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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 JANE DOE, in her own capacity and as)
10 the natural mother and legal guardian of)
her minor child, John Doe; JOHN DOE,)

No. CV-07-01998-PHX-GMS

11 Plaintiffs,)

ORDER

12 vs.)

13)
14 BILL FRANKLIN DICKENSON; CITY)
OF PHOENIX,)

15 Defendants.)
16)

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19 Pending before the Court is the Motion for Summary Judgment of the City of Phoenix
20 (Dkt. # 154), which has been joined in part by Defendant Bill Franklin Dickenson (Dkt. #
21 165). For the reasons explained below, the Court grants the motion as it pertains to the City
22 of Phoenix, grants the motion as it pertains to the Eighth Amendment claim against
23 Dickenson, and denies the motion as it pertains to the familial association claim against
24 Dickenson.¹

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¹Both parties have requested oral argument. Those requests are denied because the parties have thoroughly discussed the law and the evidence, and oral argument will not aid the Court's decision. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

1 **BACKGROUND**

2 Plaintiff John Doe, a minor, alleges that he was molested by Defendant Dickenson on
3 several occasions and that both Dickenson and the City were responsible for the
4 molestations.² At the time of the alleged acts, Dickenson was assigned to John Doe’s
5 elementary school as a School Resource Officer (“SRO”), which is a law enforcement officer
6 assigned to a school. Plaintiffs assert that John Doe and his mother, Plaintiff Jane Doe,
7 suffered injuries as a result of the molestations, including injury to their relationship. The
8 factual background of this case, including the nature of the alleged molestations themselves,
9 is more thoroughly discussed in the Court’s Order issued on November 14, 2008. (*See* Dkt.
10 # 142.) The facts thus need not be recapitulated here.

11 Plaintiffs filed their Complaint on October 16, 2007. (Dkt. # 1.) Plaintiffs asserted
12 state law claims for negligence, assault, and sexual conduct with a minor, as well as federal
13 law claims for “violation of Plaintiffs’ rights under the Fourteenth Amendment” pursuant to
14 42 U.S.C. § 1983 (2003). (*Id.* at 1.) Specifically, Plaintiffs alleged that Defendant
15 Dickenson was acting “in accordance with the customs, practices, and policies of the Police
16 Department of the City of Phoenix,” that the City “negligently trained and supervised its
17 employee Defendant Dickenson,” and that “[a]s a result of Defendants’ negligence and
18 misconduct, Ms. Doe and Mr. Doe suffered and continue to suffer emotional distress,
19 injuries, medical expenses and other damages.” (*Id.* at 2-3.) Among the asserted injuries,
20 Plaintiff Jane Doe argues that her son has been required to go to therapy, that Jane Doe
21 herself still experiences pain because of what happened to her son, and that she believes her
22 son is “never going to be normal” again. (Dkt. # 172 Ex. F at 129-32.) The City has since
23 filed a motion for summary judgment, which asserts that Dickenson alone is responsible for
24 any injuries resulting from the alleged molestations. (Dkt. # 154.)

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27 ²Plaintiffs also brought claims against the Alhambra School District, but those claims
28 have since been dismissed and the school district terminated from this action. (*See* Dkt. ##
142, 162.)

1 **DISCUSSION**

2 **I. Legal Standard**

3 Summary judgment is appropriate if the admissible evidence, viewed in the light most
4 favorable to the nonmoving party, “show[s] that there is no genuine issue as to any material
5 fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c);
6 *see Jesinger v. Nev. Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). The moving
7 party bears the initial burden of supporting its contention that there is no genuine issue of
8 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The burden is then on
9 the nonmoving party to establish that a genuine issue of material fact exists. *See id.*
10 Substantive law determines which facts are material, and “[o]nly disputes over facts that
11 might affect the outcome of the suit . . . will properly preclude the entry of summary
12 judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Similarly, the
13 dispute must be genuine; that is, the evidence must be “such that a reasonable jury could
14 return a verdict for the nonmoving party.” *Id.*

15 **II. Analysis**

16 The City argues that all of Plaintiffs’ claims must be dismissed for a variety of
17 reasons. The Court will first discuss the City’s challenges to Plaintiffs’ federal law claims,
18 then assess the City’s arguments against Plaintiffs’ state law claims, and conclude by
19 addressing the City’s assertion that punitive damages are not warranted.

20 **A. Federal Law Claims**

21 The City argues that Plaintiffs’ federal law claims fail, in whole or in part, because:
22 (1) the Complaint does not adequately allege a § 1983 claim against the City; (2) the record
23 lacks sufficient evidence establishing that deliberate indifference in training or supervision
24 caused a constitutional violation; (3) the Complaint does not allege that the City was
25 deliberately indifferent in hiring or investigating Dickenson; (4) there is no evidence of any
26 injury stemming from the City’s alleged failure to undertake corrective measures in response
27 to Plaintiffs’ allegations; (5) the Complaint does not allege any claim for interference with
28 familial association, and in any event there is no evidence in the record to support such a

1 claim; and (6) Plaintiffs cannot assert an Eighth Amendment claim. Defendant Dickenson
2 joins in arguments (5) and (6) only, arguing that he is not liable on the familial association
3 and Eighth Amendment claims. (Dkt. # 165 at 2.) The Court will address each of these six
4 arguments in turn.

5 **1. Sufficiency of the § 1983 Claim in the Complaint**

6 The City argues that Plaintiffs' Complaint fails to allege a valid § 1983 claim against
7 the City because: (1) the Complaint identifies no specific custom, practice, or policy that
8 caused a constitutional deprivation, and (2) the Complaint states that the City was
9 "negligent" in its training and supervision, not that it was "deliberately indifferent." (Dkt.
10 # 154 at 6-7.) The City's arguments on this point are directed merely at the nature of
11 Plaintiffs' pleading, and not at the evidence in the record (which the City challenges later).

