

<b>Navarra v Board of Educ. of the City of N.Y.</b>
2022 NY Slip Op 31098(U)
March 25, 2022
Supreme Court, Kings County
Docket Number: Index No. 505731/2018
Judge: Consuelo Mallafre Melendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: PART 20

\_\_\_\_\_  
STEVEN NAVARRA,

Index No. 505731/2018  
**DECISION AND ORDER**

Plaintiff,

-against-

BOARD OF EDUCATION OF THE CITY OF  
NEW YORK and THE CITY OF NEW  
YORK

Defendants.

\_\_\_\_\_  
**CONSUELO MALLAFRE MELENDEZ, J.:**

The court’s Decision and Order is based upon consideration of the following papers:  
CPLR 2219(a) Recitation: Motion Sequence 1, NYSCEF Numbers:12-22, 24, 27.

Plaintiff, a former second-grade teacher, brought forth this negligence action against Defendants, Board of Education of the City of New York (BOE) and the City of New York, for alleged injuries caused by a student in his classroom. Defendants now move for an order dismissing Plaintiff’s negligence cause of action pursuant to CPLR 3211(a)(7) and 3212. Defendant City claims the case must be dismissed against it as it is not a proper party in this action. Defendant BOE seeks summary judgment in their favor claiming, *inter alia*, that Plaintiff failed to plead and prove that they owed him a special duty of care and that the actions complained of are protected under the governmental function immunity defense.

As a threshold matter, the Court finds that this motion was timely filed in accordance with the Governor’s Executive Orders and Administrative Order AO/71 DATED March 19, 2020 and by stipulation of the parties. Additionally, the action against Defendant the City of New York is dismissed as it is well established that the City of New York and the Department of Education (DOE) are separate legal entities, and the City cannot be held liable for torts

committed by the DOE and its employees (see NY Education Law §2551; *Matter of Allende v. City of New York*, 69 A.D.3d 931, 932 [2d Dept. 2010]; *Miner v. City of New York*, 78 A.D.3d 669 [2d Dept. 2010]). The care, custody and control of public schools and the supervision of students entrusted in its care lies with the DOE, a distinct legal entity from the City. Here, Plaintiff cannot maintain his cause of action against Defendant City of New York as it was merely an out of possession landowner of the school building on the date of the incident. Therefore, and its motion for summary judgment is Granted and the action against the City of New York is dismissed.

Plaintiff, a second-grade teacher at the time of the incident, alleges he was injured when a student became irate and pushed a desk onto his foot, causing him to sustain injuries. Plaintiff claims Defendants were negligent in failing to protect him from this student. Specifically, Plaintiff claims that Defendant BOE failed to provide adequate supervision of students, failed to remove the student who assaulted him from the class or school, and failed to provide a full-time paraprofessional or teacher's aide for the student. Plaintiff also brought forth claims for the negligent hiring, training and supervision of the school's employees.

The parties do not dispute that the alleged student assailant, S.J., was one of Plaintiff's second grade students and had an Individualized Education program (IEP) which required her to have a regularly assigned one-to-one paraprofessional from 8:00 a.m. to 11:00 a.m. At his 50-h Examination Before Trial (EBT), Plaintiff provided the following testimony: on the date of the incident, the paraprofessional left the classroom at approximately 9:30 as she was re-assigned to accompany a class on a field trip. Shortly thereafter, Plaintiff approached S.J. because she was throwing clay at other students. S.J. became irate and aggressively pushed her desk causing it to turn over and fall onto Plaintiff's foot, injuring his left toe. Plaintiff also testified that due to

behavioral issues, he would have S.J. sit with a school safety agent or with the principal when her assigned paraprofessional was no longer with her in the classroom.

The court notes that during questioning at his EBT Plaintiff confirmed the following: at no time did any school official or administrator assure him that S.J. would be transferred out of his class or out of school due to behavioral issues. Plaintiff never requested that S.J. be transferred. The school security agents, school principal, assistant school principal and DOE employee never promised to keep Plaintiff safe in the classroom from S.J.

During her EBT testimony, Assistant Principal Jennifer Troment acknowledged that a paraprofessional was assigned to S.J. in conjunction with her IEP. Ms. Troment explained that an IEP is “meant for the student” and will address all matters concerning the subject student’s issues in terms of their education and background.

Defendant BOE argues that this action must be dismissed because it owed no special duty to Plaintiff. A school district may not be held liable for the negligent performance of its governmental function of supervising children in its charge, at least in the absence of a special duty to the person injured (see *Dinardo v. City of New York*, 13 N.Y.3d 872, 874 [2009]; *Ferguson v. City of New York*, 118 A.D.3d 849 [2d Dept. 2014]; *Stinson v. Roosevelt U.F.S.D.*, 61 A.D.3d 847, 847–848 [2d Dept. 2009]; *Moreno v. City of New York*, 27 A.D.3d 536, 536–537 [2d Dept. 2006]). Although a school district owes a special duty to its minor students, that duty does not extend to teachers, administrators, or other adults on or off school premises (see *Ferguson v. City of New York*, 118 A.D.3d at 850; *Stinson v. Roosevelt U.F.S.D.*, 61 A.D.3d at 847–848; *Brumer v. City of New York*, 132 A.D.3d 795, 796 [2d Dept 2015]).

However, “[w]ith regard to teachers, administrators, or other adults on or off school premises, a special relationship with a municipal defendant 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” (*Thomas v. New York City Dept. of Educ.*, 124 A.D.3d 762, 763, [2d Dept. 2015] [internal citation omitted]; *Brumer v. City of New York*, 132 AD3d 795, 796 [2d Dept 2015]; see *Cuffy v. City of New York*, 69 N.Y.2d 255, 260 [1987]). “[T]he injured party's reliance is as critical ... as is the municipality's voluntary affirmative undertaking of a duty to act.... Indeed, at the heart of most of these ‘special duty’ cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced [her] either to relax [her] own vigilance or to forego other available avenues of protection” (*Cuffy v. City of New York*, 69 N.Y.2d 255 at 261). “The assurance by the municipal defendant must be definite enough to generate justifiable reliance by the plaintiff” (*Dinardo v. City of New York*, 13 N.Y.3d 872 at 874; *Wilson v. New York City Bd. of Educ.*, 167 AD3d 820, 821 [2d Dept 2018]).

Here, Defendant BOE made a *prima facie* showing through admissible evidence that it did not assume a special duty to Plaintiff for which it can be held liable. Likewise, Plaintiff did not establish that he relied on any promises made to protect him or that any actions of Defendant BOE lulled him into a false sense of security. Plaintiff himself confirmed at his EBT that no school administrator, employee or security agent ever made any promises or assurances to protect him from S.J. “When the reliance element is either not present at all or, if present, is not causally related to the ultimate harm ... the invocation of the ‘special duty’ exception is then no longer justified” (*Cuffy v. City of New York*, 69 N.Y.2d at 261). Plaintiff’s employment as a

teacher does not require Defendant BOE to provide any additional protections or somehow exempt Plaintiff from the parameters of the special duty doctrine (*Feinsilver v. City of New York*, 277 A.D.2d 199 [2d Dept. 2000] [“the plaintiff’s status as a teacher is insufficient, without more, to create the requisite special duty as he was in the same position as every other school employee.”]; see, *Johnson v. New York City Board of Education*, 249 A.D.2d 370 [2d Dept. 1998]).

Furthermore, contrary to Plaintiff’s assertion, S.J.’s IEP has no bearing on his claims. The purpose of an IEP is to provide an outline of support for the student for the benefit of the student. It does not serve to protect school officials. ““An IEP...details the special needs of a disabled child and the services which are to be provided to serve the individual needs of that child”” (*P.S. v. Pleasantville Union Free School Dist.*, 168 AD3d 853, 854 [2d Dept 2019] [internal citations omitted]). An IEP is not a promissory protective cloak created to shield others from danger. As Ms. Tromant testified, “[a]n IEP is for the student” (Def. Exh. H p. 54) and covers “everything *related to the student* in terms of their education and background” (Def. Exh. H p. 28 [emphasis added]). This is also explicitly stated on Defendant BOE’s official website: “The Individualized Education Program (IEP) is a written statement of our plan *to provide your child* with a Free and Appropriate Public Education (FAPE) in their Least Restrictive Environment (LRE)” (emphasis added). Therefore, Plaintiff’s EBT testimony regarding S.J.’s IEP is speculative and clearly constitutes inadmissible hearsay.

The court further finds that Plaintiff failed to plead that a special duty was owed directly to him in either in his Notice of Claim or Complaint, much less in both, as is required in such actions against a municipal defendant (see *Valdez v. City of New York*, 18 N.Y.3d 69, 75 [2011]; see also *Vitale v. New York*, 60 N.Y.2d 861 [1983]). A plaintiff does not state of claim for

negligence in a governmental context unless the pleadings, taken as true, allege that a special duty of care was owed directly to the injured person (see *Valdez v. City of New York*, 18 N.Y.3d at 75; *Lauer v. City of New York*, 95 N.Y.2d 95, 100 [2000]; *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 584 [1994]). Here, under the most liberal construction in Plaintiff's favor, both the Complaint and Notice of Claim are devoid of facts sufficient to establish that Defendant BOE owed Plaintiff any legally recognized and actionable category of special duty. Plaintiff does not allege that any direct contact by Defendant BOE amounted to affirmative promise to protect him or to take any other action on his behalf. Plaintiff alleges no facts that would objectively establish objectively that he engaged in direct contact with school officials regarding any problem with S.J. Plaintiff failed to allege that any governmental actor had knowledge that inaction under these circumstances would lead to harm. All of the pleadings contain no allegation that Plaintiff reasonably and objectively relied on any promise made by anyone, including Defendant BOE and its agents and employees, to his detriment.

Further, the allegations Plaintiff plead constitute discretionary actions taken during the performance of a governmental function which are protected under governmental immunity. The Court of Appeals has held that "discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Tango v. Tulevech*, 61 N.Y.2d 34, 41 [1983]; *Lauer v. City of New York*, 95 N.Y.2d at 99, 107; see also *Katz v. Town of Clarkstown, N.Y.*, 120 A.D.3d 632 [2d Dept. 2014]). To succeed on the governmental function defense, the municipal defendant has the burden to show that the governmental action at issue was discretionary and that discretion was in fact exercised (*Valdez v. City of New York*, 18 N.Y.3d at 79-80). Here, Defendant BOE correctly argues that

the alleged events from which Plaintiff's claim arose resulted from BOE's discretionary determinations made in the exercise of its governmental function. This includes the determination as to whether S.J.'s conduct presented a serious risk to herself or others, including a teacher, the decision to assign S.J. a half-day paraprofessional and the decision to re-assign and leave S.J. without her half-day paraprofessional on the date of the incident. Therefore, even if the actions and decisions diverted from the usual plan, Defendant BOE established that Plaintiff's claimed injuries were the result of discretionary actions protected under governmental immunity.


Based on the foregoing, Defendant BOE established its *prima facie* entitlement to summary judgment as a matter of law: Defendant BOE did not owe Plaintiff a special duty of care, Plaintiff failed to set forth the requisite allegations that he was owed a special duty and those allegations from which Plaintiff's claimed injury arose were the result of discretionary actions protected under governmental immunity. Plaintiff failed to raise an issue of fact in opposition.

Accordingly, Defendants, the City of New York and BOE's motion to dismiss Plaintiff's Complaint pursuant to CPLR 3211(a)(7) and 3212 is GRANTED.

This constitutes the Decision and Order of the Court.

Dated: March 25, 2022  
Brooklyn, NY

ENTER.

  
\_\_\_\_\_  
Hon. Consuelo Mallare Melendez  
J. S. C.