APPENDIX TABLE OF CONTENTS

SUMMARY ORDER OF THE SECOND CIRCUIT (OCTOBER 31, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LILLIE LEON,

Plaintiff-Appellant,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION, PAULA CUNNINGHAM, in Her Individual and Official Capacity,

Defendants-Appellees.

17-3567

Appeal from a judgment of the United States District Court for the Eastern District of New York (Kuntz, J.).

Before: Robert A. KATZMANN, Chief Judge, Amalya L. KEARSE, Denny CHIN, Circuit Judges

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Appellant Lillie Leon, proceeding pro se, appeals the judgment of the district court granting summary judgment in favor of the appellees with respect to her claims under the Age Discrimination in Employment

Act, the Americans with Disabilities Act, and state and city human rights laws, and her claim of intentional infliction of emotional distress. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review orders granting summary judgment *de novo* and focus on whether the district court properly concluded that there was no genuine dispute as to any material fact and the moving party was entitled to judgment as a matter of law. *Sotomayor v. City of New York*, 713 F.3d 163, 164 (2d Cir. 2013) (per curiam).

We note that the record does not reflect that Leon received the usual warning about the nature and consequences of a summary judgment motion, including the need to adduce evidence, and not simply reply on allegations in the complaint, per *Vital v. Interfaith Medical Center*, 168 F.3d 615, 620-21 (2d Cir. 1999). The absence of such a warning is "ordinarily grounds for reversal." *Ruotolo v. IRS*, 28 F.3d 6, 8 (2d Cir. 1994) (per curiam). Reversal is not warranted, however, "where the record otherwise makes clear that the litigant understood the nature and consequences of summary judgment." *Vital*, 168 F.3d at 621. Here, Leon's papers in opposition to summary judgment cited to Local Rule 56.1, and she included 60 pages of exhibits. Accordingly, we do not reverse. *See Sawyer v. Am. Fed'n of Gov't Emps., AFL-CIO*, 180 F.3d 31, 34-36 (2d Cir. 1999) (upholding summary judgment despite absence of proper notice where pro se plaintiff "knew that he was required to produce evidence supporting the issues of material fact that he needed to preserve for trial").

Here, an independent review of the record and relevant case law reveals that the district court properly granted summary judgment. We affirm for substantially the reasons stated by the district court in its thorough September 29, 2017 decision.

We have considered all of Leon's arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

For the Court:

/s/ Catherine O'Hagan Wolfe
Clerk of Court

DECISION AND ORDER OF THE DISTRICT COURT OF NEW YORK (SEPTEMBER 29, 2017)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LILLIE LEON,

Plaintiff,

v.

THE DEPARTMENT OF EDUCATION, a/k/a THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; and PAULA CUNNINGHAM, in Her Individual and Official Capacities,

Defendants.

10-CV-2725 (WFK) (ARL)

Before: Hon. William F. KUNTZ, II, United States District Judge:

WILLIAM F. KUNTZ, II, United States District Judge:

On June 15, 2010, Lillie Leon ("Plaintiff") filed her *pro se* Complaint in this action, ECF No. 1, which she subsequently amended on August 13, 2012, after having obtained legal counsel, ECF No. 39.[1] As relevant

[1] Plaintiff first obtained representation by March 10, 2011, *see* ECF No. 13, and numerous counsel have represented her over the course of the litigation, *see* ECF Nos. 17, 19, 56, 64, 67, 68,

to the instant motion, the Amended Complaint sets forth claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34; the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 11201-12213; section 296 of the New York State Executive Law ("NYSHRL"); and section 8-107 of the New York City Administrative Law ("NYCHRL"); as well as state common law claims of intentional infliction of emotional distress and defamation. Am. Compl. ¶¶ 81-153. These claims arise out of events that took place while Plaintiff was employed by the New York City Department of Education ("DOE") and Paula Cunningham, the Principal of P.S. 117 (together, "Defendants"). *See generally id.* On February 8, 2013, Defendants filed their fully briefed motion to dismiss the Amended Complaint, ECF Nos. 48-50, which this Court granted on April 29, 2014, ECF No. 52. Plaintiff appealed and, on May 22, 2015, the Second Circuit issued a Summary Order affirming this Court's Order as to Plaintiff's hostile work environment and First Amendment retaliation claims and all of her claims relating to alleged conduct that occurred prior to the 2010-11 school year. ECF No. 57. The Second Circuit reversed and remanded the claims arising from the 2010-11 school year. *Id.* On February 21, 2017, Defendants

---

71. By November 2016, in the middle of the briefing schedule for the instant motion, Plaintiff informed the Court that she had terminated the attorney representing her at that time and, accordingly, she sought an extension of time to file her Opposition. ECF No. 72. The Court granted this request, as well as her subsequent request for an extension of time so that Plaintiff could obtain new counsel, which was filed December 21, 2016. ECF No. 74. Plaintiff never secured counsel, however, and ultimately filed her Opposition *pro se*. *See* ECF No. 86. The Court treats Plaintiff as *pro se* for the purposes of this motion.

filed their fully briefed motion for summary judgment as to all remaining claims. ECF Nos. 82-87. For the reasons discussed below, Defendants' motion is GRANTED.

