SHORT FORM ORDER **INDEX NO. 29720/2007**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

COREY BIRSNER, an infant under the age of fourteen (14) years, by his mother and natural guardian, DEBORAH LYONS-BIRSNER and DEBORAH LYONS-BIRSNER, individually

Plaintiff(s),

-against-

LINDENHURST PUBLIC SCHOOLS

Defendant(s).

ORIG. RETURN DATE: July 9, 2008
FINAL RETURN DATE: August 25, 2008
MTN. SEQ. #: 001-MotD
CROSS MTN. SEQ. # 002-MotD

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Upon the following papers numbered 1 to 27 read on this motion and cross motion for summary judgment: Notice of Motion and supporting papers 1 - 5; Notice of Cross Motion/Opposition to Motion and supporting papers 6 - 23; Affirmation in Opposition/Reply Affirmation 24 - 27; it is,

ORDERED that the motion (001) by the defendant for summary judgment dismissing the complaint in its entirety is granted in part and denied in part; it is

ORDERED and ADJUDGED that the defendant's motion for summary judgment dismissing the complaint is granted to the extent that the first, second and third causes of action are dismissed in their entireties; and the dismissal of the fourth cause of action is denied only to the extent that it alleges acts of "retaliation" (as found in paragraphs 74, 75 and 76); and it is further

ORDERED and ADJUDGED that the allegations within the fourth cause of action which allege other negligent acts aside from "retaliation" (to wit, paragraphs 71, 72 and 73), are stricken as they sound in "educational malpractice" and, as such, are not proper as a basis for a cause of action against a school district couched in terms of negligence, and it is further.

ORDERED that the cross motion (002) by the plaintiffs for summary judgment granting the relief sought in their complaint is denied; and it is further

ORDERED that, pursuant to 22 NYCRR 202.8(f), the parties are directed to appear for a preliminary conference on November 4, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

The complaint in this action contains four causes of action arising from a dispute regarding the providing of educational services to the infant plaintiff, Corey Birsner (hereinafter the student). The student's mother, Deborah Lyons-Birsner (hereinafter the parent) is named as a co-plaintiff in her individual and natural guardian capacities.

The defendant is the Lindenhurst Union Free School District, sued herein as Lindenhurst Public Schools (hereinafter the District).

In the course of this decision and order, a number of acronyms will be used. For purposes of convenience, those acronyms are listed here:

CSE - Committee on Special Education
ESY - extended school year
FAPE - Free Appropriate Public Education
IDEA - Individuals with Disabilities Education Act (20 USC §1400 et seq.)
IEP - Individualized Education Program

It is alleged that the student, now 15 years old, was born with a hearing deficit and suffers from some other disabilities as well (Complaint, ¶ 1). A special education teacher was assigned to the student to assist him with his daily schooling (Complaint, ¶ 12). Before the 2006-2007 academic year, the parents requested an ESY for the preceding summer to provide the special education services needed for his beginning the regular school year in September of 2006 (Complaint, ¶ 21).

At a CSE meeting on June 21, 2006 (which was recorded), the request for an ESY was denied (Complaint, ¶ 22) but some other more limited educational services were offered for the summer (reading and keyboarding) (Complaint, ¶ 23). The parents, at that same CSE meeting, then made an oral and written request for a impartial due process hearing.

A follow-up CSE meeting was held on July 5, 2006 at which, it is alleged, the District asked the parent to withdraw her request for the impartial due process meeting or, if she did not, the District would provide no summer educational services at all to the student during the summer of 2006 (Complaint, ¶ 26). The parent refused to withdraw her request for the impartial due process hearing and the District, indeed, did not provide the reading and keyboarding instruction it had agreed to as well as deciding to curtail other educational services early in the 2006-2007 academic year (Complaint, ¶¶ 28-30).

The parent then filed a complaint with the United States Department of Education, Office of Civil Rights (hereinafter OCR) in which she alleged that the District took illegitimate and adverse actions which were the result of wrongful retaliation against the student and her for her refusing to withdraw her request for the impartial due process hearing (Complaint, ¶¶ 36-37).

In August of 2006, the student was removed from the District's schools by the parent and placed in the Sappo School (Complaint, ¶ 42), a private educational facility specializing in special educational needs. The District would not reimburse the parent for the costs of the private schooling or the costs of transportation to said school.

Based upon these allegations, the complaint contains four causes of action, namely:

(1) Violation of 42 USC § 1983 in depriving the student of his educational rights and privileges under the IDEA (20 USC §§ 1400 et seq.);
(2) Violation of 42 USC § 1983 in depriving the student of his FAPE as required pursuant to Section 504 of the Rehabilitation Act of 1973 (29 USC § 794);
(3) A claim for attorneys fees pursuant to 42 USC § 1988; and
(4) A claim sounding in negligence for the breach of duties owed to the student, for the District's "reckless and wanton disregard" in failing to provide various educational services required by certain specified laws and for retaliation.

Administrative proceedings (State and Federal):

State:

The following facts are taken from the opinion of the New York State Department of Education State Review Officer (hereinafter SRO), dated August 15, 2007, in resolving the issues on appeal from the state's impartial hearing:

An impartial hearing was held by the New York State Education Department commencing on December 7, 2006, with seven days of testimony, ending on February 7, 2007. The decision of the impartial hearing officer (dated May 7, 2007) found as follows:

(1) Members of the District's CSE did not have appropriate knowledge of the District's programs and services;
(2) the June 21, 2006 CSE included an inappropriate regular education teacher;
(3) the District delayed in providing an assistive technology evaluation of the student;
(4) the administering of an English Language Arts exam in 2004 posed a "serious distraction" at the June 21, 2006 CSE meeting;
(5) the parents did not show the appropriateness of Sappo for the student; and
(6) Sappo was an overly restrictive placement for the student.

The impartial hearing officer concluded with ordering the District to reconvene a CSE meeting and denied the request of the parents for tuition reimbursement for the Sappo placement.

The decision of the impartial hearing officer was appealed by both sides. The parents alleged that the impartial hearing officer erred in failing to address the issue of ESY services; in precluding the parents

from offering witness testimony to rebut certain aspects of the school psychologist's testimony; in finding the parents' placement of the student at Sappo as inappropriate solely on the basis of it not being the least restrictive environment; failing to address equitable considerations; and, failing to address the parents' request for transportation.

The District cross-appealed with regard to the findings that the District's June 21, 2006 CSE members did not have appropriate knowledge of the District's programs and services; that the parents were "distracted" from a meaningful discussion of the student's assistive technology needs at the June 21, 2006 CSE meeting; and, that irregularities in the English Language Arts exam during the 2004-2005 school year were also a distraction to the parents at said meeting. The District further asserted that the June 21 ,2006 CSE meeting was properly composed; the assistive technology evaluation was timely; the 2006-2007 IEP was procedurally and substantively sound; the parents/student were not entitled to transportation costs to Sappo; Sappo is not an appropriate placement for the student; the parents' requests for ESY services, transportation to and from Sappo and for reimbursement for said transportation costs should all be denied.

The SRO found, inter alia, as follows (all references are to pages of the SRO's decision dated August 15, 2007):

> (1) The parents failed to show that procedural errors impeded the student's right to a FAPE or impeded the student/parents' opportunity to participate in the decision making process with regard to a FAPE or brought about the deprivation of educational benefits (p. 8);
> (2) the parents "actively participated in the formulation of their son's IEP [citations omitted]" (p. 9);
> (3) the members of the June 21, 2006 CSE did have appropriate knowledge of services and programs (p. 10);
> (4) the parents were not distracted at the June 21, 2006 CSE meeting by the timing of the assistive technology evaluation (p. 11);
> (5) irregularities in the administering of the English Language Arts exam did not result in distractions at the June 21, 2006 CSE meeting (p. 11);
> (6) the District has "consistently demonstrated that its CSE is responsive to the student's needs and that it offered an appropriate program for the 2006-2007 school year" (p. 13);
> (7) the June 21, 2006 IEP "accurately reflected the results of evaluations which identified the student's needs, established annual goals related to those needs, and provided for the use of appropriate special educational services [citations omitted]" (p. 13); and,
> (8) the parents failed to "meet their burden to establish that [the District] failed to offer the student a FAPE for the 2006-2007 school year" and, accordingly, the request for reimbursement of tuition costs for Sappo is denied (p. 14).

[NOTE: According to the plaintiffs, the SRO decision of August 15, 2007 is the subject of review in a federal action (EDNY; CV-07-4577).]

Federal:

The parent filed a complaint on November 9, 2006 with the OCR (United States Department of Education, Office of Civil Rights). The gravamen of the complaint was the claim that the District engaged in retaliation against the parent when it informed her that the District would withdraw its offer of reading and keyboarding instruction during the summer of 2006 unless she withdrew her request for an impartial due process hearing.

An investigation was undertaken in which the OCR interviewed the parent, the Assistant to the Superintendent for Special Education and Pupil Personnel Services (hereinafter the Assistant) and the school psychologist. The OCR also reviewed the minutes and audio of the June 21, 2006 CSE meeting, reviewed a proposed resolution agreement, and reviewed the District's relevant policies and procedures as well as other documents submitted by both sides. There was no taking of testimony and no questioning of witnesses by the parties. In short, this was an investigation and not a quasi-judicial proceeding.

In a letter to the parent from the OCR Compliance Team Leader, dated May 7, 2007, the OCR made the following determinations:

> (1) Although it was determined at the June 21, 2006 CSE meeting that the student was not eligible for ESY, the Assistant (who chaired the meeting) did offer reading and keyboarding instruction for the summer of 2006 to assist the student's transition to middle school;
> (2) the CSE agreed to meet on July 5, 2006 regarding how such services would be provided;
> (3) the parent made a request for an impartial due process hearing orally and in writing at the June 21, 2006 CSE meeting;
> (4) a subsequent letter, dated June 27, 2006, from the Assistant to the parent informed the parent that the July 5, 2006 meeting would be a "resolution meeting of your due process request regarding the ESY services" rather than a discussion on how such reading and keyboarding services would be provided;
> (5) at the July 5, 2006 meeting, the parent was presented with a proposed resolution agreement which made the providing of reading/keyboarding services contingent upon the parent withdrawing the request for the impartial due process hearing;
> (6) the parent declined to sign the proposed resolution agreement and the reading/ keyboarding services were not provided;
> (7) the request for the impartial due process hearing was a "protected activity" and the District knew this;
> (8) the District's decision not to provide the reading/keyboarding services was an "adverse action";
> (9) there was a causal connection between the hearing request and the District's withdrawal of the previously unconditional offer of reading/keyboarding services; and
> (10) the District's stated reasons for conditioning the withdrawal of reading/ keyboarding services upon the withdrawal of the hearing request was "not legitimate and [not] non-retaliatory."

As part of this complaint procedure, a Resolution Agreement (dated May 2, 2007) was signed by the District for the purpose of resolving the retaliation issue which was raised in the complaint to the OCR. The Resolution Agreement provided, inter alia, that the District would review the actions of the Assistant within a set time period and "take any action deemed appropriate such as counseling or discipline"; the District would notify the parent that it will provide 18 hours of reading and 6 hours of keyboarding instruction by the beginning of the next school year (September 2007); and, remind all personnel involved in CSE meetings, in writing, about the prohibition against retaliation against persons "attempting to assert their rights pursuant to Section 504 [Rehabilitation Act of 1973 (29 USC § 794)] and Title II [Americans with Disabilities Act of 1990 (43 USC § 12132 et seq.)]."

This Resolution Agreement contained no admissions on behalf of the District.

The Court notes that counsel for the parents does not contest that the state administrative proceedings - consisting of the impartial hearing and the appeal - are appropriate for the application of collateral estoppel and urges the Court to consider the federal complaint procedure culminating in the OCR letter (discussed below) as equally applicable to the principles of res judicata or collateral estoppel.

Defendant's Motion for Summary Judgment:

The District now moves for summary judgment dismissing the complaint. In brief, the District argues that the first and second causes of action - which allege violations of 42 USC § 1983 - both involve the key issue of whether a FAPE was provided or not and that this issue was resolved in favor of the District in the SRO's decision in the state administrative proceeding. Accordingly, the District asks the Court to apply the doctrines of res judicata and collateral estoppel to preclude the relitigation of this issue in this action.

As to the third cause of action (for attorneys fees pursuant to 42 USC § 1988), the District contends that there is no cause of action permitted for this relief.

As to the fourth and final cause of action alleging negligence on the part of the District, the District argues that this cause of action is actually alleging educational malpractice and that New York State does not recognize a cause of action for educational malpractice.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied regardless of the sufficiency of the opposition papers (*see Smalls v AJI Industries, Inc.,* 10 NY3d 733, 853 NYS2d 526 [2008]). If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of this motion, the District submits an attorney's affirmation, a memorandum of law, the SRO decision and other documents to support its position that, as a matter of law, these causes of action must all be dismissed.

First and Second Causes of Action:

The first and second causes of action allege federal civil rights violations pursuant to 42 USC §1983 with regard to the alleged failure to provide the student with a FAPE as is ensured to individuals with disabilities pursuant to the IDEA (20 USC §1400 et seq.) (first cause of action) and also pursuant to the Rehabilitation Act of 1973 (29 USC §794) (second cause of action).

In support of the District's request to dismiss these two causes of action, the District relies upon the doctrines of re judicata and collateral estoppel. More specifically, the District argues that the SRO resolved the issue of whether a FAPE was provided to the student in the District's favor and that determination is binding in the instant action. Accordingly, according to the District, since in order to prevail on these first two causes of action, the plaintiffs must establish that a FAPE was not provided to the student, the prior determination by the SRO that a FAPE was, indeed, provided, establishes that issue for purposes of this action and requires the dismissal of the first and second causes of action.

At the outset, the Court notes the interchangeable use of the terms res judicata ("claim preclusion") and collateral estoppel ("issue preclusion") throughout the submissions of both sides.

Res judicata is applicable to identical claims brought or which could have been brought in different judicial or quasi-judicial forums. Where a claim, as opposed to an issue, has been previously decided on the merits in one such forum among the same parties, it can be used to preclude the relitigating of the same claim in a subsequent forum (*see Allen v McCurry,* 449 US 90, 94 [1980]; *Monohan v New York Dept. of Corrections,* 214 F3d 275, 285 [2d Cir 2000], *cert denied* 531 US 1035 [2000]; *Schuylkill Fuel Corp. v B. & C. Nieberg Realty Corp.,* 250 NY 304, 306-307 [1929]).

Collateral estoppel precludes the re-trying of an issue, as opposed to a claim, where the identical issue was actually litigated and resolved in the prior judicial or quasi-judicial proceeding, the party against whom issue preclusion is being sought had a "full and fair opportunity" to litigate the issue in the prior proceeding and the resolution of the issue in question was necessary to support the final determination on the merits in the prior proceeding (*see Jeffreys v Griffith,* 1 NY3d 34, 39, 769 NYS2d 184 [2003]; *Ryan v New York Telephone,* 62 NY2d 494, 500-501, 478 NYS2d 823 [1984]; *Matter of Yellow Cab of Newburgh, Inc. v Westchester County,* 72 AD3d 835, 836, 898 NYS2d 659 [2d Dept 2010]; *Chiara v Town of New Castle,* 61 AD3d 915, 916, 878 NYS2d 755 [2d Dept 2009]).

In reviewing the first and second causes of action, it is clear that the key issue to be determined is whether a FAPE was provided to the student. A determination that no FAPE was provided would allow for consideration of the "1983" violations. A determination that a FAPE was provided would be contrary to finding that there were any "1983" violations in the context of this action.

The SRO's finding with regard to FAPE was that the District did provide a FAPE to the student for the school year in question. Specifically, the SRO found that the "[parents] did not meet their burden to establish that [the District] failed to offer the student a FAPE for the 2006-2007 school year" (SRO decision, p. 14).

The determination of the FAPE issue by the SRO is entitled to collateral estoppel effect in the instant action because the factors required for issue preclusion are satisfied here, to wit: the identical issue (whether a FAPE was provided) was actually litigated and resolved in the state administration proceeding; that proceeding was quasi-judicial; it allowed the parent a "full and fair opportunity" to litigate the issue in the impartial due process hearing and in the subsequent appeal; and, the resolution of the issue in question was necessary to support the final determination on the merits in that prior proceeding (*see Ryan v New York Telephone,* 62 NY2d 494, 500-501, 478 NYS2d 823 [1984]; *Chiara v New York Tel. Co.,* 61 AD3d 915, 916, 878 NYS2d 755 [2d Dept 2009]).

Moreover, the plaintiffs do not contest that collateral estoppel is appropriate here.

On the basis of these submissions, the Court finds that the District has made a prima facie showing of entitlement to summary judgment in its favor dismissing the first and second causes of action. The burden now switches to the plaintiffs to show material issues of fact in this regard requiring a trial.

The plaintiffs' opposition to the dismissal of these two causes of action is principally based upon their contention that the claims before the SRO were not the same claims as the claims in these first two causes of action. The claims here are based upon the violation of federal civil rights; the claims before the SRO were not.

This argument would be persuasive if res judicata ("claims preclusion") were involved here, but the claims stated in the instant action (denial of civil rights) , the federal OCR investigation (retaliation) and in the state Department of Education proceeding (denial of a FAPE, inter alia) are all distinguishable among the three proceedings. Therefore, it cannot be said that the actual claims in the instant case were decided in the other proceedings. In this regard, the Court agrees with the plaintiffs that res judicata does not apply.

But as discussed herein, the issues underlying the respective claims (as opposed to the claims themselves) - particularly with regard to these first two causes of action - depend upon a finding that a FAPE was not provided to the student. That very issue was decided in the Department of Education proceeding and, thus, the application of collateral estoppel in the instant action to preclude the relitigating of the FAPE issue is in order.

The same analysis, however, does not apply to giving collateral estoppel effect to the OCR findings. The OCR findings came out of an investigation and not from a judicial or quasi-judicial proceeding. Accordingly, collateral estoppel would not apply to the findings of the OCR investigation (*see Ryan v New York Telephone,* 62 NY2d 494, 500-501, 478 NYS2d 823 [1984]; *Chiara v New York Tel. Co.,* 61 AD3d 915, 916, 878 NYS2d 755 [2d Dept 2009]).

The Court finds that the plaintiffs have failed to raise material issues of fact in opposition to granting summary judgment on the first two causes of action. Accordingly, dismissal is granted on the basis of collateral estoppel and these two causes of action are dismissed.

Third Cause of Action:

This cause of action is a claim for reasonable attorneys fees pursuant to 42 USC § 1988.

The District seeks dismissal of this cause of action arguing, as a matter of law, that no separate cause of action for a 42 USC § 1988 attorneys fees claim is permitted. In support of this contention, the District cites numerous cases holding that attorneys fees are awarded by the court to the prevailing party under 42 USC § 1983 after a determination on the "1983" claims, "as part of the costs" (42 USC § 1988), and that 42 USC § 1988 does not create an independent cause of action for same (*see Schroder v Volcker,* 864 F2d 97, 99 [10th Cir 1988]; *Horacek v Thone,* 710 F2d 496, 499 [8th Cir 1983]; *Carvel v Franchise Stores Realty Corp.,* 2009 US Dist LEXIS 113410 [SD NY 2009]; *Vecchia v Town of Hempstead,* 927 F Fupp 579 [ED NY 1996]).

In opposition, the plaintiffs cite no authority which contradicts the cases cited by the District. The plaintiffs merely argue that if they were to prevail on the "1983" claims, they would be entitled to reasonable attorneys fees pursuant to 42 USC § 1988. There is no dispute that the plaintiffs would be entitled to seek reasonable attorneys fees if they were to prevail on the "1983" claims but, as a matter of law, there is no cognizable cause of action for same. In the event a party succeeds on a cause of action for a "1983" claim, the time to seek attorneys fees is after such a determination is made. Accordingly, summary judgment is awarded to the District in dismissing the third cause of action for reasonable attorneys fees pursuant to 42 USC § 1988.

Fourth Cause of Action:

The fourth cause of action claims that the District was negligent in that it breached its "quasi-parental duty" owed to the student to provide competent instruction and that this breach evidences "reckless and wanton disregard" for the health, etc. of the student (Complaint, ¶¶ 69-76). This fourth cause of action includes paragraphs specifically alleging claims of "retaliation" (*see* Complaint, ¶¶ 74, 75 and 76).

In asking the Court to dismiss this cause of action, the District contends that this cause of action is essentially a claim of "educational malpractice" and that such a claim or cause of action is not recognized in New York. In support of this contention, the District cites *Hoffman v Bd. of Educ. of the City of New York* (49 NY2d 121, 424 NYS2d 376 [1979]).

In the *Hoffman* case, the intellectual ability of a young student was allegedly wrongly determined

due to the negligence of the school authorities. This led to a wrongful classification of the student's course of study. In support of a cause of action for negligence, the plaintiff in *Hoffman* specified various acts of negligence which the court held were essentially attacks on the judgment of the school authorities. As such, though framed as a "negligence" cause of action, the court held that the cause of action actually sounded in "educational malpractice." In this regard, the court went on to say that as a matter of public policy, "Courts will intervene in the administration of the public school system only in the most exceptional circumstances involving 'gross violation of defined public policy' [citation omitted]" (*Hoffman*, at 126; *see also Torres v Little Flower Children's Services,* 64 NY2d 119, 125, 485 NYS2d 15 [1984] [as a matter of public policy, courts should not entertain such claims).

This is the situation in the instant case to the extent that the plaintiffs allege negligence on the part of the District in that the District did not develop an appropriate plan for the student's education (Complaint, ¶ 72) and that the District's actions resulted in the deprivation of needed special education services (*Id,* ¶ 73). However, these allegations are distinguishable from the additional allegations (*Id.*, ¶¶ 74-76) which accuse the District of "retaliation."

The non-retaliation allegations of negligence fall within the ambit of the *Hoffman* case insofar as they are actually alleging "educational malpractice" of the sort that the courts should not intervene in. In addition, and in any event, these particular allegations were issues decided in the context of the New York State administrative proceedings in which the SRO found, inter alia, as follows:

> The parents failed to show that procedural errors impeded the student's right to a FAPE or impeded the student/parents' opportunity to participate in the decision making process with regard to a FAPE or brought about the deprivation of educational benefits (SRO, finding no. 1, p. 8);
>
> the District has "consistently demonstrated that its CSE is responsive to the student's needs and that it offered an appropriate program for the 2006-2007 school year" (SRO, finding no. 6, p. 13);
>
> the June 21, 2006 IEP "accurately reflected the results of evaluations which identified the student's needs, established annual goals related to those needs, and provided for the use of appropriate special educational services [citations omitted]" (SRO, finding no. 7, p. 13); and,
>
> the parents failed to "meet their burden to establish that [the District] failed to offer the student a FAPE for the 2006-2007 school year" and, accordingly, the request for reimbursement of tuition costs for Sappo is denied (SRO, finding no. 8, p. 14).

Accordingly, in view of the SRO's findings on these issues and the collateral estoppel effect of that decision, as discussed earlier, the issues and allegations raises in paragraphs 72 and 73 under the plaintiff's fourth cause of action are to be determined in favor of the defendant for the purposes of trial and for the purpose of striking said allegations from the complaint.

However, the allegations in the fourth cause of action touching upon acts of "retaliation" (paragraphs 74-76) fall under the ambit of a "gross deviation of defined public policy" (*see Hoffman v Bd. of Educ. of the City of New York* (49 NY2d 121, 424 NYS2d 376 [1979]; *New York City School Bds. Assn. v Bd. Of Educ.*, 39 NY2d 111, 121, 383 NYS2d 208 [1976]). The issue of "retaliation" was not decided in the state administrative proceeding and, thus, is not subject to collateral estoppel in favor of either party.

Accordingly, as to the fourth cause of action, summary judgment is granted to the District to the extent that the non-retaliatory allegations are hereby stricken from the complaint (¶¶ 72 and 73). The fourth cause of action, otherwise, remains viable as alleging negligence based upon the "retaliation" allegations (¶¶ 74-76) which support a claim of "gross deviation of a defined public policy," to wit, the public policy against retaliatory conduct by a school district against a parent or student (*id.*).

Plaintiffs' cross motion for summary judgment:

The plaintiffs' cross motion for summary judgment is denied as academic to the extent that summary judgment has been granted to the District in this decision and order. With regard to the "retaliation" allegations within the fourth cause of action as to which summary judgment was not granted to the District and which, thus, remain in this action, the plaintiffs argue that the Court should give collateral estoppel effect to the findings of the OCR investigation which expressly found that the District improperly engaged in retaliation. The Court, though, has already held in this decision and order that the findings of the OCR investigation are not entitled to collateral estoppel effect. Accordingly, this argument has no merit.

The plaintiffs' additional argument that in the OCR's Resolution Agreement, which the District signed, the District admitted to acting in "retaliation" is also without merit. There is no such admission of "retaliation" or any other wrongdoing in the Resolution Agreement. While the District agreed in the agreement, inter alia, to investigate the actions of the Assistant and to remind all District personnel in writing of the prohibition against retaliation, those provisions in no way constitute admissions of the underlying conduct.

In the absence of any binding effect on this litigation of the OCR findings as to "retaliation," the lack of any admission on the part of the District with regard to the "retaliation" issue and, moreover, the lack of an affidavit from the parent or anyone else with personal knowledge of the underlying events which would support the mere allegations of "retaliation" in the complaint's fourth cause of action with admissible evidence, the Court concludes that the plaintiffs have failed to meet their burden on this cross motion for summary judgment of showing a prima facie entitlement to same (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the plaintiffs' cross motion for summary judgment is denied, in part, as academic, and denied in part for the failure to show a prima facie entitlement to summary judgment. There is, thus, no need to consider the sufficiency of the District's papers in opposition to the relief sought in the cross motion for summary judgment (*see Smalls v AJI Industries, Inc.*, 10 NY3d 733, 853 NYS2d 526 [2008]).

In conclusion, after considering the motion (001) and cross motion (002) for summary judgment, the only cause of action remaining in this action is the fourth cause of action which alleges negligence on the part of the District and only insofar as it alleges negligence based upon acts of "retaliation."

This constitutes the decision and order of the court.

Dated: October 20, 2010

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.