SCANNED ON 7/10/2007

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN, Justice — PART 52

Index Number : 104848/2006
MILLER, NANCY
vs
DEPARTMENT OF EDUCATION
Sequence Number : 003
DISMISS ACTION

INDEX NO. 104848/2006
MOTION DATE 4/11/07
MOTION SEQ. NO. 003
MOTION CAL. NO.

this motion to/for D

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION to the gray sheet for motion sequence 001.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
JUL 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/5/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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NANCY MILLER,

Plaintiff,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION, JOEL KLEIN, as Chancellor of the New York City School District, MARGARET THEODORE-TASSY, MARIE FOUCHE, FRANCIA DEVIL, THE DAILY NEWS, L.P., MARK I. PUBLICATIONS, INC.

Defendants.

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Index No.	104848/2006
Submission Date	April 11, 2007
Mot. Seq. Nos.	001, 002, 003
Cal. Nos.	7, 8, 9

DECISION & ORDER

Appearances:

For Plaintiff:
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For Defendants NYC Dep't of Education, Joel Klein, Margaret Theodore-Tassy and Marie Fouche:
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For Defendant Daily News, L.P.:
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For Defendant Mark I. Publications, Inc.:
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For Defendant Francia Devil:
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PAUL GEORGE FEINMAN, J.:

The motions bearing sequence numbers 001, 002 and 003 have been joined together for purposes of decision.

Plaintiff brought this defamation action seeking to recover for statements made in two

newspapers, the Daily News and the Queens Chronicle (together, the "newspaper defendants"). She is also seeking damages for defamatory statements allegedly made by defendants Margaret Theodore-Tassy, Marie Fouche and Francia Devil, and claims defendants New York City Department of Education (DOE) and Chancellor Joel Klein ("Klein") are vicariously liable for the statements of Theodore-Tassy and Fouche, both employees of the DOE. The newspaper defendants and the DOE, Chancellor Joel Klein, Theodore-Tassy and Fouche (the "DOE Defendants) all move to dismiss the plaintiff's Complaint. In the alternative, the newspaper defendants move for summary judgment. Defendant Francia Devil, who is self-represented, has submitted an "Affidavit in Support of Motion to Dismiss," but did not serve a notice of motion to dismiss upon the plaintiff or co-defendants. For the reasons stated below, the newspaper defendants' motions, and the DOE and Chancellor Klein's motions to dismiss are granted. The motions of Theodore-Tassy and Fouche are denied. The court does not reach the merits of any purported motion contained within the text of defendant Devil's Affidavit inasmuch as the motion is not properly noticed pursuant to CPLR 2214.

At the time of the incident that led to the instant action, plaintiff was an assistant principal of P.S. 34 in Queens. In the spring of 2005, some students and parents complained to the DOE that plaintiff disciplined a bilingual class of Haitian students (normally taught by Ms. Theodore-Tassy) by making them sit on the floor and eat without utensils. Plaintiff allegedly told the students that they used to be treated like animals in their country and so she was treating them like animals. The DOE investigated these complaints. In its report of the findings of the investigation, dated April 25, 2005, the DOE found that Ms. Miller had indeed made the students sit on the floor and eat lunch without utensils and called the students "animals" but was unable to

substantiate the reference to the children's "country" of origin.

The Daily News published several articles about this incident. An article published on April 26, 2005 reported that "Two of the students interviewed by education investigators said [plaintiff] told them they were acting unruly because they were from Haiti." On May 9, 2005, the Daily News published another article which stated that "school investigators substantiated the allegations against Ms. Miller" and that she allegedly told a group of Haitian students "'In Haiti, they treat you like animals and I will treat you the same way here.'" The May 9 article also stated that "Miller apparently snapped after two fourth-graders scuffled in the cafeteria, authorities said."

On November 23, 2005, the Queens Chronicle (published by defendant Mark I. Publications) published an article about a different teacher at P.S. 34. The teacher taught Haitian Creole bilingual classes. By way of background, the article described the incident involving Ms. Miller on March 16, 2005 and stated that the DOE investigation "substantiated the children's account of the incident." The article also stated that, "'In Haiti they treat you like animals, I will do the same here,' the children claim Miller told them." The reporter who wrote the article, Ronald Brownlow, has stated that he did not review the DOE report in writing his article and instead relied on the prior Daily News articles. Plaintiff claims that both the article in the Daily News and the article in the Queens Chronicle were defamatory in that they omitted the fact that the DOE report did not substantiate the allegations regarding mention of Haiti or the children's "country" of origin.

Ms. Miller also brings defamation claims against Theodore-Tassy and Fouche, both teachers at the school, and Devil, a relative of a student involved in the incident. She alleges that Theodore-Tassy directed her students to write false and defamatory letters about the incident in the cafeteria and that, at Fouche and Theodore-Tassy's urging, Fouche and Devil contacted the media about the incident and made defamatory statements about plaintiff to the media. Ms. Miller

also alleges that Chancellor Klein and the DOE are vicariously liable for the actions of Theodore-Tassy and Fouche, DOE employees.

The Newspaper Defendants' Motions

The newspaper defendants' motions to dismiss the complaint are granted on the ground that they are privileged under New York Civil Rights Law Section 74, which protects the publication of "a fair and true report of any... official proceeding." (Civil Rights Law Section 74). The test for whether an activity is an "official proceeding" is whether the action was "taken by a person officially empowered to do so." *(Freeze Right Refrigeration and Air Conditioning Services, Inc. v City of New York*, 101 AD2d 175, 182 [1st Dept 1984] [*citing Farrell v New York Evening Post*, 167 Misc 412, 416 (Sup Ct, NY Cty 1938)]). An administrative agency investigation into activities within its purview is an "official proceeding." (*See Freeze Right*, 101 AD2d at 182 [finding that a Department of Consumer Affairs investigation into air conditioning repair practices was an official proceeding]). A report of an official proceeding is "fair and true" as long as it is "substantially accurate." (*Holy Spirit Ass'n v New York Times Co.*, 49 NY2d 63, 67-68 [1979]). The *Holy Spirit* court went on to say that "newspaper accounts of legislative or other official proceedings must be accorded some degree of liberality." (*Id.* at 68).

The April 26, 2005 Daily News article was a "fair and true" report of an official proceeding as the courts use that term. The DOE investigation of the March 16th incident at P.S. 34 was an official proceeding as the DOE was empowered to investigate allegations of inappropriate actions by its employees. The article was "substantially accurate" in that it accurately reported the allegations against Ms. Miller. The statement alleged by Ms. Miller to be defamatory, that two children had alleged that she had made negative remarks about their country of origin, was, in fact, correct. Two children had made this allegation. The fact that the article

omitted specifying whether this particular allegation had been confirmed does not render the article as a whole inaccurate. As a "fair and true" report of an official proceeding, the statements in the April 26th article are privileged under the Civil Rights Law, Section 74.

Similarly, the May 9th Daily News article was also a "fair and true" report of the DOE investigation. The statements in that article that the DOE had "substantiated the allegations against Miller" and that she allegedly told them she would treat them like animals, the way they do in Haiti were "substantially accurate." The DOE did substantiate the majority of the allegations against plaintiff, including that she forced them to sit on the floor, eat without utensils and called them animals and some children did allege that she had made the remarks about Haiti. Once again, the omission of the fact that the DOE did not substantiate one allegation does not render the whole article inaccurate. In addition, the statement in the article that Ms. Miller "snapped" after the students misbehaved is also a fair and true report of what happened - that Ms. Miller lost her temper. The statement does not imply, in context, any psychological problems or breakdown but rather indicates what it was (the students' misbehavior) that prompted Ms. Miller's reaction. Thus, as a fair and true report of an official proceeding, the May 9th article is privileged under Civil Rights Law Section 74.

The same analysis applies initially to the Queens Chronicle article at issue. Like the Daily News articles, the Queens Chronicle article recounted the allegation that Ms. Miller had made negative comments about Haiti and stated that the DOE had "substantiated the children's account of the incident." Also like the Daily News, the Queens Chronicle article failed to note that the DOE had not substantiated the allegation regarding plaintiff's comment about the children's Haitian heritage. However, that failure does not render the article as a whole inaccurate given that the DOE did, in large part, confirm the allegations against Ms. Miller.

However, because the Queens Chronicle relied on the Daily News articles, further analysis is required. Under New York law, a republisher of material that is of "public concern" may rely on the research of another as long as he was not "grossly irresponsible" in doing so. (*See Duane Reade Inc. v Local 338 Retail, Wholesale, Department Store Union*, 6 Misc3d 790, 795 [Sup Ct, NY Cty 2004]; *Karaduman v Newsday*, 51 NY2d 531, 547-51 [1980]; *Chapadeau v Utica Observer-Dispatch, Inc.*, 38 NY2d 196 [1975]). Known as the "republication" or "wire service" defense, this doctrine holds that the republisher is not "grossly irresponsible" if it fails to do independent research in preparing the relevant material for republication, absent some reason to question the trustworthiness of the source relied upon. (*See Duane Reade*, 6 Misc3d at 795; *Karaduman*, 51 NY2d at 547-51). The *Duane Reade* court held specifically that "relying on a long running New York City newspaper... is clearly not grossly irresponsible." (*Duane Reade*, 6 Misc3d at 795)

The March 16th incident was clearly a matter of public concern. Inappropriate behavior towards, and statements by public school teachers to, the schoolchildren they teach or supervise are clearly matters about which the public would want to know. Moreover, it was not "grossly irresponsible" for the Queens Chronicle to rely on the article in the Daily News, a long running New York City newspaper, in reporting about the DOE investigation of plaintiff. The Queens Chronicle and its reporter, Ronald Brownlow, had no reason to doubt the veracity of the articles in the Daily News. While it would have been the better journalistic practice to review the DOE report independently, the Chronicle's failure to do so does not render it "grossly irresponsible." As such, the Queens Chronicle's article is also privileged under Section 74 of the Civil Rights

Law as a "fair and true" report of an official proceeding.[1]

The DOE Defendants' Motions

Theodore-Tassy and Fouche's motions to dismiss plaintiff's complaint are denied on the grounds that these motions are improper and untimely pursuant to CPLR 3012. Under CPLR 3012, a defendant has 20 days to answer the complaint if it was personally served and 30 days to answer the complaint if it was served in another manner (CPLR 3012[a] and [c]). Although it is unclear exactly when and by what manner Theodore-Tassy and Fouche were served, more than thirty days have undoubtedly passed and, to date, Theodore-Tassy and Fouche have not answered the complaint, nor moved to extend their time to answer, nor moved to dismiss within the time for a pre-answer motion to dismiss. Although Corporation Counsel on this motion now asserts that it represents Theodore-Tassy and Fouche for purposes of this motion only, it has not previously appeared on their behalf, nor have Theodore-Tassy and Fouche appeared otherwise in this action. The Corporation Counsel cites no authority for "limited appearances" on behalf of a defendant and does not move to vacate the defaults of Theodore-Tassy and Fouche. As they are in default, any summary judgment motion would be premature and the time for a pre-answer motion to dismiss has expired. Accordingly, the motion is denied as to them.

The DOE and Chancellor Klein's motions to dismiss the plaintiff's complaint are granted on the grounds that plaintiff's Notice of Claim was untimely and/or failed to set forth with sufficient specificity the time, place and manner in which the claim arose and that the complaint was insufficiently specific as well. General Municipal Law Section 50-e requires that a

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[1] Inasmuch as the court is granting the newspaper defendants' motions to dismiss on the grounds of privilege under Civil Rights Law Section 74, it need not address defendants' other arguments, namely, the incremental harm doctrine and the "single instance" doctrine.

prospective plaintiff must serve a Notice of Claim on the DOE and its employees within 90 days of the date on which the claim arose. (General Municipal Law § 50-e[1][a]). The Notice of Claim must state the time when, the place where and the manner in which the claim arose. (General Municipal Law Section § 50-e(2)). A complaint for defamation must specify the defamatory words complained of and the time, place and to whom the defamatory statement was made. (CPLR 3016[a]; *Dillon v City of New York*, 261 AD2d 34, 37 [1st Dept 1999]).

The cause of an action for defamation accrues when the allegedly defamatory material is "published;" that is, when it is put on sale or made generally available to the public. *(See E.B. v Liberation Publications, Inc.*, 7 AD3d 566 [2d Dept 2004]; *Gregoire v G.P. Putnam's Sons*, 298 NY 119 [1948]). Thus, plaintiff's claim against defendant Theodore-Tassy (and her concomitant vicarious liability claim against DOE) accrued on March 23, 2005, when her students wrote letters regarding plaintiff's actions. Plaintiff would have had until June 21, 2005 to file her Notice of Claim regarding this claim. Plaintiff also claims that defendants Theodore-Tassy and Fouche requested that defendant Devil contact the media and that Devil and Fouche did contact the media and made allegedly false statements about plaintiff which were then published in the Daily News and "various media outlets." Plaintiff claims that DOE and Chancellor Klein are vicariously liable for Theodore-Tassy and Fouche's actions as well. These media contacts would have necessarily had to have taken place before the allegedly defamatory articles were published. Therefore, with regard to the Daily News articles, these contacts would have had to taken place by April 26, 2005 and May 9, 2005, respectively. Thus, plaintiff would have had until July 25, 2005 and August 7, 2005, respectively, to file Notices of Claim regarding these claims. With regard to the Queens Chronicle article published on November 23, 2005, the Notice of Claim would have had to have been filed by February 19, 2006. Plaintiff filed her Notice of Claim on December 2,

2005, well past the 90-day limit for the claims based on contacts with the Daily News, although within the time frame for that based on contacts with the Queens Chronicle.

Plaintiff's argument that her claims did not accrue until after the children involved filed a lawsuit against her in September 2005 is unavailing. As explained above, defamation claims accrue upon publication (*See E.B.*, 7 AD3d 566; *Gregoire*, 298 NY 119). Therefore, plaintiff's claims against Chancellor Klein and DOE based on the letters written on March 23, 2005, and the articles of April 26 and May 9, 2005, including any contact the defendants had with the media prior to the publication of those articles, are dismissed based on the untimeliness of plaintiff's Notice of Claim.

In addition, the Department of Education and Chancellor's motion is granted because, as to all the claims, including any that may be based on the Queens Chronicle article of November 23, 2005, plaintiff's Notice of Claim and the complaint are insufficiently specific. In the Notice of Claim, plaintiff states that Theodore-Tassy and Fouche made defamatory statements "in the presence of others" but those others remain unidentified. Nor does the Notice of Claim state when those statements were made or exactly what those statements consisted of. Similarly, the Notice of Claim does not identify specific statements made by Chancellor Klein or identify the specific news articles in which these statements were published, other than a Daily News article of April 12, 2005, which is not the basis for any claim in plaintiff's complaint. The Notice of Claim fails to even mention the Queens Chronicle at all, much less identify a specific article or statement therein. The complaint is similarly vague with regard to the claims against the DOE Defendants. It does not identify the specific words alleged to be defamatory or to whom they were made, as required in a defamation claim. (*See Dillon*, 261 AD2d at 37). Because plaintiff's Notice of Claim and complaint are insufficiently specific, plaintiff's claims against the DOE defendants are

dismissed.[2]

In summary, the motions of the two newspaper defendants, the DOE and Chancellor Klein are granted and the plaintiff's complaint is dismissed as against them. The motions of Theodore-Fassy and Fouche, who are in default, are denied and therefore, the case shall be severed and continue as against them. In addition, because defendant Devil did not file and serve a notice of motion in accordance with CPLR 2214, the court has treated her affidavit as one in support of the other defendants' motion to dismiss and has not addressed whether she is entitled to dispositive relief. While the case shall continue against her as well, the court expresses no view as to whether a properly noticed motion to dismiss or for summary judgment, if in fact she has interposed an answer, should be granted.

Accordingly, it is

ORDERED that the motions by defendants The Daily News, L.P., Mark I. Publications, Inc., New York City Department of Education, and Joel Klein, as Chancellor of the New York City School District, to dismiss the complaint in its entirety as against them are **granted** and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the motions by Margaret Theodore-Tassy and Marie Fouche to dismiss the complaint in its entirety as against them is **denied**; and it is further

ORDERED that the action is severed and continued under this index number as against the defendants Margaret Theodore-Tassy, Marie Fouche and Francia Devil; and it is further

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[2]Because the DOE Defendants' motions to dismiss have been granted on the grounds that the Notice of Claim was untimely and that it and the complaint was insufficiently specific, the court need not reach defendants' arguments regarding whether Chancellor Klein's statements are privileged, that plaintiff failed to allege in the complaint that she served a Notice of Claim and that 30 days have since passed without adjustment, or regarding the truth of the Queens Chronicle article.

ORDERED that inasmuch as the municipal defendants are no longer parties to this action and inasmuch as the Corporation Counsel has neither answered the complaint nor filed a notice of appearance on behalf of Theodore-Tassy or Marie Fouche, the Trial Support Office is directed to transfer this action to a General IAS Part.

This constitutes the decision and order of the court.

Dated: July 5, 2007
New York, New York

Paul George Feinman
J.S.C.