

**T.E. v South Glens Falls Cent. Sch. Dist.**

2023 NY Slip Op 32813(U)

August 10, 2023

Supreme Court, Saratoga County

Docket Number: Index No. 20193474

Judge: Richard A. Kupferman

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SUPREME COURT  
STATE OF NEW YORK COUNTY OF SARATOGA

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**T.E. Individually and as Parent and Natural  
Guardian of E.E., an Infant,**

Plaintiffs,

**DECISION & ORDER**

-against-

Index # 20193474

**South Glens Falls Central School District,**

Defendant.

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Appearances:

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KUPFERMAN, J.,

This action arises out of a physical assault on a tenth-grade student, Emma, at a public high school on September 11, 2018. The assault was carried out principally by Jenna, a fellow tenth-grade student, while another student joined in hitting Emma and a third student recorded the assault. Emma's mother commenced this action against the defendant School District, asserting claims for monetary damages on behalf of Emma and herself. The complaint essentially states a claim for negligent supervision and alleges that the School District had notice of Jenna's violent propensities and negligently failed to protect Emma from the attack.

Following discovery, the School District filed a motion seeking summary judgment dismissing the complaint. In support of the motion, the School District relies upon, among other things, a video of the attack, disciplinary records, sworn testimony, and previously filed affidavits from its high school principal and superintendent of schools. In opposition, the plaintiffs rely upon several of the same materials, as well as an affidavit from a psychiatric nurse practitioner, an affidavit from an attorney licensed in Connecticut, sworn testimony from additional witnesses, the School District's code of conduct, Jenna's report cards, and notes taken by the School District's personnel. A summary of the relevant facts from the motion papers are set forth below.<sup>1</sup>

### **FACTS**

Emma and Jenna attended the same schools in the School District. They first met in elementary school and later became very good friends in middle school during seventh grade. Jenna stayed at Emma's house and went on vacation with Emma's family. Their relationship, however, soured. In the eighth grade, they each accused the other of unpleasant behavior.

In November 2016, while in eighth grade, Emma believed that Jenna intended to physically assault her in the cafeteria on a particular day. She did not disclose this to any School District personnel. Rather, Emma sought to confront Jenna by herself. Emma informed her mother of the potential fight and asked her mother the night before to give her leggings and a baggy shirt for it. During lunch at school the following day, without any provocation from Jenna, Emma left her cafeteria table and sat at Jenna's table to try and get Jenna to hit her. When the middle school principal advised Emma she should return to her own table, Emma called him a "douchebag."

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<sup>1</sup> For purposes of this motion, the facts are viewed in the light most favorable to the plaintiffs, as the opposing party (see Wood v Watervliet City School Dist., 30 AD3d 663, 664 [3d Dept 2006]).

Ultimately, Jenna and Emma did not engage in a fight in the cafeteria that day. Rather, the two ended up engaging in a mutual fight after lunch. Both students were disciplined for their bad behavior. Jenna received an out-of-school suspension for five days. In addition, after the fight, the School District implemented a safety plan to minimize the incidental contact between the two students. This involved modifying their schedules and requiring Jenna to eat lunch separately from the general student body.<sup>2</sup> In addition, Jenna testified that the School District imposed other restrictions on her movement, including requiring her to be escorted by a hall monitor in the hallway.

Eventually, Emma and Jenna attempted to reconcile. Emma's mother contacted the school and requested that Jenna be permitted to eat lunch in the cafeteria once again. That reconciliation was apparently short-lived, as Jenna (still in eighth grade) posted disrobed photos of Emma online outside of school in January 2017. Thereafter, according to Emma, she had no further in-school contact with Jenna for the remainder of the eighth grade. The following year, both Emma and Jenna started ninth grade at the high school. Emma testified that the two were not involved in any altercations in their first year in the high school. While there was one brief verbal exchange where Jenna asked Emma, "what are you looking at," that exchange did not involve any threat or any physical contact. Other than that incident, Emma testified that they had zero confrontations during the ninth grade. Jenna confirmed this. According to Emma and Jenna, the two also had no contact during the summer between the ninth and tenth grades.

Jenna and Emma started the tenth grade in September 2018. The two did not have any common classes. From the start of school, just after Labor Day, to the day of the attack on

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<sup>2</sup> As a result of the fight, the disciplinary records indicate that, in addition to the suspension, Jenna also had lunch detention from November 15, 2016 to December 23, 2016.

September 11, 2018, the two did not have any contact until shortly before the attack. In addition, Emma testified that she had no prior issues with the other students involved in the attack.

On her way to lunch on September 11, 2018, Emma saw Jenna and the other student who attacked her. Emma testified that she had no reason to believe that she would be assaulted by them or anyone else. Likewise, the School District had no information regarding any threat to Emma on September 11, 2018. Emma testified as follows (Transcript at pages 103-104 and 122):

“Q. Did you see [Jenna] at all that morning before the incident?

A. I walked by her and [the other student who attacked me] on my way to lunch. And they were, like, huddling in a corner. And they glared at me, but I didn't really think anything of it at the time.

Q. Did you have any reason to believe at that point that they were going to attack you in any way?

A. No.

Q. Did you text your mom that day about any concerns you had about [Jenna]?

A. No.

Q. Is there any way you could have seen this attack coming?

A. No.

Q. And you're aware of all the disciplinary issues that [Jenna] has had; right?

A. Yes.

Q. And even knowing that, did you feel like you were in any danger that day?

A. No.

...

Q. Prior to September 11th, 2018, did you have any reason to believe [Jenna] was going to attack anyone in tenth grade?

A. No.”

Shortly after Emma arrived at the cafeteria, Jenna slowly approached her. Emma testified that she did not think anything of it “because nothing had happened up until then.” Jenna characterized her own behavior on that day as impulsive. Jenna explained that she initially intended to verbally confront Emma about the way Emma had treated her friend over the summer. Jenna testified that she did not know that she was going to be violent until she saw Emma’s face. According to Jenna, it was “just a quick, impulsive decision.” Jenna testified, as follows (Transcript at pages 33-35):

“Q. Did you inform [the other student who attacked Emma] of what you intended to do?

A. No.

Q. When you saw [Emma], did you make up your mind that you were going to have a physical altercation with her?

A. No, but that happened instantly. Once I got to [Emma], I decided really on impulse violently.

Q. When [the other student] said to record this, you were still by the water fountain?

A. Yes.

Q. How far away was [Emma] from you at that point?

A. [Emma] had already walked into the cafeteria.

Q. In terms of time, how long did it take you to get from the water fountain to where [Emma] was?

A. I would say thirty seconds to a minute.

Q. So, in that thirty seconds to a minute as you were walking over - let me rephrase. Did you walk? Run? Something else?

A. I walked.

Q. While you were walking over to [Emma], did you make any decision in your head about whether you were going to verbally confront her or whether it was going to be a physical altercation?

