IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| Nicole Morales, as next friend of Nalasia Townes, | ) | |
| Plaintiff, | ) | |
| v. | ) | C.A. No. N12C-03-176 JRJ |
| Family Foundations Academy, Inc. School; Monika Sheinblum; And Dr. Tennell Brewington, | ) | |
| Defendants. | ) | |

Date Submitted: March 8, 2013
Date Decided: June 11, 2013

**OPINION**

*Upon Defendants' Motion to Dismiss Plaintiff's Amended Complaint*: **GRANTED**

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**Jurden, J.**

## I. Introduction

Before the Court is Defendants' Motion to Dismiss Plaintiff's Amended Complaint for Failure to State a Claim Upon Which Relief Can be Granted. Defendants argue that Plaintiff has failed to plead facts sufficient to overcome the immunity provided by the Delaware State Tort Claims Act ("DSTCA"), 10 *Del. C.* § 4001.[1] For the reasons set forth below, Defendants' Motion to Dismiss Plaintiff's Amended Complaint is **GRANTED**.

## II. Background

On June 3, 2010, Nalasia Townes was a fourth grader at Family Foundations Academy, Inc. School.[2] That day, Townes' class watched a movie on a thirty-two inch television, perched atop a four-to-five foot rolling cart.[3] After the movie ended, Townes' teacher, Monika Sheinblum, instructed Townes to wheel the television cart to the back of the classroom.[4] Sheinblum did not supervise Townes moving the cart because she was attending to another student in the back of the classroom.[5] As Townes moved the cart, the television cord became tangled in a wheel, causing the

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[1] Delaware State Tort Claims Act, 10 *Del. C.* § 4001.
[2] Amended Complaint ¶¶ 1-3, *Morales v. Family Found. Acad., Inc. Sch.*, No. N12C-03-176 JRJ (Del. Super. Sept. 4, 2012) (Transaction ID ("Trans. ID") 46237314) [hereinafter "Complaint"].
[3] *Id.* ¶ 5.
[4] *Id.* ¶ 6.
[5] *Id.*

television to fall and hit Townes on the head.[6] Together, Townes and the television crashed to the floor.[7]

Townes' mother, Nicole Morales, filed her initial complaint on March 15, 2012.[8] Family Foundations Academy, Inc., Monika Sheinblum and Dr. Tennell Brewington (collectively, "Defendants") filed a motion to dismiss under Superior Court Civil Rule 12(b)(6), alleging Plaintiff failed to overcome the immunity afforded Defendants by 10 *Del. C.* § 4001.[9] The Court heard oral argument on August 21, 2012, and deferred decision, granting Plaintiff leave to file an Amended Complaint.[10]

Plaintiff filed her Amended Complaint on September 4, 2012,[11] and Defendants renewed their Motion to Dismiss on September 17, 2012.[12] The Court heard oral argument on March 1, 2013. Following oral argument, the parties filed supplemental briefing.[13] Briefing is now complete and this matter is ripe for decision.

## III. Standard of Review

On a 12(b)(6) motion to dismiss, the Court must accept every well-pleaded allegation as true and draw all reasonable inferences in the non-movant's favor.[14]

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[6] *Id.* ¶ 7.
[7] *Id.*
[8] Trans. ID 43118198.
[9] Trans. ID 44204589.
[10] Trans. ID 46021091.
[11] Trans. ID 46236377.
[12] Trans. ID 46479605.
[13] Trans. ID 49886335.
[14] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

Well-pleaded allegations place the defendant on notice of the claim at issue.[15] The Court must deny a 12(b)(6) motion if "plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof."[16]

## IV. Discussion

Under the DSTCA,[17] any political subdivision of the state, including school districts and their employees, have immunity from liability when a discretionary act is performed in good faith, without gross negligence.[18]

Plaintiff alleges that Defendants' failure to, *inter alia*, "accurately screen, hire, retain and supervise" Sheinblum and protect Townes from harm was "negligent,

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[15] *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).

[16] *Spence*, 396 A.2d at 968.

[17] 10 *Del. C.* § 4001 provides: Except as otherwise provided by the Constitutions or laws of the United States or of the State, as the same may expressly to be interpreted as requiring by a court of competent jurisdiction, no claim or cause of action shall arise, and no judgment, damages, penalties, costs or other money entitlement shall be awarded or assessed against the State or any public officer or employee, including the member of any board, commission, conservation district or agency of the State, whether elected or appointed, and whether now or previously serving as such, in any civil suit or proceeding at law or in equity, or before any administrative tribunal, where the following elements are present:

> The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination or policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over whom the public officer, employee or member shall have supervisory authority;
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> The act or omission complained of was done in good faith and in the belief that the public interest would be best served thereby; and
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> The act or omission complained of was done without gross or wanton negligence.

[18] *Smith v. Christina Sch. Dist.*, 2011 WL 5924393, at * 3 (Del. Super. Ct. Nov. 28, 2011). *See also Bantam v. New Castle Country Vo-Tech Education Assoc.,* 21 A.3d 44 (Del. 2011); *Simms v. Christiana Sch. Dist.*, 2004 WL 344015, at *8 (Del. Super. Jan. 30, 2004).

intentional, wanton, reckless, malicious and oppressive."[19] Plaintiff also alleges that Sheinblum's instruction to move the television cart, and her failure to supervise Townes as Townes did so, were "ministerial act[s] pursuant to Delaware Law" because Sheinblum failed to "maintain" school property under 14 *Del C.* § 1055.[20] Plaintiff's claim survives this motion only if she adequately alleges a claim for gross negligence or a claim that Sheinblum's actions were ministerial, not discretionary.[21]

**A. Gross Negligence**

"Gross negligence is a higher level of negligence representing 'an extreme departure from the ordinary standard of care.'"[22] It is "more than ordinary inadvertence or inattention."[23] The Delaware Supreme Court has compared gross negligence with criminal negligence as defined in 11 *Del. C.* § 231(a).[24] Gross negligence exists when a "person fails to perceive a risk…of such a nature and degree that failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[25]

In deciding a 12(b)(6) motion, the Court is limited to the well-pleaded allegations in Plaintiff's Amended Complaint, which, in this case, are: a teacher asked

[19] Complaint ¶¶ 9, 13, 14.
[20] *Id.* ¶ 11.
[21] Plaintiff has not alleged bad faith.
[22] *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990), quoting W. Prosser, Handbook of the Law of Torts 150 (2d ed. 1955).
[23] *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).
[24] *Id.*
[25] 11 *Del. C.* § 231(a).

a fourth grader to push a television cart to the back of the room and, while the teacher's attention was diverted, the television cord became tangled, causing the television to fall on the fourth grader.

Drawing all reasonable inferences in Plaintiff's favor, the Court does not find, under any reasonably conceivable set of circumstances susceptible of proof, that Sheinblum was grossly negligent in instructing Townes to move the television cart while Sheinblum attended to another student. By definition, gross negligence requires "more than…inattention," which is all that Plaintiff has alleged here.[26] Allowing a student to assist in this classroom task does not constitute as "a gross deviation from the standard of conduct that a reasonable person would observe."[27] Even if Plaintiff had alleged that Sheinblum's failure to secure the television cord was negligent (which she did not), such an allegation fails to establish a gross deviation, i.e., an "extreme departure," from the standard of conduct of a reasonable person.

No only does Plaintiff fail to plead facts supporting her conclusory claim that Defendants' actions were grossly negligent, but her briefing fails to offer cases supporting that proposition. Instead of alleging facts supporting the conclusory claim of "gross negligence," Plaintiff merely alleges Defendants' conduct was "negligent,

[26] *Jardel*, 523 A.2d at 530.

[27] *See Smith v. Silver Lake Elementary Sch.,* 2012 WL 2393722, at *2 (Del. Super. June 25, 2012) ("It is not sufficient merely to make a 'general statement of facts which admits of almost any proof to sustain it.' A recitation of conclusory allegations is not sufficient to meet the particularity requirement when the plaintiff has not provided any facts supporting a claim of extreme departure from the standard of care.").

intentional, wanton, reckless, malicious and oppressive" because they failed "to exercise their duty to protect students from harm by permitting a minor student to operate a cart holding heavy equipment." Nowhere does Plaintiff plead facts putting Defendants on notice of how or why Sheinblum's actions "were [or could be] an extreme departure from the standard of care."[28] Plaintiff fails to allege any facts that suggest Sheinblum was, or could have reasonably been, on notice that a substantial risk of harm existed in allowing a student to move the television cart.[29] In further conclusory fashion, Plaintiff's briefing asserts Defendants' "actions were…done with gross negligence," and "[t]he facts that form the basis of Plaintiff's Complaint establish that…the action was done with gross negligence," yet completely neglects to detail sufficient reasons underlying those conclusions.[30]

In the end, Sheinblum's actions as pleaded by Plaintiff were, at most, negligent. Gross negligence must be pleaded with specificity, and Plaintiff has failed to do so despite two attempts. Simple negligence is insufficient to overcome sovereign immunity as set forth in the DSTCA.[31]

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[28] *Id.*

[29] In order for conduct to be "wanton," the teacher must have been aware of and consciously disregarded a "substantial and unjustifiable risk" to the safety of the student. *Koutoufaris v. Dick*, 604 A.2d 390, 399 (Del. 1992). Plaintiff's Amended Complaint is wholly devoid of any such allegations.