12 On the first point, Plaintiffs properly plead a § 1983 claim. Plaintiffs alleged that
13 Dickenson was acting "in accordance with the customs, practices, and policies of the Police
14 Department of the City of Phoenix." (Dkt. # 1 at 2 ¶ 11.) "In this circuit, a claim of
15 municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if
16 the claim is based on nothing more than a bare allegation that the individual officers' conduct
17 conformed to official policy, custom, or practice." *Lee v. City of Los Angeles*, 250 F.3d 668,
18 682-83 (9th Cir. 2001) (quoting *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621,
19 624 (9th Cir. 1988)). Plaintiffs provided such a statement of policy here, and were not
20 required to plead the nature of that policy with a greater degree of specificity.

21 The City's second argument, however, has more merit. The Complaint states only that
22 "Defendant City of Phoenix *negligently* trained and supervised its employee Defendant
23 Dickenson." (Dkt. # 1 at 3 (emphasis added).) Mere negligence is not sufficient to establish
24 a § 1983 claim for liability stemming from supervision or training; rather, the failure to
25 adequately guard against violations of constitutional rights must rise to the level of
26 "deliberate indifference" to those rights. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989);
27 *see also Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 407 (1997) ("A
28 showing of simple or even heightened negligence will not suffice."). Plaintiffs' Complaint

1 never uses the words “deliberate indifference,” nor does the Complaint use any other
2 language sufficient to plead a level of culpability beyond mere negligence.

3 However, because this case has advanced significantly without a challenge to
4 Plaintiffs’ pleading, and because the parties have proceeded throughout discovery with the
5 clear knowledge that Plaintiffs were advancing a § 1983 claim against the City for improper
6 training and supervision (as evidenced by the Joint Proposed Case Management Plan), the
7 Court will reach the substance of the municipal liability claim. For the reasons discussed
8 below, the Court agrees that the City is entitled to summary judgment on that claim.

9 **2. Evidence of Deliberate Indifference in Training or Supervision**

10 The City argues that there is insufficient evidence of deliberate indifference in its
11 training or supervision of Dickenson to survive summary judgment on Plaintiffs’ § 1983
12 claim for municipal liability. (Dkt. # 154 at 7-9.) Section 1983 provides:

13 Every person who, under color of any statute, ordinance,
14 regulation, custom, or usage, of any State . . . subjects, or causes
15 to be subjected, any citizen of the United States . . . to the
16 deprivation of any rights, privileges, or immunities secured by
the Constitution and laws, shall be liable to the party injured in
an action at law, suit in equity, or other proper proceeding for
redress.

17 42 U.S.C. § 1983. Under § 1983, local government entities are considered “persons” and
18 therefore may be sued, but the municipality’s liability must be premised on its own infliction
19 of an injury and not on a respondeat superior theory. *Monell v. Dep’t of Soc. Servs.*, 436 U.S.
20 658, 690-91 (1978). There are two ways of showing that a municipality inflicted a
21 constitutional injury: (1) by showing that a municipality itself violated someone’s rights or
22 directed its employee to do so, or (2) by showing that the municipality’s omissions were
23 responsible for a constitutional violation committed by one of its employees. *Gibson v.*
24 *County of Washoe*, 290 F.3d 1175, 1185-86 (9th Cir. 2002).

25 Plaintiffs here follow the second route, arguing that the City’s failure to train or
26 supervise Dickenson was responsible for the alleged acts of molestation. (Dkt. # 181 at 13-
27 21.) Both the Ninth Circuit and the United State Supreme Court have opined that this theory
28 of liability involves “much more difficult problems of proof” than the first. *Gibson*, 290 F.3d

1 at 1186 (quoting *Brown*, 520 U.S. at 406). “That a plaintiff has suffered a deprivation of
2 federal rights at the hands of a municipal employee will not alone permit an inference of
3 municipal culpability and causation; the plaintiff will simply have shown that the *employee*
4 acted culpably.” *Brown*, 520 U.S. at 406-07.

5 To establish municipal liability, a plaintiff must show that: (1) a municipal employee
6 violated his constitutional rights; (2) the municipality had a custom, practice, or policy that
7 amounted to “deliberate indifference”; and (3) the municipal custom, practice, or policy was
8 the “moving force” behind the employee’s violation of the plaintiff’s constitutional rights.³
9 *Gibson*, 290 F.3d at 1193-94. Because “[a] policy can be one of action or inaction,” *Long*
10 *v. County of Los Angeles*, 442 U.S. 1178, 1185 (9th Cir. 2006), a plaintiff seeking to show
11 that a municipality’s failure to act caused an injury “must show that the municipality’s
12 deliberate indifference led to its omission and that the omission caused the employee to
13 commit the constitutional violation,” *Gibson*, 290 F.3d at 1186.

14 There is no dispute here over whether Dickenson’s alleged acts of molestation, if true,
15 violated John Doe’s constitutional rights. See *Plumeau v. Sch. Dist. No. 40 County of*
16 *Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997) (“[T]he Constitution protects a child’s right to be
17 free from sexual abuse by school employees while attending public school.”). The City’s
18 motion for summary judgment instead focuses on whether there is evidence of “deliberate
19 indifference” and whether any omission on the City’s part was the “moving force” behind
20 the alleged constitutional violations. (See Dkt. # 154 at 8-9.) The Court finds that Plaintiffs’
21 claim for municipal liability cannot survive summary judgment under either of these prongs.
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24 ³This test is sometimes expressed as a four-part test, in which a plaintiff must show
25 that: (1) he was deprived of a constitutional right; (2) the municipality had a policy; (3) the
26 policy evinced “deliberate indifference” to the plaintiff’s constitutional rights; and (4) the
27 policy was the “moving force” behind the constitutional violation. See, e.g., *Oviatt ex rel.*
28 *Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (citing *Canton*, 489 U.S. at 389-91).
Although the Supreme Court announced this test in the context of a claim for deliberate
indifference in training, the Ninth Circuit has recognized that the test applies to supervision
claims as well. *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996).

