

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

AMY ROCK, conservator of
JP, and AMY ROCK,

Plaintiffs,

vs.

Case No. 2:12-cv-255
Hon. Robert Holmes Bell
United States District Judge

UNITED STATES OF AMERICA,

Defendant.

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**Plaintiffs' Brief in Opposition to Defendant's
Motion to Dismiss Plaintiffs' First Amended Complaint**

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Introduction

FTCA. Amy Rock filed a Federal Tort Claim Act (FTCA)¹ claim on behalf of her injured minor, JP, and a claim in her own right. This court has jurisdiction of FTCA suits. The FTCA applies to this case through statutes related to funding of tribal organizations, including the Tribally Controlled School Act, TSCA,² and the Indian Self-Determination and Education Assistance Act, ISDEAA.³

The United States says that the FTCA does not apply here because of an appropriation bill. It says that bill exempts charter school employees and “(e)mloyees of Bureau-funded schools related to the charter school operation.”⁴

Plaintiff says the person responsible in this case was not carrying out the duties of a charter school or a “Bureau-funded school related to the charter schools operation.” Plaintiff says the person responsible for the injury to JP was working for the 21st Century Community Learning Center which operated separately from Hannahville school. Hannahville School has a dual status as a Michigan Public School Academy and a Bureau of Indian Education School.⁵ The 2011 Hannahville School Handbook lists two school boards, one for Nah Tah Wahsh PSA and another for Hannahville Indian School.⁶

¹ 28 U.S.C. §§2671-2680.

² 25 USC 2501 et seq.

³ 25 USC 450 et seq.

⁴ Pub. L. No. 111-88, 123 Stat. 2919.

⁵ Northern Michigan University website on its charter schools. <http://www.nmu.edu/charterschools/node/2>. See attachment 1.

⁶ See 2011 Hannahville Student Handbook, p. 7, Attachment 2.

It also lists the administrative staffs for its schools. None of the school administrators are part of the 21st CCLC.

Plaintiff made a claim for negligent infliction of emotional distress. The United States says plaintiff cannot claim a physical harm, a necessary element for the claim. Second the United States says that Ms. Rock needed to be present at the time of the injury. Plaintiff says that the elements are not as rigid as claimed by the United States

Description of Event

Both claims arise out of the same occurrence. JP was severely injured when a school bus ran over him. Amy Rock's claim for JP is that he was in the care of a Hannahville Indian 21st CCLC program and that its agent/employee, who was charged to supervise JP, failed to provide appropriate adequate adult supervision, leaving JP and other students in a parking lot, after dark, in the winter, to wait for a school bus.

The 21st CCLC conducts an after school and summer program, "Kidzone." During the school year at the end of 21st CCLC's after school program, children are picked up by a church school bus for another after school program at a church in Bark River, Michigan. The 21st CCLC building is located adjacent to the Hannahville Indian school on Hannahville B.1 Rd. The arranged location for the bus pick up is across Hannahville B.1 Rd in the parking lot of the Hannahville Health Center.