Background[2]

Plaintiff, who was eighty years of age at the time she filed her Amended Complaint, has worked as a teacher for Defendant DOE since 1978. Am. Compl ¶¶ 6, 16. The events that gave rise to this litigation took place before and during the 2010-11 school year, when Plaintiff was a tenured teacher at P.S. 117 in

---

[2] Under the Local Rules of this Court, parties to a summary judgment motion are required to each submit a statement of material facts. E.D.N.Y. R. 56.1(a) & (b). Rather than reiterating undisputed facts, the nonmoving party is tasked with responding to each of the facts offered by the moving party; each fact that is not "specifically controverted" may be deemed admitted. *Id.* at 56.1(b) & (c). Plaintiff, the nonmoving party here, submitted a Rule 56.1 statement that does not conform to the Court's rules and, perhaps more significantly, does not admit or deny Defendants' facts. The facts within Defendant's Rule 56.1 statement are therefore deemed admitted. *See Gadsen v. Jones Lang Lasalle Ams., Inc.*, 210 F.Supp.2d 430, 438 (S.D.N.Y. 2002) (Motley, J.) (noting "Courts in this circuit have not hesitated to deem admitted the facts in a movant's Local Civil Rule 56.1 Statement that have not been controverted by a Local Civil Rule 56.1 statement from the nonmoving party" and citing cases). "*Pro se* litigants are 'not excused from meeting the requirements of Local Rule 56.1.'" *Lee v. Starwood Hotels & Resorts Worldwide, Inc.*, 14-CV-5278, 2016 WL 3542454, at *7 (S.D.N.Y. June 22, 2016) (Failla, J.) (quoting *Wall v. One Source Co.*, 678 F.Supp.2d 170, 178 (S.D.N.Y. 2009) (Freeman, J.)). The Court is mindful of Plaintiff's *pro se* status, however, and "conduct[ed] its own independent review of the record" in determining the facts of the case. *Hayes v. County of Sullivan*, 853 F.Supp.2d 400, 406 (S.D.N.Y. 2012) (Karas, J.).

Queens, New York. Defs.' Rule 56.1 Statement ("Defs.' Facts") ¶¶ 1-3, 15, ECF No. 83.

P.S. 117 is a two-wing school building: One wing was recently renovated, and so all of its classrooms have air conditioning and their own separate bathrooms; the other wing is eighty-three years old, and its classrooms are not air conditioned. *Id.* ¶¶ 19-20. In general, classroom location at P.S. 117 is organized by grade "so that students of similar grades are grouped together within the building." *Id.* ¶ 19. Kindergarten and first-grade classrooms are generally in the new wing of the building. *Id.* ¶ 20. The pre-kindergarten classroom—Room 114—presents something of an exception, as it is in the old wing of the building, so it is not air-conditioned, but it has its own bathroom. *Id.* ¶ 24. But Room 114 is also "the largest room in the school," and because pre-kindergarten students are each allocated a certain number of square feet of classroom space, and their classroom is "supposed to have a bathroom," pre-kindergarten is held in Room 114. Englander Decl. Ex. F, at 194:20-95:6, ECF No. 85-6.

Ahead of each school year, including the 2010-11 school year, Plaintiff and the other teachers were permitted to "submit bid sheets listing their top three choices" in terms of classes they would teach during the following academic year. Defs.' Facts ¶¶ 25-29. Plaintiff, who is licensed to teach, and has in fact taught, pre-kindergarten through sixth grade, Englander Decl. Ex. E, at 12:6-14:12, ECF No. 83-5, ranked pre-kindergarten first, kindergarten second, and first grade third, Defs.' Facts ¶¶ 28-29. Defendant Cunningham—who, as P.S. 117's principal, makes teaching assignments based on a number of factors,

including teachers' seniority, preferences, and evaluations—assigned Plaintiff to kindergarten, her second choice. *Id.* ¶¶ 25-30.

Plaintiff had previously expressed a preference for non-air-conditioned classrooms because she has allergies, and so her class for the 2010-11 year was assigned to Room 113 in the old wing of the school—a room in which Plaintiff had taught in without issue on at least one prior occasion. *Id.* ¶¶ 25-30. Room 113, however, did not have a bathroom, "which required that [P]laintiff take her students to the bathroom for the first two weeks of the school year until they became familiar with the bathroom locations and could go on their own." *Id.* ¶ 36; *see also id.* ¶ 37 (noting kindergarten classrooms are not required to have bathrooms). Plaintiff did not want to "bathroom"[3] her students, although she testified that she was physically able to do so. *See* Englander Decl. Ex. F, at 323:10-27:19. *But see* Am. Compl. ¶¶ 87-88 (noting Plaintiff suffered from severe arthritis in her knees that limited her ability to walk); Defs.' Facts ¶ 64 (noting Plaintiff had medical accommodations on file for elevator use and a special parking space). She also protested that Room 113 was uncleanly and "did not have age appropriate furniture"—opinions that she also communicated to the parents of the children in her class. Defs.' Facts ¶¶ 51-57.