1 **a. Deliberate Indifference**

2 “Deliberate indifference is a stringent standard of fault, requiring proof that a
3 municipal actor disregarded a known or obvious consequence of his action.” *Christie v.*
4 *Iopa*, 176 F.3d 1231, 1240 (9th Cir. 1999) (quoting *Brown*, 520 U.S. at 410). “To prove
5 deliberate indifference, the plaintiff must show that the municipality was on actual or
6 constructive notice that its omission would likely result in a constitutional violation.”
7 *Gibson*, 290 F.3d at 1186. According to the Ninth Circuit:

8 Deliberate indifference to a person’s constitutional rights occurs
9 when the need for more or different action “is so obvious, and
10 the inadequacy of the current procedure so likely to result in the
11 violation of constitutional rights, that the policymakers can
12 reasonably be said to have been deliberately indifferent to the
13 need.”

14 *Lee*, 250 F.3d at 682 (quoting *Oviatt*, 954 F.2d at 1477-78) (internal brackets and ellipsis
15 omitted). In other words, “the need for training must be obvious and violation of
16 constitutional rights must be a highly predictable consequence.” *Plumeau*, 130 F.3d at 439
17 n.4.

18 As Plaintiffs concede, there is no evidence in the record indicating that the City had
19 any actual knowledge of sexual misconduct. Plaintiffs’ only argument is that the need for
20 some sort of further training was “obvious.” Plaintiffs base that argument on the district
21 court decision in *Doe v. Estes*, 926 F. Supp. 979 (D. Nev. 1996). In *Doe*, a public school
22 student alleged that one of his teachers had molested him. *Id.* at 983. The student sued the
23 teacher, a supervisor, and the school district under § 1983. *Id.* The school district moved for
24 summary judgment, arguing that there was no evidence of deliberate indifference, but the
25 district court denied that request because:

26 the defendant school district had . . . no policy whatever
27 regarding the reporting of suspected incidents of sexual abuse of
28 students, had never instructed its employees in the techniques of
recognizing the warning signs of suspected sexual abuse of
students, [and] had never provided its staff with guidelines for
dealing with such suspicions.

29 *Id.* at 988. The district court reasoned that these facts established the “stringent standard of
30 fault” required for deliberate indifference, *Christie*, 176 F.3d at 1240, not because of any

1 evidence in the record, but rather because “it is today hardly remarkable to find in our
2 newspapers accounts of children sexually attacked by teachers” and because “[t]he last ten
3 or fifteen years have seen these shocking incidents repeated in dozens of communities across
4 the country,” *Doe*, 926 F. Supp. at 987.

5 Here, even assuming that it would be proper for the Court to resolve a case-dispositive
6 motion by reference to facts about the prevalence of student molestations that are not in the
7 record, and even further assuming that the City’s failure to train Dickenson could have been
8 the “moving force” behind the alleged molestations, *Doe* would still be inapplicable. The
9 deliberate indifference in training that *Doe* found was an absence of training for *other school*
10 *employees* in how to recognize and stop sexual abuse. *See id.* at 988 (finding deliberate
11 indifference based on the absence of a policy regarding “the reporting of suspected incidents
12 of sexual abuse of students,” “recognizing the warning signs of suspected sexual abuse of
13 students,” and “provid[ing] its staff with guidelines for dealing with such suspicions”).
14 Plaintiffs’ Complaint, on the other hand, only alleges that the City was deficient in training
15 *Defendant Dickenson*; it does not allege that the City’s training of its other employees was
16 deficient. (Dkt. # 1 at 3 ¶ 19.) Plaintiffs’ response to the motion for summary judgment
17 confirms that their only argument about training is that “the City was deliberately indifferent
18 in training *Officer Dickenson*.” (Dkt. # 181 at 13 (emphasis added).)

19 It is well-established, however, that a municipality is not deliberately indifferent in
20 failing to train law enforcement officers to not sexually assault those with whom they come
21 into contact. *See Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998) (“[W]e are not
22 persuaded that a plainly obvious consequence of a deficient training program [for prison
23 guards] would be the sexual assault of inmates. Specific or extensive training hardly seems
24 necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior.”);
25 *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489-90 (11th Cir. 1997) (holding that a town
26 could not be held liable for a police officer’s acts of molestation because a municipality’s
27 failure to train officers to not molest suspects is not deliberate indifference); *Andrews v.*
28 *Fowler*, 98 F.3d 1069, 1077 (8th Cir. 1996) (“In light of the regular law enforcement duties

1 of a police officer, we cannot conclude that there was a patently obvious need for the city to
2 specifically train officers not to rape young women.”).

3 The reasoning of these cases has been explained well by the Second Circuit:

4 It is not enough to show that a situation will arise and that taking
5 the wrong course in that situation will result in injuries to
6 citizens. . . . *City of Canton* also requires a likelihood that the
7 failure to train or supervise will result in the officer making the
8 wrong decision. *Where the proper response . . . is obvious to all
without training or supervision, then the failure to train or
supervise is generally not “so likely” to produce a wrong
decision as to support an inference of deliberate indifference by
city policymakers to the need to train or supervise.*

9 *Walker v. City of New York*, 974 F.2d 293, 299-300 (2d Cir. 1992) (emphasis added). In
10 short, the City’s failure to train Dickenson to not molest John Doe was not deliberate
11 indifference because it is obvious that Dickenson should not do such a thing. Because
12 Plaintiffs’ Complaint makes no claim that the City failed to properly train its other
13 employees, *Doe* does not apply, and Plaintiffs cannot establish deliberate indifference
14 sufficient to survive summary judgment.⁴