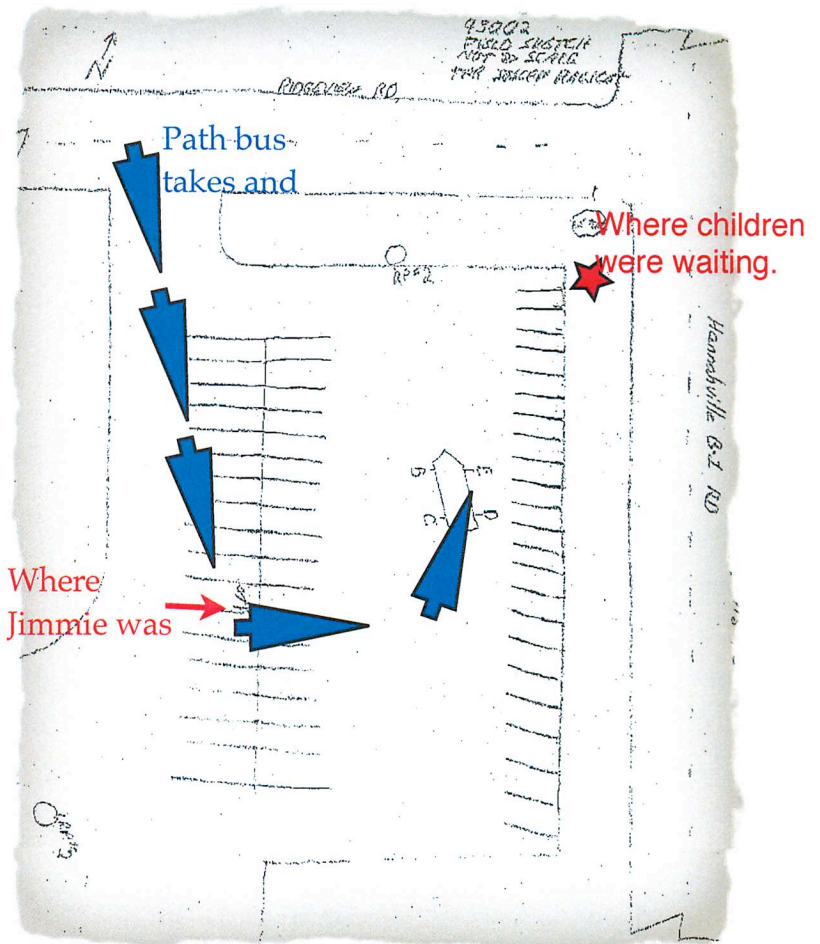
Ida Meshiguad, an agent/employee of 21st CCLC, transported JP, and other children from the "Kidzone" program to Health Center parking lot. On the night JP

was hurt, she left the children to wait for the church school bus. JP and the other children waited in the Health Center Parking lot after dark without supervision. It was one of the first two or three times JP had gone to the church program after "Kidzone," the 21st CCLS activity.⁷

The Bark River Bible Church school bus came into the Health Department parking lot, drove to the end of the lot and made a U-Turn.

When the bus made the U-turn JP ran towards the bus. Not fully appreciating the hazard involved in running towards the bus, JP hit a patch of ice and slid under the wheels of the bus which ran over the lower portion of his body.

Ida Meshiguad left JP and other minor children in the parking lot without adult supervision. It was winter, dark and snow banks were located on the perimeter of the parking lot.



Attorney's version of description in Michigan State Police Report

⁷ See Michigan State Police narrative report, Attachment 3.

The FTCA

FTCA through TCSA. Imposing liability on the United States of America for actions by an employee or agent of an Indian tribe is counterintuitive. But about 40 years ago, the federal government began applying the FTCA to actions by some tribal employees. Generally, the FTCA applies to functions the United States had one time performed for tribes, but still fund, leaving the governance of those programs to tribal organizations. Defendant gave a concise outline of the evolution of FTCA claims resulting from the performance of tribal actions under a contract, grant agreement or cooperative agreement authorized by the TCSA.⁸

Appropriations act exception to TCSA. Removing extraneous language, the TCSA's liability provision of the United States of America for actions by employees for an Indian tribe, tribal organization or Indian contract while acting in the scope of employment is thus:

With respect to claims resulting from the performance of functions . . . under a contract, grant agreement or cooperative agreement authorized by the . . . [TCSA] . . . an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior . . . while **carrying out any such agreement** and its employees are deemed part of the Bureau . . . **while acting in the scope of their employment in carrying out the contract or agreement**: Provided, That . . . any civil action or proceeding involving such claim brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and afforded the full protection and coverage of the [FTCA].⁹

⁸ See Defendant's Brief p10-11.

⁹ *Mentz v. United States*, 359 F.Supp.2d 856, 859-860 (D.N.D. 2005)

21st CCLC and its agents -

<http://hannahvilleyouthservices.org/programs/21st-century/>

separate from Hannahville School. In

21st Century

the case before the court, the person



responsible for JP's supervision was

Hannahville's 21st Century Community Learning Center Program (21st CCLC) is grant funded by the Bureau of Indian Education. The 21st CCLC Program's services are available to all of Hannahville's youth who reside on or near the reservation, regardless of what day school he or she attends. The 21st CCLC Coordinator's responsibilities include the development of academic

providing transportation for the 21st

lesson plans for all of the activities Hannahville's Youth Services Department offers. The Coordinator especially focuses on creatively integrating math, science and language arts into all after school and summer events and activities. Student Technology utilization is emphasized and supported by the center's 30 lap tops with wireless Internet and a host of digital cameras, video recorders and hand held GPS units.

CCLC while in the scope of her

employment. The 21st CCLC is not part

Kidzone is an academically based program that is a large part of Hannahville's 21st CCLC Program. During the school year, Kidzone runs from 3-5:15 PM on M-Th. During the summer, Kidzone runs for 8-weeks from 7:45AM till 4PM on M-Th. Transportation, meals and snacks are provided free of charge.

of the Hannahville school. The 21st CCLC

Hannahville Youth Services Website

program advertises that it is grant funded by the

Bureau of Indian Education and available to all

Hannahville youth who reside on or near the reservation, [regardless of the day school](#)

[the child attends](#). The Hannahville school is adjacent to the Bark River School District

and about 18 miles from Escanaba Schools.

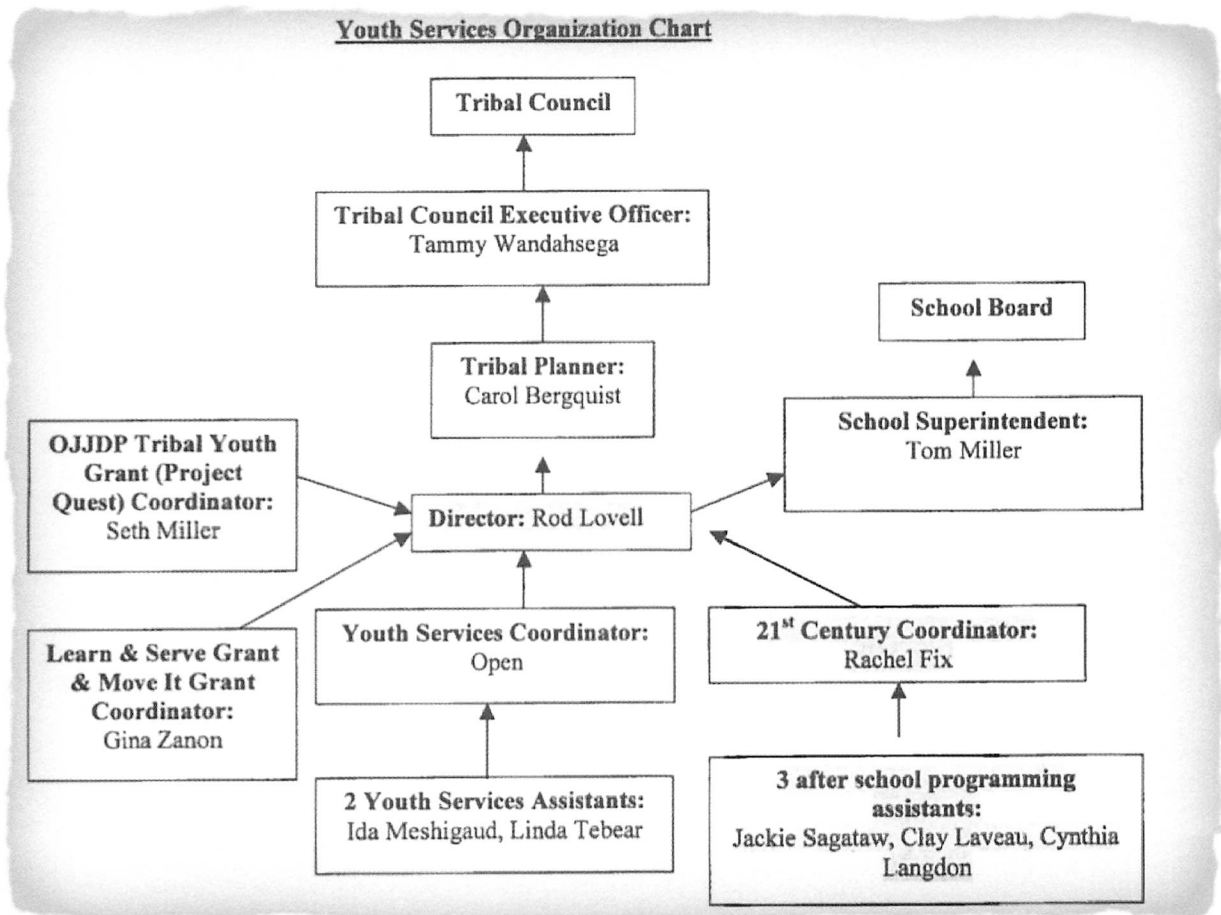
The 21st CCLC "is an actual physical structure built in 2005"¹⁰ The structure is attached directly to the school. Grants fund the 21st CCLC, not the Hannahville Schools.