A. [I] was planning [for it] to be a verbal altercation. I was planning to confront her and ask her in the best way that I could have [about Emma's treatment of her friend], but then my temper got the best of me and I was impulsive and I just went violent on her right when I [saw] her, as soon as I got up to where she was at.

Q. Is it fair to say that [the other student who attacked Emma] didn't know there was going to be a physical altercation until it happened?

A. Yes.

Q. And, to your knowledge, did anyone in the school district know that this confrontation was going to happen?

A. No.”

According to Emma, she “was in shock” from the attack and did not see it coming. The attack was recorded on a cell phone by another student. The video of the attack depicts Jenna walking slowly up to Emma. At one point, Jenna turns around and appears to wait for the camera to get closer before she ultimately approaches Emma. Upon reaching Emma, Jenna then immediately attacks her for approximately nine seconds until being pulled away. Another student then begins hitting Emma for approximately two seconds until a staff member intervenes and successfully separates them after about four or five more seconds.

On the day of the attack, the cafeteria was staffed with four lunch monitors and a school sentry.

### Jenna's Prior Disciplinary History

In addition to the incidents regarding Emma (discussed above), Jenna was disciplined on several prior occasions for misconduct, mostly in middle school. In 2016, while in the seventh grade, Jenna allegedly failed to report to lunch detention and consumed a Twisted Tea (alcohol) with three other students. As punishment for these incidents, Jenna received detention and an out-of-school suspension for three days.

In eighth grade, Jenna also allegedly missed class, used inappropriate language, failed to report to detention, set another student's hair on fire (see footnote below), stole another student's hat, punched a male student back after he started punching her several times, and left the middle school without permission.<sup>3</sup> In addition to other various forms of discipline imposed for this misconduct, the cumulation of events in the eighth grade led to a superintendent's hearing in early April 2017 and the suspension of Jenna from the middle school for the remainder of the school year.

The notes from the superintendent's hearing contain several descriptions regarding Jenna. They also reference Jenna's outside counselor and indicate that the family filed a PINS petition. In addition, they further reference the following: "home tutoring," "complete all [homework and] assignments," "attend regular counseling sessions," "follow directions of the counselor," and "out of school until recommended by all parties involved."

During her long-term suspension, Jenna apparently received treatment at a mental health facility. Emma was there at the same time. The testimony indicates that the two of them discussed their issues while at the facility. In or around May 2017, a discharge report from the mental health

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<sup>3</sup> The record contains scant details regarding the hair incident. There is no information regarding the gravity of any injuries or the identity of the victim.

facility (not included in the record) was apparently emailed to certain persons at the School District, presumably for their consideration in determining when Jenna could return to school.

Jenna was allowed to participate in a moving up ceremony with her class at the end of eighth grade. The middle school principal recalled Jenna at the ceremony being very nonresponsive, very tired, and very quiet. The middle school principal did not recall at his deposition (conducted in March 2022) whether he met with Jenna prior to her starting the ninth grade. However, he indicated in an email dated August 2017 that they met to discuss Jenna's return to school and that Jenna appeared "highly medicated" when they met. In addition, Jenna testified that she thinks she recalls having a meeting with someone from the school prior to starting the ninth grade.

Ultimately, Jenna was permitted to return to school and enter high school. Shortly after entering the ninth grade, however, Jenna hit another girl in the library in September 2017. Jenna testified that the other girl allegedly hit her first. This resulted in an out-of-school suspension for five days. That same school year, in January 2018, Jenna also received punishment for being disrespectful to a staff member on two occasions. The following school year, while in the tenth grade, the disciplinary records indicate that Jenna missed class on September 6, 2018 and September 10, 2018.

#### Jenna's Mental Health

Regarding her mental health, Jenna testified that she was diagnosed as having depression and bipolar disorder in the sixth grade from one of her outside counselors. She was also diagnosed as having anxiety and mood disorder while in the middle school. She did not know if the school knew about her bipolar disorder or medication. She believes that her mother informed her counselor in the middle school that she had anxiety and depression. When asked, the current and

former School District personnel deposed either denied knowing that Jenna had bipolar disorder or could not recall such. There also does not appear to be any testimony in the transcripts submitted that any of these witnesses were aware of any specifics regarding any medications prescribed to Jenna.

Jenna testified that she visited the middle school counselor a lot and had lunch with her a few times. Jenna also had an outside counselor and was prescribed medication. After the fight with Emma in middle school, Jenna testified that she felt very isolated and violent. She felt anxiety for having to walk to the classroom with an escort and not being allowed in the halls with other students. There was testimony that multiple people in the middle school were involved in trying to help resolve the issue between Jenna and Emma. The superintendent of schools at the time of the conflict felt that the matter concerned an issue between two families, including alleged attempts by Emma's mother to counsel Jenna.

As discussed above, the record indicates that Jenna received treatment at a mental health facility during her long-term suspension in eighth grade. While in high school, Jenna also met with a school counselor. Jenna did not recall ever informing the high school counselor that she intended to harm anyone in school or that she intended to get expelled. The high school counselor testified that she encouraged Jenna to make good choices, go to class, and focus on herself. She also met with Jenna's mother in person and communicated with her mother over the telephone. The high school counselor was aware that Jenna was working with an outside counselor. During Jenna's ninth-grade year, the outside counselor expressed concern over whether Jenna's medications were interfering with her academic performance. The high school counselor asked Jenna's mother to sign a release to facilitate her communications with the outside counselor.

The record indicates that approximately two weeks before the attack, Jenna's mother apparently spoke with Jenna's high school counselor on August 29, 2018. During the conversation, Jenna's mother apparently informed the counselor that Jenna had "anxiety/depression" and was "on meds"; that Jenna "has asked to go back to counseling"; and that Jenna "says will get herself expelled so she doesn't have to come to school."

During her testimony, Jenna denied telling her mother or anyone else that she intended to get herself expelled from school. She did not want to be at school, but she did not want to have a bad reputation that year. She testified that Emma had been talking bad to her friends during the summer, calling them names. She testified that she had a bad temper that day and that the physical altercation happened instantly.

Jenna further testified that she had stopped taking medication the week before the incident. When asked if anyone knew that she was off her medication, she testified that her mother knew. Jenna further testified that she felt like she was in a turtle shell. She felt very little, like she could not talk to anyone. She also had a lot of anxiety. She went to the bathroom to skip class. Jenna testified, as follows (Transcript at pages 44-45):

"A. ... I was going through withdrawals from my prescribed medications ...

...

A. ... I just started going all crazy kind of, off the wall. I was really impulsive for awhile, really mind-splitting, thinking different thoughts.

Q. Had you thought of hurting yourself?

A. I definitely did have those thoughts. Right after in that same week, I thought about hurting myself. I didn't tell anybody, though. But it was a lot about the anxiety I had about going to school. My mom was forcing me to get up to go to school, getting me up earlier than I needed to be. I didn't feel I was ready to go to school until

the point where I didn't feel ready enough to be in school. I didn't feel like I was dressed well or have my hair done well enough. So, it gave me a lot of anxiety in the first place being seen at all.”

Jenna further testified, as follows (Transcript at pages 29 and 31-32):

“A. ... I was not in my classes a lot in the first -- in the beginning of tenth grade. I had anxiety, so I was sitting in the bathroom trying to find my own thing to do honestly to not go to class.

...

“A. For the first week, I would just go in the bathroom during classes and I wouldn't come out until the bell rang. I would go in the hall with all the other kids. And when the next period would come, I would basically hide in the bathroom again.”

Jenna testified that her bipolar disorder played a part in her impulsive decisions in the seventh, eighth, and ninth grades. One moment she would be very happy and the next minute she would be very mad or sad. She testified that anxiety contributed to all the fights that broke out in middle school. She attributed the decline in her academic performance after the seventh grade to her mental health and depression. She also attributed these problems to her prior medications and blamed them for ruining her life. She believes that she was overmedicated when she was younger. At the time of her deposition, Jenna testified that she was no longer taking the medications and that she had stopped taking them (as an adult), without consulting a physician. She testified that she had never felt better since stopping the medications. She now felt content with life.

### The Superintendent's Notes and the Characterizations

The plaintiffs rely on the notes apparently taken at the superintendent's hearing in April 2017, when Jenna was thirteen years old and in the eighth grade. The notes contain the following words below Jenna's name: "runaway risk," "violent behavior," "not taking medicine," "lies," "depression/anxiety," and "no judgment, very unpredictable." When asked about the descriptions, the superintendent who conducted the hearing testified that they "would have been [his] notes from the conversation that the parents and the administrator would have been sharing as they were introducing the background of the incident." He did not recall who provided the information. He assumed that Jenna's parents may have provided it. He further explained that he did not think that the school personnel would be aware of certain information, such as medications, unless that came from the nurse and Jenna was scheduled to receive medication during the school day. He admitted, however, that he was making assumptions.

The plaintiffs' counsel further asked the School District's personnel about these descriptions of Jenna. The middle school counselor did not recall whether she provided the information regarding the descriptions of Jenna as a "runaway risk," "violent behavior," and "not taking medicine." The middle school principal testified that he did not recall attending the superintendent's hearing. He did not recall the details of the decision other than the length of the suspension. The descriptions on the superintendent's notes did not refresh his memory.

When the middle school counselor was asked generally whether the terms applied to Jenna based on her experience, she did not recall whether Jenna was a runaway risk or whether Jenna was taking any medicine or committing any lies. She assumed that Jenna may have had anxiety or depression based on an email she was shown during her deposition. She agreed that the term

violent behavior would apply to Jenna. She also agreed that the term “very unpredictable” applied based on certain records reviewed at the deposition.

The middle school principal was also asked about the definition of “violent student” in the School District’s code of conduct. He agreed that the definition of a “violent student” would be one who commits an act of violence upon another student. After being provided this definition, the middle school principal agreed that Jenna had been a violent student during the period when he was the principal of the middle school. When asked to provide details regarding Jenna’s violent behavior, he could not recall specifically, but referenced the disciplinary history, specifically the fight between Jenna and Emma in eighth grade. According to the middle school principal, the fight would constitute an act of violence.

The plaintiffs’ counsel further asked Jenna’s high school counselor to assume that the superintendent in 2017 described Jenna as exhibiting violent behavior before the hearing. When asked if she agreed with the superintendent’s impression, the high school counselor agreed with that impression based on Jenna’s disciplinary record. She further agreed that it was accurate for the superintendent to state in his notes from April 2017 that Jenna had no judgment and was very unpredictable. The high school counselor, however, did not know whether Jenna was a runaway risk, took medication, or had depression/anxiety in middle school.

In addition, the high school counselor was asked questions about Jenna’s behavior prior to attending high school and whether Jenna’s behavior indicated any emotional problems. The high school counselor testified that she did not have evidence of specific emotional problems, but that she “knew [Jenna] had social emotional problems.” The high school counselor was also asked about a comment on Jenna’s referrals from middle school in March 2017, which stated that Jenna had “been given numerous opportunities to change her behavior, but at this point her poor decision-

making is effecting other students.” When asked what the comment meant to her, the high school counselor explained that Jenna was an at-risk student, which is a student at risk of not being successful in high school because their choices are impacting their ability to be successful.

The high school counselor was also asked about an email (not in the record) sent to her and others from the assistant principal of the high school, apparently in November 2017. The assistant principal apparently informed the readers of a conflict between Emma and Jenna and that Emma’s mother was advising that Jenna will hit Emma from behind. The email notified teachers and the school sentry to be aware of the conflict and asked people to be in the hallway between periods, presumably to limit or to reduce the possibility of Emma and Jenna having some sort of conflict in the hallway between classes. When asked if the email concerned her regarding Jenna’s behavior at the time, she responded in the affirmative and explained that “Jenna had mental health issues, she was impulsive and ... sometimes engaged in actions without thinking about the consequences of them.” She could not recall when she formed that impression. She further explained that the basis for her characterization of Jenna as “impulsive” was based on Jenna’s disciplinary history from the middle school, including her leaving class, skipping class, and fighting with other students. She did not think that Jenna thought before she made choices.

#### Jenna’s Academic Performance

The plaintiffs also rely on Jenna’s report cards. They indicate that in the sixth grade she received a final overall average of 88. Her worst subject was math (65 average). In contrast, her best subjects were physical education, health, art, music, and band. During the following school years, Jenna’s final overall average decreased to 79 (seventh grade), 72 (eighth grade) and 69 (ninth grade). In ninth grade, her best grades were in studio in art (91 average) and physical education (88 average). Her worst grades were in living environment (65 average) and global

history (58 average). The notations under these two subjects read “did not complete required work” and “homework incomplete/not done.”

The record further indicates that the school provided Jenna with tutoring services and summer school. When asked if she ever sought help for her grades, Jenna responded that she did not want help at the time.

#### The Opposing Affidavits

The plaintiffs have submitted affidavits from an attorney licensed to practice law in Connecticut and a psychiatric nurse practitioner. The attorney asserts that if the School District had employed the strategy of a “conditional expulsion” and required voluntary counseling and specialized classes (such as anger management and dispute resolution), Jenna would have received help and the student body would have been protected from her. The attorney further opines that the School District failed to comply with its statutory and regulatory obligation to evaluate Jenna to determine whether her misbehavior was causally connected to her diagnosis/disability. The attorney further opines that if Jenna had been evaluated, she could have received non-punitive, therapeutic interventions, including disability programs designed to address her problem behaviors. The attorney opines that, if provided, the services would have prevented the assault, specifically, the attorney opines that more likely than not Jenna would have been removed from the general student population while she received remedial treatment and there would have been no opportunity for Jenna to assault Emma or anyone else.

The attorney cites a variety of statutes and regulations that concern the rights of individuals with disabilities, including 34 CFR 300.8; NY Education Law § 4401; Section 504 of the Federal Rehabilitation Act of 1973; 20 USC § 1412; 8 NYCRR 200.4; and 34 CFR 300.111. The attorney opines that not only did the School District fail to comply with these statutes and regulations, but

that the School District exhibited a negligent misunderstanding of its responsibility to its students in this matter.

The psychiatric nurse practitioner further opines that the School District failed to evaluate Jenna to determine whether her bipolar condition presented a likelihood of violent behavior. The nurse opines that Jenna's psychological condition affected her grades. The nurse opines that Jenna was a "ticking time bomb" and a "danger to every student." The nurse opines that the School District should have evaluated Jenna under federal and state laws/regulations, specifically 20 USC § 1412 and 8 NYCRR 200.4. The nurse further opines that such an evaluation would have allowed the School District to separate Jenna from the general student population and provide her with services that would have prevented the assault.

#### **ANALYSIS**

"Summary judgment is a drastic remedy and should not be granted unless there are no triable issues" (Michaelis v State, 135 AD2d 1005, 1006 [3d Dept 1987]). To obtain summary judgment, the party requesting such relief must establish its cause of action "sufficiently to warrant the court as a matter of law in directing judgment in [its] favor", and it must do so by tendering evidentiary proof in admissible form (CPLR 3212 [b]). If the moving party satisfies this burden, the opponent then has the burden to "show facts sufficient to require a trial of any issue of fact" (id.). Normally the opponent must make this showing by producing evidentiary proof in admissible form (see Barber v Daly, 185 AD2d 567, 569 [3d Dept 1992]). "Bald conclusory allegations are insufficient to defeat a motion for summary judgment" (Michaelis, 135 AD2d at 1006).

**I.**  
**The Negligent Supervision Theory**

Regarding the negligent supervision claim, it is well-settled that schools are required to supervise their students and to exercise the same degree of care as a parent of ordinary prudence would exercise in comparable circumstances (see Stephenson v City of New York, 19 NY3d 1031, 1033 [2012]; Mirand v City of New York, 84 NY2d 44, 49 [1994]). Schools are not, however, insurers of their students' safety (see Stephenson, 19 NY3d at 1033). They are not required to continuously supervise and control every movement and activity of their students (see id.; Rose v Oteora Cent. School Dist., 52 AD3d 1161, 1162 [3d Dept 2008]). Nor may schools be held liable for every thoughtless act by which one student may injure another (see Stephenson, 19 NY3d at 1033; Mirand, 84 NY2d at 49).

To impose liability for a breach of this duty, it must be established that the risk of injury was more than a remote possibility and could have been reasonably anticipated (see Mirand, 84 NY2d at 49; see also Kemper v Arnow, 18 AD3d 939, 940-941 [3d Dept 2005]; White v Ausable, 161 AD2d 1060, 1062 [3d Dept 1990] ["The failure to guard against a remote possibility of accident is not negligence"]). Generally, in the context of student assaults, the school authorities must have possessed "sufficiently specific knowledge or notice of the dangerous conduct which caused injury" (see Mirand, 84 NY2d at 49; Morning v Riverhead Cent. School Dist., 27 AD3d 435, 436 [2d Dept 2006] ["a school must have sufficiently specific knowledge or notice of a particular danger at a particular time"]).

"Actual or constructive notice to the school of prior similar conduct is generally required because, obviously, school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily" (Mirand, 84 NY2d at 49). Thus, "an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give

rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act” (id.).

Further, even where such notice is present, the inadequate supervision must be a proximate cause of the injuries (see id.; Conklin v Saugerties Cent. Sch. Dist., 106 AD3d 1424, 1426 [3d Dept 2013]; MacCormack v Hudson City School Dist. Bd. of Educ., 51 AD3d 1121, 1122 [3d Dept 2008]; see also Stephenson v City of New York, 85 AD3d 523, 525 [1st Dept 2011], affd 19 NY3d 1031 [2012]). “The test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school’s negligence” (Mirand, 84 NY2d at 50; see MacCormack, 51 AD3d at 1122).

Here, the record establishes that the School District did not have any reason to believe that Jenna posed any specific threat to Emma on the day in question. This is not disputed. Emma’s mother in fact admitted that Jenna was not a threat to her daughter. Similarly, Emma admitted during her testimony that she had no reason to believe that Jenna intended to attack her. According to Emma, their last altercation had occurred during middle school, and Jenna had never threatened her in high school. Jenna also confirmed that she had not made any recent threats to Emma and that the attack was spontaneous.

The plaintiffs nonetheless rely on Jenna’s disciplinary history to assert that she was such a dangerous person that the School District should have anticipated the attack. This theory appears to be contradicted by Emma’s prior testimony. Emma in fact testified that, despite her awareness of Jenna’s disciplinary history, she did not feel like she was in any danger when she saw Jenna on the day in question. Further, Emma also testified that prior to the attack she did not have any reason to believe that Jenna “was going to attack anyone in tenth grade” (emphasis added).

In any event, the misconduct in the disciplinary records largely concern non-violent behavior and incidents that are too remote in time. These incidents did not make it foreseeable that Jenna would attack anyone, as the plaintiffs contend. In fact, they are essentially irrelevant for purposes of determining whether Jenna's violent behavior was foreseeable (see Morman v Ossining Union Free Sch. Dist., 297 AD2d 788, 789 [2d Dept 2002]; MacCormack, 51 AD3d at 1122-1123; see also Knaszak v Hamburg Cent. Sch. Dist., 196 AD3d 1141, 1143 [4th Dept 2021]; Taylor v Dunkirk City Sch. Dist., 12 AD3d 1114, 1115 [4th Dept 2004]; Strnad v Floral Park-Bellerose Union Free School Dist., 50 AD3d 774, 775 [2d Dept 2008]).

The only relevant prior misconduct worthy of discussing concerns the three prior fights and the hair incident. Two of the three prior fights occurred in middle school and the most recent one occurred at the beginning of ninth grade. The prior fights all appear to have been minor altercations that did not result in any significant injuries. It also appears that they involved circumstances of other students hitting Jenna first or at least instigating her. The hair incident similarly occurred in middle school (December 2016). There do not appear to have been any injuries, however, only a few details exist in the record regarding this incident. The limited facts regarding this incident are set forth in a brief, two-line summary in the disciplinary records.

The Court does not consider any of these prior instances as substantially similar to the conduct that occurred on September 11, 2018. Unlike the prior incidents, which were relatively minor, this incident involved Jenna and another student attempting to seriously injure Emma by ganging up on her, catching her off guard, and hitting her as many times as possible.<sup>4</sup> It was a vicious and spontaneous attack (see Malik v Greater Johnstown Enlarged Sch. Dist., 248 AD2d

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<sup>4</sup> Emma alleges that she sustained, as a result of the attack, a concussion and head injury, laceration and bruising of her face, blurred vision, headaches, dizziness, nausea, loss of balance, diminished hearing, flashbacks, and aggravation of PTSD.

774, 776 [3d Dept 1998]; MacCormack, 51 AD3d at 1122; Velez v Freeport Union Free Schiano. Dist., 292 AD2d 595, 596 [2d Dept 2002]; Janukajtis v Fallon, 284 AD2d 428, 430 [2d Dept 2001]; McLoughlin v East Islip Union Free Sch. Dist., 2017 NY Slip Op 31028[U] [Sup Ct, Suffolk County 2017]; see also Brandy B. v Eden Cent. School Dist., 15 NY3d 297, 302-303 [2010]; Knaszak, 196 AD3d at 1143).

In addition, the risk of danger was rendered only a remote possibility based on several other factors, including the passage of time, the discipline imposed, and the mental health treatment and medication that Jenna received. During the interim, Jenna's misconduct appears to have sharply declined. In fact, the disciplinary records do not contain any reported instances of violence for a period of approximately one year prior to the attack. Based on these circumstances, the prior instances were insufficient to provide the School District with sufficient notice of the attack (see e.g. Morman, 297 AD2d at 789; Velez, 292 AD2d at 596; Malik, 248 AD2d at 776; McLoughlin v East Islip Union Free Sch. Dist., 2017 NY Slip Op 31028[U] [Sup Ct, Suffolk County 2017]; see also Brandy B., 15 NY3d at 302; Jake F. v Plainview-Old Bethpage Cent. School Dist., 94 AD3d 804, 805-806 [2d Dept 2012]).

There is also no competent and admissible evidence that Jenna had made any recent threats or engaged in any recent violent behavior prior to the attack, or that the School District had notice of such. During discovery, the plaintiffs had the opportunity to investigate and engage in discovery. They could have subpoenaed other students or parents to obtain admissible evidence of recent threats, if any such evidence existed. Notwithstanding, no such evidence has been provided (compare Hofmann v Coxsackie-Athens Cent. School Dist., 70 AD3d 1116 [3d Dept 2010]; Smith v Poughkeepsie City School Dist., 41 AD3d 579 [2d Dept 2007]; Wilson v Vestal

Cent. School Dist., 34 AD3d 999 [3d Dept 2006]; Wood v Watervliet City School Dist., 30 AD3d 663 [3d Dept 2006]; Druba v E. Greenbush Cent. Sch. Dist., 289 AD2d 767 [3d Dept 2001]).

The plaintiffs' reliance on the superintendent's notes is also insufficient to establish the requisite notice. While the notes contain unfavorable descriptions of Jenna, the superintendent and the other witnesses could not recall any details regarding the descriptions, including who provided the information. The descriptions are also too generalized and remote in time to have any meaningful significance. At best, they are generalized conclusions based on the information contained in Jenna's disciplinary records, which (as discussed above) are insufficient by themselves to provide the requisite notice.

Similarly unpersuasive is the plaintiffs' reliance on certain deposition testimony from the School District's personnel which characterized Jenna as violent. The elicited testimony was largely in response to very strategic questioning by the plaintiffs' counsel. The scope of inquiry on these issues was either overly broad or extremely limited. They generally concerned Jenna's disciplinary records, student discipline, expected conduct, and the broad definition for violent student which is contained in the code of conduct (see also Education Law § 3214). While this tactic was successful at getting the witnesses to essentially characterize Jenna as violent, the resulting testimony is simply too conclusory and technical to sufficiently establish the requisite element of notice.

Further, the plaintiffs' reliance on Jenna's mental health disorders is also misplaced. Even if the School District knew that Jenna had been diagnosed with any disorders, there is no evidentiary basis in the record to conclude that the School District had sufficient notice that Jenna's mental health was causing her to experience any violent behavior. Nor is there any basis to conclude that Jenna was exhibiting any objective signs that caused others to feel that she posed a

danger to herself or others. Indeed, Jenna testified that she felt like a turtle and was hiding in the bathroom during the days preceding the attack. This is hardly the type of conduct that would cause one to reasonably foresee that violent behavior was imminent or even a remote possibility. There is also no competent evidence that any other students or faculty members expressed concern regarding the way that Jenna was acting. Not even Jenna's testimony provided any basis to conclude that anyone at the school had any objective reason to notice that she was off her medication or thinking differently. Moreover, although Jenna allegedly had thoughts of hurting herself, she testified that she kept this to herself and did not disclose this to anyone.

Similarly, the plaintiffs also misplace reliance on the high school counselor's conversation with Jenna's mother approximately two weeks prior to the incident. The conversation apparently occurred a week before the school year began. Jenna's parents presumably had complete control over Jenna at the time. Regardless of the timing, the general comment by Jenna's mother that Jenna intended to get herself expelled was too vague to render the attack foreseeable. Indeed, the requisite notice must be much more specific (see Conklin, 106 AD3d at 1424 [unfounded rumor insufficient]; Romero v YMCA of Greater Malone Dev. Group, LLC, 79 AD3d 1344 [3d Dept 2010] [prior name calling/arguing insufficient]; Sanzo v Solvay Union Free School Dist., 299 AD2d 878 [4th Dept 2002] [awareness of prior verbal taunting insufficient]; Busby v Ticonderoga Cent. Sch. Dist., 258 AD2d 762, 764 [3d Dept 1999] [prior comment, "I'm going to fight you," insufficient]; MacCormack, 51 AD3d at 1121 [prior argument insufficient]; see also Lawes v Board of Education, 16 NY2d 302 [1965]).

There is no evidence to infer that Jenna's mother thought that Jenna was a danger or would act violently. To the contrary, she sent her to school. The counselor's notes and testimony further indicate that the information shared by Jenna's mother was limited. Specifically, Jenna's mother

informed the school counselor that Jenna had anxiety/depression and was on medication; that Jenna asked to go back to counseling; and that Jenna said that she would get herself expelled so she does not have to go to school. These statements do not hint at any violent behavior or contain any specific information regarding any threats, especially nothing to foreshadow the attack. The plaintiffs likewise misplace reliance on the superintendent's comments that she would have wanted the school to ascertain additional details to figure out the meaning of this statement and that "there would be a safety plan set up if we believed that this was what was going on" (emphasis added).

While such initiative is applaudable, there is no evidence that such a general policy existed at the school or that the superintendent implemented such a policy in response to a legitimate threat of violence. To the contrary, the comments reflect nothing more than idealistic advocacy and general precautionary measures. The statements do not define the scope of a school's duty, which is a legal issue for the courts to determine (see e.g. Malik, 248 AD2d at 776-777). In any event, considering that Jenna's mother apparently did not convey any specific information that Jenna was acting violent or intended to engage in violence to get expelled, the School District lacked the requisite notice (see e.g. Conklin, 106 AD3d at 1426; Romero, 79 AD3d at 1346; Sanzo, 299 AD2d at 878; Busby, 258 AD2d at 764; MacCormack, 51 AD3d at 1122).

In addition, there is no evidence to infer that any such investigation would have resulted in any safety plan or otherwise prevented the attack. There is nothing in the record to indicate that Jenna in fact wanted to get herself expelled or, more importantly, that she wanted to do so by engaging in violent behavior. In fact, during her testimony, Jenna denied making these statements or having any intention to get herself expelled. The element of proximate cause is therefore lacking on this issue.

The lack of foreseeability and proximate cause are further established by the sudden and spontaneous nature of the attack (see MacCormack, 51 AD3d at 1122 [sudden punch]; Malik, 248 AD2d at 775-776 [metal object thrown]; Janukajtis, 284 AD2d at 430 [stick thrown]; Busby, 258 AD2d at 764 [sucker punch]; McLoughlin v East Islip Union Free Sch. Dist., 2017 NY Slip Op 31028[U] [Sup Ct, Suffolk County 2017] [chair thrown]). In fact, Emma testified that she was surprised by the attack and did not see it coming. Nor did she have any reason to anticipate it. The video, as well as Jenna's testimony, further reveal that Jenna did not provide any warning that she intended to attack Emma. Based on the circumstances, it would be rank speculation for a jury to infer that the School District could have anticipated the attack or taken any measures to prevent it (see e.g. MacCormack, 51 AD3d at 1123; Romero, 79 AD3d at 1346; Busby, 258 AD2d at 764).

Moreover, the plaintiffs also contend that the attack could have been deterred and prevented by the presence of a security officer in the cafeteria. This would have been in addition to the four monitors and the school sentry already assigned to the cafeteria at the time. Notwithstanding, the impulsive and spontaneous nature of the act refute this contention, in that that attack happened so quickly that it appears that no amount of supervision could have prevented it (see e.g. Malik, 248 AD2d at 776). In addition, even if the attack could have been deterred by fortifying the cafeteria with a security guard, Jenna could have attacked Emma "at any time, possibly weeks later, or at any place" (Stephenson, 85 AD3d at 525). The lack of a security guard in the cafeteria was therefore not a proximate cause of the injuries.

Accordingly, that portion of the motion seeking to dismiss the negligent supervision claim is granted.

## **II.**

### **The Permanent Suspension Theory**

While not expressly articulated in the complaint, Emma's mother alleged during her GML § 50-h testimony that Jenna should have been removed from the school and placed out on permanent suspension indefinitely in eighth or ninth grade.<sup>5</sup> To the extent the plaintiffs are still relying on this theory (as opposed to a modified version), it is not sustainable.

First, this theory of liability rests on the unsupported assumption that a permanent suspension could have been imposed based on Jenna's misconduct in middle school and ninth grade. The education commissioner has opined that "[a] permanent suspension of a student is an extreme penalty which is generally educationally unsound except under the most extraordinary circumstances" (1992 Op Comm Ed No. 12,760; see also 2001 Op Comm Ed No. 14,628).

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<sup>5</sup> Specifically, Emma's mother testified, as follows (Transcript at pages 120-121):

“Q. What do you think the district should have done differently in September of 2018?

A. Nothing they could have done differently in 2018. It should have been done way before that.

Q. What?

A. J.H. wasn't a threat to my daughter. She was a threat to the entire student body, the entire administration and the faculty....

Q. What should the district have done differently?

A. She should have been placed out on permanent suspension indefinitely.

Q. When?

A. Eighth or ninth grade.... If the district did what they were supposed to do and kept her out and kept her at home, my daughter wouldn't have gotten hurt ...”

Similarly, the School District's code of conduct provides that a permanent suspension "is reserved for extraordinary circumstances such as where a student's conduct poses a life-threatening danger ..." (emphasis added). In the case of Jenna, several factors exist that would have mitigated against imposing such a harsh penalty (expulsion) against Jenna for her conduct in middle school and ninth grade, including Jenna's young age in middle school, the lack of any evidence of any significant injuries from her prior misconduct, and the very limited misconduct that occurred in ninth grade.

Second and more importantly, the decision of whether to allow a student to remain at a school and the degree of discipline imposed for misconduct is entirely discretionary (see Education Law § 3214; Brady v Board of Educ., 197 AD2d 655, 656 [2d Dept 1993] ["pupil placement is a matter of educational policy, the responsibility for which lies within the professional judgment and discretion of those charged with the administration of the public schools"]; see e.g. 2003 Op Comm Ed No. 14,951; 2000 Op Comm Ed No. 14,338; 2000 Op Comm Ed No. 14,416).

Under the general rule, "[a] public employee's discretionary acts - meaning conduct involving the exercise of reasoned judgment - may not result in the municipality's liability even when the conduct is negligent" (Lauer v City of New York, 95 NY2d 95, 99 [2000]; see Bawa v City of New York, 94 AD3d 926, 927-928 [2d Dept 2012]). Thus, the discretionary nature of the disciplinary determinations renders the plaintiffs' challenges to them as untenable (see Lauer, 95 NY2d at 99; see also Brady, 197 AD2d at 656 ["since pupil placement is a matter of educational policy [and discretionary], the defendant cannot, under the circumstances presented here, be found negligent for allowing the allegedly assaultive student to remain in the school"]).<sup>6</sup>

Accordingly, the permanent suspension theory is untenable.

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<sup>6</sup> The plaintiffs have also failed to cite any legal authority permitting them to assert a challenge under Education Law § 3214. Nor does the plain language of the statute evidence any such intent.

### **III.** **The New Theories**

The School District contends that the plaintiffs' opposition to the motion raises several new theories in the case, specifically the federal and state laws/regulations regarding persons with disabilities. The School District further contends that the plaintiffs cannot base liability on these statutes/regulations because the plaintiffs do not fall within the class of persons the statutes/regulations were intended to protect. The School District further contends that insufficient evidence exists to conclude that the alleged violations proximately caused the injuries, and that the affidavits from plaintiffs' experts are speculative and lack an evidentiary foundation.

#### **The Sufficiency of the Notice of Claim**

A notice of claim is a condition precedent to asserting a tort claim against a school district (see General Municipal Law § 50-i; see also Education Law § 3813). The notice must be served within 90 days after the claim arises, and the action must be commenced within one year and ninety days after the happening of the event upon which the claim is based (see General Municipal Law §§ 50-e [1][a]; 50-i [1]). To be sufficient, the notice of claim must set forth, among other things, the nature of the claim and the time and manner in which the claim arose (see General Municipal Law § 50-e [2]; Urena v City of New York, 221 AD2d 429 [2d Dept 1995] [claim based on negligent hiring was properly dismissed where the notice of claim lacked specificity and factual allegations]).

Further, a plaintiff may not raise "causes of action or legal theories that were not directly or indirectly mentioned in the notice of claim and that 'substantially alter' the nature of the claim or add a new theory of liability" (Meyer v Magalios, 170 AD3d 1163, 1165-1166 [2d Dept 2019] [citation omitted]; Semprini v Village of Southampton, 48 AD3d 543, 544-545 [2d Dept 2008]; St. John v Town of Marlborough, 163 AD2d 761, 763 [3d Dept 1990]; see also Davis v New York

City Tr. Auth., 117 AD3d 586, 587 [1st Dept 2014]; Blackstock v Board of Educ. of the City of N.Y., 84 AD3d 524, 524 [1st Dept 2011] [holding that the “failure to allege or provide the factual predicate for the special relationship theory in [the] notice of claim or complaint is fatal to maintenance of this action”]).

The application of these principles to this case is perhaps best illustrated by the decision in Meyer v Magalios, 170 AD3d 1163 (2d Dept 2019). There, in addition to a claim for negligent supervision, which was asserted in the notice of claim, the complaint and bill of particulars contained allegations that the school district, among other things, failed to detain, suspend, and remove the other student from the presence of the injured plaintiff; failed to file a PINS (person in need of supervision) petition against the other student; and failed to provide a copy of the school’s code of conduct to teachers and parents of the students. The Second Department concluded that the new theories were improperly interjected in the case and should have been summarily dismissed by the trial court on the summary judgment motion based on the proof that the notice of claim did not mention these causes of action and legal theories.

Here, a review of the record indicates that there are only two theories of liability in this case that appear to be timely and properly raised. The first one is for negligent supervision and was expressly set forth in the notice of claim. That theory is therefore properly before the Court.<sup>7</sup> The second one is for the alleged failure to permanently suspend Jenna in the eighth or ninth grade. This theory was made by Emma’s mother during her GML § 50-h examination. As the GML §

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<sup>7</sup> The remaining allegations in the notice of claim are either too generalized (e.g., failure to “properly train ... persons” and failure to “take adequate measures to address [Jenna’s] escalating violent ... behavior”) (see e.g. Carrasquillo v New York City Dept. of Educ., 104 AD3d 516, 516 [1st Dept 2013]; St. John v Town of Marlborough, 163 AD2d 761, 763 [3d Dept 1990]) or concern an anti-bullying statute (Dignity for All Students Act) that does not provide any private right of action (see Motta v Eldred Cent. Sch. Dist., 141 AD3d 819, 820 [3d Dept 2016]).

50-h examination contents may be considered in determining the sufficiency of the notice of claim, this theory appears to be properly before the Court (see Barone v Town of New Scotland, 145 AD3d 1416, 1417-1418 [3d Dept 2016]; see also General Municipal Law § 50-e [5]).

In contrast, the remaining theories relied upon by the plaintiffs in opposition to the motion do not appear to have been timely interjected into the case. The bill of particulars, for example, is dated May 17, 2021. In this Court's view, it asserts a different theory than the theory asserted in the notice of claim and the complaint and discussed during the GML § 50-h examinations. Specifically, the bill of particulars alleges the assault "could have, and should have, been avoided if the defendant had previously referred [Jenna] to the Committee on Special Education and the school psychologist for evaluation and referral to an alternative education program and removal from the mainstream educational program." The bill of particulars also cites several statutes and regulations that were not previously set forth in the notice or claim or discussed during the GML § 50-h examinations.

Then, there are several additional theories of liability raised by the plaintiffs in opposition to the summary judgment motion. These new theories include the plaintiffs' theories that the School District violated federal and state laws/regulations regarding persons with disabilities when Jenna was in middle school. Although the plaintiffs' counsel asked some questions during depositions regarding laws regarding disabilities, these depositions occurred several years after the attack and long after any reliable investigation into these issues could have taken place. Similarly, the plaintiffs also rely on Jenna's deposition testimony from December 2022 (more than 4 years after the attack) to now claim that Jenna's bathroom usage a week before the attack constitutes evidence that the School District negligently supervised her.

The Court finds that the new theories are improper and that allowing them would substantially alter the nature of the case and substantially prejudice the School District. Indeed, the School District would be required to begin its investigation into the alleged violation of the laws/statutes and Jenna's bathroom usage years after the events transpired (see Barone, 145 AD3d at 1418 [holding that the notice of claim, coupled with any GML § 50-h testimony, must adequately apprise the defendant as to the theory of liability and enable the defendant to investigate]). Accordingly, the new theories are barred based on the plaintiffs' failure to include them in the notice of claim or otherwise timely interject them into the case (see Meyer, 170 AD3d at 1166; Price-Linden v State of New York, 119 AD3d 1192, 1192-1193 [3d Dept 2014]; Rumyacheva v City of New York, 36 AD3d 790, 790-791 [2d Dept 2007]; see also Biondi v Behrman, 149 AD3d 562, 563-564 [1st Dept 2017] ["a plaintiff cannot defeat a summary judgment motion ... by merely asserting, without more, a new theory of liability for the first time in the opposition papers"]; Rose v Oteora Cent. School Dist., 52 AD3d 1161, 1163 [3d Dept 2008] [rejecting a new theory raised for the first time in opposition to a summary judgment motion]).

#### Alternative Grounds

Although this defect alone is sufficient to dismiss the new theories from the case, the new theories are untenable for several additional reasons as well. For starters, the statutes and regulations relied upon by the plaintiffs' experts were enacted to promote the educational needs of students with disabilities (see e.g. 20 USC § 1400 et seq.; NY Education Law § 4401 et seq.). To the extent the plaintiffs are relying on them for purposes of addressing student safety in general or preventing assaultive behavior of other students, the plaintiffs do not fall within the class of individuals entitled to the protections of these statutes and regulations (see e.g. Boston v Dunham, 274 AD2d 708, 710 [3d Dept 2000]; Keiser by Vesselak v Elmer, 225 AD2d 589, 590 [2d Dept

1996]). As such, the School District cannot be held liable to the plaintiffs for any alleged violation of the duties contained in the statutes and regulations (see e.g. Boston, 274 AD2d at 710; Keiser by Vesselak, 225 AD2d at 590).

In addition, there is no basis for a reasonable juror to conclude that the alleged failure to evaluate and provide special services to Jenna proximately caused Emma's injuries. The alleged violations and acts of negligence occurred when Jenna was in middle school, as many as three years prior to the attack. The School District had limited control over Jenna during this three-year period, and any number of factors may have contributed to Jenna's ultimate decision to attack Emma, including Jenna's home life, medications, the cooperation of her parents, her personal life, the stressors of being a teen, and the experiences and interactions she had with others outside of school. The causal connection between the alleged misconduct/negligence by the School District and the attack in September 2018 – as many as three years later - is simply too attenuated and speculative to support liability (see Williams v State of New York, 18 NY3d 981, 984 [2012]; see also Restatement [Second] of Torts § 433 [c], Comment f [“Experience has shown that where a great length of time has elapsed between the actor's negligence and harm to another, a great number of contributing factors may have operated, many of which may be difficult or impossible of actual proof”]; see also McNally v Sabban, 32 AD3d 340, 341 [1st Dept 2006]).

Further, the ultimate assertions of the plaintiffs' experts are speculative and unsupported by any evidentiary foundation, and they are therefore insufficient to withstand summary judgment (see Gray v South Colonie Cent. School Dist., 64 AD3d 1125, 1128 [3d Dept 2009]; Diaz v New York Downtown Hosp., 99 NY2d 542, 544 [2002]; see also Bellinger v Ballston Spa Cent. School Dist., 57 AD3d 1296, 1298-1299 [3d Dept 2008]). The alleged correlation between Jenna's grades and any disabilities is spurious. Indeed, the conclusion that Jenna's mental health caused her

overall grades to decline over the years is based on rank speculation. Jenna just as likely received lower grades in general over the years based on the increased complexity of the subjects, the change in teachers, the presumed increase in homework, her failure to complete assignments and do homework, and an indifference to whether her final overall average was in the 80s or the 70s.

Similarly, the alleged correlation between Jenna's prior instances of fighting and bipolar disorder is similarly lacking in any foundation. In fact, Jenna blamed all her fights in middle school on her anxiety rather than her bipolar disorder. Of course, it would be impossible to reliably ascertain what, if any, extent her alleged mental health contributed to her past behavior without an extensive evaluation of Jenna, her medical records, and the other witnesses involved in the altercations. Notwithstanding, no such evaluation or examinations of these critical issues by the plaintiffs' experts appear to have been performed. Their affidavits also do not reference any such investigation as having been conducted.

The experts' conclusion that Jenna had disabilities that required special education and removal from the general student population also lacks evidentiary support. Again, the experts did not conduct any examination of Jenna or review her medical records. The analysis is also not based on any deposition transcripts from any teachers. Further, the analysis rests on too many assumptions and hypotheticals. The analysis assumes, without any proper evidentiary support, that Jenna's parents would have consented to the evaluation and the services (see 20 USC § 1414 [a][1][D]); that the services would have resulted in Jenna's removal from the general student population; that Jenna would not have challenged any such attempt by the School District to ostracize her in middle school or ninth grade; that Jenna would not have returned to the general student population by her tenth grade year; and that the provision of anger management classes and other services to Jenna would have prevented the assault. All these unsupported assumptions

render the entire analysis too speculative and conclusory to support a finding of liability (see e.g. Williams, 18 NY3d at 984; Stephenson, 85 AD3d at 525; see also Knaszak, 196 AD3d at 1143).

Further, the plaintiffs' experts do not address the undisputed evidence that Jenna received outside counseling and mental health treatment in middle school and ninth grade. Critically, the plaintiffs' experts fail to explain how much outside counseling was provided, what was discussed, and how much additional counseling was needed. Again, they apparently did not review Jenna's records from her outside counselors. They have also failed to explain how the hypothetical counseling services referenced by them would have made a difference in preventing the assault when the actual outside counseling received by Jenna was unable to prevent it.

In addition, the experts fail to explain how their theory is consistent with the general mandates of the statutes, which require that "children with disabilities generally be educated with nondisabled children" (Cooke Ctr. for Learning & Dev. v Mills, 19 AD3d 834, 836 [3d Dept 2005], citing 20 USC § 1412 [a] [5] [A] and 34 CFR 300.550 [b]; see also NY Education Law § 4402 [2] [a] ["Each district shall provide to the maximum extent appropriate such services in a manner which enables students with disabilities to participate in regular education services when appropriate"]).

Accordingly, the new theories fail to create a triable issue of fact.

It is therefore,

**ORDERED**, that the defendant's motion seeking summary judgment is **GRANTED** and the complaint is **DISMISSED**; and it is further

**ORDERED**, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court. The Court is hereby uploading the original Decision & Order into the NYSCEF system for filing and entry by the County Clerk. The Court further directs the defendant to serve notice of entry of this Decision & Order upon the plaintiffs in accordance with the Local Protocols for Electronic Filing for Saratoga County.

Enter:

Dated: August 10, 2023  
at Ballston Spa, New York

  
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HON. RICHARD A. KUPFERMAN  
Justice Supreme Court

Papers Considered:  
NYSCEF Document Nos. 3, 13-14, 15, 21, 40-70; video