Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

Dennis Rivera, Jr., an infant under the age of 14 years by his mother and natural guardian, Jasmina Vasquez, and Jasmina Vasquez, individually, Plaintiffs, - against -	Index Number: 14727/08
	Motion Date: 2/14/12
The City of New York, The Board of Education of the City of New York, and the Police Department of the City of New York, Defendants.	Motion Cal. Number: 7
	Motion Seq. No.: 5

The following papers numbered 1 to 10 read on this motion by defendants for summary judgment or, in the alternative, for an order precluding plaintiffs' experts from testifying at trial and from utilizing educational records and documents at trial.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibit.....	5-7
Reply-Exhibit.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

That branch of the motion by defendants for summary judgment or, in the alternative, for an order precluding plaintiffs' experts from testifying at trial and from utilizing educational records and documents at trial is granted solely to the extent that so much of plaintiffs' first cause of action alleging educational malpractice, improper placement and negligent training, so much of the fourth cause of action seeking punitive damages, the fifth cause of action alleging intentional infliction of emotional distress, the sixth cause of action alleging negligent infliction of emotional distress and so much of the complaint seeking punitive damages are dismissed. In all other respects, said branch ofthe motion is denied.

Infant plaintiff, a 5-year-old Kindergarten student at P.S. 81 in Queens County, allegedly sustained injuries, including emotional harm, as a result of being handcuffed by a school safety officer and brought to Elmhurst Hospital for psychiatric evaluation on January 17, 2008 after he had thrown a temper tantrum.

Plaintiffs allege in their first cause of action, inter alia, that "defendants failed to properly and competently determine the requirements and needs of the infant plaintiff through appropriate testing and then failed to address those needs through proper social, educational and physical aides and programs; that defendants...had knowledge of the infant plaintiff's condition and behavior but failed to address those issues by properly testing and diagnosing those conditions and failed to provide the required care and classes appropriate for the infant's condition". Succinctly stated, plaintiffs are alleging a cause of action for educational malpractice or negligence.

A cause of action based upon educational malpractice may not be maintained, as a matter of public policy (see Livolsi v Hicksville Union-Free School Dist., 263 AD 2d 447 [2nd Dept 1999]). Therefore, plaintiffs' cause of action based upon the above-quoted allegations must be dismissed.

Plaintiffs also assert in their first cause of action, inter alia, a claim for improper placement. However, it is well-established that "pupil placement is a matter of educational policy, the responsibility for which lies within the professional judgment and discretion of those charged with the administration of the public schools..." (Brady v Board of Educ. Of City of New York, 197 AD 2d 655, 656 [2nd Dept 1993]). "[P]ublic policy precludes judicial interference with the professional judgment of educators and with educational policies and practices" (Suriano v Hyde Park Cent. School Dist., 203 AD 2d 553, 553 [2nd Dept 1994]). Therefore, plaintiffs' claim that the DOE was negligent in assessing infant plaintiff's condition and needs and placing him in the appropriate educational environment does not constitute a cognizable cause of action, as a matter of law. In any event, plaintiffs concede that they failed to assert a claim for negligent placement in their notice of claim. Plaintiffs proffer no opposition to this branch of the motion for dismissal of plaintiffs' cause of action for negligent placement.

Plaintiffs' causes of action for punitive damages must also be dismissed, as no such cause of action lies against the City or a municipal entity (see Krohn v New York City Police Dept., 2 NY 3d 329 [2004]).

Plaintiff's causes of action alleging negligent training must also be dismissed because said claim was not alleged in the notice of claim (see Bonilla v City of New York, 232 AD 2d 597 [2nd Dept 1996]). A condition precedent to commencement of a tort action against a municipality or municipal entity is the service of a notice of claim upon the municipality or municipal entity(see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). The notice of claim must set forth "the nature of the claim" "the time when, the place where and the manner in which the claim arose" and "the items of damages or injuries claimed to have been sustained" (General Municipal Law §50-e [2]). "[C]auses of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed" (Finke v City of Glen Cove, 55 AD 3d 785 [2nd Dept 2008] internal quotations and citations omitted]).

Even had it been included in the notice of claim, it is a well-established principle that no action for negligent training may be maintained against an employer for the acts of an employee acting within the scope of his or her employment, since the employer would be liable under the doctrine of respondeat superior and, therefore, a cause of action for negligent training would be entirely redundant (see Ashley v. City of New York, 7 AD 3d 742 [2nd Dept 2004]; Karoon v. NYC Transit Authority, 241 AD 2d 323 [1st Dept 1997]). "This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training" (Karoon at 324).

This principle applies to the instant matter, even as to plaintiffs' claims alleging assault. An employee may be found to have acted within the scope of his employment even with respect to intentional torts and, therefore, his employer may be liable under respondeat superior (see Choi v. D&D Novelties, 157 AD 2d 777 [2nd Dept 1990]). An assault by a police officer who is engaged in police business may be found to be within the scope of his employment (see generally Garcia v. City of New York, 104 AD 2d 438 [2nd Dept 1984]).

Where the employer concedes that its employee was acting within the scope of his employment in the commission of the allegedly tortious act, no cause of action lies for negligent hiring, training or supervision, as a matter of law (see Ashley v. City of New York, 7 AD 3d 742, supra; Rosetti v. Board of Education, 277 AD 2d 668 [3rd Dept 2000]). Here, it is undisputed, and defendants concede, that the school safety officer who

handcuffed infant plaintiff was employed by them and was acting within the scope of her employment.

The Court notes, parenthetically, that although plaintiffs allege in their notice of claim that defendants violated the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education ACT (IDEA), and defendants, in their moving papers, address these claims, contending that plaintiffs' only remedy if they were dissatisfied with infant plaintiff's placement was to commence an action under these Acts after exhausting their administrative remedies thereunder, plaintiffs do not include such claims in their complaint. Therefore, any discussion of the ADA and IDEA by counsel for the parties is moot.

With respect to plaintiffs' claims of intentional and/or negligent infliction of emotional distress, both such causes of action require allegations of conduct that is "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 society" (Berrios v Our Lady of Mercy Medical Center, 20 AD 3d 361, 362 [1st Dept 2005] [citations and internal quotations omitted]). The allegations of the complaint, and the record on this motion, do not support a claim for either intentional or negligent infliction of emotional distress. In any event, with respect to intentional infliction of emotional distress, such a claim may not be brought against a municipality (see Clark-Fitzpatrick, Inc. V. Long Island Railroad, 70 NY 2d 382 [1987]). Plaintiff does not oppose the granting of summary judgment dismissing his claims of intentional and negligent infliction of emotional distress. Indeed, plaintiffs do not proffer any opposition to the granting of summary judgment dismissing these claims.

However, defendants have failed to establish a prima facie entitlement to summary judgment dismissing plaintiffs' causes of action alleging false arrest, excessive force and assault. The record on this motion raises an issue of fact as to whether the actions of the school safety officer were reasonable and warranted under the circumstances. Although defendants contend that the municipality is immune from liability for conduct involving the exercise of discretion and reasoned judgment, the record herein raises issues of fact as to whether the handcuffing of a five-year-old was an act involving reasoned judgment and discretion. Contrary to the argument of defendants' counsel, there are questions of fact as to whether placing infant plaintiff in handcuffs constituted the use of excessive force and was reasonable. Governmental immunity for discretionary acts is not available unless the municipality establishes that the action resulted from discretionary decision-

making, which is "the exercise of reasoned judgment which could typically produce different acceptable results" (Valdez v City of New York, 18 NY 3d 69, 79 [2011] [internal citation omitted]). The use of excessive force certainly does not qualify as an act of reasoned judgment which could be viewed as an acceptable result. Defendants cite no authority, and this Court is unaware of any, finding the municipality immune from claims of false arrest and excessive force upon the ground that such acts are acts of discretion. Indeed, it has been held that governmental immunity does not apply in "instances in which the government employee directly causes the injury" (Pelaez v Seide, 2 NY 3d 186, 205 [2004]).

Accordingly, that branch of the motion is granted solely to the foregoing extent. Although defendants, in their notice of motion, seek summary judgment "on all causes of action", in their affirmation in support of the motion, they do not seek dismissal of any other causes of action asserted in the complaint other than those heretofore mentioned.

Finally, the remaining branch of the motion to dismiss the complaint against the Police Department of the city of New York upon the ground that it is not a suable entity is granted, there appearing no opposition to this branch of the motion. Since the NYPD is merely a department, or agency, of the City and not a separate entity, it is not a cognizable party. Therefore, the NYPD is deleted from the caption of this matter and the new caption of this case shall read:

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Dennis Rivera, Jr., an infant under the age of 14 years by his mother and natural guardian, Jasmina Vasquez, and Jasmina Vasquez, individually,

Plaintiffs,

- against -

The City of New York and The Board of Education of the City of New York,

Defendants.

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Index Number: 14727/08

Dated: February 16, 2012

KEVIN J. KERRIGAN, J.S.C.