[30] Plaintiff's Opposition to the Defendants' Motion to Dismiss Plaintiff's Amended Complaint at ¶¶ 3 and 7, Trans. ID 47104970 [hereinafter "Opposition"].

[31] *See Smith v. Silver Lake Elementary Sch.*, 2012 WL 2393722.

## B. Discretionary vs. Ministerial Act

Ministerial acts occur "[w]hen a policy is implemented by a school, [and] the school is required to follow that policy."[32] Simply stated, ministerial acts are "those which…are routinely or mandatorily required."[33] A ministerial act, therefore, is performed "without regard to [the actor's] own judgment concerning the act to be done."[34] Discretionary acts are "those which require some determination or implementation which allows a choice of methods, or…those where there is no hard and fast rule as to a course of conduct."[35] A discretionary act has been described as one where there is "no hard and fast rule as to course of conduct that one must or must not take."[36] Whether a duty is ministerial or discretionary is normally a question of law.[37]

Plaintiff argues that Sheinblum's act was ministerial because, under 14 *Del. C.* § 1055,[38] she neglected her "responsibility in administering this ministerial act of moving and maintaining control over the school's property and equipment" and failed "to care for this equipment by instructing a fourth grade student to operate the

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[32] *O'Connell v. LeBloch*, 2000 WL 703712, at *6 (Del. Super. Ct. Apr. 19, 2000).
[33] *Scarborough v. Alexis I. DuPont High Sch.*, 1986 WL 10507, at *2 (Del. Super. Ct. Sept. 17, 1986).
[34] *Simms*, 2004 WL 344015, at *8.
[35] *Id.*
[36] *Scarborough*, 1986 WL 10507, at *6 quoting *Elder v. Anderson*, 205 Cal.App.2d 326 (1962).
[37] *Simms*, 2004 WL 344015, at *8.
[38] **"Maintenance of school property**: The school board . . . shall provide for the care of buildings, grounds, equipment . . . and other school property and shall maintain the same in accordance with the standards adopted by the Department."

equipment without supervision."[39] In a continued effort to attempt to relate §1055 or another regulation to the moving of a television cart, Plaintiff further argues that Defendants violated a duty "to provide a reasonably safe premises" when Sheinblum failed to supervise Townes as she moved the cart.[40]

In support of her arguments, Plaintiff relies on *Smith v. Christina School District*.[41] In *Smith v. Christina School District*, an autistic six-year old student severed his fingertip while riding a tricycle in gym class, essentially unsupervised.[42] The Court denied summary judgment, but noted that Smith's complaint alleged only ordinary negligence, and had Christina School District brought a timely motion to dismiss, it would have been granted.[43] *Smith v. Christina School District* does not help Plaintiff's case in any way and, in fact, it supports Defendants' arguments as to why their motion to dismiss should be granted.

Plaintiff also relies on *O'Connell v. LeBloch*.[44] *O'Connell* stemmed from a fight in a school stairwell that resulted in the plaintiff's arm going through a glass window.[45] Finding that that same window had been broken on prior occasions, and that school property "must be maintained by mandate of law" in order to "provide

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[39] Complaint ¶ 11; *see also* Opposition at 2.
[40] *Id.*
[41] *Smith v. Christina School District*, 2011 WL 5924393.
[42] *Id.* at *1.
[43] *Id.* at *3.
[44] *O'Connell*, 2000 WL 703712.
[45] *Id.* at *1.

reasonably safe premises for their invitees," the Court in *O'Connell* held that the act of "inspecting and maintaining the windows of the school is ministerial," and denied summary judgment.[46] Plaintiff's Amended Complaint contains no allegations that the television cart at issue caused injury prior to the incident at issue, or that it was not properly "maintained."

Plaintiff next relies on *Scarborough v. Alexis I. DuPont High School*.[47] *Scarborough* involved the collapse of school stadium bleachers.[48] Despite the defendants' contention that annual bleacher inspections occurred, Scarborough claimed the bleacher wood was rotten.[49] The Court in *Scarborough* found that the maintenance of bleachers was required under 14 *Del.C.* § 1055, and therefore their upkeep would be a ministerial, not discretionary, act. The Court in *Scarborough* held that the school failed to maintain the bleachers and provide a reasonably safe premises for its invitees in accordance with legal mandate, and which was a ministerial act.[50] The present case is distinguishable, however, because there are no regulations relating to the movement of a television cart in a classroom and that action is far different than the proper upkeep of bleachers, the latter of which is clearly contemplated by 14 *Del.C.* § 1055.

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[46] *Id.* at *2, *6. The Court was relying on 14 *Del.C.* § 1055.
[47] *Scarborough*, 1986 WL 10507.
[48] *Id.* at *1.
[49] *Id.*
[50] *Id.* at *3.

Finally, Plaintiff relies on *Whitsett v. Capital School District*.[51] *Whitsett* involved a student with a medical excuse from gym class.[52] Whitsett's gym teacher decided to hold class outdoors and allow Whitsett to sit on the sidelines.[53] On the way to a soccer field, Whitsett was injured.[54] The Court found in *Whitsett* that the school had a policy specifically pertaining to students excused from gym class.[55] The Court denied summary judgment because "there was a policy in place . . . [and] not enough facts in the record to determine whether that policy was adequately followed . . . or whether defendants acted with gross negligence."[56] Although Plaintiff cites *Whitsett* for the proposition that Whitsett's gym teacher's decision to hold gym class outdoors was a ministerial act, the teacher's decision on where to hold class was <u>not</u> at issue in *Whitsett*.

The cases relied upon by Plaintiff do not support her arguments. Unlike in *Whitsett*, Plaintiff fails to offer a school policy that regulates the moving of a television cart. Without deciding whether the television cart is "equipment" under 14 *Del. C.* § 1055, the Court notes that Plaintiff fails to allege that Defendants knew that the television cart was unsafe. In contrast to the above cases, there is no

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[51] *Whitsett v. Capital School District*, 1999 WL 167836 (Del. Super. Ct. Jan. 28, 1999).
[52] *Id.* at *1.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

allegation that Townes' injuries resulted from ill-maintained, eroded, deteriorated, or damaged equipment. Even so, the Court is confident that Sheinblum's decision to allow a student to move a television cart is not the situation contemplated by § 1055, because the nexus is missing between the moving of the cart and the "maintaining of premises." And, unlike bleachers or glass windows, a television cart is not a part of the school's actual premises. Although the Court finds no merit in Plaintiff's argument that §1055 applies to moving a television cart, even assuming, *arguendo*, it does, Plaintiff's argument fails because § 1055 is not applicable to charter schools.[57]

Furthermore, although the overarching duty to supervise children is a ministerial act, the manner in which a teacher actually supervises is discretionary. The manner in which a teacher chooses to supervise her students depends on many factors, and Plaintiff fails to allege any reasonably conceivable set of circumstances susceptible of proof that would suggest a ministerial action on the teacher's part.[58] Sheinblum's action was an unregulated, non-routine and non-mandated act. As

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[57] 14 *Del. C.* § 505(a) expressly exempts charter schools from the majority of Title 14 regulations. 14 *Del. C.* § 505(a), provides in pertinent part, "[a] charter school is exempt from all provisions of this title except the provisions of Chapter 31 of this title, and all regulations of any board of education of a reorganized school district."

[58] *See Tews v. Cape Henlopen School District*, 2013 WL 1087580, at *4 (Feb., 14 2013) ("…the manner in which teachers supervise a student while the student walks down a set of stairs is dependent upon many factors, such as, the student's special needs, whether the student is familiar with the stairs, or whether the student has ever encountered or exhibited difficulty in negotiating stairs, whether other students have fallen while negotiating the stairs."). *See Also* Longacre v. Delaware C.A. No. 10C-04-257 (Hearing Transcript 20:14-18) (Supervision is a fluid act where a teacher must react to the events as they transpire, as opposed to one set manner to cover all situations.)

pleaded in the Amended Complaint, her actions constitute discretionary acts as a matter of law, which are insufficient to overcome sovereign immunity as set forth in the DSTCA.

**C. Dismissal**

As noted above, under the DSTCA, a school and its employees have immunity from liability when a discretionary act is performed in good faith, without gross negligence. The Plaintiff has the burden of demonstrating these elements, and absent such a showing, the claims will be barred by the DSTCA. As discussed below, in such a case, dismissal pursuant to 12(b)(6) is warranted.

In *Lee v. Johnson*[59] the defendant filed a Motion to Dismiss contending that the DSTCA precluded liability because the plaintiff only alleged ordinary negligence, instead of gross negligence with the particularity that is required to overcome the DSTCA.[60] Lee was incarcerated and filed suit alleging that prison staff members threatened him, and caused him to be exposed to second-hand smoke which endangered his mental and physical health. Noting that a plaintiff bears the burden of "alleging circumstances that would negate the existence of one or more of these…elements of immunity [from Section 4001]," the Court in *Lee* determined that the well-pleaded facts failed to meet this pleading requirement because ordinary

[59] *Lee v. Johnson*, 1996 WL 944868 (Del. Super. Ct. 1996).
[60] *Id.* at *2.

negligence is insufficient to establish liability under the statute.[61] The Court in *Lee* granted the defendant's Motion to Dismiss.

In *Smith v. Silver Lake Elementary School*[62], the plaintiff was injured when he fell on the school playground.[63] The plaintiff's original complaint alleged only ordinary negligence. In response to defendants' motion to dismiss, plaintiff provided a proposed amended complaint. After reviewing the proposed amended complaint, the Court in *Smith v. Silver Lake Elementary School* held that the plaintiff merely added descriptive terms to the language of the original simple negligence claim, and failed to plead facts demonstrating that the defendants' acts were an "extreme departure from the standard of care."[64] The Court also held that the plaintiff did not allege any facts to establish knowledge by the defendants of any prior incidents and "did nothing more than re-package the negligence claim with gross negligence language."[65] Because the plaintiff did not allege with the required particularity that the defendants' acts were an extreme departure from the standard of care, the Court dismissed the plaintiff's claim of gross negligence.[66]

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[61] *Id.*
[62] *Smith v. Silver Lake Elementary Sch.,* 2012 WL 2393722.
[63] *See Id.* at *2.
[64] *Id.*
[65] *Id.*
[66] *Id.*

Lastly, in *Hughes ex rel. Hughes v. Christina School District*[67], the plaintiff alleged that the teacher's manner of supervision breached a ministerial duty. Hughes was a seventh grade student who had a history of fainting and seizures, and thus required extra care (transportation to the nurse's office in a wheelchair) when she informed the teacher that she was feeling faint.[68] Although Hughes felt faint, she did not tell her teacher, but simply asked to go to the nurse. Because Hughes did not tell her teacher she felt faint, her teacher sent her on foot, and Hughes subsequently fainted, suffering an injury. The Court in *Hughes* noted that although the "*duty* to do something…may be ministerial, the *manner* in which it is accomplished may be discretionary."[69] Because there was no "hard and fast rule" concerning how her teacher was to supervise in a situation where Hughes did not inform her that she felt faint, the teacher had to exercise her own judgment and the Court found that her actions were not ministerial, but instead discretionary.[70]

As in *Lee* and *Smith v. Silver Lake Elementary School*, Plaintiff here has failed to allege a claim of gross negligence with particularity. And, like the teacher's act in *Hughes*, Sheinblum's decision to ask Townes to move the television cart was discretionary, not ministerial, because she had no "hard and fast rule" with which to

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[67] *Hughes ex rel. Hughes v. Christina School District*, 2008 WL 73710 (Del.Super.Ct. Jan. 7, 2008).
[68] *Id.*
[69] *Id.* at *3 (quoting *Martin v. State*, 2011 WL 112100, at*5) (Del.Super.Ct. Jan. 17, 2001)).
[70] *Id.* at *4.

comply.[71] In sum, the Court finds that Plaintiff has failed to overcome the sovereign immunity provided by the DSTCA. Plaintiff has neither demonstrated that Defendants acted with gross negligence nor that Sheinblum's actions or failures to act were ministerial. Because Plaintiff has failed to sufficiently plead facts necessary to overcome sovereign immunity under the DSTCA, her claims will be barred.

## V. Conclusion

As explained above, Plaintiff's Amended Complaint falls short of sufficiently pleading gross negligence or the absence of a discretionary act by Defendants. Therefore, Defendants' Motion to Dismiss Plaintiff's Amended Complaint is **GRANTED**.

**IT IS SO ORDERED**.

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Jan R. Jurden, Judge

cc: Prothonotary

[71] *See Tews*, , 2013 WL 1087580, at *4 ("There are no facts pled in the Complaint that show Defendants failed to supervise, or that Defendants failed to exercise due care to protect the Minor Plaintiff or provide for her safety. The scant facts pled in the Complaint fail to establish the absence of a discretionary act on the part of the Defendants.").