To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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STEPHAN HEBERLING, as Father and Natural Guardian of HEIDI HEBERLING, an Infant Under the Age of Sixteen, and STEPHAN HEBERLING, Individually,

Plaintiffs,

-against -

BREWSTER CENTRAL SCHOOL DISTRICT and HENRY WELLS MIDDLE SCHOOL,

Defendants.

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DECISION & ORDER

Index No. 1337-2008

Sequence No. 5

LUBELL, J.

The following papers were considered in connection with this motion by defendants for an Order pursuant to CPLR §3212 granting the defendant, Brewster Central School District s/h/a Brewster Central School District and Henry Wells Middle School, summary judgment and dismissal of plaintiffs' complaint, in its entirety, with prejudice, together with such other and further relief as to this Court mays seem just and proper, together with the costs and disbursements of this action:

PAPERS	**NUMBERED**
Motion/Affirmation/Exhibits A-P	1
Affirmation in Opposition/Exhibits A-C	2
Affirmation in Reply and Support	3

Plaintiff, Stephan Heberling, as Father and Natural Guardian of Heidi Heberling ("Heidi"), brings this action against defendants Brewster Central School District (the "District") and Henry Wells Middle School (the "Middle School"; sometimes collectively referred to as the "District") on his own behalf and on behalf of Heidi in connection with a sexual assault upon Heidi by a thirty-one year old parolee, Corey Stewart ("Stewart"). Stewart has since pleaded guilty in New York State to sexual abuse in the first degree in connection with the incident and is an indeterminate period of

incarceration of 2½ to five years. Stewart was also convicted of related crimes in the State of Connecticut.

Plaintiffs contend that the District breached its duty of care to Heidi and was negligent in failing to see to her safe entry into the Middle School upon her departure from her school bus on the morning of March 28, 2007. Plaintiffs charge the District with lax and chaotic security procedures about which they should have been aware due to the earlier actions of two of Heidi's classmates who, just several months earlier and with the assistance of a male acquaintance, had left the school premises prior to the commencement of the school day. Plaintiffs also contend that defendants were given actual notice of the possibility that an "adult male predator" was pursuing Heidi and that, in response, the Principal and Assistance Principal of the Middle School agreed to "keep an eye on Heidi and to provide a monitor for her added security and supervision."

Heidi's record at the Henry Wells Middle School shows uniformly poor grades, disruptive behavior and poor attendance including tardiness and multiple excused and unexcused absences. She was disciplined with increased frequency over the years, including detention and suspensions.

The material undisputed facts in this case establish that Heidi was not abducted from school grounds. Rather, she voluntarily left school grounds with Stewart with whom she became acquainted over a period of several months through multiple telephone calls after having initially been introduced to him through a telephone chat line. There is no suggestion that Heidi was aware of Stewart's true background and/or actual age. In fact, Stewart used an alias when communicating with Heidi.

On the day in question, Heidi agreed to have Stewart follow her school bus in his van and then pick her up from the Middle School parent pick-up/drop-off area after she disembarked from her school bus. In order to accomplish this, Heidi would have to walk from the bus stop towards the parent pick-up/drop-off area, rather than proceeding directly into the nearest entrance of the school. And that is what she did. Unknown to Heidi, however, the District was immediately notified by the friend with whom she made that walk.

In spite of the District's efforts and those of the police and her parents (who were promptly notified of the incident), Heidi spent the entire school day with Stewart who, in the end, sexually abused her.

As earlier indicated, Stewart has been called upon to answer for his actions, at least criminally. The question now before the Court is whether the District can be held civilly liable. The question is answered in the negative.

Here, there is no question that in December 2006 there was direct contact between Mr. Heberling and District officials about Heidi's academic performance, conduct in school and, most pertinent to this action, Mr. Heberling's concern about the many telephone calls that Heidi had been receiving from various strange males, some of whom he believed to be adults. Nonetheless, the Court does not find from the papers currently before it that liability can be imputed to the school based upon the substance of that conversation and well established precedent, or upon any other theory advanced.

Although Mr. Heberling testified during his deposition that during his unannounced December 2006 visit to the Middle School, he expressed concern to Dr. JoAnne Januzzi, the Middle School Principal, and Mr. Conroy, the Assistant Principal, that Heidi might be targeted by a "predator", he later admits that he is not sure if he actually used that word. Either way, Mr. Heberling testified that he asked Dr. Januzzi and Mr. Conroy for their advise on how to handle the situation.