15 **b. Moving Force**

16 “In order to be a ‘moving force’ behind [a plaintiff’s] injury, we must find that the
17 ‘identified deficiency’ in the [municipality’s] policies is ‘closely related to the ultimate
18 injury.’” *Gibson*, 290 F.3d at 1196 (quoting *Canton*, 489 U.S. at 391). Thus, “[t]he plaintiff’s
19 burden is to establish ‘that the injury would have been avoided’ had the [municipality] had
20 a policy” that would have prevented the injury. *Id.* (quoting *Oviatt*, 954 F.2d at 1478).
21 However, “[p]ointing to a municipal policy action or inaction as a ‘but-for’ cause is not
22 enough to prove a causal connection under *Monell*. Rather, the policy must be the proximate
23 cause of the section 1983 injury.” *Van Ort*, 92 F.3d at 837; *see also McDade v. West*, 223
24 F.3d 1135, 1142 (9th Cir. 2000) (“Since it is clear that no state policy served as the ‘moving
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26 ⁴The only possible assertion of deliberate indifference that remains would be
27 Plaintiffs’ claim that the City failed to properly supervise Defendant Dickenson. However,
28 it is not necessary to reach this issue because, as explained below, any such claim would fail
under the “moving force” prong.

1 force' behind the violation, there was no proximate causality between the municipality's acts
2 and the [injury].").

3 As these cases suggest, the causation inquiry is exacting. "[A] plaintiff must show
4 that the municipal action was taken with the requisite degree of culpability and must
5 demonstrate a *direct causal link* between the municipal action and the deprivation of federal
6 rights." *Brown*, 520 U.S. at 404 (emphasis added). "Where a plaintiff claims that the
7 municipality has not directly inflicted an injury, but nonetheless has caused an employee to
8 do so, *rigorous standards of culpability and causation* must be applied to ensure that the
9 municipality is not held liable solely for the actions of its employee." *Id.* at 405 (emphasis
10 added). "To adopt lesser standards of fault and causation would open municipalities to
11 unprecedented liability under § 1983," for "[i]n virtually every instance where a person has
12 had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able
13 to point to something the city 'could have done' to prevent the unfortunate incident."
14 *Canton*, 489 U.S. at 391-92.

15 In this case, Plaintiffs' claims that the City was deliberately indifferent in training
16 Dickenson and in supervising him both fail under the "moving force" prong. First of all,
17 Plaintiffs do not even respond to the City's arguments under this prong, and thus they are
18 deemed to have waived the issue. *See Jenkins v. County of Riverside*, 398 F.3d 1093, 1095
19 n.4 (9th Cir. 2005) ("Jenkins abandoned her other two claims by not raising them in
20 opposition to the County's motion for summary judgment."); *Foster v. City of Fresno*, 392
21 F. Supp. 2d 1140, 1147 n.7 (E.D. Cal. 2005) ("[F]ailure of a party to address a claim in an
22 opposition to a motion for summary judgment may constitute a waiver of that claim.") (citing
23 *Abogados v. AT&T, Inc.*, 223 F.3d 932, 937 (9th Cir. 2000); *Doe v. Benicia Unified Sch.*
24 *Dist.*, 206 F. Supp. 2d 1048, 1050 n.1 (E.D. Cal. 2002)).

25 Moreover, on the merits, there is no evidence that the "moving force" behind the
26 claimed constitutional violations would have been anything other than Defendant
27 Dickenson's own deviant sexual impulses. Plaintiffs have not adduced any evidence
28 suggesting that Dickenson molested John Doe because of the content, or absence of content,

1 of any of the City’s training programs. In the absence of any such evidence Plaintiffs have
2 not established a genuine issue of material fact as to whether the contents of the City’s
3 training programs were the “moving force” behind Plaintiffs’ injuries. *See Andrews*, 98 F.3d
4 at 1077 (“Andrews simply cannot demonstrate the close relationship necessary to conclude
5 that the city’s failure to properly train [police officer] Fowler *caused* him to rape Andrews
6 or even raises a question of fact as to causation.”).

7 In the same way, there is no genuine issue of material fact as to whether Plaintiffs’
8 injuries were caused by any lack of supervision by the City. “Usually, a failure to supervise
9 gives rise to section 1983 liability only in the situations in which there is a history of
10 widespread abuse.” *Bowen v. Watkins*, 669 F.2d 979, 988 (5th Cir. 1982); *compare Ware*
11 *v. Jackson County*, 150 F.3d 873, 885 (8th Cir. 1998) (holding that a reasonable jury could
12 conclude that a municipality was the moving force behind a prison officer’s sexual
13 misconduct because the municipality failed to supervise the officer even though there were
14 a “number of reported acts of sexual misconduct” by that officer), *with D.T. ex rel. M.T. &*
15 *K.T. v. Indep. Sch. Dist. No. 16*, 894 F.2d 1176, 1180, 1192-93 (10th Cir. 1990) (holding that
16 a school district’s policy of supervising its employees was not the “moving force” behind a
17 teacher’s alleged molestation of students because there was insufficient evidence of a direct
18 causal link between only sporadic supervision and subsequent molestations), *and Santos ex*
19 *rel. Santos v. City of Culver City*, 228 Fed. App’x 655, 659 (9th Cir. 2007) (affirming the
20 district court’s grant of summary judgment on a *Monell* claim under the “moving force”
21 prong because there was no evidence of a causal link between city policies and the officer’s
22 actions).

23 Here, there is no evidence of such a history or pattern in the record. Even if
24 Dickenson might have been better supervised, there is simply no evidence from which a
25 reasonable jury could conclude that the level of supervision *caused* Dickenson to molest John
26 Doe. *See Gibson*, 290 F.3d at 1186 (“[A] plaintiff must show that the municipality’s
27 deliberate indifference led to its omission and that *the omission caused the employee to*
28 *commit the constitutional violation.*”) (emphasis added). Indeed, Plaintiffs’ argument

1 regarding the City’s deliberate indifference in supervision offers no legal authority and never
2 addresses the issue of causation. (See Dkt. # 181 at 18-21.) In the absence of any evidence
3 or argument suggesting that a lack of supervision “caused the employee to commit the
4 constitutional violation,” *Gibson*, 290 F.3d at 1186, Plaintiffs cannot establish that any
5 deliberate indifference in supervision was the “moving force” behind their alleged injury.

