UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

AMY ROCK, conservator of JP,
and AMY ROCK

Plaintiffs,

Case No. 2:12-CV-255

v.

Hon. Robert Holmes Bell
United States District Judge

UNITED STATES OF AMERICA,

Defendant.
_____/

DEFENDANT'S BRIEF IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

INTRODUCTION

Plaintiff is suing the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, despite the fact that the unfortunate accident at issue did not involve any employee of the United States. After an employee of the Hannahville Indian School or Hannahville 21st Century Learning Center dropped off Plaintiff's son "JP" in a parking lot to be picked up for a church activity, JP apparently ran towards a moving church bus, slipped, and fell under the wheels of the church bus. Plaintiff nevertheless contends that the United States is responsible, apparently on the implied theory that the person who dropped off JP is an employee of the United States and that she negligently failed to remain and supervise JP before the church bus arrived.

Even if this negligent supervision theory is viable,[1] Plaintiff's claims against the United

1 Plaintiff's negligent supervision claim fails under Michigan law because the school employee did not owe a duty to continue supervising JP after safely dropping him off in the parking lot and because the school employee's actions are not the proximate cause of the injuries, which resulted from intervening causes including JP's negligence, an alleged patch of ice, and the church bus driver's actions. Defendant will assert these additional arguments in a motion for summary

States must be dismissed because the person who dropped Plaintiff off in the parking lot is not an employee of the United States for purposes of the United States' limited waiver of sovereign immunity under the FTCA. In some circumstances, a tribal employee acting pursuant to a grant or contract under the Tribally Controlled Schools Act (TCSA) may be deemed a federal employee and the United States can be held liable for personal injuries caused by her tortious actions. But the United States Department of Interior's appropriations act explicitly provides that Indian school employees that work for a charter school or perform functions related to charter school operations are not federal employees under the FTCA. Pub. L. No. 111-88. 123 Stat. 2919.

Hannahville Indian School held itself out as a charter school, was operating as a charter school, is incorporated as a charter school, and is recognized by the State of Michigan as a charter school. As a result, Plaintiff cannot pursue a claim against the United States based on the alleged negligence of a school employee. Plaintiff's addition in her First Amended Complaint ("Complaint" or "Compl.") of allegations pertaining to the tribal and charter school's 21st Century Community Learning Center Program, does nothing to undermine this conclusion. Because there is no claim arising from the alleged negligence of an employee of the United States, the Court lacks jurisdiction over the United States and Plaintiff cannot state a claim against the United States. Plaintiff's Complaint therefore must be dismissed under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Even if Plaintiff could overcome this hurdle, her tort claim for negligent infliction of emotional distress is not viable as a matter of Michigan law and must be dismissed under Rule 12(b)(6). While this undoubtedly was a tragic accident that would be difficult for any parent, Plaintiff has not alleged that she personally suffered any actual physical harm, that she was present

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judgment at the appropriate time if its Motion to Dismiss does not result in a complete dismissal.

at the time of the accident, or that she experienced shock fairly contemporaneously with the accident. Plaintiff cannot couch her experience, however challenging, as a negligent infliction of emotional distress claim because she was never at the accident scene and apparently did not see JP until hours after it happened.

FACTUAL BACKGROUND

I. The Hannahville Indian School's Charter School Status

The Hannahville Indian School, also referred to as Nah Tah Wahsh School, is located in Wilson, Michigan. (Compl. at ¶ 10; Dkt. No. 6-1, Articles of Incorporation.)[2] The tribe, which is known as the Hannahville Indian Community, operates the school and its after-school programs with the assistance of funding that the United States Department of Interior's Bureau of Indian Education (the "Bureau") provides pursuant to a grant authorized under the TCSA, 25 U.S.C. §§ 2501-2511. (Compl. at ¶¶ 8-9; Dkt. No. 6-3 at 3, Administrative Claim (narrative statement for Item 8 at 1).)[3]

The Hannahville Indian School operates and is incorporated as a charter school, or "Public School Academy," as state law denominates it. (Compl. at ¶ 10; Dkt. No. 6-1.) In Michigan, a "Public School Academy" (or "PSA") is a term of art that refers to one of several types of charter school in the Michigan school system. *See* MICH. COMP. LAWS ANN. § 380.501 *et seq.; Council of Organizations and Others for Education About Parochiaid, Inc. v. Governor of Michigan*, 455 Mich. 557, 566 N.W.2d 208 (Mich. 1997). According to the Michigan Department of Education,

2 The documents filed as Dkt. No. 6-1 are on file with the Michigan Department of Licensing and Regulatory Affairs and are publicly available through a Michigan corporation division business entity search for Nah Tah Wahsh. *See* http://www.dleg.state.mi.us/bcs_corp/sr_corp.asp (last visited August 24, 2012).

3 The United States has redacted portions of Dkt. No. 6-3 to protect JP's privacy, consistent with Fed. R. Civ. P. 5.2. In addition, a narrative statement from Dkt. No. 6-3 was filed under seal.

a Public School Academy is a "state-supported public school under the state constitution, operating under a charter contract issued by a public authorizing body. . . . PSAs are also commonly referred to as charter schools." Michigan Charter Schools – Questions and Answers, Michigan Dep't of Education, Jan. 2012, at 1-2, http://www.michigan.gov/documents/PSAQA_ 54517_7.pdf (last visited August 24, 2012). (Dkt. No. 7-2).

The Hannahville Indian School is recognized as a Public School Academy by the State of Michigan. Public School Academy Directory, Michigan Dep't of Education, at 64, http://www.michigan.gov/documents/mde/PSAs_297270_7.pdf (last visited August 24, 2012). (Dkt. No. 7-3.) The school holds itself out a "charter school," noting that "[i]n addition to the children of community members, the State of Michigan Charter Public School Academy status . . . is drawing non-Native Americans who are dissatisfied with local public schools." Hannahville Indian School, About Our School, http://hannahvilleschool.net/index.php/ ntw_pages/about/ (last visited August 22, 2012). (Dkt. No. 7-4.) Similarly, the cover letter to the school's Annual Education Report states that the school is a Public School Academy. Hannahville Indian School, School Documents (August 15, 2011), http://hannahvilleschool.net/docs/NTWSchoolCover Letter.pdf (last visited August 24, 2012). (Dkt. No. 7-5.) Perhaps most importantly, the school's Articles of Incorporation explicitly provide that the school is organized as a Public School Academy authorized by the Board of Control of Northern Michigan University. (Dkt. No. 6-1; Compl. at ¶ 10.) Plaintiff admits and alleges that it has this status as a charter school. (Compl. at ¶ 10.)

Plaintiff alleges that agents or employees of the Hannahville Indian School or the 21st Century Community Learning Center were negligent in failing to supervise JP after dropping him off at the parking lot. (Compl. at ¶¶ 14-16, 21-23.) She contends that the 21st Century Community

Learning Center is covered by the Indian Self-Determination and Education Assistance Act (ISDA) and is grant-funded by the Bureau. (*Id.* at ¶¶ 7-8, 13). According to her, it provides after-school activities to school-age youth of both the Hannahville Indian School and the local public schools. (*Id*. at ¶ 9.) Plaintiff acknowledges that the 21st Century Learning Center Building is attached to the Hannahville Indian School building and that the 21st Century Learning Center is part of Hannahville Indian Community's Youth Services Department. (*Id*. at ¶¶ 11-12.) Finally, she alleges that it was pursuant to the TSCA grant that the employee at issue transported JP and dropped him off. (*Id*. at ¶¶ 14-15.)

II. The Accident

According to Plaintiff's Complaint, on February 3, 2010, JP attended an after-school program run for the benefit of the school at the 21st Century Learning Center associated with the school. (Compl. at ¶¶ 7-9, 14-15; Dkt. No. 6-3 at 3-5 (narrative statement for Item 8 at 1-3).) Plaintiff asserts that after the program, Ida Meshigaud, a school employee, transported JP and other students across the road to a parking lot at the tribal Community Health Care facility and dropped them off there to wait for a bus from the Bark River Bible Church, which was going to pick up JP and other students and take them to an AWANA program at the church. (Compl. at ¶¶ 14-15; Dkt. No. 6-3 at 5-6 (narrative statement for Item 8 at 3-4).) Sometime before 6:00 p.m., as the church bus came into the parking lot and began to do a u-turn, JP apparently ran toward the church bus, slipped, and slid under the wheels of the bus, which ran over the lower portion of his body. (Compl. at ¶ 17-18; Dkt. No. 6-3 at 7-8 (narrative statement for Item 8 at 5-6).) Plaintiff contends that JP suffered injuries, including injuries to his pelvis and internal organs, as a result. (Compl. at ¶ 23.) Plaintiff was not at the scene and did not see JP until much later, about four hours after he arrived at St. Francis Hospital (Dkt. No. 6-3 at 10 (narrative statement for Item 10 at

