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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 STEVEN J. PHILLIPS and MARIE
4 CONDOLUCI, individually and as
parents and natural guardians
of T.C.P., an infant,

5 Plaintiffs, New York, N.Y.

6 v. 10 Civ. 236(SHS)

7 COUNTY OF ORANGE, BOARD OF
8 EDUCATION GOSHEN CENTRAL
SCHOOL DISTRICT, VILLAGE OF
9 GOSHEN,

10 Defendant.
-----x

11 August 19, 2015
12 12:00 p.m.

13 Before:

14 HON. SIDNEY H. STEIN,
15 District Judge

16 APPEARANCES

17
18 BERGSTEIN & ULLRICH, LLP
Attorneys for Plaintiffs
19 BY: STEPHEN BERGSTEIN

20 MATTHEW J. NOTHNAGLE
Orange County Attorney

21 SILVERMAN & ASSOCIATES
22 Attorneys for Defendant Board of Education
BY: CAROLINE B. LINEEN

23 SOKOLOFF STERN, LLP
24 Attorneys for Defendant Village of Goshen
BY: ADAM I. KLEINBERG

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F8j2phic

1 (Case called; all parties present)

2 THE COURT: Good morning. Please be seated.

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

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

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

16 Is that acceptable to everybody?

17 Plaintiff?

18 MR. BERGSTEIN: Yes, your Honor.

19 THE COURT: Defendants?

20 COUNSEL: Yes, your Honor.

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

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

F8j2phic

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

7 My decision is as follows:

8

9 I. INTRODUCTION

10 Plaintiffs, Steven Phillips and Marie Condoluci, suing
11 individually and on behalf of their infant daughter, T.C.P.,
12 who was five years old at the relevant time, bring this action
13 against the County of Orange ("the County"), the Goshen Central
14 School District Board of Education ("the School District"), and
15 the Village of Goshen ("the Village") (collectively,
16 "defendants"), alleging that defendants are liable pursuant to
17 42 U.S.C. 1983 for violations of plaintiffs' Fourth Amendment
18 rights. Plaintiffs also claim that defendants are liable for
19 conspiring to violate 42 U.S.C. 1983.

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

F8j2phic

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

3

4 II. BACKGROUND

5 The following facts are undisputed unless otherwise
6 noted.

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

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

F8j2phic

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

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

F8j2phic

1 county for liability purposes.

2 Pursuant to New York Social Services Law 423(6), a
3 social services district may establish a multidisciplinary team
4 ("MDT") to investigate reports of suspected child abuse.
5 Members of an MDT must include representatives from CPS, law
6 enforcement, and the district attorney's office. (Id.) Orange
7 County established an MDT within its Child Abuse Investigation
8 Unit which only investigates SCR reports involving sexual
9 abuse, fatalities, or serious physical abuse. (Joint Defs.'
10 56.1 Response 31.) One of the stated objectives of the MDT is
11 to "increase the number of child sexual abuse cases that are
12 adjudicated in family court and/or result in a conviction in
13 criminal court," and a New York State Police file is opened on
14 all SCR reports investigated by the MDT. (Id. 35, 91; Exhibit 4
15 to Bergstein affidavit at 2.) The County contracted with the
16 Village for a Village police officer to serve as one of the law
17 enforcement members of the MDT. (Id. 49.) That Village police
18 officer, Andrew Scolza, was directly supervised by John
19 Richichi, a senior investigator for the New York State Police
20 who served as the MDT's Law Enforcement Supervisor. (Id. 39,
21 50.) And we will see that the only involvement of the village
22 is its contract with the county to supply a police officer to
23 be a member of the MDT.

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

F8j2phic

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

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

25 The MDT investigation, which began the next day,

F8j2phic

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

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

F8j2phic

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

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

12 Although defendants deny that the MDT protocols
13 require interviewing an alleged child victim at school without
14 parental consent or notice when both parents are subject to a
15 SCR report, see *id.* 103, Smith, Richichi, Scali-Decker, Scolza,
16 Dudzik-Andrews, LaSusa testified that it was the MDT's practice
17 to do so. (Dudzik-Andrews Dep. at 49-54; Smith Dep. at 44-46,
18 48-50, Richichi Dep. at 54-56; Scali-Decker Dep. at 40-42,
19 47-51, 87-88; LaSusa Dep. at 24-27; Scolza Dep. at 39-40, 97.
20 David Jolly, the Commissioner of the County's Department of
21 Social Services, also testified that it was the MDT's standard
22 practice to do so, but it depended on when the report was
23 received. (Jolly Dep. at 38.)

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

F8j2phic

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

7 On November 4, 2009, Scali-Decker and the officer
8 arrived at the child's school and identified themselves. (Id.
9 129; Joint Defs.' 56.1 336.) Daniel Connor, the school's
10 superintendent, allowed Scali-Decker and Officer Scolza to
11 interview the child without parental notification or consent.
12 (Joint Defs.' 56.1 Response 133, 138.) The superintendant
13 testified that it was the School District's practice to permit
14 CPS caseworkers or police officers to interview students
15 without parental consent or notice. (Id. 138.) The School
16 District believed that it was legally obligated to allow CPS to
17 interview children in school without parental consent or
18 notification, but it has not cited in its submission any
19 statute or regulation or other legally enforceable obligation
20 on which this belief was formed. (Joint Defs.' 56.1 155, 156.)

21

22 B. Interview of T.C.P.

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

F8j2phic

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

10 Scali-Decker and Officer Scolza interviewed the child
11 with Jankowski present for approximately 15 to 20 minutes. (Id.
12 145; Joint Defs.' 56.1 345.) The child did not know
13 Scali-Decker or Scolza and didn't, presumably, know the school
14 social worker Jankowski. Jankowski told the child that "it was
15 okay" to answer questions that Scali-Decker and Officer Scolza
16 would ask her. (Joint Defs.' 56.1 Response 144.) Scali-Decker
17 did not offer the girl an opportunity to call her parents, nor
18 did she tell the girl she was free to leave and not answer the
19 questions. (Id. 149.) The doors to the office she was in were
20 closed. (Id. 145.) She was questioned about various topics,
21 including: (1) whether she bathed alone and how she bathed; (2)
22 whether either of her parents ever touched her inappropriately;
23 (3) whether she had any secrets; (4) whether she could identify
24 her body parts, including the private body parts; (5) whether
25 she had seen anyone else's private parts or whether she had

F8j2phic

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

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

19

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

22 The day after the school interview, on November 5,
23 2009, plaintiffs arrived at the Department of Social Services
24 ("DSS") office with their two-year old daughter and they waited
25 for an interview with Scali-Decker and Officer Scolza, that is,

F8j2phic

1 the two employees who had interviewed the child. (Joint Defs.'
2 56.1 Response 171.) While Plaintiffs waited, Scali-Decker
3 received a phone call from Ms. Falletta, who continued to
4 insist on anonymity. (Id. 176.) She did identify herself as
5 Hogle's source of information for her report against plaintiffs
6 and described what she viewed as her grounds for concern. She
7 stated that the father occasionally made vulgar or
8 inappropriate comments, that he sometimes slept in the same bed
9 as the child, and that there were pictures of the child in a
10 mermaid costume which she, Falletta, felt were "sexual in
11 nature." (Jnt. Defs.' 56.1 404, 406, 407, 408.) Falletta
12 also informed Scali-Decker that another friend had stated that
13 Phillips gave him "a sick feeling." (Id. 263.) Falletta
14 admitted that she had no knowledge whatsoever of the child
15 acting out sexually, that the child had never told her that her
16 father had acted inappropriately, and she had never seen naked
17 pictures of the child. (Joint Def.'s 56.1 Response 178;
18 Scali-Decker Dep. at 97.)

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

F8j2phic

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

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

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

25 After interviewing the parents, Scali-Decker and the

F8j2phic

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

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

F8j2phic

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

8

9 III. THE LEGAL STANDARD

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

F8j2phic

1 404, 414-15 (S.D.N.Y.2012), aff'd 541 F. App'x 62 (2d Cir.
2 2013).

3 "When considering cross-motions for summary judgment,
4 a court must evaluate each party's motion on its own merits,
5 taking care in each instance to draw all reasonable inferences
6 against the party whose motion is under consideration." Make
7 the Rd. by Walking, Inc. v. Turner, 378 F.3d 133,142 (2d Cir.
8 2004) (internal quotation marks omitted).

