**SHORT FORM ORDER**
SUPREME COURT, STATE OF NEW YORK
COUNTY OF NASSAU

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**RICHARD SHEA and ANTOINETTE ESTEVES, as parentsand natural guardians of COURTNEY SHEA, RICHARD SHEA and ANTOINETTE ESTEVES,**
Plaintiff

**Trial/IAS Part 17**
**Index No. 06-17706**
**Sequence No. 01, 02**
**Submit Date 11/26/08**

*against*

**THE UNION FREE SCHOOL DISTRICT OF MASSAPEQUA and THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT OF MASSAPEQUA,**
Defendants

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**The following papers read on this motion:**

**Notice of Motion/Order to Show Cause..... X**
**Cross-Motions..... X**
**Answering Affidavits..... X**
**Replying Affidavits..... X**

**PRESENT: HON. JOSEPH P. SPINOLA**

This motion by the defendants The Union Free School District of Massapequa and The Board of Education of the Union Free School District of Massapequa ("School District") for an order pursuant to CPLR 3211(a)(1), (2), (5) and (7) dismissing the complaint is determined as provided herein.

This cross-motion by plaintiffs Richard Shea and Antoinette Esteves, as parents and natural guardians of Courtney Shea, and Richard Shea and Antoinette Esteves, Individually, for an order pursuant to CPLR 3025(b) granting them leave to amend their complaint to, *inter alia*, seek leave to file a late Notice of Claim and to expand their cause of action for civil rights violation, is determined as provided herein.

In this action, the plaintiffs seek to recover, *inter alia*, damages for the mental anguish and psychological injuries that the infant plaintiff Courtney Shea ("C.S.") allegedly suffered as a result of the School District's failure to timely and properly address a myriad of problems she encountered at school. The plaintiffs allege that as the

result of the School District's failure to address the problems she experienced in school, in particular bullying by other students dating back to the fifth grade, C.S. has been diagnosed with chronic posttraumatic stress disorder, schizoid personality disorder, depressive disorder, anxiety, agoraphobia and dysthymia which has rendered her a student with a mental disturbance requiring her classification as a "disabled" student under the Individuals with Disabilities Act ("IDEA") (20 USC § 1415; Article 89 of the New York State Education Law; 8 NYCRR 200.5).

The plaintiffs allege that while C.S. is a bright girl, that her I.Q. is in the superior range and that her grades have always been exceptional, she has not attended school since November 2005 on account of School District's failure to fulfill its duties to her. C.S. began attending school in the defendant School District in 1991 and she alleges that almost immediately, the other students began bullying her, both verbally and physically. Plaintiffs allege that not only was C.S. excluded by other students, but that twice in fifth grade she was pushed or thrown to the ground and that on one such occasion, a gold necklace was torn from her neck. They allege that the bullying intensified in sixth grade and that C.S. was kicked, scratched and elbowed numerous times and accused of being a homosexual. C.S. allegedly received her first death threat on April 29, 2003, and that those threats continued for three days. Plaintiffs allege that the bullying and exclusions intensified in seventh grade and that one day C.S. was crying uncontrollably on account of a boy's comments and that the Dean suspended the boy for one week on account of what he had said. Plaintiffs allege that the harassment of C.S. only further intensified following the suspension, with ridicule and derogatory statements continuing. Plaintiffs allege that in eighth grade, C.S. was voted "least liked girl" and "least liked overall" every marking period. Plaintiffs allege that in January of eighth grade, C.S. stopped attending school on account of chagrin, headaches, stomach aches and daily nightmares. They also allege that C.S.'s communication with her parents was negatively affected and that she lost interest in her hobbies. C.S. ultimately received homebound instruction for the rest of the eighth grade. Plaintiffs allege that C.S. returned to school in ninth grade but on the very first day, the name-calling resumed; someone threw a pickle at her; and, one student performed a sham exorcism on her. Plaintiffs allege that C.S. began to fear for her physical safety and her pediatrician recommended that she see a psychologist.