1, filed under seal in Dkt. No. 8).)[4] She apparently was in Hermansville, Michigan, (approximately 15 miles from the scene of the accident and 26 miles from the hospital), when she received the news. (*Id.*, asserting that JP's parents "came from Hermansville to meet him at St. Francis hospital.")

Plaintiff's Complaint attempts to allege two counts: (1) that Hannahville Indian School employees negligently failed to supervise JP after dropping him off in the parking lot, as he allegedly was too young to appreciate the danger in running toward the moving church bus; and (2) that Hannahville Indian School employees negligently inflicted emotional distress on Plaintiff because she learned of the accident and injuries, went to the hospital to care for JP, and at some unspecified time had emotional distress requiring counseling. (Compl. at ¶¶ 21-27.)

STANDARDS FOR MOTIONS TO DISMISS

A challenge to subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure may be a facial attack, which challenges the sufficiency of the plaintiff's factual allegations, or a factual attack, which challenges the fact of subject matter jurisdiction. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir.1994); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 324 (6th Cir.1990). In considering a factual attack on subject matter jurisdiction, the court is free to weigh the evidence relating to jurisdiction, and the plaintiff has the burden of proving jurisdiction to survive the motion. *Ritchie* at 598. The court can consider affidavits and other evidence outside the pleadings to resolve factual disputes regarding jurisdiction. *Rogers v. Stratton Industries*, 798 F.2d 913, 916 (6th Cir.1986).

4 St. Francis Hospital is located in Escanaba, Michigan.

Rule 12(b)(6) provides for dismissal where the complaint fails to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To state a valid claim, a complaint must contain . . . allegations respecting all the material elements to sustain recovery under some viable legal theory." *LULAC v. Bredsen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562, 127 S.Ct. 1955, 1969 (2007)). A court should dismiss a claim under Rule 12(b)(6) when the plaintiff has failed to plead "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly* at 555). A claim is facially plausible only where it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Iqbal* at 678. While the court should accept the complaint's factual allegations as true, the court need not accept legal conclusions, including those that are couched as factual allegations. *Id.*

The Supreme Court's decisions in *Iqbal* and *Twombly* reaffirm that "the pleading standard [in] Rule 8 . . . demands more than an unadorned, the-defendant-unlawfully- harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). In finding that such conclusory pleading was insufficient to survive a motion to dismiss, the Supreme Court reiterated the long-held rules that a plaintiff is required to plead "'a short and plain statement of the claim showing that the pleader is entitled to relief'" *Twombly*, 550 U.S. at 555 (quoting Fed. R. Civ. P. 8(a)(2)), and that courts should not accept "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ." *Iqbal* at 678. Instead, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570.) This requires "more than a sheer possibility that a defendant has acted unlawfully," and instead is satisfied only when a plaintiff pleads more than

"facts that are merely consistent with a defendant's liability . . . ." *Id*. (internal citations and quotation marks omitted). While a complaint need not contain "detailed factual allegations," it must include sufficient factual allegations "to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555 (citations omitted); *accord id.* at 556 (factual allegations must "possess enough heft to 'sho[w] that the pleader is entitled to relief.'") (internal citation omitted). A complaint states a plausible claim when it pleads sufficient factual content to allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal* at 678.

