D.G. ON BEHALF OF THE MINOR, T.G.	*	**NO. 2001-CA-0276**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
NEW ORLEANS PUBLIC SCHOOL AND XYZ INSURANCE COMPANY	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 89-4463, DIVISION "B-6"
HONORABLE LOUIS A. DIROSA, JUDGE PRO TEMPORE
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JUDGE MICHAEL E. KIRBY
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(Court composed of Judge Steven R. Plotkin, Judge Patricia Rivet Murray, Judge Michael E. Kirby)

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Plaintiff, D.G., on behalf of her minor child, T.G., appeals the trial court's judgment dismissing her lawsuit against the Orleans Parish School Board (hereinafter referred to as "School Board"). We affirm.

On March 3, 1989, D.G. filed a petition for damages against the School Board alleging that on March 28, 1988, T.G. was a kindergarten student at the Joseph Craig Elementary School in New Orleans. On that date, T.G. went to the bathroom without being accompanied by a teacher or another student, and was allegedly assaulted by a male student who inserted a pencil into her vagina. D.G. alleges that T.G.'s injuries were the result of the School Board's negligence.

D.G. filed a motion for leave of court asking to amend and supplement her petition to add as defendants T.G.'s teacher, Ms. Loma-Linda Boutney, and her principal at Craig Elementary, Mr. Leonard Belton. The trial court denied the motion, stating that it was too late to amend

because trial was set to begin in less than one month. D.G. filed a separate lawsuit against Boutney, Belton, and their insurers, and filed a motion in the instant lawsuit seeking to have the two cases consolidated. The trial court initially granted the motion to consolidate, but subsequently denied it when one of the insurers named in the second lawsuit objected. The School Board was the sole defendant in the trial resulting in the judgment that is the subject of this appeal.

At trial, the first witness was Ms. Loma-Linda Boutney, T.G.'s kindergarten teacher at Craig Elementary. She is now retired. She did not learn of the alleged incident involving T.G. until the principal, Leonard Belton, informed her. She testified that she was shocked when she heard because she never allowed her students to go to the bathroom alone. She either accompanied the student, or sent two or three other students with the student who needed to go to the bathroom. Boutney said the kindergarten teachers were constantly with the students. She said if boys and girls both had to go to the bathroom at the same time, she would take the girls and a volunteer would take the boys. If no volunteer was available, she would make the boys stand outside the bathroom door until the girls were finished,

and then she would take the boys to the bathroom. She stressed that the boys and girls were never allowed to be in the bathroom together. She said the School Board had a policy that kindergarten teachers were to stay with their students at all times.

Boutney stated that she did not have a teacher's aide in 1988. Sometimes a parent volunteered, but she could not remember if a parent volunteer was present on the day in question. She said she thinks her class that year had one or two additional students, but was not substantially overcrowded. She stated that those additional children did not affect her ability to supervise the students. Boutney said her kindergarten students were brought to the bathroom at least four times a day with an adult present. If a child needed to go to the bathroom at any other time and the teacher could not accompany the child, several other students were sent to the bathroom with the child. Sometimes the teacher would accompany the child to the bathroom, while the rest of her class goes to the kindergarten class next door and remains under the supervision of that teacher. That is also the procedure a teacher would follow if one of her students got hurt. If a kindergartner needed to use the bathroom during recess, one of the two

teachers on recess duty took the child to the bathroom while the other teacher watched the rest of the children on the playground.

The kindergarten classes have their own recess, with no other students in the schoolyard. If a second child needed to use the bathroom while one of the teachers on recess duty had already taken another child, then the remaining teacher on recess duty would send the second child to the bathroom with three or four other students. Boutney testified that she was on recess duty at the time of the alleged incident.

Boutney said that she participated in an interview conducted by a police officer on March 30, 1988, two days after the alleged incident, at which Belton, D.G. and T.G. were also present. The interview was tape-recorded. She said she first heard about the allegations of a sexual molestation in the bathroom on March 28th at the March 30th meeting.

The next witness was Antoinette Marie Aubrey-Guillory, the director of school social work services and the supervisor of child welfare and attendance for the New Orleans Public School System. She said her department provides direct psychological social services to students and support services for the learning environment. She said that, to her

knowledge, there was one social worker assigned to Craig Elementary in 1988. Aubrey-Guillory did not hold her current position in 1988, and although she was a social worker then, she was not a social worker within the school system. In 1988, she worked for the Office of Community Services, and one of her duties was to provide training in reporting laws to the staff of the School Board. She said that the laws in 1988 mandated the staff of the School Board to report suspicion of abuse or neglect of children. Her search of the School Board's child abuse reports did not include any reports involving T.G.

Aubrey-Guillory stated that the policy of the School Board as outlined in a document entitled "Task Force on Drugs, Crime, Safety and Security in the Orleans Parish School District" is to protect the welfare of the children and to ensure that students are under supervision at all times. She stated that to the best of her knowledge, a teacher's responsibility in 1988 was to report an incident of sexual molestation to the New Orleans Police Department. However, if the police were already involved when the teacher learned of the molestation, there would be no further duty to report on the part of the teacher.

The next witness was Dr. Everett Williams, the School Board superintendent from 1985 to 1991. He said that during his tenure as superintendent, the School Board compiled reports of crime and violence in the public schools and conducted studies in order to determine how to prevent the continuing occurrence of school violence. He stated that the School Board has a duty to take steps to ensure the safety of students. No evidence was presented during Dr. Williams' testimony that referred specifically to reports of crime at Craig Elementary in 1988. Dr. Williams stated that he was never made aware of the alleged incident at Craig Elementary on March 28, 1988.

Dr. Coleridge Franklin testified by deposition. He was accepted as an expert in the evaluation and treatment of children who have been sexually abused and neglected. D.G. brought T.G. to Dr. Franklin's office on March 28, 1988 for an examination. D.G. told Dr. Franklin that T.G. had received trauma in the vaginal area when a boy put a pencil in her vagina in the school bathroom. He found blood in T.G.'s underwear and some recent superficial abrasions in her vaginal area. He said that T.G. was wearing a dress. He instructed D.G. to report this incident to the police. He said

T.G.'s injuries were consistent with the insertion of a pencil into her vagina. He said it is not unusual for young victims of sexual assault to be afraid to talk about it. Dr. Franklin said that based on the history given by D.G. and his physical examination of T.G., his opinion is that it is more probable than not that T.G.'s injuries occurred at school as the result of a forcible act of another person.

On cross-examination, Dr. Franklin said that the plaintiff's attorney had talked to him before his deposition about another female member of T.G.'s household who had been abducted from a bus stop and molested, and about T.G. telling the police that someone pushed her on a chair. He said it is not unusual for a young victim to have confusion about certain details of a traumatic incident, and that D.G.'s statement at the police interview that T.G. told her the assault occurred in the classroom could have been a result of confusion. His opinion was that something happened to this child at school, but he could not say for sure what the circumstances were. He said he obtained the child's history almost exclusively from the mother, because T.G. was crying and upset and did not say much throughout her visit with Dr. Franklin.

Cornelius J. Schutte, Ph.D. was the next witness. Dr. Schutte was qualified as an expert witness in the field of clinical psychology with a subspecialty and expertise in sexual abuse. He testified that he evaluated T.G. during five sessions in 1999 to assess her psychological functioning and to provide treatment recommendations. He reviewed medical records and conducted interviews with family members. His diagnostic impression was that T.G. suffered from post-traumatic stress disorder. Dr. Schutte stated that based on the information available to him, his opinion was that it was more probable than not that T.G. was sexually molested in the school bathroom during school hours on March 28, 1988.

T.G. related to Dr. Schutte that when she was in kindergarten, an older boy accosted her in the school bathroom, pulled down her panties and put an object into her vagina. She told him she did not see the object during the assault, but indicated that she could recall the pain she felt when the object was forced into her vagina. T.G. told him that the older boy told her that if she told anyone what happened, one of her friends would be hurt. Dr. Schutte said that symptoms that T.G. described were similar to other children who have been assaulted and threatened.

Dr. Schutte also testified that he listened to an audiotape that was made two days after the alleged assault. The audiotape was of an interview conducted by a police officer in the Craig Elementary principal's office. T.G., her mother, the school principal and T.G.'s teacher all participated in this interview. He said the tape indicated that T.G. was frightened during this interview. In the tape, T.G. asserted that the assault took place in the classroom during naptime. Dr. Schutte said that the teacher strongly disputed T.G.'s allegation during this taped interview. He stated his opinion that the circumstances surrounding this interview would be very traumatic for the child and could make her feel that she was in trouble or would suffer repercussions for telling her story. His opinion is that it is extremely unlikely that T.G. would have fabricated her allegations of sexual assault.

Dr. Schutte testified that T.G.'s mother, D.G., told him that T.G. told her about the assault that same day. D.G. told Dr. Schutte that she saw blood in T.G.'s underwear. Dr. Schutte said the fact that T.G. did not report the incident to anyone at the school until two days later is consistent with the behavior of young children who are sexually assaulted and threatened. He said with young victims, there is usually either delayed disclosure or no

disclosure at all. He also said that T.G.'s statement during the taped interview that the assault took place in the classroom could be explained by her fear of getting in trouble for going to the bathroom alone.

On cross-examination, Dr.Schutte testified that he was also provided with information regarding T.G.'s sister having been sexually assaulted twice, once at the age of six and once at the age of thirteen. The sister turned thirteen in 1988, the same year of the alleged assault involving T.G. He did not know exactly when the second assault on T.G.'s sister occurred.

Dr. Schutte said his opinion is that an older male student at the same school assaulted T.G. in the bathroom. He came to the conclusion that an assault occurred in the bathroom because that is what T.G. told her mother and T.G. reported having anxiety about using public restrooms during her evaluation by Dr. Schutte. Dr. Schutte also stated that he received a report that T.G. became fearful that her brother would sexually assault her after the alleged incident in the school bathroom. But he said that T.G. became increasingly fearful of all males, including her father.

When asked about his opinion as to the accuracy of T.G.'s memory in 1999 of what happened to her in 1988 when she was five years old, Dr.

Schutte stated that he thought there was a good degree of reliability due to the nature of the occurrence. Specifically, Dr. Schutte thought T.G.'s recollection in 1999 that the assault occurred in a bathroom rather than a classroom was probably very reliable. He could not say whether T.G.'s recall about the location of the incident was more reliable at the time of the event or eleven years later. Dr. Schutte's assumption was that T.G. always said the assault occurred in the bathroom, except during the police interview two days later when she said the assault occurred in the classroom. He reiterated his opinion that she said the incident occurred in the classroom at that time out of fear of getting in trouble for having gone to the bathroom alone, which she knew was against the rules. He recalled T.G. telling him that she went to the bathroom alone because the teacher denied her permission to go when she asked, but she knew what she did was against the teacher's rules.

The next witness was T.G.'s sister, Lynette. She stated that she had been the victim of a sexual assault several months after T.G. was assaulted in the school bathroom. Lynette testified that she never discussed her attack with T.G. because she did not want to traumatize T.G. She said that on the

afternoon of T.G.'s alleged assault in the school bathroom, T.G. approached Lynette at their home and indicated to her that she had pain in her genital area. Lynette instructed T.G. to tell their mother. She said her mother came into the bathroom with Lynette and T.G. and saw that T.G. was bleeding. T.G. told her mother that a boy at school had hurt her in the school bathroom. She said the boy slapped her and told her he would hurt her if she told anyone else. D.G. then called her aunt and prepared to take T.G. to the doctor. D.G. took T.G. to see Dr. Coleridge Franklin, their family physican.

On cross-examination, Lynette said she was sexually molested at age six by her mother's former boyfriend. She was also sexually molested at age thirteen by a stranger, who was never caught by the police.

D.G., T.G.'s mother, was the next witness. She said when she picked T.G. up from school on the day in question, T.G. was acting normally although she did not ask to go to the bathroom before they walked home as she usually did. When they got home, T.G. went into the bathroom and then called her mother to tell her she was in pain. She said T.G. was wearing pants and a shirt, not a dress. D.G. saw blood on T.G.'s underwear and pants. She said there was no one else in the bathroom with her and T.G., and

she could not recall if there were any other people in the house. D.G. said T.G. told her that a boy took her into the bathroom at school and stuck a pencil in her vagina, and threatened to hurt her and her friends if she told anyone. She said she immediately took T.G. to Dr. Franklin, without removing T.G.'s bloody clothes. She said she asked T.G. where her teacher was when this happened, and T.G. said she did not know.

D.G. said that Dr. Franklin examined T.G., but D.G. told him what happened because T.G. was crying. D.G.'s aunt accompanied them to Dr. Franklin's office. Dr. Franklin instructed D.G. to call the police. She called the police when she returned to her home and told them what happened. She said the incident occurred on a Friday, and she was at the school the following Tuesday with T.G. when the police informed the principal and the teacher of the incident. They met in the teachers' lounge, and the meeting was tape-recorded. T.G. was upset and crying during the interview, and did not answer all of the questions asked of her. D.G. said the principal and teacher kept saying that T.G. could not have been assaulted in the school bathroom because the kindergarten students were not allowed to go to the bathroom by themselves. She said the principal and teacher suggested that

T.G. could have been assaulted on the way home. D.G. said she was with T.G. at all times on her way home from school that day.

On cross-examination, D.G. said that T.G. never said she went to the bathroom on her own; she said the boy who assaulted her took her into the bathroom. T.G. always said the assault occurred in the bathroom, not in the classroom. After the tape made several days after the incident was played at trial and D.G. was heard saying that T.G. told her the assault occurred in the classroom and that a boy named Michael saw a boy named Ira or Irving commit the assault, D.G. stated that she did not remember saying that. She said she was mistaken when she said those things during the interview. She said she did not tell the police on the night of the incident what T.G. told her about the threats to T.G.'s friend made by the perpetrator because she was upset and forgot. D.G. also said that T.G. never told her that she reported the incident to her teacher before the day of the taped interview with police.

D.G. said she sometimes went to Craig Elementary during recess time. Her deposition testimony was that she had not been at the school at recess time. At trial, D.G. said her deposition testimony on this issue was mistaken. She said she had gone to the school during recess a few times and

she always saw two or three teachers on duty during recess. She said her son did not move out of the house after the incident, and that T.G. never told her she was afraid to visit her father because of fear that he might do to her what the boy at school had done.

On redirect examination, D.G. said she did not mention during the police interview what T.G. told her about the boy threatening her friend if she told anyone because T.G. asked her not to mention that threat.