Plaintiffs allege that Dr. Zieher diagnosed C.S. with posttraumatic stress disorder, attributable to bullying. Dr. Zieher's report was forwarded to the School District. In November, 2005, C.S. left ninth grade; in December she applied for home instruction; and in January, 2006, the School District approved it. Plaintiffs allege that when the School District proposed that the Section 504 Committee meet to discuss C.S.'s educational needs, her parents responded that they preferred that the Committee on Special Education evaluate her as a "disabled" student entitled to protection under IDEA. In May, 2006 the School District refused to qualify C.S. as disabled under the IDEA but asked that she be evaluated by a psychiatrist of its choice. Dr. Guertin ultimately concurred with Dr. Zieher's diagnosis of posttraumatic stress disorder which he found chronic, not acute, as well as a diagnosis of agoraphobia. When the School District reconsidered C.S.'s possible classification at C.S.'s parents' request, they found that

C.S.'s psychiatric difficulties did not impact her educational performance and she was accordingly denied classification as "disabled" under IDEA. Such a classification would have vested C.S. with a variety of rights including but not limited to special educational and related services through an Individualized Education Program ("IEP").

In their proposed amended complaint, plaintiffs allege that C.S. was the target of incessant bullying, ridicule, death threats and physical and mental abuse by students, teachers, the faculty and employees of the School District, as a result of which she became a dysfunctional child. They allege that the School District was "well aware" of this since 2001; that it had a special duty to keep C.S. safe from harm and to protect her from this hostile environment; and that it acted with deliberate indifference in its treatment of C.S.

In ¶ 22A of their complaint, the plaintiffs identify thirteen specific occasions from September 2001 to June 2003 at the Raymond J. Lockhart School when C.S. was, *inter alia*, made fun of, inappropriately confronted, harassed, bullied, criticized, shunned, accosted, threatened, including death threats. They allege that the School District was made aware of all of these occurrences via written letter.

In ¶ 22(B) of their complaint, the plaintiffs identify nineteen specific occasions from September, 2003 to June 2005 at Alfred G. Berner Middle School when C.S. was, *inter alia*, called names, embarrassed, singled out, bullied, sometimes in writing, harassed, flashed, accosted, treated with hostility and graded unfairly. They allege that C.S. became unable to attend school and learned that that was an outgrowth of her mistreatment. They again allege that the School District was continuously notified of these occurrences.

In ¶ 22(C) of their complaint, the plaintiffs identify eighteen occasions from September 2005 to March 17, 2008, at Massapequa High School-Ames Campus, when C.S. was treated unfairly, harassed, mistreated, demeaned, denied home instruction, poorly educated via homebound instruction, denied privileges which she was qualified for, improperly denied treatment under IDEA and inappropriately referred to Child Protective Services.

Plaintiffs allege that all of these things occurred persistently with the School District's knowledge and that the School District's failure to take appropriate action exacerbated misconduct. Plaintiffs allege that as a result of the School District's negligence, C.S. has suffered extreme indignities, humiliation, severe emotional distress, mental anguish, loss of liberty, loss of standing in the community, and has been held up to ridicule before her peers and has lost her statutory right to an education free and clear of the above infractions. They allege that C.S.'s injuries will cause her and have caused her to be permanently incapacitated, will permanently impair her earning capacity, will deprive her of an education, will and has left her physically and mentally impaired, and has necessitated psychiatric, psychological, medical and surgical treatment and supplies for an indefinite period of time.

The plaintiffs challenged the School District's refusal to classify C.S. as a "disabled" student administratively. After a hearing spanning several days, by decision dated June 20, 2007, Impartial Hearing Officer Martin Schiff upheld the School District's Committee on Special Education's May 31, 2006 and September 13, 2006 recommendations to deny classifying C.S. as "disabled" under the IDEA, specifically, as a student with an emotional disturbance. Hearing Officer Schiff found that the parents unreasonably rejected the School District's offer of programs and placements under Section 504 of the Rehabilitation Act. He noted that while a child with a "serious emotional disturbance" may be classified as a "child with a disability" under IDEA, to be so classified, it is required that the disability "adversely affect a student's educational performance." See 20 USC § 1401(3); 34 C.F.R. 300.7(a); see also 8 NYCRR 200.1(22)(4). Hearing Officer Schiff found that although C.S. suffered from a variety of conditions, namely, chronic posttraumatic stress disorder, schizoid personality disorder, depressive disorder, anxiety, agoraphobia and dysthymia, her parents failed to establish that any of those conditions had an adverse impact on her educational performance. In addition, although C.S.'s parents maintained that her medical conditions led her to stop attending school, Hearing Officer Schiff found "that it was not those conditions that kept her out of school but rather the failure of her parents to cooperate with the school district in finding a program in which to re-enroll their child," more specifically, Section 504 programs.

C.S.'s parents appealed the Independent Hearing Officer's decision and on September 4, 2007, State Review Officer Paul Kelly of the New York State Education Department rejected the Independent Hearing Officer's findings and sustained C.S.'s appeal. He noted that while the parties disagreed as to the diagnoses' effect on C.S.'s educational performance and whether she required special education as a result, her diagnosis of posttraumatic stress disorder, agoraphobia and major depressive disorder were not disputed. State Review Officer Paul Kelly noted that "regardless of where [she] received instruction, [C.S.'s] psychiatric/psychological conditions did not prevent her from consistently achieving high academic performance in the general curriculum." However, he noted that her "psychiatric/psychological problems prevented her from reentering [the] school building in January 2006." Moreover, State Review Officer Kelly found that the evidence showed that C.S. "was experiencing significant anxiety associated with bodily harm;" that she "utilized defenses to keep her at a distance from others, and that she seems to use an oppositional stance." State Review Officer Kelly found that the evidence "establishe[d] that [C.S.] has a generally pervasive mood of unhappiness or depression and a tendency to develop physical symptoms or fears associated with personal or school problems." He concluded that the Impartial Hearing Officer erred by limiting his consideration to the effect C.S.'s psychological conditions had on her educational performance and by not adequately considering her non-academic limitations in determining her eligibility for special education services. State Review Officer Kelly in fact found that C.S.'s psychological conditions were severe enough to adversely impact her ability to function in her school setting and that they adversely affected her educational performance. He concluded that C.S. required special education services and accordingly directed that the School District's Committee on Special Education to

reconvene and develop an IEP for C.S., along with a recommendation for placement.

The School District has commenced an action in federal court in the Eastern District of New York seeking a *de novo* review of the record; an annulment of the State Review Officer's conclusions; and, a finding that it does not have to classify C.S. as a "disabled" student pursuant to IDEA and Article 89 of the New York State Education Law, specifically, a student with an emotional disturbance.

Richard Shea and Esteves, as guardians of C.S., filed a Notice of Claim against the District on or about January 25, 2006, alleging, *inter alia*, that (1) the District was negligent in its hiring of teachers and in the maintenance, conduct and control of its employees, (2) that the School District allowed a hostile environment to continue in the schools attended by C.S. which prevented her from receiving an education, (3) that the School District negligently supervised C.S., causing her emotional and physical injuries, (4) that the School District improperly refused to allow C.S. to wear tape over her earrings during physical education class, and (5) that the School District improperly denied C.S. homebound instruction.

The plaintiffs commenced this action on October 27, 2006.

The School District seeks dismissal of the complaint in this action on several grounds: as untimely; based upon the plaintiffs' failure to exhaust their administrative remedies; on the grounds that they are protected by the doctrine of qualified immunity; and, for failure to state a claim.

In response to the School District's motion, the plaintiffs seek leave to amend their complaint.

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR § 3211 "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v Ginzburg, 43 NY2d 268 (1977). The facts as alleged must be accepted by the court as true and are to be accorded every favorable inference. On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court's attention "should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one." Rovello v Orofino Realty Co., 40 NY2d 633, 634 (1976).

"In the absence of prejudice or surprise to the opposing party, a motion for leave to amend the complaint pursuant to CPLR 3025(b) should be freely granted unless the proposed amendment is 'palpably insufficient' to state a cause of action or is patently devoid of merit." Scofield v DeGroodt, 54 AD3d 1017 (2nd Dept. 2008), citing Lucido v Mancuso, 49 AD3d 220 ,229 (2nd Dept. 2008); Smith-Goy v AMC Prop. Evaluations, Inc., 52 AD3d 809 (2nd Dept. 2008); Trataros Constr. Inc. v New York City School Constr. Auth., 46 AD3d 874 (2nd Dept. 2007); G.K. Alan Assoc., Inc. v Lazzari, 44 AD3d

95, 99 (2nd Dept. 2007), aff'd. 10 NY2d 941 (2008).

The School District has not opposed the plaintiffs' application for leave to amend their complaint. It is granted and the defendants' motion pursuant to CPLR 3211 will be evaluated with respect to the proposed amended complaint submitted herewith.

Failure to Exhaust Administrative Remedies

In view of the resolution of the plaintiffs' appeal to the State Board of Education, the School District's motion to dismiss the complaint based on the plaintiffs' failure to exhaust their administrative remedies is denied.

Another Action Pending

"CPLR § 3211(a)(4) authorizes a court to dismiss or stay an action on the ground that there is another [action] pending between the same parties for the same cause of action in another court." In re Topps Co., Inc., Shareholders Litigation, 19 Misc3d 1103(A) (Supreme Court New York County 2007). "A motion to dismiss pursuant to CPLR 3211(a)(4) should be granted only when there is another action pending between the same parties for the same cause of action and raises the danger of conflicting rulings relating to the same matter." Pagoulatov v Kourkoumelis, 14 Misc3d 1222(A) (Supreme Court Queens Co. 2007), citing White Light Prods. v On The Scene Prods., 231 AD2d 551). "With respect to the subject of the actions, the relief sought must be the same or substantially the same." White Light Prods. v On The Scene Prods., supra, quoting Kent Dev. Co. v Liccione, 37 NY3d 899, 901 (1975); see, JC Mfg. v NPI Elec., 178 AD2d 505, 506 (1991).

The School District's request that this action be dismissed pursuant to CPLR 3211(a)(4) on the grounds that an action is pending in federal court is denied. The claims in that action, while related, have not been shown to be sufficiently similar to warrant the application of that doctrine here. In the federal court action, the School District seeks review of the State Review Officer's findings and directive that C.S. be classified as a "disabled student." In this action, the plaintiffs seek to recover damages for, *inter alia*, negligence, intentional and negligent infliction of emotional distress, loss of companionship and violation of federal rights. The relief sought in this action is different than that sought in the federal court action. Relief pursuant to CPLR 3211(a)(4) is denied. See, Lauder v Jacobs, 10 Misc3d 1052(A) (Surrogate's Court Westchester County 2005); In re City of New York, 7 Misc3d 1022(A) (Supreme Court Kings County 2005).

Statute of Limitations/Notice of Claim

All of Richard Shea and Antoinette Esteves' claims for negligence and/or personal injury based on events pre-dating October 27, 2003, three years before this action was commenced are subject to dismissal as untimely. CPLR 215(5). All of their claims for intentional infliction of emotional distress which are also based on events pre-dating

October 27, 2005, one year before this action was commenced, are also dismissed as untimely. CPLR 215(3). In fact, General Municipal Law § 50-i requires that plaintiffs' claims against the School District be advanced within one year and 90 days of the event. Applying that limitation, any claims based on events pre-dating July 27, 2005 are dismissed.

Contrary to the plaintiffs' argument the continuous treatment or continuing violation doctrine does not apply to their negligence or intentional infliction of emotional distress claims. "In order to benefit from the [continuing violation] doctrine, a plaintiff must establish that the defendant's conduct is 'more than the occurrence of isolated or sporadic acts.' " Cowell v Palmer Township, 263 F3d 286, 292 (3rd Cir. 2001) citing West v Philadelphia Elec. Co., 45 F.3d 744, 754 (3rd Cir. 1995). "[C]ourts should consider at least three factors: (1) subject matter–whether the violations constitute the same matter–whether the violations constitute the same type of discrimination, tending to connect them in a continuing violation; (2) frequency–whether the acts are recurring or more in the nature of isolated incidents; and (3) degree of permanence–whether the act had a degree of permanence which should trigger the plaintiff's awareness of and duty to assert his/her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate." Cowell v Palmer Township, supra, at p. 292, citing West v Philadelphia Elec. Co., supra, at p. 755, n. 9, citing Berry v Board of Supervisors of Louisiana State Univ., 715 F.2d 971, 981 (5th Cir. 1983). "Absent **concrete factual allegations** of a continuing conspiracy or concerted course of action against plaintiff" the acts more remote in time cannot be considered actionable as part of a "continuing tort" (emphasis added). Misek-Falkoff v International Business Machines Corp., 162 AD2d 211 (1st Dept. 1990). The plaintiffs' conclusory allegation that the School District's acts were all part of a pattern does not save those claims from dismissal pursuant to CPLR 3211(a)(5), Educational Law § 3813(1) and General Municipal Law § 50-e, 50-i. Schrank v Lederman, 52 AD3d 494 (2nd Dept. 2008), citing Bleiler v Bodnar, 65 NY2d 65 (1985); Van Slyke v Columbia Mem. Hosp., 118 Misc2d 203, 205 (1983), compare, 212 Inv. Corp. v Kaplan, 44 AD3d 332 (1st Dept. 2007), citing Greene v Greene, 56 NY2d 86, 94-95 (1982) (applying continuous representation doctrine to provision of professional series); Weisman v Weisman, 108 AD2d 853 (2nd Dept. 1985); see also, Foley v Mobil Chemical Co., 214 AD2d 1003 (4th Dept. 1995), rearg den. 1995 WL 413878 (1995).

A verified notice of claim was required to be filed within three months of the claims' accrual under Education Law § 3813(1) and within 90 days of their accrual under General Municipal Law § 50-e. Strict compliance with those requirements is required. Saintano v Western Suffolk BOCES, 242 AD2d 301 (2nd Dept. 1997). Letters or reports simply do not qualify. Scolo v Cent. Islip School District, 40 AD3d 1104 (2nd Dept. 2007). Accordingly, since a Notice of Claim was not filed until January 25, 2006, any claims by Richard Shea and Antonio Esteves based on occurrences prior to October 25, 2005 are dismissed.

An application to file a late Notice of Claim may only be granted if the application

is made before the expiration of the one year and 90 day Statute of Limitations. Welch v Board of Educ. of Saratoga Central School Dist., 287 AD2d 761, 762 (3rd Dept. 2001), citing General Municipal Law § §50-e[5], 50-i[1][c]. In determining whether to permit the service of a late notice of claim, the court will generally consider three factors: (1) whether the petitioner has a reasonable excuse for his or her failure to timely serve a notice of claim; (2) whether the school district acquired actual notice of the essential facts of the claim within 90 days after the claim arose, or a reasonable time thereafter; and (3) whether the delay would substantially prejudice the school district in its defense (Scolo v Central Islip Union Free School Dist., 40 AD3d 1104, 1105 (2nd Dept. 2007) citing Matter of Doyle v Elwood Union Free School Dist., 39 AD3d 544 (2nd Dept. 2007); Matter of Padovano v Massapequa Union Free School Dist., 31 AD3d 563, 564 (2nd Dept. 2006); Matter of Conroy v Smithtown Cent. School Dist., 3 AD3d 492, 493 (2nd Dept. 2004); Matter of Bordan v Mamaroneck School Dist., 230 AD2d 792 (2nd Dept. 1996); Matter of Sica v Board of Educ. of City of N.Y., 226 AD2d 542 , 542-543 (2nd Dept. 1996). The court notes that at this juncture, particularly in view of the history of this case, i.e., the 50+ letters and multiple phone calls and meetings, these factors cannot be adequately examined to determine whether plaintiffs' application for leave to file a late notice of claim lacks merit. Richard Shea and Antoinette Esteves' motion for leave to amend their complaint **to seek permission** to file a late notice of claim is granted with respect to claims not otherwise dismissed. The court notes however that leave to file a late notice of claim with respect to claims pre-dating the 1 year and 90 day Statute of Limitations is denied.

The Statute of Limitations for C.S.'s claims was tolled due to her infancy, as was the time in which C.S. could seek leave to file a late Notice of Claim. CPLR 208; Laroc v City of New York, 46 AD3d 760 (2nd Dept. 2007). Accordingly, none of C.S.'s claims are untimely. Carter v City of New York, 38 AD3d 702 (2nd Dept. 2007), citing Perry v City of New York, 238 AD2d 326, 327 (2nd Dept. 19997), see also, Cohen v Pearl Riv. Union Free School Dist., 51 NY2d 256 (1980), on remand to 81 AD2d 876 (2nd Dept. 1981). She is free to seek leave to file a late notice of claim with respect to all of her claims.

CPLR 3211(a)(7)

Plaintiffs cannot recover for failure to provide education or for a negligent educational processes. Donahue v Copiague Union Free School Dist., 47 NY2d 440 (1979); Hoffman v Board of Education, 49 NY2d 121 (1979). Those claims are dismissed.

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision." Mirand v City of New York, 84 NY2d 44, 49 (1994); Lawes v Board of Education of the City of New York, 16 NY2d 302; Smith v Poughkeepsie City School District, 41 AD3d 579 (2nd Dept. 2007); Silver v Mahopac Central School District, 18 AD3d 532, 533 (2nd Dept. 2005). "In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow

students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated (citation omitted)." Mirand v City of New York, supra; see, Smith v Poughkeepsie City School District, supra; McLeod v City of New York, 32 AD3d 907, 908 (2nd Dept. 2006); Moody v New York City Board of Education, 8 AD3d 639, 640 (2nd Dept. 2004); McElrath v Lakeland Central School District, (2nd Dept. 2005). "The adequacy of the school's supervision and whether the alleged lack thereof was a proximate cause of the underlying injury generally are questions of fact for the jury to resolve." Doe v Board of Educ. of Morris Cent. School, 9 AD3d 588, 590 (3rd Dept. 2004). C.S. has adequately pled a claim for negligent supervision as she alleges that the School District had notice of the students' and teachers' behavior which led to her injuries for years yet took inadequate or no action at all. See, S.K. ex rel. Phillip K. v City of New York, 19 Misc3d 493 (Supreme Court Kings County 2008); Johnson v Ken-ton Union Free School Dist., 48 AD3d 1276 (4th Dept. 2008); Smith v Poughkeepsie City School Dist., supra.