The 21st CCLC Director and four assistants are funded by the tribe. The 21st Century Program Coordinator (full time certified teacher) and two assistants are funded thru the 21st CCLC grant and are part of this funding request. Another key staff member is our Quest Coordinator, a certified physical education and health teacher, who is funded by an Office of Juvenile Justice and Delinquency Prevention grant.

TSCA Grant Application - Summary and Abstract

¹⁰ Grant Application for 21st CCLC - 2007 - Summary and Abstract. Attachment 4.

The Tribal Director for Youth Services, in this case Rod Lovell, supervises the 21st CCLC.¹¹ The organization chart that is part of the grant application for the 21st CCLC



Grant application, narrative p 14 of 16. Highlighting uncertain origin.

shows the person charged with supervising JP and his companions, Ida Meshigaud, was a Youth Services Assistant working in direct line with the Director of Youth Services and the 21st CCLC.

The 2011 Hannahville School Handbook lists two school boards. One for Nah Tah Wahsh PSA and another for Hannahville Indian School.¹² It also lists the

¹¹ 2007 Grant Application for 21st CCLC - Program narrative, p 14 of 16, Attachment 5.

¹² See Attachment 2.

administrative staffs for its schools. None of the administrators are part of the 21st CCLC.

The School Board has hired the following administrative staff to operate the school:

Tom Miller, Superintendent

William Boda, Principal

Rose Potvin, Elementary Principal

Brendan Williams, Special Education/Discipline Coordinator

Scott Brant, Guidance Counselor

Tom Ohman, Athletic Director

Brenda Gerber, Technology Coordinator

The school is located and may be contacted at:

Physical Address
N15100 Eagle Road

Mailing Address
N14911 Hannahville Road B-1
Wilson, MI 49896

Hannahville School Handbook 2011, p. 8.

The United States says the FTCA does not cover JP's injuries or his mother's claim because of an exception to the FTCA. Congress passed an appropriations bill, Pub.L.No. 111-88, 123 Stat. 2919 excepting, "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."

The person who left JP and the other students was not an employee of a charter school nor an employee of a Bureau -funded school performing any function related to

a charter school. Hannahville school is, in part, a charter school and, in part not a charter school. Ms. Meshigaud was not an employee of either. She was a Youth Services assistant in the 21st CCLC program.

The 21st Century Community Program is and was separated from the Hannahville School by time, place and participants. Hannahville organizes its 21st CCLC program, not in its school, but in its Youth Services Program.¹³ Its Youth Services Program published mission statement:

The Hannahville Indian Community's Youth Services Department coordinates a variety of safe, supervised, recreational and learning activities for youth and families fostering the development of respectful, caring, empowered citizens who contribute to their community in positive ways.¹⁴

The 21st CCLC accepts children who do not attend Hannahville School. "Kidzone," the program attended by JP, is an after school program during the school year and all day in the summer, much like summer camp. Transportation is part of the "Kidzone" program.

The director of Youth Services directs the 21st CCLC program.¹⁵ In its application for the TCSA grant Hannahville submitted an organizational chart. The chart shows that Ida Meshigaud, the person who was responsible for the transportation of students from the 21st CCLC to the pickup point for the church bus, was under the

¹³ <http://hannahvilleyouthservices.org/>

¹⁴ <http://hannahvilleyouthservices.org/>

¹⁵ Hannahville 2007 Grant Application for TCSA grant, narrative p. 14 of 16, Attachment 5.

immediate supervision of the Director of the 21st CCLC / Youth Services. She was part of 21st CCLC program.

Ms. Rock does have a claim in her own right. Ms. Rock's complaint says that within a few minutes of the injury to JP, she was informed of the injury and that she immediately went to the hospital to advocate and care for JP. Ms. Rock claims a cause of action based upon Michigan's common law of negligent infliction of emotional distress. Ms. Rock suffered distress that required counseling. It was an objective manifestation of the shock inflicted by JP's injury.

The United States says that Mr. Rock does not have a viable claim for negligent infliction of emotional stress.

Over the past 30 years, Michigan's law on emotional distress has expanded the class of plaintiffs who are covered by the cause of action. See "Negligent Infliction of Emotional Distress" by Renee Birnbaum.¹⁶ At one time, Michigan required physical impact or physical injury to impose liability upon a defendant, but the impact requirement was eliminated by *Daley v LaCroix*.¹⁷ Case law evolved to a more open approach in *Gustafson v Faris*.¹⁸ *Gustafson* eliminated the necessity that plaintiff be a witness to the accident and instead said that the shock to plaintiff must be "fairly contemporaneous."

¹⁶ See "Negligent Infliction of Emotional Distress," Birnbaum, Renee, Michigan Bar Journal, P 18 (June, 2004). What appears in this brief is based, in large measure, upon this article and cases cited within.

¹⁷ 384 Mich 4 (1970).

¹⁸ 67 Mich App 363, 367-368 (1976).

It is clear that the injury threatened or inflicted upon the third person must be a serious one, of a nature to cause severe mental disturbance to the plaintiff, and that the shock must result in physical harm. The action might, at least initially, well be confined to members of the immediate family of the one endangered, or perhaps to husband, wife, parent, or child, to the exclusion of mere bystanders, and remote relatives. As an additional safeguard, it might be required that the plaintiff be present at the time of the accident or peril, or at least that the shock be fairly contemporaneous with it, rather than follow when the plaintiff is informed of the whole matter at a later date.¹⁹

As set out by Ms.Birnbaum:

Currently, a party can establish a viable claim for negligent infliction of emotional distress when the party proves four elements: (1) that the injury threatened or inflicted on the third person is a serious one, of a nature to cause severe mental disturbance to the plaintiff; (2) that the shock must result in actual physical harm; (3) that the plaintiff is a member of the third person's immediate family, i.e., a parent, child, husband or wife, and (4) that the plaintiff must actually be present at the time of the accident or injury, or suffers shock "fairly contemporaneous" with the accident or injury.²⁰

In the case at bar the injury was serious, effect a close relative, was relayed with minutes to Ms. Rock, and thereby "fairly contemporaneous."

¹⁹ 67 Mich App at 368–369, quoting Prosser.

²⁰ Citing *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75 at 81.


RELIEF REQUESTED

Plaintiffs request that the Court deny Defendant's Motion.

Respectfully submitted,

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Dated: October 29, 2012

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