Janet Jackson was the next witness. She was a kindergarten teacher at Craig Elementary in 1988, but she was not T.G.'s teacher. She said Craig Elementary did not have any security officers that year. She said all the doors from the inside hallways to the bathrooms were locked during lunch and recess; only the doors from the bathroom leading outdoors are open during those times. She corroborated the testimony of Ms. Loma-Linda Boutney regarding the procedures used for kindergarten students going to the bathroom during recess.

The next witness was Sina Jones, D.G.'s aunt. She said on March 28, 1988, T.G.'s brother called her and said D.G. wanted Jones to meet her at Dr. Franklin's office because something had happened to T.G. When she

arrived at Dr. Franklin's office, D.G. told her that a boy took T.G. into the school bathroom and inserted a pencil in her vagina. D.G. also showed Jones T.G.'s bloody underwear.

T.G.'s brother, Dennis, testified that on March 28, 1988, he got home from school and his mother told him that something happened to T.G., but she would not say what. She told Dennis not to leave the house. He said his two other sisters, Lynette and Sheila, were also at home. His mother told him what happened to T.G. when she and T.G. returned home after seeing Dr. Franklin. Dennis testified that he did not move out of the house after the 1988 incident involving his sister, T.G., but he did stay at his aunt's house frequently.

The next witness was Leonard Belton, the principal of Craig Elementary in 1988. He testified that he first learned of the alleged assault of T.G. when NOPD Officer Sherman Defillo called him and requested an interview with him, T.G.'s teacher, T.G. and her mother. Officer Defillo told Belton that the alleged incident occurred in the classroom during school hours. Belton questioned Ms. Boutney, T.G.'s teacher, and was told that she did not know how this could have happened because she was with the

children in her class at all times. He said there were no teachers' aides in the kindergarten classes or security officers assigned to Craig Elementary in 1988.

Belton said that the School Board owed a duty to all students to provide constant supervision. He said he asked the others present for the police interview if anyone objected to the session being recorded, and no one objected. He remembered Ms. Boutney saying that she stayed with her students at all times even when they went to the bathroom. He did not ask Boutney any questions during the interview about taking the children to the bathroom because he was under the impression that T.G. reported to her mother that the incident occurred in the classroom. He said school policy was that no kindergarten student was ever to go to the bathroom alone.

Belton was presented with a list of 911 calls placed from Craig Elementary from February 1985 through March 1988. On March 4, 1988, someone at the school made a 911 call regarding one of the students carrying a concealed weapon. The records showed that twenty-three 911 calls were placed from the school during that three-year period. The 911 records refreshed Belton's memory as to some of these incidents, but he could not

recall most of them. Many of the incidents occurred after school hours. He said that the School Board had security officers that visited each school approximately once a week to see how things were going. When an incident occurred, someone at the school either called the police or the security force that went from school to school. He said the school principals met with the School Board superintendent at least once a month to discuss many topics, including safety issues.

Belton testified that on his orders, the custodians locked the interior bathroom doors during the lunch hour. He took this action out of concerns about unsupervised students in the hallways. The purpose of this rule was to keep the students outside where they could be supervised. He said the custodians checked the interior doors leading to the bathroom daily at the lunch hour to make sure they were locked. The custodians would also stand outside the bathroom doors leading to the schoolyard handing out toilet paper to the students at lunch period.

Belton said a child named Ira or Irving was named in the interview as the person responsible for the molestation. Belton observed this boy in his classroom, but he never talked to the boy's parents about the allegations

because he had no real evidence that the alleged incident occurred on school grounds.

On cross-examination, Belton said that no other students are allowed on the schoolyard with the kindergarten students during their recess and lunch periods. He said on a typical day, two teachers and possibly one or two parent volunteers supervise the kindergarten recess. He said he also assisted the teachers with supervision of the kindergarten students at recess. Belton said Craig Elementary had six custodians in March 1988, and one of those would usually be stationed outside the girls' bathroom. He said the interior bathroom doors could only be locked with a key.

The next witness was Earl Kilbride, the Director of Management Information Sources for the City of New Orleans. One of his department's duties is to maintain information regarding 911 emergency calls collected by the New Orleans Police Department. He brought to trial records of 911 calls placed from Craig Elementary and High Schools from January 1, 1985 through December 31, 1989. He detailed the complaints made to police during that period. Kilbride stated that there was no report of an incident on March 28, 1988. On March 4, 1988, there was an incident reported at Craig

Elementary of a student bringing a BB gun to school.

Dianne Markel testified as an expert in the field of social work and psychotherapy. She stated that she provided individual psychotherapy to T.G. beginning on June 21, 1999. She had five therapy sessions with T.G. At that time, T.G. was seventeen years old, and related a history of an incident when she was five years old in which she was accosted when she entered the boys' bathroom at school by mistake and had a pencil shoved in her vagina. She also related to Markel that the perpetrator told her he would hurt her and her friend if she told anyone. T.G. said this attack occurred during school hours. Markel related the trauma T.G. suffered during that incident to symptoms of anger, anxiety and distrust of males that she was experiencing when she first began therapy with Markel eleven years after the attack.

T.G. told Markel that after the incident, she was afraid of men in general. She reported that her family asked her brother to stay with an aunt for two weeks until T.G. was "able to get her balance back." Markel said she saw no indication that T.G. was abused by anyone else. When asked specifically about male family members and other males in her house, T.G.

told Markel that none of them had ever hurt her.

After reviewing the tape-recorded meeting at the school held two days after the alleged incident, Markel said the presence of several adult figures in the room would have been intimidating to a five year old, and she felt that being questioned persistently by the police officer was a horrible experience for T.G. and could account for her lack of response during the interview. Markel said that the comments by the principal and teacher expressing doubt as to whether the incident occurred as described by T.G.'s mother would also create great anxiety for a child. She said that if the person who assaulted T.G. also threatened to hurt her if she told, that would explain her initially not answering questions, and then saying that her friend, Tiffany, hurt her by cutting her with glass and pushing her on a chair. Markel said when young children are threatened if they tell the truth, they often will lie. However, Markel stated that T.G. was always consistent in her story that she got hurt and that it happened at school. Her opinion is that T.G.'s story told to her eleven years after the incident is reliable.

On cross-examination, Markel said she believed that T.G. might have been mistaken when she told her the incident happened in the boys'

bathroom. But she said she believed it could have happened in either the girls' or the boys' bathroom. T.G. told Markel that she asked the teacher several times if she could go to the bathroom and the teacher ignored her requests, so she went without permission. T.G. told her the attack occurred during recess. She said T.G. consistently said the incident occurred in a bathroom.

The next witness was A.C. Boyd, who was the Director of Security for the School Board in 1988. He stated that his duty was to safeguard property, students, staff and teachers in the school district and its facilities twenty-four hours a day, seven days a week. He said his department essentially supplemented the police department. His opinion was that his department needed more manpower than it had in 1988 to deal with crime and crime prevention in the schools. He said school principals were obligated to notify the security department of any incidents of crime at their schools. He did not recall ever getting any report of a sexual molestation occurring at Craig Elementary on March 28, 1988. Most of his testimony involved crime in the Orleans Parish School District in general.

T.G. was the plaintiff's last witness. She was seventeen at the time of

trial. She testified that when she was in kindergarten, she went to the bathroom and saw a boy. He pushed her, brought her into a stall and slapped her. She tried to scream but he put his hand over her mouth. She said she assumed it was the boys' bathroom because of the fact that there was a boy in it. She said the boy took off her pants and stuck a pencil in her vagina. She did not see that the object was a pencil until he pulled it out of her. The boy told her not to tell anyone or he would hurt her and her friend. She said that before she went to the bathroom, she was in the schoolyard at recess. She asked a teacher two or three times if she could go to the bathroom, but the teacher kept telling her to wait and continued to talk to another teacher.

T.G. said that the day of the incident was the only time she had gone to the bathroom at school by herself. She said she went through the cafeteria and into the bathroom through an interior door, which was not locked. She said there were no custodians outside of the bathroom she entered. T.G. said after she was attacked, she put her pants back on and went outside. She did not tell anyone what happened because she was scared and thought it was her fault for having "snuck off" to the bathroom. She said she believed the boy's threats.

T.G. said she did not tell her mother what happened when her mother picked her up from school. When she got home, she was in the bathroom with her sister and told her sister she was having trouble urinating. Her sister told her to go get their mother. She said her mother saw the blood on her clothes and started crying. Her mother asked what happened. She did not tell her at first, but told her later that day. She asked her mother not to tell anyone. She said her mother and sister were the only people in the house when she got home from school.

Her mother brought T.G. to Dr. Franklin's office that afternoon. She said she felt scared and sad during the tape-recorded police interview a couple of days after the incident. She said she did not say what happened to her because the boy who assaulted her told her not to tell.

On cross-examination, defense counsel asked T.G. about her deposition testimony that was given two and one-half years after the incident. She said when she said there were no teachers in the yard at recess, she was not answering honestly. She testified at trial that there were teachers in the yard, and that her memory is better now than it was at the time of the deposition or at the time of the alleged incident. She said she

went into the bathroom voluntarily, and that she knew there was a rule that kindergarteners were not allowed to go to the bathroom alone.

T.G. admitted that she said at one time that her friend Tiffany cut her with a piece of glass, but at trial she said that statement was not true. She said she did not remember ever talking to a police officer about the incident. She said the boy who assaulted her specifically threatened her friend Tiffany. She said she was trying to protect Tiffany even though she said that Tiffany cut her with a piece of glass. T.G. said during cross-examination that the day of the incident was not the only time she went to the bathroom alone when she was in kindergarten. She said that on the day of the incident, she did not tell her teacher what happened.

The first witness for the defense was Marylynn Turbington, who testified that she is currently a social worker employed by the New Orleans Public Schools. In September 1990, she was employed at the Children's Bureau of New Orleans. She wrote a letter to defense counsel that month in response to a request for medical records pertaining to the incident involving T.G. In the letter, she said that D.G. had requested counseling for T.G. after T.G. reported that a boy on the school playground at Craig Elementary took

her in the restroom and inserted a pencil in her vagina. The Children's Bureau assigned a social worker to provide counseling to T.G., and scheduled three appointments. D.G. did not show up for any of these appointments with T.G. The case was closed shortly after the third missed appointment.

Officer Sherman Defillo of the NOPD testified that he was a detective assigned to the juvenile division in March 1988. He investigated crimes involving juveniles, including crimes of sexual molestation of juveniles. He prepared the police report of the incident involving T.G. The report was introduced into evidence.

The police report prepared on the evening of March 28, 1988 stated that T.G. told Detective Defillo that she fell asleep in the classroom and the teacher left her in the room alone, except for a boy named Irvin or Ira who came up to her and pushed a pencil up into her vagina. T.G. told Detective Defillo that when the teacher returned to the classroom, T.G. told her what happened but the teacher just took the pencil and told T.G. she would "whip" Irvin or Ira. After interviewing T.G.'s teacher, the other kindergarten teacher and the school principal, who all disputed details of

T.G.'s story, Detective Defillo decided to interview T.G. again.

In the second interview, T.G. offered a completely different version of the events of March 28, 1988. She said that a girl named Tiffany pushed her down on a chair in the room and that is what caused T.G. to bleed. She said this happened in the classroom, but that her teacher said it did not. T.G. then offered a third version in which she told Detective Defillo that the assault occurred in the boys' bathroom by a student named John and that he put a pencil in her vagina as she lay on the floor. The report stated that Detective Defillo could not come to a conclusion as to what happened, other than that T.G. had blood on her underwear.

After trial, the trial court rendered judgment in favor of the School Board, dismissing D.G.'s claims against it. The trial court rendered reasons for judgment, finding no causal connection between the incident and the School Board security policies in place at Craig Elementary in March 1988. The court found that the School Board was not liable to D.G. because the evidence established that there was reasonable and adequate supervision of the kindergarten classes at Craig Elementary at the time of the alleged incident.

On appeal, D.G. presents seven assignments of error. In her first assignment, she argues that the trial court erred in failing to find that the School Board had a duty to have a written policy setting forth security measures to be followed to ensure the safety of students. She claims that this Court's decision in Doe v. City of New Orleans, 577 So.2d 1024 (La.App. 4 Cir. 1991), requires such a written policy. We disagree.

In the Doe case, which involved a nine year old child who was assaulted in a school bathroom after her teacher allowed her to go to the bathroom by herself, this Court found no error in the trial court's apparent conclusion that the School Board had a duty to formulate and properly promulgate an official policy against allowing young children to leave the classroom alone and use the bathroom during school hours. The teacher in Doe testified at trial that she never allowed her students to go to the bathroom alone, but in her deposition testimony, she stated that school policy allowed the children to go to the bathroom alone and that she allowed this from time to time. The child testified that it was normal for the teacher to allow her students to go to the bathroom alone. This Court found that the School Board's breach of its duty to establish a policy regarding young

children going to the bathroom alone was a legal cause of the child's injuries, and that had such a policy been in existence, "the teacher would not have been free to employ what amounted to an inconsistent, haphazard policy of her own and there would have been something more reliable to guide the teacher than the vague, unwritten policy adopted by the principal in this case." Doe v. City of New Orleans, supra at 1025.

In the instant case, there was no evidence that the policy regarding young children not being allowed to go to the bathroom alone was inconsistent or haphazard. T.G.'s teacher, the other kindergarten teacher, the principal and even T.G. herself all testified unequivocally that kindergarten students were not allowed to go to the bathroom alone. In her testimony, T.G. stated that she "snuck off" to the bathroom, and that she knew there was a rule that kindergartners were not allowed to go to the bathroom by themselves. She also stated that she gave a false version of the incident because she was afraid of getting in trouble for breaking that rule.

Although there was no written School Board policy regarding kindergarten students not being allowed to go to the bathroom alone, the policy at Craig Elementary on this issue was not vague or ambiguous. The

evidence at trial was uncontroverted that the rule against kindergarten students going to the bathroom alone was known to the students and enforced by the faculty. Accordingly, we find the case of Doe v. City of New Orleans, supra, to be distinguishable from the instant case.

A school board is not the insurer of the safety of school children; however, liability will be imposed upon a school board where there is a causal connection between a lack of supervision and an incident that could have been avoided by the exercise of a reasonable degree of supervision. Vaughn v. Orleans Parish School Board, 2001-0556, p. 2 (La.App. 4 Cir. 11/28/01), 802 So.2d 967, 969. School board employees have a duty to provide reasonable supervision commensurate with the age of the children and the attendant circumstances. Id.

We do not find that the absence of a written policy constituted a breach of the School Board's duty in this case, given the overwhelming evidence that there was an unwritten policy regarding kindergarten students not going to the bathroom alone that was clearly understood by faculty and students alike. Furthermore, as will be more fully discussed in the next assignment of error, the faculty and staff at Craig Elementary provided

reasonable supervision for the kindergarten students. The evidence in this case did not establish that the lack of a written School Board policy was a legal cause of T.G.'s injuries.

D.G. next argues that the trial court erred in not finding the School Board negligent in this case. An appellate court may not set aside a trial court's finding of fact unless it is clearly wrong. Mistich v. Volkswagen of Germany, Inc., 95-0939 (La. 1/29/96), 666 So.2d 1073. The Mistich court held that if a trier of fact's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even if convinced that if it had been sitting as trier of fact, it would have weighed the evidence differently. Id. at p. 5, 666 So.2d at 1077, citing Stobart v. State, Through DOTD, 617 So.2d 880 (La.1993); Housley v. Cerise, 579 So.2d 973 (La.1991); Sistler v. Liberty Mutual Ins. Co., 558 So.2d 1106 (La.1990).

In this assignment of error, D.G. suggests that the trial court permitted evidence regarding T.G.'s own negligence in this incident. Neither the trial transcript nor the trial court's reasons for judgment support this allegation. T.G.'s fault is not an issue in this case, and the trial court did not say that she

was negligent.

In its reasons for judgment, the trial court noted that the record is replete with testimony reflecting reasonable, proper, detailed and adequate supervision of the kindergarten classes at Craig Elementary. He listed many of the steps taken by the school to ensure the safety of its kindergarten students, including: 1) having a lunch period exclusively for kindergarten students, 2) having teachers take all kindergarten students to the bathroom four times a day, including when they left the cafeteria after lunch, 3) having six custodians in the area with at least one in the cafeteria, two in the hallways, and two in the school yard with one of those handing out toilet paper outside the bathroom, 4) having at least two teachers supervise the children at lunch and during the school yard recess, 5) having a policy known to the kindergarten students that they were never to go to the bathroom alone, 6) locking inside doors during the luncheon recess and using locks that could only be opened with a key, 7) always having several adults conducting supervision, sometimes including the principal, and 8) having a policy known to the students that anyone caught in the hallway during a time that being in the hallway was prohibited would be disciplined.

The court stated that the reports of 911 calls made from the school did not establish that the school failed in its duty to supervise its students because the majority of those calls did not occur during school hours and that the number of calls during school hours over the four-year period for which the records were introduced was negligible.

The testimony established that the principal and teachers at Craig Elementary, all employees of the School Board, adhered to their duty to properly supervise and safeguard the students in their care. The trial court found these witnesses to be credible, and its factual findings based on those credibility determinations were reasonable. The trial court did not err in finding that the School Board was not negligent.

In her next assignment of error, D.G. argues that the trial court erred in its credibility evaluations of her witnesses. Where the factfinder's conclusions are based on determinations regarding credibility of the witnesses, the manifest error standard demands great deference to the trier of fact, because only the trier of fact can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Rosell v. ESCO, 549 So.2d 840 (La. 1989). The finder

of fact has the discretion to accept or reject the testimony of any witness. Arceneaux v. Wallis, 94-2016 (La.App. 4 Cir. 4/26/95), 654 So.2d 1117. The weight to be given expert testimony is dependent upon the facts on which it is based, as well as the professional qualifications and experience of the expert. Barre v. Bonds, 99-1806, p. 21 (La.App. 4 Cir. 5/10/00), 763 So.2d 60, 72.

In reasons for judgment, the trial court noted the inconsistencies in the versions of the incident related by T.G. to police and Dr. Franklin shortly after the incident and at trial eleven years later. The court stated that Dr. Franklin failed to record anything about the location of the incident in his records in 1988, yet claimed to vividly remember this detail when he was deposed eleven years later. The trial court stated that it was particularly unimpressed with the testimony of Dr. Cornelius Schutte and Ms. Dianne Markel who first saw T.G. eleven years after the alleged incident.

The trial court was in the best position to determine the credibility of the witnesses. We do not find his determinations to be manifestly erroneous. Furthermore, even if the trial court had found that T.G. was assaulted in the school bathroom as she testified to at trial, the evidence does not show that

the School Board was negligent.

In the next two assignments of error, D.G. argues that the trial court erred in failing to allow her to cross-examine Dr. Everett Williams about his statements in a 1992 newspaper article regarding the School Board's performance, and in failing to allow certain questions to be asked of Dr. Williams, Mr. Belton, and Ms. Boutney that were proffered by counsel for D.G. During Dr. Williams' testimony, counsel for D.G. repeatedly asked questions regarding crime in New Orleans public schools in general during Dr. Williams' tenure as superintendent. The trial court sustained defense counsel's objections to these questions, ruling that the questions were overly broad and not relevant to the issue of crime at Craig Elementary at the time of the alleged incident involving T.G. Similarly, when counsel for D.G. posed questions to Williams, Belton and Boutney regarding general issues of school violence, the trial court sustained defense counsel's objections to the relevance of such evidence. We find no error in those rulings.

D.G. next argues that the trial court erred in denying her motion to recuse the court from this case. D.G.'s counsel filed this motion on the grounds of bias and prejudice of the trial court. D.G. also argues that a

second judge to whom the motion to recuse was referred erred in denying the motion.

La. C.C.P. art. 151 states, in pertinent part:

> B. A judge of any court, trial or appellate, may be recused when he:
>
> (5) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings.

A party desiring to recuse a judge of a district court must file a written motion assigning the ground for recusation; if the motion sets forth a valid ground for recusation, the judge shall either recuse himself, or refer the motion to another judge for hearing. La.C.C.P. art. 154.

In this case, counsel for D.G. made an oral motion to recuse the trial court, which was denied. He then filed a written motion to recuse, alleging that the trial court had bias, prejudice or interest in the case, citing La. C.C.P. art. 151(B)(5). The trial transcript indicates that the trial court referred the motion to recuse to Judge Gerald Federoff for hearing, and the parties have indicated that Judge Federoff denied the motion to recuse. The record in this case includes the written motion to recuse, but it does not include Judge Federoff's ruling or a transcript of the recusal hearing. Without Judge

Federoff's ruling in the record, the only ruling that we can review on the recusal issue is the trial court's oral ruling denying the motion.

The party seeking to recuse cannot merely allege lack of impartiality; he must present some factual basis. Tamporello v. State Farm Mutual Automobile Insurance Company, 95-458 (La.App. 5 Cir. 11/15/95), 665 So.2d 503. Bias, prejudice, or personal interest must be of a substantial nature and based on more than conclusory allegations. Id. Counsel for D.G. argues that the trial court showed clear bias and prejudice toward him personally and toward his client's case.

He cites several exchanges between him and the trial court, which he cites as evidence of the trial court's bias and prejudice. When viewed separately, some of the comments directed to counsel for D.G. by the trial court seem antagonistic and discourteous. However, our review of the record in its entirety shows that counsel for D.G. had a rather combative courtroom style, and he often continued to pursue lines of questioning after objections to those had been sustained. While some of the trial court's comments to counsel for D.G. seem unnecessarily harsh, they appear to be rooted more in aggravation with some of counsel's trial tactics rather than a bias or prejudice toward or against the parties or their attorneys. Overall, the trial court's rulings on objections were sound and the trial was fairly and

impartially conducted. This argument is without merit.

In the final assignment of error, D.G. argues that the trial court erred in denying her motion to consolidate this lawsuit with her lawsuit against T.G.'s teacher and principal, Loma-Linda Boutney and Leonard Belton, and their insurers, after initially granting the motion.

Plaintiff filed suit against the School Board on March 3, 1989. At a status conference on May 4, 1999, the trial court set this matter for trial on September 2, 1999. On August 6, 1999, plaintiff filed a second amending and supplemental petition seeking to add Boutney and Belton and their insurers as defendants. The trial court denied leave to file the second amending and supplemental petition, stating that it was too late to amend because the trial was set for September 2, 1999. On August 31, 1999, the trial court granted plaintiff's counsel's motion to continue the trial, and reset the matter for October 5, 1999.

On September 14, 1999, plaintiff filed a separate lawsuit arising out of this same incident, but naming Boutney, Belton and their insurers as defendants. On September 24, 1999, plaintiff filed a motion to consolidate the two cases. A hearing on the motion to consolidate was held on September 28, 1999. Counsel for the School Board did not oppose the motion to consolidate, and the trial court granted the motion on that date.

The trial court refused to grant plaintiff's counsel's request to continue the trial set for October 5, 1999.

By letter dated September 30, 1999, counsel for Insurance Company of North America, one of the insurers named in the second lawsuit filed on September 14, 1999, objected to the consolidation of the two cases. He stated that the insurer he represents was served with the lawsuit on September 24, 1999, and he was first notified of the lawsuit on September 29, 1999. He argued that with trial set for October 5, 1999, he did not have adequate time to prepare to defend his client in this matter. On October 1, 1999, the trial court ruled that the two lawsuits would not be consolidated, and denied another request for continuance from plaintiff's counsel.

La. C.C.P. art. 1561 states:

> A. When two or more separate actions are pending in the same court, the section or division of the court in which the first filed action is pending may order consolidation of the actions for trial after a contradictory hearing, and upon a finding that common issues of fact and law predominate.
>
> B. Consolidation shall not be ordered if it would do any of the following:
>
> (1) Cause jury confusion.
>
> (2) Prevent a fair and impartial trial.
>
> (3) Give one party an undue advantage.

(4) Prejudice the rights of any party.

Given the fact that the trial court reversed his earlier ruling on the motion to consolidate after receiving the letter from Insurance Company of North America, we can assume that the court denied the motion to consolidate because consolidation would unfairly prejudice the rights of this new party that was added only a couple of weeks before trial. We find no error in that ruling. Furthermore, the trial court's denial of the motion for continuance filed by counsel for D.G. after learning of the newly named insurer's objection to the consolidation was well within the trial court's discretion, especially due to the fact that more than ten years had elapsed since the filing of the original lawsuit in this matter.

Accordingly, for the reasons stated above, we affirm the trial court's judgment.

AFFIRMED