C.S. has not adequately pled a cause of action for negligent hiring as she has not alleged that the School District had knowledge or notice of any teachers' deficiencies. Ghaffari v North Rockland Cent. School Dist., 23 AD3d 342 (2nd Dept. 2005).

"A public entity cannot be held liable for the negligent performance of a governmental function unless it has formed a special relationship with the injured person, thus creating a specific duty to protect that person, and the person relied on the performance of that duty." Doe v Town of Hempstead Bd. of Educ., 18 AD3d 600, 601 (2nd Dept. 2005) citing Cuffy v City of New York, 69 NY2d 255, 260 (1987); Miller v State of New York, 62 NY2d 506, 510 (1984). "While the existence of a special relationship depends on the facts, 'a plaintiff has a heavy burden in establishing such a relationship' and, as a result, most such claims fail and are dismissed as a matter of law.' " Abraham v City of New York, 39 AD3d 21, 25 (2nd Dept. 2007), citing Pelaez v Seide, 2 NY3d 186, 199 n 8 (2004).

> "A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty: or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation." (Pelaez v Seide, supra at 199-200).

"As to the second way of forming a special relationship, viz., by the municipality's voluntary assumption of an affirmative duty and the plaintiffs' justifiable reliance on the municipality's undertaking, four elements must be shown:

> '(1) an assumption by a municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of a municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.' " Abraham v City of New York, supra, at p. 26, quoting Pelaez v Seide, supra, at p. 202; and citing Laratro v City of New York, 8 NY3d 79 (2006); Kovit v Estate of Hallums, 4 NY3d 499, 506-507 (2005); Lauer v City of New York, 95 NY2d 95, 102 (2000); Cuffy v City of New York, supra, at p. 260.

C.S. has adequately pled the School District's negligent performance of a governmental function. Having a student enrolled in their school with the history pled here may have given rise to a special duty, i.e., a duty to protect C.S. and keep her safe from harm as well as the School District's negligence which are necessary for such a claim. While defendants maintain that this principle applies to only physical harm, they have not cited any cases nor has this court found support for that conclusion.

Plaintiffs' cause of action for violation of a Code does not fail for want of the requisite specificity in pleading. Those facts can be discovered via discovery.

"The tort of intentional infliction of emotional distress has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." Howell v New York Post Company, Inc., 81 NY2d 115, 121 (1993). "To state a cause of action to recover damages for the intentional infliction of emotional distress, the conduct alleged must be so outrageous in character and extreme in degree as to surpass the limits of decency so 'as to be regarded as atrocious and intolerable in a civilized society.' " Leonard v Reinhardt, 20 AD3d 510 (2nd Dept. 2005) quoting Freihofer v Hearst Corp., 65 NY2d 135, 143 (1985) and citing Howell v New York Post Co., 81 NY2d 115, 121 (1993); Murphy v American Home Prods. Corp., 58 NY2d 293, 303 (1982); Fischer v Maloney, 43 NY2d 553, 557 (1978). The same principles apply to a claim of negligent infliction of emotional distress. Harville v Lowville Cent. School Dist., 245 AD2d 1106 (4th Dept. 1997), lv to app den. 92 NY2d 808 (1998), citing Rocco v Town of Smithtown, 229 AD2d 1034, 1035 (4th Dept. 1996), app. dism. 88 NY2d 1065 (1996). C.S. has not adequately pled the extreme and outrageous conduct necessary to support a cause of action for the intentional or negligent infliction of emotional distress. Those claims are dismissed.

While Richard Shea and Antoinette Esteves cannot recover for loss of their daughter's companionship, they may recover for loss of her services if special damages are proven. White v New York, 37 AD2d 603 (1971). That claim will not be dismissed at this juncture.

Section 504 of the Rehabilitation Act (29 U.S.C. § 701, *et seq.*) and Title II of the ADA )42 USC 12101, *et seq*) were designed to protect disabled persons from discrimination, both intentional and unintentional, in the provision of public services. K.M. v Hyde Park Central School District, 381 F.Supp.2d 343, 357 (S.D.N.Y. 2005), citing Weixel v Bd. of Educ., 287 F.3d 138, 146 (2nd Cir. 2002). Section 504 provides:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program of activity receiving federal financial assistance. 29 U.S.C. § 794.

Similarly, Title II of the ADA states:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12134

"Apart from the Rehabilitation Act's limitation to denials of benefits 'solely' by reason of disability and its reach of only federally funded–as opposed to 'public'-entities, the reach and requirements of both statutes are precisely the same." K.M. v Hyde Park Central School District, supra, at p. 357, citing Weixel v Bd. of Educ., supra, at p. 146 n.6; Rodriguez v City of New York, 197 F.3d 611, 618 (2nd Cir. 1999). The Section 504 and Title II claims are therefore analyzed together. K.M. v Hyde Park Central School District, supra, at p. 357, citing Henrietta D. v Bloomberg, 331 F.3d 261 (2d Cir. 2003); D.D. v New York City Bd. of Educ., No. 03 Civ 1489 (DGT), 2004 WL 633222 at *17 (E.D.N.Y. 2004). To avoid dismissal, the plaintiffs must allege that "(1) [C.S.] has a disability for purposes of Section 504 and Title II; (2) [s]he was otherwise qualified for the benefits [she] was denied; (3) [s]he was denied the benefit by reason of [her] disability"(K.M. v Hyde Park Central School District, supra, at p. 357-358, citing Weixel v Bd. of Educ., supra, 287 F.3d at 146-147; Henrietta D. v Bloomberg, supra, at p. 272) "or was otherwise discriminated against by defendants because of [her] disability." Tylicki v St. Onge, __ F3d __, 2008 WL 4726328 (2d Cir. 2008). "Discrimination includes the failure to make a reasonable accommodation." Tylicki v St. Onge, supra, citing Henrietta D. v Bloomberg, 331 F3d 261, 272 (2d Cir. 2003).

"Both Section 504 and Title II define a 'disabled individual' as one who '(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." K.M. v Hyde Park Central School District, supra, at p. 358, citing 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(2). "A three-part test exists for determining where a person is disabled under these statutes." K.M. v Hyde Park Central School District, supra, at p. 358, citing Bragdon v Abbott, 524 U.S. 624 (1998) and Colwell v

Suffolk County Police Dept., 158 F.3d 635, 641 (2d Cir. 1998). "Under Colwell, plaintiff must (i) show that [C.S.] suffers from a physical or mental impairment, (ii) identify the activity claimed to be impaired and establish that it constitutes a "major life activity" (in this case, learning); and (iii) show that [C.S.'s] impairment 'substantially limits' the major life activity identified." K.M. v Hyde Park Central School District, supra, at p. 358, citing Weixel v Bd. of Educ., supra, at p. 147.

For purposes of this motion, pursuant to CPLR 3211, the plaintiffs have adequately alleged that [C.S.] is "disabled" under both Section 504 and the ADA. And, there is no dispute that if "disabled," she is entitled to a public education and access to special education programs, which, again, the plaintiffs have adequately alleged. The question is whether the plaintiff has identified a "major life activity" of C.S.'s and alleged that her impairment "substantially limits" it. "The ADA's requirement that, in order to constitute a disability under its terms, an impairment must *substantially* limit a *major* life activity underscores that 'the impairment must be significant, and not merely trivial.' " Reeves v Johnson Controls World Services, Inc., 140 F3d 144, 151 (2d Cir 1998), citing Sutton v United Air Lines, Inc., 130 F.3d 893, 900 (10th Cir. 1997) and Runnenbaum v Nations-Bank of Maryland, 123 F3d 156, 167 (4th Cir. 1997); Byrne v Board of Educ., 979 F2d 560, 564 (7th Cir. 1992). "That is, not any limitation, but only a 'substantial' limitation, of not any life activity, but only a 'major' life activity, will constitute a disability within the meaning of the statute." Reeves v Johnson Controls World Services, Inc., supra, at p. 151, citing Ryan v Grae & Rybicki, P.C., 135 F2d 867, 869-870 (2d Cir. 1998); Knapp v Northwestern Univ., 101 F3d 473 (7th Cir. 1996). In fact, the court "must determine 'whether the impairment at issue substantially limits the plaintiff's ability to perform one of the major life activities *contemplated by the ADA*, not whether the particular activity that is substantially limited is important to [*her*].' " Reeves v Johnson Controls World Services, Inc., supra, at p. 152 citing Runnenbaum v Nations-Bank of Maryland, supra, at p. 170 and Abbott v Bragdon, 107 F3d 934, 940 (1st Cir. 1997). "The need to identify a major life activity that is affected by the plaintiff's impairment plays an important role in ensuring that only significant impairments will enjoy the protection of the ADA." Reeves v Johnson Controls World Services, Inc., supra., at p. 152.

Plaintiffs need not show, let alone allege, that C.S. could not learn in order to establish that she is "disabled;" that she is substantially limited in her ability to attend and function in a traditional classroom is adequate. Weixel v Board of Education of City of New York, supra, at p. 147. The plaintiffs have adequately pled claims under the Rehabilitation Act and the ADA.

School districts are considered persons within the meaning of 42 USC § 1983. Back v Hastings On Hudson Union Free School Dist., 365 F.3d 107, 128 (2d Cir. 2004), citing Jett v Dallas Indep. School Dist., 491 U.S. 701 (1989); Monell v Dept. of Soc. Servs., 436 U.S. 658, 659 (1978). To state a cognizable claim under 42 USC § 1983 and the Fourteenth Amendment for violation of due process or equal protection, plaintiff is required to allege that defendant acted with "deliberate indifference" to the alleged harassment and hostile environment that C.S. endured. Yap v Oceanside Union Free

School District, 303 F.Supp.2d 284, 294 (E.D.N.Y. 2004), citing Gant ex rel Gant v Wallingford Bd. of Educ., 195 F.3d 134, 140 (2d Cir. 1999). "Deliberate indifference to discrimination can be shown from a defendant's actions or inaction in light of known circumstances." Gant ex rel Gant v Wallingford Bd. of Educ., supra, at p. 140. "Viewed in the light of these circumstances, 'deliberate indifference can be found when the defendant's response to known discrimination "is clearly unreasonable in light of the known circumstances." ' " Yap v Oceanside Union Free School District, supra, quoting Davis v Monroe County Bd. of Educ., 526 U.S. 629, 648 (1999). "In short, the undisputed evidence that must allow a reasonable trier of fact to conclude 'that the defendant[s'] indifference was such that the defendant[s] intended the discrimination to occur.' " Yap v Oceanside Union Free School District, supra, at p. 140.

Furthermore, to recover against a municipality like the School District, "plaintiff must demonstrate that his or her injury resulted from a municipal policy, custom, or practice." Hennenberger v County of Nassau, 465 F.Supp.2d 176, 197 (E.D.N.Y. 2006). "Thus to survive a motion to dismiss, plaintiffs may demonstrate the liability of a municipality . . . by showing 'the action of the employee[s] in question is taken by, or is attributable to, one of the entity's authorized policy makers [and therefore] the action will be considered the act of the entity itself.' " Hennenberger v County of Nassau, supra, at p. 197. See also, Back v Hastings On Hudson Union Free School Dist., supra, citing Monell v Dept. of Soc. Servs., supra, at p. 689.

In addition, the School District is entitled to qualified immunity from suit unless "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v Creighton, 483 U.S. 635 (1987). In fact, even assuming a plaintiff's constitutional right is violated, immunity exists if the defendant "objectively and reasonably believed that [it] was acting lawfully." Luna v Pico, 356 F3d 481, 490 (2d Cir. 2004). However, immunity does not exist if "in light of pre-existing law the unlawfulness is apparent." Hope v Pelzer, 536 U.S. 730, 739 (2002). In determining whether a right is clearly established and whether qualified immunity exists, the courts look to three factors: 1) whether the right in question was defined with reasonable specificity, 2) whether the decisional law of the Supreme Court and the Second Circuit support the existence of such a right, and 3) whether under preexisting law a reasonable defendant official would have understood that his acts were unlawful. Back v Hastings on Hudson Union Free School District, supra, at p. 129, citing Jermosen v Smith, 945 F.2d 547, 550 (2d Cir. 1991). The Second Circuit has further clarified this determination by stating that courts should not consider what "a lawyer would learn or intuit from researching case law, but what a reasonable person in [the official's] position should know about the appropriateness of his conduct under Federal law." Johnson v Newburgh Enlarged School Dist., 239 F.3d 246, 250 (2d Cir. 2001).

The plaintiffs cannot recover pursuant to 42 USC § 1983. While plaintiffs have adequately pled that C.S. suffers from a disability; that her disability has substantially impaired one of her major life activities; that the defendants intended the alleged harassment or hostile environment thus fulfilling the depraved indifference requirement;

and, that the defendants knew that their conduct was violative of C.S.'s rights, they have not adequately pled a municipal policy which is necessary to hold the School District liable here.

This constitutes the decision and order of the Court.

ENTER:

Joseph P. Spinola, Justice
Supreme Court, Nassau County

Dated: January 6, 2009
Mineola, NY