In connection with this motion to dismiss, the Court can consider documents that are: (1) "attached to, incorporated by, or referred to in the pleadings;" (2) documents attached to the motion "that are referred to in the complaint and central to the plaintiff's allegations, even if not explicitly incorporated by reference;" (3) "public records;" and (4) "matters of which the court may take judicial notice without converting the motion into a Rule 56 motion" for summary judgment. *Dobrski v. Ford Motor Co.*, 698 F.Supp.2d 966, 974-75 (N.D. Ohio 2010) (citing *Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 514 (6th Cir. 1999) and other cases); *see also Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 680-81 (6th Cir. 2011); *Jones v. City of Cincinnati*, 521 F.3d 555, 562 (6th Cir. 2008) (on a motion to dismiss, the Court may consider "public records . . . and letter decisions of governmental agencies" without converting the motion into one for summary judgment under Rule 56); *Marshek v. Eichenlaub*, No. 07–1246, 2008 WL 227333 at *1 (6th Cir. Jan. 25, 2008) (court can take judicial notice of prisoner's transfer data accessed on a government agency's official website); *Desclafani v. Pave–Mark Corp*., No. 07–CV–4639, 2008 WL 3914881, at *6 (S.D.N.Y.2008) (court can take judicial notice of records from the State government's Department of State, Division of Corporations Website). The court may consider Plaintiff's administrative claims, which she refers to in her Complaint (Compl. ¶¶ 3-4)

and which are central to her claim. *See Weiner v. Klais & Co*., 108 F.3d 86, 89 (6th Cir. 1997) (court may consider such attachments to motions to dismiss). An administrative claim is also a party admission. *Williams v. Union Carbide Corp*., 790 F.2d 552, 556 (6th Cir. 1986).

ARGUMENT

I. The Person Who Dropped JP Off Is Not A Federal Employee And The United States Is Not Liable For Her Conduct Under The FTCA.

There is no basis for jurisdiction over the United States and Plaintiff cannot establish one of the elements for a claim against the United States under the FTCA because Ms. Meshigaud, the Hannahville Indian School or Hannahville 21st Century Community Learning Center employee at issue, is not an employee of the United States under the plain text of a controlling federal statute. Congress has repeatedly and pointedly declined to waive sovereign immunity relating to the alleged torts of employees involved in charter school operations such as the Hannahville Indian School (Nah Tah Wahsh Public School Academy) and its after-school program.

As the sovereign, the United States is immune from suit unless it has consented to be sued. *Clay v. United States*, 199 F.3d 876, 879 (6th Cir. 1999). Any waiver of its sovereign immunity is strictly construed and must be unequivocal. *Clay*, 199 F.3d at 879. Without an applicable waiver of sovereign immunity, the Court does not have jurisdiction over Plaintiff's suit against the United States. *See Dolan v. United States Postal Service*, 546 U.S. 481, 484-85 (2006).

The FTCA contains a limited waiver of sovereign immunity for certain torts committed by federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1).[5] But

5 The FTCA provides that the United States may be liable for "personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

there is no such waiver in this case, and Plaintiff cannot establish an essential element of an FTCA claim: that an employee of the United States committed the alleged acts. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994) (listing six elements for FTCA claims).

Plaintiff's entire Complaint apparently is based on the faulty implied premise[6] that under the ISDA, 25 U.S.C. § 450 *et seq.*, and the TCSA, 25 U.S.C. §§ 2501 *et seq.*, the person who dropped off JP is an employee of the United States for FTCA purposes. (Complaint at ¶¶ 1, 7-9.) This conclusion is contradicted by both the purposes of the ISDA and TCSA and, more importantly, by the plain text of the appropriations acts that have consistently and explicitly prohibited such FTCA coverage for employees of charters schools and employees who perform charter-school related operations.

The ISDA was enacted to promote the federal policy of giving Indian tribes control over the administration of federal programs that benefit them. *Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181, 2186 (2012); *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir. 1995); 25 U.S.C. § 450a(a). A tribe that enters into a self-determination contract receives funding that allows it to plan, conduct and administer programs or services that the federal government otherwise would have provided "to Indian tribes and their members pursuant to federal law." *FGS Constructors* at 1234; *see also Ramah Navaho Chapter* at 2186; 25 U.S.C. § 450b(j). The purpose of ISDA is "to increase tribal participation in the management of programs and activities on the reservation." *Snyder v. Navaho Nation*, 382 F.3d 892, 897 (9th Cir. 2004); *see also Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1279 (10th Cir. 2006) (ISDA is intended to "promote tribal autonomy by permitting tribes to operate programs previously operated by the United States");

6 Plaintiff failed to specifically allege that the employees at issue are considered employees of the United States for FTCA purposes.

Demontiney v. United States, 255 F.3d 801, 806 (9th Cir. 2001) ("Congress enacted the ISDA to encourage Indian self-determination and tribal control over administration of federal programs for the benefit of Indians. . . .")

Congress also wanted to limit the liability of tribes that agreed to these arrangements and provided services under these contracts, so it provided for FTCA liability for the torts of tribal employees hired and acting pursuant to these contracts in certain situations. *Snyder*, 382 F.3d at 897. As a result, "an Indian tribe, tribal organization or Indian contractor" generally is deemed to be a federal employee covered by the FTCA "while acting within the scope of their employment in carrying out the [TCSA] contract or agreement." *See* 25 U.S.C. § 450f, note (reprinting relevant portions of Pub. L. 101-512, title III, § 314, Nov. 5, 1990, 104 Stat. 1959, as amended by Pub. L. 103-138, title III, § 308, Nov. 11, 1993,107 Stat. 1416) (FTCA extension). In amending the ISDA to provide for FTCA coverage, Congress was acknowledging the unique legal trust relationship that exists when tribal governments are performing federal functions pursuant to a self-determination contract. *FGS Constructors*, 64 F.3d at 1234; s*ee also* 25 U.S.C. § 2501(b) (policy declaration). But, as explained below, the mere fact that a self-determination contract or grant exists does not mean that tribal employees necessarily have FTCA coverage, particularly where – as here – there is a specific exception to the general rule.

Despite the general extension of FTCA coverage to claims resulting from a tribal employee's performance of previously federal duties under a TCSA grant, the FTCA coverage does not apply to Indian Schools that are also operating charter schools. More specifically, the Congressional appropriations act in effect at the time of this accident explicitly provides that:

> Funds made available under this Act may not be used to establish a charter school at a Bureau-funded school . . . except that a charter school that is in existence on the date of the enactment of this Act and that has operated at a Bureau-funded school

> before September 1, 1999, may continue to operate during that period, but only if the charter school pays to the Bureau a pro rata share of funds to reimburse the Bureau for the use of the real and personal property (including buses and vans), the funds of the charter school are kept separate and apart from Bureau funds, and the Bureau does not assume any obligation for charter school programs of the State in which the school is located if the charter school loses such funding. Employees of Bureau-funded schools sharing a campus with a charter school and performing functions related to the charter schools operation and employees of a charter school shall not be treated as Federal employees for purposes of chapter 171 of title 28, United States Code.

Pub. L. No. 111-88, 123 Stat. 2919 (emphasis added). Congress has repeated this explicit exclusion of FTCA coverage for employees employed by, or performing functions relating to, charter schools, in Department of Interior appropriation acts since 1999. *See* Pub. L. No. 106-113, 113 Stat. 1501; Pub. L. No. 106-291, 114 Stat. 922; Pub. L. No. 107-63, 115 Stat. 414; Pub. L. No. 108-7, 117 Stat 11; Pub. L. No. 108-447, 118 Stat. 2809; Pub. L. No. 109-54, 119 Stat. 499; Pub. L. 110-161, 121 Stat. 1844; P.L. 112-74, 125 Stat. 786. Appropriations acts like these are Congressional acts that have the full force of law and they cannot be disregarded. *Norton Const. Co. v. United States Army Corps of Engineers*, 280 F. App'x 490, 493 (6th Cir. 2008) (where appropriations act "passed both houses of Congress and was signed by the President . . . . it is a binding act of Congress and [plaintiff] has not asserted a plausible argument regarding why we should ignore its substance."); *see also City of Chicago v. United States Dep't of Treasury*, 423 F.3d 777, 782 (7th Cir. 2005) (appropriations acts are binding, and Congress may amend substantive law in appropriations statutes) (citing Supreme Court cases).

In light of this specific exclusion, it is impossible to apply a strict construction to waivers of sovereign immunity and still conclude that Congress has unequivocally waived the United States' sovereign immunity for the acts of employees of charter schools. This exclusion of FTCA coverage is explicit and within the purview of Congress. It is well-established that an explicit

statutory provision takes precedence over a more general one. *Edmond v. United States*, 520 U.S. 651, 657 (1997); *First American Title Co. v. Devaugh*, 480 F.3d 438, 450 (6th Cir. 2007); *Nevada v. Dep't of Energy*, 400 F.3d 9 (D.C. Cir. 2005) (applying rule to appropriations acts).

While there are cases in which courts have concluded in general language that a tribal school employee who is carrying out a TCSA grant is considered an employee of the United States for FTCA purposes, there is no precedent for extending such coverage to employees of a school that was also operating as a charter school. In fact, no decisions have confronted the explicit language of the serial appropriations acts that explicitly exclude FTCA coverage where the grant-funded school employee also performs charter school-related activities.

Here, there is no possible dispute that the Hannahville Indian School is operating as a charter school. As established above, its Articles of Incorporation through a charter with Northern Michigan University specifically provide that it is a Public School Academy; the State of Michigan recognizes it as a charter school; and the school's website and other communications explicitly proclaim that it is a charter school. Plaintiff even admits it. (Compl. at ¶ 10.) The school and its employees fit into the statutory exclusion from FTCA coverage because the school is Bureau-funded but operates as, and performs the functions of, a charter school. As a result, the FTCA provisions that otherwise would allow for suit against the United States under 28 U.S.C. §§ 2671-2680 simply do not apply.

Nothing in Plaintiff's administrative claim provides any grounds for concluding that Ms. Meshigaud can be considered anything other than either (1) an employee of a charter school, or (2) an employee of a Bureau-funded school that shares a campus with a charter school operation and performs functions related to that charter school operation. Plaintiff's administrative claim admits that the 21st Century Community Learning Center is integrated with the Hannahville Indian

School and that the grant was through the Hannahville Indian School. (Dkt. No. 6-3 at 3.) In that document, she asserts that JP's attendance at this program was "part of his curriculum at" Hannahville Indian School (*id*. at 4) and that it was part of his education at the Hannahville Indian School, in supplement to his regular classes (*id.* at 5). Plaintiff states that the transportation at issue was through an agreement with Hannahville Indian School. (*Id.* at 4.) She later indicates that it was Hannahville Indian School that provided the transportation. (*Id.* at 6.)

Similarly, Plaintiff's Complaint does nothing to undermine the conclusion that Ms. Meshigaud cannot be an employee of the United States for FTCA purposes because of her employment by, or connection with, the charter school operations of the Hannahville Indian Community and 21st Century Community Learning Center. To the contrary, the Complaint recognizes that the Hannahville Indian School is a charter school (Compl. at ¶ 10). It notes that the 21st Century Learning Center building is attached to the Hannahville Indian School building and that the 21st Century Learning Center is part of Hannahville Indian Community's Youth Services Department. (*Id*. at ¶¶ 11-12.) It was pursuant to the TSCA grant that the employee at issue transported JP and dropped him off. (*Id*. at ¶¶ 14-15.) The 21st Century Community Learning Center serves students of the Hannahville Indian School as well as local public schools. (*Id*. at ¶ 9.) As a result, there is even less reason, not greater, to treat Ms. Meshigaud as an employee of the United States because of her connection to the 21st Century Community Learning Center.

Plaintiff cannot allege the elements of an FTCA claim because no employee of the United States is implicated. By the same token, the Court lacks jurisdiction because there is no waiver of sovereign immunity. Accordingly, the claims against the United States must be dismissed under Rules 12(b)(1) and (6).

II. Plaintiff Fails To State A Claim For Negligent Infliction Of Emotional Distress.

Even if Plaintiff's tort claims against the United States were not barred by sovereign immunity and the lack of involvement by an employee of the United States, her attempt to allege a claim for negligent infliction of emotional distress fails under Rule 12(b)(6) and the pleading standards in Rule 8. Fed. R. Civ. P. 8, 12(b)(6). As an initial matter, her Complaint does not allege sufficient factual predicate to support such a claim; her three-paragraph claim merely contains formulaic and conclusory recitations that are insufficient to plead a claim under *Twombly*. 550 U.S. at 555.

In addition, she cannot establish the elements of the Michigan tort of negligent infliction of emotional distress because she does not allege actual physical harm; she was not present at the time of the accident; and any shock or emotional distress she experienced was not fairly contemporaneous with the accident. The elements of a *prima facie* claim for negligent infliction of emotional distress are: (1) a serious injury threatened or inflicted on a third person, of a nature to cause a severe mental disturbance to the plaintiff, (2) the shock results in actual physical harm, (3) the plaintiff is a member of the third person's immediate family, and (4) the plaintiff is present at the time the third person is injured or suffers shock fairly contemporaneously with the injury. *Taylor v. Kurapati*, 236 Mich. App. 315, 360, 600 N.W.2d 670 (Mich. Ct. App. 1999); *Gustafson v. Faris*, 67 Mich. App. 363, 368-69, 241 N.W.2d 208, 211 (Mich. Ct. App. 1976) (denying claim of mother whose child was struck and killed by defendant driver). Here, Plaintiff's Complaint fails on both the second and fourth elements.

With respect to the second element, Plaintiff's claim completely neglects to allege that she experienced any physical harm and her claim can be dismissed on this basis alone. All she alleges

is that she learned of the injury shortly after it happened, went to the hospital, and experienced emotional distress requiring counseling at some unspecified time. This does not rise to the level required; there must be a definite and objective physical injury. *Daley v. LaCroix*, 384 Mich. 4, 179 N.W.2d 390 (Mich. 1970).

The defects are even more glaring with respect to the fourth element of a claim, and she cannot correct these problems by amending her complaint. Plaintiff was not present when the accident occurred and did not see JP at the scene; she was in another town. (Dkt. No. 6-3 at 10, (narrative statement for Item 10 at 1, filed under seal in Dkt. No. 8).) She did not see JP until a significant time later when she arrived at the hospital, which was approximately 26 miles away from where she was when she found out about the accident. (*Id.*) In fact, her administrative claim appears to indicate that she did not arrive at the hospital until JP was sedated, unconscious, and being prepared for transfer to another facility; by that time JP had been at the hospital for four hours. (*Id.*) Her conclusory allegation that she was informed of the injury within a few minutes of it (Compl. ¶ 25) and that this was fairly contemporaneous is not enough. It is fairly contemporaneous shock, not fairly contemporaneous knowledge of an injury, that matters. She does not allege any shock, let alone shock that was fairly contemporaneous with the accident.

This requirement that the shock must be fairly contemporaneous is a significant and important hurdle where the plaintiff was not present when and where the injury occurred. *See Henley v. Dep't of State Highways and Transp.*, 128 Mich. App. 214, 340 N.W.2d 72 (1983) (parents of injured child did not meet requirement because they did not witness the accident, did not arrive on the scene moments later, and did not learn of injuries until they saw the child at the hospital). In *Gustafson*, the Michigan Court of Appeals approved of a California decision, *Powers v. Sissoev*, 114 Cal. Rptr. 868 (Cal. Dist. Ct. App. 1974), determining that emotional

distress that resulted from observing one's injured child 30-60 minutes after an accident was not "fairly contemporaneous." 241 N.W. 2d at 211. The *Gustafson* opinion reasoned that the temporal limit is essential because otherwise virtually any parent could pursue such a claim after her child has been injured in an accident that the parent did not witness. 241 N.W.2d at 211 (discussing *Powers*). Likewise, in *Detroit Automobile Inter-Insurance Exchange v. McMillan,* 159 Mich. App. 48, 406 N.W.2d 232, 235 (Mich. Ct. App. 1987), the Michigan Court of Appeals concluded that a mother who did not witness the accident but arrived on the scene over an hour later and after her child had been removed from the car could not satisfy the fairly contemporaneous requirement. *See also Deisler v. Lutz,* No. 252051, 2005 WL 736517, at *4 (Mich. Ct. App. March 31, 2005) (seeing daughter an hour later at the hospital was too great a lapse to be fairly contemporaneous); *Bernier v. Bd. of County Road Commissioners the County of Ionia*, 581 F.Supp. 71 (W.D. Mich. 1983) (citing *Gustafson* and concluding that two-hour interval between accident and when plaintiff found out about it could not satisfy this element of the tort.) Under Michigan law, Plaintiff has not pled and cannot establish a shock that was fairly contemporaneous with JP's accident.

CONCLUSION

For the reasons stated above, the Court should dismiss all of Plaintiff's claims against the United States with prejudice.

Respectfully submitted,

PATRICK A. MILES, JR.
United States Attorney

Dated: September 21, 2012

\s\ Ryan D. Cobb

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