other students; they did not inquire of Smith about any other

incidents involving Bostic or other students with whom he might have had improper contact; and they did not inquire of any of the faculty or staff, including Smith's wife, about the relationship between Bostic and Smith. (*See id.* at 11.) Nor did they engage anyone else to conduct any further investigation. From the deposition testimony of both Smith and Bostic, it appears that, had anyone followed them for even a limited time, the coach and student would have been caught *in flagrante delicto*. (See *id.* at 30.)

On January 3, 2000, Smith's wife reported to Lloyd that she had caught Smith and Bostic alone in a classroom, a breach of Lloyd's direct instruction to Smith. (*See id*. at 17.) The next day, Mrs. Bostic went to the high school and reported to Lloyd that she and her husband continued to have grave concerns about Smith's interactions with their daughter. (*Id*. at 18.) She told Lloyd that they had hired a private investigator to look into the relationship and that they had a phone bill reflecting contact between Smith and the girl. (*See id*.) The extent of Lloyd's response was apparently to meet with Smith and tell him again not to have inappropriate contact with Bostic. (*Id.* at 18.)

Early the next month, Mrs. Bostic returned to the school and told Lloyd that she had overheard a phone conversation in which Smith arranged a surreptitious rendevous with her daughter. (*Id.* at 19.) She further told Lloyd that her other daughter, also a student at the high school, had reported that Smith and Bostic had met in the faculty bathroom, and that a relative of Smith's had reported seeing Smith and Bostic kissing. (*Id*.) Later the same day, Lloyd himself observed Smith and Bostic alone together at the school conversing by a vending machine. (*Id*. at 19.) This was in direct contravention of Lloyd's earlier instruction to Smith that he not have one-on-one contact with Bostic. (*Id*. at 17, 19.) Lloyd also had a conversation that day with the Bostics' private investigator

in which the investigator reported having taken pictures on one of several occasions on which he observed Smith and Bostic slip alone into the track team's equipment shed for several minutes. (*Id.*) In spite of all this, Lloyd took no disciplinary action against Smith and apparently conducted no further investigation on his own. (*See id.*)

Concerns about the relationship were reported to the Superintendent of the school district at least as early as November of 1999. (Id. at 11, 20.) In February of 2000, Lloyd had conversations with the Superintendent and an Assistant Superintendent about the more recent information he had received regarding the relationship between Smith and Bostic. (*Id*. at 20.) The Superintendent took no remedial or investigatory steps. (*See is.* at 11, 20.) When a member of the School Board learned of allegations about Smith's behavior from Mrs. Bostic, the Board member called the Superintendent and urged that the matter be reported to the police immediately, but the Superintendent resisted that suggestion. (*Id*. at 20-21.) The Board member then took it upon himself to report Smith to the police. (*See id*. at 21.) After a brief investigation, Smith was arrested for having an illicit relationship with a young student other than Bostic. (*Id*.) He was subsequently arrested for his involvement with Bostic. (*Id*.) He was charged with 57 counts of rape. (*Id*.) In November of 2000, Smith pled guilty to three counts of forth-degree rape against Bostic. (D.I. 69 at 10.)

III. DISCUSSION

The foregoing is not an exhaustive recounting of the evidence the plaintiffs have adduced. Needless to say, the School Defendants contest many of the factual allegations made by the plaintiffs and, even where certain facts are not in dispute, the inferences to be drawn from them are hotly contested. The question then becomes

whether the factual disputes are material to the liability of the School Defendants, which can only be answered by reference to the legal standards governing private actions under Title IX and claims under § 1983 and Delaware tort law.

A. Title IX

In *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), the Supreme Court reaffirmed that a student can bring suit against a federally funded educational institution for sexual harassment that the student suffers at the hands of one of the institution's employees. *Id.* at 277. The School Defendants have not disputed that the Institutional Defendants are federally funded educational institutions.[5] Those defendants can be liable for damages under Title IX if "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the [employee's] misconduct." *Id.*

Despite the School Defendants' protestations to the contrary (*see* D.I. 82 at 5-6) Lloyd is clearly an official under Title IX with authority to take actions to correct inappropriate staff conduct at the high school.[6] The Third Circuit has observed that, "a school principal who is entrusted with the responsibility and authority normally

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[5] The School Defendants have not attempted to draw any distinction among the Institutional Defendants for purposes of any liability that may attach from plaintiffs' claims. The Court thus treats the Institutional Defendants as equally yoked. The School Defendants have, however, correctly argued (see D.I. 56 at 10), and the plaintiffs have conceded (see D.I. 74 at 36), that, to the extent the complaint alleges Title IX liability against defendants named as individuals, those claims cannot stand. *See Kinman v. Omaha Public School District,* 171 F.3d 607, 611 (8th Cir. 1999). Partial summary judgment on that issue will be entered.

[6] Because the Court finds that Lloyd is an "official of the school district [with] ... authority to institute corrective measures[,]" it is unnecessary to determine whether Soligo is also such an official for Title IX liability purposes.

associated with that position will ordinarily be 'an appropriate person' under Title IX."[7] *Warren v. Reading Sch. Dist.,* 278 F.3d 163, 171 (3d Cir. 2002). There is no indication in the record that Lloyd was anything other than what one would expect a principal to be, namely the district official at the school primarily responsible for directing the work of the faculty and staff and seeing that district policies were followed. Accordingly, if the level of his knowledge can be said to amount to "actual knowledge" of impropriety and his response to it can reasonably be characterized as "deliberately indifferent," then the Institutional Defendants can be liable under Title IX.

As to the level of Lloyd's knowledge, the School Defendants repeatedly assert that he did not actually know of the affair between Smith and Bostic. (*See, e.g.,* D.I. 82 at 6-12.) They argue that all of the evidence cited by the plaintiffs is either refuted by other evidence or subject to an innocuous interpretation.[8] (*See id.*) The implication of their briefing on this point is that, at most, school officials were aware of a risk or possibility that there was an improper relationship. (*See id.*) Their arguments miss the point. While they may be correct that the mere risk of abuse does not satisfy the "actual notice" standard articulated in *Gebser*, *see Baynard v.Malone*, 268 F.3d 228, 237-38 (4th Cir. 2001), the evidence of record is such that, viewed in the light most favorable to the plaintiffs, a rational fact finder could indeed conclude that Lloyd did have, or certainly

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[7] Officials with the authority sufficient to satisfy the standard set in *Gebser,* are sometimes referred to as "appropriate persons" in Title IX litigation. *See Warren,* 278 F.3d at 171 n.3.

[8] In their reply brief, the School Defendants claim that "[n]one of the evidence set forth by the plaintiffs meets the standard of creating a material issue of fact as to whether Mr. Lloyd had actual knowledge of the affair." (D.I. 82 at 6.) They then proceed to place in opposition to the plaintiffs' evidence other points of evidence, including deposition excerpts, which they claim rebut or substantially undermine the plaintiffs' contentions. They thus ignore the Court's obligation at this stage to take the evidence in the light most favorable to the plaintiffs and to draw every inference in the plaintiffs' favor.

should have had, “actual knowledge” of inappropriate conduct amounting to harassment of a student by a member of the school’s staff, whether or not he knew that they had consummated their relationship with sexual intercourse. An administrator cannot turn a blind eye to a mounting stream of information showing that a staff member and student are engaged in an obviously inappropriate relationship. The evidence in this case can fairly be characterized as going well beyond a demonstration of the mere risk of harassing behavior.

That conclusion is bolstered by the Third Circuit’s recent opinion in *Warren, supra.* In that case, the court noted that the testimony of a single witness who told an elementary school principal about a teacher’s taking a student to the teacher’s home and paying the student to engage in questionable physical activity was sufficient to support both a finding that the school principal actually knew of the teacher’s misconduct and a finding that the principal was deliberately indifferent to it. 278 F.3d at 173. The court found it noteworthy that the principal had acknowledged that the conduct was inappropriate by reprimanding the teacher. *Id.* at 172. In the present case, the several reports to Lloyd can be viewed as being as significant as the single report received by the principal in *Warren*. Also, as in *Warren*, Lloyd had directly told the staff member concerned that his behavior was inappropriate and his interaction with the student had to change. (*See supra* at 5-6.)

The next inquiry is whether Lloyd’s response to his knowledge of Smith’s behavior toward Bostic can be characterized as “deliberate indifference.” Deliberate indifference exists when “an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance.” *Gebser*, 524 U.S. at 290. The School

Defendants argue that they did take action to address the concerns that were brought to their attention. They say that they instructed Smith to only have contact with Bostic in his capacity as track coach, that they asked school personnel to be aware of any suspicious circumstances, that they consulted with district officials and outside counsel, and that they permitted Mr. and Mrs. Bostic's private investigator to conduct surveillance on school grounds. (D.I. 56 at 15-16.)

Again, the School Defendants ask the Court to view the evidence in the light that suits them best, when the obligation of the Court is exactly to the contrary. Accepting the plaintiffs' evidence and drawing in their favor the inferences from it, one could rationally conclude that the actions of the Institutional Defendants, through Lloyd, Soligo and other agents, including the district superintendent, were woefully inadequate to address a known, continuing relationship, rife with sexual overtones and accusations of sexual contact, between a coach and student. *Cf. Warren,* 278 F.3d at 173 (principal's referring complaining parent to school guidance counselor and merely sending teacher a memo to stop physical "games" with students "would support a finding that [the principal] knew of [the teacher's] misconduct and was deliberately indifferent to it"); *Doe v. Sch. Admin. Dist. No. 19,* 66 F. Supp. 2d 57, 64 (D. Me. 1999) (principal's failure to investigate allegations of sexual impropriety could be viewed by a reasonable jury as deliberate indifference). When finally the accusations against Smith came to the attention of a School Board member, the district superintendent actively attempted to dissuade the member from reporting the matter to the police. (*See* D.I. 74 at 21, 32.) It was only after that School Board member went ahead, in spite of the superintendent's urging, and reported the matter to police that Smith's conduct was finally investigated by

lawful authorities and steps were taken to protect Bostic and other students from him. (*Id.* at 21.) The Court cannot say, under these circumstances, that it would be irrational for a jury to conclude that the Institutional Defendants acted with deliberate indifference.

Finally, in seeking to avoid liability under Title IX, the School Defendants argue that the improper relationship between Smith and Bostic cannot constitute harassment because Bostic welcomed and encouraged Smith's conduct (D.I. 56 at 17-18), and that, for the same reason, any dereliction of duty to protect Bostic from Smith was not the proximate cause of injury she might have suffered. (D.I. 82 at 13.) Those arguments fly in the face of long-standing law and policy governing the actions of an adult towards a child. Smith's behavior was literally criminal. He is serving a jail sentence because, under Delaware law, his relationship with a teenager was nothing more nor less than rape. *See* 11 Del. C. § 770(a)(4) (defining fourth degree rape to include sexual contact with a victim less than eighteen years of age when the perpetrator stands in a position of trust, authority, or supervision over the victim). It would be a bizarre rule indeed that, for purposes of civil liability, would call a teenager's "consent" sufficient to make a relationship "welcome" and thus not a basis for civil liability, when the very same relationship is rape under the exacting standards for criminal liablity. *See Mary M. v. North Lawrence Cmty Sch. Corp.*, 131 F.3d 1220, 1227 (11th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998) (Because children cannot "consent to sex in a criminal context, they similarly cannot be said to welcome it in a civil context. To find otherwise would be incongruous.") Bostic's sadly misguided participation in the affair is no shield from liability for the defendants.

B. §1983

The School Defendants acknowledge that under 42 U.S.C. § 1983, both the individual defendants and the Institutional Defendants can be liable for the violation of clearly established statutory or constitutional rights. (*See* D.I. 56 at 18.) They argue, however, that there cannot be liability in this case because there was not deliberate indifference to Smith's misconduct. (*See id.* at 13-16.) Going further, they also assert that the individual defendants should enjoy qualified immunity to suit because the affair was "consensual" and therefore the affair "did not violate clearly established statutory rights of which a reasonable person would have known." (*Id.* at 18 (quoting *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir. 1989), *cert. denied sub nom.*, *Smith v. Stoneking*, 493 U.S. 1044 (1990).)

As already discussed, the Court rejects the premises behind both of those contentions. Third Circuit precedent indicates that, if a jury credits the evidence advanced by the plaintiffs, a finding of deliberate indifference would not be improper in this case. (*See supra* at 10-11.) And Smith's affair with Bostic cannot be viewed as consensual, given the minority of the student and the relationship of trust and authority which the coach held over her. (*See supra* at 12-13.) There is a clearly established constitutional right to "bodily integrity, under the Due Process Clause," and that right "encompass[es] a student's right to be free from sexual assaults by his or her teachers." *Stoneking,* 131 F.3d at 727; *cf. Baynard v. Malone,* 268 F.3d 228, 235 (4th Cir. 2001), *cert. denied sub nom., Baynard v. Alexandria City Sch. Bd.,* 535 U.S. 954 (2002) (supervisory officials can be liable under §1983 when "supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care"). In light of the plaintiffs' evidence,

neither a grant of immunity nor the entry of summary judgment on the §1983 claims is appropriate.[9]

C. Delaware Tort Law Claims by Mr. and Mrs. Bostic

The School Defendants argue that Mr. and Mrs. Bostic lack standing to bring any claims under Title IX or §1983. (D.I. 56 at 20.) The plaintiffs concede that point. (D.I. 74 at 38.) The School Defendants go further, however, and argue that Mr. and Mrs. Bostic do not have any claims under state tort law either. They assert (1) that there is no recognized claim under Delaware law for loss of consortium of a daughter, (2) that, because Mr. and Mrs. Bostic have not alleged any physical injury to themselves, they cannot have a claim for negligent infliction of emotional distress, and (3) that there have been no allegations that would support a claim of intentional infliction of emotional distress. (D.I. 56 at 20.) The School Defendants are correct as to the first two of those assertions but not as to the third.

In support of their claim for loss of filial consortium (D.I. 24 at ¶ 28), Mr. and Mrs. Bostic provide no more authority than an 1828 case from Kentucky holding that a family may recover for "dishonor and disgrace" upon the seduction of one of their children. (*See* D.I. 74 at 39 (citing *Trimble v. Spiller,* 23 Ky. 394 (Ky. 1828).) As the School Defendants note, no basis in Delaware law is cited for the proposition advanced by Mr.

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[9] The record on what supervisory authority Soligo actually possessed over Smith is not well developed, or at least has not been presented to the Court in a meaningful way. The Amended Complaint alleges that he possessed such authority (D.I. 24 at ¶ 11), which the School Defendants deny. (D.I. 31 at ¶ 11.) While the showing of evidentiary support for Soligo's supervisory involvement is substantially weaker than the alleged involvement of Lloyd, it is still sufficient to weather the School Defendants' motion for summary judgment.

and Mrs. Bostic and this Court declines to establish a cause of action which apparently neither the legislature nor the courts of Delaware have seen fit to recognize.

Regarding Mr. and Mrs. Bostic's claim for negligent infliction of emotional distress, the School Defendants correctly observe (*see* D.I. 56 at 20; D.I. 82 at 19) that no allegation of physical injury is alleged and, therefore, a key element of the tort has not been pleaded nor supported by any evidence. *See Garrison v. Medical Center of Delaware, Inc.*, 581 A.2d 288, 293 (Del. 1990) (reviewing "parents['] ... claim [for] damages for emotional distress" and holding "[i]t is settled law in Delaware that, in a negligence action, for a claim of mental anguish to lie, an essential ingredient is present and demonstrable physical injury to the plaintiff"); *Correa v. Pennsylvania Mfrs. Ass'n Ins. Co.,* 618 F. Supp. 915 (D. Del. 1985) (essential element of claim under Delaware law for negligent infliction of emotional distress is bodily injury or sickness.)

The Court cannot conclude, however, on the present record, that Mr. and Mrs. Bostic should be precluded from submitting to a jury a claim against the School Defendants for intentional infliction of emotional distress. In attempting to make out such a claim, Mr. and Mrs. Bostic clearly have a heavy burden. It is not enough for them to argue, as they do in their briefing in opposition to summary judgment, that the School Defendants should be directly liable to them because Smith's conduct toward their daughter was willful and outrageous. (*See* D.I. 74 at 39.) That approach wrongly focuses on Smith's behavior with Bostic and the consequences of that behavior to her. The School Defendants are not arguing that Smith's behavior is less than outrageous and thus not a basis for a claim by Bostic against Smith for intentional infliction of emotional distress. The question is whether the parents can collect against the School

Defendants for intentional infliction of emotional distress, and that question is not answered by referring reflexively to what the School Defendants are likely to concede was outrageous behavior by Smith.

Looking rather at the School Defendants' actions towards Mr. and Mrs. Bostic, it may be that the plaintiffs can persuade a rational jury that the decisions made by the School Defendants regarding the repeated complaints from both Mr. and Mrs. Bostic were not merely wrong and not "[m]ere inadvertence, mistake or errors of judgment which constitute mere negligence[,]" that they instead manifested "a conscious indifference to the decision's foreseeable effect" upon the plaintiffs, including the parents. *Jardel Co. Inc. v. Hughes,* 523 A.2d 518, 529 (Del. 1987). It cannot be said, at least not at this point in the case, that a jury would be irrational if it accepted all of the plaintiffs' evidence and the inferences therefrom and then determined that the School Defendant's handling of the matter was so recklessly indifferent to the consequences to both Bostic and her parents as to be outrageous. *See id.* at 529-30 ("outrageous conduct may be the result of an evil motive or reckless indifference ... [,] [b]ut each requires that the defendant foresee that his unacceptable conduct threatens particular harm to the plaintiff"). That, in turn, could be the basis for a finding that the outrageous recklessness caused the parents foreseeable and severe emotional distress at the ongoing sexual exploitation of their daughter.

As already noted, Mr. and Mrs. Bostic face a remarkably difficult standard of proof to establish such a claim, *cf. Correa, supra,* 618 F. Supp. at 928 (claim of intentional infliction of emotional distress required finding that defendant's conduct was "attrocious and utterly intolerable in a civilized community[;]" internal quotes omitted);

Mattern v. Hudson, 532 A.2d 85, 85-86 (Del. Super. 1987) (liability for intentional infliction of emotional distress "has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency[;]" internal quotes omitted); and the Court's decision to permit the claim to remain in the case at this stage in no way reflects an assessment that the claim will be or should be successful, if it is submitted to a jury.[10]

In addition to their claim for intentional infliction of emotional distress, Mr. and Mrs. Bostic's claim for the expenses they incurred in obtaining medical care for their daughter survives the School Defendants' motion for summary judgment. Delaware law provides that parents may recover against a tortfeasor for "the reasonable value of the care or attendance rendered" to their child as a consequence of the tort. *See Mancino v. Webb,* 274 A.2d 711, 713 (Del. Super. 1971); *Hobbs v. Lokey*, 183 A. 631 (Del. Super. 1936) (father has right of action to recover for costs of medical treatment for minor son incurred as consequence of defendant's tort).

IV. CONCLUSION

For the foregoing reasons, it is hereby ORDERED that School Defendants' Motion for Summary Judgment (D.I. 56) is DENIED, except as to any claim that defendants Lloyd and Soligo are liable under Title IX and as to the claims of Mr. and Mrs. Bostic for loss of filial consortium and for negligent infliction of emotional distress, as to which claims partial summary judgment will be granted for the School Defendants. An Order will follow.

[10] The same observation is, of course, true with regard to the Court's assessment of any claim in the context of a summary judgment decision.