

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 REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF’S FIRST AMENDED COMPLAINT**

INTRODUCTION

There is no basis for any Federal Tort Claims Act (“FTCA”) claim against the United States in this case because Ida Meshigaud, the person whose alleged negligence is at issue, is not an employee of the United States. Plaintiffs’ Brief in Opposition to Defendant’s Motion to Dismiss Plaintiff’s First Amended Complaint (“Plaintiff’s Brief”) does not contest the dispositive fact that the Hannahville Indian School where Ms. Meshigaud worked operates as a Michigan charter school. Nor does Plaintiff dispute that under the relevant appropriations statutes, Hannahville Indian School employees are not considered employees of the United States for purposes of FTCA claims against them because the school operates as a charter school. Instead, ignoring the evidence and her own previous assertions, she now contends that Ms. Meshigaud worked for Hannahville Indian Community’s 21st Century Community Learning Center (“CCLC”) and that Ms. Meshigaud therefore was not a charter school employee or a tribal school employee involved in charter school operations.

This artificial distinction is not supported by the evidence. The 21st CCLC is part and parcel of the Hannahville Indian School, which is a charter school. Any award of Tribally Controlled Schools Act (“TCSA”) funds for the 21st CCLC is explicitly premised upon the program’s connection with the school. In fact, it was the Hannahville Indian School that applied for TCSA grant funding to run the 21st CCLC, and Hannahville Indian School officials are involved in managing the 21st CCLC, which utilizes and depends on Hannahville Indian School staff and resources. Finally, in addition to contradicting the statutory requirements, the TCSA grant materials, and the Hannahville Indian School’s representations, Plaintiff’s assertions are undermined by her own allegations and statements. The Court therefore should dismiss her claims against the United States.

ARGUMENT

I. The 21st CCLC Is Funded By The Hannahville Indian School’s TCSA Grant, Which Is Subject To The FTCA Exception In The Appropriations Statute.

The 21st CCLC and its employees are part of the Hannahville Indian School, which applied for the 21st CCLC grant funding, and 21st CCLC staff members are subject to the same exclusion of FTCA coverage as are other employees of this charter school. The 21st CCLC funding for the program at issue here is derived from the No Child Left Behind Act of 2001. Title IV, Part B of Public Law 107-110, 115 Stat. 1425; 20 U.S.C. §§ 7171-76. That funding is then incorporated into the school’s TCSA grant. *See* 25 U.S.C. § 2503(a)(3)(C) (“The grant provided under [the TCSA] to an Indian tribe or tribal organization for any fiscal year shall consist of ... (3) the total amount of funds that are allocated **to such schools** for such fiscal year under . . . (c) any other Federal education law, that are allocated **to such schools**” (emphasis added). Only Indian schools and dormitories that receive Bureau of Indian Education (“Bureau”) funding are eligible for 21st

CCLC funding through the TCSA. 25 U.S.C. § 2504(a) (enumerating various eligibility requirements for TCSA funding, all of which assume the involvement of a Bureau-funded or otherwise tribally controlled school).

These statutory requirements demonstrate that without the Hannahville Indian School, there is no 21st CCLC for tribal members. In addition, the grant program further specifies that “A 21st CCLC is a highly inter-collaborative program *within a BIE elementary, middle or secondary school system . . .*” Bureau of Indian Education Division of Performance and Accountability, 21st Century Community Learning Centers Program Application Packet, <http://www.bie.edu/cs/groups/xbie/documents/text/idc-028339.docx> at 4 (emphasis original); *see also id.* at 7 (Local Education Agencies – BIE elementary, middle or secondary schools or dormitories that receive BIE funding – can apply for 21st CCLC grants). (Attached to Second Pfister Declaration, Ex. 1-A.)

Consistent with this statutory framework and Bureau program requirements, the Hannahville Indian School – not some separate entity – applied to the Bureau for funding for the 21st CCLC. (Second Pfister Declaration, Ex. 1-E Hannahville Indian School 21st Century Community Learning Center Program Grant Application, Jun. 11, 2007, SF-424 (“Grant Application”), item nos. 8.a and 15.)¹ The Bureau’s Reimbursement Authorization for the 21st CCLC funding indicates that the unit to be funded is the Hannahville Indian School. (Badwound Declaration, Ex. 2-A at 3.) The 21st CCLC funding is listed as line item 21 on the Bureau’s itemized list of grant funds provided as part of the TCSA. (*Id.* at 2.) The Notice of Intent to Apply for the 21st CCLC Grant also lists the Hannahville Indian School as the name of the

¹ Plaintiff attached the Grant Application – and all of the grant-related materials discussed in this section – to her administrative claim. (Ex. 1. Second Pfister Decl. at ¶¶ 7-10.)

organization applying. (Ex. 1-B.) The school superintendent and school board president both signed the document. (*Id.*) Both the superintendent and the school board wrote letters in support of the Grant Application. (Ex. 1-D, 1-C.) The superintendent's letter represents that the Hannahville Indian School was committing "all resources (facilities, personnel, supplies etc.) at [its] disposal" to ensure the success of the 21st CCLC in raising the achievement level of the school's students. (Ex. 1-D.) The school board's letter voices its full support for the 21st CCLC Grant Application and pledges that the school board will comply with all grant provisions and requirements. (Ex. 1-C.)

