UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

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| DENISE LIGHTNING FIRE AND WAKIYAN PETA, on behalf of and as legal guardians of S.C., a minor child, and AARON D. EISELAND AND JAMES CERNEY, on behalf of and as Guardians Ad Litem of S.C., a minor child,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Defendant. | Case: 3:15-cv-03015-RAL<br><br>**Reply Brief in Support of Motion to Dismiss and Motion for Summary Judgment** |

Defendant, United States of America, by and through counsel, submits the following reply brief in support of its motion to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction and for summary judgment. This reply brief is accompanied by the Second Declaration of Delia M. Druley in Support of Motion to Dismiss and for Summary Judgment and the attached exhibits.

## REPLY ARGUMENT

### I. Peggy Henson is not a federal employee.

#### A. The *Adams* decision does not control the outcome of this case.

Plaintiffs' reliance on *Adams v. Tunmore*, CV-05-270, 2006 WL 2591272 (E.D. Wash. Sept. 8, 2006) is misplaced. The school at issue in *Adams* was

operated under the Tribally Controlled School Act of 1988, 28 U.S.C. §§ 2501-2511, not under a Cooperative Agreement like the Cheyenne-Eagle Butte School District. *Id.* at *1. The employee in question was a "Jesuit volunteer" paid by the *tribe's* general fund. *Id.* at *1, 3 (emphasis supplied). As the Court reasoned, "Congress extended the United States' liability under the FTCA by way of Public Law 101-512, which imposes liability upon the United States for the acts of *tribal organizations and their employees administering a TCSA Grant." Id.* at *2. (citing *Mentz v. United States,* 359 F. Supp. 2d 856 (D.N.D. 2005), *Big Owl v. United States*, 961 F. Supp. 1304, 2307 (D.S.D. 1997)) (emphasis supplied). Public Law 101-512 provides in relevant part:

> With respect to claims resulting from the performance of functions ... under a contract, grant agreement, or cooperative agreement authorized by the ... Tribally Controlled School Grant of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, ... an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior ... while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment ... any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act[.]

Public Law No. 101-512, Title II, § 314, Nov. 5, 1990 (codified at 25 U.S.C. § 450f Note, Historical and Statutory Notes). *Id.* at *3. The government argued that because the volunteer was paid from the tribe's general fund, not from specific TCSA grant money, then she should not be considered a tribal employee under Public Law 101-512. The court found that the volunteer was an employee of the

tribal school performing functions under the TCSA Grant. *Id.* Consequently, under Public Law 101-512, the United States would be liable for any negligence by the volunteer. This case is materially different than the case presented here.

The Cheyenne Eagle Butte School District does not operate under the Tribally Controlled School Act. It is operated under a Cooperative Agreement with the Eagle Butte Public School District, a South Dakota Public School District. *See* Defendant's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment at ¶ 11. As such, it is staffed both by employees of the BIE and by employees of the public school district. *Id.* at ¶ 7-10, 18. Peggy Henson is an employee of the public school district, who is paid by the public school district. *Id.* at ¶¶ 22, 23. She is not a tribal employee and does not receive any tribal funds. Thus, under Public Law 101-512, Henson cannot be considered an employee of a tribe or a tribal organization, so as to categorize her as a federal employee for purposes of the Federal Tort Claims Act (FTCA). Consequently, the *Adams* decision does not support Plaintiffs' theory of the case.

**B. Plaintiffs admitted multiple facts that establish that Ms. Henson is not a federal employee.**

Plaintiffs contend that the fact that Ms. Henson was compensated by the Eagle Butte public school district, not the Bureau of Indian Education (BIE) or the Cheyenne River Sioux Tribe, is irrelevant to whether she is a federal employee. While the United States disagrees with this assertion, which is based upon the distinguishable *Adams* decision, the source of Ms. Henson's compensation is only one factor that leads to the conclusion that she is not a

federal employee. Plaintiffs have admitted that Ms. Henson has a contract with the Eagle Butte public school district. Docket 29, Plaintiff's [sic] Response to United States' Statement of Undisputed Material Facts, ¶ 23. Plaintiffs also admit that Ms. Henson lives in housing provided by the South Dakota public school district, not in the housing provided by the BIE to its employees. *Id.* at ¶¶ 24-25. Additionally, Plaintiffs admit that Ms. Henson had a separate contract with the BIE to compensate her for her duties as senior class advisor and student counsel advisor during the 2013-2014 school year. *Id.* at ¶ 26. If Ms. Henson were a federal employee as Plaintiffs allege, a separate contract would not be necessary. Plaintiffs also admitted that the staff at the Cheyenne Eagle Butte School District were divided between BIE employees and public school district employees, that each entity within the school district has its own budget, and that the Cooperative Board, which administers the Cheyenne Eagle Butte School District does not have its own budget. *Id.* at ¶¶ 35-37. Plaintiffs also concede that although a BIE employee, the high school principal, supervised Ms. Henson, a public school district employee, his authority to discipline Ms. Henson was limited. *Id.* at ¶ 38. Critically, Plaintiffs even admit that the only employee with the power to hire or fire Ms. Henson was Carol Veit, the superintendent of the Eagle Butte public school district. *Id.* at ¶ 29.[1] Plaintiffs cannot reasonably contend that Ms. Henson is a federal employee in the face of these admissions.

