Maldonado v City of New York
2017 NY Slip Op 30792(U)
March 6, 2017
Supreme Court, Bronx County
Docket Number: 17741/2007
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

IZAYA MALDONADO, by Parent and Natural Guardian LUIS MALDONADO,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION OFFICE OF PUPIL TRANSPORTATION, THE PIONEER TRANSPORTATION CORPORATION, JOHN DOE, Individually and as bus driver, JANE DOE, Individually and as bus aide, SUSAN ERBER, Individually and as Regional Superintendent of the District 75 Special Education Program, LORRAINE SESTI, Individually and as Principal of P.S. 17X and J. RICHBERG, Individually and as a member of the Committee on Special Education for Service District 75,

Defendants.

INDEX NUMBER: **17741/2007**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to ,

Read on this Defendants' Motions for Summary Judgment

On Calendar of **10/14/15**

Notices of Motion-Exhibits, Affirmations 1, 2

Affidavit/Affirmation in Opposition 3

Reply Affirmations 4, 5

Supplemental/Further Reply Affirmations

Upon the foregoing papers, defendants the City of New York (hereinafter "City"), the Board of Education of the City of New York and the New York City Department of Education (hereinafter collectively 'DOE"), Office of Transportation (hereinafter "OPT"), Susan Erber (hereinafter "Erber"), Lorraine Sesti

(hereinafter "Sesti") and Joanne Richburg s/h/a J. Richberg's (hereinafter "Richburg") motion for summary judgment and defendant The Pioneer Transportation Corporation's (hereinafter "Pioneer") motion for summary judgment are consolidated for purposes of this decision.

Plaintiff Luis Maldonado brings this action on behalf of his son Izaya Maldonado alleging violations of constitutional rights, federal and state anti-discrimination laws, New York Social Services Law and negligence. At the time of the alleged incidents, on October 17, 18 and 19, 2005, the infant plaintiff was a non-verbal, five year old with a diagnosis of autism spectrum disorder, attention deficit hyperactivity disorder and a moderate to severe intellectual disability. He was attending special education public school, P.S. 17X, in Bronx, New York. As a result of his disabilities, the infant was to be transported to and from school on a "minibus", seating up to 18 children, with a matron or attendant. In addition to the matron or attendant, the minibus could have additionally attendants if a particular child was assigned a one-on-one paraprofessional or "para". Those assignments would be contained in the child's Individualized Education Program ("IEP"). To ensure that disabled children receive a free and appropriate education ("FAPE"), a school district must create an IEP for each disabled child upon request (20 U.S.C. § 1414[a]). An IEP is a written statement setting forth [1] the child's present academic status; [2] measurable annual goals, including how progress towards those goals will be measured and reported; [3] what special education, supplementary aids and services will be provided to the child or on the child's behalf; [4] the program modifications and supports for school personnel that will be provided to the child; [5] the extent, if any, the child will participate with non-disabled children; and [6] what accommodations, if any, are necessary to measure the child's academic performance. 20 U.S.C.§ 1414(d)(1)(A). The IEP "describes the specially designed instruction and services that will enable the child to meet stated educational objectives and is reasonably calculated to give educational benefits to the child". M.W. v. New York City Department of Education, 725 F.3d 131 (2d Cir. 2013).

Pursuant to the infant's IEP, the infant required a minibus for transportation. Due to the error, the infant was instead placed in a full-sized special education school bus, seating up to 35 students, from the beginning of the school year until the dates of the incidents. Plaintiff claims that the infant was "brutal attack[ed]", "abuse[d]" and subjected to "unwarranted sexual and physical harassment" while on the full-sized bus. The bus transportation service was provided by defendant Pioneer pursuant to a contract with the City. Pioneer owned the buses they operated and hired the drivers and matrons. Pioneer provided buses for "special education runs" which transported special education students. The special education runs had one matron or

attendant on board the bus whose duty was to make sure the children were transported and escorted off the bus safely. Pioneer operated only full-sized buses and did not provide minibuses to the infant's school as that was not part of its contract with the City.

