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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

SABRINA GERACI-YEE, an infant by her father and mother and natural guardians, JIMMY YEE and LORI GERACI, individually,

Plaintiffs,

- against -

FREEPORT UNION FREE SCHOOL DISTRICT,

Defendant.

Index No.: 10503/06
Motion Seq. No.: 06
Motion Date: 08/03/10
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion for Summary Judgment, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation and Exhibits	3

Defendant moves, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing plaintiffs' complaint. Plaintiffs oppose defendant's motion.

Plaintiffs commenced this action for damages due to an alleged assault to plaintiff Sabrina Geraci-Yee (the "infant plaintiff") by another high school student, Stephania Pena ("Ms. Pena") while on the grounds of defendant's Freeport High School. Plaintiff alleges that on March 29, 2006, at the end of a play rehearsal at approximately 8:40 p.m., the infant plaintiff got into a physical confrontation wherein the infant plaintiff allegedly suffered injuries.

Defendant contends it had no evidence that Ms. Pena was a disciplinary problem (*see*

Defendant's Affirmation in Support Exhibit O) and it has no prior complaints from the infant plaintiff or her parents as to Ms. Pena. *See* Defendant's Affirmation in Support Exhibit C, p. 19. The infant plaintiff stated Ms. Pena did not make any physical threats toward the infant plaintiff prior to the March 29, 2006 incident. *See* Defendant's Affirmation in Support Exhibit J, pp. 19-20 and Exhibit Q. The infant plaintiff never requested a security detail for protection against anyone. *See* Defendant's Affirmation in Support Exhibit C, p. 127.

As to the specific incident of March 29, 2006, Ms. Pena had been attending softball practice when Ms. Pena approached the infant plaintiff in the hallway as the infant plaintiff sought to enter play practice. Ms. Pena accused the infant plaintiff of having a sexual encounter with Ms. Pena's boyfriend. While it is alleged Ms. Pena did not touch the infant plaintiff, it is alleged Ms. Pena spat on the infant plaintiff. The infant plaintiff continued to play practice. The infant plaintiff did not inform the teacher in charge of the play rehearsal. When play practice was over, Ms. Pena again approached the infant plaintiff and the infant plaintiff began to scuffle. School security broke up the incident within a minute of the start of the altercation.

Prior to the March 29, 2006 incident, the infant plaintiff did have problems with a few other female students (not Ms. Pena). The infant plaintiff reported the problems to the infant plaintiff's softball coach, Ms. Christina Bivona, and the problems ended. Ms. Bivona stated she had not heard of physical threats against the infant plaintiff. *See* Defendant's Affirmation in Support Exhibit O.

Plaintiffs allege defendant owed the infant plaintiff a "special duty."
As to a "special duty" to establish a special duty of protection, a party must show the assumption by the public entity through promises or action, of an affirmative duty to act on

behalf of the injured party, knowledge on the part of the defendant that inaction could lead to harm of the plaintiff, some form of direct contact between the defendant and the injured plaintiff and the injured plaintiff's justifiable reliance on the defendant's affirmative action. *See Basher v. City of New York*, 268 A.D.2d 546, 702 N.Y.S.2d 371 (2d Dept. 2000) *lv to app den.* 95 N.Y.2d 759, 704 N.Y.S.2d 709 (2000). The mere implementation of security measures at a high school does not give rise to a special duty. *See Dickerson v. City of New York*, 258 A.D.2d 433, 684 N.Y.S.2d 584 (2d Dept. 1999).

Here, defendant's act of having security guards did not create a special duty to protect the infant plaintiff. There is no indication that the security guards were hired specifically to protect the infant plaintiff or a limited class of which the infant plaintiff was a member. *See Blanc v. City of New York*, 223 A.D.2d 522, 636 N.Y.S.2d 112 (2d Dept. 1996); *Salmond by Salmond v. Board of Education of City of New York*, 131 A.D.2d 829, 517 N.Y.S.2d 90 (2d Dept. 1987).

A "special duty" involves a promise of protection to a particular citizen as opposed to the population at large. *See Cuffy v. City of New York*, 69 N.Y.2d 255, 513 N.Y.S.2d 372 (1987). Plaintiffs have not set forth or shown a "special relationship" existed between the infant plaintiff and defendant. *See Shinder v. State of New York*, 62 N.Y.2d 945, 479 N.Y.S.2d 189 (1984); *Dickerson v. City of New York, supra.*

Here, the record is devoid of defendant assuming an affirmative duty that generated justifiable reliance by the infant plaintiff of a special duty. *See Cuffy v. City of New York, supra.*

There is no evidence on the record that the infant plaintiff relied on school personnel or school security to protect her. *See France v. New York City Board of Education,* 40 A.D.3d 268,

834 N.Y.S.2d 193 (1st Dept. 2007).

Here, defendant made out a *prima facie* case for summary judgment that it established it owed no special duty to the infant plaintiff and plaintiffs failed to raise a triable issue of fact. *See Reynolds v. Central Islip Union Free School District*, 300 A.D.2d 292, 751 N.Y.S.2d 850 (2d Dept. 2002).

Further, schools are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances. *See David v. County of Suffolk*, 1 N.Y.3d 525, 775 N.Y.S.2d 229 (2003).

Schools are not insurers of safety as they cannot reasonably be expected to continuously supervise and control all movements and activities of students. *See Doe v. Orange-Ulster Board of Cooperative Educational Service*, 4 A.D.3d 387, 771 N.Y.S.2d 389 (2d Dept. 2004).

Although schools are not insurers of safety, they are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances. *See David v. County of Suffolk, supra*; *Shannea M. v. City of New York*, 66 A.D.3d 667, 886 N.Y.S.2d 483 (2d Dept. 2009).

Schools cannot reasonably be expected to continuously supervise and control all movements and activities of students. *See Mirand v. City of New York*, 84 N.Y.2d 44, 614 N.Y.S.2d 372 (1994); *Doe v. Orange-Ulster Board of Cooperative Educational Service, supra*, 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 A.D.2d 548, 674 N.Y.S.2d 740 (2d Dept. 1998).

As 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.

See Brandy B. v. Eden Cent. School Dist., 15 N.Y.3d 297, 907 N.Y.S.2d 735 (2010); *Mirand v. City of New York, supra.*

For a school to breach a duty to adequately supervise students in its charge so to be liable for foreseeable injuries proximately related to the absence of adequate supervision, the school must have sufficiently specific knowledge or notice of the dangerous condition which caused the injury in that the third-party acts could reasonably have been anticipated. *See Whitfield v. Board of Educ. of City of Mount Vernon*, 14 A.D.3d 552, 789 N.Y.S.2d 188 (2d Dept. 2005); *In-Ho Yu v. Korean Central Presbyterian Church of Queens*; 303 A.D.2d 369, 756 N.Y.S.2d 89 (2d Dept. 2003); *Smith v. East Ramapo Central School District*, 293 A.D.2d 521, 741 N.Y.S.2d 251 (2d Dept. 2002); *Velez v. Freeport Union Free School District*, 292 A.D.2d 595, 740 N.Y.S.2d 364 (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 because school personnel cannot reasonably be expected to guard against all of the sudden spontaneous acts that take place among students on a daily basis. *See Mirand v. City of New York, supra.*

An injury caused by the compulsive unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence by a school, absent proof of prior conduct that could put a reasonable parent on notice to protect against the injury causing act. *See Convey v. City of Rye School District*, 271 A.D.2d 154, 710 N.Y.S.2d 641 (2d Dept. 2000).

To find that a school breached its duty to provide adequate supervision of students, in context of injuries caused by acts of fellow students, a plaintiff must show that the school had sufficiently specific knowledge or notice of the dangerous conduct which caused the injury, that

is, that the third-party acts could reasonably have been anticipated. *See LaPage v. Evans*, 37 A.D.3d 1019, 830 N.Y.S.2d 818 (3d Dept. 2007); *Velez v. Freeport Union Free School District, supra.*

Sufficiently specific knowledge or notice generally requires actual or constructive notice to the school of prior similar conduct, and an injury caused by the impulsive, unanticipated act of another student will ordinarily not give rise to a finding of negligence. *See Calabrese v. Baldwin Union Free School Dist.*, 294 A.D.2d 388, 741 N.Y.S.2d 569 (2d Dept. 2002). Here, there was absolutely no history as to Ms. Pena and the infant plaintiff nor Ms. Pena as to other students.

Also, constant supervision of students at the high school level is not required under the school's duty to provide adequate supervision. *See Rose ex rel. Rose v. Onteora Cent. School Dist.*, 52 A.D.3d 1161, 861 N.Y.S.2d 442 (3d Dept. 2008).

As to school events that are intermural and other school approved extracurricular activities, the Court of Appeals has held that the school exercise the less demanding ordinary "reasonable care" standard as opposed to the "reasonable parent standard." *See Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 543 N.Y.S.2d 29 (1989).

