SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART 52**

Justice

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ALIREZA JAVAHERI, FIROOZEH JAVAHERI,

Plaintiff,

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, RHONDA PERRY, INDIVIDUALLY AND AS PRINCIPAL FOR THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, AND LESLIE BERCK, INDIVIDUALLY AS GUIDANCE COUNSELOR FOR THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK

Defendant.

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INDEX NO. 159964/2013

MOTION DATE 03/10/2022, 05/16/2022

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 87

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 88

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is

Motion Sequence 002 and 003 are consolidated herein for decision. In Motion Sequence 002, defendants, The Department of Education of the City of New York ("DOE"), The City School District of the City of New York, Rhonda Perry ("Perry") individually and as Principal for the Department of Education of the City of New York, and Leslie Berck ("Berck") individually and as Guidance Counselor for the Department of Education of the City of New York, (collectively "DOE"), move for an order, pursuant to CPLR § 3211(a)(7) and/or CPLR § 3212, granting summary judgment and dismissing the complaint.

In Motion Sequence 003, plaintiffs, Dr. Alireza Javaheri and Dr. Firoozeh Javaheri, move for an order, pursuant to CPLR § 3025, granting plaintiffs leave to amend the complaint and deeming the proposed amended complaint the operative pleading.

Factual Background:

The plaintiffs in this case are parents to a then school-age child, NJ, needing special education services due to a diagnosis of autism and/or determinations of certain mental health conditions. Plaintiffs contend there was a contentious relationship between the parties and a longstanding and ongoing disagreement with defendants regarding the services that should be provided to their child. Plaintiffs have allegedly long maintained that the DOE failed to provide their child with an appropriate education and/or educational services. At some point, while the child was in the eighth grade, NJ began to experience certain medical or behavioral issues related to her autism. These issues, which were occurring while NJ was in school, resulted in absences and eventually compelled the plaintiffs to take NJ out of school to receive medical and psychiatric treatment.

Defendants claim they became concerned about the child's frequent undocumented absences and requested plaintiffs to provide medical documentation. Defendants eventually reported the plaintiffs to the New York City Administration of Child Services ("ACS") stating that NJ was being educationally neglected by the plaintiffs and that plaintiffs were putting NJ at risk. ACS opened an investigation in order to determine whether the plaintiffs were liable for educational neglect. In addition to the approximately forty (40) days of missed school, the defendants also claim that there was an improper documentation of the excusable reasons for the child's absences; including a doctor's note that was not on proper letterhead and a home instruction form which was given to the plaintiffs but not returned. At the depositions, defendants testified that they had reached out to the plaintiffs several times in order to obtain proper documentation for the absences, including a home instruction form, and the alleged medical reasons behind them. Defendants assert that their inability to get a response from the plaintiffs was when the initial report to ACS was made. As a result of ACS conducting an investigation, the plaintiffs were placed on the ACS child registry, ACS investigators were sent to the schools the plaintiffs other children attended, and an investigator was sent to the plaintiffs' home to confirm the report made by the school. The ACS investigation was subsequently closed, and the charges determined to be unfounded as to both plaintiffs.

This lawsuit followed, with plaintiffs, in the original complaint, asserting seven causes of action. The first cause of action asserts a claim for malicious prosecution. The second cause of action is slander. The third cause of action alleges that the defendants violated 29 USC sec. 504 (Rehabilitation Act). The fourth cause of action is for intentional infliction of emotional distress. The fifth cause of action is for negligence. The sixth cause of action is for prima facie tort. The seventh cause of action alleges a violation of Article I, Section 11 of the New York State Constitution (equal protection).

For the reasons set forth more fully on the record at oral argument, made on February 7, 2024, the defendants' motion for an order granting summary judgment and dismissing the claims of defamation/libel/slander, malicious prosecution, and intentional infliction of emotional distress was granted. Additionally, for the reasons set forth below,

the plaintiffs' remaining claims are also dismissed. However, the plaintiffs' motion to amend the complaint is also granted.

