UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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STEVEN J. PHILLIPS and MARIE CONDOLUCI, individually and as parents and natural guardians of T.C.P., an infant,

Plaintiffs,

v.

COUNTY OF ORANGE, BOARD OF EDUCATION GOSHEN CENTRAL SCHOOL DISTRICT, VILLAGE OF GOSHEN,

Defendant.
----------x

New York, N.Y.

10 Civ. 236(SHS)

August 19, 2015
12:00 p.m.

Before:

HON. SIDNEY H. STEIN,

District Judge

APPEARANCES

BERGSTEIN & ULLRICH, LLP
Attorneys for Plaintiffs
BY: STEPHEN BERGSTEIN

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BY: ADAM I. KLEINBERG

(Case called; all parties present)

THE COURT: Good morning. Please be seated.

I called you here today to read an opinion resolving all of the pending motions for summary judgment. As you see, there is a reporter here, and I am going to read it into the record.

What I would like to do, with the permission of the parties, is, as I read it, not read out the specific record references -- they are in my opinion -- but, rather than say Defendants' Joint 56.1 statement, paragraph XB, plaintiffs responding, I won't read that. I am giving the draft to the reporter and the reporter will fill that in.

Similarly with the case citations. I do intend to say Schneckloth v. Bustamonte, but the reporter will then fill in -- I am making this up -- 364 U.S. the numbers.

Is that acceptable to everybody?

Plaintiff?

MR. BERGSTEIN: Yes, your Honor.

THE COURT: Defendants?

COUNSEL: Yes, your Honor.

THE COURT: So we will proceed on that basis. It certainly will let the reading be more fluid.

And just to get to the end first, what I am doing is I am granting summary judgment to the plaintiffs against the county on the seizure, because I think it was an

unconstitutional seizure. I am dismissing the village entirely, so I am granting the village's motion for summary judgment. The village is out. And then I am denying all of the other summary judgment aspects, okay? This will narrow the case and it will either proceed to settlement or trial. We will talk about that at the end as to how you want to proceed.

My decision is as follows:

I. INTRODUCTION

Plaintiffs, Steven Phillips and Marie Condoluci, suing individually and on behalf of their infant daughter, T.C.P., who was five years old at the relevant time, bring this action against the County of Orange ("the County"), the Goshen Central School District Board of Education ("the School District"), and the Village of Goshen ("the Village")(collectively, "defendants"), alleging that defendants are liable pursuant to 42 U.S.C. 1983 for violations of plaintiffs' Fourth Amendment rights. Plaintiffs also claim that defendants are liable for conspiring to violate 42 U.S.C. 1983.

Before the Court are the parties' various cross-motions for summary judgment. For the reasons that I am about to set forth, I grant the Village's motion for summary judgment, grant partial summary judgment to plaintiffs -- as I said, I am granting it on the issue of reasonable seizure as to liability and it will be up to the jury to determine

damages, if any -- and deny the summary judgment motions of the County and the School District.

II. BACKGROUND

The following facts are undisputed unless otherwise noted.

A. The Report and the Initiation of a Child Abuse Investigation

On November 3, 2009, Robin Hogle called the State Central Registry ("SCR") to report that a family friend of the plaintiffs, suspected that Mr. Phillips, the father, had sexually abused his five-year-old daughter, T.C.P, and that Condoluci, the child's mother, was aware of the abuse and failed to intervene. (Joint Defs.' 56.1 Response 2, 21, 25.) Hogle told SCR personnel that, according to this anonymous family friend, plaintiffs had nude pictures of the child on the refrigerator that they referred to as art, Phillips allegedly said that his child had a "sweet ass," the child frequently visited the school nurse, and the child and her sister allegedly slept with their parents. (Id. 23-26.) The narrative of the call to SCR states: "It is suspected father is sexually abusing [T.C.P.] and mother is aware and doing nothing. There have been ongoing concerns for about 3 months... close friends of the family have witnessed specifics and confronted the family." (Id. 27; Ex. 3 to Bergstein Aff. at 4.) You will see,

as it turns out, of course, there is nothing to these anonymous allegations, but that's down the road. Hogle admitted to the SCR that she had no firsthand knowledge whatsoever of these allegations. (Id.)

The SCR accepted the anonymous report of Hogle. (Id. 28.) The SCR only accepts a report when a SCR hotline specialist determines that there is "reasonable cause to suspect that a child is an abused or maltreated child." (Id. 16.) The SCR Manual defines "reasonable cause to suspect" as "what reasonable people, in similar circumstances, would conclude from such things as the nature of the injury(ies) to the child, statement and demeanor of the parents of the child, conditions of the home, etc." (Id. 17.) In applying the "reasonable cause" standard, the SCR Manual instructs that the specialist "should accept the report regardless of whether the information is firsthand knowledge" and should assume that all callers are acting in good faith. (Id. 18, 19.) Linda Joyce, Director of the SCR, testified that the SCR does not give reduced weight to allegations of child abuse when they are made anonymously. (Deposition of Linda Joyce, 86-87, Ex. L.) After making the determination that Hogle's report constituted reasonable cause to suspect abuse, the SCR transmitted the report to the Orange County Department of Social Services, Child Protective Services ("CPS") for investigation. (Id. 15, 29.) I will refer to that as "CPS," which is part of the

county for liability purposes.

Pursuant to New York Social Services Law 423(6), a social services district may establish a multidisciplinary team ("MDT") to investigate reports of suspected child abuse. Members of an MDT must include representatives from CPS, law enforcement, and the district attorney's office. (Id.) Orange County established an MDT within its Child Abuse Investigation Unit which only investigates SCR reports involving sexual abuse, fatalities, or serious physical abuse. (Joint Defs.' 56.1 Response 31.) One of the stated objectives of the MDT is to "increase the number of child sexual abuse cases that are adjudicated in family court and/or result in a conviction in criminal court," and a New York State Police file is opened on all SCR reports investigated by the MDT. (Id. 35, 91; Exhibit 4 to Bergstein affidavit at 2.) The County contracted with the Village for a Village police officer to serve as one of the law enforcement members of the MDT. (Id. 49.) That Village police officer, Andrew Scolza, was directly supervised by John Richichi, a senior investigator for the New York State Police who served as the MDT's Law Enforcement Supervisor. (Id. 39, 50.) And we will see that the only involvement of the village is its contract with the county to supply a police officer to be a member of the MDT.

Upon receiving the SCR report, no member of the MDT assessed whether the report met the "reasonable cause to

suspect" abuse standard. (Id. 81.) The Village and the School District state that the MDT does not make its own reasonable cause determination because the SCR has already done so and because "the MDT must investigate the report." (Id.) The parties dispute whether an SCR report can be rejected without an investigation if CPS determines that there is not reasonable cause to suspect abuse. (Id 87.) The Village and the School District argue that all SCR reports must be investigated, while plaintiffs claim that CPS could decide not to investigate a SCR report should CPS find that the report does not meet the reasonable cause standard. (Id.) The County admits that members of the MDT were not trained to reject reports that lacked reasonable cause to believe abuse occurred. (County 56.1 Response, 87.)

Upon receipt of the SCR report on November 3, 2009, Susan Hughes, an Orange County CPS caseworker, contacted Hogle. Hogle told her that there "is a strong suspicion that the child is being sexually abused" but stated that "the children are not in imminent danger." (Joint Defs. 56.1 Response 71, 72.) Karen Smith, the MDT case supervisor, determined that the child was not in imminent danger and the MDT did not need to begin its investigation immediately. (Id. 74) I have no idea where Hogle came up with the idea that there is a strong suspicion of sexual abuse but, again, that's for down the road.

The MDT investigation, which began the next day,

November 4, 2009, was assigned to Jamie Scali-Decker, a CPS employee, and Officer Scolza, a Village police officer, who had been assigned by contract to this case. (Id. 88, 93.) Pursuant to MDT protocols, Scali-Decker checked CPS records to determine whether the family was the subject of any prior complaints. There was no such history. (Id. 95.) Scali-Decker then contacted Hogle, who told her that while she personally knew the plaintiffs and had contact with the child during a summer bible camp, where Hogle saw her on a daily basis outside plaintiffs' presence, Hogle observed no signs of child abuse or inappropriate conduct. (Id. 6, 97; Scali-Decker Dep. 75-77.) She also denied ever seeing nude pictures of the child. (Id.) She reiterated that the information she had provided came from a so-called friend of the family who insisted on anonymity and informed Scali-Decker that the child was enrolled in the Goshen Central School District. (Id. 99, 102.) Scali-Decker urged Hogle to have this anonymous source call her directly. (Id. 101.) Hogle's source, as you all know, turned out to be Theresa Falletta, the former babysitter of the family.

Scali-Decker contacted Scotchtown Avenue Elementary School and confirmed the child's attendance there. (Id. 109.) Because their investigation had as the target both of the parents, the plaintiffs here, Scali-Decker and the police officer decided to interview the child at her school without parental consent or notice. (Id. 113; Scali-Decker Deposition

Ex. H at 79; Scolza Deposition, Ex. F at 91; Smith Deposition, Ex. Q at 78.) Smith, the MDT case supervisor, approved the interview. (Smith Deposition, Ex. Q at 78.)

The MDT protocol emphasizes that "the most ideal and advantageous location . . . to interview . . . is at [CPS] offices," but states that "schools represent a commonly utilized location for child interviews consistent with the pre-established protocol between the school and CPS" because school interviews are "often the only option in cases which require an immediate response and risk assessment to a report of a sexual abuse." (Joint Defs. 56.1 Response 94.)

Although defendants deny that the MDT protocols require interviewing an alleged child victim at school without parental consent or notice when both parents are subject to a SCR report, see id. 103, Smith, Richichi, Scali-Decker, Scolza, Dudzik-Andrews, LaSusa testified that it was the MDT's practice to do so. (Dudzik-Andrews Dep. at 49-54; Smith Dep. at 44-46, 48-50, Richichi Dep. at 54-56; Scali-Decker Dep. at 40-42, 47-51, 87-88; LaSusa Dep. at 24-27; Scolza Dep. at 39-40, 97. David Jolly, the Commissioner of the County's Department of Social Services, also testified that it was the MDT's standard practice to do so, but it depended on when the report was received. (Jolly Dep. at 38.)

When Scali-Decker contacted the school to confirm the child's attendance, she did not speak with the school nurse or

any teachers regarding the allegations in the report. (Id. 110.) The parties agree that members of the MDT do not normally contact school personnel prior to speaking with a child unless school personnel are the source of the report; however, defendants deny that it was the MDT's policy not to contact the school nurse or teachers in such instances. (Id. 110-11.)

On November 4, 2009, Scali-Decker and the officer arrived at the child's school and identified themselves. (Id. 129; Joint Defs.' 56.1 336.) Daniel Connor, the school's superintendent, allowed Scali-Decker and Officer Scolza to interview the child without parental notification or consent. (Joint Defs.' 56.1 Response 133, 138.) The superintendant testified that it was the School District's practice to permit CPS caseworkers or police officers to interview students without parental consent or notice. (Id. 138.) The School District believed that it was legally obligated to allow CPS to interview children in school without parental consent or notification, but it has not cited in its submission any statute or regulation or other legally enforceable obligation on which this belief was formed. (Joint Defs.' 56.1 155, 156.)

B. Interview of T.C.P.

After Superintendent Connor authorized the interview, Mary Kay Jankowski, the school social worker, removed the child from her kindergarten class -- remember we are dealing with a

five-year-old -- and took her to the assistant principal's office to be questioned by Scali-Decker and the police officer. (Joint Defs.' 56.1 Response 143, 145.) The child had never been in that office prior to the interview, and children at the school knew that they were not allowed to walk alone in the hallways. (Id. 146, 147.) The officer was not in uniform, but he was carrying a gun, which was under his suit jacket, and was carrying his shield, and handcuffs. (Id. 127.) For these purposes, I am prepared to assume they were not visible.

Scali-Decker and Officer Scolza interviewed the child with Jankowski present for approximately 15 to 20 minutes. (Id. 145; Joint Defs.' 56.1 345.) The child did not know Scali-Decker or Scolza and didn't, presumably, know the school social worker Jankowski. Jankowski told the child that "it was okay" to answer questions that Scali-Decker and Officer Scolza would ask her. (Joint Defs.' 56.1 Response 144.) Scali-Decker did not offer the girl an opportunity to call her parents, nor did she tell the girl she was free to leave and not answer the questions. (Id. 149.) The doors to the office she was in were closed. (Id. 145.) She was questioned about various topics, including: (1) whether she bathed alone and how she bathed; (2) whether either of her parents ever touched her inappropriately; (3) whether she had any secrets; (4) whether she could identify her body parts, including the private body parts; (5) whether she had seen anyone else's private parts or whether she had

ever shown her private parts to anyone; (6) whether she had ever been alone; (7) whether she slept with her mother or father; (8) whether her parents argue and, if so, what they argue about; (9) whether anyone was naked at home; (10) whether there were naked pictures of anyone at home; and (11) whether she ever saw magazines, movies, or TV programs with any naked people. (Id. 151-52, 155; Ex. 10 to Bergstein Aff. at 10.) She was quiet and compliant throughout the questioning. (Id. 153.) Not a single one of the child's answers indicated that she had been abused or maltreated or that there was any cause for concern. (Id. 170.)

After the interview, Jankowski told Scali-Decker and Officer Scolza that the school nurse informed Jankowski that the child had not made an unusual number of visits to her. (Id. 167.) You will remember that was another one of the anonymous allegations. The parents did not learn that CPS had interviewed their child until later that afternoon. (Joint Defs. 56.1 389-90.)

C. The Interview of Plaintiffs and the Search of their Home

The day after the school interview, on November 5, 2009, plaintiffs arrived at the Department of Social Services ("DSS") office with their two-year old daughter and they waited for an interview with Scali-Decker and Officer Scolza, that is,

the two employees who had interviewed the child. (Joint Defs.' 56.1 Response 171.) While Plaintiffs waited, Scali-Decker received a phone call from Ms. Falletta, who continued to insist on anonymity. (Id. 176.) She did identify herself as Hogle's source of information for her report against plaintiffs and described what she viewed as her grounds for concern. She stated that the father occasionally made vulgar or inappropriate comments, that he sometimes slept in the same bed as the child, and that there were pictures of the child in a mermaid costume which she, Falletta, felt were "sexual in nature." (Jnt. Defs.' 56.1 404, 406, 407, 408.) Falletta also informed Scali-Decker that another friend had stated that Phillips gave him "a sick feeling." (Id. 263.) Falletta admitted that she had no knowledge whatsoever of the child acting out sexually, that the child had never told her that her father had acted inappropriately, and she had never seen naked pictures of the child. (Joint Def.'s 56.1 Response 178; Scali-Decker Dep. at 97.)

After receiving this call from Falletta, Scali-Decker and Officer Scolza interviewed the parents. They, of course, vehemently denied the allegations of sexual abuse. (Joint Def.'s 56.1 Response 182.) The father did say he had said his daughters "have cute butts." (Plaintiffs' 56.1 Response 270; Phillips Dep., Ex. D at 70.) Plaintiffs showed Scali-Decker the pictures of the child in a mermaid costume -- everyone here

has seen them; they are part of the record -- the pictures Falletta had referenced, and Scali-Decker wrote in her notes that in the pictures, "[a]ll of the child's private areas were covered and the child appeared happy . . . it does not appear sexual in nature." (Joint Def.'s 56.1 Response 183; Ex. 3 to Bergstein Aff. at 32.) Certainly that's the way the picture of the young child in a mermaid costume appears to me. That's not for me to determine.

Scali-Decker scheduled a home visit with plaintiffs for the next day, November 6, 2009. (Id. 185.) Condoluci testified that she agreed to the home visit after Scali-Decker told the parents that a home visit was "required." (Condoluci Dep. Ex. E at 99.) Scali-Decker averred that she is unsure whether she said that the home visit was "required," but in fact she said she often tells parents that she is required to do a home visit. (Scali-Decker Decl. 14.) In other words, she did not know what she said on this particular time.

Dudzik-Andrews, the MDT's Senior Case Supervisor, testified at a deposition that caseworkers tell parents that a home visit is required and are not trained to tell parents that they can refuse to consent to the home visit. (Dudzik-Andrews Dep. 59-60.) Smith, a MDT case supervisor, could not recall any parent ever refusing to consent to a home inspection. (Joint Def.'s 56.1 Response 187.)

After interviewing the parents, Scali-Decker and the

police officer concluded that "there was not enough for a criminal charge," therefore, Scolza would close the criminal case and Scali-Decker would conclude the CPS case (Id. 189.) Scali-Decker then met with her supervisor, Smith, and informed Smith that there was no basis to the allegations against plaintiffs, but that she would still complete the home visit "based on [the MDT] protocol." (Id. 190.) Plaintiffs aver that had they known that they could refuse the home visit and that the allegations against them had been made anonymously and were hearsay and that they had, in part, already been disproven, they would not have consented to the visit. (Id. 188.)

Joseph LaSusa, a senior CPS caseworker, conducted an inspection of plaintiffs' home on November 6, 2009. (Id. 197, 202.) He walked around the kitchen, living room, home office, and all the bedrooms. (Id. 202-03.) Plaintiffs state that LaSusa said, "With allegations like these, I need to see the bedrooms." (Condoluci Decl. 12; Phillips Decl. 14.) When LaSusa asked why the child and her younger sister sometimes did not sleep in their bedrooms by themselves, the parents responded, not surprisingly, that the children sometimes had trouble sleeping. (Joint Def.'s 56.1 Response 205.) On November 9, 2009, LaSusa told Scali-Decker and Smith that there was nothing unusual with the home and that he had no concerns about the parents. (Joint Def.'s 56.1 Response 206.) On that same day, Scali-Decker and Smith agreed to close the case as

unfounded. (Id. 207.) Scolza testified that he then closed the criminal investigation into plaintiffs on November 6, 2009 -- the very day of the home visit -- and that he wrote that it was closed "by investigation" rather than as unfounded or baseless, because he believed that plaintiffs demonstrated "improper judgment" by displaying the photos of their daughter in her mermaid costume on the refrigerator. (Scolza Dep. at 71-73.)

III. THE LEGAL STANDARD

I am not going to go through the legal standard at length here. Everyone here knows what it is, that is, essentially, summary judgment is appropriate only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317,322 (1986). In determining whether a genuine dispute of material fact exists, the Court "is to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." Patterson v. Cnty. of Oneida, 375 F.3d 206, 219 (2d Cir.2004). Nonetheless, the party opposing summary judgment "may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence" in support of its factual assertions. D'Amico v. City of New York, 132 F.3d 145,149 (2d Cir. 1998); see also Buckley v. Deloitte & Touche USA LLP, 888 F.Supp.2d

404, 414-15 (S.D.N.Y.2012), aff'd 541 F. App'x 62 (2d Cir. 2013).

"When considering cross-motions for summary judgment, a court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Make the Rd. by Walking, Inc. v. Turner, 378 F.3d 133,142 (2d Cir. 2004) (internal quotation marks omitted).

IV. DISCUSSION

a. The Child Was Seized in Violation of the Fourth Amendment

Plaintiffs claim that the interview of the child at her school violated her Fourth Amendment right to be free from unreasonable searches and seizures. "[T]he Fourth Amendment applies in the context of the seizure of a child by a government agency official during a civil child-abuse or maltreatment investigation." Kia P. v. McIntyre, 235 F.3d 749, 762 (2d Cir. 2000). The threshold question is whether the in-school interview of the child constituted a "seizure" for Fourth Amendment purposes.

"A 'seizure,' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority ... in some way restrained the liberty of a citizen.'" Graham v. Connor, 490

U.S. 386, 395 n. 10 (1989) (quoting Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968)). Further, a seizure occurs where, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Kia P., 235 F.3d at 762 (internal quotation marks omitted). When evaluating whether a child was seized, a court should consider the age of the child at issue. See Guan N. v. NYC Dept. of Educ., 11 CIV. 4299, 2014 WL 1275487 at *20 (S.D.N.Y. Mar. 24, 2014) (concluding that "a reasonable [twelve-year-old] . . . would have felt restrained from leaving"); Jones v. Hunt, 410 F.3d 1221, 1226 (10th Cir. 2005) (viewing the seizure claim "through the eyes of a reasonable sixteen-year-old").

This Court is unaware of any precedent within the Second Circuit that directly addresses whether an in-school interview of a child by CPS caseworkers can constitute a seizure. However, in Doe v. Heck, 327 F.3d 492 (7th Cir. 2003), the Seventh Circuit answered this question in the affirmative. Lower courts within the Second Circuit have held that the removal of a child, even temporarily, constitutes a seizure and also that an in-school interview of a child by a school district representative regarding the student's conduct constituted a seizure. See e.g., Mislin v. City of Tonawanda Sch. Dist., No. 02-CV-273 S, 2007 WL 952048, at *8-9 (W.D.N.Y. Mar. 29, 2007) (holding that a student "was seized for purposes of the Fourth Amendment when ... he was removed from his class

during the school day and required to sit for a 20-minute, closed-door, recorded interview with [an investigating attorney]"); Estiverne v. Esernio-Jenssen, 833 F.Supp.2d 356, 375-76 (E.D.N.Y. 2011); E.D. ex rel. V.D. v. Tuffarelli, 692 F.Supp.2d 347, 366 (S.D.N.Y. 2010). Several other circuits have also held that such interviews constitute seizures under the Fourth Amendment. See Phillips, 894 F. Supp. 2d at 361 (collecting cases).

The parties agree that the following factual statements are true:

The school social worker removed the child from her kindergarten class and brought her to the assistant principal's office. She had never been to the assistant principal's office before.

The social worker told the child that it "was ok" to answer the questions of the two adults strangers.

Behind closed doors and in front of three adults, she was subjected to 15 to 20 minutes of intimate questioning.

She was not given the opportunity to call her parents, she was not told that she could leave, she was not told she could decline to answer questions and, as I stated, the parties agreed the school rules prohibited children from walking in the hallways by themselves.

In those circumstances, this court concludes that a reasonable five-year-old child would not have thought she was

free to leave or that she was free decline to answer the questions posed by the adults.

I therefore find that T.C.P. was seized within the meaning of the Fourth Amendment. See e.g., Mislin, 2007 WL 952048; Jones, 410 F.3d at 1227 (noting that "[a] reasonable high school student would not have felt free to flaunt a school official's command, leave an office to which she had been sent, and wander the halls of her high school without permission"); Heck, 327 F.3d at 510 (finding that where eleven-year-old boy was removed from his class and questioned by a police officer and two caseworkers "for twenty minutes about intimate details of his family life," he was "'seized' within the meaning of the Fourth Amendment because no reasonable child would have believed that he was free to leave").

The Court must now examine whether T.C.P's seizure was unreasonable, so I have concluded there was a seizure. The next determination is was it an unreasonable seizure and therefore violative of the Fourth Amendment of the Constitution. Probable cause is generally descriptive of what seizures are reasonable where, as here, no warrant or court order has been obtained. See Tenenbaum v. Williams, 193 F.3d 581, 602-03 (2d Cir. 1999). The Second Circuit, though, has not yet definitively stated whether the probable cause standard or a lower "special needs" based standard applies in the context of a child abuse investigation to determine the

reasonableness of a seizure. See Estiverne, 833 F.Supp.2d at 376; Phillips, 894 F. Supp. 2d at 364.

Some government officials outside the realm of criminal law enforcement "have 'special needs beyond the normal need for law enforcement [that] make the warrant and probable-cause requirement impracticable.'" Tenenbaum v. Williams, 193 F.3d 581, 603 (2d Cir. 1999) (quoting O'Connor v. Ortega, 480 U.S. 709, 720 (1987). "If forcing a non-law enforcement government officer to follow ordinary law enforcement requirements under the Fourth Amendment would impose intolerable burdens on the officer or the courts, would prevent the officer from taking necessary action, or tend to render such action ineffective, the government officer may be relieved of those requirements and subjected to less stringent reasonableness requirements instead." Tenenbaum, 193 F.3d at 603; see also, e.g., T.L.O., 469 U.S. at 340-43 (school administrator's search of a student's purse was not subject to the warrant and probable-cause requirements).

In Tenenbaum, where CPS caseworkers took a child from her school to a hospital for a medical examination without a warrant or consent of the parents, the Court rejected a categorical exemption from probable cause requirements for caseworkers in the context of child abuse and evaluated the seizure using the probable cause standard. Id. at 604 ("[I]f [CPS] caseworkers have 'special needs,' we do not think that

freedom from ever having to obtain a predeprivation court order is among them.") Other circuits have also indicated that the seizure of a child by caseworkers is not such a "special needs" situation. See, e.g., Good v. Dauphin County Soc. Servs. for Children and Youth, 891 F.2d 1087, 1092-94 (3d Cir.1989) (applying ordinary probable-cause standard to inspection of child's nude body by caseworker and police officer); Donald v. Polk County, 836 F.2d 376, 384 (7th Cir.1988) (applying probable-cause standard to caseworkers' removal of child from parents' custody). See Darryl H. v. Coler, 801 F.2d 893, 901-02 (7th Cir.1986). Tenenbaum did leave open the possibility, though, that in other circumstances CPS caseworkers could demonstrate "special needs" such that their actions should be subject to the less stringent reasonableness requirement.

Here the defendants argue that the "special needs" of the MDT justify the application of the less stringent reasonableness requirement. To support that, they cite T.L.O. and its progeny. But those cases are minimally relevant here, because while they also examine in-school searches and seizures, the searches and seizures in those cases were conducted by school officials seeking to utilize the school's "swift and informal disciplinary procedures" necessary to "maintain order in the school," rather than being conducted by a CPS caseworker and a police officer who were pursuing

parallel child abuse and criminal investigations. See T.L.O., 469 U.S. at 340-41.

A case involves "special needs" where the government has identified some need, "beyond the normal need for law enforcement," to justify a departure from traditional Fourth Amendment probable cause standards. See Ferguson v. City of Charleston, 532 U.S. 67, 76 n.7 (2001). Fourth Amendment protections are relaxed only where there is no law enforcement purpose behind the searches or seizures and "little, if any, entanglement with law enforcement." Id. at 81 n. 15. Here, law enforcement objectives and law enforcement entanglement are decidedly present. The MDT's own written objectives include "increas[ing] the number of child sexual abuse cases that are adjudicated in family court and/or result in a conviction in criminal court." (Exhibit 4 to Bergstein affidavit at 2.) Although Police Officer Scolza testified that when he was investigating a case, he was "not necessarily" conducting a criminal investigation and that it was, rather, his job "to see if there is a criminal component." In this case, Scolza participated in interviews as a law enforcement officer to determine whether Phillips had sexually abused his daughter; that is, clearly he was doing criminal investigation, at least in part. Had Scolza determined it was appropriate, he would have effected an arrest and coordinated with the District Attorney's office to "swear out" a charging document, without a

referral to local law enforcement. (Richichi Dep at 32; Joint Defs.' Response 89.) And indeed, a New York State Police file is opened on all SCR reports investigated by the MDT. (Joint. Defs.' Response 35, 91; Exhibit 4 to Bergstein affidavit at 2.) So here there is direct involvement of law enforcement in an in-school seizure and interrogation of a suspected victim of child abuse, though, in light of that, I cannot find that the child was seized for some "special need[ ], beyond the normal need for law enforcement." Ferguson, 532 U.S. at 74 n. 7; see also Roe v. Texas Dep't of Protective & Regulatory Servs., 299 F.3d 395, 407 (5th Cir. 2002) (where investigations into allegations of physical or sexual abuse are performed jointly with law enforcement agencies, "we must apply the traditional Fourth Amendment analysis" because "a child protective services search is so intimately intertwined with law enforcement.")

Thus, I evaluate the child's seizure using the probable cause standard. I must determine whether Officer Scolza and Scali-Decker knew "facts and circumstances that were sufficient to warn a person of reasonable caution in the belief that a child was abused or neglected." Southerland v. City of New York, 680 F.3d 127, 158 (2d Cir. 2012).

The parties here agree on the basic contents of Hogle's calls. That's not really at issue. It is not at issue. Although Hogle identified herself, she was reporting the concerns of an anonymous source who she did not identify

then and she refused to identify the source on other occasions as well. "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." Florida v. J.L., 529 U.S. 266, 270 (2000) (internal citations and quotations omitted).

Although Hogle reported the basis for her anonymous source's knowledge- -- that is, that the unnamed source was allegedly a family friend of plaintiffs -- Hogle's statements did not bolster the veracity of her anonymous source. The source's allegations concerning the parents displaying allegedly nude pictures of their five-year-old, their sleeping arrangements, and the alleged frequent visits to the school nurse by the child were not, without more, indications that sexual abuse was occurring.

Linda Joyce, the director of the SCR, testified that the allegations of a parent sleeping with a child or that a child frequently visited the school nurse would not in and of itself meet the SCR's "reasonable cause to suspect abuse standard." She also testified that nude pictures of the child in the home would not automatically meet that reasonable cause standard. In fact, Hogle testified that the SCR specialist she spoke to initially told her "she did not think there was enough information to take a report," indicating that even the SCR

believed that these allegations might not have provided a sufficient basis on which to initiate an investigation.

Going back to what Hogle was saying, she stated, "it is suspected" that there is sexual abuse and her anonymous source claimed to have "witnessed specifics," although she provided absolutely no specifics. Hogle herself undermined her source's report and credibility when she admitted that Hogle knew the family, Hogle had had daily personal contact with T.C.P. when they both attended a summer bible camp at Hogle's church, and that Hogle had observed no indications of abuse or inappropriate conduct. The risk of distortion of the report as it was transmitted from party to party was illustrated here where Scali-Decker spoke directly to the anonymous source herself and learned that the source had not in fact seen nude pictures and the source's concern stemmed largely from the little girl's mermaid costume and several allegedly vulgar comments she claimed the father had made.

I hereby make the finding that Hogle's report did not provide probable cause to seize the child and that this interview was conducted in violation of the Fourth Amendment.

Defendants argue that members of the MDT were entitled to rely on the SCR's determination of reasonable cause to suspect abuse. As the SCR manual makes clear, SCR specialists do not make a determination of probable cause. They assume the good faith of anonymous callers and the accuracy of their

reports as a matter of policy. The MDT, therefore, was not entitled to rely on any SCR determination of reasonable cause.

b. Liability Pursuant to Monell

Plaintiffs bring claims against each defendant for the alleged violation of their Fourth Amendment rights. "Congress did not intend municipalities to be held liable [under 42 U.S.C. 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort." Monell v. Dep't of Soc. Servs. of N.Y.C., 436 U.S. 658, 691 (1978). Thus, "to prevail on a claim against a municipality under section 1983 based on acts of a public official, a plaintiff is required to prove: (1) actions taken under color of law; (2) deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official policy of the municipality caused the constitutional injury." Roe v. City of Waterbury, 542 F.3d 31, 36 (2d Cir. 2008). The fifth element reflects the notion that "a municipality may not be held liable under 1983 solely because it employs a tortfeasor." Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 403, (1997). In other words, a municipality may not be liable under section 1983 "by application of the doctrine of respondeat superior." Pembaur v. City of Cincinnati, 475 U.S. 469, 478 (1986). Instead, there must be a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation." City of

Canton v. Harris, 489 U.S. 378, 385 (1989).

Moreover, "a custom or policy cannot be shown by pointing to a single instance of unconstitutional conduct by a mere employee of the [government]." Newton v. City of New York, 566 F.Supp.2d 256, 271 (S.D.N.Y.2008); see also Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.") In the end, therefore, "a plaintiff must demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the alleged injury." Roe, 542 F.3d at 37 (internal quotations omitted). "That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 404 (1997).

i. The County Is Liable Pursuant to Monell for the Child's Unconstitutional Seizure

The MDT is a unit within the Orange County CPS, and therefore its seizure of the child constitutes an action of the County taken under the color of law. As set forth above, the

child's seizure was unconstitutional in the view of this court. The question of damages is a factual matter for a jury to decide. As you know, upon finding of a constitutional violation under 1983, I instruct the jury that it must find $1 nominal damages if it doesn't find any other damages, so there is a dollar here in damages, and it will be up to the jury to decide whether there are additional damages, if it gets to a jury, that is, if this comes to trial.

Plaintiffs claim that there are no genuine disputes of material fact as to the final elements of the Monell test: that is, "an official policy of the municipality caused the constitutional injury" such that the municipality was the "moving force" behind the deprivation of federal rights.

Plaintiffs allege that the County had a policy of interviewing children regarding allegations of parental abuse at school without parental consent or notification and without probable cause. The County contends that it did not have such a policy and investigatory decisions were instead made on a case-by-case basis. Despite the County's position, the testimony of all relevant witnesses confirms that there was such a policy. There is no disputed material fact in that regard.

A municipality's informal practice may be sufficient to establish Monell liability. See Jeffes v. Barnes, 208 F.3d 49, 57 (2d Cir. 2000). Numerous caseworkers and supervisors

attested that the MDT had a practice of interviewing children at school without parental notification or consent. David Jolly, Commissioner of Social Services for the County averred that "[i]n this case, the decision to interview the child at the child's school was reached by the MDT in accordance with our local protocols." (Jolly Decl. 12.) He acknowledged that the County's MDT protocol could be read to direct that children be interviewed at DSS offices, but "it makes more sense to interview the child in the community" and that concerns of alleged perpetrator access to children "leads to interviews being conducted at school or in other spaces where the subject child feels safe." (Id. 30, 31.) He further testified that if the report of abuse is received during school hours, the MDT's practice would be to interview the child at school without notice to the parents. (Jolly Dep. at 38.) The MDT protocols themselves state that "[s]chools represent a commonly utilized location for child interviews consistent with a pre-established protocol between the school and C.P.S. This location is not always the most favorable location for such an interview, but is often the only option in cases which require an immediate response and risk assessment to a report of sexual abuse." (Ex. 4 to Bergstein Aff. at 110 2.)

Richichi, the MDT's Law Enforcement Supervisor, testified at his deposition that where a parent is the target of the allegation, "we'll try to talk to the children first,"

and "[d]epending on the age of the child . . . if we can, we'll interview them at school," in part because "[i]t would be counterproductive to notify a parent that they're the target of an investigation or somebody in the household is a target of the investigation prior to talking to the alleged victim." (Richichi Dep. at 55-56.)

Dudzik-Andrews, the MDT's Senior Case Supervisor, testified similarly that in cases of suspected sexual abuse, the MDT would interview the child before anyone else is interviewed unless they did not have access to the child. (Dudzik-Andrews Dep. at 32-33.)

Smith, the MDT case supervisor, as well as the police officer and Scali-Decker, also testified that it was the MDT's practice where both parents are accused of abuse to interview the child at school without parental notification or consent and without speaking to school personnel first, unless school personnel are the source of the report. (See Smith Dep. at 46, 48, 50; Scolza Dep. at 39; Scali-Decker Dep. at 40-41, 47.)

LaSusa, a senior CPS caseworker who had worked on the MDT for seven years, similarly testified that the standard practice was to interview the child at school, generally without notifying the child's parents, and that an interview with the child is the first investigative step taken after speaking to the source of the report. (LaSusa Dep. at 25-27.)

County witnesses testified unequivocally that the MDT

does not assess whether reports it receives from the SCR constitute "reasonable cause to suspect abuse" or probable cause. (See Dudzik-Andrews Dep. 45-46; Richichi Dep. 34-35.) The County's practices, which were to interview children without notification or authorization of the parents and to interview them at school whenever possible and without making a determination of probable cause were unquestionably the moving force behind the unconstitutional seizure for purposes of Monell liability.

The County protests that once the MDT receives a report from the SCR, the MDT is required to investigate it. The County argues that the County's actions therefore do not constitute the deliberate conduct that Monell requires. Regardless of whether or not the MDT had any choice in whether it had to investigate the report from the SCR, the MDT certainly had discretion over how to investigate the report. In this case, for example, the MDT could have sought to corroborate the anonymous report with other adults who would have had direct knowledge of the veracity of those allegations, such as the school nurse. Additional investigation could have either established probable cause or cast further doubt upon the report. The MDT could also have sought parental permission for an interview and, if it was refused, presumably they could have sought a court order. And if there is any evidence of imminent danger to T.C.P. -- and there doesn't seem to have

been any in this record -- arguably the MDT could have used the exigent circumstances exception to probable cause and invoked that. See Tenenbaum, 193 F.3d at 605. It was the county's -- that is, MDT's -- discretionary investigatory protocols which caused the child's unconstitutional seizure and results in the County being liable pursuant to Monell, and that's why I am granting summary judgment in favor of the parents, but only against the county on liability.

ii. The Village is Not Liable Pursuant to Monell

Plaintiffs allege that the Village is liable pursuant to Monell for the child's unconstitutional seizure. However, the defendant in discovery has not adduced any evidence whatsoever that the Village had any role whatsoever in creating the policies of the MDT or guiding its investigations. Instead, discovery showed that the Village's involvement with the MDT consisted exclusively of a contract with the County to assign a single police officer, Officer Scolza, to the MDT. (Jnt. Defs. 56.1 78.) Officer Scolza was then supervised on a day-to-day basis by supervisors from the County, and the State and the Village had no oversight or supervision over the daily operations of officers assigned to the MDT. (Jnt. Defs. 56.1 81, 82.) The parties agree that the MDT Protocol was in effect prior to the Village's contract with the County and that "the way in which investigations are conducted by the MDT has not

changed since the Village became involved with the MDT." (Jnt. Defs. 56.1 54, 55.)

Plaintiffs say that when the Mayor of the Village signed the Vendor Services Contract with the County, that is the contractor I am talking about that ended up in Scolza being assigned to this investigation, in which the village agreed to assign a police officer to the MDT and that the officer would agree to follow mutually agreed protocols, that according to the plaintiffs, the Village was delegating the authority to create municipal policy to an entity that directed unlawful action, thereby incurring liability. The Village did not have the authority to create CPS investigative policy for the County, therefore it could not delegate such authority.

Additionally, Pembaur v. City of Cincinnati, 475 U.S. 469, 471 (1986), which plaintiffs cite to support this proposition, applies only to situations where a municipality delegates policymaking authority to an official within that same municipality, rather than delegating policymaking authority to another municipality altogether, which is what plaintiffs allege the Village did here.

So I conclude that no reasonable jury could find that the Village's policy of assigning one law enforcement officer to the MDT was the "moving force" behind the child's unconstitutional seizure.

I therefore grant the Village's motion for summary

judgment in its favor and deny plaintiffs' motion for summary judgment as to the Village's Monell liability. Therefore the Village no longer has any claims against it.

iii. Material Questions of Fact Exist Regarding Plaintiffs' Claim that the School District is Subject to Monell Liability

Plaintiffs allege that the School District's policy of permitting CPS caseworkers and police officers to interview students without parental consent or notice was a "moving force" behind the child's constitutional injury. "[T]he word 'policy' generally implies a course of action consciously chosen from among various alternatives." Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985). Where a municipality acts merely to comply with state law, rather than in accordance with its own discretionary policy, it cannot be held liable pursuant to Monell. See Vives v. City of New York, 524 F.3d 346, 356 (2d Cir. 2008) ("[A] municipality cannot be held liable simply for choosing to enforce [the law].")

It is undisputed that the school district believed that it was obligated by law to allow CPS to interview children in school without parental consent or notification. But the school district has not cited to this court any statute or regulation on which this belief was formed and, thus, I cannot preclude Monell liability at this time on the part of the

school district. They have just given me nothing to back up their statement that they were legally obligated to allow CPS to interview the children without parental consent or notification.

I therefore find that there is a material question of fact as to whether the school district was required to permit CPS to interview children without parental consent or notification and, as I say, I am denying the plaintiffs' and the school district's summary judgment on this issue.

c. Material Question of Fact Exist Regarding Plaintiffs' Conspiracy to Violate 42 U.S.C. 1983 Claim except as to the Village

The parties also move for summary judgment on plaintiffs' claim that a conspiracy to violate 42 U.S.C. 1983 existed among the County, the Village, and the School District in connection with the interview of the child. To prove a Section 1983 conspiracy, plaintiffs must show: "(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999). "[A] plaintiff must show that defendants acted in a willful manner, culminating in an agreement, understanding, or meeting of the

minds, that violated [his or her] rights, privileges or immunities secured by the Constitution or federal courts." Bussev v. Phillips, 419 F.Supp.2d 569, 586-87 (S.D.N.Y. 2006).

Material questions of fact as to whether or not an agreement existed between at least two state actors precludes summary judgment for any party. As set forth above, the Village merely assigned an officer to the MDT. The Village itself had no role whatsoever in creating or enacting the County's MDT practices. A reasonable jury therefore could not find that the Village acted in concert with the County to inflict an unconstitutional injury, and I am granting summary judgment to the Village on plaintiffs' conspiracy claim.

As is also set forth above, there is a material question of fact as to whether or not the School District acted willfully when it agreed to allow the County's MDT to interview the child without parental consent or notification.

In sum, plaintiffs have not proven a conspiracy because the Village did not "act in concert" with the County "to inflict an unconstitutional injury," and there is a material question of fact as to whether the School District acted in "a willful matter." Summary judgment for the County and the School District is therefore precluded because a reasonable jury could find that the County and the School District conspired to violate the child's constitutional rights. I therefore deny summary judgment on this claim to the

plaintiffs, the County, and the School District, but I am granting summary judgment on the conspiracy count to the Village.

d. Material Questions of Fact Exist Regarding Plaintiffs' Claim that Their Home Was Searched in Violation of the Fourth Amendment

Plaintiffs argue that the home visit constituted an unlawful search in violation of the Fourth Amendment for which the County is liable pursuant to Monell on the grounds that their admitted consent to the search was not voluntarily given.

It is well settled that "one of the specifically established exceptions to the requirement of both a warrant and probable cause is a search that is conducted pursuant to consent." Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Such consent must be voluntary. Id. at 227.

"[T]he question whether a consent to a search was voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all circumstances." Schneckloth, 412 U.S. at 227 (internal quotations omitted).

In reviewing the totality of the circumstances, courts consider:

> the youth of the accused, . . . his lack of education, . . . or his low intelligence, . . . the lack of any

advice to the accused of his constitutional rights, . . . the length of detention . . . the repeated and prolonged nature of the questioning, . . . and the use of physical punishment such as the deprivation of food or sleep.

Of course this is from Schneckloth as well, 412 U.S. at 226.

Courts also consider whether the subject knew of the right to refuse at time he or she consented; however, such knowledge is not dispositive of the question of voluntariness. See id. at 231-33. Further, "[t]he standard for measuring the scope of a [subject's] consent under the Fourth Amendment is that of objective reasonableness," Florida v. Jimeno, 500 U.S. 248, 251 (1991), and thus, the claimant's subjective fears do not vitiate consent where government actors did not otherwise engage in coercive conduct. Winfield v. Trottier, 710 F.3d 49, 53 (2d Cir. 2013) (citing Jimeno, 500 U.S. at 251).

Plaintiffs claim that the consent that they gave, they admitted they gave consent, but they claim it was not voluntary because Scali-Decker told them that a home visit "was required." Scali-Decker said that while she does not remember the exact words she used when setting up the home visit, she often tells parents that she is "required" to do a home visit. (Scali-Decker Decl. 14.)

The MDT's Senior Case Supervisor, Dudzik-Andrews,

testified in his deposition that caseworkers tell parents that a home visit is required and are not trained to tell parents that they can refuse to consent to the home visit. (Dudzik-Andrews Dep. 59-60.) Smith, an MDT case supervisor, was not able to recall any parent ever refusing to consent to a home inspection. (Joint Def.'s 56.1 Response 187.)

Regardless of whether Scali-Decker told plaintiffs that a home visit was required, the County contends that the mother, who happens to be an experienced attorney -- the plaintiff Condoluci is an attorney -- must have known that she could refuse to allow a warrantless search of her home.

In that regard, the County also urges upon the court that there has been spoliation of evidence here because the mother admits that she conducted Westlaw research for two hours after she learned that her child had been interviewed without a consent but before the interview of the mother at the Department of Social Services. The alleged spoliation arises out of the fact that when the County sought copies of that research four years later, the mother, certainly understandably, no longer had the cases, but she did provide the county with the statute and case that she had read in advance of her interview at the Department of Social Services. That's adequate. I find there is no spoliation of evidence here.

A reasonable jury could conclude either that the

parents' consent was voluntary or that the parents' consent was only granted "in submission to a claim of lawful authority," under Schneckloth, 412 U.S. at 233, and therefore involuntary.

The County also argues that regardless of whether a constitutional violation occurred, it cannot be held liable pursuant to Section 1983 because 18 NYCRR 432.2 requires caseworkers to conduct a home visit prior to closing a case as unfounded. However, while the County may not have discretion over whether caseworkers attempt to conduct a home visit, it does have discretion over how such attempts are made. It has discretion, for example, over whether the subjects of the investigation are told that such a visit is required and whether they are told that they have the right to refuse to consent to the searches.

If a jury found that plaintiffs' consent was not voluntarily given, it is certainly possible for a reasonable jury to find that the County's policy of telling parents that a home visit was required and not informing them of the right to refuse to consent was the "moving force" behind the constitutional violation.

Therefore, the voluntariness of plaintiffs' consent to the search of the home is a disputed issue of material fact and, accordingly, the Court denies summary judgment to both plaintiffs and the County here.

V. CONCLUSION

Okay. I think I have made it clear what I am doing. I will enter a minute order saying that for the reasons set forth on the record today:

I am granting summary judgment to plaintiffs on the Monell claim against the County for the seizure, which I find to be unreasonable;

I am denying summary judgment to the plaintiffs on their Monell claims against the School District and the Village for the unreasonable seizure, as well as on their Monell claim against the County for the search of the home;

I am granting the Village's motion for summary judgment in its favor, and I am dismissing the Village as a defendant;

I am denying the school district's motion for summary judgment in all respects; and

I am denying the county's motion for summary judgment in all respects.

All right. Thank you.

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