On October 17, 18 and 19, the infant was found partially or fully disrobed while on the full-sized bus. Plaintiff argues that the infant's clothing was removed by other children on the bus as the infant was physically unable to undress himself. Plaintiff alleges that the infant was sexually attacked and abused by other children on the bus, some of which were fifth and sixth graders, much older than the infant. Plaintiff claims that these incidents occurred as a result of defendants placing the infant on the wrong bus, for several weeks, and when the incidents continued to escalate, nothing was done to protect the infant and provide him with the proper transportation. Plaintiff further argues that the infant was attacked and abused as a result of Pioneer's inadequate supervision of the infant and of the older special education students on the subject bus. Plaintiff contends that in allowing older special education students on the same bus as the non-verbal, five year old, autistic plaintiff, with completely inadequate supervision, it set the stage for the infant's abuse in which he was disrobed by one or more of the children on the bus and sexually assaulted.

Plaintiff Luis Maldonado claims that when the bus arrived in front of his house on October 18th, the infant's home aide went to meet the bus as plaintiff looked out of the window. The matron did not escort the infant off the bus and he saw the aide walk to the back of the bus and remained there. His wife went out to see what was happening and when she got on the bus, she found the aide in the back. The aide told her that when she got on the bus, she found the infant in the back of the bus, strapped into a seat in the last row, again naked with all of his clothes spread out over four or five seats from where he was seated.

Plaintiff Luis Maldonado testified that there were "red marks all over [the infant's] private area and lower abdomen" following the incident on October 19th. When the infant was examined at Lincoln Hospital, they found no evidence of sexual assault, abuse or rape, but plaintiff claims it was because the examination did not take place until days after the assaults. Plaintiff testified that there was no physical evidence of sexual abuse other than these red marks. Plaintiff argues that contrary to defendants' contentions, the matron did not actually see the infant disrobe himself, and only assumed that he had did when she found him undressed. Plaintiff argues that the matron was not watching the infant the entire duration of the bus ride because she had a bus full of other special education children, some "unruly" and "very disruptive", which she had to supervise, and at every bus stop, she had to escort children on/off the bus and hand them off to their

guardians. Plaintiff claims that as a result of what happened on the bus, the infant suffered from terrible nightmares with extreme tantrums and self-injurious behaviors. While the infant had previously had sleep problems for which he had been treated, the issue magnified following the subject incidents. Previously, he would wake in the middle of the night and play quietly and go back to sleep. However, following the incidents, the infant began to wake nightly, in the midst of extreme tantrums, and was unable to return to sleep. He would breathe heavily, scream, cry, hit the wall and floor with his open hand, and throw himself of the floor, scratching his face with his hands. Plaintiff claims this was a nightly occurrence which continued through late 2007 or early 2008.

Defendants claim that they are entitled to summary judgment because the evidence shows that the infant was not sexually abused, but instead removed his own clothing and masturbated while on the bus. Pursuant to his father's testimony, the infant had been known to masturbate in public places, as well as at home for at least one year prior to these incidents. Additionally, the father testified that shortly after being diagnosed with autism at age three, he could not "take his clothes off", but was able to slide his pants down. Pioneer argues that the case against it should be dismissed because the infant was placed on the bus by City officials, and Pioneer did not have the authority to remove or refuse to transport a special needs student, despite a child's disruptive behavior. Pioneer would make report of the incidents on the bus and would pass them on to the City, but Pioneer did not make the determination as to which type of bus or means of transportation was most suitable for the child. Pioneer argues that it promptly reported the infant's behavior to the parents and the City officials, and recommended that alternate transportation be provided to the child.