Summary Judgment Standard:

Under CPLR § 3212 (b), a court shall grant summary judgment if "upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Once the proponent of a motion for summary judgment has made a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party opposing a motion for summary judgment may not rely upon conclusory allegations but must present evidentiary facts sufficient to raise a triable issue of fact (*Mallad Construction Corp. v County Federal Savings & Loan Assoc.*, 32 NY2d 285, 290 [1973]; *Tobron Office Furniture Corp. v King World Productions*, 161 AD2d 355, 356 [1st Dept 1990] [the opponent of a motion for summary judgment must assemble, lay bare and reveal his proofs; merely setting forth factual or legal conclusions is not sufficient]; *Polanco v City of New York*, 244 AD2d 322 [2nd Dept 1997] ["a shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment"]). "[M]ere speculation and unsubstantiated allegations are insufficient to raise a triable issue of fact" (*Judith M. v Sisters of Charity Hospital*, 93 NY2d 932 [1999]).

MALICIOUS PROSECUTION

Plaintiffs have asserted a cause of action against defendants for malicious prosecution, asserting that defendants initiated a neglect proceeding based on, or by providing, false information. Defendants assert that the plaintiffs cannot establish a claim of malicious prosecution as there was no official proceeding that was commenced against the plaintiffs. To demonstrate a claim of malicious prosecution, a plaintiff must proof the following elements: (1) the initiation or continuation of a criminal or civil proceeding against the plaintiff; (2) a termination favorable to the plaintiff; (3) lack of probable cause to initiate the proceeding; and (4) actual malice (*see Colon v City of New York*, 60 NY2d 78, 82 [1983]; *Hernandez v City of New York*, 100 AD3d 433 [1st Dept 2012]. Contrary to defendants' assertions, a claim for malicious prosecution may also lie when the defendant causes the initiation of an administrative proceeding to be commenced which contains sufficient attributes of a judicial proceeding (*see Scollar v City of New York*, 160 AD3d 140, 149 n9 [2018]; *Manti v New York City Tr. Auth.*, 165 AD2d 373, 381 [1st Dept 1991]). In a civil malicious prosecution claim, the plaintiffs must also allege and prove a special injury (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 [1st Dept 2015]).

Plaintiffs cannot establish a prima facie claim of malicious prosecution based on the defendants' report to ACS. Plaintiffs contend that the defendants initiated a proceeding against them when Berck filed a report with ACS. However, in this case, there were no official proceedings or actions of any kind that were ever commenced

against the plaintiffs, and therefore, there is no cause of action for malicious prosecution (*see Scollar*, 160 AD3d at 148; see also *Broughton v State of New York*, 37 NY2d 451 [1975], *cert denied* 423 US 929 [1975]). The potential commencement for a neglect proceeding is not enough; especially considering that after the initial report to ACS was made, ACS investigated the allegations but declined to initiate an official neglect proceeding as the report was concluded to be unfounded (*Id.*).

Plaintiffs also argue that defendants may be liable for the commencement of a proceeding as individuals, other than the agent that prosecutes the action, may be liable when they play an active role. Plaintiffs assert that a proceeding was "initiated" when Berck contacted ACS to report the plaintiffs for suspected educational neglect. An individual may be held liable for malicious prosecution by playing an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act (*Lupski v County of Nassau*, 32 AD3d 997, 998 [2d Dept 2006]). However, merely providing false information to the authorities does not constitute the initiation of the proceeding without an additional showing that at the time the information was provided, the defendant knew it to be false, yet still provided it (*Id.*). Plaintiffs have failed to offer evidence which establishes that Berck, a mandated reporter, played an active role in initiating a proceeding by advising or encouraging ACS to commence a proceeding or by intentionally providing ACS with information regarding the student's attendance record or potential neglect of educational services, that she knew or should have known was false at the time she made the report (*see* Social Services Law § 413 [l] [a]). Additionally, the Attendance History report for the student establishes that NJ missed forty days of school in the first term alone, a period of September to January (*see* NYSCEF Doc. No. 72 at 42). Nevertheless, Berck making a report to ACS and the subsequent investigation did not constitute the commencement of a proceeding against the plaintiffs as it is undisputed that no formal charges were ever brought.

Neither can the plaintiffs meet their burden of establishing a patent and entire lack of probable cause, that the defendants acted with actual malice, or that they suffered a special injury (*see Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 614 [1st Dept 2015]; see also *Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005]). Accordingly, defendants are entitled to summary judgment and dismissal of the malicious prosecution claim.

SLANDER / PRIMA FACIE TORT

Plaintiffs are asserting a claim of defamation based on the school Guidance Counselor, Berck, communicating or reporting false allegations of suspected educational neglect to ACS (*see Cortes v Twenty-First Century Fox Am., Inc.*, 285 F Supp 3d 629, 641 [SDNY 2018], *affd sub nom. Cortes v 21st Century Fox Am., Inc.*, 751 Fed Appx 69 [2d Cir 2018] [Under New York Law, a claim of defamation is an umbrella term that incorporates the twin torts of slander and libel, which require pleading the same basic elements]). A civil action for defamation may be maintained based on the false reporting of allegations of child abuse and/or neglect (*see Scollar*, 160 AD3d at 145; *Biondo v Ossining Union Free School Dist.*, 66 AD3d 725, 727 [2d Dept 2009];

Scholz v Wright, 57 AD3d 645, 646 [2d Dept 2008]; *Zornberg v North Shore University Hosp.*, 29 AD3d 986, 986-987 [2d Dept 2006]).

Plaintiffs assert that they have adequately established a claim of defamation and/or defamation per se based upon Berck filing a report with ACS, which allegedly contained false allegations of educational neglect. Defamation is the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of them in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). To prove a claim of defamation, the plaintiffs must show: (1) a false statement that is; (2) published to a third party; (3) without privilege or authorization, fault as judged by at a minimum, a negligence standard; and that (4) either causes special harm or constitutes defamation per se (*Id.*; see also *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]).

However, in this case, plaintiffs cannot establish the third element of a defamation claim as the defendants' actions, reporting the plaintiffs to ACS, were covered by a common-interest privilege. Notwithstanding that truth is an absolute defense, New York law also recognizes various qualified privileges, including common interest privilege, that may immunize a declarant from liability for a defamatory statement, unless the declarant has abused the privilege (*Conti v Doe*, 535 F Supp 3d 257, 275 [SDNY 2021]). The common interest privilege extends to a communication made by one person to another upon a subject in which both have an interest (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992]; see also *Simpson v Cook Pony Farm Real Estate, Inc.*, 12 AD3d 496, 497 [2d Dept 2004] ["Protection from defamation is afforded where the person making the statements does so fairly in the discharge of a public or private duty in which the person has an interest and where the statement is made to a person or persons with a corresponding interest or duty"]). To invoke the privilege, the parties need only have such a relation to each other as would support a reasonable ground for supposing an innocent motive for imparting the information (*Conti v Doe*, 535 F Supp 3d 257, 276 [SDNY 2021]).

Here, the common-interest applies as the entirety of the communication in Berck's report to ACS concern the possible and/or suspected educational neglect of the plaintiffs' child, who was enrolled as a student at the school. This report was made to an agency that is responsible for investigating the nature and substance of these types of allegations. The report was made by a school official who observed what they reasonably believed to be excessive absences by a child, and who has a mandatory duty to report these types of concerns to ACS. Such reports allow the Department of Education to both provide and obtain information from ACS needed to better protect their students. This communication is clearly covered by the common-interest privilege as the party that made the report and the recipient of the report have corresponding interests in the subject matter: protecting children that may have been the subject of educational neglect.

As the privilege applies, absent proof of common-law or actual malice, a cause of action for defamation based upon the ACS report cannot lie. The shield provided by this qualified privilege may be dissolved if plaintiff can demonstrate that the defendant spoke with malice (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992]). Malice has been defined as a showing of personal spite or ill will, or culpable recklessness or negligence (*Pezhman v City of New York*, 29 AD3d 164, 168 [1st Dept 2006]; *Laguerre v Maurice*, 192 AD3d 44, 49 [2d Dept 2020]). Plaintiffs have not offered evidence to suggest that the ACS report was the result of personal spite or ill will. Nor can the plaintiffs demonstrate the existence of actual malice, which in this case, requires proof that the defendants made the ACS report with knowledge that it was false or with reckless disregard as to whether it was false or not (*see Sweeney v Prisoner's Legal Services*, 84 NY2d 786, 792-793 [1995]). A qualified privilege may also be sustained if the speaker is genuinely unaware that a statement is false (*Id.*) As previously established, there is no evidence from which it could be inferred that defendants knew or should have known the contents of the report to ACS, concerning possible educational neglect based on excessive absences, were false. Accordingly, plaintiffs have failed to raise a triable issue of fact as to whether the statements were motivated solely by malice to overcome the qualified privilege (*see Bernacchi v County of Suffolk*, 118 AD3d 931, 932 [2d Dept 2014]).

Additionally, the duty and requirement imposed upon the defendants to report any evidence of suspected abuse or neglect further insulates the defendants from liability (*see Biondo v Ossining Union Free School Dist.*, 66 AD3d 725, 727 [2d Dept 2009] *quoting* Social Services Law 413 [1] ["School officials are required to make a report to the... local child protective service 'when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child'"]). In filing the report, defendants relied on the information in their records indicating that the child had missed numerous days of school, with no indication or proper documentation that the child was being home-schooled or receiving alternative instruction as the required home instruction form was not returned (*see In re Annalize P.*, 78 AD3d 413, 414 [1st Dept 2010] [educational neglect may be based on excessive unexcused absences]; see also *In re Fatima A.*, 276 AD2d 791, 791 [2d Dept 2000] [educational neglect was established when there was evidence of excessive school absences and there was no evidence offered to show that the child was receiving the required instruction elsewhere as the appropriate documentation was not provided]). Also, while the defendants did eventually obtain a doctor's note pertaining to the student's absences and inability to attend school, the note was not on an official stationary/letterhead and the requests for further documentation were not completed (*see* NYSCEF Doc. No. 31-35). Under these circumstances, the defendants could, at the very least, have reasonably believed that they were required to report the child's frequent absences. Therefore, actual malice cannot be inferred.

A plaintiff must plead special damages unless the defamation falls into any one of the four per se categories, which relevant here are: (1) statements charging the plaintiff with a serious crime; or (2) statements that tend to injure the plaintiff in her trade, business or profession (*Nolan v State*, 158 AD3d 186, 195 [1st Dept 2018]).

Contrary to plaintiffs' contentions, Berck's statements to ACS about the possibility of educational neglect do not amount to a serious crime under New York Penal Law or otherwise implicate the plaintiffs as having committed a serious crime (*Riordan v Garces*, 216 AD3d 416, 416 [1st Dept 2023]). Additionally, plaintiffs have not demonstrated that Berck's alleged statements disparaged or injured the plaintiffs in their professional capacities as the statements were not made with reference to a matter of significance and importance for the purpose of harming plaintiffs in their business (*Bulow v Women in Need, Inc.*, 89 AD3d 525, 526 [1st Dept 2011]; *Whelan v Cuomo*, 220 AD3d 979, 982 [2d Dept 2023], *appeal dismissed, lv to appeal denied*, 41 NY3d 975 [2024]). Considering, plaintiffs have failed to establish a claim of defamation *per se* and therefore, summary judgment is warranted.

Finally, plaintiffs are required to plead and prove, with specificity, that they suffered special damages, which consist of the actual loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation, and not from the effects of the defamation (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 93 [1st Dept 2015]). Here, plaintiffs have not adequately established that they suffered special damages, as general statements are insufficient (*Whelan v Cuomo*, 220 AD3d 979, 981 [2d Dept 2023], *appeal dismissed, lv to appeal denied*, 41 NY3d 975 [2024]). Accordingly, as plaintiffs have failed to plead and/or establish special damages by identifying a specific and measurable loss, the plaintiffs' claim of prima facie tort must also be dismissed (*Yang v Northwell Health, Inc.*, 195 AD3d 662, 666 [2d Dept 2021] [the requisite elements of a claim of prima facie tort include [1] intentional infliction of harm; [2] resulting in special damages; [3] without excuse or justification; [4] by an act or series of act which are otherwise legal]; see also *Mable Assets, LLC v Rachmanov*, 192 AD3d 998 [2d Dept 2021] [a plaintiff seeking to recover for prima facie tort must allege special damages with specific particularity]). Therefore, plaintiffs' claims of defamation and prima facie tort must be dismissed.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiffs are asserting a claim of intentional infliction of emotional distress (IIED) against the individual defendants, alleging that as a result of their intentional actions, a neglect proceeding would not have been commenced. Plaintiffs assert that as a result of this conduct, plaintiffs have suffered extreme distress and their reputations have been irreparably harmed. The tort of intentional infliction of emotional distress consists of 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 Co.*, 81 NY2d 115, 121, [1993]). The standard of outrageous conduct is "strict," "rigorous" and "difficult to satisfy" (*Id.*, at 122).

Defendants assert that summary judgment is warranted as claims of intentional infliction of emotional distress cannot be brought against a municipality. A claim of intentional infliction of emotional distress is not available against governmental entities (*Price v City of New York*, 172 AD3d 625, 629 [1st Dept 2019]; *Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008]). Additionally, defendants contend that as the

action was brought against the individually named defendants, who were acting in the scope of their employment, the claim may not be asserted against them as well. When individual defendants are sued in their official capacities, a plaintiff cannot state a claim of intentional infliction of emotional distress as against them (*see Gottlieb v City of New York*, 129 AD3d 724, 727 [2d Dept 2015]). In bringing this action, plaintiffs sued defendants, Perry, individually and as Principal for the DOE, and Berck, individually and as Guidance Counselor for the DOE. Therefore, to the extent that the individual defendants, Berck and Perry, were sued in their official capacities, the IIED claim must be dismissed as against public policy.

Additionally, to the extent that the plaintiffs' IIED claim was asserted against defendants Perry and Berck in their individual capacities, the claim must still be dismissed. In a cause of action for intentional infliction of emotional distress, the improper conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community (*Tueme v Lezama*, 217 AD3d 715, 718 [2d Dept 2023]). Plaintiffs have not offered evidence or otherwise established that the conduct or actions of Berck and Perry about which they complain, rises to the standard of extreme and outrageous (*see Howell v New York Post Co., Inc.*, 81 NY2d 115, 122 [1993], quoting Prosser and Keeton, Torts § 12, at 60–61 [5th ed]). Accordingly, defendants have established their entitlement to summary judgment on this claim, and the plaintiffs' IIED claim must be dismissed.

REHABILIATON ACT

In Motion Sequence 002, defendants seek dismissal of the plaintiffs' retaliation claim on the basis that the statute plaintiffs cited, Federal Rehabilitation Act, 29 U.S.C. 504, refers to labor law and not schooling. Defendants assert that since plaintiffs were not employees of the DOE, the claim must be dismissed. In Motion Sequence 003, plaintiffs move to amend the complaint. Specifically, to amend the third cause of action which asserts a claim based on defendants' alleged violation of the federal Rehabilitation Act, 29 U.S.C. Section 504, *et. seq.* (complaint ¶ 41) to correct the pleadings to instead assert the claim under the proper statute: Section 504 of the Rehabilitation Act, codified under 29 U.S.C. 794(a) and 29 C.F.R. 33.13 (proposed amended complaint ¶ 41).

On a CPLR § 3025 motion, applications to amend pleadings are within the sound discretion of the trial court, with the consideration that leave shall be freely given upon such terms as may be just (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]). Motions for leave shall be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]). A movant need not establish the merit of the proposed new allegations, however in order to conserve judicial resources, examination of the underlying merit of the proposed amendments is mandated (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). Accordingly, leave will be denied where the proposed amendment, as pleaded, fails to state a cause of action, or is palpably insufficient as a matter of law (*Id.*). Accordingly,

the sufficiency of the pleading of the plaintiffs' proposed amended claim, arising under section 504 of the Rehabilitation Act, must be assessed.

In the proposed amended complaint, plaintiffs assert that defendants violated Section 504 of the Rehabilitation Act, 29 U.S.C. 794(a) and 39 C.F.R. 33.13, by discriminating and retaliating against the plaintiffs because they advocated on behalf of their disabled, special education child (NYSCEF Doc. No. 78 ¶ 41). Section 504 of the Rehabilitation Act, codified under Title 29 (29 U.S.C. § 794 [a]) and 29 C.F.R. § 33.13, protects persons with disabilities from discrimination in the provision of programs or activities receiving Federal financial assistance, including elementary schools as defined under 20 U.S.C. 7801 (19). The Rehabilitation Act is worded as a negative prohibition against disability discrimination in federally funded programs and offers relief from discrimination (*I.M. by L.M. v City of New York*, 178 AD3d 126, 134 [1st Dept 2019]).

