

**Barber v Bayport-Blue Point Union Free School
Dist.**

2007 NY Slip Op 31631(U)

June 7, 2007

Supreme Court, Suffolk County

Docket Number: 0000342/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-9-07
ADJ. DATE 3-2-07
Mot. Seq. # 001 - MG; CASEDISP

-----X		
HEATHER BARBER, an infant under the age of	:	MICHAEL V. DEVINE, ESQ.
14 years of age, by her father and natural guardian,	:	Attorney for Plaintiffs
HENRY J. BARBER, and HENRY J. BARBER,	:	1000 Main Street
individually,	:	Port Jefferson, New York 11777
	:	
Plaintiffs,	:	
	:	CONGDON, FLAHERTY, O'CALLAHAN,
- against -	:	REID, DONLON, TRAVIS & FISHLINGER
	:	Attorneys for Defendants
	:	The Omni
BAYPORT-BLUE POINT UNION FREE	:	333 Earle Ovington Boulevard, Suite 502
SCHOOL DISTRICT and "JANE DOE," a	:	Uniondale, New York 11553-3625
fictitious name intended to represent the gym	:	
teacher,	:	
	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 24 - 28; Replying Affidavits and supporting papers 29; Other _____; and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants Bayport-Blue Point Union Free School District and "Jane Doe" a fictitious name intended to represent the gym teacher (hereinafter collectively referred to as "the school district") for summary judgment dismissing the complaint against them is granted.

This is an action to recover damages for personal injuries allegedly sustained by infant plaintiff Heather Barber on April 23, 2004 when she was a third grade student at the Blue Point Elementary School. On the day of the accident, Heather and the other students in her class were being timed in the "arm hang," one of the activities in "The President's Challenge." After hanging from a chinning bar, Heather let go of the bar, dropped to her feet on a mat, and thereafter felt back pain. The plaintiffs commenced this action against the school district alleging: that it failed to properly train and supervise its physical education teacher; that the teacher was unqualified and not properly certified; that the teacher failed to "spot" Heather when she was required to hang from the chinning bar; that the teacher was

negligent in that she knew, or should know, that Heather was on medication which made it dangerous for her to participate in such an activity; and that the mat used was of a type and thickness that was unsuited and inappropriate for its use. The plaintiffs' verified bill of particulars alleges that Heather suffered a fracture of three vertebrae with soft tissue injuries.

The school district now moves for summary judgment arguing that there is no evidence of lack of supervision or negligent hiring and that Heather's class had more than adequate supervision. It argues that Heather was participating in a relatively low-impact activity in a national program designed to promote physical fitness in young people. The school district also argues that for approximately a month prior to her accident, Heather had been excused from physical education after receiving conflicting notes from her parents concerning her back pain. In support of its motion, the school district submits, *inter alia*, the four notes written by Mr. and Mrs. Barber. The first note, dated March 9, 2004 indicates that Heather was having back pain due to a urinary infection, and the following three notes, dated March 12, 2004, March 24, 2004, and April 16, 2004, indicate that Heather was having back pain due to viral disease that affects her muscular system. The school district alleges that it then requested clarification and direction from Heather's doctor, and thereafter received a note from Dr. Eberhard, which it also submits in support of this motion. Dr. Eberhard writes that Heather, "should be encouraged to participate in all physical education activities. She should however, be permitted to withdraw from any activity which causes her pain." The school district alleges that, after receiving Dr. Eberhard's note, Heather was permitted to once again participate in physical education class.

In addition, the school district submits a copy of the municipal hearing testimony of Heather, and her father. At such hearing Mr. Barber testified that Heather had been diagnosed with dermatomyositis two years prior to the accident and that she had been under Dr. Eberhard's care since the onset of her symptoms. Mr. Barber further testified to the effect that he and his wife were told that they needed a doctor's note to excuse Heather from gym class and that they requested such note from her doctor. He stated that he expected Dr. Eberhard to have agreed not to allow Heather to go back to gym class, because he considered his daughter to be at risk and was concerned about her getting hurt. He also stated that they were at a loss to understand why Dr. Eberhard wrote such a note not excusing her from gym, and that after Heather's accident, the doctor reversed her decision.

At such municipal hearing, Heather testified to the effect that: gym class consisted of stations; her teacher, Ms. Livingston, talked about the rules; her first station was jumping rope; since she cannot jump rope, she just twisted the big jump rope; and her friends jumped rope. Heather stated that she later went over to the area of the gymnasium where the bar is located and Ms. Livingston explained to the students what they were going to do and demonstrated how they should do it. She stated that the students used a chair to reach the bar, that they would hang facing the wall, and that the teacher said to just hang as long as they could. Heather also testified that Ms. Livingston was right next to the mat, sitting in a chair, with a timer. She further stated that when her turn came to hang on the bar, she climbed on the chair, reached up to the bar, and after another student pulled the chair away, she hung from the bar. She stated that when she could not hang on anymore, she "let go like the other kids" and fell on her feet. Heather testified, "I fell on my feet but I got a lot of pressure on my back, I felt [sic] on my bottom." She stated that the pain was moving around her back. Heather was also shown photographs of the gymnasium and she identified the bar she used to do the arm hang and the mat that was used below the bar. The school district submits such photographs in further support of its motion.

In addition, the school district submits a copy of Heather's deposition testimony wherein she testified to the effect that: on the day of her accident, her class was divided into three groups and each group would go to a different station; her first station was the jump rope; she started to jump rope, but her back hurt, so she stopped; and when she stopped jumping rope, she just turned the rope. Heather stated that she went over to Ms. Livingston, who was at the bar for the arm-hang station, and told her that her back hurt when she was jumping rope. Heather also testified that she told Ms. Livingston that she wanted to sit out and that Ms. Livingston responded that she needed a note from her mom or dad or doctor. Heather testified that thereafter she went to the agility station where the students would pick up a weight and run to the other side of the gymnasium, drop the weight and grab another weight and then run back. Heather stated that she was able to run because "it didn't hurt my back when I ran," and that she had no pain doing the agility station.

At her deposition, Heather further stated that after the agility test she went to the next station which was the arm hang from the bar. She testified that she did not say anything again to Ms. Livingston about her back when she went to the bar. She stated that Ms. Livingston was sitting right next to the mat and bar taking down records, and there was another woman in the gym helping her. Additionally, Heather stated that when it was her turn to hang, she did not feel any pain in her back. She testified that when she let go, she fell to the mat and her back hurt; her behind and her feet touched the mat; and when her behind touched the mat, she felt pain right away. She indicated that the drop to the mat was approximately eighteen inches.

The school district also submits the deposition testimony of Heather's mother, Mrs. Barber who testified that after Heather was diagnosed with dermatomyositis, she was given Prednisone, Fosamax, Leucovorin, and Methotrexate, and was permitted to participate in sports. She testified that before Heather's accident, she wrote one or two notes to the school because Heather was crying that she was having back pain. Mrs. Barber also stated she thereafter requested a note from Dr. Eberhard for the gym teacher so that Heather would not have to participate. She testified that Dr. Eberhard agreed, and wrote the note. Mrs. Barber testified that she was given a copy of the note and read the note while she was in the doctor's office. When asked if she had any questions as to what the doctor was saying in the note, Mrs. Barber responded, "I don't remember." When asked if she understood after the note was submitted to the school that Heather would be participating in gym class, Mrs. Barber again responded, "I don't remember."

Finally, the school district submits a copy of "The President's Challenge" physical fitness program, and the deposition testimony of Heather's physical education teacher, Tricia Livingston. Ms. Livingston testified that she received her degree in physical education and her teaching certificate in 2001, and that since that time she has also gotten her certification in health, AED and CPR. Ms. Livingston stated that in March, of 2004, she became aware of Heather's limitations through letters from Heather's parents and the school nurse. She also testified that on April 23, 2004, her teaching plan consisted of a warm-up, a run, part of "The President's Challenge" and practice stations, and then the conclusion. She stated that "The President's Challenge" is in the school's curriculum and tests five different components of physical fitness, one of which is upper body strength. She further stated that upper body strength is tested by a choice of pull-ups or arm hang. Ms. Livingston explained that on that particular day the class was focusing on the arm hang or pull-ups, but there was an opportunity to practice other activities. She also stated that there was a teacher's assistant in the gymnasium during

Heather's class, there was only one class in the gymnasium, and there were approximately twenty students in the class.

Additionally, with regard to the arm hang, Ms. Livingston testified to the effect that: the students would step on a chair to be closer to the bar; she or the teacher's aide would spot them; at her direction a student would pull the chair away; she would spot the students until they wanted to come down; and when they come down, they go off to the side. She testified that when Heather did the arm hang she was right next to her. She alleged that Heather was hanging, said she was done, dropped to the ground, and then sat down and said her back hurt. She also said it was the normal end of each child's hang that they drop down to get off the bar, and that spotting did not involve physically helping the student down. When Ms. Livingston was asked how spotting would be done, she answered, "Guiding the person. If they fell back, there would be a hand and if they fell to the side," and that such spotting was done in Heather's case. Ms. Livingston testified that prior to the hang Heather did not tell her that her back hurt. She stated that from March 9, 2004 to April 16, 2004, due to the requests of Heather's parents, Heather did not participate in gym, and that after the school received a note from Heather's doctor, she participated again. Ms. Livingston further testified to the effect that Heather did not return to full participation, since pursuant to the doctor's orders, she was permitted to withdraw from activities. She also stated that she was unaware of any medications that Heather was on when she returned to participation.

The school district argues that based upon the submitted evidence there is no proof of lack of supervision, negligent hiring, or improper training. It asserts that Heather's doctor instructed the school that Heather should be encouraged to participate in all physical education activities. The school district alleges that given the mandatory nature of physical education, the adequacy of the ratio of supervisors to child, the relatively low-impact nature of the activity, and the instructions from Heather's doctor, it is not liable as a matter of law for Heather's injuries.

The plaintiffs oppose this motion contending that numerous notes were sent to the school asking that Heather be excused from physical education class because of a condition known as dermatomyositis. They submit, *inter alia*, a copy of the same four notes that were submitted by the school district, as well as a print out from the Mayo Clinic web site which describes the symptoms of dermatomyositis as, "Progressive muscle weakness, particularly in the muscles closest to the trunk, such as those in your hips, thighs, shoulders, upper arms, and neck." They argue that prior to the arm hang, Heather made a complaint to Ms. Livingston that "she wanted to sit out." They further contend that Heather's complaint was not taken seriously and she was told only a doctor's note would be acceptable to excuse her from gym. The plaintiffs maintain that amazingly the school district had already been provided such note. They allege that while Dr. Eberhard's note stated that Heather should be encouraged to participate, it was also clear that "she be permitted to withdraw from any activity which causes her pain."

The plaintiffs claim that numerous issues of fact exist, the first of which is why the gym teacher failed to properly spot Heather. They point to Heather's testimony wherein she stated that Ms. Livingston was sitting on a chair right next to the mat, and argue that Ms. Livingston was thus not in a proper position to insure Heather's safety. The plaintiffs also claim that there is a question of fact as to why Heather was forced to participate in this activity at all, when it was clearly inappropriate for her to do so, and after Heather told the teacher that she wanted to sit out. The plaintiffs further argue that the

defendants have offered nothing to rebuke their claim that the school district was negligent in its training of the gym teacher. They contend that they have repeatedly made a demand for training materials, class programs and continuing education materials, but none have been produced. In addition, the plaintiffs allege that a question of law remains unsettled concerning whether a school district exercising ordinary prudence would have allowed a child with Heather's condition to participate in an activity whose danger was obvious. Lastly, plaintiffs claim that Heather's injury was entirely foreseeable, and as a matter of law, the school district should be held accountable.

Although schools are under a duty to adequately supervise the children in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*Ungaro v Patchogue-Medford, N.Y. Sch. Dist.*, 19 AD3d 480, 797 NYS2d 114 [2005]), they are not insurers of the safety of their students (*Legette v City of New York*, 38 AD3d 853, 832 NYS2d 669 [2007]). Moreover, in any physical exercise there is, of course, some possibility of injury, but generally, it cannot be said that it is unreasonably dangerous to require students to engage in ordinary physical exercise (see, *Cambareri v Board of Education of the City of Albany*, 246 AD 127, 284 NYS 892 [1936]; *affd* 283 NY 741). "As participation in physical education classes is compulsory (see, Education Law §§ 803, 3204), a school district owes the same duty of care to its students in those classes as would be exercised by a reasonably prudent parent" (*Heim v Board of Education of North Tonawanda Sch. Dist.*, 2001 WL 1606800, 2001 NY Misc. LEXIS 605, 2001 NY Slip. Op. 40401U; see also, *David v County of Suffolk*, 1 NY3d 525, 775 NYS2d 229 [2003]).

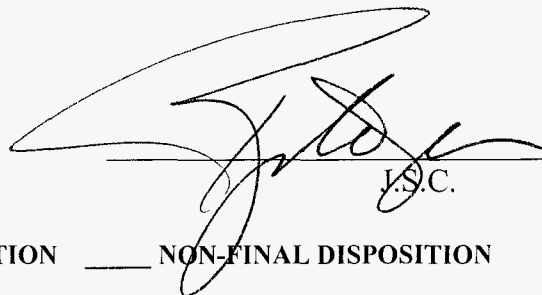
Here, the school district has demonstrated entitlement to summary judgment. The evidence establishes that Ms. Livingston was a qualified and certified teacher who had the necessary training and skills to teach physical education. Ms. Livingston, following "The President's Challenge" fitness program, properly instructed the students on the arm hang and demonstrated how the arm hang should be done (see, *David v County of Suffolk, supra*). Ms. Livingston had no knowledge of Heather's medications and was following the doctor's directive that Heather "**be encouraged to participate in all physical education activities**" (emphasis added) (see, *Pacella v Masone*, 262 AD2d 291, 691 NYS2d 557 [1999]). Even if Heather had told Ms. Livingston during the jump rope activity that her back hurt, the doctor's note did not excuse her from participating in the other activities, but simply excused her from the jump rope after experiencing pain. As to the issue of spotting, even assuming arguendo that Ms. Livingston was sitting in a chair right next to the mat, there is no showing that spotting would have prevented Heather's injury, since spotting did not involve helping the children down from the bar. Rather, it was normal for the students to drop down from the bar onto a mat at the end of the arm hang (see, *Santana v City of New York*, 282 AD2d 208, 722 NYS2d 545 [2001]). As such, the school district has made a prima facie showing of entitlement to judgment as a matter of law by establishing that it provided adequate supervision and that the level of supervision was not a proximate cause of Heather's injuries (see, *Ungaro v Patchogue-Medford, N.Y. Sch. Dist., supra*).

In opposition, the plaintiffs have failed to establish that a triable issue of fact exists to overcome the admissible evidence submitted by the school district (see, *Alvarez v Propect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Henry v Roosevelt School District*, 29 AD3d 954, 815 NYS2d 472 [2006]). Contrary to the plaintiffs' claim, there is no evidence, expert or otherwise, which indicates that Heather was not properly spotted or that children were supposed to be helped down from the bar (see, *David v County of Suffolk, supra*). Nor is there anything in Dr. Eberhard's note to indicate that Heather should

be permitted "to sit out" the remaining gym class after telling Ms. Livingston that she had pain jump-roping. Furthermore, there is no evidence that Ms. Livingston needed special training to test students performing "The President's Challenge," or that the mat used beneath the bar was unsuitable. As to the plaintiffs' claim that they have made repeated demands for "training materials, class programs, and/or continuing education materials" the only demand in evidence was a demand for "any rules or teaching guides for the physical education curriculum" (see, No.5 of plaintiffs' Demand for Discovery and Inspection, dated May 20, 2005), which the school district complied with in its "Response to Discovery Demands" dated August 9, 2005. If the plaintiffs believed that the school district's response was inadequate, they should have made a motion pursuant to CPLR 3124. The plaintiffs have not submitted any evidence showing that Heather's injury should have been anticipated (see, *Shabot v East Ramapo Sch. Dist.*, 269 AD2d 587, 703 NYS2d 268 [2000]), or that the school district failed to exercise ordinary reasonable care in allowing Heather to participate in the arm hang (see, *Pacella v Masone, supra*).

Accordingly, the defendants' motion for summary judgment dismissing the complaint against them is granted.

Dated: JUN 07 2007



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION