IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CHARLES HALE and ANNE HALE, individually and on behalf of their minor daughter, ZOEY HALE,[1]	)	
Plaintiffs,	)	
v.	)	
ELIZABETH W. MURPHEY SCHOOL, INC.,	)	**C.A. No. N13C-07-375 PRW**
Defendant/Third-Party Plaintiff,	)	
v.	)	
CAPITAL SCHOOL DISTRICT AND DOVER HIGH SCHOOL,	)	
Third-Party Defendants.	)	

Submitted: February 20, 2014
Decided: May 20, 2014

MEMORANDUM OPINION

Upon Third-Party Defendants' Motion to Dismiss,
DENIED.

Richard R. Weir, Jr., Esquire, Shannon Larner Brainard, Esquire, Marshall, Dennehey, Warner, Coleman & Coggin, Wilmington, Delaware, Attorneys for Defendant/Third-Party Plaintiff.

Marc S. Casarino, Esquire, Sean A. Meluney, Esquire, White and Williams, LLP, Wilmington, Delaware, Attorneys for Third-Party Defendants.

WALLACE, J.

I. INTRODUCTION[1]

Before the Court is a motion to dismiss Elizabeth W. Murphey School, Inc.'s ("Murphey School") third-party complaint against the Capital School District ("the District") and Dover High School ("the High School") alleging failure to adequately supervise Dover High School students. "John Doe"[2] ("Doe"), a minor and Dover High School student, lured Zoey Hale ("Zoey"), a minor and fellow Dover High School student from school grounds to a secluded wooded area and sexually assaulted her at knifepoint. At the time of the assault, Doe was a resident of the Murphey School, an institute that provided care and counseling for dependant and neglected minors. Zoey is developmentally disabled, requiring special education assistance. Zoey and her parents, Charles Hale and Anne Hall, filed suit against the Murphey School for failure to properly warn of Doe's "sexual deviance," and for failure to supervise and control Doe.

The Murphey School in turn filed a third-party complaint against the Capital School District and Dover High School for failure to adequately supervise Zoey

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[1] The Court has assigned pseudonyms to the Plaintiffs. *See* Del. Supr. Ct. R. 7(d) (a trial court, lower appellate court, or the Supreme Court itself may deem certain matters to be of a sensitive nature, in which case the Court may order the use of pseudonyms sua sponte). Delaware courts do so routinely to protect the privacy of juvenile victims of sexual assault. *E.g.*, *Ashley v. State*, 85 A.3d 81 (Del. 2014); *Gordon v. State*, 2013 WL 6569705 (Del. Dec. 11, 2013); *State v. McCollough*, 2012 WL 4321286 (Del. Super. Ct. Sept. 18, 2012); *Doe v. Green*, 2008 WL 282319 (Del. Super. Ct. Jan. 30, 2008) (juvenile civil complainant alleging sexual abuse).

[2] A pseudonym used by the parties since the inception of this case.

and Doe to prevent the assault. The District and High School filed a motion to dismiss alleging pleading failures and immunity under the Delaware Tort Claims Act, DEL. CODE ANN. tit. 10, § 4001 *et seq.* For the reasons stated below, the District's and High School's motion to dismiss is **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Charles Hale and Anne Hale are Zoey's parents and natural guardians. Zoey, the Minor-Plaintiff, was at all relevant times 16 years old. She is developmentally disabled, with an IQ between 48 and 52, and requires special needs including, among other things, special educational assistance and a special curriculum. Zoey was enrolled in the Capital School District's Individualized Education Program and was attending classes at Dover High School, a public school located in Dover, Delaware.

Defendant/Third-Party Plaintiff Elizabeth W. Murphey School, Inc. provides foster care, counseling, and in-house treatment for minors suffering with dependency and neglect issues. Murphey School provided Doe such care and counseling. He too, for all relevant times, was a minor and was enrolled at Dover High School.

At the High School, the school day would end upon dismissal at 2:20 p.m. Zoey typically rode a school bus, leaving Dover High School at 2:30 p.m. and arriving home by 2:45 p.m.

On April 30, 2012, Mr. Hale received a text message at approximately 2:30 p.m. from Zoey's sister that Zoey was not on the school bus. Mr. Hale telephoned the High School to inform the administrators of the situation. He then drove there. When he arrived at the High School's main office, Mr. Hale met Zoey's printing shop teacher who told him that Zoey had been in the print shop for her last class and that the teacher had seen her leave class at dismissal time. Mr. Hale then met with Zoey's homeroom teacher who suggested that he speak to other students to determine if they had witnessed anything. A student told Mr. Hale that Zoey was seen leaving the building with Doe. High School staff advised Mr. Hale that Doe should be in detention, that he was scheduled to be on a 4:00 p.m. bus back to the Murphey School, and that he frequently ran away.

Mr. Hale immediately left the High School for Murphey School's campus. Police officers arrived at the Murphey School just as Mr. Hale did. He overheard a Murphey School employee tell a police officer that Doe is known to shoplift, skip school, and hang out at the Dover Mall. Mr. Hale then enlisted Dover Mall security's assistance to locate Zoey. A security officer found Zoey at the mall. When the officer approached her, a young male standing nearby gave some name and fled the scene. Zoey was escorted to the mall's security office and was interviewed by police. They learned that Zoey had been sexually assaulted.

Zoey told the police that Doe had lured her from the High School's grounds by telling her that he wanted her to meet someone at a hardware store. Instead, Doe led Zoey to a secluded wooded area. Once there, Doe produced a knife, forced Zoey to lay down in a clearing where particle board or sheetrock had been laid out, and sexually assaulted her at knifepoint. Doe then took Zoey from the area. While doing so, he threw the knife in some bushes. The weapon was later found there by the police.

Plaintiffs brought the underlying action against the Murphey School for failure to warn of Doe's "sexual deviance" and his behavior issues, failure to counsel Doe, and failure to monitor, control, or supervise Doe; Plaintiffs further allege that such failures amount to gross negligence constituting an extreme departure from the ordinary standard of care.

Murphey School filed a third-party complaint against the School District and the High School, that incorporated the Plaintiffs' allegations and further claimed that the High School and the District were: (1) negligent in carrying out their duty to adequately supervise Doe by ensuring that he attended detention; and (2) negligent for failing to adequately supervise Zoey by ensuring that she safely boarded the school bus after dismissal. These failures, Murphey School argues, breached the duty of care owed to Plaintiffs, and should mitigate or eliminate Murphey School's liability to Plaintiffs.

III. LEGAL STANDARD

When deciding a motion to dismiss pursuant to Delaware Superior Court Rule of Civil Procedure 12(b)(6), the Court reads the complaint generously, accepting all of the well-pleaded allegations contained therein as true, and drawing all reasonable inferences in a light most favorable to the non-moving party.[3] A complaint's allegations are "well-pleaded" if they put the opposing party on notice of the claims being brought against it.[4] "The complaint generally defines the universe of facts that the trial court may consider" at this stage.[5] And when a third-party complaint incorporates by reference the allegations in the plaintiffs' complaint, the Court must accept as true for purposes of deciding a motion to dismiss the well-pleaded allegations in both the underlying complaint and the third-party complaint.[6] In turn, a third-party plaintiff's complaint may only be dismissed if it "would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[7] The necessary factual issues cannot

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3 *Doe 30's Mother v. Bradley*, 58 A.3d 429, 443 (Del. Super. Ct. 2012) (internal quotation marks and citations omitted) (emphasis added).

4 *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A.2d 403, 406 (Del. 1995); *Doe 30's Mother*, 58 A.3d at 443.

5 *In re Gen. Motors Shareholder Litigation*, 897 A.2d 162, 168 (Del. 2006).

6 *Precision Air*, 654 A.2d at 406; *Beesly v. Miller*, 2014 WL 1759862, at *1 (Del. Super. Ct. Apr. 3, 2014).

7 *Precision Air*, 654 A.2d at 406.

always be resolved at the motion to dismiss stage; nor can it "be assumed at the pleading stage that the defendant will carry the burden [of establishing a defense to the Plaintiffs' claim.]"[8]

IV. DISCUSSION

A. NEGLIGENCE CLAIMS SURVIVE UNDER RULE 12(b)(6).

The District and the High School first allege that Murphey School has not sufficiently alleged negligence on their part. Murphey School must, through its own complaint and incorporation of the Hales' complaint, have alleged the existence of facts that would demonstrate the elements of negligence: duty, breach, causation, and harm.[9] Murphey School's complaint will not be dismissed as insufficiently pleaded simply because it might be "vague or lacking in detail," so long as it "puts the opposing party on notice of the claim being brought against it."[10] Where, as here, the "third-party complaint incorporates by reference the allegations in Plaintiffs' complaint, [the Court] accept[s] as true . . . the well-pleaded allegations in both the underlying complaint and the third-party complaint."[11] Murphey School's Third-Party Complaint incorporates by reference the allegations in Plaintiffs' underlying complaint and the Court has examined both

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8 *Krasner v. Moffett,* 826 A.2d 277, 287 (Del. 2003).

9 *Hudson v. Old Guard Ins. Co.*, 3 A.3d 246, 250 (Del. 2010) (internal citations omitted).

10 *Precision Air*, 654 A.2d at 406.

11 *Id.*

carefully. In sum, they together are sufficient to give the required general notice as to the nature of the claims brought—Capital School District's and Dover High School's alleged inaction and negligence which Murphey School claims was the proximate cause of any alleged harm to Zoey.

Accepting the well-pleaded allegations contained in both as true, and viewing all reasonable inferences in the light most favorable to the non-moving party, Murphey School has satisfied its obligation to plead a *prima facie* claim of negligence by Third-Party Defendants. The Court cannot, at this stage, given the unique factual circumstances presented here, find that Murphey School, if found negligent, "may [not] recover [against the District or High School] under any reasonably conceivable set of circumstances susceptible to proof under the complaint."[12] Nor can the Court, under the standards applicable to a motion to dismiss for failure to state a claim, find that Murphey School's claim is "clearly without merit" as a "matter of law or of fact."[13]

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12 *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

13 *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

B. MURPHEY SCHOOL'S CLAIMS CANNOT BE DETERMINED TO BE BARRED AT THIS STAGE.

The doctrine of sovereign immunity provides that the State cannot be sued without its consent.[14] The only way that the State can waive its sovereign immunity is by an act of the General Assembly.[15] The General Assembly has extended sovereign immunity protections to school districts, their officials and teachers under the Delaware Tort Claims Act, 10 *Del. C.* § 4001 *et seq.* ("DTCA").[16] In order to overcome this immunity, a plaintiff must demonstrate that: "(1) the State has waived the defense of sovereign immunity for the actions mentioned in the complaint; and, (2) the [DTCA] does not bar the action."[17] And where there is a failure to adequately plead facts that would negate immunity provided by the DTCA, the appropriate mechanism may be a motion to dismiss.[18]

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[14] *Doe v. Cates*, 499 A.2d 1175, 1176 (Del. 1985) (internal citations omitted).

[15] *Id.*

[16] *See* DEL. CODE ANN. tit. 10, § 4003 (2013) ("Any political subdivision of the State, including the various school districts, and their officers and employees shall be entitled to the same privileges and immunities as provided in this chapter for the State and its officers and employees . . . .").

[17] *Smith v. Christina Sch. Dist.*, 2011 WL 5924393, at *3 (Del. Super. Ct. Nov. 28, 2011) (internal citations omitted).

[18] *See Curley v. Klem*, 298 F.3d 271, 277 (3d Cir. 2002) ("[Q]ualified immunity is not a mere defense from liability; it is an entitlement not to stand trial or face the other burdens of litigation.") (internal quotation marks omitted); *see, e.g., Smith*, 2011 WL 5924393, at *3 (noting that had defendant filed a motion to dismiss, dismissal would have been proper).

Here, it is not disputed that Third-Party Defendants' have insurance; therefore the first prong is satisfied.[19]

Murphey School must next demonstrate the absence of the elements of the DTCA, and as a result that the School District and High School have waived their immunity. Section 4001 of Title 10 provides:

> Except as otherwise provided by the Constitutions or laws of the United States or of the State, as the same may expressly require or 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 members 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:
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> 1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of 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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> 2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and

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19 *Id.*

> 3) The act or omission complained of was done without gross or wanton negligence.[20]

As Murphey School has not alleged that Third-Party Defendants' conduct was grossly negligent or done in bad faith, the sole question is whether, under these particular circumstances, the alleged failure to supervise Doe and Zoey involved the exercise of discretion by the school officials.

A meaningful bright-line rule articulating the distinction between "ministerial" and "discretionary" acts has long escaped the courts.[21] In adopting the general definition of "ministerial" set forth in the Restatement (Second) of Torts, however, our state supreme court observed that "[a]n act is ministerial if the 'act of the official involves less in the way of personal decision or judgment or the matter for which judgment is required has little bearing of importance upon the validity of the act . . . .'"[22] The distinction between "ministerial" and "discretionary," the court noted, is "always one of degree."[23] An act is ministerial when the actor "performs in a prescribed manner without regard to his [or her] own

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20 DEL. CODE ANN. tit. 10, § 4001 (2013).

21 *See, e.g., Sussex Cnty., Del. v. Morris*, 610 A.2d 1354, 1359 (Del. 1992); *Scarborough v. Alexis I. DuPont High Sch.*, 1986 WL 10507, at *2 (Del. Super. Ct. Sept. 17, 1986) ("[M]any courts have found difficulty in defining a pithy, easily applied standard to determine what is discretionary and what is ministerial.").

22 *Morris*, 610 A.2d at 1359 (quoting Restatement (Second) of Torts § 895D cmt. h (1979)).

23 *Id.*

judgment concerning the act to be done."[24] An act is discretionary, by contrast, when it "require[s] some determination or implementation which allows a choice of methods, or, differently stated, those where there is no hard and fast rule as to a course of conduct."[25]

The determination of "[w]hether a duty is ministerial or discretionary is normally a question of law."[26] While Delaware courts have routinely held that the *manner* in which teachers and administrators choose to supervise students is a discretionary act, the underlying obligation to supervise students is ministerial.[27] Of further importance is our courts' recognition that "under Delaware law a school official 'stands *in loco parentis* to pupils under his [or her] charge for disciplinary action, at least for purposes which are consistent with the need to maintain an effective educational atmosphere.'"[28]

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[24] *Simms v. Christina Sch. Dist.*, 2004 WL 344015, at *8 (Del. Super. Ct. Jan. 30, 2004) (citing *Scarborough*, 1986 WL 10507, at *2).

[25] *Id.*

[26] *Morales v. Family Found. Acad., Inc. Sch.*, 2013 WL 3337798, at *3 (Del. Super. Ct. June 11, 2013) (internal citation omitted).

[27] *Morales*, 2013 WL 3337798, at *4; *Tews v. Cape Henlopen Sch. Dist.*, 2013 WL 1087580, at *4 (Del. Super. Ct. Feb. 14, 2013); *Martin ex rel. Martin v. State*, 2001 WL 112100, at *6 (Del. Super. Ct. Jan. 17, 2001).

[28] *Rogers v. Christina Sch. Dist.*, 73 A.3d 1, 10 (Del. 2013) (quoting *State v. Baccino*, 282 A.2d 869, 871 (Del. Super. Ct. 1971)).

What may be considered discretionary versus ministerial generally needs to be addressed on a case-by-case basis. This type of fact-intensive inquiry does not always lend itself well to adjudication under a motion to dismiss, as Rule 12(b)(6) requires that the non-moving party prevail under any reasonable set of facts alleged in the complaint.[29] This case presents the unique circumstance of two students—one with special needs, one with behavioral issues, both, arguably, requiring known peculiar supervisory obligations—and conduct that at least arguably initiated while they were being or were supposed to supervised. The Court, with the scant record before it, would misstep to declare the Third-Party Defendants' acts (or inaction) to be either clearly discretionary or clearly ministerial. That this question lingers at this stage of the proceedings counsels for denial of this motion to dismiss.

When approaching similar disputes, absent clear evidence that the challenged act was discretionary, courts have shown reluctance to grant dismissal without the opportunity for discovery.[30] The distinction between discretionary and

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[29] *See Moffett*, 826 A.2d at 286.

[30] *See Montgomery-Foraker v. Christina Sch. Dist.*, 2013 WL 6113244, at *2-4 (Del. Super. Ct. Oct. 30, 2013) (After granting dismissal on DTCA claim of negligent supervision, training, and/or hiring of a teacher, the court denied motion to dismiss on *respondeat superior* claim under the "liberalized pleading standard pertaining to a motion to dismiss."); *Esposito v. Townsend*, 2013 WL 493321, at *9 (Del. Super. Ct. Feb. 8, 2013) ("At [the motion to dismiss] stage of the proceedings, viewing the facts in the light most favorable to the non-moving party, it is at the very least, arguable that the acts in question were ministerial."); *J.L. v. Barnes*, 33 A.2d 902, 914-15 (Del. Super. Ct. 2011) (despite noting that "in-the-field decisions" made "concerning the

ministerial is often fact-driven, and in reaching a determination of the nature of the alleged acts or omissions, the Court should consider, *inter alia*: the existence of and compliance with any statutory mandates; the existence of and compliance with any school policies; and the extent to which the challenged act involved *considered* action or inaction.[31]

The Court cannot, at the pleading stage, state definitively that there is no conceivable set of circumstances under which Defendant/Third-Party Plaintiff Murphey School would be able to demonstrate that the Third-Party Defendants' alleged failure to adequately supervise Doe and Zoey implicated a ministerial duty. In reaching such a conclusion, the Court renders no opinion regarding the ultimate determination of the nature of the High School's and the District's acts or omissions; rather, the Court merely holds that it is premature, absent the opportunity for preliminary discovery, to grant dismissal.

Murphey School's obligation at the pleading stage is to allege sufficient legal grounds and supporting facts that, when viewed in the light for favorable to

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care and custody of [minor] while in the fluid environment of custodial supervision . . . are necessarily discretionary," the court noted that but for plaintiff's improper claim splitting, "limited discovery" would have been appropriate to determine "whether mandatory policies and procedures were in place" and "whether the individual defendants adhered to those mandatory policies and procedures"); *Martin*, 2011 WL 112100, at *6-7 (after noting that the actions in question were clearly discretionary, the court refused to grant dismissal on the issue of whether DTCA immunity was applicable based on the "paucity of information in the record").

[31] The Court cannot assume here that a school official's failure to take certain actions regarding student supervision is the result of consideration, and is hence properly viewed as a discretionary act. *Unconsidered* inaction might merely constitute that official's failure to fulfill his or her mandatory obligation to supervise students.

it, would support a decision in its favor. It has met this burden. Murphey School has alleged failure by the High School and the School District to supervise students' activities, an inherently ministerial act, rather than challenging the manner in which such supervision occurred, which would require significant discretion.

V. CONCLUSION

The Court is acutely aware that dismissal may be the appropriate course in many instances similar this.[32] But the Court cannot say here that Murphey School's claims, when examined under Rule 12(b)(6), fail as a matter of law. So, for the foregoing reasons, Capital School District's and Dover High School's Motion to Dismiss must be **DENIED**.

IT IS SO ORDERED.

/s/ Paul R. Wallace
Paul R. Wallace, Judge

Original to Prothonotary
cc: Counsel via File & Serve

[32] *See Montgomery-Foraker*, 2013 WL 6113244, at *3 (Del. Super. Ct. July 12, 2013) ("'Presentation of undeveloped or unsupported allegations results in a waste of valuable Court resources, unnecessary expense for the Defendants, and does little to advance this Court's ability to render swift justice.'") (quoting *Tews v. Cape Henlopen Sch. Dist.*, 2013 WL 1087580, at *5 n.32. (Del. Super. Ct. Feb. 14, 2013)).