6 For these reasons, summary judgment in favor of the City is appropriate on Plaintiffs’
7 § 1983 claim for municipal liability.

8 **3. Allegation of Deliberate Indifference in Hiring or Investigation**

9 The City argues that the Complaint does not allege deliberate indifference in its hiring
10 or investigation of Defendant Dickenson. (Dkt. # 154 at 9-11.) Plaintiffs fail to respond to
11 the City’s argument. Therefore, Plaintiffs have abandoned any such claim. See *Jenkins*, 398
12 F.3d at 1095 n.4; *Foster*, 392 F. Supp. 2d at 1147 n.7. Regardless, the Complaint does not
13 make any such allegation; it only alleges negligent training and supervision. (See Dkt. # 1
14 at 3.) Thus, the City prevails on this argument as well.

15 **4. Evidence of Injury Caused by the Absence of Corrective Measures**

16 The City argues that, although the Complaint alleges that the City failed to undertake
17 corrective measures in response to Plaintiffs’ allegations, there is no evidence that this caused
18 any injury since no further molestations occurred after Plaintiffs made their allegations.
19 (Dkt. # 154 at 11-12.) Plaintiffs decline to respond. The causation problem would indeed
20 be fatal to such a claim, and in any event Plaintiffs’ failure to respond has caused the claim
21 to be abandoned. See *Jenkins*, 398 F.3d at 1095 n.4; *Foster*, 392 F. Supp. 2d at 1147 n.7.

22 **5. Allegation or Evidence of Interference with Familial Association**

23 The City and Dickenson argue that Jane Doe cannot maintain a claim for violation of
24 her due process right to familial association. (Dkt. # 154 at 12-13; Dkt. # 165 at 2-4.)
25 Although the Court need not reach the issue in regard to the City (because Plaintiffs’ claims
26 against the City do not otherwise withstand summary judgment), this is also one of the two
27 arguments that Defendant Dickenson advances. Thus, the Court will reach the issue as
28 applied to Defendant Dickenson.

1 Defendants' first argument is that the Complaint contains no claim for interference
2 with familial association. (Dkt. # 154 at 12.) Although the Complaint is quite terse in this
3 regard, it does assert a claim pursuant to § 1983 that *both* Plaintiffs' Fourteenth Amendment
4 rights were violated. (Dkt. # 1 at 1 ¶ 1.) As described below, Jane Doe's right to familial
5 association is more precisely described as the right to the society and companionship of her
6 child, which the Ninth Circuit has found to stem from the Fourteenth Amendment. The
7 Complaint also lays out the factual basis for Plaintiffs' lawsuit and alleges that both Plaintiffs
8 were injured in a number of ways, including through the violation of federally protected
9 rights. (*See id.* at 1-4.) It is also clear from the nature of the papers filed in this action,
10 including the Joint Proposed Case Management Plan, that all of the parties have been aware
11 that Plaintiffs were pursuing this claim throughout the course of litigation. (*See* Dkt. # 22
12 at 10.) Under these circumstances, the Court cannot say that the Complaint fails to put
13 Defendants on notice of Jane Doe's claim. *See* Fed. R. Civ. P. 8(a)(2) (requiring only a
14 "short and plain statement of the claim"); Fed. R. Civ. P. 8(e) ("Pleadings must be construed
15 so as to do justice."); *Morrison v. Jones*, 607 F.2d 1269, 1275 (9th Cir. 1979) ("[W]e are
16 required to construe complaints under the Civil Rights Act liberally."); *cf. Lee*, 250 F.3d at
17 682 ("Here, plaintiffs' § 1983 claims meet the requirements of notice pleading. Indeed,
18 defendants' papers filed in support of their motions to dismiss and on appeal demonstrate that
19 they had fair notice of what the plaintiffs' claims are and the grounds upon which they
20 rest."). The Court therefore rejects Defendants' argument that the familial association claim
21 was insufficiently pled.

22 Defendants' second argument is that Jane Doe's claim cannot survive summary
23 judgment because "the constitutional claim is limited to instances in which a parents' rights
24 [sic] are *permanently* impaired," and in this case "Jane Doe's right to the companionship of
25 her son has not been permanently terminated or impaired." (Dkt. # 154 at 12-13.) In its
26 reply brief, the City alters its argument somewhat to assert that even if a non-permanent
27 deprivation of Jane Doe's constitutional right is actionable, that deprivation must
28

1 nevertheless be “total.”⁵ (Dkt. # 186 at 7-8.) Upon review of the relevant caselaw, however,
2 the Court does not agree that an impairment of the right to the society and companionship
3 of one’s child must be either “permanent” or “total” to present a valid claim under § 1983.

4 It is well-established in the Ninth Circuit that “parents have a fundamental liberty
5 interest in maintaining a relationship with their children which is protected by the Fourteenth
6 Amendment.” *Kelson v. City of Springfield*, 767 F.2d 651, 654 (9th Cir. 1985). Specifically,
7 “a parent has a constitutionally protected liberty interest in the companionship and society
8 of his or her child,” and “[t]he state’s interference with that liberty interest without due
9 process of law is remediable under section 1983.” *Id.* at 655.

10 Defendants offer no authority holding that only “permanent” or “total” deprivations
11 of this right are actionable under § 1983, nor do Defendants make a conceptual argument as
12 to why that should be. Indeed, there is nothing inherent in the type of damage done to a
13 parent-child relationship as a result of molestation that would suggest that such damage
14 cannot be permanent. Rather, Defendants simply assert that the relevant caselaw has tended
15 to focus on deprivations that are “permanent” and “total,” such as in cases where the child
16 has been killed or parental rights have been terminated. Although the bulk of cases may
17 focus on those types of injuries, other cases have involved injuries that are less than
18 permanent and less than total.

19 For instance, *Ovando v. City of Los Angeles*, 92 F. Supp. 2d 1011 (C.D. Cal. 2000),
20 permitted a child to pursue § 1983 claims for violation of her right to the society and
21 companionship of her father, even though the alleged injuries were not both “permanent” and
22 “total.” In that case, a man had been shot and wrongfully imprisoned for three years as a
23 result of police misconduct, which allegedly caused him to become a paraplegic and to suffer
24

25 ⁵“The district court need not consider arguments raised for the first time in a reply
26 brief.” *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). The Court is skeptical that
27 the City’s argument about “permanent” deprivations is the same as its argument about “total”
28 deprivations, but in the interests of inclusiveness the Court will nevertheless reach the City’s
argument on both points.

1 brain damage. *Id.* at 1014-15. The man was released from prison when the district attorney’s
2 office discovered the police misconduct, and the man’s daughter brought a § 1983 claim
3 against the city that had employed the police officers. *Id.* at 1015. The daughter alleged that
4 her constitutional right to the society and companionship of her father had been violated in
5 two ways: (1) by his wrongful imprisonment, and (2) as a result of his physical and mental
6 impairments. *Id.* at 1018. The city moved to dismiss the case, arguing that the alleged
7 injuries were not sufficient to state a claim under § 1983. *Id.* at 1015.

8 The court denied the city’s motion. First, the court squarely rejected the argument that
9 the daughter’s injury stemming from her father’s wrongful imprisonment was not actionable
10 simply because it was less than permanent (the same argument the City advances here). *Id.*
11 at 1019 (“Nowhere [does the Ninth Circuit] indicate that a deprivation of a duration shorter
12 than the entirety of the child’s life was not a ‘deprivation’ cognizable under Section 1983,
13 and this Court can find no principled basis for drawing such a distinction.”). Next, the court
14 held that the daughter could also maintain the claim stemming from her father’s mental
15 injuries because “injury to a parent’s mental capacity can infringe on a child’s ability to
16 create and maintain the emotional bond protected by the Fourteenth Amendment,”⁶ even
17 though the actual degree of that impairment was a factual question. *Id.* at 1021. Thus, the
18 court held that both a non-permanent deprivation (a three-year imprisonment) and a non-total
19 deprivation (some degree of mental limitation) were actionable under § 1983.

20 In so holding, the *Ovando* court looked to the Supreme Court’s view of how the due
21 process clause is implicated by the deprivation of property rights. *Id.* at 1019-20. In the
22 context of deciding that a state statute that authorized prejudgment attachment of real estate
23 was unconstitutional, the Supreme Court has held that even temporary and partial
24 deprivations of property implicate due process protections:

25
26
27 ⁶The *Ovando* court drew a distinction between physical and mental injuries, holding
28 that the former cannot interfere with familial associations while the latter can. 92 F. Supp.
2d at 1020-21. This Court does not express an opinion on that distinction.

1 [T]he State correctly points out that these effects do not amount
2 to a complete, physical, or permanent deprivation of real
3 property; their impact is less than the perhaps temporary total
4 deprivation of household goods or wages. *But the Court has*
5 *never held that only such extreme deprivations trigger due*
process concern. To the contrary, our cases show that even the
temporary or partial impairments to property rights that
attachments, liens, and similar encumbrances entail are
sufficient to merit due process protections.

6 *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (emphasis added and citations omitted). As
7 *Ovando* demonstrates, temporary or partial impairments of a liberty interest in the integrity
8 of a family relationship merit the same due process protection as temporary or partial
9 impairments of property interests. *See* 92 F. Supp. 2d at 1020.

10 Supreme Court precedent supports this conclusion, for several cases have extended
11 due process protection to plaintiffs that have suffered a deprivation of the right to raise and
12 bring up a child, even though the deprivation was neither “permanent” nor “total.” *See*
13 *Moore v. City of East Cleveland*, 431 U.S. 494, 504-06 (1977) (extending due process
14 principles to invalidate a statute that limited the rights of members of non-nuclear families
15 to live with one another, even though the statute did not limit other aspects of their familial
16 association and the deprivation was not intrinsically permanent); *Pierce v. Soc’y of Sisters*,
17 268 U.S. 510, 534-35 (1925) (finding that a law requiring children to attend public school
18 “unreasonably interferes with the liberty of parents and guardians to direct the upbringing
19 and education of children under their control” and holding the law unconstitutional, even
20 though the deprivation was not permanent, in that it would last only as long as the child was
21 of school age, and not total, in that it did not interfere with other aspects of upbringing).⁷

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23
24 ⁷This is not to say that *all* deprivations that are less than total or less than permanent
25 are actionable, for there may be deprivations that are so brief and otherwise justified that due
26 process principles do not apply. *See, e.g., Nicholson v. Scopetta*, 344 F.3d 154, 172 (2d Cir.
27 2003) (“[B]rief removals [of a child from parental custody] generally do not rise to the level
28 of a substantive due process violation, at least where the purpose of the removal is to keep
the child safe during investigation and court confirmation of the basis for removal.”). The
Court merely holds that a § 1983 action is not inherently foreclosed simply because
deprivation of the right to familial association is less than permanent or less than total.

1 Indeed, at its core, Defendants’ argument that Jane Doe’s constitutional injury was
2 neither “permanent” nor “total” is an argument about the *severity* of her injury. Arguments
3 about the severity of injuries, however, are more properly directed to the question of
4 damages, not to the question of liability. *See Ray v. Henderson*, 217 F.3d 1234, 1243 (9th
5 Cir. 2000) (“[T]he severity of an action’s ultimate impact . . . goes to the issue of damages,
6 not liability.”) (internal quotations omitted). Here, there is evidence that John Doe has been
7 required to undergo therapy, that he is “never going to be normal” again, and that Jane Doe
8 continues to suffer emotional pain as a result. (Dkt. # 172 Ex. F at 129-32.) From this, a
9 reasonable jury could conclude that Jane Doe has suffered at least some loss of her son’s
10 society and companionship. Thus, summary judgment on this claim is not appropriate.

