SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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HANNAH CAMHI, an infant under the age of fourteen years by her mother and natural guardian, KAREN CAMHI, and KAREN CAMHI, individually

Plaintiff,

-against-

SYOSSET CENTRAL SCHOOL DISTRICT

Defendant.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 18
Index No.: 15201/05
Motion Seq. No.: 02

DECISION & ORDER

Papers Read on the Motion:

Defendant's Notice of Motion	02
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The defendant Syosset Central School District "School District" moved by Notice of Motion for an order granting them Summary Judgment pursuant to CPLR §3212 on May 21, 2007. The Plaintiff opposes the motion and filed an Affirmation in Opposition on June 11, 2007.

The infant plaintiff was a fifth grader at Walt Whitman Elementary School on March 7, 2005. While participating in a deck hockey game another student on the opposing team (there were five students per team–both boys and girls–plus a goalie, with two teams playing at a time; Exhibit C pg. 15 annexed to School District's motion) hit the infant with the plastic blade of his stick (Exhibit C, pg. 24). The infant plaintiff stated that the other student, Jake Esposito ("Jake") took an illegal "slap" shot as she was trying to get the puck away from him (see Exhibit C, p. 24). In the deposition of Robert Kopp, the gym teacher in charge of the class when the incident occurred (see Exhibit E annexe to School District's motion; the following pages refer to that exhibit), stated that the students were given a demonstration along with safety instructions informing them that only "wrist" shots were permitted (p. 33-34). In his affidavit, (immediately

following the affirmation in support by School District's counsel) Kopp stated Jake raised his hockey stick behind him in an attempt to take a shot. The infant plaintiff was behind Jake when she reached for the puck, and was struck by Jake's "slap" shot wind -up. Kopp stated that there had been no prior incidents of "slap" shots, or high stick incidents in the gym class attended by the infant plaintiff, and Jake had not been involved in any prior "slap" shot or "high stick" incidents. Kopp and another teacher were watching and supervising the game three feet away from the infant plaintiff (plaintiffs allege he was much farther away) when the incident occurred. Plaintiffs argue that proper supervision by the School District's staff could have prevented the injury to the infant plaintiff.

Schools are not insurers of safety because they cannot reasonably be expected to continuously supervise and control all the movements and activities of students, *see Doe v Orange-Ulster Board of Cooperative Educational Service*, 4 AD3d 387 (2d Dept 2004) and are not to be held liable for every thoughtless or careless act by which one pupil may injure another, *see Johnsen v Cold Spring Harbor Central School District*, 251 AD2d 548 (2d Dept 1998).

However, schools are obligated to exercise such care of their students as a parent of ordinary prudence would in comparable situations, *see David v County of Suffolk*, 1 NY3d 525 (2003).

Since schools are under a duty to adequately supervise students in their charge, they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision, *Lawes v Board of Education 16 NY 2d 302 (1965)*.

A school breaches its duty to adequately supervise students in its charge and is liable for foreseeable injuries proximately related to the absence of adequate supervision when, the school

has sufficient and specific knowledge or notice of a dangerous condition which causes an injury, and the third-party acts could reasonably have been anticipated, *see Whitfield v Board of Educ. of City of Mount Vernon*, 14 AD3d 552 (2d Dept 2005); *In-Ho Yu v Korean Central Presbyterian Church of Queens*, 303 AD2d 369 (2d Dept 2003); *Smith v East Ramapo Central School District*, 293 AD2d 521 (2d Dept 2002); *Velez v Freeport Union Free School District*, 292 AD2d 595 (2d Dept 2002).

Actual or constructive notice to a school of prior similar conduct is generally required to find that a school has breached its duty to provide adequate supervision as a result of injuries caused by the acts of fellow students. School personnel cannot reasonably be expected to guard against all of the sudden spontaneous acts that take place amongst students on a daily basis, *see Mirand v City of New York, 84 NY2d 44 (1994)*.

An injury caused by the compulsive unanticipated act of a fellow student will ordinarily not give rise to a finding of negligence by a school, absent proof of prior conduct that could have put a reasonable person on notice to protect against the injury causing act, *see Convey v City of Rye School District*, 271 AD2d 154 (2d Dept 2000).

In this case, there was no history of Jake and the infant plaintiff, nor Jake individually violating the game rules of deck hockey, i.e., no prior slap shot violations.

The record clearly reflects that the School District did not have actual or constructive notice, as required for a finding of liability to an injured student on the theory of inadequate supervision. There is no proof of prior similar conduct on the part of Jake who allegedly injured the infant plaintiff with his "slap" shot, and thus the School District is not liable in negligence for injuries allegedly sustained by the infant plaintiff, *see Calabrese v Baldwin Union Free School*

District, supra.

There is no indication that more intense supervision could have prevented the incident, *see Navarra v Lynbrook Public Schools*, 289 AD2d 211 (2d Dept 2002); *Ancewicz v Western Suffolk BOCES*, 282 AD2d 632 (2d Dept 2001). Short of prohibiting the infant plaintiff from engaging in gym activities, there was no way to insure that the incidents such as the one herein would not have occurred.

Where an incident occurs in such a short time-span that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury and summary judgment in favor of the school district is warranted, *see Mayer v Mahopac Central School District*, 29 AD3d 653 (2d Dept 2006). .

A plaintiff may not assert new theories of liability in his or her papers in opposition to a motion for summary judgment, *see Golubov v Wolfson*, 22 AD3d 635 (2d Dept 2005).

In conclusion, defendants have shown *prima facie* that they had no actual or constructive notice of prior similar conduct by the student Jake, who allegedly pushed plaintiff, *see Anglero v New York City Board of Education*, 304 AD2d 596 (2d Dept 2005). The School District has also shown that the level of supervision it provided for the plaintiff was at least that which a reasonable prudent parent would have provided, and that the incident happened so suddenly that no amount of supervision could have prevented it, *see Cranston v Nyack Public Schools*, 303 AD2d 441 (2d Dept 2003). The Plaintiff has failed to rebut the Defendant's case.

Accordingly, the defendant's motion for Summary Judgement pursuant to CPLR §3212 is **GRANTED**.

This constitutes the **Decision** and **Order** of the Court.

DATED: September 17, 2007
Mineola, NY

ENTER:

HON. MICHELE M. WOODARD, J.S.C.
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