IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

KRISTIN HURT, et. al,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.:
V.	)	CV-13-HS-0230-S
	)	JURY DEMAND
SHELBY COUNTY BOARD OF	)	
EDUCATION, et. al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' BRIEF IN SUPPORT OF CLASS CERTIFICATION

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I. INTRODUCTION

In 1992, the Alabama Department of Human Resources found that Daniel Acker had sexually abused Kristin Hurt, his fourth grade student. (Ex. 1)The Shelby County Board of Education disregarded DHR's findings and returned Acker to the classroom, where, for the rest of his nearly twenty year career, Acker continued to abuse fourth grade girls. On January 4, 2012, Acker confessed to molesting Kristin Hurt and *at least* twenty other girls throughout his tenure as a teacher in the Shelby County school system, including four other named plaintiffs, Jane Doe #1 in 2005-2006; Jane Doe #2 in 2006; Jane Doe #3 in 2008-2009; and Jane Doe #4 in 2008-

2009. (Ex. 2; *See also* Doc. 10 p. 8 ¶13; Doc. 16 p.6 ¶13))Acker subsequently pleaded guilty to criminal charges of child sexual abuse. (Ex. 3)

Pursuant to Federal Rule of Civil Procedure 23(b)(3), Plaintiffs move for certification of the following class:

> Any current or former female student during the time period that Dan Acker worked for Shelby County School Board who was either injured, sexually harassed, abused or molested by Dan Acker or who witnessed such conduct or who was exposed to a sexually hostile educational environment through Acker's conduct.

The named Plaintiffs' claims are typical of the claims of the putative class, and the named Plaintiffs will adequately represent the claims of all female students in Acker's fourth grade classrooms and his bus routes who were exposed to a sexually hostile educational environment as a result of Acker's abuse. Common issues capable of classwide resolution predominate over individualized issues, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy, as discussed below. *See* Fed. R. Civ. Proc. 23(b)(3).

II. STATEMENT OF FACTS

A. Acker Has Admitted Molesting At Least Twenty Female Students

1. As admitted in Defendant Acker's answer, in 1991 he subjected Kristin Hurt Lopez, who was an eleven year old fourth grade student in Acker's Creekwood

Elementary School classroom, to sexual contact by placing his hand under shirt and bra and caressing her right breast and that it was for his own sexual gratification. (Doc. 10 p. 8 ¶ 15; Doc. 16 p.6 ¶15)

2. In 2012, Acker confessed to Alabaster police that he had molested at least twenty (20) different girls for his own sexual gratification during his tenure with the Shelby County School Board. (Doc. 10 p. 8 ¶13; Doc. 16 p.6 ¶13)

B. Alabama Department of Human Resources Investigated & Determined Acker Sexually Abused Hurt

3. Acker continued to teach while DHR investigated Hurt's allegations. (Acker admits ¶39 of Doc. 10 p. 13 *See* Doc. 16 p. 8 ¶39).

4. On August 30, 1991, Stephanie Taylor, a Shelby County Department of Human Resources (DHR) social worker, communicated a finding of "reason to suspect" child abuse to Defendant Acker. (Ex. 1 SCBE 000014).

5. On September 19, 1991, Acker requested a hearing with the administrative hearing office of the State Department of Human Resources. (Ex. 1 SCBE 000014).

6. The administrative hearing commenced on February 27, 1992, and by Order was continued until June 29, 1992. (Ex. 1 SCBE 000014-15).

7. The issues addressed were:

1. Whether on or about August 6, 1991, at 5 Eddings Lane, Danny Acker fondled Kristin Lopez;

2. Whether or not the facts are reasonably related to whether the alleged perpetrator Danny Acker should be allowed to have regular and substantial contact with children;

3. Whether this information should be shared with the employer or potential employer.

(Ex. 1 - SCBE 000015)

8. The June 19, 1992, DHR Final Decision included details of Acker's alleged conduct and his responses:

A. "In the 1990-1991 school year, Kristin was a student at Thompson Elementary School, and Mr. Acker was one of her instructors. Kristin stated in testimony that Mr. Acker would touch and rub her on her "bottom" when she approached him for assistance with her work. It was her opinion that those touchings were not accidental. . . Mr. Acker denied having intentionally touched Kristin Lopez on her buttocks. He stated that his usual pattern of interaction was to pat them or touch them on the back. He went on to say if he had touched Kristin's buttocks, it would have been an accident." (Ex. 1 SCBE 000015)

B. Kristin recounted another unusual incident which occurred between her and Mr. Acker during the same school year. In preparation for a test, Mr. Acker had divided the students into small study groups. During the study period, Kristin complained to Mr. Acker that several boys were trying to under her skirt at her panties. Later, the test was administered. There was on Kristin's test paper the question, "What color are Kristin's panties?" The test papers had to be reviewed by parents. Mr. Acker wrote a note to Ms. Lopez. The note, a copy of which was admitted into evidence, reads as follows:

Mrs. Lopez,

I thought the last question might need some explanation. Kristin Came to me complaining about some boys trying to look up her

> dress while we were studying. I kidded her saying the boys must think I was going to have a question about her underwear since that was the only they were studying. I promise I'm not a pervert, I just have a strange sense of humor. I assure you this question was only on her copy of the test.
>
> /s/ D. Acker

Acker agreed that "that type of question for a nine- or ten- year old's test is [not] appropriate. (Ex. 1 SCBE 000019-20)

9. DHR's final decision explains

> The evidence did reveal that Kristin has received substantial and widespread attention in her community. Tonality of testimony suggests that the allegations have been widely discussed throughout the parties' communities and the public sentiment is in respondent's favor. Kristin's testimony revealed that the event and hearing have generated peer ridicule and rejection of Kristin. In spite of this negative attention, Kristin Lopez persists with her affirmation that Danny Acker fondled her breast. Kristin's tenacity enhances her credibility. (Ex. 1 SCBE 000022-23)

10. From these factual conclusions the DHR Administrative Hearing judge found that there was "sufficient credible evidence to support" the social worker's "reason to suspect" child abuse finding. Moreover, the judge held, "the preponderance of the evidence supports a **determination of fact that Kristin Lopez was sexually abused, and that abuse was perpetrated by Danny Acker** at the Lopez's residence on August 6, 1991. . . " *emphasis added* (Ex. 1 SCBE 000031)

11. DHR determined that Daniel Acker:

> . . . intentionally touched Kristin's breast, an intimate part of her body, by placing his hand under her shirt and then under her bra. The circumstances in which the touching occurred and the nature of the touching indicated that the act was **perpetrated for the sole purpose of generating sexual pleasure for Danny Acker**; the evidence shows the touching was not accidental, nor did Danny Acker have a legitimate medical or hygienic purpose for touching Kristin's breast. The touching of Kristen Lopez's breast **constitutes an act of child abuse** as defined by the Code of Alabama and the Department of Human Resources' Administrative Code. The **findings of the hearing should be entered in the central register in order to protect children whose health and welfare may be adversely affected by Mr. Acker's regular and substantial contact with children.**

(Ex. 1 SCBE 00031).

12. On October 14, 1992, Shelby County Department of Human Resources Director Rene C. Williams mailed a letter to Dr. Norma, Rogers, Superintendent of Education for the Shelby County School Board, stating, " A founded determination has been entered into the **State Central Registry**. . . the contents of the investigation of reports of suspected child abuse/neglect where school personnel are the alleged perpetrator must be furnished in writing to the School Board on **all *indicated* reports** after the department investigative is waived or held. . . Enclosed is a copy of the child abuse investigation Final Hearing Decision . . ." *emphasis added* (Ex. 1 SCBE 000013)

13. On October 19, 1992, Superintendent Rogers sent a letter to Acker stating,

> On October 15, 1992, upon recommendation by the Superintendent, the Shelby County Board of Education voted to consider cancellation of your contract of employment. The grounds for this action include . . . .
>
> 1. You are suspected of and have been **found guilty** by a state hearing official **of child abuse of a sexual nature**. (See attached copy of "Final Decision.")
>
> 2. You have **engaged in inappropriate oral and written communication** with such female, minor student on school premises. (See attached correspondence to student's mother.)
>
> 3. Your conduct as alleged and described in the foregoing paragraphs demonstrates a lack of fitness to serve as an instructor and authority figure to students in the Shelby County School System, **compromises your reputation and effectiveness as an educator**, and diminishes the standing of the school and the entire school system in the community."

(Ex. 1 SCBE 00003).

14. On October 19, 1992, Acker was relieved of his duties pending the disposition of whether his contract would be cancelled. (Ex.4 - SCBE 00000101)

C. Defendant School Board & Agents Voted To Return Acker to Classroom

15. The private hearing was continued until February 8, 1993, the President Dr. Lee Doebler reconvened the public meeting at 2:30 a.m. on February 9, 1993. Upon

written recommendation of the Superintendent, a motion was made by School Board Vice President Mr. Steven Martin seconded by Board member Mrs. Morris, and unanimously rejected the motion to terminate the employment contract of Mr. Danny Acker. (Ex. 5 SBCE 00001)

16. Following the hearing, Dr. Lee Doebler, responding to a letter from concerned parent regarding Shelby County School Board of Education's decision to reinstate Acker, wrote:

> In fact, Mrs. Carpenter, if you recall, you and I talked on the phone about two weeks before the hearing. At that time, you told me 2 other girls had come forward with charges against Mr. Acker I urged you to make those names available to Mr. Sweeney. I understand that Mr. Sweeney's office made extensive efforts to identify these witnesses. They were not available.
>
> ***
>
> **My colleagues and I read the DHR Report** and listened to all 8 ½ hours of testimony of and all five of us independently reached the same conclusion. We did not have the luxury of making our decision based on phantom claims of knowing numerous children who had the same experience. *Those children, if they exist, did not come forward to testify*."

emphasis added (Ex. 6)

D. Plaintiffs Are a Fraction Of Victims, but Represent the Spectrum of Damages

17. On May 3, 2012, Danny Acker pled guilty to criminal charges of sexual abuse

of a child less than twelve, a Class B and C felonies. (Doc. 10 p. 8 ¶14; Doc. 16 p.6 ¶14).

18. On January 4, 2012, Defendant Acker admitted during an interview with Alabaster Police Department's lead investigator Grant Humphries that **during his time as a teacher in the Shelby County School System** he had **sexually molested over twenty female** students by touching various body parts, including their buttocks for his own sexual gratification and that he could not remember their exact names. (Doc. 10 p.10 ¶23 of; Doc. 10 p.29 ¶68; Doc. 16: p. 7-8 ¶23; p.20 ¶68; see also Ex. 3 Plea Transcript pp: 10:14-22). Acker admitted he "could not remember the exact name of the student he had touched and stated that this had occurred over a period of years and that he had touched female students in this way - - over twenty students in this way over time. . "; Ex. 3 p.11:11-18; 12:2-6)

19. The five named Plaintiffs - Kristin Hurt; Jane Doe #1; Jane Doe #2; Jane Doe #3; Jane Doe #4 - suffered common forms of harm while in the custody of Shelby County School Board of Education at the hands of Daniel Acker. These harms are briefly detailed below.

Kristin Hurt: Hurt was a member of Defendant Acker's fourth grade science and reading classes during the 1989-1990 school year. Throughout the 1989-1990 school year, Hurt was sexually abused by Defendant Acker, who would rub her lower back and buttocks when she came to his desk to ask

questions. While Hurt was his fourth grade student Defendant Acker gave her a test asking "What color are Kristen's underwear?" (Acker admits ¶¶24-26 Doc. 10 pp. 10-11 *See* Doc. 16 p. 8 ¶¶24-26)

Jane Doe #1: In May of 2006, JANE DOE #1 was a ten-year-old student in Daniel Acker's classroom, just finishing up her fourth grade year.About five or six days before the end of the school year, Acker called JANE DOE #1 to his desk while the rest of the students were reading. Acker was entering grades in his computer. When JANE DOE #1 commented on how fast Acker was able to type, Acker put his hand on her back and began rubbing it, then moved his hand lower and grabbed her buttock. JANE DOE #1 recalls that Acker frequently called **female students to chalkboard and held their wrist as he stood behind them**. Jane Doe #1 recalls him **pressing his penis against her**. (Doc. 10 pp. 20-21¶¶ 70-75; see also Ex. 3 Plea Transcript pp.10:23-11:10)

Jane Doe #2: In December 2006, **JANE DOE #2** was a fourth grader at Thompson Intermediate School. Danny Acker was her homeroom teacher.In December, 2006, when **JANE DOE #2** was alone with Acker, Acker **touched her breast**. (Doc. 10 p.21 ¶¶76-77; see also Ex.3 Plea Transcript pp.11:19-12:1)

Jane Doe #3: In 2008, JANE DOE #3 was an eight-year-old in Danny Acker's fourth grade class. One day, JANE DOE #3 failed a reading test on the computer. JANE DOE #3 asked Acker if she could re-read the book and then take the test again. Acker sent her into the hall to re-read; about ten minutes later, he called her to the desk and told her that he was going to help her. Acker took JANE DOE #3 by the upper arm and **sat her on his lap**. He put his **hand on her leg** and pulled up the test on the computer. JANE DOE #3 answered the first few question herself; then Acker took the mouse and began answering the test questions for her.

At the point when Acker began answering the questions for her, JANE DOE #3 felt Defendant **Acker's erect penis pressing against her**. After returning from lunch that day, Acker pulled JANE DOE #3 aside and told her not to talk about what had happened, that she was his favorite and he didn't want her to mess it up.Next, at the end of the February, Acker showed a movie, the Chronicles of Narnia, to the fourth grade class. JANE DOE #3 was sitting in the last row, and Acker had positioned himself directly behind her. JANE DOE #3 felt her desk begin to move backward. She realized that Acker had hooked his feet around the legs of her chair and was pulling her toward him.Acker started **rubbing her back on top of her shirt, and after a while moved his hands under her shirt and tank top.** Then he took his hands out of her shirt and began **rubbing down her pants, including penetrating her anus with his finger**. On other, similar occasions when the class watched movies Acker would sit behind JANE DOE #3 and **touch her under her clothes**; on one such occasion, **Acker penetrated her vagina** with his finger. One day Acker pulled JANE DOE #3 out of Physical Education class, telling the PE teacher that she needed to go back in with him to re-do a test. In the classroom, Acker sat JANE DOE #3 down and told her that he was sorry he'd touched her. He said, "That's for you and your [future] husband, and I'm going to stop right now," or something to that effect. However, Acker did not stop. In April, JANE DOE #3 was at 4H camp, which Acker was also attending as a counselor. JANE DOE #3 was looking for the basketball court, and Acker offered to take her. While walking her to the basketball court, Acker stopped her, **grabbed her hand, and put it on his penis** between his pants and his boxer shorts. Following this occasion, Acker again sat behind JANE DOE #3 and touched her while showing a movie, **putting his hand up her shirt and down her pants**. (See Doc. 10 pp.22-24 ¶¶80-91; see also Ex. 3Plea Transcript pp. 7:18- 9:2)

Jane Doe #4: During the 2008-2009 school year, Acker also worked as a bus driver. Acker was JANE DOE #4s fourth grade teacher and also the bus driver who drove her home each day. When JANE DOE #4 got off the bus, Acker would hug her. **During one of these hugs, he put his hand on her buttock**. Acker retired from teaching after the 2008-2009 school year, though he was only in his mid-forties. However, he continued to work for the school system as a bus driver. (See Doc. 10 pp.24 ¶¶92-94; see also Ex. 3Plea Transcript pp. 10:03-13)

Acker confirmed that these are only five of the more than twenty or so victims he admits to molesting. These named Plaintiffs are only five of the hundreds of female students who were exposed to a sexually hostile educational environment as a result of Defendants failure to meet their obligations to protect Shelby County's school children by not taking corrective measures by failing to remove Acker or to monitor his interaction with students to ensure he did not sexually molest minor students in his custody (Doc. 10 ¶¶1,3,11,13)

IV. ARGUMENT

A. THE LEGAL FRAMEWORK OF TITLE IX.

Title IX requires that no person "on the basis of sex" be "subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.S § 1681(a) "The Supreme Court has recognized an implied right of action under Title IX for cases involving intentional sexual discrimination,

and it has held money damages are available in such lawsuits. *A.G. v. Autauga County Bd. of Educ*., 506 F. Supp. 2d 927, 2007 U.S. Dist. LEXIS 34885 (M.D. Ala. 2007) *citing Sauls v. Pierce County Sch. Dist.*, 399 F.3d 1279, 1283 (11th Cir. 2005) (citing *Franklin v. Gwinnett County Public Sch*., 503 U.S. 60, 65, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992). Furthermore, "a teacher's sexual harassment of a student constitutes actionable discrimination for the purposes of Title IX." Id. (citing *Franklin*, 503 U.S. at 74-76).

> The Eleventh Circuit - which, for cases involving teacher-on-student harassment uses as its guidepost the Supreme Court's analysis in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277, (1998) - has held that "Title IX plaintiffs . . . seeking to recover damages against a school district for teacher-on-student sexual harassment must establish two things to survive summary judgment: (1) a school district official with the authority to take corrective measures had actual notice of the harassment; and (2) the official with such notice was deliberately indifferent to the misconduct." *Sauls*, 399 F.3d at 1284.

A.G. v. Autauga County Bd. of Educ., 506 F. Supp. 2d 927, 936, 2007 U.S. Dist. LEXIS 34885 (M.D. Ala. 2007).

Deliberate indifference is an exacting standard; school administrators will only be deemed deliberately indifferent if their "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648,

119 S. Ct. at 1674. In essence, Title IX's premise "is an official decision by the recipient not to remedy the violation." *Gebser v. Lago Vista Independent School District*, 524 U.S. at 290, 118 S. Ct. at 1999.

A student who is sexually abused by a teacher can recover from the school district under Title IX if the "school district actually knew that there was a substantial risk that sexual abuse would occur." *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 652-53 (5th Cir.1997). *See A.G. v. Autauga County Bd. of Educ*., 506 F. Supp. 2d 927, 944, 2007 U.S. Dist. LEXIS 34885 (M.D. Ala. 2007) *See also* Floyd v. Waiters, 133 F.3d 786 (11th Cir. 1998), vacated, 525 U.S. 802, 119 S. Ct. 33, 142 L. Ed. 2d 25 (1998), reinstated, 171 F.3d 1264 (11th Cir. 1999) (discussing identity of the "appropriate school official" to whom actual notice must be given). Thus, to recover damages from a school district for a teacher's sexual harassment of a student under Title IX, the plaintiff must allege and prove that (1) a school district employee with supervisory power over the offending teacher (2) had actual notice of the harassment and (3) responded with deliberate indifference." *King v. Conroe Indep. Sch. Dist., No. 05-20988*, 289 F. App'x 1, *4 n.3 (5th Cir. May 29, 2007) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998)).

B. THE REQUIREMENTS OF RULE 23(a) AND (b)(3) ARE MET.

In order to obtain class certification, Plaintiffs must establish all four requisites of Rule 23(a) and a least one part of Rule 23(b) are met. *See Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994)(citing *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir. 1975)). Plaintiff's burden of demonstrating that a common question exists at the certification stage with the plaintiffs' later burden of answering that question in their favor:

> Requiring Named Plaintiffs to prove all class members were inadequately monitored or are actually exposed to a threat of harm due to [the Department's] monitoring practices at the certification stage would require them to answer the common question of fact or law, rather than just prove it exists. *Rule 23 (a) does not require the district court to have an answer before certifying a class*; classwide discovery and further litigation answer the question after certification.

D.G. v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010 at 1198 (emphasis added). Plaintiffs seek to certify a class under Fed. R. Civ. P. 23(b)(3).

1. PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS OF FRCP 23(a).

In any class certification, the threshold issue is whether the four requisites of Rule 23(a), numerosity, commonality, typicality, and adequacy are met. Rule 23(a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class

> is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *Prado -Steiman v. Bush*, 221 F.3d 1266, 1278 (11th Cir. 2000) (describing numerosity, commonality, typicality and adequacy elements). The purpose of Rule 23(a) is to ensure that the bond between class representatives and other class members is sufficiently strong to warrant leashing the fortunes of all class members to the named representatives. *See Cooper*, 390 F.3d at 713; *see also Wright v. Circuit City Stores, Inc*., 201 F.R.D. 526, 535 (N.D. Ala. 2001) (explaining that Rule 23(a) "acts as a lens through which the court looks to ensure that the interests and claims of the representative plaintiff match those of the putative class"). In performing the Rule 23 analysis, the Court may not inquire into the merits of plaintiffs' claims at this preliminary stage. *See, e.g., Cooper*, 390 F.3d at 712 (repeating well worn admonition that Rule 23 does not confer upon a court authority to conduct preliminary merits inquiry in making class certification determination); *Morrison v. Booth*, 763 F.2d 1366, 1371 (11th Cir. 1985) (concurring with district court's assessment that it "could not conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action").

a. The Class Is Sufficiently Numerous.

The numerosity requirement obliges plaintiffs to show that "the class is so numerous that joinder of all members is impracticable." Rule 23(a)(1), Fed.R.Civ.P. No rigid numerical threshold must be met. *See Bacon v. Honda of America Mfg., Inc*., 370 F.3d 565, 570 (6th Cir. 2004) ("There is no automatic cut-off point at which the number of plaintiffs makes joinder impractical, thereby making a class-action suit the only viable alternative."); *Silva-Arriaga v. Texas Exp., Inc*., 222 F.R.D. 684, 688 (M.D. Fla. 2004) (explaining that no specific number of class members is required to show impracticability of joinder for Rule 23(a)(1) purposes). Nonetheless, the sheer number of potential class members may warrant a conclusion that Rule 23(a)(1) is satisfied. *See Bacon*, 370 F.3d at 570 (if there are more than several hundred class members, that fact favors numerosity). Numerosity is generally presumed when a proposed class exceeds 40 members. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986); *Serventi v. Bucks Technical High School*, 225 F.R.D. 159, 165 (E.D. Pa. 2004) ("generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met"); *Dujanovic v. Mortgage America, Inc*., 185 F.R.D. 660, 666 (N.D. Ala. 1999) ("As a general rule, classes of more than 40 members are deemed to satisfy the numerosity requirement."). Other considerations for Rule 23(a)(1) purposes include

geographic diversity of class members, judicial economy, and the ease of identifying and locating class members. *See Jones v. Roy*, 202 F.R.D. 658, 665-66 (M.D. Ala. 2001) (collecting cases).

Acker himself cannot remember the names of all the girls he molested, but he admitted that it was more than twenty girls spanning his entire tenure as a teacher and bus driver. Daniel Acker taught from 1984 through his retirement in May 2009. The proposed class includes all female students in Acker's class and bus route starting from 1991 through 2009. Only looking at small sample of Acker's class size shows that there are potentially hundreds of plaintiffs, and likely more than forty (40). In 2000 Acker was assigned twenty-six (26) children in his class, 13 female. In 2002 Acker was assigned twenty-nine (29) children in his class, 10 female. In 2003 Acker was assigned twenty-six (26) children in his class, 11 females. (Ex. 7)Assuming that during the span of 18 years Acker only had 11 girls in each class each year, then on this formulation of the proposed class it is reasonable to assume that these prospective class members number of 198 females. This calculation does not even take into account to those girls who were on Acker's bus routes. Accordingly, the likely class size is too large to make joinder practicable.

b. The Claims of The Named Plaintiffs are Typical of the Claims of the Putative Class, and Share Common Issues of Law and Fact.

The Federal Rules of Civil Procedure authorize class certification only where "there are questions of law or fact common to the class"(the "commonality" requirement) and "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (the "typicality" requirement). Rule 23(a)(2), (3). The Eleventh Circuit has opined that these requirements, while distinct,[1] are interrelated and overlapping, inasmuch as "both requirements focus on whether a sufficient nexus exists" between the claims of class representatives and those of other class members to warrant class certification. *Cooper v. Southern Co*, 390 F.3d 695, 713 (11th Cir. 2004) (quoting *Prado-Steiman v. Bush*, 221 F.3d 1266, 1278 (11th Cir. 2000)); *see also General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge."); *Prado-Steiman*, 221 F.3d at 1278-79 ("the commonality and typicality requirements of Rule 23(a) overlap"). The critical function of the typicality / commonality inquiry is to verify that named plaintiffs' incentives are aligned with those of absent class members to ensure that the latter's

[1]Typicality and commonality are generally distinguished by positing that the former weighs individual characteristics of a named plaintiff relative to the class, while the latter examines the group characteristics of the class as a whole. *See Cooper*, 390 F.3d at 714; see also *Piazza v. Ebsco Industries, Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001) ("Traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class.").

interests are properly served. *See Prado-Steiman,* 221 F.3d at 1279. The Court may consider the commonality and typicality requirements separately, but recognizes that the distinctions between them may be blurry.

(1) Title IX Gives Rise to Common Issues of Law and Fact.

The commonality standard of Rule 23(a)(2) is not a high bar: it does not require identical claims or facts among class member, as "the commonality requirement will be satisfied if the named plaintiffs share at least one question of law or fact with the grievances of the prospective class. *Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 184 (3d Cir. 2001).[2] Rule 23(a)(2)'s commonality prerequisite contemplates that "a class action must involve issues that are susceptible to classwide proof." *Cooper*, 390 F.3d

[2]The commonality requirement is not a stringent threshold and does not impose an unwieldy burden on plaintiffs. *See Dujanovic v. Mortgage America, Inc*., 185 F.R.D. 660, 667 (N.D. Ala. 1999) (characterizing Rule 23(a)(2) burden as "not high"); *Georgine v. Amchem Products, Inc.,* 83 F.3d 610, 627 (3rd Cir. 1996) (recognizing "very low threshold for commonality "). In fact, as a general rule, all that is necessary to satisfy Rule 23(a)(2) is an allegation of a standardized, uniform course of conduct by defendants affecting plaintiffs. *See, e.g., Bentley v. Honeywell Intern., Inc*., 223 F.R.D. 471, 481 (S.D. Ohio 2004) ("when defendants' conduct towards the proposed class is alleged to be uniform, the commonality requirement is met."); *Agan v. Katzman & Korr, P.A.*, 222 F.R.D. 692, 697 (S.D. Fla. 2004) ("The commonality element is generally satisfied when a plaintiff alleges that defendants have engaged in a standardized course of conduct that affects all class members."). Plaintiffs need only show a "common nucleus of operative facts" to satisfy Rule 23(a)(2). *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 581 (N.D. Ill. 2005); *In re Currency Conversion Fee Antitrust Litigation*, 224 F.R.D. 555, 562 (S.D.N.Y. 2004) ("the commonality requirement does not require that each class member have identical claims as long as at least one common question of fact or law is evident"); *Bentley*, 223 F.R.D. at 479 (observing that factual dissimilarities among class members' claims do not, in and of themselves, warrant denial of class certification on commonality grounds).

at 714 (citation omitted). "A court cannot simply presume that the commonality requirement has been satisfied; the plaintiff bears the burden of proof on this issue." *Nelson v. U.S. Steel Corp*., 709 F.2d 675, 679-80 (11th Cir. 1983) (at class certification stage, plaintiff is obligated to show, in at least a preliminary fashion, commonality between her claims and those of putative class). To meet this burden, "it is not necessary that all of the questions raised by arguments are identical; it is sufficient if a single common issue is shared by the class." *Weiss v. La Suisse, Societe D'Assurances Sur La Vie*, 226 F.R.D. 446, 449 (S.D.N.Y. 2005); *see also Amone v. Aveiro*, 226 F.R.D. 677, 684 (D. Haw. 2005) ("Commonality is established by the existence of shared legal issues with divergent factual predicates or a common core of salient facts coupled with disparate legal remedies within the class.") (citation omitted).

The legal framework of Title IX, as discussed above, gives rise to several "common contention[s] ... capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 :. Ed. 2d 374, 389 (2011). The questions common to the named plaintiffs and the putative class include: 1) whether Defendants received actual notice of Acker's sexually abusive conduct in 1992; 2) whether the Shelby County Board of Education, President Doebler, and Vice President Martin are "appropriate school officials" under Title IX; 3) whether, in returning Acker to the classroom after

receiving such notice, Defendants were deliberately indifferent to an unreasonable risk of harm; 4) following Acker's return to the classroom in 1992, whether Acker's continued and repeated sexual abuse of female students created a sexually hostile educational environment for female students in his fourth grade classes and on his bus routes in violation of Title IX; and 5) whether, given the actual notice Defendant received in 1992, and given Defendant's deliberate indifference in returning Acker to the classroom despite receiving actual notice, Plaintiffs and the putative class may recover damages for Acker's creation of a sexually hostile educational environment following his return to the classroom from 1992 until Acker's retirement in 2011.

(2) The Named Plaintiffs' Claims are Typical of the Claims of the Putative Class.

A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and her claims are based on the same legal theory. Even though some factual variations may not defeat typicality, the requirement is meant to ensure that the named representative's claims have the same essential characteristics as the claims of the class at large. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (quotation marks and citations omitted). *See also In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996). Simply put, class representatives "must possess the same interest and suffer the same

injury as the class members in order to be typical under Rule 23(a)(3)." *Cooper*, 390 F.3d at 713 (citation omitted). The key to this inquiry is whether class representatives' claims are similar to those of putative class members. *See Hines v. Widnall*, 334 F.3d 1253, 1257 (11th Cir. 2003). In other words, the typicality requirement turns on whether the claims of class representatives are "reasonably co-extensive" with those of other plaintiffs, in terms of class representatives' individual circumstances and the legal theories upon which they proceed. *Tanne v. Autobytel, Inc*., 226 F.R.D. 659, 667 (C.D. Cal. 2005). *See Kornberg v. Carnival Cruise Lines, Inc*., 741 F.2d 1332, 1337 (11th Cir. 1984) (opining that typicality is satisfied if claims of class representatives and other class members arise from same events and are based on same legal theory); *Weiss*, 226 F.R.D. at 450 ("The typicality requirement of Rule 23(a)(3) is satisfied if the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members."); *Agan*, 222 F.R.D. at 698 ("If parties seeking class certification can establish that the same unlawful conduct was directed at or affected both the class representatives and the class itself, then the typicality requirement is usually met irrespective of varying fact patterns which underlie the individual claims."); *Noble v. 93 University Place Corp.*, 224 F.R.D. 330, 338 (S.D.N.Y. 2004)("A class representative's claims are "typical" under Rule 23(a)(3), where each class member's claims arise from the same course of events

and each class member makes similar legal arguments to prove defendants' liability."); *Wright v. Circuit City Stores, Inc*., 201 F.R.D. 526, 542-43 (N.D. Ala. 2001) (noting that Rule 23(a)(3) requires only that class representatives' claims arise from same broad course of conduct and be based on same legal theory as those of other plaintiffs).

The claims of the named Plaintiffs are typical of the claims of the putative class. Like the claims of the putative class members, the named Plaintiffs' claims arise from injuries they suffered as a result of the Board's deliberate indifference in placing Acker back in the classroom after DHR found him to be a substantial risk to children. The fact that the harms alleged by named Plaintiffs may differ in some respects from those suffered by unnamed Plaintiffs, or the likelihood that Defendant may have been received additional notice that Acker was sexually abusing other class members and/or named plaintiffs does not undermine typicality. *See, e.g., D.G.*,594 F.3d at 1199 ("[T]ypicality exists where, as here, all class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances"); *Baby Neal*, 43 F.3d at 56 ("Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice."); *Tyler v. Suffolk County*, 253 F.R.D. 8, 10-11 (D.

Mass. 2008) (rejecting defendants' argument that name plaintiffs were not typical despite fact that "different inmates had widely different experiences"); *Rolland v. Cellucci*, No. 98-30208-KPN, 1999 WL 34815562, at *7 (D. Mass. Feb. 2, 1999) ("The fact that individual class members may have somewhat different needs, . . . or may be entitled to or need different services, does not justify denying class certification.").

Actual injury to absent class members need not be proven at this stage. *See*, e.g., *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) ("[A] class will often include persons who have not been injured by the defendant's conduct. . . . Such a possibility or indeed inevitability does not preclude class certification.[2]) (internal citation omitted); *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) ("[C]lass members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice.") (emphasis in original); Fed. R. Civ. P. 23(b)(2), 1966 Amendment Advisory Committee Note (certification appropriate if defendant's action or inaction "has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class"); *See also Connor B. v. Patrick*, 272 F.R.D. 288, 2011 U.S. Dist. LEXIS 19217 (D. Mass. 2011); *See D.G. v. Devaughn*, 594 F.3d 1188, 1192 (10th Cir. 2010). Affirming

the district court's decision to certify the class, the Court of Appeals stated that "[t]hough each class member may not have actually suffered abuse, neglect, or the risk of such harm, Defendants' conduct allegedly poses a risk of impermissible harm to all children in [state] custody." *Id*. at 1196. Here, likewise, the Court should certify a class, as each of the putative class members was exposed to a sexually hostile education environment in violation of Title IX.

c. The Named Plaintiffs Will Adequately Represent the Interests of the Class.

The adequacy-of-representation requirement "tends to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982).

The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-158, n.13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). "[A] class representative must be part of the class and 'possess the same

interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 52 L. Ed. 2d 453, 97 S. Ct. 1891 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 41 L. Ed. 2d 706, 94 S. Ct. 2925 (1974)).

The named Plaintiffs are the majority of the known victims that have stepped forward to report and oppose Acker's pattern of sexual abuse; their courage and assertiveness makes them ideal representatives of the class of children harmed by Acker. Their interest are in alignment with the interests of the putative class. There is no evidence of any misalignment nor should any be presumed at this procedural point.

d. Plaintiffs Have Satisfied the Requirements of Fed. R. Civ. P. 23(b)(3).

In addition to satisfying the four requisites of Fed. R. Civ. P. 23(a), Plaintiffs must show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 22(b)(3). As the Advisory Committee noted, "it is only where this predominance exists that economies can be achieved by means of the class-action device." Rule 23(b)(3), Advisory Notes to 1966 Amendment.

(1) Questions of Law or Fact Common to Class Members Predominate over Any Questions

Affecting Only Individual Members

As discussed above, the questions common to the named plaintiffs and the putative class include: 1) whether Defendants received actual notice of Acker's sexually abusive conduct in 1992; 2) whether the Shelby County Board of Education, President Doebler, and Vice President Martin are "appropriate school officials" under Title IX; 3) whether, in returning Acker to the classroom after receiving such notice, Defendants were deliberately indifferent to an unreasonable risk of harm; 4) following Acker's return to the classroom in 1992, whether Acker's continued and repeated sexual abuse of female students created a sexually hostile educational environment for female students in his fourth grade classes and on his bus routes in violation of Title IX; and 5) whether, given the actual notice Defendant received in 1992, and given Defendant's deliberate indifference in returning Acker to the classroom despite receiving actual notice, Plaintiffs and the putative class may recover damages for Acker's creation of a sexually hostile educational environment following his return to the classroom from 1992 until Acker's retirement in 2011.

These common questions predominate over individualized issues because any potential class member who levies a Title IX claim will rely on the common nucleus of operative facts regarding the School Board's decision to return Acker to the classroom. Answers to these common questions of fact and law will have

classwide applicability and ramifications to all potential class members claims. The generalized proof will predominate over issues that require individualize proof for establishing liability.

Defendants' primary defenses are likely to be common defenses to all potential plaintiffs. For example, Defendants answers includes numerous defenses that can be neatly grouped into the following general categories: immunities (*See* Doc. 17, Defenses:4-7, 17, 22, 23, & 25); statute of limitations (*See* Doc. 17, Defenses: 2,20); available relief (1,3,12-16,18-21,24,26-29,34,36, &37) All of these defenses are generalized defenses, requiring generalized proof and not plaintiff specific proof, meaning the Court may dispense with on a class wide basis. The predominance of these common factual and legal issues fit into the class action mechanism.

Predominance is also satisfied because this case presents fewer disputes of fact than the typical Title IX claim. First, unlike other Title IX cases, Plaintiffs here may point to the Alabama DHR's "preponderance of the evidence" determination that a student was sexually abused and that abuse was perpetrated by the accused teacher. (SCBE 000031). Moreover, unlike other Title IX cases involving teacher-on-student sexual harassment, there is no dispute here that Acker in fact sexually abused students in the classroom, as he pled and confessed to molesting more than

twenty students during his tenure with Defendant.

(2) SUPERIORITY IS SATISFIED BECAUSE THE CLASS ACTION MECHANISM IS THE MOST FAIR AND EFFICIENT MEANS OF RESOLVING THE CLASS CLAIMS.

The economies of class treatment of the common issues weigh in favor of class treatment. The body of evidence is essentially the same for all potential class members as applied to the dominant legal standards of the claims and defenses at issue in this case. The addition of more plaintiffs leaves the quantum of evidence by the plaintiffs as a whole relatively undisturbed. If the class action resolved liability as to the Title IX claim, this would be a legitimate function of the class action mechanism. The value or resolving the common class-wide issues discussed above is significant in each class members underlying causes of action. Class treatment is superior because it will promote economy and efficiency through consistent litigation and legal precedent.

CONCLUSION

For all the foregoing reasons, Plaintiffs request certification of the proposed class under Rule 23(b)(3).

Respectfully submitted this 15th day of October, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been properly served via CM/ECF, e-mail and facsimile to:

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on this the 15th day of October, 2013.

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