11 Finally, Defendant Dickenson, citing a number of cases from other Circuits, argues
12 that Jane Doe cannot maintain her § 1983 claim because there is no evidence that Dickenson
13 actually intended to harm the parent-child relationship between Jane Doe and John Doe.
14 (Dkt. # 165 at 2-4.) The Ninth Circuit has explicitly taken a different position from the cases
15 Dickenson cites. *Smith v. City of Fontana*, 818 F.2d 1411, 1420 n.12 (9th Cir. 1987) (“As
16 long as the state official’s *action* which deprived the plaintiffs of their liberty was more than
17 merely negligent, the plaintiffs can state a section 1983 claim without further alleging that
18 the official was trying to break up their family.”), *overruled on other grounds by Hodgers-*
19 *Durgin v. De La Vina*, 199 F.3d 1037, 1041 n.1 (9th Cir. 1999). Thus, the absence of
20 specific intent in this regard does not entitle Dickenson to summary judgment.

21 **6. Applicability of the Eighth Amendment**

22 The City argues that the Eighth Amendment does not apply (Dkt. # 154 at 13), and
23 Dickenson joins in that argument (Dkt. # 165 at 2). Plaintiffs do not respond. Plaintiffs
24 therefore have abandoned this claim. *See Jenkins*, 398 F.3d at 1095 n.4. Even if the claims
25 were not abandoned, the Eighth Amendment does not apply until after a criminal conviction
26 has occurred and a sentence has been handed down. *Graham v. Connor*, 490 U.S. 386, 393
27 n.6 (1989) (“Judge Friendly . . . thought that the Eighth Amendment’s protections did not
28 attach until after conviction and sentence. This view was confirmed by *Ingraham v. Wright*,

1 430 U.S. 651, 671 n.40 (1977) ('Eighth Amendment scrutiny is appropriate only after the
2 State has complied with the constitutional guarantees traditionally associated with criminal
3 prosecutions').”) (internal and parallel citations omitted). Because Plaintiffs have not been
4 convicted or sentenced here, they have no Eighth Amendment claim.

5 **B. State Law Claims**

6 The City argues that Plaintiffs’ state law claims fail because the City is statutorily
7 immune from liability pursuant to Arizona Revised Statutes section 12-820.05(B) (2003).⁸
8 That statute provides that “[a] public entity is not liable for losses that arise out of and are
9 directly attributable to an act or omission determined by a court to be a criminal felony by
10 a public employee unless the public entity knew of the public employee’s propensity for that
11 action.” Ariz. Rev. Stat. § 12-820.05(B). Liability stemming from knowledge of an
12 employee’s propensity to engage in felonious action is a “limited exception” to this statutory
13 grant of municipal immunity. *McGrath v. Scott*, 250 F. Supp. 2d 1218, 1234 (D. Ariz. 2003).

14 Plaintiffs agree that this statute requires them to establish that the City had some
15 actual knowledge of Dickenson’s propensity to molest children, and Plaintiffs do not contest
16 that their losses in this case would arise out of and be directly attributable to a criminal felony
17 committed by a public employee (specifically, Dickenson’s alleged molestation of John
18 Doe). *See* Ariz. Rev. Stat. § 13-1405 (Supp. 2008) (making sexual conduct with a minor a
19 felony offense). Rather, Plaintiffs argue that the City knew of Dickenson’s propensity to
20 molest children based on certain “red flags.” (Dkt. # 181 at 12-13.) The relevant “red flags”
21 of which the City was ostensibly aware were that Dickenson: (1) “would spend many hours
22 helping at the school and helping the kids” (Dkt. # 172 Ex. K); (2) would drive some students
23 to and from school, and specifically that he was named Employee of the Month by the school
24 district because “he brings kids to school who wouldn’t obey their parents, and he takes kids

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26 ⁸The City also argues that summary judgment is proper because there is insufficient
27 evidence that any negligent training or supervision caused the injury and that Dickenson was
28 acting outside the scope of his employment. (Dkt. # 154 at 14-17.) Because summary
judgment is otherwise appropriate, the Court need not reach these arguments.

1 home when their parents forget to pick them up” (Dkt. # 172 Ex. DD); and (3) would
2 occasionally pay for students’ field trip costs (Dkt. # 172 Ex. S at 56).⁹

3
4
5 ⁹None of the other evidence Plaintiffs assert is proper for consideration. For instance,
6 Plaintiffs discuss the hindsight opinions of the school principal regarding Dickenson’s
7 conduct, but there is nothing in the record to suggest that the City was aware of this evidence
8 (and the record does not establish that the principal was an employee of the City). Plaintiffs
9 further point out that one of Dickenson’s fellow officers found some of Dickenson’s behavior
10 “odd” (Dkt. # 172 Ex. T at 7), and that another was “concerned for Officer Dickenson
11 because of how it looked that he spent so much time with the kids and at the school” and
12 “suggested Officer Dickenson not spend so much time helping at the school and do other
13 things” (Dkt. # 172 Ex. K). These are hearsay statements from unauthenticated police reports
14 and thus are inadmissible. *See Kight v. Guilford*, No. CV-07-0418-PHX-DGC, 2008 WL
15 2026355, at *5 (May 9, 2008) (“The police reports submitted by Defendants are not
16 admissible evidence. There is no accompanying verification by the custodian of records, and
17 the reports contain hearsay evidence. Defendants have not identified any applicable
18 exception to the hearsay rule. As such, they will not be considered by the Court.”).