Mr. Heberling testified that, in response, Dr. Januzzi and Mr. Conroy volunteered that they would keep an “eye on her” and would assign a monitor to Heidi which Mr. Heberling assumed "was just somebody that would walk her around the school." Admittedly, no specifications were given to Mr. Heberling regarding the duties and obligation of a monitor (also referred to as an "aide"), nor did he ask. Either way, there is no indication in the record that the monitor was supposed to escort Heidi from the school bus into the school building as she arrived each day.

While Mr. Heberling testified that the monitor was assigned shortly before the incident, he does not recall if one had been assigned after the incident.

Notwithstanding parental concern, no prior contact had been made to any law enforcement officials. In addition, neither Mr. Heberling nor Mrs. Heberling ever complained to the District about building security, even though they were aware of an earlier incident involving two students who had voluntarily left the building during school session. Ms. Heberling testified that she neither made a request for any type of heightened school security nor did anyone from the District ever tell her that Heidi would be provided with heightened security during the period prior to the incident. Ms. Heberling could not recall whether an aide was

assigned pre- or post-incident.

Contrary to Mr. Heberling's deposition testimony, Principal Januzzi testified that an aide, who was assigned to walk Heidi from class to class, had not been assigned to Heidi until after the incident. The Assistant Principal's deposition testimony is the same.

Notwithstanding any heightened parental concern, during the week in which the incident took place, Heidi was allowed to return to an empty home after school. Mr. Heberling was not available since he was out-of-town on business and Mrs. Heberling was working her regular shift which would mean a return home anywhere between 6:00 P.M. and 7:00 P.M., depending on traffic.

The Court finds that the District has come forward in the first instance with a sufficient showing establishing entitlement to judgment in its favor as a matter of law and, in response, plaintiffs have failed to raise any material triable issues of fact regarding same.

Even upon accepting Mr. and Mrs. Heberling's deposition testimony at face value and upon bestowing thereon every reasonable inference, as it must, the Court does not find that plaintiffs have come forward with sufficient proof in admissible form raising any triable issues of material fact. More particularly, even assuming that the School District had promised to keep an eye on Heidi and/or had assigned a monitor or aide to Heidi prior to the incident, such does not warrant the denial of the District's motion upon an asserted special duty of care basis or any other theory herein advanced.

"A school's duty to its students is co-extensive with the school's physical custody and control over them" (Morning v Riverhead Cent. School Dist., 27 AD3d 435, 436 [2d Dept 2006] citing Pratt v Robinson, 39 NY2d 554, 560 [1976]). "[A] school district is [not] responsible for an injury to a student which occurs off school grounds except where such student was involved in a school sponsored or supervised off-campus activity" (Palella by Palella v Ulmer, 136 Misc 2d 34, 36-37 [Sup Ct 1987] citing Pratt v Robinson, supra [no liability for young child struck by vehicle while walking from bus stop to her home]; Bushnell v Lee, Sup Ct, Albany County, Dec. 17, 1985, Index No. 8982-84, Hughes, J. [no liability when student seriously injured while passenger in car operated by fellow student off campus in violation of school bus policy]).

Where, as here, a student voluntarily absents himself or herself from the custody and control of school grounds, the school owes no duty to supervise the activities of the students (Palella by Palella v Ulmer, supra at 37).

Upon ruling as such, the Court in Palella by Palella v Ulmer, supra, stated at page 37:

> Nothing short of a prison-like atmosphere with monitors at every exit could have prevented the infant from leaving the school grounds on the day in question. This court is not prepared to mandate that a school district must employ security measures to insure that its students comply with reasonable attendance policies. Once a student is beyond its lawful control the School District owes no legal duty to supervise the activities of a student.

As more recently stated, "[w]here a student removes herself from the school grounds she may no longer look to the school to protect her" (Chalen v Glen Cove School Dist., 29 AD3d 508, 509 [2d Dept 2006] citing Youngs v Bay Shore Union Free School Dist., 258 AD2d 580 [1999]; Wenger v Goodell, 220 AD2d 937 [1995]; Palella v Ulmer, 136 Misc 2d 34 [1987]; see also, Rowe v Board of Educ. of City of N.Y., 12 AD3d 494 [2004]; Winter v Board of Educ. of City of N.Y., 270 AD2d 343 [2000]).

This Court sees no legal distinction where, as here, the voluntary departure takes place upon disembarking from a school bus. In fact, such a voluntary departure would appear even less egregious than a situation where a student leaves the school from within and during class session.

Furthermore,

> [a]lthough a school district breaches a duty of care when it "releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating" (Ernest v Red Cr. Cent. School Dist., 93 NY2d 664, 672 [1999]; see Bell v Board of Educ. of City of N.Y., 90 NY2d 944, 946 [1997]), to impose liability on the school, it must have

> sufficiently specific knowledge of the particular danger (see Mirand v City of New York, supra at 49; Nocilla v Middle Country Cent. School Dist., 302 AD2d 573 [2003]) such that the criminal act could have been reasonably anticipated (see Nossoughi v Ramapo Cent. School Dist., 287 AD2d 444 [2001]; Bretstein v East Midwood Jewish Ctr., 265 AD2d 442 [1999]).

(Chalen v Glen Cove School Dist., 29 AD3d 508, 509-10 [2d Dept 2006]). Notwithstanding any comments by or concerns raised by Mr. Heberling to the District, the Court does not find that any such comments or concerns rise to such a level that it was reasonably foreseeable that Heidi would voluntarily absent herself from school in the manner in which she did, meet up with the likes of Stewart and be harmed as she was.

Upon review of the record currently before the Court and upon full and fair consideration of plaintiffs' submission and upon giving them every benefit of the doubt, the Court cannot conclude that the incident should reasonably have been anticipated. As such, the District cannot be said to have breached its duty of supervision over Heidi (see Chalen v Glen Cove School Dist., 29 AD3d 508, 510 [2d Dept 2006] citing Morning v Riverhead Cent. School Dist., supra at 437; Jimenez v City of New York, 292 AD2d 346 [2002]; Marshall v Cortland Enlarged City School Dist., 265 AD2d 782 [1999]).

The Court further finds that the District is entitled to summary judgment dismissing the cause of action based on inadequate security. In this regard, plaintiffs have failed to demonstrate that the District assumed a "special duty" to protect Heidi from the harm to which she was exposed.

> It is well settled that a school's provision of security against physical attacks by third parties is a governmental function involving policymaking regarding the nature of the risk presented and no liability arises from the performance of such a function absent a special duty of protection (Bonner v City of New York, 73 NY2d 930, 932 [1989]; see Bain v New York City Bd. of Educ., 268 AD2d 451 [2000]).

(Chalen v Glen Cove School Dist., 29 AD3d 508, 510 [2d Dept 2006]).

There is no evidence in the record before this Court that would suggest that either the District's promise to "keep an eye on" Heidi and/or provide her with an aide or monitor constituted an affirmative promise of protection over and above that which is owed by the District to its students as they disembarked from the bus and made their way into the school (see Wenger v Goodell, 288 AD2d 815, 816-817 [2001], lv denied 98 NY2d 605 [2002]; see generally Woodworth, 34 AD3d at 1193). In any event, plaintiffs have failed to come forward with proof in admissible form establishing that they relied an any such representation. In fact, the circumstances under which Heidi was allowed to return home that week (unattended and vacant) would suggest otherwise.

Finally, the Court finds that Stewart's criminal conduct is independent of and far removed from the District's alleged misconduct in seeing to Heidi's safe entry into the school building, thereby breaking any causal nexus linking the District to Stewart's criminal act (see Davis v Marzo, 55 AD3d 1404, 1405 [4th Dept 2008] citing Derdiarian v Felix Contr. Corp., 51 NY2d 308, 315 [1980], rearg denied 52 NY2d 784 [1980]; see Briggs v Rhinebeck Cent. School Dist., 2 AD3d 383 [2003], lv denied 2 NY3d 706 [2004]).

However unfortunate the underlying incident, given the clear precedent in this area of law and there being no merit to any of the arguments advanced by plaintiffs in opposition to the District's motion, it is hereby

ORDERED, that summary judgment be and is hereby granted in favor of the defendants and against plaintiffs.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
March 29, 2012

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

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