SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

JOANNE SCHOONMAKER Plaintiff, vs. JOSEPH BACKHAUS, WELLSVILLE SECONDARY SCHOOL, WELLSVILLE CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE WELLSVILLE CENTRAL SCHOOL DISTRICT, Defendants.	Index No. 47103/2019

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff Joanne Schoonmaker ("Joanne" or "Plaintiff") respectfully submits this memorandum of law in opposition to Defendants Wellsville Secondary School, Wellsville Central School District, The Board of Education of the Wellsville Central School District's (collectively the "District") and Defendant Joseph Backhaus's ("Backhaus," and, collectively with the District, "Defendants") Motion for Summary Judgment.

PRELIMINARY STATEMENT

This case principally seeks redress for the District's negligence that permitted the repeated, violent sexual assaults of a District student, Joanne, during school hours and on school property. The abuse occurred from 1980-82 when Joanne was twelve to fifteen years old. The abuse was committed by District janitor Robert Wade ("Wade") who was twenty-six when the abuse started. Wade was later arrested for raping at least one other woman; at the time of his death, Wade was a registered sex offender.

The crux of Defendants' motion for summary judgment is that Wade was not a District employee and, even if he were, the District had no actual or constructive knowledge of the abuse. But whether a worker was sufficiently under the Defendants' control to create an employer-employee relationship, and whether Defendants had knowledge of the alleged wrongdoing, are classic fact-intensive inquiries unripe for summary judgment. Indeed, the record sets forth ample evidence raising triable issues of material facts on both contentions.

As to Wade's employment with the District, multiple witnesses' testimony places Wade at the school, in a District-issued janitor's uniform, performing janitorial duties under the supervision and control of District personnel during the years of the abuse.

As to the District's knowledge of Wade's abuse, the record includes testimony that Joanne told the school's acting principal, Joseph Backhaus, among others, in 1980 that Wade was sexually

and physically abusing her. He *ignored* this disclosure allowing the abuse to continue. A few months later, with full knowledge of the abuse and as a thirty-five-year-old-man, he wrote in Joanne's yearbook (who was a *thirteen-year-old* girl) that she should "Take care of all the boys next year [in ninth grade]. Be good to all of them." A fellow teacher testified that the note "crosses the line" agreeing that Backhaus's words "felt just wrong."

Although Backhaus concedes he wrote the note, he predictably denies that he was told of the abuse, setting up a 'he said/she said' narrative that is almost never appropriate for resolution on summary judgment. Further, while Joanne's permanent student record (which is in the District's control) would likely shed significant light on this disputed issue (as well as a related disputed issue concerning a fight between Joanne and another student that led to Joanne disclosing the abuse), the District claims it is unable to locate her records. The District's failure to locate and produce Joanne's permanent record militates against granting the District summary judgment on the precise issue that her record would likely resolve, since that failure of proof must be held against them – not Plaintiff.

FACTS

Plaintiff's statement of facts is provided in Plaintiff's Rule 202.8-g Response To Defendants' Statement of Undisputed Facts And Plaintiff's Statement of Disputed Facts ("Pl.'s Rule 202.8-g Statement") submitted herewith.

ARGUMENT

A. Summary Judgment Is a "Drastic Remedy" Available Only When There Are No Material and Triable Issues

Summary judgment is a "drastic remedy" that should be denied if a court has *any doubt* as to the absence of material issues of fact. *See Vega v. Restani Const. Corp.*, 18 N.Y.3d 499,

503 (2012). Indeed, "the granting of such a motion is the procedural equivalent of a trial." *Falk v. Goodman*, 7 N.Y.2d 87, 91 (N.Y. Ct. App. 1959).

Therefore, when reviewing a motion for summary judgment, a court must view facts "in the light most favorable to [the non-moving party]" *Kimberly S.M. by Mariann D.M. v. Bradford Cent. School*, 226 A.D.2d 85, n.1 (4th Dep't 1996). At summary judgment, the court does not "make credibility determinations or findings of fact," but rather "identif[ies] material triable issues of fact (or point[s] to the lack thereof)." *Vega*, 18 N.Y.3d at 505. And "questions of credibility on motions for summary judgment . . . should be deferred to the trier of the facts." *Craft v. Maier*, 167 A.D.2d 933 (4th Dep't 1990).

POINT I

A. Triable Issues of Fact as to Wade's Employment at the District Preclude Summary Dismissal of Plaintiff's Second and Third Causes of Action

Defendants claim that Plaintiff's second and third causes of action for negligent hiring, negligent retention, and negligent supervision claims should be dismissed "because Wade was not employed by the district." (Defendants' Memorandum of Law in Support of Motion for Summary Judgment ("Br.") at 2). Defendants then argue that there is supposedly no "credible evidence to suggest Wade was employed by the District" to make their sweeping conclusion of law that "Plaintiff's Second and Third Causes of Action for negligent hiring / retention and supervision fail and should be dismissed." (*Id*. at 3-4). These arguments fail factually and as a matter of law.

i. Wade Was Supervised by District Employees and Worked as a Janitor During the School Year

District staff and students, at or around the time of the abuse, testified that Wade worked as a janitor at District schools. *See* Pl.'s Rule 202.8-g Statement at ¶¶ 26-30 (citing and summarizing District personnel and former student testimony establishing Wade worked as a

janitor at the school under District supervision). This testimony is direct evidence of triable issues of material fact regarding Wade's employment at the District. Therefore, Defendants' contention — that Plaintiff's claims for negligent supervision, negligent retention and negligent hiring should be dismissed, as a matter of law, because Wade was not a District employee — should be rejected. *See Raymond v. Hillebert*, 195 A.D.3d 1386, 1387-88 (4th Dep't 2021) (reversing lower court's granting of summary judgment holding that determination of whether wrongdoer was "employee" of defendant "involves a question of fact as to whether there is evidence of either control over the results produced or over the means used to achieve the results") (citing cases).

ii. Defendants Also Fail to Meet Their Burden of Establishing as a Matter of Law that Wade Was Not an Employee of the District

Even setting aside the evidence cited above, the District's lack of proof that Wade was *not* its employee defeats summary judgment on this issue.

In *Gadson v. City of New York*, 156 A.D.3d 685, 686-87 (2nd Dep't 2017), defendants sought summary judgment dismissing plaintiff's negligence, negligent hiring and negligent retention claims brought against a school janitor for his tortious conduct towards a student. The defendants argued that the offending janitor was "an employee of a nonparty independent contractor identified only as 'Temco.'" *Id.* at 686.

The Second Department rejected this argument affirming the lower court's summary judgment denial because "the defendants failed to establish, prima facie, that the janitor in question was the employee of an independent contractor retained to provide janitorial services to the subject middle school." *Id.* at 686-687.

Similar to the defendants in *Gadson*, the District offers no contract or other documentation to confirm that Wade performed work for the District through a third party. The District instead proffers that Wade's name does not appear on certain internal documents. (*See* Pl.'s Rule 202.8-g

Statement at ¶ 12).[1] But even the District's few hand-picked documents are inconclusive. Michael McKinley ("McKinley"), the District's former head of maintenance and lone witness to testify regarding these documents, conceded that the documents do not list substitute janitors "who were employed in [his] department," further conceding that "it's possible that the school does not have any list of who its substitutes were at any given time." (Ex. 6 at 43:6-10, 45:8-14, 47:18-23).[2]

These documents therefore fail to "tender[] sufficient evidence to eliminate any material issues of fact from the case" which "requires denial of the motion[.]" *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985) (defendant seeking summary judgment must establish its defenses sufficiently to warrant direct judgment in its favor as a matter of law).

The District's corollary argument — that it has *no* documents that show Wade was its employee — is unavailing. (Br. at 3). The District also does not have "any documents comprising [Plaintiff's] complete school file." Ex. 5 at p. 20. The District of course does not contend that Plaintiff was not a District student.

The District also relies on McKinley, Michael Hall, Barrie Fanton, Monte Ives, and Howard Prokopchuk to support its argument that Wade did not work for the District. But testimony of individuals who cannot remember the name of a janitor who worked at a school four decades ago is not compelling evidence that the individual did ***not*** work for the District.

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[1] Neither of the two cases Defendants cite to are relevant to whether an identified individual may be characterized as an employee. In *Capobianco v. Marchese*, 125 A.D.3d 914 (2nd Dept. 2015), the Second Department granted summary judgment where the pleadings did not *identify any specific employee*. And, in *Tesoriero v. Syosset Cent. Sch. Dist.*, 382 F. Supp. 2d 387, 401 (E.D.N.Y. 2005), the court did not address whether the alleged wrongdoer was an employee.

[2] References to "Ex." are references to exhibits attached to the October 11, 2021 Affirmation of Hugh Sandler submitted in support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment.

In any case, these witnesses' testimony is not compelling. McKinley, who testified that he never met Wade, was contradicted by fellow District employee Leroy Ives, who testified that McKinley introduced him to Wade and later observed McKinley fire Wade.[3] (Ex. 8 at 27:4-11, 36:1-4). Ms. Fanton testified that she did not know "*one way or the other* if [Wade] was ever a custodian at Wellsville." (Ex. 10 at 43:22-44:1) (emphasis added). Michael Hall, who was not deposed in this case, submitted a six paragraph affidavit stating only that he "has no recollection or knowledge" of Wade and is "not aware of him having any connection to the District," but Hall does *not* confirm that Wade did *not* work at the school. (Sept. 7, 2021 Affidavit of Michael Hall attached to Defendant's Motion for Summary Judgment). Wade's sister, Margaret Wade, testified that Wade may have been a janitor. (Ex. 7 at 41:4-43:7). And Prokopchuk testified that "it's possible that [Wade] worked at Wellsville during the school year . . ." (Ex. 14 at 72:17-73:17). Indeed, even Backhaus concedes that he has no "reason to dispute the allegation that Robert Wade worked within the Wellsville schools" because he does not know if Wade worked for the District. (Ex. 16 at 103:19-105:3).

Further, *even accepting* Defendants' version of the facts – *i.e.* that Wade never worked as a District janitor during the school year (which Plaintiff fervently disputes) – the District is still liable under a theory of general negligence because its polices and conduct allowed a stranger to repeatedly enter school property to sexually assault one of its students. *See* Part II.B, below.

iii. Whether Wade Worked for the District Through an Intermediary Is Irrelevant

[3] McKinley's credibility is also suspect because at his deposition he was exposed as providing untruthful testimony (Ex. 6 at 36:21-39:13, 130:9-131:23).

Defendants alternatively contend that even if Wade worked as a District janitor, he was employed through the Allegany County Department of Social Services work relief program (the "Work Relief Program"), and thus, not a District employee. (Br. at 4).

This argument is irrelevant. "It is well settled that one who is in the general employ of one party may be in the special employ of another despite the fact that the general employer is responsible for the payment of wages, has the power to hire and fire, has an interest in the work performed by the employee, maintains workers' compensation for the employee, and provides some, if not all, of the employee's equipment[.]" *Cameli v. Pace Univ.*, 131 A.D.2d 419, 420-21 (1987). At bottom, "the key factor [of whether a special employment relationship exists] is the right to direct the work and the degree of control exercised over the employee." *Id.* (citing cases).

Here, the District exercised control over Wade in his job performance. *See* Pl.'s Rule 202.8-g Statement ¶ 15 (showing control District exerted over its janitors). This evidence counsels against judgment as a matter of law on Wade's employment. *See Cameli*, 131 A.D.2d at 420–21 ("the issue of special employment is often a question of fact for the jury") (citing cases); *see also Bounds v. State*, 24 A.D.3d 1212, 1213 (2005) (triable issues of fact existed regarding whether participant in county social services welfare program was a special employee of the borrowing entity).

POINT II

A. Defendants' Knowledge of the Abuse Bars Resolution at Summary Judgment

Defendants argue that any claim for vicarious liability must be dismissed because the District cannot be held liable under a theory of *respondeat* superior for sexual abuse committed by its employee. Defendants further argue that, in any case, *all* negligence theories must be dismissed because the District supposedly lacked actual or constructive knowledge that Wade was sexually abusing Joanne. (Br. at 5-10).

i. The District's Liability for the Sexual Abuse

The District is either vicariously liable or directly liable for allowing the sexual abuse to occur once its staff had actual or constructive knowledge that Wade was sexually abusing Joanne. *See Doe v. Lorich*, 15 A.D.3d 904, 904 (4th Dep't 2005). It is also liable if the abuse was a reasonably foreseeable consequence of its negligent practices or procedures.

ii. Defendants' Actual Notice of the Abuse Bars Summary Judgment

Joanne's testimony is unequivocal: she told Backhaus, the acting principal, that Wade was sexually abusing her at school; after she told him, Wade continued to sexually abuse her on school property during school hours. (Ex. 1 at 107:13-108:8).

Defendants *do not* contest that Joanne's statement to Backhaus bars summary judgment; instead, Defendants argue that this Court should imprudently make a credibility determination on Joanne's testimony at summary judgment.

But not only are credibility determinations improper at summary judgment (*see* Argument section, Part A, above), but also Defendants' purported evidence that Joanne's testimony should be discredited is easily rebutted.

Defendants disregard Joanne's testimony based on the following: (i) Backhaus denies that Joanne told him about the abuse, and Margaret Wade claims to not recall hearing Joanne tell Backhaus; (ii) it defies "common experience" that Joanne did not tell her close friend, Cheryl Eck, about Wade's abuse when the two were in school together; (iii) none of *Plaintiff's* documents mention Joanne's fight with Margaret Wade; (iv) Joanne purportedly gave inconsistent testimony about an event that took place forty-one years ago; and (v) Joanne may have been a few months off in trying to identify the precise date month that she, as a thirteen year old girl, disclosed the sexual abuse to Backhaus. (Br. at 7-8). These arguments are easily rebutted.

First, the fact that Backhaus, a Defendant, denies having a conversation devastating to his defense is no basis to discredit Plaintiff's testimony. Further, Margaret Wade's claim to not recall hearing the same disputed conversation is of no moment. Putting aside that Margaret Wade, as Wade's sister, is likely disinclined to recall events showing her brother was a rapist, she does not deny the conversation occurred. Her testimony is that she does not recall it. Ex. 7 at 48:12-19, 49:17-23.

In any case, these denials pale in comparison to Joanne's specific and detail-oriented testimony, which must be viewed "in the light most favorable to [Plaintiff]." *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339 (2011). Joanne's testimony includes (i) what she said to Backhaus; (ii) approximately when and where the two were when she said it; (iii) Backhaus's response; and (iv) the factual context that brought about the conversation. (Ex. 1 at 107:13-108:8).

This 'he said/she said' evidence only sharpens the contention that the disputed facts should be put to a trier of fact. *See Savall v. N.Y.C. Transit Auth.*, 173 A.D.3d 566, 567 (2019) (denying summary judgment where "plaintiff and defendant provided conflicting versions of the accident"); *see also Zalewski v. E. Rochester Bd. of Educ.*, 193 A.D.3d 1426, 1427 (4th Dep't 2021).

Second, Defendants contend that it defies "common experience" that Joanne would not tell Cheryl Eck about the abuse when they were in school. But there is no "common experience" to dictate how a thirteen year old girl, who is being repeatedly raped by an adult, would act, much less in whom she would confide. Further, what constitutes "common experience" is obviously a jury question. Defendants' argument is therefore meritless. And, in any case, Cheryl testified that while they were at school, Joanne had told her she was spending time with Wade and that Cheryl "assumed" the two were having "sex" "[b]ecause they were together a lot." Ex. 11 at 58:21-59:11, 68:10-17, 101:7-20.

Further, Defendants' contention that Joanne told "the entirety of her classroom that Robert Wade was sexually assaulting her" (Br. at 7), as if to suggest she stood up in class to formally announce that she was being sexually abused is an absurd distortion of the testimony. Joanne testified that she was fighting with Margaret in class regarding the fact that Wade was sexually abusing her. (Ex. 1 at 102:21-104:16). Joanne acknowledged that *because they were fighting*, their tone of voice was likely "high pitched and angry and hurt" and therefore presumably other students in the class heard what they were fighting about. (*Id.*).

Third, Defendants' contention that there is no note in Joanne's student record concerning her fight with Margaret is misleading. Defendants *have not* produced Joanne's permanent student record. (Ex. 5) (Defendants stating in writing that they do not have Joanne's school file). Further, the "school records" that Defendants cite to in their brief are documents that *Joanne* produced in this case – an omission that falsely implies that the school's records did not indicate a fight occurred. Far from a complete school record, Defendants cite from a handful of paper documents that *Joanne* happens to have not discarded over the last forty years.

By contrast, Joanne's permanent student record would be highly relevant evidence to corroborate (or not) the fight with Margaret, which would have likely been memorialized as a disciplinary matter. But the District has not produced that record. This omission compels denial of Defendants' motion for summary judgment. *See, e.g., Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 468 (N.Y. Ct. App. 2016) ("We have long held in other contexts that where "the facts are within the defendant's peculiar knowledge . . . he [or she] should, therefore, prove them"); *Terranova v. Emil*, 20 N.Y.2d 493, 497 (N.Y. Ct. App. 1967).

Fourth, Defendants' contention that Joanne "generally retract[ed]" her statement that she

told Margaret about the sexual abuse during their fight is incorrect. Defendants contend the following:

> 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.' (Br. at 8).

This paragraph in Defendants' brief is confusing: Why would Joanne claim that "of course [she] will forget" something that she is testifying about in great detail? And how can Joanne say something "was true" if she also believes that she forgot it?

The explanation is that the transcript is missing the word "not." Joanne did not testify "of course I will forget that . . ."; she testified "of course I will ***not*** forget that." This is consistent with the rest of her sentence: "of course I will ***not*** forget that, because that's the day I told the principal I was being raped and it was ignored." Her testimony is that day was monumental to her and therefore she of course would ***not*** forget that day. This transcription error was corrected in an errata form served on the court reporter on April 28, 2021, which indicated the omitted word, "not," and provided a reason: "Reporter misheard me." (*See* Ex. 17 (Apr. 28, 2021 Email to Kelly Kozacki, employee for court reporter service, attaching errata form to Joanne's Feb. 26, 2021 deposition transcript, and attached errata form)).

Though this errata form was not served on Defendants' counsel, the reason for the error and its correction were memorialized and timely served on the court reporter. *See, e.g., Marine Tr. Co. of W.N.Y. v. Collins*, 19 A.D.2d 857, 857 (4th Dep't 1963). And, further, the corrected wording "of course I will ***not*** forget that because that's the day I told the principal I was being raped and it

was ignored" is the only coherent way to read this testimony. There is therefore no contradiction in Joanne's testimony.

Fifth, Defendants criticize Joanne because in her 2021 deposition she may have been a few months off in identifying which month, *in 1980*, she told Backhaus about the abuse. It borders on the absurd that Defendants attempt to exploit a *possible* minor factual discrepancy in the testimony of a fifty-three-year-old Plaintiff regarding something that happened when she was thirteen years old. *See, e.g., Matter of Michael C.,* 170 A.D.2d 998, 999 (4th Dep't 1991) (finding witness's "testimony to be highly credible, notwithstanding minor discrepancies, which are understandable" due to the time between the relevant incident and the testimony). Further, because Backhaus served as acting principal from December 1980 to January 1981 ***and*** on other days prior to December 1980, Joanne's testimony that she told him about the abuse in the Fall of 1980 is not refuted as a matter of law. (Means Aff. Ex. Y (District Superintendent stating in Jan. 14, 1981 letter that "Mr. Backhaus has served as an acting principal for the Wellsville Middle School for the past six weeks and has ***previous to that date acted in the Principal's behalf whenever there was a need***") (emphasis added).

Defendants' arguments attempting to discredit Joanne's testimony fail. Further, Defendants ignore the sexual innuendo-laden note Backhaus wrote to a thirteen-year-old Joanne a few months after she disclosed the abuse to him. His note reads: "Joanne, Take care of all the boys next year [in ninth grade]. Be good to all of them." As Backhaus's colleague testified, the note "crosses the line" and "just [feels] wrong." Ex. 10 at 44:22-49:1. It is implausible that as a thirty-five-year-old man,[4] Backhaus would be unaware of the coded sexual undertones his words

[4] Ex. 16 at 13:6-7. (Proof of Backhaus's age is redacted in the transcript at Defendants' counsel request. However, Plaintiff does not anticipate Defendants will dispute that Backhaus was thirty-five at the time he wrote the note).

conveyed, which supports the inference that he knew about the abuse. Interpreting the evidence in the light most favorable to Plaintiff raises material, triable issues of fact regarding the District's knowledge of the abuse. Such issues cannot be resolved on summary judgment.

iii. Defendants Cannot Meet Their Burden to Show They Lacked Constructive Knowledge

Defendants' contention that they lacked constructive notice of the abuse before Joanne notified Backhaus, or even after she notified Backhaus fails. (Br. at 9-10).

It is Defendants' burden to establish lack of notice at summary judgment. *Ward v. Pyramid Co. of Onondaga*, 11 A.D.3d 1012, 1013 (2004) (collecting cases). "Viewing the evidence in the light most favorable to plaintiff," Defendants cannot meet that burden here. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (N.Y. Ct. of App. 2007).

As to the District's constructive notice prior to Joanne telling Backhaus of the abuse, Backhaus's indifference to her disclosure raises a triable issue of fact that *he already knew* — or at least ought to have known — the abuse was occurring. Had he not known of any abuse, surely his response would have been to find out the details of the abuse; instead, he responded as if this fact was 'old news' and an annoyance to him, telling Joanne to simply avoid Wade. (Ex. 1 at 107:13-108:8). Indeed, this disclosure was so inconsequential to Backhaus he claims to not recall it happening. (Ex. 16 at 114:18-115:2). Further, as early as March 1980, Wade, while on school property, lured Joanne off school property to meet him at a park where he raped her. (Ex. 1 at 78:6-21). The facts and circumstances around Wade's conduct on school property to successfully lure Joanne off school property, as well as Joanne re-entering school property moments after being raped (Ex. 1 at 78:6-80:13), may also raise triable issues of fact concerning the District's constructive knowledge.

Finally, as to constructive knowledge after Joanne disclosed the abuse to Backhaus, there is ample evidence to raise a triable issue of fact. (*Id*. at 101:11-106:23, 113:10-118:15, 131:5-132:22 (Wade's sexual assaults on school property; Wade openly taking Plaintiff to the school's basement and boiler room where students are not permitted; Plaintiff's classmates groping Plaintiff's breasts and ripping open her shirt (in view of at least one teacher) due to the knowledge that Plaintiff was a victim of sexual abuse; Wade's sexual abuse loudly disclosed to a group of people, including a teacher; Backhaus's sexual innuendo-laden note to Plaintiff)).

B. Even Absent Knowledge of the Abuse, the District's Policies Make It Liable Under a General Negligence Theory

The District negligently failed to train teachers to identify sexual abuse (*see* Part IV.A., below). It also had grossly insufficient policies and procedures to prohibit unauthorized personnel from entering school grounds. *See* Ex. 16 at 94:19-102:5 (policy concerning strangers entering the school was limited to a sign telling the stranger to report to the office without any procedure to identify or stop a stranger who disregards that sign; District also had *no policy* to perform background checks on parent volunteers at the school or fingerprint new staff); Ex. 8 at 39:13-45:14, 71:21-72:20 (access to the boiler room was available "year round" to anyone who could enter the school's garage because the boiler room door was "propped open with a stick"); Ex. 3 at 116:18-118:20 (school did not inform Plaintiff's mother when or with whom her children left school during school hours). The foregoing raises triable issues of material facts as to whether Wade's sexual abuse of Joanne was a reasonably foreseeable consequence of the District's non-existent or deficient policies and procedures. *See Murray v. Research Found. of State Univ. of N.Y.*, 283 A.D.2d 995, 996 (4th Dep't 2001) ("We reject the contention of the District that it cannot be held liable without actual or constructive notice of [perpetrator's] behavior" finding a school

may be held liable for the criminal acts of third parties that are a reasonably foreseeable consequence of circumstances the school created).

POINT III

A. Plaintiff's Emotional Distress Claims Should Not Be Dismissed on Summary Judgment

Intentional infliction of emotional distress ("IIED") requires "extreme and outrageous conduct" done in "disregard of a substantial probability of causing severe emotional distress" resulting in severe emotional distress by plaintiff and a causal connection between the conduct and injury. *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121 (N.Y. Ct. App. 1993). This tort "imposes liability based on after-the-fact judgments about the actor's behavior. . . . The tort is as limitless as the human capacity for cruelty." *Id*.

Here, Backhaus (i) glibly disregarded a thirteen year old female student's desperate plea to him for help because she was being sexually abused and (ii) later penned a sexual innuendo-laden note in that girl's yearbook inferring that he was both aware that Joanne was a sexual target and he was at the very least indifferent to that fact.

Backhaus's conduct shows a callous disregard for the serial commission of child sexual abuse – a heinous crime widely viewed as among the most loathsome a person could commit. These facts also show Backhaus reveled in the abuse by writing a coded note to the victimized girl in her yearbook. Where conduct is "beyond all possible bounds of decency, . . . atrocious, and utterly intolerable in a civilized community" IIED liability attaches. *See Murphy v. Am. Home Prod. Corp.*, 58 N.Y.2d 293, 303 (N.Y. Ct. App. 1983). Further, this conduct, if proven, would satisfy the standard for punitive damages. *See Marinaccio v. Town of Clarence*, 20 N.Y.3d 506, 511 (2013) (punitive damages may be awarded for conduct that manifests "spite or malice, or a

fraudulent or evil motive . . . or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton").

In the alternative, if the Court dismisses Plaintiff's IIED claim against Backhaus, Plaintiff's negligent infliction of emotional distress ("NIED") claim against the District for that same conduct should proceed to trial. *See* Br. at 19-20 (District assuming legal responsibility for Backhaus's conduct: "*all claims* against Mr. Backhaus should be dismissed in so far as he was acting within the scope of his employment . . .") (emphasis added).

NIED's "generally must be premised on conduct that unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her physical safety" but "physical injury is no longer a necessary element." *Passucci v. The Home Depot, Inc.*, 67 A.D.3d 1470, 1471 (4th Dept. 2009). Backhaus's conduct communicated to Plaintiff that the District would not protect her from Wade. This conduct endangered Plaintiff's physical safety and caused Plaintiff to fear for her own safety. Because this theory of NIED is not duplicative of Plaintiff's other claims, and because the record raises triable issues of material fact warranting NIED liability, the claim should not be dismissed at summary judgment.

POINT IV

A. The Evidence Raises Triable Issues as to Plaintiff's Negligent Misrepresentation Claim.

Defendants contend that Plaintiff's negligent misrepresentation claim should be dismissed because (i) it does not meet the CPLR's fraud pleading standards, and (ii), even if it does, "the record is entirely devoid of any representations made by the District concerning Wade." (Br. at 12). But neither of these arguments is compelling.

Summary judgment is a test of the sufficiency of the evidence, not the pleadings. *See Werfel v. Zivnostenska Banka*, 287 N.Y. 91, 93 (1941). In any case, Defendants never moved against the pleadings in this case.

Further, the pleadings and the evidence adequately establish this claim. The District, by operating as a public school, represents to the community that it is as safe for children as if the children were supervised by a parent of ordinary prudence. This representation by the public school system is so entrenched it has been canonized under the 'loco parentis' doctrine. *See, e.g., Mirand v. City of New York*, 84 N.Y.2d 44, 49 (N.Y. Ct. of App. 1994) ("[A] teacher owes it to his [or her] charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances"). Yet, here, because the District lacked policies and procedures to ensure that children were safe in their facilities and programs, its representation of exercising parent-like care was false. *See* Ex. 10 at 24:1-31:11 (District teacher, who had been teaching for fifty years, confirmed no training on: (i) what would be appropriate versus inappropriate physical contact with students; (ii) ways to identify potential childhood sexual abuse; (iii) prevention of childhood sexual abuse; (iv) grooming behavior of sexual predators; and (v) responsibilities as a mandatory reporter (*i.e.* a person statutorily required to report suspected sexual abuse of a child); Ex. 16 at 24:1-27:3 (Backhaus confirming no training on (i) proper interactions with students; (ii) identifying instances where an adult might be attempting to develop an inappropriate relationship with a child; and (iii) responsibilities as a mandatory reporter; *id*. at 94:19-102:5 (Backhaus testifying that the District had no policy to ensure non-employee adults entering the school would be verified or checked in; no policy to perform background checks on parent volunteers at the school; no fingerprinting policy for hiring new staff; and no policy concerning janitors being alone with students).

Plaintiff's negligent misrepresentation claim requires only proof of reliance on incorrect information imparted by a defendant who is in a special or privity-like relationship with the plaintiff. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011). The evidence of the District's lack of policies protecting students' safety raises material triable issues of fact concerning (i) the District's misrepresentations that it will protect students in a prudent, parent-like manner; and (ii) whether Plaintiff, by attending the school, was doing so in reliance on those misrepresentations.

POINT V

A. Plaintiff's Federal Claims Are Revived Under the CVA and Are Actionable

Defendants argue that because the CVA does not revive federal claims, Plaintiff's § 1983 and Title IX claims should be dismissed. Defendants are wrong. Their argument is undermined by the language of the *Child Victims Act* ("CVA") and contradicted by this Court, which has already held that the CVA revives § 1983 and Title IX claims. *See BL Doe 3 v. The Female Acad. of the Sacred Heart*, 2020 WL 11231995, *7 (N.Y. Sup. Ct. Aug. 11, 2020) (Chimes, J.); *see also* Ex. 18 (Decision and Order in *Ark 3 Doe v. Diocese of Rockville Ctr.*, No. 900010/2019, at 14-16 (N.Y. Sup. Ct. May 13, 2020) (Jaeger, J.) (rejecting defendants' argument that the court should ignore the CVA's "sweeping statute of limitations reform," emphasizing that the "CPLR 214-g expressly revived **every** 'claim or cause of action brought against any party' that alleges 'intentional or negligent acts or omission' stemming from child sexual abuse offenses" and acknowledging the Legislature's intent to "revive all and any claims for tortious conduct") (emphasis in original).

In *BL Doe 3*, this Court held "that CPLR 214-g applies to plaintiff's claim for violation of Title IX and that plaintiff's Title IX claim has been revived" adding that "[t]he same analysis

applies to the claim plaintiff brought under 42 USC § 1983 . . . [and therefore] Plaintiff's § 1983 claims have also been revived by the Child Victims Act." 2020 WL 11231995, at *4. This Court noted that when borrowing a state's statute of limitations, "the borrowed state statute of limitations are governed by its own rules of applications, tolling and *revival*." *Id.* (emphasis in original).

The foregoing analysis should foreclose Defendants' argument. Indeed, Defendants do not cite any New York state decisions to support their argument; instead, they rely on two federal trial court decisions that cite to federal court jurisprudence articulating a federal court rule regarding using the "general" statute of limitations when assessing § 1983 claims. (Br. at 14). But federal court decisions do not bind New York courts in interpreting a New York statute, nor does the federal system's judge-made rule about which statute of limitations to borrow necessarily apply to state courts.

Further, New York's general statute of limitations – like all other statutes of limitations in New York – was temporarily suspended by the CVA for claims relating to child sex abuse. Therefore, that suspension, by act of the New York Legislature, should be heeded in adjudicating Plaintiff's § 1983 claim (along with any other claim (federal or state) governed by this general statute of limitations).

Indeed, absent recognizing the CVA's suspension of New York's general statute of limitations, courts would confusingly both apply and not apply the limitations period depending on whether the plaintiff's claim was pleaded under state or federal law. Such an inconsistent application of a statute of limitations is not supported in the CVA's language, which revives "all claims," nor is it contemplated by the federal courts, which desire "simplicity and uniformity"

when applying statutes of limitations. *See Boyle v. N. Salem Cent. Sch. Dist.*, No. 19 CV 8577 (VB), 2020 WL 2319116, at *3 (S.D.N.Y. May 11, 2020).

Defendants further seek dismissal of Plaintiff's Title IX claim on the basis that "Title IX . . . does not redress injuries suffered as a result of the actual misconduct and therefore does not fall under the CVA." (Br. at 15). Defendants rely on a Delaware state trial court's interpretation of Delaware's version of the CVA statute; but a Delaware court's interpretation of wording in a Delaware statute does not bear on how New York courts interpret a *differently worded* New York statute, particularly when this Court has already held that the CVA "applies to plaintiff's claim for violation of Title IX and that plaintiff's Title IX claim has been revived." *See BL Doe 3*, 2020 WL 11231995, at *7.

POINT VI

A. Plaintiff's § 413 Claim Should Proceed to Trial Because the Mandatory Reporter Had Actual Knowledge of the Abuse And He Chose Not to Report It

Defendants seek dismissal of Plaintiff's N.Y. Soc. Serv. L. § 413 ("§ 413") claim arguing that Joanne was not an "abused child" under the statute, and, in any case, Backhaus's failure to report was not done "knowingly and willfully." (Br. at 19). This latter contention is of no moment. Whether Backhaus's failure to report was done "knowingly and willfully" is an issue of fact based on Joanne's testimony that she expressly told Backhaus of the abuse and he never reported it, or even followed up with her about it. (Ex. 1 at 107:13-108:8, 109:1-13).

Defendants' other argument – that because Wade was not a "'person legally responsible' for the care of Plaintiff . . . Plaintiff's claim for failure to report necessarily fails" (Br. at 18) – should equally be rejected.

Defendants argue that Wade cannot be a "person legally responsible" under the statute because he did not have care over Joanne that was "analogous to parenting and occurs in a

household or family setting." *Id*. Therefore, according to the Defendants, if Wade is not a "person legally responsible" for Joanne, Defendants have no statutory duty to report Wade's abuse.

Defendants are wrong; this Court has already rejected this same argument. *See PB-36 Doe v Niagara Falls City Sch. Dist.*, 72 Misc.3d 1052, 1057-58 (July 19, 2021) (Chimes, J.) (rejecting defendant's argument "that there is no basis for liability [under § 413] . . . because [the perpetrator] was not a 'person legally responsible' for plaintiff's care"); *see also Kimberly*, 226 A.D.2d at 89 (finding that "whether a teacher is required to report a suspected case of child sexual abuse is determined by the facts and circumstances *known to the teacher at the time she [or he] learns of the abuse*" and that "[i]t is not the duty of the mandated reporter to assess whether the abuser would be considered by Family Court to be a 'person legally responsible' or whether a 'person legally responsible' allowed the abuse to occur . . . Instead, upon "reasonable cause to suspect that a child has been sexually abused, *the reporter must report immediately*.") (emphasis added).

Further, Defendants' Sept. 9, 2021 Statement of Undisputed Facts submitted in support of its Motion for Summary Judgment ("SUF") *relies* on testimony that Joanne met Wade at her home after her mother started to date Wade (SUF ¶ 7). Defendants appear to have included this testimony in their SUF to distance themselves from Joanne's interactions with Wade. However, now, in seeking dismissal of the § 413 claim, where Joanne's connection to Wade through her family would *cut against* Defendants' defense (because it may suggest that Wade could have been viewed as a "person legally responsible" for Joanne), Defendants make the *polar opposite* argument that Wade was some itinerant "third-party with no relationship to . . . Plaintiff . . .". (Br. at 16). But regardless of Defendants' inconsistent arguments of convenience, per *PB-36 Doe* and *Kimberly*, Backhaus's failure to report the abuse cannot be papered over by a lawyerly *ex post facto* argument about whether Wade would have fit under the definition of "person legally responsible." Instead,

once Backhaus learned of the abuse, he was required to report it "immediately" and then follow that up with "a report in writing within forty-eight hours" (§ 415). These obligations do not comport with empowering a mandatory reporter to sit back and decide not to report the abuse based on a private assessment of whether the abuse qualifies as reportable under esoteric definitions of statutory language. Such discretion would gut the purpose of the reporting statute, and, indeed, Backhaus never suggests he ever did such an analysis.

Additionally, based on Defendants' SUF regarding Wade as a paramour of Joanne's mother, there was the risk that Joanne's mother was *allowing the abuse to be committed*, which, if true, would also obligate Backhaus to report it. *See Kimberly*, 226 A.D.2d at 88-89 (duty to report arises when the "*parent . . . allows to be committed*[] a sex offense against such child") (emphasis added). This risk of the mother's complicity obliged Backhaus to report the abuse *independent* of whether Wade is a "person legally responsible."

Finally, Defendants' reliance on *Matter of Yolanda D.*, 88 N.Y.2d 790 (1996) is misguided. *Yolanda D.* does not mention § 413. Instead it explicates the definition of "person legally responsible" under the *Family Court Act*. But, as *Kimberly* and *PB-36 Doe* illustrate, the legal obligations and duties that flow from § 413 are distinct from those under the *Family Court Act*. Further, *Yolanda D.* cuts against Defendants' argument that Plaintiff's § 413 claim should be dismissed at summary judgment because it emphasizes that the determination of who fits under this definition is a "fact-intensive inquiry." (*Id*. at 796).

POINT VII

A. Punitive Damages are Available

Defendants overreach by attempting to dismiss Backhaus and all punitive damages from the case. (Br. at 19-21). Backhaus is a proper defendant because the IIED claim and demand for

punitive damages are uniquely asserted against him. If Backhaus were dismissed, Plaintiff would be denied the opportunity for this relief because those claims are not available against the District. Further, Backhaus's willful and wanton disregard of Plaintiff's disclosure that she was being sexually abused by Wade may warrant punitive damages. Indeed, his dismissiveness, which caused Plaintiff to be further abused, ratified and condoned Wade's conduct.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment should be denied.

Respectfully submitted,

DATED: October 11, 2021
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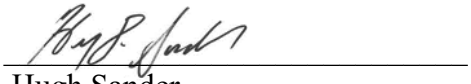
CERTIFICATION OF WORD COUNT

I certify that Plaintiff's Opposition To Defendants' Motion For Summary Judgment, not including case caption, Table of Contents, Table of Authorities, or signature block, contains 6,997 words, which complies with the word count limit.



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