19 Also, although Plaintiffs do not discuss the issue in the state law context, Plaintiffs
20 elsewhere point out that Dickenson may have been sexually assaulted as a child. (*See* Dkt.
21 # 172 Ex. Q.) Plaintiffs suggest that this creates an issue of fact regarding deliberate
22 indifference under § 1983 because “[v]ictims of child sexual abuse are more likely to become
23 perpetrators of child sexual abuse as adults.” (Dkt. # 181 at 19.) Even if Plaintiffs had
24 argued that such a fact was relevant to the state law issue, Plaintiffs have failed to properly
25 provide evidence to support it. Plaintiffs’ statement of facts citation for this matter is
26 inconsistent throughout their briefing, but Plaintiffs presumably mean to refer to ¶ 42, which
27 includes a similar assertion about the “probability that a person who was sexually abused
28 would become an abuser.” (*See* Dkt. # 172 at 20 ¶ 42.) However, the record citation
included in that statement of fact does not support such an assertion. (*See id.* (citing *id.* Ex.
I at 67).) The Court therefore cannot rely on it. *See Carmen v. San Francisco Unified Sch.*
Dist., 237 F.3d 1026, 1031 (9th Cir. 2001) (“[A] district court is ‘not required to comb the
record to find some reason to deny a motion for summary judgment[.]’”) (quoting *Forsberg*
v. Pac. Bell Tel. Co., 840 F.2d 1409, 1418 (9th Cir. 1988)).

Moreover, even if the Court considered this as evidence, the mere fact that victims of
child abuse are more likely to engage in abusive conduct than members of the general
population does not tend to establish that victims of past abuse have a *propensity* to abuse
children. In the same way, if Plaintiffs had produced evidence that male school employees
were more likely to molest children than female school employees, the mere fact that
Dickenson is male would not be evidence that he has a propensity to molest children. While
there might be some level of likelihood at which such correlational evidence would
inherently establish causal propensity, Plaintiffs have not provided any evidence along those
lines in this case.

1 Even assuming that all this evidence is true, and even assuming that it is admissible,
2 no reasonable jury could conclude that the City “knew” that Dickenson had a propensity to
3 molest children based on these facts. The farthest the cases have ever gone is to suggest that
4 a public entity “knew” of an employee’s propensity to commit a criminal act when it had
5 actual knowledge that its employee committed an act or acts in the past that were similar to
6 the harm suffered by the plaintiff. *See McGrath*, 250 F. Supp. 2d at 1233-35 (finding that
7 a plaintiff who brought claims for assault and battery against an Arizona police officer and
8 the State of Arizona made sufficient allegations to survive a motion to dismiss under section
9 12-820.05(B) because the plaintiff alleged that the officer had a prior complaint for excessive
10 force and had admitted to numerous other incidents resulting in counseling and reprimand);
11 *State of Arizona v. Heinze*, 196 Ariz. 126, 128, 131, 993 P.2d 1090, 1092, 1095 (Ct. App.
12 1999) (finding that a plaintiff who brought claims for sexual assault against a state agency
13 and its employee presented sufficient evidence to survive summary judgment under an
14 analogous immunity statute because the plaintiff provided evidence that the employee had
15 engaged in “multiple acts of sexual misconduct and harassment” of which the agency was
16 aware). Here, unlike *McGrath* and *Heinze*, there is no evidence that the City knew of, or that
17 Dickenson had ever engaged in, any past improper conduct with minors (or any type of
18 misconduct, sexual or otherwise). Thus, Plaintiffs’ state law claims are barred by section 12-
19 820.05(B).

20 Even if there were a case in which something less than knowledge of past actions
21 similar to the alleged harm could establish a public entity’s knowledge of criminal propensity
22 under section 12-820.05(B), this is not such a case. Evidence that Dickenson helped around
23 the school, helped students get to and from school, and helped students finance field trips
24 simply does not, in and of itself, give rise to knowledge that Dickenson had a propensity to
25 molest children. This evidence could only suggest such a propensity if the City knew that
26 these behaviors, although facially innocent, nevertheless indicated that the person who
27 engaged in them had a propensity to molest children. There is no such evidence in the
28 record. Thus, Plaintiffs have failed to establish that the “limited exception” to municipal

1 immunity in section 12-820.05(B) applies to the circumstances of this case. The City is
2 therefore entitled to summary judgment on Plaintiffs' state law claims.

3 **C. Punitive Damages**

4 The City argues that it cannot be compelled to pay punitive damages, citing *City of*
5 *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (“[A] municipality is immune from
6 punitive damages under 42 U.S.C. § 1983.”), and Arizona Revised Statutes section 12-820.04
7 (2003) (“Neither a public entity nor a public employee acting within the scope of his
8 employment is liable for punitive or exemplary damages.”). (Dkt. # 154 at 17.) Plaintiffs
9 decline to respond and thus have abandoned any claim for punitive damages. *See Jenkins*,
10 398 F.3d at 1095 n.4; *Foster*, 392 F. Supp. 2d at 1147 n.7. Given Plaintiffs' failure to
11 respond, and in light of the authorities cited by the City, summary judgment is appropriate.

12 **CONCLUSION**

13 The City is entitled to summary judgment on Plaintiffs' federal and state law claims.
14 Dickenson is entitled to summary judgment on the Eighth Amendment claim, but he is not
15 entitled to summary judgment on Jane Doe's familial association claim.

16 **IT IS THEREFORE ORDERED** that the Motion for Summary Judgment of the City
17 of Phoenix (Dkt. # 154) is **GRANTED**, except insofar as it argues that Plaintiff Jane Doe
18 cannot maintain a § 1983 claim against Defendant Dickenson for violation of her right to the
19 society and companionship of John Doe, to which extent it is **DENIED**.

20 **IT IS FURTHER ORDERED** that the City of Phoenix is **TERMINATED** from this
21 action.

22 DATED this 29th day of April, 2009.

23
24 
25 _____
26 G. Murray Snow
27 United States District Judge
28