[1] Plaintiffs' additional argument regarding ¶ 29 in their response to Defendant's Statement of Material Facts, that Ms. Veit alone has the power to hire or fire Ms. Henson "serve[s] as an admission of federal control over Ms. Henson" is puzzling. Carol Veit is the superintendent of the Eagle Butte school district, a South Dakota public school district. *See* Second Druley Decl. at ¶ 2.a, Ex. 9, Veit

Despite admitting these material facts, Plaintiffs submitted an "Plaintiff's [sic] Statement of *Issues* Still in Dispute," along with their brief in opposition to this motion, rather than a statement of disputed material *facts*. *See* Docket 30, Plaintiff's [sic] Statement of Issues Still in Dispute (emphasis supplied). "Plaintiff's [sic] Statement of Issues Still in Dispute is a series of "whether" statements that appear to be Plaintiffs' formulation of the issues in this case, not the itemized statement of *facts*, supported by documentary evidence or testimony, that is required by Rule 56(c) of the Federal Rules of Civil Procedure and D.S.D. L.R. 56.1.B. None of the "*issues"* identified by Plaintiffs relate to the two issues before the Court in this motion: (1) whether Ms. Henson can be considered a federal employee for purposes of the FTCA; and (2) Alternatively, if the Court concludes Ms. Henson is a federal employee, whether the discretionary function exception to the FTCA bars Plaintiffs' claims. Additionally, this pleading is unsigned in violation of Rule 11. *See* Fed. R. Civ. P. 11(a) ("Every pleading, written motion, and other paper must be signed by at least one attorney or record in the attorney's name – or by a party personally if the party is unrepresented."). Because "Plaintiff's [sic] Statement of Issues Still in Dispute," is procedurally

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Deposition Excerpt, at pp. 5-7. As Plaintiffs admitted, the Cheyenne Eagle Butte School District is operated by the BIE in cooperation with the local school district. *See* Docket 29, Plaintiffs' Response to Statement of Facts at ¶ 3. Carol Veit is the superintendent of that local school district, not of the BIE. During her deposition, she was represented by counsel for the Eagle Butte School District, not by the United States Attorney's Office. *See* Second Druley Decl., Ex. 9, Veit Deposition Excerpt at p. 7 ("Q: And you're also represented by counsel for the Eagle Butte School District? A: Mm-hmm, yes"). Thus, Plaintiffs should be aware that she is employed by the South Dakota public school district, not the BIE. Accordingly, her power to hire or fire Ms. Henson cannot be an admission of federal control.

improper, the United States will not respond to the seven "whether" statements articulated within it.

**C. Plaintiffs' argument that unspecified treaty obligations render Ms. Henson a federal employee or create an FTCA cause of action fail.**

Plaintiffs also appear to be contending that Peggy Henson is somehow rendered a federal employee for purposes of the FTCA because of the United States' general treaty obligation to provide education for Indian children. (*See* Docket 28, Plaintiffs' Brief at p. 4). Although Plaintiffs do not cite to a specific treaty, to the extent that Plaintiffs assert that treaty obligations create a basis for an FTCA action or waive the sovereign immunity of the United States, they are incorrect. *See Moran v. United States*, Civ. 07-3006, 2007 WL 4570813 at * 1 (D.S.D. Dec. 26, 2007) (dismissing Plaintiff's "breach of trust" claim under the Treaty of Ft. Laramie of 1868 because they did not arise under the FTCA). The FTCA only allows for claims that can be brought against a similarly situated private person in accordance with the law of the place where the act occurred. 28 U.S.C. § 1346(b). This breach of trust claim does not arise under the FTCA because it is not a claim that can be brought against a similarly situated private person under South Dakota law. *See Klett v. Pim*, 965 F.2d 587, 589 (8th Cir. 1992) ("Federally imposed obligations, whether general or specific, are irrelevant to our inquiry under the FTCA, unless state law imposes a similar obligation on private persons"). South Dakota law does not impose federal trust responsibilities on private persons. To the extent that Plaintiffs seek to bring a

breach of trust claim in this action, it must be dismissed for lack of subject matter jurisdiction.

The United States has special responsibilities to the American Indian population, but such obligations are creatures of federal law. The government's responsibility to Indians does not create a specific financial obligation where one does not otherwise exist by virtue of statute, except in circumstances not present here, where the Federal government assumes control or supervision over tribal monies or property, i.e., a tangible trust corpus. *See e.g., United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987). This case does not involve federal fiduciary obligations in managing Indian property or trust assets. *See United States v. Mitchell*, 463 U.S. 206 (1983). The United States did not violate any federal responsibility, whether founded on trust, statute or regulation. Moreover, the violation of a federal trust duty does not, standing alone, create a cause of action under the FTCA. Nor does an unspecified treaty somehow render Ms. Henson, a public school employee who the BIE cannot even fire, a federal employee for purposes of the FTCA.

**D. Plaintiffs cannot contend for the first time at summary judgment that the high school principal was somehow negligent.**

Plaintiffs now assert in their brief in opposition to summary judgment, for the first time, that the high school principal of the Cheyenne Eagle Butte School was also negligent in some unspecified manner. *See* Docket 28, Plaintiffs' Brief at p. 5. This new claim of negligence is barred by the well-established rule that "[a] party is not allowed to claim a better version of the facts more favorable to

[themselves] in an attempt to avoid summary judgment." *Pickett v. Colonel of Spearfish*, 209 F. Supp. 2d 999, 1006 (D.S.D. 2001) (citing *Anderson v. Production Credit Ass'n*, 482 N.W.2d 642, 648 (S.D. 1992); *see also St. Pierre v. State ex rel. S. Dakota Real Estate Comm'n*, 813 N.W.2d 151, 158 (S.D. 2012) ("A party cannot ... assert a better version of the facts than [their] prior testimony and cannot ... claim a material issue of fact which assumes a conclusion contrary to [their] own testimony"). The testimony here establishes that the high school principal, Mr. Nelson, arrived in the classroom very quickly after the incident and directed the injured students to be taken to an emergency room. For example, School Safety Officer Don Mitchell testified that:

> Q: What did you say to them?
>
> A: I said -- you know, we attempted to calm them down. And like I said, *Mr. Nelson was there within a very short time* and that's why we started moving, we just got them out of the room and we took them to the Emergency Room.
>
> Q: What was Mr. Nelson's position?
>
> A: He was the high school principal at that time.
>
> .....
>
> Q: So when Mr. Nelson came in the room, what did he say?
>
> A: He directed us to get them to the Emergency Room.
>
> *Q: How long after you got there do you think Mr. Nelson showed up?*
>
> *A: I would say within 30 seconds. He was right behind me.*
>
> Q: And as soon as he directed you to take them to the Emergency Room, you knew you were the one that was going to take them?

> A: Absolutely. Because no disrespect to our ambulance service around here, but it takes a while for them to respond and it's –
>
> Q: It's faster?
>
> A: It's a lot quicker for me to take the children to the Emergency Room, which is a half mile away.

*See* Second Declaration of Delia M. Druley in Support of Motion to Dismiss and for Summary Judgment at ¶ 2.b, Exhibit 10, Excerpt from Mitchell Deposition at pp. 16-17 (emphasis supplied). Similarly, Peggy Henson testified that Principal Nelson arrived immediately after the incident:

> A: And I was helping a student in the next kitchen so I heard a scream. She was hysterical. I'm like, you know, "What happened? Calm down. Tell me what happened." And she said that the grease flew up at her. And I said, "Okay. Where?" And she was very concerned about her hand. So I got her hand under cool water and started running cool water over her hand. And you know, instantly when a burn happens, you can't tell how bad the burn is. Like it will get red, you know. So as I'm running it under cold water, I had someone call the office and told them to get Mitchell, I need immediate assistance. So Officer Mitchell came down, Mr. Nelson came down.
>
> Q: Nelson was the principal?
>
> A: At the time, yeah.

*See* Second Declaration of Delia M. Druley in Support of Motion to Dismiss and for Summary Judgment at ¶ 2.c, Exhibit 11, Peggy Henson Deposition Excerpts at 26-27. When asked a second time, Ms. Henson against testified that Principal Nelson arrived quickly:

> Q: How long do you think it would have took for Officer Mitchell to show up after the call was made?
>
> A: Oh, not long at all. Maybe four minutes, if that. I mean he was right there.

> Q: How long was it until Mr. Nelson came?
>
> A: I'm going to say he was in there right after. Like from what I remember, they almost came in together.
>
> Q: Mitchell and Nelson?
>
> A: Yes, Mitchell and Nelson. Sorry.

(*Id.* at pp. 36-37). Plaintiffs have not previously alleged that the high school principal was negligent and they cannot do so now to avoid summary judgment.[2]

**E. The BIE's "control" over the high school building does not create a genuine issue of material fact.**

Plaintiffs' final argument on this issue is that because the BIE retains control over "federal property" at the Cheyenne Eagle Butte High School, this Court somehow has jurisdiction under the FTCA. *See* Docket 28, Plaintiffs' Brief at p. 6. This argument is their final attempt to avoid analysis of the real issue: whether Peggy Henson, a public school district employee, who was working in a blended BIE and local school district governed by a cooperative agreement can be considered a federal employee for purposes of the FTCA. Plaintiffs' claim is that S.C. was injured because of Ms. Henson's alleged negligence and the

[2] While S.C. testified that she did not remember seeing Mr. Nelson come in, *see* Second Druley Decl. at ¶ 2.d, Ex. 12, S.C. Deposition Excerpts at p. 38, that testimony is insufficient to create a genuine issue of material fact regarding any alleged negligence by Mr. Nelson. A party resisting summary judgment has the burden to designate the specific facts that create a triable question of fact, *see Crossley v. Georgia–Pacific Corp.*, 355 F.3d 1112, 1114 (8th Cir. 2004), and "must substantiate allegations with sufficient probative evidence that would permit a finding in the plaintiff's favor." *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638 (8th Cir. 2005). "An assertion that a party does not recall an event does not itself create a question of material fact about whether the event did, in fact, occur." *To v. U.S. Bancorp*, 651 F.3d 888, 892 n.2 (8th Cir. 2011). Thus, S.C.'s testimony that she does not remember whether Mr. Nelson arrived shortly after the incident is insufficient to create a genuine issue of material fact.

allegedly negligent supervision of the class in which she was injured by the school district. *See* Docket 5, Redacted Complaint. There is no nexus between S.C.'s injury and what Plaintiffs characterize as the BIE's "effective total control" over the facility in which her injury occurred. Accordingly, Plaintiffs' contention that control over the high school building in some way creates jurisdiction under the FTCA is unpersuasive.

## II. Even if this Court concludes that Ms. Henson is a federal employee for purposes of the FTCA, then Plaintiffs' claims are barred by the discretionary function exception.

Plaintiffs misapprehend the nature of the discretionary function exception to the Federal Tort Claims Act. Rather than analyzing the two-pronged test for application of the discretionary function, Plaintiffs contend that the relevant issue in this case is whether "what was done in the classroom was done in a safe manner and under proper supervision." Docket 28, Plaintiff's Brief at p. 7. This Court should reject Plaintiffs' feeble attempt to sidestep the analysis required whenever the discretionary function defense is raised.

The first step in discretionary function analysis is to determine whether the "challenged conduct or omission is truly discretionary, that is, whether it involves an element of judgment or choice instead of being controlled by mandatory statutes or regulations." *Herden v. United States*, 726 F.3d 1042, 1046-47 (8th Cir. 2013). Plaintiffs have not identified any mandatory statutes or regulations that controlled Ms. Henson's choice of curriculum or of the safety procedures in her classroom. Nor has the United States located any mandatory regulations pertaining to BIE employees' choice of curriculum or safety

instruction. Thus, the challenged conduct is discretionary and the first prong of the test is met.

Plaintiffs similarly fail to address the second prong of discretionary function analysis, i.e. whether Ms. Henson's judgment or choices regarding curriculum and safety were "based on considerations of social, economic and political policy." *Layton v. United States*, 984 F.2d 1496, 1499 (8th Cir.1993). "[W]hen governmental policy permits the exercise of discretion, it is presumed that the acts are grounded in policy." *Chantal v. United States*, 104 F.3d 207, 212 (8th Cir. 1997). It is well-established that decisions regarding what safety warnings to give are grounded in policy. *See, e.g., Meyer v. United States,* 32 Fed. Appx. 163, (8th Cir. 2002) (holding that "judgments involving the security and safety measures made available to patients staying in the domiciliary at the VA are the type of judgment the discretionary function exception was designed to shield") (per curiam); *Garrett v. United States*, Civ. 02-5057, Docket 24, Order Granting Defendant's Motion for Summary Judgment (D.S.D. Apr. 30, 2003) (holding that school district officials determination of "how to best protect the students" and discipline students who were inappropriately touching others was "the kind of judgment that the discretionary function exception was designed to shield"); *Whalen v. United States*, Civ. 98-5022, Docket 18, Memorandum Opinion and Order Granting Motion to Dismiss (D.S.D. Aug. 10, 1998) (holding that decision not to place warning signs in Badlands National Park was "susceptible to policy analysis"). Ms. Henson's choices of which safety measures to take in her classroom involved policy judgments, fulfilling the second element

of the discretionary function test. Perhaps out of recognition of this fact, Plaintiffs do not offer any arguments or evidence to the contrary. Accordingly, the discretionary function exception to the FTCA applies and Plaintiffs' claims against the United States must be dismissed.

## CONCLUSION

For the above reasons, the United States respectfully requests that the Court grant its motion to dismiss and motion for summary judgment.

Date: March 2, 2017.

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