SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **IAS MOTION 5**

Justice

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INDEX NO. 155163/2019

DINELY NATERA, EDGAR ADOLFO HUSBAND,
Plaintiffs,

MOTION DATE 9/22/20

- v -

MOTION SEQ. NO. 002

M.G., FRANCA GIOIA, ROBERT HORTON, INDIVIDUALLY,
Defendants.

DECISION + ORDER ON MOTION

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M.G., FRANCA GIOIA, ROBERT HORTON, INDIVIDUALLY,
Third-Party Plaintiffs,

Third-Party
Index No. 596057/2019

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION, THE CHILD SCHOOL/LEGACY HIGH SCHOOL,
Third-Party Defendants.

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BRITTANY FRAIM, LOWELL GREENBLATT HER HUSBAND,
Plaintiffs,

Index No. 161251/2018

-against-

Motion Sequence 002

M.G., AN INFANT, UNDER THE AGE OF UNDER THE AGE OF EIGHTEEN, BY HIS MOTHER AND NATURAL GUARDIAN, FRANCA GIOIA, FRANCA GIOIA INDIVIDUALLY, ROBERT HORTON, INDIVIDUALLY,
Defendants.

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M.G., AN INFANT, UNDER THE AGE OF UNDER THE AGE OF EIGHTEEN, BY HIS MOTHER AND NATURAL GUARDIAN, FRANCA GIOIA, FRANCA GIOIA INDIVIDUALLY, ROBERT HORTON, INDIVIDUALLY,
Plaintiffs,

Third-Party
Index No. 596056/2019

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION, THE CHILD SCHOOL/LEGACY HIGH SCHOOL,
Defendants.

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The following e-filed documents, listed by NYSCEF document number, were considered on this motion to dismiss in the *Natera* Action, 155163/2019 (sequence 002): 26, 27, 29-45

The following e-filed documents, listed by NYSCEF document number, were considered on this motion to dismiss in the *Fraim* Action, 161251/2018 (sequence 002): 34, 35, 38-52

BACKGROUND AND PROCEDURAL HISTORY

In index number 155163/2019 (the "Natera Action"), Plaintiffs Dinely Natera and her spouse Edgar Adolfo commenced this action against M.G., an infant whom Natera taught as a behavior specialist, and M.G.'s parents (collectively "M.G.") to recover damages stemming from an alleged assault on April 4, 2019 on the premises of Defendant Child School/Legacy High School ("Legacy School"), a private school and Natera's employer.[1] In index number 161251/2018 (the "Fraim Action"), Plaintiff Brittany Fraim, also a Legacy School teacher, and her spouse Lowell Greenblatt commenced an action against M.G. to recover damages stemming from alleged assaults by M.G. on November 8, 2017 and January 9, 2018 at the Legacy School, also Fraim's employer (*Fraim NYSCEF 41*).

Natera asserts seven causes of action: (1) assault and battery against all Defendants; (2) aggravated assault and battery against all defendants; (3) negligence against all Defendants; (4) that M.G. "intentionally struck Natera, but did not intend to cause injuries"; (5) that M.G.'s parents knew of his "vicious propensities" but failed to take action; (6) that M.G.'s parents were negligent for sending him to a school which was not suited to his behavior; and (7) Adolfo's loss of consortium. M.G. commenced a third-party action seeking indemnification and contribution from Third-Party Defendants Legacy School and the New York City Department of Education (the "DOE") (*Natera NYSCEF 40* [the "Natera Third-Party Complaint"]). Fraim and Greenblatt asserted essentially the same seven causes of action as Natera and her spouse. As in the Natera Action, M.G. commenced a third-party action seeking indemnification and contribution from Legacy School and the DOE (*Fraim NYSCEF 44* [the "Fraim Third-Party Complaint"]). The Court (Kotler, J.) consolidated the actions for joint discovery on October 22, 2019 (*Fraim NYSCEF 43*).

In both actions under sequence 002, Legacy School moves, pursuant to CPLR 3211(a)(7), to dismiss for failure to state a cause of action, arguing that the Third-Party Complaint and the DOE's cross-claims are barred by the Workers' Compensation Law. Also in both actions, the City cross-moves, pursuant to CPLR 3211(a)(7), to dismiss M.G.'s Third-Party Complaint against the DOE, arguing that it is an improper party because it owed no duty to Fraim or Natera, and in the alternative opposes Legacy School's motion as premature. M.G. and his parents oppose. For the reasons below, after oral argument, all motions under sequence 002 are **GRANTED**, and the Third-Party Complaints are dismissed. Based on this dismissal, DOE is no longer a party to this action and the case, and pending sequence 003, shall therefore be reassigned to a non-City Part.

[1] To the extent that both the Complaint and Third-Party Complaint in the *Natera* action do not redact the infant's name, the Clerk of Court is directed to amend the caption to name the infant as "M.G.," and the parties are directed to coordinate with the Clerk of Court to redact and/or re-file in redacted form each and every document containing the infant's first and last name (22 NYCRR 202.5[1][e][ii], [2]).

DISCUSSION

I. Standard of review

On a CPLR 3211 motion to dismiss, a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[O]n such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618 [1st Dept 2018]). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" and the court "determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]).

II. Legacy School Motion (Workers' Compensation Law)

Legacy School moves to dismiss the Third-Party Complaint, arguing that the Worker's Compensation law forbids suing an employer for workplace injuries. Indeed, Workers' Compensation Law § 11 was amended in 1996 to provide that employers are not liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee unless the employee's injuries are grave (*Castro v United Container Mach. Group, Inc.*, 96 NY2d 398, 400-401 [2001]). In opposition, M.G. correctly argues that "the exclusivity provisions of the Workers' Compensation Law do not apply to bar an action by an employee to recover for an intentional tort committed, instigated or authorized by the employee's employer" (*Randall v Tod-Nik Audiology, Inc.*, 270 AD2d 38, 39 [1st Dept 2000]).

However, as the Legacy School argues in reply, the *employer* must engage in the intentional act, not merely fail to appreciate the risk or negligently expose the employee to it (*see Miller v Huntington Hosp.*, 15 AD3d 548, 549-550 [2d Dept 2005] ["A mere knowledge and appreciation of a risk is not the same as the intent to cause injury. ... Allegations that an employer negligently exposed an employee to a substantial risk of injury have therefore been held insufficient to circumvent the exclusivity of the remedy provided by the Workers' Compensation Law."]). To the extent that M.G. cites myriad cases involving either a general or special duty by a school or school district, the question of Legacy School's duty bears on the issue of negligence, which is not an intentional tort and therefore not an exception to the Worker's Compensation Law. Accordingly, the Third-Party Complaints against the Legacy School are dismissed.

III. DOE cross-motion to dismiss

In both actions, DOE argues that M.G. fails to state a claim because DOE did not owe any duty to either teacher when M.G. assaulted them. In opposition, M.G. argues that it has adequately pled that DOE is liable because it is charged with overseeing and implementing IEPs for students with disabilities, recommending and approving the placement of students with disabilities in nonpublic schools pursuant to their IEP, and providing monetary funding for students with disabilities that are placed in approved nonpublic schools pursuant to their IEP (*M.G. Opp* ¶ 23). M.G. argues, in sum and substance, that DOE is liable because M.G.'s IEP and

placement in the Legacy School were deficient, thereby causing the subject incident (*M.G. Opp* ¶¶ 23, *et seq.*).

As the City argues in reply, "[t]he oversight and regulation of the educational system in the State of New York, together with the determination of its policies, is a governmental and fully public function," and therefore entitled to governmental immunity (*Nicholson v State of NY*, 23 Misc 3d 313, 319 [Ct Cl 2008]). "The government is immune from liability for harm resulting from a failure…to enforce statutory or regulatory requirements unless the claimant demonstrates the existence of a special relationship between the defendant and the claimant" (*id.*).

"A special relationship can be formed in three ways: (1) when the defendant 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 defendant assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*Pelaez v Seide*, 2 NY3d 186, 199-200 [2004]). "To form a special relationship through breach of a statutory duty, the governing statute must authorize a private right of action. One may be fairly implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme . . . If one of these prerequisites is lacking, the claim will fail" (*id.* at 200). "While the existence of a special relationship depends on the facts, a plaintiff has a heavy burden in establishing such a relationship" and, consequently, has "dismissed most such claims as a matter of law" (*Nicholson*, 23 Misc 3d at 320, quoting *Pelaez*, 2 NY3d at 199 n 8).

To the extent that M.G. seeks the imposition of a duty on the DOE for incidents at the legacy school, even DOE employees on DOE property generally do not qualify, absent a special duty owed; that is, liability for a teacher's injuries caused by a student may not be imposed on the school district for its breach of duty owed generally to persons in the school system and members of the public (*Vitale v New York*, 60 NY2d 861, 863 [1983] [holding that no special duty was imposed by adoption of security plan, even where the teacher was an integral component of the security plan, because the teachers "stood as [the plan's] beneficiaries in exactly the same position as students, other personnel in the school system, and members of the public who came on the school property."]; *Ferraro v N. Babylon Union Free Sch. Dist.*, 69 AD3d 559, 560 [2d Dept 2010] ["Although a school has a statutory duty to provide special education services to children who require them, where the school has appropriately contracted-out that duty, it cannot be held liable on a theory that the children were in the school's physical custody at the time of injury"]; *Begley v City of NY*, 111 AD3d 5, 27 [2d Dept 2013] [rejecting argument that the "statutory mandate to provide the infant plaintiff with an appropriate education provides a basis to hold the DOE directly liable for any alleged negligence in failing to supervise Jonathan while he was in the physical custody of the school]; *see also Diaz-Fonseca v Puerto Rico*, 451 F3d 13, 31 [1st Cir 2006] ["tort-like money damages are not within the scope of appropriate relief under the IDEA, because the IDEA's primary purpose is to ensure free and appropriate public education, not to serve as a tort-like mechanism for compensating personal injury"]; *Chambers v Sch. Dist. of Phila. Bd. of Educ.*, 587 F3d 176, 184 [3d Cir 2009] [noting that "every circuit that has addressed this issue has held that compensatory and punitive damages are not available under the IDEA."]; *see e.g. Charlie F. by Neil F. v Bd. of Educ.*, 98 F3d 989,

991 [7th Cir 1996] ["...the structure of the statute--with its elaborate provision for educational services and payments to those who deliver them--is inconsistent with monetary awards to children and parents."]).

There is some disagreement between Appellate Division Departments as to whether a "school district's responsibility to formulate and implement an IEP brings a child who is not in its physical custody within its orbit of authority" (*see Begley v City of NY*, 111 AD3d 5, 26 [2d Dept 2013] [holding that Second Department's decision in *Ferraro v North Babylon Union Free School Dist.*, 69 AD3d 559 [2010], implicitly rejected the Fourth Department's rationale in *Troy v N. Collins Cent. Sch. Dist.*, 267 AD2d 1023, 1023 [1999], which affirmed denial of a summary judgment motion where the plaintiff and school "raised a triable issue of fact whether plaintiff's son was within Lackawanna's "orbit of authority" by virtue of Lackawanna's statutory duty to formulate and enforce the IEP"]).

However, M.G. asks the Court to expand the "orbit of authority" yet further, differentiating *Begley* and similar cases by arguing that DOE's IEP and placement of M.G. in the Legacy School created a basis for liability for injury to the *teachers* because M.G., based on his behavior, was not a good candidate for Legacy School and therefore posed a risk (*see Pl Opp* ¶ 31, citing *Begley*, 111 AD3d at 26, citing *Ferraro v North Babylon Union Free School Dist.*, 69 AD3d 559 [2d Dept 2010]). However, precedent expanding DOE's "orbit of authority" by virtue of a school district's formulation and implementation of an IEP focuses on the foreseeable risk of harm (and therefore recognizes a special relationship) to the *child*, not third parties (*see e.g. Lewis v Bd. of Educ. of the Lansingburg Cent. Sch. Dist.*, 137 AD3d 1521, 1522 [3d Dept 2016] ["Where, as here, a school is aware that a student has a particular disability that makes him or her more susceptible to harm, the school must, in accordance with general negligence tenets, exercise care commensurate with that known disability."]; *Williams v Weatherstone*, 104 AD3d 1265, 1266 [4th Dept 2013] ["orbit of authority" extended to bus stop based on IEP's requirement that defendant provide transportation to school where the bus arrived at the bus stop, passed it, and turned around to pick up the child, at which time bus struck child, who had crossed the street to catch the bus]).

Finally, M.G. also cites at least one case in which a court found that a jury could have found the existence of a special duty, but that case involved at least an implicit promise of action (*see e.g. Pascucci v Bd. of Educ.*, 305 AD2d 103, 105 [1st Dept 2003] [Plaintiff raised an issue of fact as to whether the secretary's acknowledgment of plaintiff's call to remove a disruptive student that later injured plaintiff was an implicit promise for help]; *cf Rivera v Bd. of Educ. of the City of NY*, 82 AD3d 614, 615 [1st Dept 2011] [where "plaintiff neither alleged nor testified that defendant assured her that the student would be removed from her classroom or that she would be provided with any particular security there, she has not satisfied the requirement of pleading a special duty owed to her by defendant"]). Accordingly, DOE is entitled to immunity and dismissal of the Third-Party Complaint.

CONCLUSION/ORDER

Based on the above, it is

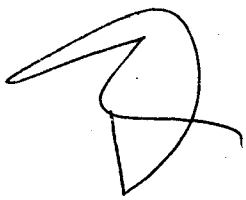
ORDERED that the motions of the Legacy School and cross-motion of the Department of Education to dismiss in both actions are GRANTED, and the Clerk of Court shall enter judgment dismissing both Third-Party Complaints; and it is further

ORDERED that the Legacy School shall, within 30 days, e-file and serve a copy of this order with notice of entry upon the NYSCEF dockets in both actions; and it is further

ORDERED that these actions, and pending motion sequence 003 in both actions, shall be transferred to a Justice of a non-City part; and it is further

ORDERED that the Clerk of Court shall amend the caption in action 155163/2019 to name Defendant/Third-Party Plaintiff as "M.G."

This constitutes the decision and order of the Court.



10/1/2020
New York, NY

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:	X	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE