STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALLEGANY

JOANNE SCHOONMAKER

Plaintiff,

v.

Index No.: 47103/2019

JOSEPH BACKHAUS, WELLSVILLE SECONDARY SCHOOL, WELLSVILLE CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE WELLSVILLE CENTRAL SCHOOL DISTRICT,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

PRELIMINARY STATEMENT

Plaintiff commenced this action under the Child Victims Act, alleging various causes of action against Defendants Joseph Backhaus, Wellsville Secondary School, Wellsville Central School District and The Board Of Education of the Wellsville Central School District (sometimes collectively referred to as the "District" or "Defendants"). Plaintiff's case centers around allegations that non-party Robert Wade sexually assaulted her on several occasions while she was 12 to 15 years old, both on and off the premises of the Wellsville Secondary School.[1] Plaintiff's pleading and testimony demonstrate she understood Wade was employed as a janitor at the District; however, discovery has revealed that Wade was never so employed. In fact, Plaintiff testified she met Wade through her mother, and that future interactions between Plaintiff and Wade were facilitated by and through, among other things, an ongoing relationship between Wade and Plaintiff's mother, and through encounters arranged by Plaintiff's grandparents. Wade's lack of employment with Defendants necessarily subjects certain of Plaintiff's claims to dismissal outright, including her claims for negligent hiring, retention and supervision, and her remaining claims otherwise remain subject to dismissal for the reasons below.

FACTUAL BACKGROUND

The relevant facts are set forth in the accompanying Statement of Material Facts dated September 9, 2021 ("SOF") and in the interest of brevity are not repeated herein.

[1] To the extent Plaintiff references instances of sexual assault occurring outside of the premises of the District, Defendants are not liable as a matter of law (*see Williams v Weatherstone*, 23 NY3d 384, 403 [2014] ["Because the accident did not happen while A. was within the District's custody and control, the District is not liable for A.'s injuries."]).

ARGUMENT

Applicable Standard

Summary judgment is proper where the movant establishes that there are no triable issues of fact (*see* CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Upon such showing, the burden shifts to the opposing party to establish a triable issue of fact through evidentiary proof (*see Zuckerman v City of New York,* 49 NY2d 557, 561 [1980]). The court is required to view the evidence in the light most favorable to the non-moving party and afford that party the benefit of all reasonable inferences that maybe drawn from the evidence (*see Negri v Stop and Shop, Inc.*, 65 NY2d 625, 626 [1985]). "[M]ere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "When properly employed, . . . summary judgment is a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources" (*Matter of Suffolk County Dep't of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]).

POINT I

PLAINTIFF'S NEGLIGENT HIRING / RETENTION / SUPERVISION CLAIMS SHOULD BE DISMISSED INSOFAR AS WADE WAS NOT EMPLOYED BY THE DISTRICT

Plaintiff's claims for negligent hiring, retention and supervision should be dismissed because Wade was not employed by the District. This case thus lacks the central element of an employee-employer relationship to sustain Plaintiff's Second and Third Causes of Action (*see, eg, Capobianco v Marchese*, 125 AD3d 914, 917 [2d Dept 2015] [finding Supreme Court erred in denying motion for summary judgment dismissing claims for negligent hiring and supervision where defendants established their prima facie entitlement to judgment as a matter of

law "by establishing that the plaintiff had failed to identify any employee allegedly negligently hired or supervised"] [internal citations omitted]; *see also Tesoriero v Syosset Cent. Sch. Dist.*, 382 F Supp 2d 387, 401 [EDNY 2005] [recognizing that in order to avoid summary judgment on the issue of negligent retention, "a plaintiff must offer evidence that the defendant negligently failed to terminate an employee - that is, that the defendant knew or should have known of the employee's propensity to commit acts meriting dismissal, yet failed to act accordingly"]).

Here, the record lacks any credible evidence to suggest Wade was employed by the District, thus ending any hypothetical inquiry into the actions the District could have taken had it actually hired him. To the contrary, the record makes clear that Wade was never employed by the District, whether as a janitor as alleged by Plaintiff or otherwise.

The District has no record of an employee named Robert Wade (*see* SOF at ¶ 12). Moreover, long-time employees of the District confirmed they have no knowledge of Wade having worked for the District. More specifically, Michael McKinley, who served as Superintendent of Buildings and Grounds for the District from 1972 until he retired in approximately 2000 (*see* Means Aff. at Ex. H. at pp. 9-10), and supervised all employees assigned to buildings and grounds, including custodians and janitors (*see id.* at p. 20; Ex. S at p. 56; Ex. K at pp. 43-44), testified he has no recollection of an employee named Robert Wade (*see id.* at Ex. H at p. 21). Leroy Ives served as head custodian from 1980 and as union steward for CSEA from 1975 until he retired in 2017 and confirmed Wade was not on the list of union members and that he otherwise did not believe he worked as a janitor for the District (*see* Ex. T at pp. 10, 22-23, 80-81). Barrie Fanton, who has remained employed by the District for approximately five decades, has never heard of the name Robert Wade (*see* Ex. Q at p. 44). Additionally, Michael Hall, Assistant Principal of the Wellsville High School from 1977 through 1980 and Principal of the Wellsville Middle School

from 1981 through 1985, testified he has no recollection of Robert Wade and is not aware of him having any connection to the District (*see* Affidavit of Michael Hall, sworn to on September 7, 2021 ("Hall Aff.") at ¶¶2, 4). Likewise, Wade's younger sister, Margaret (*see* Ex. J at p. 25), who was also a student at Wellsville Secondary School in the early 1980s (*see id.* at 23), testified she has no recollection of her brother working at the District (*see id.* at 38).

Rather than being employed by the District, the record indicates that Wade worked for the Allegany County Department of Social Services' work relief program, a program administered in the 1970s and 1980s, conditioning welfare benefits upon employment with Allegany County (*see* Means Aff. at Ex. W at SCHOONMAKER 002285 [defining the program]). In connection with that program, Wade appears to have been assigned to clean the Wellsville Secondary School for a period of weeks one summer in or around the 1980s (*see* Means Aff. at Ex. K at pp. 72, 137; Ex. T at pp. 22-23, 28). Former janitor at the District, Howard Propochuk also worked for that program in the early 1980s (*see* Ex. K at p. 39) prior to being hired as a janitor by the District in 1984 (*see id.* at pp. 18-19, 41). During the time Mr. Propochuk worked for the program, he was not paid by the District; instead, he received public assistance (*see id.* at p. 40). Mr. Propochuk testified that his recollection of Wade is limited to his time working for the program for one summer, and that he did not believe he was ever employed by the District (*see id.* at pp. 72, 78-79; 137-138).

Without evidence that Wade was ever employed by the District, Plaintiff's Second and Third Causes of Action for negligent hiring / retention and supervision fail and should be dismissed.[2]

[2] The record is otherwise devoid of anything to suggest that had the District employed Wade, which it denies, it would have known or should have known of his alleged propensity to commit sexual abuse (*see Shu Yuan Huang v St. John's Evangelical Lutheran Church*, 129 A.D.3d 1053, 1054 [2d Dept 2015], or that any such propensity would have been apparent through a background check (*K.I. v New York City Bd. of Educ.*, 256 AD2d 189, 191 [1st Dept 1998]).

POINT II

PLAINTIFF'S NEGLIGENCE CLAIM FAILS INSOFAR AS IT PREMISED UPON VICARIOUS LIABILITY AND FOR LACK OF NOTICE

A. Any alleged tortious act by Wade was outside the scope of his alleged employment

Setting aside that Wade was never employed by the District (*see* POINT I, *supra*), Plaintiff's First Cause of Action remains subject to dismissal to the extent it is premised upon a finding of vicarious liability, because the alleged acts indisputably fall outside the scope of Wade's *alleged* status as an employee of the District (*see, e.g., Cornell v State of New York,* 46 NY2d 1032, 1033 [1979]; *Wende C. v United Methodist Church*, 6 AD3d 1047, 1052-53 [4th Dept 2004], *affd,* 4 NY3d 293 [2005]).

"Although the issue whether a particular act is within the scope of employment is usually one of fact for the jury, there is no liability as a matter of law if the employee was 'acting solely for personal motives unrelated to the furtherance of the employer's business'" (*Mazzarella v Syracuse Diocese*, 100 AD3d 1384, 1385 [4th Dept 2012] [internal citation omitted). "Sexual abuse is a clear departure from scope of employment, committed solely for personal reasons, and unrelated to the furtherance of his employer's business" (*Torrey v Portville Cent. Schoo*l, 66 Misc 3d 1225(A), 2020 NY Slip Op 50244(U) *2 [Sup Ct, Cattaraugus Cty 2020] [quoting *Doe v Rohan*, 17 AD3d 509, 512 [2d Dept 2005]; *see also*, *Mazzarella*, 100 AD3d at 1385). "Therefore, as a matter of law, the doctrine of respondeat superior is not applicable to the present matter" (*Torrey*, 66 Misc 3d 1225(A), *3), and Plaintiff's First Cause of Action should be dismissed to the extent it seeks to hold Defendants' liable under such theory.

B. Plaintiff's alleged notice statement is incredible as a matter of law.

"It is well established that '[s]chools are under a duty to adequately supervise the students in their charge[,] and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision'" (*Knaszak v Hamburg Cent. Sch. Dist.*, 196 AD3d 1141 [4th Dept 2021] [quoting *Mirand v City of New York*, 84 NY2d 44, 49 [1994]). "However, unanticipated third-party acts causing injury . . . will generally not give rise to a school's liability in negligence absent actual or constructive notice of prior similar conduct" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]). "[I]t must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (*Mirand*, 84 NY2d at 49 [internal citation omitted]; *see, e.g.*, *Doe v Town of Hempstead Bd. of Educ.*, 18 AD3d 600, 601-602 [2d Dept 2005] ["Moreover, the school defendants did not have knowledge or notice of any prior sexual assaults at the school," thus demonstrating that they were not "on notice of an imminent foreseeable danger", and thereby established their entitlement to judgment as a matter of law with respect to the negligent supervision cause of action"] [internal citation omitted]).

The central allegation of notice in this lawsuit[3] is limited to an alleged conversation involving the Plaintiff which has been denied by all other parties to that conversation (*see* SOF

[3] In addition to Mr. Backhaus, Plaintiff alleges two additional District employee may have been aware of the sexual assault committed by Wade, namely Mr. and Mrs. Prokopchuk; however, the record refutes this suggestion. More specifically, Plaintiff suggested the former wife of Mr. Prokopchuk was employed by the District as a secretary and was home during the alleged assaults (*see* Means Aff. at Ex. D at No. 49; Ex. N at pp. 154-155). However, Mr. Prokopchuk testified he was only ever involved in one relationship with an employee of the District, explaining that he met his ex-wife Caroline Mariotti in 1991, nearly a decade after the incidents alleged in this lawsuit, while she was working as a teacher's aide at the high school (*see* Ex. K at p. 49-50). They married approximately a year later, in 1992 (*see id.* at 50). Plaintiff further alleges that Mr. Prokopchuk was aware of the abuse, having both committed acts of sexual assault against Plaintiff himself and having notice of the sexual abuse committed by Wade (*see* Ex. D at No. 49). Mr. Prokopchuk testified he never spent any time with Wade outside of school, Wade never came to his house and he never saw Wade with any students at Wellsville (*see* Ex. K at pp. 108, 113-114). Mr. Prokopchuk further testified Plaintiff was never in his house, and he denies having ever sexually assaulted Plaintiff (*see id.* at pp. 115, 130).

at ¶¶ 19-20). In particular, Plaintiff claims she got into a verbal and physical altercation with Wade's younger sister, Margaret, regarding Plaintiff's claim that Wade was sexually assaulting her in the presence of approximately 30-40 other students during English class (*see* Means Aff. at Ex. N at pp. 103-106). Plaintiff testified the teacher was present, but she does not recall who her teacher was (*see id.* at pp. 104-105). Plaintiff also testified she was unable to recall any of the approximately 30-40 students in the classroom aside from herself and Margaret (*see id.* at p. 107). Plaintiff claims the teacher sent Plaintiff and Margaret to interim-principal Backhaus' office as a result of the altercation (*see id.* at pp. 105-106). Plaintiff claims she then told interim-principal Backhaus that she was being sexually assaulted by Wade, while Margaret was present (*see id.* at pp. 101-102). For the reasons that follow, Defendants respectfully submit Plaintiff's alleged notice statement is incredible as a matter of law.

First, the only parties Plaintiff can recall being present, namely Margaret and Mr. Backhaus, have denied any recollection or knowledge of these events. Margaret testified she has no recollection of these events (*see* Means Aff. at Ex. J. at p. 49). Mr. Backhaus testified he was never confronted with any information regarding any sexual assault involving the Plaintiff and Robert Wade and has no recollection of learning of any fight between Plaintiff and Margaret (*see* Means Aff. at Ex. S at pp. 114, 134; *see also* Affidavit of Joseph Backhaus, sworn to on August 26, 2021 ("Backhaus Aff.") at ¶¶6-7). Mr. Backhaus further testified he had not even heard of Wade until being served with Plaintiff's lawsuit in 2019 (*see* Means Aff. at Ex. S at p. 103; Backhaus Aff. at ¶8).

Second, it defies common experience that Plaintiff would tell her "girlfriends" and the entirety of her classroom that Robert Wade was sexually assaulting her, yet her best friend, Cheryl Eck, would remain completely unaware (*see* Means Aff. at Ex. L at pp. 122-123, 128 [testifying

she learned of the abuse from Facebook in or around summer 2019], 130 [confirming Ms. Schoonmaker was one of her best friends from high school, that she remains one of her best friends, and that she considers her a sister]; *see also* Ex. X at ¶ 13 [Cheryl Eck testifying in her affidavit she learned of the abuse after her time at Wellsville]).

Third, despite Plaintiff's school records containing other disciplinary referrals and events (*see, e.g.*, Means Aff. at Ex. O at SCHOONMAKER000127 [referencing excessive tardiness], SCHOONMAKER000130 [noting Plaintiff and Ms. Eck were sent to report to the office for talking, laughing and fooling around], SCHOONMAKER000131 [requesting parent conference as a result of disruptive behavior involving Plaintiff and Ms. Eck], SCHOONMAKER000140 [referencing detention due to disruptive behavior]), there was no mention of the alleged physical altercation between Plaintiff and Margaret.

Fourth, Plaintiff's own recount of this alleged incident is inconsistent: at page 104 of her deposition, Plaintiff claims "I told [Margaret] that [Wade] was hurting me physically, violently, leaving marks and sexually assaulting me"; later on at pages 237-239, Plaintiff generally retracts that statement, noting "of course I will forget that . . ." and concedes she "does not know the exact words that were said in the classroom", but that as far as she knows, she told Margaret, with respect to the accusations regarding her brother, "it was true" (*compare* Means Aff. at Ex. N at p. 104 *with* Ex. N at pp. 237-239).

Finally, the timing of the alleged reporting raises yet another factor to support deeming the same inconceivable: in her pleading, Plaintiff recalled the fight and alleged reporting occurring in the fall of 1980 (*see* Means Aff. at Ex. A at ¶¶ 38-39) and confirmed it again during her deposition, noting she told Mr. Backhaus in the "Fall of 1980", and specifically recalling that "[i]t was before fall hit because I miscarried from Wade, so it was fall of September of 1980, September-ish"

(*see* Ex. N at pp. 101-102). Notably, however, Mr. Backhaus did not serve as principal in the fall of 1980; to the contrary, Mr. Backhaus served as interim-principal in December 1980 through January 1981 (*see* Means Aff. at Ex. S at pp. 29-30, 135; *see also* Ex. Y at Wellsville000445; Hall Aff. at ¶ 6). As a result, Plaintiff simply could not have been sent down to report see Mr. Backhaus in the fall of 1980, because he was not serving as interim-principal at this time and otherwise did not have access to the principal's office (*see id.; see also* Backhaus Aff. at ¶¶3-4).

Accordingly, the District respectfully submits Plaintiff's alleged notice statement should be deemed incredible as a matter of law, thus subjecting Plaintiff's negligence claim to dismissal (*see Price v City of NY*, 172 AD3d 625, 629 [1st Dept 2019], *appeal dismissed* 34 NY3d 989 [2019] ["While issues of credibility are, except in rare cases, for the finder of fact to resolve, we may find testimony to be utterly incredible as a matter of law when it is "manifestly untrue, physically impossible, or contrary to common experience, and such testimony should be disregarded as being without evidentiary value notwithstanding that it is uncontradicted"]). At a minimum, and only to the extent the alleged notice statement suffices to raise a question of fact, Plaintiff's claim against the District must be limited to the alleged abuse occurring after the fall of 1980, subsequent to the alleged notice statement to Mr. Backhaus.

C. <u>The District lacked constructive notice of any alleged sexual abuse.</u>

The record is otherwise devoid of any evidence to suggest constructive notice. Plaintiff and her mother offered testimony to suggest Plaintiff reported an interaction/assault by Wade to Plaintiff's mother, but Plaintiff's mother testified she did not relay this information further upon receiving it from Plaintiff (*see* SOF at ¶ 9 [citing Ex. N at p. 17, Ex. U at pp. 74-79]). By contrast, multiple depositions of former and current employees of the District have been conducted, confirming they had no knowledge of any prior instances of sexual assault occurring at the District

or of the sexual assaults alleged in this lawsuit (Means Aff. at Ex. T at p. 71 [Leroy Ives testifying he did not hear any rumors of any inappropriate behavior by Howard Prokopchuk or Wade]; Ex. Q at p. 36-37 [Ms. Fanton testifying she never observed sexual assault or inappropriate touching by a staff member toward a student at the District]; Ex. S at pp. 37, 41 [Mr. Backhaus testifying he was not informed of any issues related to suspected child sexual abuse, and that he had no concerns of child sexual abuse while employed as a teacher at the District]; Ex. H at 129 [Mr. McKinley testifying he was not aware of any rumors of any inappropriate behavior by Howard Prokopchuk]; *see also* Hall Aff. at ¶5 [Mr. Hall testifying he neither observed nor otherwise had notice of any sexual assaults against any student occurring during his employment at the District]; Backhaus Aff. at ¶7 [Mr. Backhaus confirming he was not apprised by Plaintiff or otherwise of any sexual assaults against Plaintiff by Wade]).

These depositions have also demonstrated that staff either had no knowledge or recollection of anyone named Robert Wade or limited his time at the District to a period of weeks over the summer when school was not in session (*see* SOF at ¶¶ 14-16; *see also* Hall Aff. at ¶ 4 [testifying he has no knowledge or recollection of Wade and is not aware of him having any connection to the District]). The record thus lacks any support to suggest the District should be deemed to have had constructive notice, and Plaintiff's negligence claim should be dismissed (*see Charles D.J. v City of Buffalo*, 185 AD3d 1488, 1488 [4th Dept 2020] [recognizing "[s]chools are not insurers of safety"]; *Geywits v Charlotte Val. Cent. Sch. Dist.*, 98 AD3d 804, 806-807 [3d Dept 2012] [holding "defendant was entitled to summary judgment because defendant had no notice that the illegal actions of a third party, i.e., Quigley, could reasonably have been anticipated, rendering the abuse unforeseeable"]).

POINT III

PLAINTIFF'S EMOTIONAL DISTRESS CLAIMS ARE UNFOUNDED AND DUPLICATIVE

For the reasons set forth above, in POINT II.A, Plaintiff's negligent and intentional claims for infliction of emotional distress are barred insofar as they rely on *respondeat superior* liability. Additionally, they are duplicative of her other tort claims, including her First, Second and Third Causes of Action. Additionally, Plaintiff's claim for intentional infliction of emotional distress simply cannot stand against the District, a municipal entity.

A. Plaintiff's Negligent and Intentional Infliction of Emotional Distress Claims are impermissibly duplicative.

In addition to falling outside the scope of Wade's alleged employment, Plaintiff's emotional distress claims should be dismissed as duplicative of Plaintiff's other tort claims (*see Torrey*, 66 Misc 3d 1225(A), 2020 NY Slip Op 50244(U)*3 ["Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action."]; (*Di Orio v Utica City School District Board of Education*, 305 AD2d 1114, 1115-16 [4th Dept 2003]).

B. Plaintiff's claim for intentional infliction of emotional distress otherwise falls short and is unavailable against the District, a municipal entity.

Plaintiff's cause of action for intentional infliction of emotional distress is otherwise subject to dismissal insofar as the record lacks any evidence of conduct on the part of the District which "meets the threshold of outrageousness required to support such a claim (*Lillian C. v Admin. for Children's Services*, 48 AD3d 316, 316 [1st Dept 2008] [citing *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]), and because "this claim is not available against governmental entities" (*Lillian C.*, 48 AD3d at 317 [1st Dept 2008] [citing *Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008] ["The cause of action for intentional infliction

of emotional distress should have been dismissed as not available against governmental entities such as defendants"]).

POINT IV

PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM FAILS TO STATE A CLAIM

Preliminarily, Plaintiff's negligent misrepresentation claim should be dismissed in the first instance pursuant to CPLR 3016(b) for failure to sufficiently detail this cause of action (*see Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] ["A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)."]). Plaintiff never specifies who made the alleged misrepresentation, suggesting instead that it was the collective "Wellsville Defendants," when it was made, or in what manner it was communicated to Plaintiff and/or her family (*see generally* Compl. at COUNT VI). Even assuming she had sufficiently pleaded this cause of action, however, the claim still necessarily fails.

To sustain a cause of action for negligent misrepresentation, the plaintiff is required to demonstrate "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011] [citing *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]]). Here, assuming the first element is established for the sake of argument, the record is entirely devoid of any representations made by the District concerning Wade. Again, Wade was never employed by the District, and the District made no representations about him to anyone, including, but not limited to, Plaintiff or her parents. Nothing in the record exists to suggest otherwise, and Plaintiff's basis, if any, to suggest that "Wellsville Defendants affirmatively represented to Plaintiff and her family that Wade did not have a history of abusing, harassing, and/or molesting children, that

Wellsville Defendants did not know or suspect Wade had a history of molesting children, and/or that Wellsville Defendants did not know that Wade was a danger to children" (*see* Ex. A at ¶ 99) remains entirely unknown.

Given the absence of anything to suggest the District made any affirmative representations concerning Wade to Plaintiff or her family, Plaintiff cannot credibly argue she relied on that information to her detriment, as alleged in paragraph 103 of the Complaint. To the contrary, Plaintiff recounts that she met Wade through her mother off school premises at her home (*see* Ex. N at pp. 75-76). As a result, Plaintiff's negligent misrepresentation claim should be dismissed (*see Dunlevy v New Hartford Cent. Sch. Dist.*, 266 AD2d 931, 933 [4th Dept 1999] ["Even assuming that there was a special relationship between the parties, we conclude that defendant established that its teachers did not provide any false information to plaintiffs, and plaintiffs failed to raise an issue of fact"]).

POINT V

PLAINTIFF'S FEDERAL LAW CLAIMS ARE UNTIMELY

Plaintiff's Seventh Cause of Action, a claim under federal Title IX, and Eighth Cause of Action, a claim under 42 U.S.C. § 1983, should each be dismissed because the claims are untimely, and the New York Child Victims Act does not revive them.

Neither Title IX nor Section 1983 contain a statute of limitations. Instead, courts borrow the relevant state law's time limit for personal injury claims (*see Salim v County of Erie*, No. 15-CV-418A(Sr), 2017 US Dist LEXIS 142285, at *10 [WDNY Aug. 31, 2017, No. 15-CV-418A(Sr)] ["The statute of limitations for a Section 1983 actions commenced in New York is three years."] [citing *Owens v Okure*, 488 US 235, 249-250 [1989]; *see also Curto v Edmundson*, 392 F3d 502, 504 [2d Cir 2004] [adopting CPLR § 214(5) as relevant time limitation for Title IX

claims]), premised on the understanding that Section 1983 "confer[s] a general remedy for injuries to personal rights" (*Owens*, 488 US at 240 [internal citation omitted]) and "Title IX claims are most closely analogous to personal injury actions" (*Curto*, 392 F3d at 504). For the reasons set forth below, Plaintiff's federal claims are both time barred.

A. Plaintiff's Section 1983 claim is untimely.

Boyle v N. Salem Cent. Sch. Dist., No. 19 CV 8577 (VB), 2020 US Dist LEXIS 82504, at *8 [SDNY May 11, 2020]) is instructive and confirms that Plaintiff's Eighth Cause of Action under 42 U.S.C. § 1983 should be dismissed as untimely. In *Boyle*, the Southern District of New York was confronted with a similar claim, purported timely by the plaintiff by virtue of the CVA, and held:

> Although Section 214-g extends the statute of limitations for ***state law claims*** respecting child sexual abuse, it does not extend the statute of limitations for Section 1983 claims. This is because "where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions"

(*Boyle v N. Salem Cent. Sch. Dist.*, 2020 US Dist LEXIS 82504, at *8 [emphasis added] [internal citations omitted]; *accord Doe v NYS Off. of Children & Family Servs.*, No. 1:20-cv-01195 (BKS/CFH), 2021 US Dist LEXIS 125965, at *15-17 [NDNY July 7, 2021] citing *Boyle* and holding that the plaintiff's "argument that the CVA revives her § 1983 claim, also fails"]). Defendants respectfully submit the same result is warranted here, and Plaintiff's Eighth Cause of Action dismissed as untimely.