Defendants argue that the claim must be dismissed as the plaintiffs did not initiate this action on behalf of their child for the alleged failure to provide educational services but rather, on their own behalf due to their belief that their reputations were damaged. Plaintiffs argue that the scope of the Rehabilitation Act and its protections against retaliation are far broader and cover parents of a disabled or educationally challenged child who seek services on behalf of that child. Plaintiffs' interpretation is correct. Therefore, contrary to defendants' contentions, plaintiffs, as parents of a disabled student, may bring a claim under the statute as it is well-settled that parents of a disabled child may pursue a claim for retaliation pursuant to Section 504 of the Rehabilitation Act (*see Weixel v Board of Education of the City of New York*, 287 F3d 138 [2d Cir 2002]; *J.L. on behalf of J.P. v New York City Dept. of Educ.*, 324 F Supp 3d 455, 467 [SDNY 2018]). District courts in the Second Circuit have held that parents also have standing to assert their own claims for violations related to their child's education under Section 504, recognizing that a parent of a child with a disability has a particular and personal interest in preventing discrimination against the child (*Rutherford v Florida Union School Dist.*, 16-CV-9778 [KMK], 2017 WL 11583110, at *1 [SDNY June 14, 2017]; *A.M. ex rel. J.M. v NYC Dept. of Educ.*, 840 F Supp 2d 660, 675 [EDNY 2012], *affd sub nom. Moody ex rel. J.M. v NYC Dept. of Educ.*, 513 Fed Appx 95 [2d Cir 2013]).

In *Weixel*, a similar fact pattern as the one that exists here, the child was a seventh-grader who was absent for two months at the start of the school year after falling ill with various symptoms. In that case, the principal then threatened the parents with the filing of child neglect charges with the child welfare agency if they did not return the child to school. After the threat, the mother returned the child to school, only to observe upon visiting that the child was still ill and unable to attend class. Accordingly, the mother took the child home and followed up with a pediatrician's diagnosis. The principal responded by initiating a child neglect proceeding, which subjected the family to an investigation. The Second Circuit held that the retaliatory conduct of the DOE included threatening and instituting a child welfare investigation allegedly in retaliation for the plaintiff's attempts to obtain services for Ms. Weixel's attempts to secure services

for her child. As such, Plaintiffs' have established that as parents of a disabled child, they may pursue a claim for retaliation pursuant to Section 504 of the Rehabilitation Act.

Considering, the proposed amended complaint plausibly states a claim of retaliation under Section 504.The required elements of a claim for retaliation under Section 504 are: "(i) a plaintiff was engaged in protected activity; (ii) the alleged retaliator knew that plaintiff was involved in protected activity; (iii) an adverse decision or course of action was taken against plaintiff; and (iv) a causal connection exists between the protected activity and the adverse action" (*Weissman v Dawn Joy Fashions, Inc.*, 214 F3d 224, 234 [2d Cir. 2000]; *Sands v Runyon,* 28 F3d 1323, 1331 [2d Cir. 1994]). In both the proposed amended complaint and the original complaint, plaintiffs include allegations that there was an on-going disagreement as to the services that should be provided to N.J. and plaintiffs maintained that the DOE failed to provide their daughter with a free and appropriate education (complaint ¶ 7; proposed amended complaint ¶ 7). Additionally, plaintiffs alleged that in retaliation for the on-going dispute, defendants stated to ACS that the plaintiffs' child N.J. was being educationally neglected by them and that N.J. did not attend school, and thus an investigation was commenced (complaint ¶¶ 8, 9; proposed amended complaint ¶¶ 8, 9). Therefore, the proposed amended complaint sufficiently alleges that defendants engaged in retaliation, in violation of Section 504 of the Rehabilitation Act ,29 U.S.C. § 794 (a) and 29 C.F.R. § 33.13, in response to their advocation for necessary services on behalf of their disabled child (proposed amended complaint ¶ 41).

In opposition, defendants assert that the motion should be denied; pointing to the substantial delay in filing the motion and claiming the amendment would result in severe prejudice as the note of issue has been filed and discovery has been completed. However, plaintiffs have demonstrated that the defendants would not be prejudiced by the amendment as the defendants were on notice of, and had the opportunity to conduct discovery on, the issues underlying the claim. Considering that the entirety of the allegations in the proposed amended complaint and original complaint are the same aside from the citation of the statute, plaintiffs have sufficiently shown that they are not asserting a new claim or theory of liability but are instead merely correcting the citation. Accordingly, as resolution of the claim cannot be done on the papers, summary judgment and dismissal of the claim would not appropriate. Additionally, as the proposed pleadings sufficiently allege a claim of Rehabilitation under Section 504 and the defendants cannot demonstrate surprise and/or prejudice by the amendment, the plaintiffs' motion to amend is granted.

NEW YORK STATE CONSTITUTION, ARTICLE I, SECTION 11

Plaintiffs are allegedly asserting equal protection claims against defendants, alleging that the "aforementioned discrimination" and other adverse treatment by the defendants are a violation of the plaintiffs' right to equal protection as secured by Article I, Section 11 of the New York State Constitution (proposed amended complaint ¶ 56). Plaintiffs assert that they have met their burden of establishing an equal protection claim as they have adequately alleged a claim under Section 504 of the Rehabilitation Act.

However, defendants have demonstrated their entitlement to summary judgment and dismissal of the claim as plaintiffs have failed to meet their burden of demonstrating a prima facie claim and/or otherwise raise a triable issue of fact. The New York Equal Protection Clause, modeled after its federal counterpart, commands that persons similarly situated should be treated alike (*Walton v New York State Dept. of Correctional Services*, 13 NY3d 475, 492 [2009]). To state a cognizable equal protection cause of action, a plaintiff must allege sufficient facts that plausibly suggest that they were treated differently than others similarly situated as a result of the intentional or purposeful discrimination directed at an identifiable or suspect class (*Giano v Senkowski*, 54 F3d 1050, 1057 [2d Cir 1995]; *Marom v Town of Greenburgh*, 13-CV-4733 NSR, 2015 WL 783378, at *9 [SDNY Feb. 23, 2015]). If a plaintiff is not a member of a protected class, a class of one equal protection claim requires that (1) they were treated differently from others similarly situated in all relevant respects; (2) the defendants had no rational basis for the different treatment; and (3) the different treatment resulted from a non-discretionary state action (*Dubarry v Annucci*, 21-CV-5487 [KMK], 2023 WL 4106488, at *9 [SDNY June 21, 2023]). Defendants correctly contend that the plaintiffs have not shown that they are members of a protected class or a specific classification, nor that defendants treated them adversely compared to similarly situated individuals. In opposition, plaintiffs have not offered evidence which raises a triable issue of fact as to any of these elements.

Motion Sequence 002:

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is GRANTED IN PART; to the extent that the plaintiffs' claims of malicious prosecution, defamation and/or libel and/or slander, intentional infliction of emotional distress, prima facie tort, and Article I, Section 11 of the New York Constitution are dismissed; and is DENIED as to the plaintiffs' Section 504 of the Rehabilitation Act, codified under 29 U.S.C. 794(a) and 29 C.F.R. 33.13 claim; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants and against plaintiff as to these causes of action; and it is further

ORDERED that these causes of action are severed and the action shall continue as to the seventh cause of action: Section 504 of the Rehabilitation Act, codified under 29 U.S.C. 794(a) and 29 C.F.R. 33.13 claim.

This constitutes the decision and order of the court.

6/21/2024
DATE

NICHOLAS W. MOYNE, J.S.C.

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

Motion Sequence 003:

Accordingly, it is hereby

ORDERED that the plaintiff's motion for leave to amend the complaint to amend the seventh cause of action from, "federal Rehabilitation Act, 29 U.S.C. Section 504, *et. seq.*" to instead read "Section 504 of the Rehabilitation Act, codified under 29 U.S.C. 794(a) and 29 C.F.R. 33.13" herein is GRANTED; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry and the amended complaint in conformity herewith.

This constitutes the decision and order of the court.

6/21/2024
DATE

NICHOLAS W. MOYNE, 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:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE