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D.D., on behalf of S.R. and A.R. *Plaintiff,* v. CAMDEN CITY BOARD OF EDUCATION, and GLORIA MARTINEZ-VEGA, DEBRA GAETA, DENISE MARTINEZ, and MINTERVA CASTRO, in their individual and official capacities, *Defendants.*	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION / CAMDEN COUNTY DOCKET NO. CAM-L-1919-18 *Civil Action* **OPINION**

Decided: November 14, 2018

Franklin Rooks, Esquire, The Law Firm of Jacobson & Rooks LLC, Counsel for Plaintiffs, D.D. on behalf of S.R. and A.R.

Benjamin Zieman, Esquire, Capehart Scatchard, Counsel for Defendants, Camden City Board of Education, Gloria Martiniez-Vega, Debra Gaeta, Denise Martinez, and Minerva Castro

STEVEN J. POLANSKY, P.J.Cv.

INTRODUCTION

Plaintiff, D.D., is the parent and natural guardian of S.R., minor female, and A.R., minor male.[1] A.R. and S.R. were second-grade students in a Camden City school in 2016-2017. Both have been diagnosed with learning disabilities and other medical issues.

Defendants, Camden City Board of Education ("Camden BOE"), Gloria Martinez-Vega, Debra Gaeta, Denise Martinez, and Minerva Castro have filed the present motion seeking to have the court dismiss with prejudice Counts II through IX of Plaintiffs' Complaint for failure to state

[1] This action is being brought on behalf of A.R., minor male, and S.R., minor female, through D.D., the children's parent and natural guardian. As such, all three will be referred to as "Plaintiffs" for the purposes of this opinion.

a claim pursuant to N.J.R. 4:6-2(e). Defendants further seek an Order dismissing all claims against Defendants in Counts I through IX for failure to name an indispensable party pursuant to R. 4:6-2(f).

BACKGROUND

This matter arises out of alleged student on student bullying that took place at the Thomas H. Dudley Family School in Camden, New Jersey on multiple occasions during the 2016-2017 school year. Plaintiffs have asserted constitutional, statutory, and common law claims against Defendants, four school officials and the Board of Education, for allegedly failing to protect them from a classmate, R.M., who bullied them on the basis of their disabilities. In their Complaint, Plaintiffs enumerate over a dozen instances of bullying by R.M. Plaintiffs assert that as a proximate cause of the Defendants' actions and inactions they have suffered damages, and they demand compensatory and equitable relief, punitive damages, interest, attorney's fees and costs.

Plaintiffs' Complaint consists of seven (7) separate Counts.

1. Count I alleges discrimination based on Plaintiffs' disability under the New Jersey Law Against Discrimination (NJLAD). Plaintiffs allege that Defendant Camden BOE, through the acts and omissions of the other Defendants, were deliberately indifferent, reckless, negligent, and/or tacitly approved a hostile classroom environment based on Plaintiffs' disabilities. Specifically, Plaintiffs allege that Defendants:
    a. Despite having knowledge of the conduct of R.M., failed to take any actions to prevent the ongoing disability discrimination;
    b. Failed to follow Camden Board of Education policy and state law resulting in a hostile classroom environment as a result of Plaintiffs' disabilities;

c. Failed to report incidents of harassment, intimidation, bullying, and physical assaults as required by the Anti-Bullying Bill of Rights Act (N.J.S.A. §18A:37-13 et seq.); and

d. Failed to institute any remedial measures that were reasonably calculated to end the harassment, intimidation, bullying, and physical assaults perpetrated by R.M.

2. Count II alleges an equal rights violation under the New Jersey State Constitution. Specifically, Plaintiffs allege a violation of the "thorough and efficient" clause of the State Constitution under the New Jersey Civil Rights Act (NJCRA) (N.J.S.A. 10:6-2). Plaintiffs allege that Defendants:

   a. Denied Plaintiffs protection from harassment, intimidation, bullying, and physical assault; and

   b. Interfered with Plaintiffs' ability to receive a thorough and efficient education at the school through their failure to perform their duties.

3. Count III alleges the state-created-danger doctrine as a basis for a substantive due process violation. Plaintiffs assert that:

   a. The harm was foreseeable because of the numerous instances of R.M.'s physical assaults on Plaintiffs;

   b. Defendants acted in willful disregard for Plaintiffs' safety;

   c. Despite numerous reports of intimidation, bullying, and physical assaults, Defendants ignored Plaintiffs' complaints, which created a continuing opportunity for R.M. to victimize Plaintiffs; and

   d. New Jersey law requires children to attend school, which created additional and continuous opportunities for R.M. to physically assault Plaintiffs.

4. Count IV asserts an "aiding and abetting" claim under the New Jersey Law Against Discrimination ("NJLAD") against the individual Defendants.
5. Count V alleges negligence against all Defendants. Plaintiffs assert that the School District had a duty to exercise reasonable care for the safety of students entrusted to them based upon Frugis v. Bracigliano, 177 N.J. 250, 268 (2003). They also assert that Defendants had a duty to use reasonable care to supervise the conduct of the students under their care. It is asserted that Defendants were negligent in:
    a. Failing to treat the R.M.'s offenses as progressive or to treat him as required under the school's Code of Conduct;
    b. Failing to report incidents of harassment, intimidation, bullying, and physical assaults as required by the Anti-Bullying Bill of Rights Act (N.J.S.A. §18A:37-13 et seq.); and
    c. Failing to institute any remedial measures that were reasonably calculated to end the harassment, intimidation, bullying, and physical assaults perpetrated by R.M.
6. Count VI alleges negligent supervision of R.M. by all Defendants.
7. Count VII alleges Intentional Infliction of Emotional Distress (IIED). Specifically, Plaintiffs allege that:
    a. Defendants intentionally or recklessly committed acts or omissions resulting in an unsafe school environment, which created severe emotional distress for Plaintiffs;
    b. Defendants' conduct (failing to treat the bully's offenses as progressive, failing to report incidents, and failing to institute any remedial measure to end the bullying) is extreme and outrageous in that it goes beyond all possible bounds of decency and is atrocious and utterly intolerable in a civilized society;

c. Plaintiffs have suffered extreme emotional distress that is so severe that no reasonable person could be expected to endure it.

8. Count VIII alleges assault against Defendants as a result of the conduct of R.M.

9. Count IX alleges battery against Defendants as a result of the conduct of R.M.

Defendants move to dismiss Counts II through IX of the Complaint for failure to state a claim, and Counts I through IX for failure to join an indispensable party.

Plaintiffs do not oppose Defendants' Motion to Dismiss Counts IV, VIII, and IX.

Failure to State a Claim

New Jersey is a notice-pleading state, requiring only that a general statement of the claim need be pleaded. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). It is still necessary for the pleadings to include a statement of facts that will "fairly apprise the adverse party of the claims and issues to be raised at trial." Jardine Estates, Inc. v. Koppel, 24 N.J. 536, 542 (1957). On a motion to dismiss for failure to state a claim, the court will accept as true the facts alleged in the complaint. Craig v. Suburban Cablevision, 140 N.J. 623, 625-26 (1995). The test for determining the adequacy of the pleading is whether a cause of action is suggested by the facts. Velantzas v. Colgate-Palmolive Corp., 109 N.J. 189 (1998). The court must search in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is conducted. Printing Mart-Morristown, 116 N.J. at 772. The court in Printing Mart cautioned that a Rule 4:6-2(e) motion to dismiss "should be granted in only the rarest of instances." Id. at 772; see also Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993).

Counts IV, VIII and IX – Aiding and Abetting, Assault and Battery

Defendants move to dismiss Count IV, for aiding and abetting, Count VIII, for assault, and Count IX, for battery, for failure to state a claim upon which relief can be granted. Plaintiffs acknowledge these Counts fail to state claims upon which relief can be granted, and should be dismissed. Accordingly, the court will dismiss Counts IV, VIII and IX of Plaintiffs' Complaint.

Count III – Substantive Due Process

Count III of Plaintiffs' Complaint asserts a substantive due process violation, arguing that "[s]tate and local officials may be held liable for an injury suffered as a result of a 'state created danger.'" Gonzales v. City of Camden, 357 N.J. Super. 339, 493 (App. Div. 2003). Defendants move to dismiss this count asserting that Plaintiffs' claim is barred by qualified immunity, and further argue Plaintiffs fail to satisfy either of the two exceptions under Due Process—a special relationship or a state-created danger.

The New Jersey Civil Rights Act authorizes a private right of action for civil rights claims against "a person acting under color of law." N.J.S.A. 10:6-2(c). In relevant part, the Act provides:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this States, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion *by a person acting under color of law*, may bring a civil action for damages and for injunctive or other appropriate relief.
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> N.J.S.A. § 10:6-2(c).

The New Jersey Civil Rights Act is modeled after § 1983. See Am. Humanist Ass'n v. Matawan-Aberdeen Reg'l Sch. Dist., 440 N.J. Super. 582, 590 (Law Div. 2015). Courts, therefore, apply the same "elements of a substantive due process claim [as]...42 U.S.C. §1983." See e.g., Rezem Family Associates, LP v. Borough of Millstone, 423 N.J. Super. 103, 115 (App. Div. 2011). "The first task in any § 1983 action is to identify the state actor, 'the person acting under color of law,' that has caused the alleged deprivation. See Monell v. New York City Dep't of Social Services, 436 U.S. 658, 691 (1978). ... The second task is to identify a 'right, privilege or immunity' secured to the claimant by the Constitution or other federal laws of the United States. 42 U.S.C. §1983 (1988)." Rivkin v. Dover Township Rent Leveling Bd., 143 N.J. 352, 363 (1996).

Vicarious Liability Under the N.J.C.R.A.

Defendants assert that all NJCRA claims against Defendant Camden BOE should be dismissed because there is no vicarious liability under the NJCRA.

Defendants argue that a municipality cannot be held liable solely because it employs a tortfeasor, and that a municipality cannot itself be held liable under section 1983. Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690 (1978). The law specifically limits liability to those who cause an employee to violate the constitutional rights of another. Id. at 692. Thus, Plaintiffs claims against Defendant Camden BOE are based on a theory of respondeat superior and thus barred.

Plaintiffs respond that their claim is based upon a failure to train. Plaintiffs rely upon Montgomery v. De Simone, which held that "a failure to train, discipline or control can only form the basis for section 1983 municipal liability if the plaintiff can show both contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar

incidents and circumstances under which the supervisor's actions or inaction could be found to have communicated a message of approval to the offending subordinate." Montgomery v. De Simone, 159 F.3d 120, 127 (3d Cir. 1998); see also Acosta v. Democratic City Comm., 288 F. Supp. 3d 597 (E.D.Pa. 2018).

They argue that failure to train may amount to deliberate indifference where the need for more or different training is obvious, and inadequacy is likely to result in violation of constitutional rights. Carter v. Cty. of Phila., 181 F.3d 339, 357 (3d Cir. 1999) (citing Cty. of Canton v. Harris, 489 U.S. 378, 389 (1989)). However, in order for failure to train to constitute deliberate indifference "it must be shown that (1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights." Ibid. Plaintiffs, in their pleadings, aver that the School's clear lack of training on harassment and bullying can be demonstrated through the actions of the individual defendants. Specifically, they point to failure to act during the repeated harassment and assaults on the minor plaintiffs.

Plaintiffs also assert that a school board may be held liable for a constitutional violation if such violation occurred as a result of a policy or custom established or approved by the entity. This liability, however, applies to section 1983. Plaintiffs provide no case law or support for applying this liability to the NJCRA, nor have they alleged a 1983 violation.

The school district itself, as opposed to its employees, may for reasons explained elsewhere in this Opinion, have potential liability to plaintiffs for its conduct. That liability however cannot be based upon the New Jersey Civil Rights Act. As noted by Defendants,

Plaintiffs have failed to point to an official custom or policy that resulted in a constitutional deprivation as required under Monell.

Moreover, Plaintiffs do not allege any facts that suggest that Camden BOE could be held liable under the failure to train theory. Like the plaintiff in Montgomery, Plaintiffs have "failed to allege any action or inaction by the municipal defendants that could be interpreted as encouraging" the individual Defendants' offensive actions. Montgomery, 159 F.3d at 127. This court finds it insufficient to aver that the failure to train can be evidenced through the actions of the individual Defendants, as this theory requires a showing of deliberate indifference. Further, Plaintiffs present nothing suggesting that the school district itself can be deemed a person acting under color of state law. Accordingly, with respect to the school district, the court will dismiss the claims asserted against the Camden County BOE contained in Count III of the Complaint.

State-Created Danger Exception

Defendants assert that Plaintiffs fail to satisfy either the "special relationship"[2] or the "state-created danger" exceptions to the general rule that Due Process does not "confer an affirmative right to governmental aid." See DeShaney v. Winnebago Cty. Dept. of Social Services, 489 U.S. 189, 196 (1989); see also Hottenstein v. City of Sea Isle City, 977 F. Supp. 2d 353, 365 (D.N.J. 2013) (interpreting the NJCRA analogously with section 1983).

"[T]here are four elements to a state-created danger claim: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actors acted with the requisite level of disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise

[2] Plaintiffs are not asserting the special relationship exception. Accordingly, the court will not address this exception.

would not have existed for the third party to cause harm." Bright v. Westermoreland Cty., 443 F.3d 276, 281 (3d Cir. 2006), cert. denied, 549 U.S. 1264 (2007). Both parties agree that this four-prong test applies both to § 1983 and N.J.S.A. § 10:6-2(c). See Gonzales v. City of Camden, 357 N.J. Super. 339, 347 (App. Div. 2003).

Prong two requires that the conduct of the state actor shock the conscience. Gormley v. Wood-El, 218 N.J. 72, 102 (2014). Whether the conduct shocks the conscience is a fact-specific issue. Mann v. Palmerton Area Sch. Dist., 872 F.3d 165, 171 (3d Cir. 2017). If there is time for an actor to deliberate prior to acting, "then all the plaintiff needs to show is deliberate indifference." Ibid. Defendants focus on the fourth prong of this test, noting that it requires an affirmative act on the part of the state actor. Bright, 443 F.3d at 281. "It is the misuse of state authority, rather than a failure to use it that can violate the Due Process Clause." Id. at 282. Defendants assert that the Third Circuit has repeatedly found that a failure to address bullying does not constitute an affirmative act under the state-created danger exception. See Morrow v. Balaski, 719 F.3d 160, 178-79 (3rd Cir. 2013), cert. denied, 571 U.S. 1110 (2013).

In Morrow, plaintiffs averred that allowing the bully to return from suspension constituted an affirmative act. Id. at 165. This argument was rejected by the court which held that the requirement "of an actual affirmative act is not intended to turn on semantics of an act or omission. Instead, the requirement serves to distinguish cases where officials might have done more from cases where officials created or increased the risk itself." Id. at 179. Therefore, defendants' complete failure to take any steps to protect plaintiffs was found to constitute mere passive inaction but not an affirmative act. Id. at 178-79.

Here, Plaintiffs allege that Defendants affirmative act was assigning R.M to the same homeroom as the Plaintiffs, while aware that R.M. was targeting and bullying Plaintiffs.

Plaintiffs rely on Gormley v. Wood-El, 218 N.J. 72, 108 (2014) to support their assertion that the Defendants used their authority to create an opportunity that would have otherwise not existed. Plaintiffs attempt to draw parallels between the institutional environment in Gormley and a school. Gormley involved a locked institutional environment where many of the patients had violent propensities and histories. Ibid. Plaintiffs argue that since school attendance is compulsory, students' movements are restricted, and control over elementary school students is generally greater than that of high school students, Gormley is analogous to this case.

The Gormley Court explained that a state actor will not escape liability by characterizing his conduct as inaction when he has exposed a person to a danger he created through the exercise of his authority. Id. at 104; see also L.W. v. Grubbs, 974 F.2d 119, 120-21 (9th Cir. 1992), cert. denied, 508 U.S. 951 (1993) (holding that defendants who led a nurse to believe she would not be left alone with violent sexual offenders, but then exposed her to risks of which they were aware, could be held liable).

Courts have refused to extend the state-created danger exception recognized in Gormley to schools. In Lansberry v. Altoona Area Sch. Dist., plaintiff was allegedly bullied on school property during school hours. 318 F. Supp. 3d 739, 745 (W.D.Pa. 2018). It was well-known that plaintiff faced constant bullying. Plaintiff was even told by a teacher witnessing the bullying to "stop being a baby." Ibid. It was asserted that this lack of action in the face of persistent bullying as well as the affirmative act of the male teacher telling plaintiff to stop being a baby satisfied the fourth prong of the state-created danger analysis. Id. at 755. The Court disagreed and refused to extend this exception to a school setting. Ibid.

The L.R. Court cautioned that when distinguishing between an act or an omission, the court should first evaluate "the 'status quo' of the environment before the alleged act or omission

occurred, and then to ask whether the state actor's exercise of authority resulted in a departure from this status quo." L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 243 (3d Cir. 2016). The failure to enforce a school policy does not constitute an affirmative act. See Morrow, 719 F.3d at 178-79. Following the reasoning in these cases, the court in Lansberry concluded that the failure to stop or prevent the bullying did not constitute an affirmative act and was therefore insufficient under the state-created danger analysis. Lansberry, 318 F. Supp. 3d 739 at 756.

Plaintiffs argue that they have a constitutional liberty interest in their personal bodily integrity protected by the Due Process Clause of the Fourteenth Amendment, citing Bridges ex rel. D.B. v. Scranton Sch. Dist., 66 F. Supp. 3d 570, 580 (M.D. Pa. 2014), aff'd, 644 Fed. Appx. 172 (3rd Cir. 2016). The court there, relying upon the Third Circuit decision in Morrow v. Balaski, granted summary judgment in favor of the school district. The court explained that the failure of the state to protect an individual against private violence does not constitute a Due Process Clause violation. DeShaney v. Winnebago Cnty. Dep't. of Social Servs., 49 U.S. 189, 197 (1989); Morrow v. Balaski, 719 F.3d at 166. "The Due Process Clause forbids the state *itself* from depriving individuals of life, liberty or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." Morrow, 719 F.3d at 166 (citing DeShaney v. Winnebago Cnty. Dep't. of Social Servs., 49 U.S. at 195). The state does not have an affirmative obligation to protect their citizens unless it falls under a recognized exception such as the state-created danger exception. Phillips v. Cnty. Of Allegheny, 515 F.3d 224, 235 (3d Cir. 2008). Therefore, unless Plaintiffs can satisfy the state-created danger exception, which requires an affirmative act by the state actor, this claim fails.

The court concludes that the circumstances presented in this case are similar to those presented to the court in Morrow and Lansberry. Like the plaintiffs in Morrow and Lansberry, Plaintiffs faced severe and near-constant bullying. Plaintiffs' Complaint avers that, time and time again, school officials failed to investigate the bullying incidents or take any preventative measures. The courts in Morrow and Lansberry found that the school's failure to intervene and stop the bullying did not constitute an affirmative action. The court finds that reasoning applicable here. While Plaintiffs attempt to dress up inaction as artful action, the Third Circuit has clearly articulated that the mere failure to stop bullying or enforce school policy does not constitute the affirmative action required under the state-created danger exception. New Jersey Courts follow federal law when interpreting the NJCRA. Therefore the court will dismiss Count III of Plaintiffs' Complaint.[3]

Count II – Thorough and Efficient Education

In Count II Plaintiffs allege an equal rights violation under the New Jersey State Constitution. Specifically, Plaintiffs allege a violation of the "thorough and efficient" clause of the State Constitution under the New Jersey Civil Rights Act, which states in relevant part:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.
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> [N.J.S.A. § 10:6-2 (c)]

[3] Since the court does not find that there was the requisite affirmative act under the state-created danger exception, there is no need to address Defendants' qualified immunity defense for Count III.

Under the New Jersey State Constitution, children have a right to a thorough and efficient system of education. N.J.S.A. Const. Art. 8, § 4, para. 1.

Article 8, Section IV of the New Jersey State Constitution provides that:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of 5 and 18 years.

The New Jersey Supreme Court in Abbott v. Burke, 153 N.J. 480 (1998), clarified at 164 N.J. 84 (2000) broadly interpreted the obligations of the State to provide a thorough and efficient system of education. These obligations included the provision of adequate physical facilities. Additionally, the Court found this obligation to include providing sufficient resources for a curriculum which would provide students with a chance to excel and succeed. See Abbott v. Burke, 119 N.J. 287 (1990). The constitutional duty under Abbott was found to include the provision of security programs and services where necessary to provide a thorough and efficient education with the court specifically noting that "violence also creates a significant barrier to quality education. Abbott v. Burke, 149 N.J. 145, 178 (1997).

Vicarious Liability under the N.J.C.R.A.

Defendants assert that all NJCRA claims against Camden BOE should be dismissed because there is no vicarious liability under the NJCRA. Per the discussion earlier in this Opinion regarding vicarious liability, with respect to the school district, the court will dismiss the claims asserted against the school district in Count II of the Complaint, since there is no basis to impose vicarious liability.

Qualified Immunity

Defendants move to dismiss Count II for failure to state a claim based on qualified immunity. They argue that it was not clearly established that failing to address bullying could violate the New Jersey State Constitution, and therefore the individual Defendants are entitled to qualified immunity. Defendants argue that the "thorough and efficient" clause historically has been employed to challenge administrative and regulatory schemes affecting public schools. They assert that there is a lack of authority applying this clause to an individual state actor's conduct, and further assert that if the court accepts Plaintiffs' theory it would impermissibly expand the categories of defendants subject to suit under NJCRA. See Williams v. Pa. Human Relations Comm'n, 870 F.3d 294, 299 (3d Cir. 2017) (finding that allowing pure Title VII and ADA claims under 1983 would throw "open a back door to the federal courthouse when the front door is purposefully fortified").

Plaintiffs respond that there is no bright line rule that the "thorough and efficient clause" is exclusively reserved for determining matters of administrative and regulatory schemes affecting public schools. Plaintiffs point to State ex rel. G.S., 330 N.J. Super. 383, 391-92 (Ch. Div. 2000) in support of their assertion, which held that the court had subject-matter jurisdiction "to decide whether an adjudicated delinquent expelled from school by a board of education...retains or is thereby stripped of his or her constitutional right to any form of public education." Plaintiffs aver that in State ex rel. G.S., the thorough and efficient clause was implicated but no administrative nor regulatory scheme was at issue. Therefore, the lack of administrative or regulatory scheme at play here is not fatal to Plaintiffs' claim.

Plaintiffs further allege that Defendants acted under color of law in their actions and inactions by failing to protect Plaintiffs from harassment, intimidation, bullying, and physical

assault, which interfered with Plaintiffs' ability to receive an education. Thus, Plaintiffs aver, none of the individual Defendants are entitled to qualified immunity.

A defendant has the burden of proof with respect to affirmative defenses, and qualified immunity is an affirmative defense. Schneider v. Simonini, 163 N.J. 336, 354 (2000). While the Plaintiff has the burden of demonstrating a clearly established right, the defendant must establish that the challenged act was objectively reasonable "in light of clearly establish law...." Id. at 355. Further, "the ultimate issue of whether defendant is entitled to qualified immunity is a legal question...." Id. at 359. Moreover, it is a question that should be answered "at the earliest possible stage in the litigation." Id. at 356.

There are two prongs to the qualified immunity analysis: "(1) whether the plaintiff alleged sufficient facts to establish a violation of a constitutional right, and (2) whether the right was clearly established at the time of the defendant's actions." L.R. v. Sch. Dist. Of Phila., 60 F. Supp. 3d 584, 596, aff'd 836 F.3d 235 (3d Cir. 2016); see also Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (finding that to overcome qualified immunity, the right violated must be "clearly established" at the time of the challenged conduct). For a right to be clearly established, however, there does not need to be "a previous precedent directly on point." Acierno v. Clouteir, 40 F.3d 597, 620 (3d Cir. 1994). A plaintiff can overcome a defendant's qualified immunity defense "without proving that the court has previously issued a binding decision recognizing a state-created danger...." Estate of Lagano v. Bergen Cty. Prosecutor's Office, 769 F.3d 850, 859 (3d Cir. 2014).

The Third Circuit has explained that "a court must center its inquiry with respect to the second prong of the qualified immunity test on 'whether it would be clear to a reasonable [official]....'" Ibid. (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)). In L.R. the court found

that although there was no precedent directly analogous, defendant was aware of the risk of releasing the minor student to a stranger, ignored the risk, and "exercised his authority as a state official to render the victim more vulnerable to harm." L.R., 60 F. Supp. 3d at 596-597. Thus qualified immunity was held not to apply. See id. At the same time, there is a "longstanding principle that clearly established law should not be defined at a high level of generality." White v. Pauly, 137 S. Ct. 548, 552 (2017) (internal quotations omitted).

It is unclear at the present time whether Plaintiffs will be able to establish a claim that the conduct of the individual Defendants in this case impacted the ability of plaintiffs to obtain a thorough and efficient education. At this preliminary pleading stage however, there is law recognizing that security and safety are part of providing a thorough and efficient education. Abbott v. Burke, 149 N.J. 145, 178 (1997). Since there is some possibility that Plaintiffs may be able to establish a constitutional violation, at this pleading stage the motion will be denied.

In addition, with respect to Defendant Martinez-Vega, Plaintiffs argue that she, as the school's principal, should not be granted qualified immunity under the theory of street-level supervisor liability. "To establish liability of a street-level supervisor in section 1983 actions, a plaintiff must prove that: (1) the supervisor failed to supervise the subordinate official; (2) there is a causal link between that failure and the violation of plaintiff's rights; and (3) the failure to supervise amounts to a deliberate indifference or recklessness." Schneider v. Simonini, 163 N.J. 366, 373-74 (2000). "The knowledge element of a plaintiff's case requires proof that the supervisor was aware of facts from which an inference could be drawn that the subordinate was acting in an unconstitutional manner that carried at substantial risk of causing serious harm." Id. (quoting City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989)).

The Schneider Court listed five non-exclusive factors for finding recklessness or deliberate indifference which are: "(1) whether there were any prior incidents similar to the constitutional violation alleged by the plaintiff; (2) how adequate the supervisor's response was to those prior incidents; (3) how the supervisor responded to the violation alleged by this particular plaintiff; (4) to what extent the supervisor can be said to have been a causal factor in contributing to the constitutional violation; and (5) to what extent the supervisor was aware of the constitutional misconduct." Id. at 374. While negligence is generally left for the finder of fact, in extraordinary cases such issues may be removed from the jury. Id. at 375.

Plaintiffs aver that Defendant Martinez-Vega failed on numerous occasions to supervise Defendants Gaeta and Castro. There are substantial facts alleged to support a claim that Defendant Martinez-Vega was fully aware of minor plaintiffs' claims of bullying and harassment, but took no action to stop the conduct. This differs from the facts presented in Schneider, where plaintiffs failed to set forth any evidence that the supervisor was aware of the risk of the constitutional violation in question. Id. at 374. While it is unclear at this early stage whether Plaintiffs will be able to establish recklessness or deliberate indifference on the part of Defendant Martinez-Vega, the court will deny the motion to dismiss since the pleadings are sufficient to establish a claim that qualified immunity does not apply to Defendant Martinez-Vega. See Maudsley v. State, 357 N.J. Super. 560, 569-70 (App. Div. 2003) (noting that the Court in Schneider assuredly relied on party depositions, affidavits, and investigative reports to rule on the applicability of qualified immunity).

Counts V and VI - Negligence

In their negligence claims, Plaintiffs have pleaded that Defendants breached their duty to exercise reasonable supervisory care for the safety of Plaintiffs who were entrusted to their care.

See Caltavuturo v. City of Passaic, 124 N.J. Super. 361, 307 (App. Div.) certif. denied, 63 N.J. 583 (1973).

Defendants assert that they are immune from liability under N.J.S.A. § 59:5-4 for failure to provide police protection and further that they are immune under both N.J.S.A. § 59:2-4 and N.J.S.A. §59:3-5 for failure to enforce the law. Essentially, they argue that under N.J.S.A. § 59:5-4, the failure to act, or the omission of an act, is insufficient to create liability. See e.g., Lee v. Brown, 232 N.J. 114, 128 (2018). Defendants argue that Plaintiffs' claim is, at its core, liability due to a failure to discipline R.M. as required by state law and school policy. They assert this type of mere failure to enforce does not create liability.

Defendants also assert that they are immune from liability under the Tort Claims Act. N.J.S.A. § 59:5-1 (providing that except as provided by the Tort Claims Act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of a public entity or a public employee or any other person); see Coyne v. State Department of Transportation, 182 N.J. 481, 488 (2005). Defendants assert that "courts should employ an analysis that first asks 'whether immunity applies and if not, should liability attach.'" Pico v. State, 116 N.J. 55, 59 (1989). Moreover, even if liability is found, it is still subject to common-law immunities. Fielder v. Stonack, 141 N.J. 101, 117 (1995).

Further, the Tort Claims act sets forth a threshold for non-economic damages. If a plaintiff fails to reach this objective threshold, it bars recovery for pain and suffering. See N.J.S.A. 59:9-2 ("No damages shall be awarded against a public entity or public employee for pain and suffering from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of bodily function, [or] permanent disfigurement...where the medical treatment expenses are in excess of $3,600.00.").

Finally, Defendants assert that Plaintiffs cannot rely on alleged violations of the Anti-Bullying Act because the plain language of that statute indicates that it does not create or alter any tort liability.

Under N.J.S.A. § 59:2-2, "[a] public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." Notably, this liability only applies when the public employee is liable. See Law v. Newark Board of Education, 175 N.J. Super. 26, 32-33 (App. Div. 1980) (finding that the public entity was liable for injuries proximately caused by acts or omissions of its employees within the scope of their employment and was not immune from liability under the Act if the employees could also be held liable).

To establish negligence, a plaintiff must demonstrate that there was (1) a duty, (2) a breach of that duty, and (3) injury proximately caused by the breach. Anderson v. Sammy Redd & Assoc., 278 N.J. Super. 50, 56 (App. Div. 1994). Negligence must be proven and will never be presumed. Long v. Landy, 35 N.J. 44, 54 (1961) (citing Hanson v. Eagle-Picher Lead Co., 8 N.J. 133, 141 (1951)). Plaintiff bears the burden of proving defendant's negligence and that such negligence is the proximate cause of plaintiff's injury. Dziedic v. St. John's Cleaners & Shirt Launderers, Inc., 53 N.J. 157, 161 (1969). An inference can be drawn from proven facts but cannot be based upon pure conjecture, speculation, surmise or guess. Long, 35 N.J. at 54.

A teacher owes students the duty of supervision and will be liable for injuries caused by failure to discharge that duty with reasonable care. Titus v. Lindberg, 49 N.J. 66 (1967); see also Caltavuturo v. City of Passaic, 124 N.J. Super. 361, 307 (App. Div. 1973), cert. denied, 63 N.J. 583 (1973) ("[T]he duty of school personnel to exercise reasonable supervisory care for the safety of students entrusted to them, and their accountability for injuries resulting from failure to

discharge that duty is firmly established.") (citing Jackson v. Hankinson and Bd. of Ed., New Shrewsbury, 51 N.J. 230, 235-236 (1968)). School authorities are obligated to take reasonable precautions for a student's safety and well-being. Jackson v. Hankinson & Bd. of Ed. of Shrewsbury, 51 N.J. 230 (1968). The reasonableness standard is designed to address a clear and precise question: whether, under the totality of the circumstances, a defendant's conduct comported with that of a reasonable educator in like circumstances. Jerkins v. Anderson, 191 N.J. 285, 301 (2007).

N.J.S.A. § 59:3-11 provides "A public employee is not liable for the failure to provide supervision of public recreational facilities. Nothing in this section exonerates a public employee for negligence in the supervision of a public recreational facility." A public employee (and hence a public entity) is not exonerated for negligence once he or she undertakes to supervise the facility. See Fleuhr v. City of Cape May, 303 N.J. Super. 481, 490 (App. Div. 1997); rev'd on other grounds 159 N.J. 532 (1999).

In Law v. Newark Board of Education, 175 N.J. Super. 26 (App. Div. 1980), the injured children were attending a School Board sponsored recreational program. They were jumping on and off a firetruck which was at the event. Id. at 29-30. The children remained on the firetruck out of sight of the firemen when the truck left the premises. Id. The children were subsequently injured jumping off the truck while on the public roadway. Id. In Law, the Board of Education had an employee responsible for supervision of the children. Id. at 32. The Court explained that while a public employee may not be held liable for failure to provide supervision, once supervision is undertaken it must not be done in a negligent manner. Id. The court further explained that the type of activity involved with supervising children by school personnel is not the type of "high level discretionary activity granted immunity by the Act." Id. at 32-33.

The Appellate Division recently rejected the arguments made by the defendant in L.E. v. Plainfield Public School District, ____ N.J. Super. _____ (App. Div. 2018). There, plaintiff was sexually assaulted while on school property during normal school hours. The district raised the same defenses raised by defendants in this case. The court distinguished between police protection immunity and the duty of an educator to supervise and provide for the safety of students (slip op. at page 12). As the court explained in detail:

> Our courts have consistently held that school officials have a duty to supervise the children in their care. See, e.g., Jerkins v. Anderson, 191 N.J. 285, 296 (2007) (stating that "[s]chool officials have a general duty 'to exercise reasonable supervisory care for the safety of students entrusted to them, and [are accountable] for injuries resulting from failure to discharge that duty'") (quoting Caltavuturo v. City of Passaic, 124 N.J. Super. 361, 366 (App. Div. 1973) (alteration in original)); Frugis v. Bracigliano, 177 N.J. 250, 268-70 (2003) (stating school officials' duty of care "extends to supervisory care" of their students). We have recognized that "[t]eachers must at times be present to oversee students on school playgrounds and in hallways, classrooms, lunchrooms and auditoriums." Kibler v. Roxbury Bd. Of Educ., 392 N.J. Super. 45, 55 (App. Div. 2007). The duty may be violated by nonfeasance, as well as misfeasance. Titus v. Lindberg, 49 N.J. 66, 74 (1967); Caltavuturo, 124 N.J. Super. at 366.
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> "The theory behind the duty is that the relationship between the child and school authorities is not a voluntary one but is compelled by law." Frugis, 177 N.J. at 270. Because "[t]he child must attend school and is subject to school rules and discipline," school officials "are obligated to take reasonable precautions for [the child's] safety and well-being." Ibid.
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> The supervisory duty extends to "foreseeable dangers . . . [that] arise from the careless acts or intentional transgressions of others." Frugis, 177 N.J. at 268; see also L.W. ex rel L.G. v. Toms River Reg'l Sch. Bd. Of Educ., 189 N.J. 381, 406 (2007). In Frugis, the court held that the supervisory duty extended to protect students from the transgressions of an adult – a school principal who privately photographed students in inappropriate poses. 177 N.J. at 268. In L.W., the court applied the supervisory duty to a case of

> student-on-student harassment. 189 N.J. at 406-07. In Titus, the court affirmed a jury verdict finding a principal liable for negligent supervision of a student who shot a paper clip at another student, injuring him. 49 N.J. at 75-76; see also Longo v. Santoro, 195 N.J. Super. 507 (App. Div. 1984) (reversing summary judgment for the school board and principal whom the plaintiff claimed negligently assigned supervisory personnel, who failed to prevent one student from striking another with a rock); Kibler, 392 N.J. Super. at 55 (noting, in reference to teachers' supervisory responsibilities, that "there is invariably the prospect that a student-on-student altercation will erupt").
>
> Consistent with this authority, we conclude that school personnel's supervisory responsibilities may extend to the prevention of unwanted sexual encounters between students.

L.E. v. The Plainfield Public School District, slip op. at 13-15.

The court finds the reasoning set forth in L.E. persuasive. Similar to that case, Plaintiffs here were on school property when they were bullied by R.M. during school hours. Thus, while "a school cannot be expected to shelter students from all instances of peer harassment[,]... reasonable measures are required to protect our youth...." L.W. ex rel L.G. v. Toms River Reg'l Sch. Bd. Of Educ., 189 N.J. 381, 406 (2007). Plaintiffs aver that no measures were taken to protect the Plaintiffs. The court finds this allegation of lack of supervision and protection of Plaintiffs sufficient, and will therefore deny the motion to dismiss Counts V and VI of the Complaint.

Count VII – Intentional Infliction of Emotional Distress

In their Complaint, Plaintiffs assert that as a proximate result of the acts and omissions of Defendants, Plaintiffs have suffered extreme emotional distress that is so severe that no reasonable person could be expected to endure the conduct.

Defendants assert that Plaintiffs fail to allege an affirmative act that is extreme and outrageous, fail to plead any details of the severity of their alleged distress, and do not claim that their alleged distress was caused by the kind of event that can sustain a claim for pain and suffering damages. Defendants further claim that Plaintiffs cannot show that the individual Defendants are liable for IIED without simultaneously proving that Defendant Camden Board of Education is immune.

To establish a claim for intentional infliction of emotional distress, a plaintiff must establish four elements:

1. Intentional and outrageous conduct by the defendant. Such conduct must either be intentional or be reckless in deliberate disregard of a high degree of probability that emotional distress will follows.
2. Defendant's conduct must be extreme and outrageous. It must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community.
3. Defendant's actions must have been the proximate cause of plaintiff's emotional distress.
4. The emotional distress suffered by the plaintiff must be so severe that no reasonable person could be expected to endure it.

Buckley v. Trenton Savings Fund Society, 111 N.J. 355, 366-367 (1988); Taylor v. Metzger, 152 N.J. 490, 516 (1997).

Defendants point to no decision which requires affirmative conduct to support a claim for intentional infliction of emotional distress as opposed to conduct constituting misfeasance or malfeasance. At this preliminary stage of the litigation, the facts alleged in the complaint are sufficient to suggest a cause of action based upon the intentional, reckless and deliberate

disregard of the ongoing and repetitive conduct of R.M., with knowledge of a high degree of probability that both injury and emotional distress would occur. The failure to comply with their legal obligations to protect the students that were the subject of bullying under these circumstances can be deemed so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. It is a fact issue whether the repetitive and ongoing nature of the conduct of which it is alleged defendants were aware is sufficient to satisfy this requirement. At this stage of the litigation, the court concludes that the allegations are sufficient to set forth a *prima facie* case.

Failure to Name an Indispensable Party

Defendants move to dismiss all counts pursuant to R. 4:6-2(f). Defendants claim that R.M.'s absence from this litigation would prevent Plaintiffs from obtaining complete relief and thus force them into duplicative litigation. Defendants further assert that, given that R.M. was the student who bullied Plaintiff, his interests are not aligned with those of the Defendants.

Plaintiffs respond that R.M. is not an indispensable party, and that he has no interest in this litigation. Plaintiffs point out that Counts I through VI are claims which involve violations of the New Jersey Constitution and NJLAD. They argue that since R.M. is not an employee of the Defendant Board of Education or any municipal/state entity, he cannot be said to have acted under color of law.

R. 4:28-1(a) states:

> A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of

> the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

Plaintiffs do not oppose the dismissal of Counts IV, VIII, and IX of the Complaint. Without the claims for battery, assault, and aiding and abetting, Plaintiffs assert that R.M. no longer has an interest in the case. All of the remaining claims relate to the acts or omissions of the named defendants, not R.M.'s possibly direct liability for the bullying itself. Per N.J. Court Rule 4:28-1(a), R.M.'s absence does not impair or impede Defendants' ability to litigate this case, nor does it subject defendants to a substantial risk of incurring multiple or inconsistent obligations.

The court does not find that R.M. is an indispensable party to this action. While R.M., the fellow student, is the actor who was allegedly bullying Plaintiffs, the focus of plaintiff's claims is upon the conduct of the Defendants and their response, and not the specific actions of R.M. While Defendants are certainly permitted to join R.M. if they believe he shares responsibility, the court finds that complete relief can be accorded without the presence of R.M. in the litigation. For that reason, the motion to dismiss for failure to name an indispensable party will be denied.

CONCLUSION

The motion to dismiss Count II is granted as against Defendant, Camden City Board of Education, and denied as to Defendants, Gloria Martinez-Vega, Debra Gaeta, Denise Martinez and Minterva Castro.

The motion to dismiss Counts III, IV, VIII and IX is granted.

The motion to dismiss Counts V, VI and VII is denied.

The motion to dismiss for failure to join an indispensable party is denied.