B. Plaintiff's Title IX claim is untimely.

Plaintiff's Seventh Cause of Action alleges a violation of Title IX, 20 U.S.C. § 1681 *et seq.*, (*see* Compl. 113), and should likewise be dismissed as untimely for the reasons articulated

immediately above, namely that the CVA does not revive federal claims. Distinct from that ground, the statutory intent of Title IX provides a further basis to dismiss this claim as untimely.

Under Title IX, a school district is liable for damages only if it is deliberately indifferent to actual knowledge of sexual assault (*see eg, Romero v City of New York*, 839 FSupp2d 588, 603-604 [EDNY 2012]). Title IX claims therefore face a burden higher than negligence, and the statue has no application for what a district "should have known" or harms brought on by the school employee themselves (*see id.* at 606). Since Title IX only redresses injuries suffered as a result of a school's inaction—and does not redress injuries suffered as a result of the actual sexual misconduct—Title IX claims do not fall within the CVA (*see* CPLR § 214-g [reviving claims "brought against any party...for physical, psychological, or other injury...suffered *as a result of conduct* which could constitute a sexual offense] [emphasis added]). Accordingly, Plaintiff's Title IX claim should be dismissed as untimely (*cf Collins v Dutton*, No.S19C-01-045 ESB, 2019 Del. Super. LEXIS 571 at *14-15 [Del. Super. Nov. 14, 2019] [analyzing Delaware Child Victims Act at Del. Code § 8145,[4] which bears substantial similarity to CPLR § 214-g, and Title IX, to ultimately dismiss plaintiff's Title IX claim as untimely]).

POINT VI

PLAINTIFF'S CLAIM ALLEGING FAILURE TO REPORT FAILS INSOFAR AS WADE CANNOT BE DEEMED A "PERSON LEGALLY RESPONSIBLE" AND BECAUSE THERE IS NO EVIDENCE OF ANY KNOWING AND WILLFULL FAILURE ON THE PART OF ANY DEFENDANT

As set forth above in POINT II.B, Defendants submit Plaintiff's alleged notice statement should be deemed incredible as a matter of law, which would subject this cause of action to dismissal, insofar as it is premised upon the same. Even without such a finding, however, Plaintiff's

[4] Del. C. § 8145(a) provides, in pertinent part: "A cause of action based upon the sexual abuse of a minor...may be filed...at any time..."

claim pursuant to Social Services Law § 420(2) still fails. First, Wade, a third-party with no relationship to the school or Plaintiff, could not be the subject of a mandatory duty to report because he cannot be deemed a "person legally responsible" for Plaintiff's care. Second, the record refutes that any alleged failure to report was done so "knowingly and willfully."

A. As no allegation exists to suggest Wade was a "person legally responsible" for Plaintiff's care, he cannot be the subject of a mandatory duty to report.

The civil penalty for failure to report sexual abuse of a child is laid out by Social Services Law § 420(2), entitled "Penalties for failure to report":

> Any person, official or institution required by this title to report a case of suspected ***child abuse*** or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure.

(*see* Social Services Law § 420[2] [emphasis added]). The breadth of Section 420(2) is not limitless, but is instead determined by the definition of its terms and the intent of the legislature in drafting the language. On the face of the statute, the mandatory reporting duty applies only to "child abuse," which it explains is defined based on the definitions of "abused child" and "person legally responsible" as found in the Family Court Act (*see id.* at § 412[1] ["An 'abused child' means a child under eighteen years of age and who is defined as an abused child by the family court act."]; *id.* at § 412[3] ["'Person legally responsible' for a child means a person legally responsible as defined by the family court act."]).

The Family Court Act defines "abused child" in terms of actions committed by the child's parent "or other personal legally responsible for his [or her] care" (*see* Family Court Act §§ 1012[e]). A "person legally responsible" is defined to include "the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time" (*id.* at § 1012[g]). Thus, when the Social Services Law refers to an abused child, it means a child who has been abused or

mistreated in some way by the child's parent, guardian, custodian, or ***other person responsible*** for his or her care (*see also* Social Services Law § 412[4]).

The question of whom a mandatory reporter must report has been answered by the Court of Appeals. In *In re Yolanda D.*, the Court of Appeals discussed at length—in addition to "parent," "guardian," and "custodian"—the definition of "other person responsible" for a child's care, 88 N.Y.2d 790 (1996), and this decision has even been referred to as the "seminal decision" on the determination of who is a "person legally responsible" under Social Services Law (*see In re Trenasia J.*, 25 NY3d 1001, 1004 [2015]).[5] In *In re Yolanda D.*, the Court of Appeals interpreted the "purpose section of article 10 to discern the meaning of 'other person responsible for the child's care":

> The stated purpose of article 10 is to "help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its family court, ***may intervene against the wishes of a parent*** on behalf of a child so that his needs are properly met."

(*see id.* at 795 [quoting Family Ct. Act § 1011] [emphasis added]). As such, the Court of Appeals noted that article 10 of the Family Court Act is "geared toward protecting the child from injury or mistreatment which may result from abusive or deficient ***parenting***" (*see id.* [emphasis added]).

The Court of Appeals explained that, in the context of mandatory reporting, "parenting" must be understood to encompass all persons serving as the "functional equivalent of parents":

> Subdivisions (a) and (g) of section 1012 embody legislative recognition of the reality that parenting functions are not always performed by a parent but may be discharged by other persons, including custodians, guardians and paramours, who perform caretaking duties commonly associated with parents. Thus, the

[5] Accordingly, the Court of Appeals' decision in *In re Yolanda D.* has been followed extensively by the Fourth Department to confirm that a "person legally responsible" must be acting "as the functional equivalent of a parent in a familial or household setting" (*see, e.g., In re Xander B.*, 191 AD3d 1434, 1435 [4th Dept 2021]); *In re Heavenly A.*, 173 AD3d 1621 [4th Dept 2019]; *In re Kameron V.*, 153 AD3d 1623 [4th Dep't 2017]; *In re Zachary T.*, 85 AD3d 1663 [4th Dept 2011]; *In re Paige K. v Jay J.B.*, 81 AD3d 1284 [4th Dep't 2011]; *In re Donnell S. v Jessica R.*, 72 AD3d 1611 [4th Dept 2010]).

> common thread running through the various categories of ***persons legally responsible for a child's care is that these persons serve as the functional equivalent of parents.***

(*see id.* at 795 [emphasis added]). Importantly, an alleged assailant only constitutes the "functional equivalent" of a parent, however, if "the care [this person] give[s] the child [is] analogous to parenting and occur[s] ***in a household or 'family' setting***" (*see id.* at 796 [emphasis added]).

Accordingly, because Wade was not a "person legally responsible" for the care of Plaintiff, he could not be considered the proper subject of a mandatory report under Social Services Law § 413 (*see generally* Social Services Law § 413; *see also Page v Monroe,* 300 F Appx 71, 73 [2d Cir. 2008]). As a result, Plaintiff's claim for failure to report necessarily fails.

B. There is nothing in the record to suggest any alleged failure to report was done so "knowingly and willfully."

Social Services Law § 420(2) provides as follows:

> Any person, official or institution required by this title to report a case of suspected child abuse or maltreatment who *knowingly and willfully* refuses to do so shall be civilly liable for the damages proximately caused by such failure.

(*see* Section § 420[2] [emphasis added]). Therefore, the statute requires on its face that the plaintiff allege and prove a knowing and willful failure refusal to report suspected child abuse (*see id.*). Accordingly, in the Fourth Department a failure to allege and prove a knowing and willful violation is fatal to a claim under Social Services Law § 420 (*see, e.g., Bowes v Noone,* 298 AD2d 859, 861 [4th Dept 2002] [affirming denial of plaintiff's directed verdict motion on grounds that a jury could rationally conclude that nurses who did not believe that child abuse had occurred had not acted willfully]; *Estate of Pesante v County of Seneca,* 1 AD3d 915, 918 [4th Dept 2003]; *see also Page v Monroe,* 488 FSupp.2d 219, 224 [NDNY 2007] [allegation that doctor had reasonable cause to suspect abuse was insufficient as a matter of law to establish civil liability under Social Services Law

§ 420(2) where plaintiffs failed to allege that the failure was knowing and willful), *affd in relevant part, revd in part,* 300 F Appx 71 [2d Cir 2008]).

As noted above, the District lacked actual or constructive notice of the alleged sexual assaults (*see* POINT II.A, B, *supra*). As a result, it follows that any alleged failure to report could not have been done knowing or willfully. In addition to the fact that Mr. Backhaus simply did not serve as interim-principal at the time of the alleged reporting, he testified he was never confronted with any information regarding any sexual assault involving the Plaintiff and Wade and has no recollection of learning of any fight between Plaintiff and Margaret (*see* Means Aff. at Ex. S at pp. 114, 134; Backhaus Aff. at ¶¶6-7). Mr. Backhaus further testified he had not even heard of Wade until being served with Plaintiff's lawsuit in 2019 (*see* Means Aff. at Ex. S at p. 103; Backhaus Aff. at ¶ 8).

POINT VII

AT A MINIMUM, THE CLAIMS AGAINST WELLSVILLE SECONDARY SCHOOL AND JOSEPH BACKHAUS AND PLAINTIFF'S REQUEST FOR PUNITIVE DAMAGES SHOULD BE DISMISSED

To the extent any claims survive the instant motion, certain defendants are plainly improper, and the action should be dismissed against them outright, as should Plaintiff's request to impose punitive damages against the District.

A. Plaintiff's claims against Wellsville Secondary School and Joseph Backhaus should be dismissed outright.

First, this action should be dismissed in its entirety as alleged against Wellsville Secondary School, which is "not a legal entity capable of being sued" (*Guerriero v Sewanhaka Cent. High Sch. Dist.*, 150 AD3d 831, 832 [2d Dept 2017]).

Second, all claims asserted against Mr. Backhaus should be dismissed insofar as he was acting within the scope of his employment at all material times, and thus there is no basis to sue

him in his individual capacity (*Caba v Equity Project Charter Sch.*, 2012 NY Slip Op 31655[U], *14-15 [Sup Ct, NY County 2012]). To the extent Plaintiff's Complaint seeks to impose liability upon Mr. Backhaus in any official capacity, dismissal is still warranted as such claims are duplicative of those asserted against the District and are thus "redundant and an inefficient use of judicial resources" (*Doe v E. Irondequoit Cent. Sch. Dist.*, No. 16-CV-6594 (CJS), 2018 US Dist LEXIS 76798, at *30 [WDNY May 7, 2018]).

B. Punitive damages cannot be imposed insofar as the District is a municipal defendant, and the request otherwise fails.

"Although punitive damages may be appropriately imposed against a private profit-making corporation, a municipality is different because it is not organized for any purpose of gain or profit, but it is a legal creation engaged in carrying on government and administering its details for the general good and as a matter of public necessity" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 386 [1987] [internal citations and quotation marks omitted]). As a result, Plaintiff's claim for punitive damages should be dismissed on account of the District's status as a public corporation and/or municipal defendant (*see Martinetti v Town of New Hartford Police Dept.*, 307 AD2d 735, 737 [4th Dept 2003]; *Krohn v NY City Police Department*, 2 NY3d 329, 336 [2004]; *Torrey*, 66 Misc 3d 1225[A], *4).

Moreover, it is well settled that "an employer is not punished for malicious acts in which it was not implicated" (*Loughry v Lincoln First Bank, NA.*, 67 NY2d 369, 378 [1986]). Instead, "punitive damages can only be imposed on an employer for the intentional wrongdoing of its employees only where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant, or the wrong was in pursuance of a recognized business system of the entity" (*see id.* [internal citations omitted]). Consistent with these principles, courts have routinely dismissed punitive damages claims

seeking to hold an entity liable for sexual abuse by an agent or employee (*see, e.g., Karen S. v Streitferdt*, 172 AD2d 440, 441 [1st Dept 1991]; *Jeffrey BB v Cardinal McCloskey School and Home for Children*, 257 AD2d 21 [3d Dept 1999]; *see also Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 934 [1999]). Here, in addition to there being no credible evidence to suggest Wade was employed by the District, nothing exists to suggest the District authorized, participated in, consented to or ratified the egregious conduct alleged by Plaintiff.

Accordingly, because Plaintiff has not and cannot credibly allege that Defendants acted with malicious intent or wanton dishonesty toward Plaintiff or displayed a criminal indifference to its civil obligations, Plaintiff's claim for punitive damages necessarily fails and should be stricken from the Complaint in its entirety.

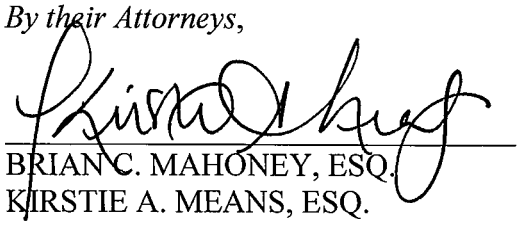
CONCLUSION

Defendants respectfully request that their Motion for Summary Judgment be granted in its entirety, dismissing Plaintiff's claims in their entirety, with prejudice, together with any such other and further relief the Court deems just and proper.

Dated: September 9, 2021
Buffalo, New York

JOSEPH BACKHAUS, WELLSVILLE SECONDARY SCHOOL, WELLSVILLE CENTRAL SCHOOL DISTRICT AND THE BOARD OF EDUCATION OF THE WELLSVILLE CENTRAL SCHOOL DISTRICT

By their Attorneys,

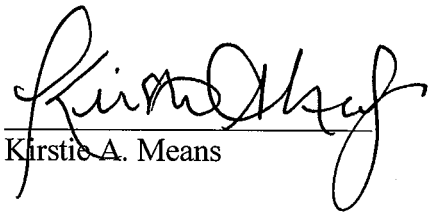


BRIAN C. MAHONEY, ESQ.
KIRSTIE A. MEANS, ESQ.
Harris Beach PLLC
726 Exchange Street, Suite 1000
Buffalo, New York 14210

CERTIFICATION

I hereby certify that that the foregoing memorandum of law complies with the word-count limitation in Rule 202.8-b of the Uniform Rules for the Supreme Court and the County Court (22 NYCRR § 202.8-b) because it contains 6,958 words, excluding the caption and signature block, which is below the 7,000 word limit required under 22 NYCRR § 202.8-b.

Dated: September 9, 2021



Kirstie A. Means