Starting on September 20, 2005, "Student Misbehavior Report[s]" pertaining to the infant's bus rides which were generated by matron Patricia DelPonte, as follows:

> September 20, 2005 "In P.M. he was disruptive on bus. He was throwing his stuff around. Also he took off his shirts (sic). He also banged his fist on bus window". On a "Checklist of Inappropriate Behavior", she marked off "Child Throws Items Around the Bus" and "Child Annoys, Disrupts, Fights with Other Students on His/Her Bus. The report further provides "This is the 1st... Behavior Report Concerning this Child."
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> September 21, 2005 "In P.M. he took off his socks and sneakers and threw them on bus... I was not aware of this because the bus is full with many students some of which are very disruptive. He needs a para [paraprofessional] because it is impossible for me to... watch him. He also eats food on the bus." On a "Checklist of Inappropriate Behavior", she marked off "Child Throws Items Around the Bus", "Child Annoys, Disrupts, Fights with Other Students on His/Her Bus"

and "Child Brings Inappropriate Items on the Bus (Candy, Food, Radio, Etc.)" "This is the ... 2nd... Behavior Report Concerning this Child".

September 22, 2005 "In P.M. he took off his shoes and sock & threw them on the floor of the bus. He also threw his book bag. He refuses to put his sock & shoes on again". On the "Checklist of Inappropriate Behavior", she marked off "Child Throws Items Around the Bus" and "Child Annoys, Disrupts, Fights with Other Students on His/Her Bus". "This is the ... 2nd... Behavior Report Concerning this Child".

September 23, 2005, "In P.M. he took off his socks & shoes and threw them on the bus floor along with his book bag. He was also yelling and banging on the bus window. This happens everyday." He refuses to put his sock & shoes on again". On "Checklist of Inappropriate Behavior", she marked off "Child Throws Items Around the Bus", "Child Annoys, Disrupts, Fights with Other Students on His/Her Bus" and "Child Brings Inappropriate Items on the Bus (Candy, Food, Radio, Etc.)". . "This is the ... 3rd ... Behavior Report Concerning this Child".

September 30, 2005 "Took his sock & sneakers off on bus & threw them. He also threw his school bag & was banging on window." On "Checklist of Inappropriate Behavior", she marked off "Child Throws Items Around the Bus", "Child Annoys, Disrupts, Fights with Other Students on His/Her Bus". "This is the... 6th... Behavior Report Concerning this Child".

The following reports were generated on the dates of the incidents by matron Joanne Indiviglia.

October 18, 2005 "Izaya took his pants off and began jumping on the seat, he then removed his diaper & began playing with his genitals."

October 18, 2005 "Izaya pulled down his pants to his knees and began playing with his genitals in view of the other children."

October 19, 2005 "Izaya pulled down his pants to his ankles - 10/19/05 @ 8:20 a.m."

Ms. Indiviglia testified at a deposition that on the dates of the incidents, the infant's clothes were strewn about the bus while the infant masturbated as the older kids shouted "he's naked, he's naked." After his seat-mate had alerted her, she saw that the infant had opened his pants and ripped into the side of his diaper. Ms. Indiviglia testified that it was very difficult to get control of the children on the bus as the kids were very disruptive, yelling, going up and down the bus aisle, and jumping up and down in the seats. Additionally, every time a child was getting off the bus, it was her job to escort them off. Every time she dropped off a child and came back, she would find that the infant was "doing the same thing". "The only problem with Izaya was every time you came back in the bus, he was out of his seatbelt and doing the same thing again." Ms. Indiviglia did not testify that she actually ever witnessed the infant removing his clothes, but she would find him without his

clothing, diaper and/or shoes and socks. It was her opinion that the infant did not belong on that bus because he could not be provided with the attention that he required. Her responsibilities on such a challenging bus in trying to keep all of the students under control, while also having to escort them off the bus, did not allow for the kind of care that a severely non-verbal child who did not follow commands needed.