Not surprisingly, Hannahville Indian School officials are responsible for the 21st CCLC program and manage its operations. The Grant Application cover page lists Thomas Miller, the Administrator for the Hannahville Indian School,² as the "Authorized Signatory for Budget Revisions/Record and Report of Local Expenditures" on the cover page of the School's materials it submitted with the Grant Application. (Ex. 1-E at 5.) The director of the 21st CCLC program is Rodney Lovell, "a member of the school's administration team . . . [which] meets to discuss school operations and coordinate efforts." (*Id.*, program narrative at 8-9; *see also id.*, program narrative at 12 ("The current director is a member of the School's administration team, which has regularly discussed the 21st Century program and its contributions to the school.)) Each year, Mr. Lovell provides several presentations to the school board regarding the 21st CCLC. (*Id.*, program narrative at 9.) The Hannahville Indian School's elementary and high school principals "both work closely with the 21st Century Program by providing curriculum guidance and helping the program network They are also vital to identifying and referring high needs students" (*Id.*, program narrative at 15-16.)

² Mr. Miller is the Superintendent of the Hannahville Indian School. (Ex. 1-E, program narrative at 14.)

Likewise, the 21st CCLC is attached to the school (Plaintiff's Br. at 6) and utilizes Hannahville Indian School support staff, facilities, and resources. The Grant Application reports that the 21st CCLC "leverages the school's kitchen, cafeteria, library and weight room to offer the student a variety of programs and healthy snacks." (Ex. 1-E, program narrative at 11; *see also id.*, program narrative at 13 ("our 21st CCLC leverages the resources of the Hannahville Indian School's kitchen staff, transportation staff and busses, paraprofessionals, library, computer lab and classrooms")) In addition, the 21st CCLC takes advantage of the busing resources of the Hannahville Indian School. (*Id.*, program narrative at 11-12.)

Finally, The Hannahville Indian School promotes the 21st CCLC as its own and uses it to advance its educational mission. For example, the Hannahville Indian School's website refers to the 21st CCLC as "our youth center," noting that it "is attached to our cafeteria" and that "students also have access to the gymnasium and weight room." (Dkt. No. 7-4.) One of the 21st CCLC's goals is "to help the Hannahville School make adequate yearly progress. . . ." (Ex. 1-E, program narrative at 5.) Students can earn high school credits through the Hannahville School after completing 21st CCLC homework and tests. (*Id.*, program narrative at 8.)

II. Plaintiff's Own Statements Demonstrate That The 21st CCLC Operates As Part Of The Hannahville Indian School.

In light of this evidence, it is not surprising that the documents Plaintiff refers to in her Brief, as well as the statements she made in her administrative claim and her initial Complaint, actually support the conclusion the 21st CCLC was part of the Hannahville Indian School's programs and operations. Her present attempt to artificially separate the 21st CCLC and its employees from the Hannahville Indian School is futile in light of these admissions. This evidence bolsters the conclusions that Ms. Meshigaud must be treated as an employee of the charter school

or a tribal school employee whose duties support its charter school operations and that she therefore should be excluded from FTCA coverage.

The evidence Plaintiff offers with her Brief significantly undermines her new argument. For example, Plaintiff points to the Hannahville Indian School's TCSA grant application, which included an organizational chart, claiming that this chart shows that Ms. Meshigaud's immediate supervisor was the Director of the 21st CCLC. (Plaintiffs' Brief, Dkt. No. 17 at 8-9.) But, as noted above, Plaintiff's Brief fails to mention that the same chart shows that the 21st CCLC Director reports to the Hannahville Indian School Superintendent, who in turn reports to the School Board. (Dkt. No. 17-5 at 2.) In addition, Plaintiff's materials acknowledge that the 21st CCLC is partially funded through the Bureau's grant. (Dkt. No. 17-4 at 2; Dkt. No. 17 at 6, stating that the 21st CCLC "is grant funded by the Bureau of Indian Education.") Plaintiff's Attachment 4 also states that the 21st CCLC "directly attaches to the Hannahville Indian School's gymnasium and cafeteria, which along with the kitchen, additional classrooms and the library, become part of **our** center at the end of the school day." (Dkt. No. 17-4) (emphasis added.) The same document also states that the 21st CCLC's core programs "are designed to support the Hannahville Indian School's pursuit of academic excellence" (*Id.*)

Plaintiff's initial Complaint is even more telling. In it, Plaintiff alleged that JP was in the care of "Hannahville Community School" (Dkt. No. 1 at ¶ 7) and that the 21st CCLC was "part of the educational program" at the school (*id.* at ¶ 8). Plaintiff alleged that it was the school that transported JP from "its school buildings" to the parking lot where he was hit, and that it was the school, through its employees, that failed to supervise JP. (*Id.* at ¶¶ 9-11, 14-15.) She alleged that it was the school's negligence that caused JP's injuries. (*Id.* at ¶ 16.) While her Amended

Complaint equivocates more about whether Ms. Meshigaud was an employee of the school or the 21st CCLC, this equivocation itself is revealing.

Likewise, Plaintiff's administrative claim highlighted the fact that the 21st CCLC and Ms. Meshigaud are part of the Hannahville Indian School. Defendant already mentioned several examples of this in its initial brief (*see* Dkt. No. 13 at 4-5, 13-14), but there are others, including:

- Plaintiff stated that the 21st CCLC coordinator “was felt to be key” to the participants’ academic success and that “Hannahville intended to use TSCA (sic) grants to pay the coordinator’s salary.” (Dkt. No. 6-3 at 3.) She subsequently contended that Ms. Meshigaud was “under the supervision of the 21st CCLC Coordinator.” (*Id.* at 4-5.)
- Plaintiff cited the TCSA grant application as providing that the 21st CCLC program “works very closely with the instructional day staff and school administration,” using the school’s test results “to identify and recruit high need students” (*Id.* at 3.)
- Plaintiff’s recitation of the events leading to the accident stated that that Ms. Meshigaud was “an assistant from the Hannahville Community School,” that she “operated the van owned by the Hannahville School to drive Hannahville students to the parking lot,” where she “released the Hannahville school children.” (*Id.* at 6.)
- Plaintiff argued that “the source of funding for Ms. Meshigaud’s pay does not determine whether the [FTCA] covers this incident.” (*Id.* at 7.)

Plaintiff cannot overcome the evidentiary significance of her prior assertions now that she has determined that it is more helpful to allege that the employee who transported JP was an employee of the 21st CCLC rather than the charter school. *See Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 829 (6th Cir. 2000) (formal admissions in pleadings are judicial

admissions and conclusively binding, but even if the pleading is amended so it is no longer a judicial admission, a party's own statement offered against him is not hearsay and is admissible under Fed. R. Evid. 801(d)); *Matter of Fordson Engineering Corp. v General Motors Corp.*, 25 B.R. 506, 509 (Bankr. E.D. Mich. 1982) (though statements in a pleading that is amended are no longer judicial admissions, they are admissible as evidentiary admissions). The statements in Plaintiff's administrative claim should also be treated as evidentiary admissions. *Williams v. Union Carbide Corp.*, 790 F.2d 552, 555-56 (6th Cir. 1986). Plaintiff cannot avoid dismissal by arguing for a revisionist separation of entities whose unity she previously asserted, particularly where the overwhelming evidence supports her initial assertions.

The 21st CCLC cannot exist without a Bureau-funded Indian school. The program was grant-funded through a TCSA grant that the school applied for and Ms. Mechigaud worked in support of the school's operations and programming. Her supervisory chain led to school officials. The appropriations statute specifically provides that the FTCA does not cover employees of charter schools and employees of Bureau-funded schools whose duties are related to charter school operations. Pub. L. No. 111-88, 123 Stat. 2919. It is beyond dispute that Hannahville Indian School is a charter school.³ (Plaintiff's Brief, Dkt. No 17 at 2.) Accordingly, there is no basis for a claim against the United States.

CONCLUSION

For the reasons stated above and in Defendant's opening brief, the Court should dismiss Plaintiff's Amended Complaint with prejudice.

³ Notably, according to Plaintiff's attachment 2, seven of the eight school board members of the Nah Tah Wahsh Public School Academy are also listed as school board members of Hannahville Indian School – many of them in the same role for both boards – and they share the same board meeting times and locations. (Dkt. No. 17-2 at 3.)

Respectfully submitted,

PATRICK A. MILES, JR.
United States Attorney

Dated: November 13, 2012

\s\ Ryan D. Cobb

RYAN D. COBB (P64773)
Assistant United States Attorney
United States Attorney's Office
Post Office Box 208
Grand Rapids, MI 49501-0208
616/456-2404
Email: Ryan.Cobb@usdoj.gov