9

10 IV. DISCUSSION

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

13 Plaintiffs claim that the interview of the child at
14 her school violated her Fourth Amendment right to be free from
15 unreasonable searches and seizures. "[T]he Fourth Amendment
16 applies in the context of the seizure of a child by a
17 government agency official during a civil child-abuse or
18 maltreatment investigation." *Kia P. v. McIntyre*, 235 F.3d 749,
19 762 (2d Cir. 2000). The threshold question is whether the
20 in-school interview of the child constituted a "seizure" for
21 Fourth Amendment purposes.

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

F8j2phic

1 U.S. 386, 395 n. 10 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1,
2 19 n. 16 (1968)). Further, a seizure occurs where, "in view of
3 all of the circumstances surrounding the incident, a reasonable
4 person would have believed that he was not free to leave." *Kia*
5 *P.*, 235 F.3d at 762 (internal quotation marks omitted). When
6 evaluating whether a child was seized, a court should consider
7 the age of the child at issue. See *Guan N. v. NYC Dept. of*
8 *Educ.*, 11 CIV. 4299, 2014 WL 1275487 at *20 (S.D.N.Y. Mar. 24,
9 2014) (concluding that "a reasonable [twelve-year-old] . . .
10 would have felt restrained from leaving"); *Jones v. Hunt*, 410
11 F.3d 1221, 1226 (10th Cir. 2005) (viewing the seizure claim
12 "through the eyes of a reasonable sixteen-year-old").

13 This Court is unaware of any precedent within the
14 Second Circuit that directly addresses whether an in-school
15 interview of a child by CPS caseworkers can constitute a
16 seizure. However, in *Doe v. Heck*, 327 F.3d 492 (7th Cir.
17 2003), the Seventh Circuit answered this question in the
18 affirmative. Lower courts within the Second Circuit have held
19 that the removal of a child, even temporarily, constitutes a
20 seizure and also that an in-school interview of a child by a
21 school district representative regarding the student's conduct
22 constituted a seizure. See e.g., *Mislin v. City of Tonawanda*
23 *Sch. Dist.*, No. 02-CV-273 S, 2007 WL 952048, at *8-9 (W.D.N.Y.
24 Mar. 29, 2007) (holding that a student "was seized for purposes
25 of the Fourth Amendment when ... he was removed from his class

F8j2phic

1 during the school day and required to sit for a 20-minute,
2 closed-door, recorded interview with [an investigating
3 attorney]"); *Estiverne v. Esernio-Jenssen*, 833 F.Supp.2d 356,
4 375-76 (E.D.N.Y. 2011); *E.D. ex rel. V.D. v. Tuffarelli*, 692
5 F.Supp.2d 347, 366 (S.D.N.Y. 2010). Several other circuits have
6 also held that such interviews constitute seizures under the
7 Fourth Amendment. See *Phillips*, 894 F. Supp. 2d at 361
8 (collecting cases).

9 The parties agree that the following factual
10 statements are true:

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

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

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

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

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

F8j2phic

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

3 I therefore find that T.C.P. was seized within the
4 meaning of the Fourth Amendment. See e.g., *Mislin*, 2007 WL
5 952048; *Jones*, 410 F.3d at 1227 (noting that "[a] reasonable
6 high school student would not have felt free to flaunt a school
7 official's command, leave an office to which she had been sent,
8 and wander the halls of her high school without permission");
9 *Heck*, 327 F.3d at 510 (finding that where eleven-year-old boy
10 was removed from his class and questioned by a police officer
11 and two caseworkers "for twenty minutes about intimate details
12 of his family life," he was "'seized' within the meaning of the
13 Fourth Amendment because no reasonable child would have
14 believed that he was free to leave").

15 The Court must now examine whether T.C.P.'s seizure was
16 unreasonable, so I have concluded there was a seizure. The
17 next determination is was it an unreasonable seizure and
18 therefore violative of the Fourth Amendment of the
19 Constitution. Probable cause is generally descriptive of what
20 seizures are reasonable where, as here, no warrant or court
21 order has been obtained. See *Tenenbaum v. Williams*, 193 F.3d
22 581, 602-03 (2d Cir. 1999). The Second Circuit, though, has
23 not yet definitively stated whether the probable cause standard
24 or a lower "special needs" based standard applies in the
25 context of a child abuse investigation to determine the

F8j2phic

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

3 Some government officials outside the realm of
4 criminal law enforcement "have 'special needs beyond the normal
5 need for law enforcement [that] make the warrant and
6 probable-cause requirement impracticable.'" *Tenenbaum v.*
7 *Williams*, 193 F.3d 581, 603 (2d Cir. 1999) (quoting *O'Connor v.*
8 *Ortega*, 480 U.S. 709, 720 (1987)). "If forcing a non-law
9 enforcement government officer to follow ordinary law
10 enforcement requirements under the Fourth Amendment would
11 impose intolerable burdens on the officer or the courts, would
12 prevent the officer from taking necessary action, or tend to
13 render such action ineffective, the government officer may be
14 relieved of those requirements and subjected to less stringent
15 reasonableness requirements instead." *Tenenbaum*, 193 F.3d at
16 603; see also, e.g., *T.L.O.*, 469 U.S. at 340-43 (school
17 administrator's search of a student's purse was not subject to
18 the warrant and probable-cause requirements).

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

F8j2phic

1 freedom from ever having to obtain a predeprivation court order
2 is among them.") Other circuits have also indicated that the
3 seizure of a child by caseworkers is not such a "special needs"
4 situation. See, e.g., *Good v. Dauphin County Soc. Servs. for*
5 *Children and Youth*, 891 F.2d 1087, 1092-94 (3d Cir.1989)
6 (applying ordinary probable-cause standard to inspection of
7 child's nude body by caseworker and police officer); *Donald v.*
8 *Polk County*, 836 F.2d 376, 384 (7th Cir.1988) (applying
9 probable-cause standard to caseworkers' removal of child from
10 parents' custody). See *Darryl H. v. Coler*, 801 F.2d 893,
11 901-02 (7th Cir.1986). Tenenbaum did leave open the
12 possibility, though, that in other circumstances CPS
13 caseworkers could demonstrate "special needs" such that their
14 actions should be subject to the less stringent reasonableness
15 requirement.

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

F8j2phic

1 parallel child abuse and criminal investigations. See T.L.O.,
2 469 U.S. at 340-41.

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

F8j2phic

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

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

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

F8j2phic

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

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

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

F8j2phic

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

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

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

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

F8j2phic

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

3

4 b. Liability Pursuant to Monell

5 Plaintiffs bring claims against each defendant for the
6 alleged violation of their Fourth Amendment rights. "Congress
7 did not intend municipalities to be held liable [under 42
8 U.S.C. 1983] unless action pursuant to official municipal
9 policy of some nature caused a constitutional tort." *Monell v.*
10 *Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 691 (1978). Thus,
11 "to prevail on a claim against a municipality under section
12 1983 based on acts of a public official, a plaintiff is
13 required to prove: (1) actions taken under color of law; (2)
14 deprivation of a constitutional or statutory right; (3)
15 causation; (4) damages; and (5) that an official policy of the
16 municipality caused the constitutional injury." *Roe v. City of*
17 *Waterbury*, 542 F.3d 31, 36 (2d Cir. 2008). The fifth element
18 reflects the notion that "a municipality may not be held liable
19 under 1983 solely because it employs a tortfeasor." *Bd. of*
20 *Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403, (1997). In other
21 words, a municipality may not be liable under section 1983 "by
22 application of the doctrine of respondeat superior." *Pembaur v.*
23 *City of Cincinnati*, 475 U.S. 469, 478 (1986). Instead, there
24 must be a "direct causal link between a municipal policy or
25 custom and the alleged constitutional deprivation." *City of*

F8j2phic

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

2 Moreover, "a custom or policy cannot be shown by
3 pointing to a single instance of unconstitutional conduct by a
4 mere employee of the [government]." *Newton v. City of New*
5 *York*, 566 F.Supp.2d 256, 271 (S.D.N.Y.2008); see also *Oklahoma*
6 *City v. Tuttle*, 471 U.S. 808, 823-24 (1985) ("Proof of a single
7 incident of unconstitutional activity is not sufficient to
8 impose liability under *Monell*, unless proof of the incident
9 includes proof that it was caused by an existing,
10 unconstitutional municipal policy, which policy can be
11 attributed to a municipal policymaker.") In the end,
12 therefore, "a plaintiff must demonstrate that, through its
13 deliberate conduct, the municipality was the 'moving force'
14 behind the alleged injury." *Roe*, 542 F.3d at 37 (internal
15 quotations omitted). "That is, a plaintiff must show that the
16 municipal action was taken with the requisite degree of
17 culpability and must demonstrate a direct causal link between
18 the municipal action and the deprivation of federal rights."
19 *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S.
20 397, 404 (1997).

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

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

F8j2phic

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

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

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

23 A municipality's informal practice may be sufficient
24 to establish Monell liability. See *Jeffes v. Barnes*, 208 F.3d
25 49, 57 (2d Cir. 2000). Numerous caseworkers and supervisors

F8j2phic

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

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

F8j2phic

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

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

12 Smith, the MDT case supervisor, as well as the police
13 officer and Scali-Decker, also testified that it was the MDT's
14 practice where both parents are accused of abuse to interview
15 the child at school without parental notification or consent
16 and without speaking to school personnel first, unless school
17 personnel are the source of the report. (See Smith Dep. at 46,
18 48, 50; Scolza Dep. at 39; Scali-Decker Dep. at 40-41, 47.)

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

25 County witnesses testified unequivocally that the MDT

F8j2phic

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

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

F8j2phic

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

9

10 ii. The Village is Not Liable Pursuant to *Monell*

11 Plaintiffs allege that the Village is liable pursuant
12 to *Monell* for the child's unconstitutional seizure. However,
13 the defendant in discovery has not adduced any evidence
14 whatsoever that the Village had any role whatsoever in creating
15 the policies of the MDT or guiding its investigations.

16 Instead, discovery showed that the Village's involvement with
17 the MDT consisted exclusively of a contract with the County to
18 assign a single police officer, Officer Scolza, to the MDT.

19 (Jnt. Defs. 56.1 78.) Officer Scolza was then supervised on a
20 day-to-day basis by supervisors from the County, and the State
21 and the Village had no oversight or supervision over the daily
22 operations of officers assigned to the MDT. (Jnt. Defs. 56.1
23 81, 82.) The parties agree that the MDT Protocol was in effect
24 prior to the Village's contract with the County and that "the
25 way in which investigations are conducted by the MDT has not

F8j2phic

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

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

14 Additionally, *Pembaur v. City of Cincinnati*, 475 U.S.
15 469, 471 (1986), which plaintiffs cite to support this
16 proposition, applies only to situations where a municipality
17 delegates policymaking authority to an official within that
18 same municipality, rather than delegating policymaking
19 authority to another municipality altogether, which is what
20 plaintiffs allege the Village did here.

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

25 I therefore grant the Village's motion for summary

F8j2phic

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

4

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

8 Plaintiffs allege that the School District's policy of
9 permitting CPS caseworkers and police officers to interview
10 students without parental consent or notice was a "moving
11 force" behind the child's constitutional injury. "[T]he word
12 'policy' generally implies a course of action consciously
13 chosen from among various alternatives." *Oklahoma City v.*
14 *Tuttle*, 471 U.S. 808, 823 (1985). Where a municipality acts
15 merely to comply with state law, rather than in accordance with
16 its own discretionary policy, it cannot be held liable pursuant
17 to Monell. See *Vives v. City of New York*, 524 F.3d 346, 356
18 (2d Cir. 2008) ("[A] municipality cannot be held liable simply
19 for choosing to enforce [the law].")

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

F8j2phic

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

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

10

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

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

F8j2phic

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

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

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

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

F8j2phic

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

4

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

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

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

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

22 In reviewing the totality of the circumstances, courts
23 consider:

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

F8j2phic

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

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

8 Courts also consider whether the subject knew of the
9 right to refuse at time he or she consented; however, such
10 knowledge is not dispositive of the question of voluntariness.
11 See *id.* at 231-33. Further, "[t]he standard for measuring the
12 scope of a [subject's] consent under the Fourth Amendment is
13 that of objective reasonableness," *Florida v. Jimeno*, 500 U.S.
14 248, 251 (1991), and thus, the claimant's subjective fears do
15 not vitiate consent where government actors did not otherwise
16 engage in coercive conduct. *Winfield v. Trottier*, 710 F.3d 49,
17 53 (2d Cir. 2013) (citing *Jimeno*, 500 U.S. at 251).

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

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

F8j2phic

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

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

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

25 A reasonable jury could conclude either that the

F8j2phic

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

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

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

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

25

F8j2phic

1 V. CONCLUSION

2 Okay. I think I have made it clear what I am doing.

3 I will enter a minute order saying that for the reasons set
4 forth on the record today:

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

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

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

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

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

19 All right. Thank you.

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