In an affidavit submitted in support of Pioneer's motion, Ms. Indiviglia states while on the bus route, she walked up and down the bus aisle to make sure all the children had on their seatbelts. On October 17, 2005, the infant was seated two seats behind her when the child sitting next to him called out to her and told her that he could "see [the] wiener" of the boy sitting next to him. She states that the infant had removed his pants and ripped into his diaper and massaged his genitals in open view of the other children. Ms. Indiviglia tried to keep him out of the view of the other children, walked to the front to let the bus driver know what was happening and when she walked back to the infant, she found he was ripping at his diaper and jumping on the seat. She tried to get his shoes and seatbelt back on, and tried to make him sit, but he would not cooperate. On October 18th, she escorted children off the bus at their stop and when she returned to the bus, the infant had removed his shoes and socks, pulled his pants down, ripped off his diaper, and was running wildly back and forth in the bus. She dressed him and attempted to get him to sit down. When the bus arrived at his stop, as she got up to assist him off the bus, he pulled down his pants and again began running back and forth in the bus. His home health aide was waiting at the stop and Ms. Indiviglia asked for her assistance in helping him off the bus. She told the attendant that the parents must speak with officials to make some other transportation arrangement as the infant's refusal to stay clothed was disturbing to other children and harmful to himself.

Plaintiff argues that during the six week period from when the school year began until the time of the incidents, defendants ignored the bus matrons' repeated formal reports of escalating trouble on the bus and repeated phone calls and notes from plaintiff Luis Maldonado's mother Linda Matos, his fiancé (later wife) Angel, and himself expressing extreme concern regarding what was occurring on the bus. In September and October 2005, plaintiff Luis Maldonado and his mother repeatedly complained to OPT (receiving Complaint Nos. 225838, 213955, 187915 and 190202), he and his wife also complained to P.S.17's transportation coordinator defendant Richburg, Yvonne Dixon, the infant's classroom teacher and Pioneer. Plaintiff testified that he went to Richburg's office on October 19 and talked to her, but to no avail. Richburg testified that on October 20th, she received a call from the Principal, defendant Sesti asking what she knew about plaintiff's written complaint to Ms. Dixon on October 19th which indicated that the infant was naked when his bus pulled

Richburg testified that she responded that she knew nothing about it and was then made aware that Angel, the infant's stepmother, had put out a social media comment asking for help with her stepson.

Defendant Pioneer moves for summary judgment arguing that it did not violate the infant's constitutional rights and was not negligent in his care. Pioneer argues that it did not decide or determine which bus was assigned to infant; it did not refuse to transport him and did not refuse to re-dress him after he disrobed; it did not refuse to transport him despite his public masturbation and aberrant behavior; its employee spoke with the infant's guardian and recommended that he be assigned a paraprofessional; and, it documented the issues on the bus in misbehavior reports and issued copies to Richberg and other school officials. The City moves for summary judgment arguing that it is not a proper party to the action. The DOE moves for summary judgment arguing that it did not violate the infant's constitutional rights and were not negligent with respect to their care of the infant. Plaintiff argues that the motions must be denied as there are questions of fact as to whether the infant plaintiff's rights were violated and whether he was assaulted and/or injured while on the bus. Plaintiff argues that the evidence presented shows that defendants failed to protect and adequately supervise the infant on the bus, and as a result of the lack of supervision, the infant was caused to sustain harm.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet

its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It has long been recognized that a board of education has a duty, arising from the fact of its physical custody over students, to exercise the same degree of care and supervision which a reasonably prudent parent would employ in the given circumstances. Pratt v. Robinson, 39 N.Y.2d 554 (1976); Logan v. City of New York, 543 N.Y.S.2d 661 (1st Dept. 1989) citing Ohman v. Board of Education, 300 N.Y. 306 (1949); Pratt v. Robinson, 39 N.Y.2d 554 (1976). "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students; therefore, schools are not to be held liable 'for every thoughtless or careless act by which one pupil may injure another'". Mirand v. City of New York, 84 N.Y.2d 44 (1994)(internal citations omitted); Schools are, however, under a duty to adequately supervise their students and are liable for foreseeable injuries which are proximately caused by the absence of such supervision. Garcia v. City of New York, 646 N.Y.S.2d 508 (1st Dept. 1996) (internal citations omitted). This duty derives from the fact that the school, once it takes over physical custody and control of the children, effectively takes the place of their parents and guardians. Mirand v. City of New York, 84 N.Y.2d 44 (1994). In order to establish a school's liability for negligent supervision, plaintiff must establish that

> school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated... Actual or constructive notice to the school of prior similar conduct is generally required because, obviously, school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily; an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act.

Id. A school district that undertakes to transport students has a duty to perform this task in a careful and prudent manner and under certain circumstances, school districts in New York have been held liable on this theory when children were injured during the act of busing itself, broadly construed. Williams v. Weatherstone, 23 N.Y.3d 384 (2014); Chainani v. Board of Education of City of New York, 87 N.Y.2d 370 (1995).

Plaintiff's Complaint pleads a negligence cause of action and alleges that defendants discriminated against the infant in violation of his statutory rights under the Human Rights Law of the City and State of New York, the Rehabilitation Act and the Americans with Disabilities Act. New York State Human

Rights Law ("NYSHRL") pursuant to Executive Law §296(4) states in relevant part that "[i]t shall be an unlawful discriminatory practice for an education corporation or association ... to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status....". Under the New York City Human Rights Law ('NYCHRL"), it is an "unlawful discriminatory practice" for "any place or provider of public accommodation, because of the actual or perceived ... disability ... of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof ....". It defines "provider of public accommodation" to mean "providers ... of goods, services, facilities, accommodations, advantages or privileges of any kind," and defines "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." The NYCHRL and NYSHRL creates lower thresholds for actionable conduct and must be construed liberally in favor of discrimination plaintiffs, meaning that a defendant may be liable under the NYCHRL and NYSHRL, but not under state or federal statutes. Although the NYCHRL and NYSHRL are subject to the ADA's analytical framework, the NYCHRL and NYSHRL's definition of disability differs significantly from the ADA, with the NYCHRL and NYSHRL's disability definitions being recognized as far broader. See Giordano v. City of New York, 274 F.3d 740, 753 (2d Cir.2001).

The Rehabilitation Act of 1973 §504, provides that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in ... or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). To state a prima facie claim under the Rehabilitation Act, a plaintiff must demonstrate: (1) that he is a qualified individual with a disability within the meaning of the statute; (2) that the defendant is subject to the Act; and (3) that he was denied the opportunity to participate in the defendant's services, programs, or activities, or was otherwise discriminated against by the defendant, by reason of his disability. Harris v. Mills, 572 F.3d 66, 73–74 (2d Cir.2009). The Rehabilitation Act is meant to reach those individuals, disabled or not, who might be adversely affected by society's accumulated myths and fears about disability and disease. Cain v. Esthetique, --- F.Supp.3d ---- (SDNY 2006) citing School Board of Nassau County v. Arline, 480 U.S. 273 (1987).

Claims under Title II of the American with Disabilities Act ("ADA") Section 504 of the Rehabilitation Act are analyzed identically. See, Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir.2003). The ADA and Rehabilitation Act were designed to protect disabled persons from discrimination, both intentional and unintentional, in the provision of public services. Under both statutes, schools are required to

provide a free appropriate public education through special education and related services. A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education, also known as FAPE, to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap. 34 C.F.R §104.33. Denial of "the opportunity to participate in or benefit from defendants' services" does not require that the student be physically prevented from access: "[r]ather, a plaintiff must establish ... harassment [by] students that is so severe, pervasive, and objectively offensive, and that so undermines and distracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650–651 (1999). "To meet [FAPE] requirements, a school district's program must provide special education and related services tailored to meet the unique needs of a particular child, and be reasonably calculated to enable the child to receive educational benefits." Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir.1998)

Plaintiff's claims pursuant to the NYCHRL, NYSHRL, the Rehabilitation Act and the ADA are dismissed as there is no evidence that the infant was discriminated against by any of the defendants. Here, there is no dispute that the infant is a person with a disability under the meaning of the ADA, the Rehabilitation Act and the related New York State and City statutes, and that the defendants were aware of his disability. The DOE classified the infant as disabled under the Individuals with Disabilities Education Act ("IDEA") which guarantees the infant a free appropriate public education. FAPE is defined as special education and related services, and related services includes transportation for the student. In accordance with FAPE, the DOE placed the infant in a school for children with special needs and created an IEP for him. Thus, the DOE complied with the requirements of providing the infant with an appropriate educational environment with special education and related services. Contrary to plaintiff's contention, there was no violation of any of the infant's rights pertaining to his rights to receive a FAPE. It is undisputed that the infant's IEP provided the appropriate "related service" with respect to transportation as it called for him to be placed on a minibus. The fact that he was not placed on a minibus for a six week period resulted from human error for which the defendants may be liable under negligence principles. There is no evidence that the infant was purposefully discriminated against as a result of his disability when he was placed on the full-sized bus. The fact that the infant was allowed to remain on the bus for several weeks, despite numerous complaints from the matrons, the plaintiff, his mother and wife, subjects the defendants to liability.

The branch of the motion that seeks summary judgment as against the City must be granted as it is not a proper party to the action. The Board of Education is a corporate body, separate and legally distinct from the City of New York. N.Y. Educ. Law §2551; Flores v. City of New York, 878 N.Y.S.2d 728 (1st Dept. 2009) "[T]he 2002 amendments to the Education Law (L. 2002, ch. 91), do not provide a basis to hold defendant liable for the personal injuries sustained by plaintiff". Corzino v. City of New York, 868 N.Y.S.2d 37 (1st Dept. 2008); Perez v. City of New York, 837 N.Y.S.2d 571 (1st Dept. 2007), *lv. denied* 10 N.Y.3d 708 (2008).

With respect to the DOE and Pioneer, the motion for summary judgment must be denied with respect to plaintiff's negligence claims. Viewing the evidence in a light most favorable to plaintiff, and based upon the record as a whole, it cannot be said, as a matter of law, that the underlying events were insufficient to put defendants on notice of a potentially dangerous situation on the bus. Pursuant to the infant plaintiff's IEP, it is undisputed that the infant plaintiff was to be transported to and from school on a mini-bus with a matron. It is also undisputed that the infant plaintiff, by admitted error of the OPT, was placed on a full-sized bus instead of a mini-bus for several weeks with children who were substantially older than the infant. The evidence presented shows that defendants were put on notice that the infant was on the wrong bus for 26 days, twice a day, and that serious incidents were occurring and had occurred while the infant was on the bus. Notwithstanding the notice, the infant continued to be transported on the full-sized bus, in direct contravention to the directives in his IEP. The incidents on the bus were not a one-time occurrence. Given that the instances of inappropriate disrobing occurred on multiple occasions, it simply cannot be said that defendants lacked notice. The evidence and testimony of the parties shows that the infant plaintiff was found disrobed several times on the bus and there are questions as to whether the infant was able to disrobe himself. Plaintiff's wife called to report the incident of the infant disrobing on the bus and the documented contemporaneous complaint shows that she stated that the infant could not disrobe himself and she was afraid that he was being abused by other children on the bus. The matrons were admittedly occupied in a "circus" environment and overwhelmed on buses full of very disruptive and unruly special education students and could not provide the infant with the attention and care he needed. Notwithstanding the numerous formal reports filled out by the matrons, the DOE permitted the situation to continue to the point where the incidents on the bus escalated. Thus, plaintiff has raised issues of fact as to whether the infant was subject to abuse while on the bus during the 26 days that he was erroneously placed on the full-sized bus. Furthermore, plaintiff's testimony regarding the red marks he found on the infant and the

subsequent nightmares, terrors and tantrums raise an issue of fact as to whether the infant was physically attacked, assaulted and/or touched by another person on the bus.

Contrary to Pioneer's contention, there is evidence that it was negligent in transporting the infant. Pioneer argues that the infant was placed on the bus by DOE's OPT and it lacked the authority to remove or refuse to transport a special needs student, despite a child's disruptive behavior. Pioneer further argues that it did not make the determination as to which type of bus or means of transportation was most suitable for a child and it properly documented numerous reports of the infant's incidents on the bus, specifying that the full-sized bus was not appropriate for the infant and passed them on to the proper officials. However, there is evidence that Pioneer failed to provide the infant with appropriate care. The reports generated by the matrons show that they were aware of the infant's problems on the bus. Thus, they were on notice of the harmful situation on the bus. A bus operator such as Pioneer owes the very same duty to the students entrusted to its care and custody as a school. See, Pratt v. Robinson, 39 N.Y.2d 554 (1976)(The school district did undertake to transport students and must therefore perform so much as it had undertaken in a careful and prudent manner. Under certain circumstances, school districts in our own State and in other States have been held liable on this theory when children were injured, even after they had technically been discharged from the bus. The liability in those cases stemmed from the fact that the injury occurred during the act of busing itself,); Harker v. Rochester City School District, 661 N.Y.S.2d 332 (4th Dept. 1997), *lv. denied*, 90 N.Y.2d 811 (1998)(The law with respect to the extent of the duty of the school towards a student is equally applicable to the bus company transporting the student). Ms. Indiviglia testified that the bus driver's responsibility was to pull over in the event students were unbelted and/or out of their seats. She further testified that the bus driver failed to do so and continued to drive while the infant and the other children were up and about and jumping up and down in the seats. She described the bus being in an uproar, yet the bus driver would continue to drive. She also testified that the driver was aware that the infant would throw things during the ride and would get undressed. Under these circumstances, a jury could dismiss Pioneer's arguments that the disruptive actions of some of the students on the bus were not unanticipated and could find that Pioneer could have foreseen the danger to the infant in continuing to transport him on the full-sized bus. Whether the bus company was negligent in the discharge of its duty to provide adequate supervision to the infant under these the circumstances is a question of fact for a jury. Thus, a jury could reasonably conclude that defendant was negligent in its supervision of the activity on bus and was a proximate cause of infant's alleged injuries.

The negligence action against defendants Sesti and Richburg also remain as the evidence set forth by the plaintiff raises an issue of fact as to whether they were put on notice of the potentially dangerous situation on the bus and failed to appropriately and timely act to protect the infant from harm. See, Cianci v. Board of Education of City School District of City of Rye, 238 N.Y.S.2d 547 (2d Dept. 1963)(It was error to dismiss the complaint as a matter of law against the school principal. Quite apart from any liability imposed by statute, under the common law there was imposed upon her as the principal, both the duty to be reasonably vigilant in the supervision of the pupils and the liability for her negligent performance of such duty). Specifically, Sesti was the school principal, and Richburg was the special education coordinator and part of the team that instituted the infant's IEP. Richburg was then aware that the infant was to be transported in a mini-bus and plaintiff alleges that as the school bus coordinator of PS 17X she was or should have been aware that the infant had been placed on the wrong bus for a period of 26 days, twice a day, thereby putting the infant in harm's way and the consequences were foreseeable.

The action against Erber is dismissed as plaintiff fails to articulate any claims against her. Other than being the Regional Superintendent for the school, plaintiff fails to set forth any acts by Erber that caused plaintiff harm. Furthermore, plaintiff's claim of failure to report suspected child abuse or maltreatment is also dismissed as plaintiff fails to articulate facts to substantiate the claim.

This constitutes the decision and Order of this Court.

Dated: 3/6/17

Hon. Alison Y. Tuitt