The infant plaintiff's prior history of "harassment" at the hands of *other* students was not sufficient to place defendant on notice that the infant plaintiff and Ms. Pena would be involved in a fight after play practice (emphasis added). *See Siegell v. Herricks Union Free School Dist.*, 7 A.D.3d 607, 777 N.Y.s.2d 148 (2d Dept. 2004).

Plaintiffs contend that security cameras or closed circuit TV would have prevented the alleged attack (allegedly fueled by an alleged affair of the heart) or serve as a deterrent. The Court disagrees.

It would have provided a record of the event and helped defendant to identify the assailants. Here, the incident was quickly quelled by a security officer and the parties were apprehended.

Also, plaintiffs cannot create a liability on the part of defendant by attempting to boot strap prior alleged bad conduct toward the infant plaintiff by Ms. Pena's alleged "crowd," "group" or posse." *See Siegell v. Herricks Union Free School Dist., supra.*

Here, plaintiffs did not show or raise triable issues of fact that defendant had actual or constructive notice of prior similar incident on the part of Ms. Pena. S*ee Whitfield v. Bd. of Educ. of the City of Mt. Vernon, supra.*

Plaintiffs seek a "20/20 hindsight" standard for defendant and attempt to raise defendant's standards to those of co-plaintiffs, i.e., infant plaintiff's parents allegedly sought a prospective cocoon around the infant plaintiff.

The Court cannot adopt plaintiffs' highly subjective standard. The Court, from an objective point of view, must utilize the reasonable person standard (of the after-school event).

As previously stated, a school and/or school district is liable for injuries caused by the intentional act of another student only when the plaintiff(s) shows that the acts of the fellow student could have been reasonable anticipated due to notice or prior specific knowledge of the specific aggressor student's propensity to engage in such conduct. *See Flanagan v. Canton Central School Dist.*, 58 A.D.3d 1047, 871 N.Y.S.2d 775 (3d Dept. 2009); *Strnad v. Floral Park-Bellerose Union Free School Dist.*, 50 A.D.3d 774, 855 N.Y.S.2d 609 (2d Dept. 2008).

The record clearly reflects that the defendant did not have actual or constructive notice, as required for finding of liability to an injured student on the theory of inadequate supervision, of prior similar conduct on the part of Ms. Pena who allegedly injured the infant plaintiff with

her alleged attack on plaintiff, and thus the defendant is not liable in negligence for injuries allegedly sustained by the infant plaintiff. *See Calabrese v. Baldwin Union Free School Dist., supra.*

As discussed, there is no indication that more intense supervision could have prevented the incident. *See Navarra v. Lynbrook Public Schools*, 289 A.D.2d 211, 733 N.Y.S.2d 730 (2d Dept. 2001); *Ancewicz v. Western Suffolk BOCES*, 282 A.D.2d 632, 730 N.Y.S.2d 113 (2d Dept. 2001). Short of prohibiting the infant plaintiff from engaging in play practice, and perhaps keeping the infant plaintiff home, there was no way to insure that incidents such as the one herein would not occur.

Where an incident occurs in so short a span of time 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 Dist.*, 29 A.D.3d 653, 815 N.Y.S.2d 189 (2d Dept. 2006).

That is the situation here.

In conclusion, defendants have made a *prima facie* showing of entitlement to judgment as a matter of law by establishing that they had no actual or constructive notice of prior similar conduct by the student, Ms. Pena, who allegedly pushed the infant plaintiff. *See Anglero v. New York City Bd. of Educ.*, 304 A.D.2d 596, 758 N.Y.S.2d 162 (2d Dept. 2003).

Defendant also showed that the level of supervision it provided for the infant plaintiff was at least that which a prudent parent and reasonable person would have provided, and it showed that the incident happened so suddenly that no amount of supervision could have prevented it. *See Cranston v. Nyack Public Schools*, 303 A.D.2d 441, 756 N.Y.S.2d 610 (2d Dept. 2003).

Accordingly, defendant's motion, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing plaintiffs' complaint is hereby granted.

This constitutes the decision and order of this Court.

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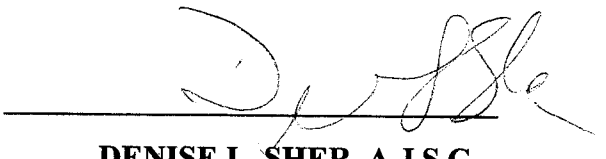

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
November 22, 2010