Plaintiff's complaints and complaints from her students' parents, over both the condition of Room

---

[3] "Bathroom" is used as a verb by both parties in this litigation to describe the task of escorting students to the restroom during instructional time.

113 and Plaintiff's refusal to bathroom the children, led to the following sequence of events:

- Plaintiff and her union representative met with Principal Cunningham and two assistant principals, who proposed Plaintiff move to Room 133, which had a bathroom. *Id.* ¶ 43.
- When Plaintiff refused this option because Room 133 is in the new wing and has air conditioning, Defendant Cunningham "offered to turn off the air-conditioning" for Plaintiff. *Id.* ¶¶ 44-45 .
- When Plaintiff nevertheless continued to refuse to move, Defendant Cunningham told Plaintiff "she could remain in [R]oom 113, and that she would be required to bathroom her students, consistent with her job description," which Plaintiff declined to do, ultimately forcing Defendant Cunningham "to send other staff members to bathroom [P]laintiff's students." *Id.* ¶¶ 45-49.
- Responding to continued concern about classroom conditions from parents of children in Plaintiff's class, Defendant Cunningham moved the class out of Room 113 into Room 133, which had, *inter alia*, more modern furnishings. *Id.* ¶¶ 57-59.
- Defendant Cunningham again offered to turn off the air conditioning, but Plaintiff instead simply refused to report to that classroom. *Id.* ¶¶ 59-60,70.
- Plaintiff also refused an assignment to tutor a small group of students, either in Room 358, which was not air conditioned and was acces sible by elevator, or in the cafeteria, which was

on the first floor of the building and thus accessible without requiring climbing stairs. *Id.* ¶¶ 73-89.

In sum, Plaintiff refused four different assignments throughout the 2010-11 school year and, at the end of the academic year and after a hearing held pursuant to section 3020-a of the New York State Education Law, Plaintiff was terminated. *Id.* ¶¶ 90-101.

According to Plaintiff, her assignment to her second choice of teaching kindergarten (instead of pre-kindergarten), her initial assignment to teach in Room 113, her subsequent assignment to teach in Room 133, and her termination at the end of the 2010-11 school year were discriminatory based on age and disability, as well as retaliatory; Defendants' attempts to make accommodations for Plaintiff's limitations and/or disabilities were insufficient; and she sustained injuries, including emotional distress, from Defendants' conduct. *See generally* Pl.'s Opp'n ("Opposition"), ECF No. 76. Defendants disagree, and move for summary judgment as to all of Plaintiff's remaining claims. *See generally* Defs.' Mem. in Supp. Mot. Summ. J. ("MSJ"), ECF No. 84. The Court now addresses Defendants' motion.

Legal Standard

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" by citation to materials in the record, including depositions, affidavits, declarations, and electronically stored information. Fed. R. Civ. P. 56(a)—(c). Affidavits and declarations, whether supporting or opposing a summary judgment motion,

"must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Id; see also Patterson v. County of Oneida*, 375 F.3d 206, 219 (2d Cir. 2004).

"In determining whether summary judgment is appropriate, [the] Court will construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (citation and internal quotation marks omitted). The role of the district court is not to weigh the evidence and determine the truth of the matter, but rather to answer "the threshold inquiry of whether there is the need for a trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). The Court must therefore consider whether the record could "lead a rational trier of fact to find for the non-moving party." *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 212 (2d Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

If the moving party carries its preliminary burden, the burden shifts to the non-movant to raise the existence of "specific facts showing that there is a genuine issue for trial." *Cityspec, Inc. v. Smith*, 617 F.Supp.2d 161, 168 (E.D.N.Y. 2009) (Wexler, J.) (quoting *Matsushita*, 475 U.S. at 586). "The mere existence of a scintilla of evidence" in support of the non-movant will not defeat a summary judgment motion. *Anderson*, 477 U.S. at 252. Nor will conclusory statements, devoid of specifics, defeat a properly supported motion for summary judgment. *See Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 (2d Cir. 1999); *Scotto*

v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998). Rather, the non-moving party must establish the existence of each element constituting its case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) ("[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.").

"When considering a dispositive motion made by or against a *pro se* litigant, the court is mindful that a *pro se* party's pleadings must be 'liberally construed' in favor of that party and are held to 'less stringent standards than formal pleadings drafted by lawyers.'" *Angulo v. Nassau County*, 89 F.Supp.3d 541, 548-49 (E.D.N.Y. 2015) (Bianco, J.) (quoting *Hughes v. Rowe*, 449 U.S. 5, 9 (1980)). "The Second Circuit 'liberally construe[s] pleadings and briefs submitted by *pro se* litigants, reading such submissions to raise the strongest arguments they suggest.'" *Id.* (quoting *Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007)). Notwithstanding this less rigorous standard, "proceeding *pro se* does not otherwise relieve a litigant of the usual requirements of summary judgment, and a *pro se* party's bald assertions unsupported by evidence[ ] are insufficient to overcome a motion for summary judgment." *Parkinson v. Goord*, 116 F.Supp.2d 390, 393 (W.D.N.Y. 2000) (Larimer, C.J.).

Discussion

I. Failure to Accommodate Medical Disability Claims

Plaintiff brings claims for failure to accommodate a medical disability under three separate statutes:

the ADA, the NYSHRL, and the NYCHRL.[4] *See generally* Am. Compl. These claims center around her status "as an 80 year old teacher with an apparent/ obvious disability," which left her with "no other choice than to initially refuse" her assignment to teach kindergarten in Room 113 for the 2010-11 year because it involved bathrooming her students. Opp'n at 4-5. Plaintiff similarly asserts she was left with "no other choice than to refuse" her three subsequent alternative assignments "in order to prevent unnecessary pain, suffering and repeated sickness" and to avoid other "safety issue[s]." *Id.* at 5-10. The Court now addresses the legal merit of these arguments.

The statutes Plaintiff invokes "require an employer to afford reasonable accommodation of an employee's known disability unless the accommodation would

---

[4] "A claim of disability discrimination under the NYSHRL is governed by the same legal standards as govern federal ADA claims." *Morse v. JetBlue Airways Corp.*, 941 F.Supp.2d 274, 292 (E.D.N.Y. 2013) (Matsumoto, J.). Although "the New York City Council has rejected" complete equivalence between NYCHRL and NYSHRL claims, New York state and federal statutes nevertheless establish the "floor below which the City's Human Rights law cannot fall." *Id.* (internal quotation marks omitted) (first quoting *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009); then quoting N.Y.C. Local Law No. 85). "Because a motion for summary judgment inquires only as to whether a 'rational factfinder could find in favor of the non-moving party,' as opposed to what the ceiling of a claim may be, the court herein applies an identical analysis to plaintiff's ADA, NYSHRL, and NYCHRL claims." *Id.* (quoting *Graves v. Finch Pruyn & Co., Inc.*, 353 F. App'x 558, 560 (2d Cir. 2009)). Although the analysis itself is the same, the Court "consider[s] separately whether [Plaintiff's NYCHRL] claim is actionable under the broader New York City standards." *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013).

impose an undue hardship on the employer." *Noll v. Intl Bus. Machs. Corp.*, 787 F.3d 89, 94 (2d Cir. 2015). To prevail on a failure-to-accommodate claim, a plaintiff must show that: "(1) [she] is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of [her] disability; (3) with reasonable accommodation, [the employee] could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations." *Id.* (quotation marks omitted) (quoting *McBride v. BIC Consumer Prods. Mfg. Co., Inc.*, 583 F.3d 92, 97 (2d Cir. 2009)). Where an "employer has already taken (or offered) measures to accommodate the disability, the employer is entitled to summary judgment if, on the undisputed record, the existing accommodation is 'plainly reasonable.'" *Id.* (quoting *Wernick v. Fed Reserve Bank of N.Y.*, 91 F.3d 379, 385 (2d Cir. 1996)).

An accommodation is reasonable if it "enable[s] an individual with a disability who is qualified to perform the essential functions of that position . . . [or] to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o)(1)(ii), (iii). Nevertheless, "employers are not required to provide a perfect accommodation or the very accommodation most strongly preferred by the employee." *Noll*, 787 F.3d at 95. "Reasonable accommodation may take many forms, but it must be effective." *Id.* The Court finds there can be no dispute that Defendants provided reasonable accommodations here.[5]

---

[5] On the Court's reading of the record, there may have been no basis for any accommodation whatsoever, notwithstanding the medical accommodations Plaintiff had on file, because she

The uncontested facts show that Defendants made three separate attempts—on this record, two more than were necessary—to accommodate Plaintiffs disabilities, even including those for which Plaintiff did not have a medical accommodation from Defendant DOE.[6] First, Defendants moved Plaintiff's kindergarten class to Room 133, which was on the first floor and had a bathroom and age-appropriate furniture, and turned off the air-conditioning in that room, *see* Defs.' Facts ¶¶ 19-20, 43-45, 51, 59-65; second, Defendants assigned Plaintiff to tutor students in Room 358, which was accessible by elevator and not air conditioned, *see id.* ¶¶ 72, 75, 77; and third, Defendants assigned Plaintiff to tutor students in the cafeteria, which "was on the ground floor of the school, such that [P]laintiff did not have to traverse stairs to reach it," *id.* ¶¶ 84-85.

Plaintiff's objections that the accommodations Defendants made were not reasonable are unavailing. Regarding her reassignment to Room 133, Plaintiff argues turning the air conditioning off was insufficient because "there is air that comes under the door." Englander Decl. Ex. F, at 374:2-14. But Plaintiff does not have a medical accommodation for a non-air-conditioned room and, even if she did, the reasonable accommodation requirement "does not require the

---

maintained she was physically able to bathroom students. Englander Decl. Ex. F, at 323:10-27:19. The Court need not decide this issue because, in any event, Plaintiff cannot prove the fourth element of a failure-to-accommodate claim.

[6] The parties agree that Plaintiff "had accommodations on file for elevator use and a special parking space," having successfully submitted medical accommodation requests to Defendant DOE's Medical Bureau, but did not have a similar accommodation request for a non-air-conditioned room. Defs.' Facts ¶¶ 63-64.

perfect elimination of all disadvantage that may flow from the disability," *Fink v. N.Y.C. Dep't of Pers.*, 53 F.3d 565, 567 (2d Cir. 1995), meaning a classroom that is allegedly drafty is insufficient to render the accommodation unreasonable. Plaintiff's concerns about Room 358's fire safety and whether she would be safe in the event of a fire are only tangentially related to her claimed medical accommodations and, more to the point, are unfounded given that the fire department inspected the room, the school, and the fire safety plan—at Plaintiff's request—and did not find any deficiencies. Englander Decl. Ex. F, at 172:5-73:5; 396: 32-99:14. And Plaintiff's determination that the cafeteria was "life-threatening" and not "educationally sound" is unsupported by the record, and the latter is unrelated to any of her claimed medical accommodations.[7] *Id.* at 399:22-402:10. There is thus nothing in the record that contravenes the reasonableness of any of the accommodations Defendants offered.

Finally, there is no support for Plaintiff's claim that "Defendants refused to enter into an interactive process of negotiation" with her. Am. Compl. ¶ 101; *cf.* 29 C.F.R. § 1630.2(o)(3) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability

---

[7] Further, in light of the reasonable accommodations offered to Plaintiff, any argument that Defendants violated the law by failing to assign Plaintiff to teach pre-kindergarten (which was in Room 114—the only room without air conditioning but that has a bathroom) or first grade (for which teachers are not required to bathroom students) is plainly foreclosed. *Cf. Noll*, 787 F.3d at 95 (clarifying employers are not required to provide "a perfect accommodation or the very accommodation most strongly preferred by the employee").

in need of the accommodation."). To the contrary, there is no dispute that Defendants engaged in numerous discussions with Plaintiff about where and what Plaintiff would teach and offered Plaintiff multiple options that would have addressed concerns Plaintiff raised during those conversations. And after offering Plaintiff these various accommodations, there certainly was no need for Defendants to make further efforts beyond those conversations because "[t]he point of engaging in an interactive process is to 'discover[ ] a means by which an employee's disability could have been accommodated.'" *Noll*, 787 F.3d at 98 (quoting *McBride*, 583 F.3d at 101). Where, as here, the end the process "is designed to serve . . . had already been achieved," no additional process is required. *Id.*

Applying the above analysis and "construing the NYCHRL liberally," the Court again finds that Defendants "engaged in the required 'interactive process' with [Plaintiff" and "ultimately offered her a reasonable accommodation." *Martinez v. Mount Sinai Hosp.*, 670 F. App'x 735, 736 (2d Cir. 2016). This is because, no matter how generously the Court construes Plaintiffs claims, she has "fail[ed] to prove the [challenged] conduct is caused at least in part by discriminatory or retaliatory motives." *Mihalik*, 715 F.3d at 113. In sum, as there is no genuine dispute that Defendants afforded Plaintiff reasonable accommodations as contemplated by the ADA, the NYSHRL, and the NYCHRL, the Court finds for Defendants on these claims.

II. Discrimination and Retaliation Claims

Plaintiff also brings claims for discrimination and retaliation under the ADA, ADEA, NYSHRL,

and NYCHRL. *See generally* Am. Compl. Specifically, she argues her assignment to teach kindergarten for the 2010-11 school year, her initial classroom reassignment, her subsequent teaching and classroom reassignments, and her ultimate termination represented discrimination and retaliation based on her age and disabilities. *See generally* Opp'n. The Court disagrees.

The burden-shifting framework that the Supreme Court articulated in *McDonnell Douglas Corp. v. Green*, 41 U.S. 792, 802-04 (1973), governs both discrimination and retaliation claims brought under the ADA, the ADEA, and the NYSHRL. *See Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 106, 110 (2d Cir. 2010) (discussing discrimination and retaliation claims under the ADEA); *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 609 (2d Cir. 2006) (discussing retaliation claims under the NYSHRL); *Regional Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48-49 (2d Cir. 2002) (discussing discrimination claims under the ADA); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223 (2d Cir. 2001) (discussing retaliation claims under the ADA); *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n.1 (2d Cir. 2000) (discussing discrimination claims under the NYSHRL). Under the *McDonnell Douglas* framework, (1) the plaintiff must first establish a *prima facie* case of discrimination; (2) if the plaintiff successfully does so, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason" for the challenged conduct; and (3) if the defendant successfully carries its burden, the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimi-

nation." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

The Court assumes Plaintiff has succeeded at the first step.[8] *Cf Burdine*, 450 U.S. at 253 (explaining burden of making out a *prima facie* case is "not onerous"). At the second step, Defendants have proffered substantial evidence that each of the actions Plaintiff challenges was "reasonably attributable to an honest even though partially subjective evaluation" of the relevant factors such that "no inference of discrimination can be drawn." *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 105 (2d Cir. 2001). According to Defendants, Plaintiff's initial assignment to teach kindergarten in Room 113 was based on P.S. 117's assignment system—which took into account not just seniority, but also other teachers' preferences and teaching evaluations—and on Plaintiff's previously expressed preference to teach in non-air-conditioned classrooms. Defs.' Facts ¶¶ 26, 33.[9] As discussed extensively, *supra*, Plaintiff's subsequent reassignments plausibly represented Defendants' efforts to make reasonable accommodations for the

---

[8] The Court notes that, while there are minor differences in the requisite showing for a *prima facie* case of discrimination from that of retaliation, and that the basis for the discrimination or retaliation differs across statutes, such distinctions are not pertinent to the outcome in the instant case.

[9] It is perhaps worth pointing out that, for the 2010-11 school year, four other teachers in addition to Plaintiff requested pre-kindergarten as their first choice, and Plaintiff had previously had the opportunity to teach pre-kindergarten on two separate occasions: once during the 2007-08 school year, and again during the 2009-10 school year; she taught kindergarten during the intervening 2008-09 school year. Defs.' Facts ¶¶ 18, 28.

health issues Plaintiff described. To the extent Plaintiff argues Defendants' decision not to reassign Plaintiff to teach first grade—a request Plaintiff made after the school year began—was discriminatory and retaliatory, Defendants explained switching teachers during the school year would have been disruptive. *Id.* ¶ 69. And Defendants explained they terminated Plaintiff from her position because Plaintiff had declined to fulfill her job responsibilities for an entire school year. *Id.* ¶¶ 90-91; *see also id.* ¶¶ 95-101 (summarizing decision of from hearing held pursuant to section 3020-a of the New York State Education Law, which determined termination was appropriate because Plaintiff "repeatedly neglected her duties").

For her part, Plaintiff does not offer any evidence from which a reasonable factfinder could conclude that these reasons were mere pretext. This failure—and indeed, her inability to show even that she was treated less well than other employees at all, let alone on the basis of her age or disability—defeats even the claims brought under the NYCHRL, which applies a less rigorous standard, but still requires some evidence that Defendants were motivated by discrimination or retaliation. *See Mihalik*, 715 F.3d at 109. In the absence of any such evidence, the Court grants summary judgment for Defendants on all Plaintiff's discrimination and retaliation claims.

III. State Law Tort Claims[10]

Plaintiff also brings claims of intentional infliction of emotional distress ("IIED") and defamation under New York law, arising from the incidents discussed *supra* that occurred during the 2010-11 school year and resulted in her termination. Am. Compl. ¶¶ 144-53. The Court turns lastly to these claims, and grants Defendants' request for summary judgment as to each.

A. Intentional Infliction of Emotional Distress

To prevail on an IIED claim under New York law, "a plaintiff must establish that there was 'extreme and outrageous conduct,' that the conduct was undertaken with 'intent to cause or disregard of a substantial probability of causing, severe emotional distress,' and that the conduct did in fact cause severe emotional distress." *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 157-58 (2d Cir. 2014). Critically, "[a]cts which merely constitute harassment, disrespectful or disparate treatment, a hostile environment, humiliating criticism, intimidation, insults or other indignities fail to sustain a claim of infliction of emotional distress because the conduct alleged is not sufficiently outrageous." *Lydeatte v. Bronx Overall Econ. Dev.*

---

[10] Because the Court grants summary judgment on the merits, it does not consider whether Plaintiff's state law claims, including those brought pursuant to the NYSHRL and the NYCHRL, are time-barred because they were first raised in the Amended Complaint, which was arguably filed outside of the one-year statute of limitations that applies to claims against Defendant DOE, or whether they relate back to the date of the original Complaint because it adequately (particularly in light of Plaintiff's *pro se* status) sets forth the relevant "conduct, transaction or occurrence" from which the new claims arise. *Slayton v. Am. Exp. Co.*, 460 F.3d 215, 228 (2d Cir. 2006).

Corp., 00-CV-5433, 2001 WL 180055, at *2 (S.D.N.Y. Feb. 22, 2001) (Daniels, J.). The undisputed facts, as discussed in this opinion, simply do not meet that very high bar. The Court thus grants summary judgment in favor of Defendants on Plaintiff's IIED claim.

B. Defamation

To prevail on a claim of defamation under New York law, a plaintiff must establish the following elements: (1) a written or oral defamatory statement of fact concerning the plaintiff; (2) publication of that statement to a third party; (3) fault, which here may be negligence; (4) that the defamatory statement is false; and (5) special damages or that the statement was defamatory on its face. *E.g.*, *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000). "New York state courts require a plaintiff to state defamation claims with particularity, setting forth 'the particular words complained of,' though 'their application to the plaintiff may be stated generally.'" *Biro v. Conde Nast*, 883 F.Supp.2d 441, 456 (S.D.N.Y. 2012) (Oetken, J.).

Having reviewed the record, the Court finds that Plaintiff has nowhere stated with any degree of specificity the allegedly defamatory statements Defendants made in connection with the 2010-11 school year. Plaintiff's allegations that Defendants "falsely accused Plaintiff of insubordination, neglect of duty, substantial cause rendering Plaintiff unfit to perform her obligations properly to the service, violations of by-laws, rules or regulations of the Chancellor, conduct unbecoming Plaintiff's position or conduct prejudicial to the good older [sic], efficiency, or discipline of the service, and incompetence," Am. Compl. ¶ 64, is insuf-

ficiently particular. And even considering every single one of the statements attributed to Defendants, there is no indication any was ever published to a third party or that any statement was false. Accordingly, the Court grants summary judgment in favor of Defendants on Plaintiffs defamation claim.

Conclusion

One final undisputed fact is that Plaintiff dedicated over three decades of her life to educating young children and endeavoring to make a positive difference in their lives. This Court does not overlook her efforts. And while the Court regrets that Plaintiff's tenure ended under contentious and unpleasant circumstances, there is nevertheless no remedy at law available to ameliorate those circumstances or their aftereffects. Defendants' motion for summary judgment is therefore GRANTED. The Clerk of Court is respectfully directed to terminate the motion pending at ECF No. 82, and close the case.

SO ORDERED.

/s/ Hon. William F Kuntz II
United States District Judge

Dated: Brooklyn, New York
September 29, 2017

DECISION AND ORDER OF THE DISTRICT COURT OF NEW YORK (APRIL 29, 2014)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LILLIE LEON,

Plaintiff,

v.

THE DEPARTMENT OF EDUCATION, a/k/a THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; PAULA CUNNINGHAM, in her Individual and Official capacities; NERIDA URBAN, in her Individual and Official capacities; and HARVEY KATZ, in his Individual and Official capacities,,

Defendants.

10-CV-2725

Before: William F. KUNTZ, II,
United States District Judge.

WILLIAM F. KUNTZ, II, United States District Judge:

This action arises out of Plaintiff's allegedly wrongful termination from Public School 117 ("P.S. 117") in 2011. At the time the Amended Complaint was filed, Plaintiff Lillie Leon was an 80-year-old tenured teacher. Plaintiff alleged that Defendants, New York

City Department of Education ("DOE"), and three former and current school officials, violated a number of federal, state, and municipal laws by discriminating against her on the basis of her age and disabilities. Defendants DOE and Paula Cunningham[1] now move to dismiss Plaintiff's Amended Complaint.

Plaintiff has already litigated the cause of her 2011 termination from P.S. 117 in State Court proceedings (the "State Proceedings"). The State Proceedings concluded that Plaintiff was dismissed for insubordination and neglect of her duties, not because of unlawful discrimination. Plaintiff's claims, as they relate to her 2011 termination, are collaterally estopped from re-litigation in this Court. Furthermore, Plaintiff's First Amendment and pre-2010 discrimination claims fail as matter of law. Finally, this Court declines to exercise supplemental jurisdiction over Plaintiff's municipal code and state-law tort claims in the absence of a surviving federal cause of action. Accordingly, Defendants' motion to dismiss is granted in its entirety.

I. Factual and Procedural Background

The following facts are taken from the Amended Complaint (Dkt. 39 ("Compl.")). These facts are not findings of fact by the Court, but rather are assumed to be true for the purpose of deciding this motion and are construed in a light most favorable to Plaintiff, the non-moving party. *See Patane v. Clark*, 508 F.3d 106, 111 (2d Cir. 2007). The Court also takes judicial

---

[1] Defendants Nerida Urban and Harvey Katz are no longer employees of the DOE and are therefore not represented by Corporation Counsel. Urban and Katz have not answered or otherwise responded to the Amended Complaint.

notice of court documents relating to Plaintiff's prior state and federal court actions in order to describe the procedural posture of this case. *See Swiatkowski v. Citibank*, 745 F.Supp.2d 150, 156 (E.D.N.Y. 2010) (Bianco, J.).

A. Plaintiff's Pre-2010 Allegations

At the time the Amended Complaint ("Compl.") was filed, Plaintiff was 80 years old and, at all relevant times, she was employed by the DOE at P.S. 117. (Compl. ¶ 6). Plaintiff had been employed by the DOE since 1978. (*Id.* at ¶ 16). Plaintiff suffered from severe arthritis in her knees that limited her ability to walk, as well as allergies that limited her ability to breathe in cold climates. (*Id.* at ¶¶ 87-88). Plaintiff provided Defendants medical documentation in May and June 2008 concerning her disabilities. (*Id.* at ¶¶ 38, 40).

Plaintiff previously sued the New York City Board of Education in June 2003, alleging that the DOE violated the Age Discrimination in Employment Act ("ADEA") by treating younger employees more favorably. (*Id.* at ¶ 21). That suit settled in Plaintiff's favor in July 2006. (*Id* at ¶ 23). Plaintiff now alleges that Defendants began discriminating and retaliating against her because she filed the federal lawsuit. (*Id.* at ¶ 22).

According to Plaintiff, Defendants began a "campaign to force Plaintiff to retire" during the pendency of the lawsuit and beyond the settlement. (Dkt. 47, (Plaintiff's Memorandum in Opposition to the Motion

to Dismiss ("Pl.'s Br.")) at 7).[2] This campaign included inquires as to when Plaintiff would retire in 2005 and 2008, (Compl. ¶¶ 27, 41); requests that Plaintiff sign a statement indicating her intended date of retirement, (*id.* at ¶ 28); the use of profanities and false accusations against Plaintiff, (*id.* at ¶ 31); and "a continuous pattern of severe harassment, hostile working environment, retaliation, humiliation, and intimidation." (*Id.* at ¶ 29).

Additionally, Plaintiff alleges that she was denied her first choice teaching assignments for the 2008-09 and 2010-11 school years, even though her seniority should have given her priority. (*Id.* at ¶¶ 34, 47, 66-67). Furthermore, Plaintiff alleges that unfounded disciplinary letters were placed in bad faith into her personnel file in April and May 2008, in an effort to have Plaintiff terminated. (Compl. ¶ 34). Plaintiff claims that in response to her complaints about the disciplinary letters, she was given an unsatisfactory "U"—for the first time in career—in her 2007-08 Annual Performance Evaluation. (*Id.* at ¶¶ 35-37). Plaintiff alleges that she was required to write out long lesson plans in September 2008, a task not required of tenured or younger teachers. (*Id* at ¶ 43).

Plaintiff alleges that in October 2008, Defendants placed two "known severely troublesome students" into her class as part of the alleged campaign to force her into retirement. (*Id.* at ¶ 46). Plaintiff alleges that later in the 2008-09 school year, she was not provided proper testing materials, (*id* at ¶ 49), a letter of dedi-

---

[2] This document is titled "Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment," but in fact opposes the Motion to Dismiss. (*See* Dkt. 49).

cation to her students was omitted from a Moving-Up Ceremony program, and her class was excluded from a field trip to Barnes & Noble. (*Id.* at ¶ 51). On March 17, 2009, Plaintiff filed a charge of discrimination against the school with the Equal Employment Opportunity Commission ("EEOC"). (*Id.* at ¶ 50). Plaintiff also alleges that similar conduct occurred during the 2009-10 school year whereby her class was excluded from a playground equipment ribbon ceremony and had a field trip canceled. (*Id.* at ¶¶ 52, 55).

B. The 2010-11 School Year

Plaintiff brought her initial complaint in this action on June 15, 2010, alleging the events discussed above. (Dkt. 1). In 2011, Plaintiff filed the Amended Complaint alleging that she was subject to further discrimination by the Defendants during the 2010-11 school year. The Amended Complaint alleged that "Defendants intensified their retaliation and discrimination of Plaintiff in order to force her to retire or to terminate her" during the 2010-11 school year. (Pl.'s Br. at 3); (Compl. ¶ 56). Plaintiff's allegations of discrimination during that school year began with her assignment to teach twenty-five Kindergarten students in a classroom without an in-class bathroom ("Room 113"). (Compl. ¶ 57). This required Plaintiff to "bathroom"[3] her students. (*Id.* at ¶¶ 57, 59). Plaintiff also alleged that Room 113 lacked age-appropriate furniture. (*Id* at ¶ 63). In Fall 2010, Plaintiff contacted the parents of her students and raised accusations that

---

[3] "Bathroom" is used as a verb by both parties in this litigation to describe the task of escorting students to the restroom during instructional time.

the classroom was filthy, lacked an attached bathroom, and lacked age-appropriate furniture. (*Id.* at ¶ 64).

In response to Plaintiff's conduct, including her refusal to accept any of the alternative teaching assignments offered in lieu of teaching Kindergarten in Room 113, Defendants brought New York Educ. Law § 3020-a charges against Plaintiff citing eight "specifications," or charges of misconduct, arising out of the events of the 2010-11 school year. (Dkt. 48-1 (Decl. of Shakera Khandakar Exhibit A, Opinion and Award in *New York City Dep't of Ed. v. Leon*, SED File No. 17, 318 (July 15, 2011)) ("Ex. A") at 3-4).[4] Plaintiff alleges that these proceedings were initiated by Defendants as part of their continued attempts to "retaliate, discriminate, harass and intimidate Plaintiff." (Pl.'s Br. at 4 (citing Compl., ¶ 76)).

C. The 3020-a Proceeding

On July 15, 2011 the Hearing Officer in the 3020-a proceeding issued the final Opinion and Award. (Ex. A at 1). After three days of evidentiary hearings, the record was closed, and all events up to May 15, 2011 were considered. (*Id.* at 2). According to the Opinion, "[b]oth parties were represented by counsel and had a full and fair opportunity to present evidence and

---

[4] The Court considers Defendants' exhibits in deciding the motion to dismiss because Plaintiff referred to the documents in the Amended Complaint, the documents are in Plaintiff's possession, and they are documents that Plaintiff had knowledge of and relied upon in filing the Amended Complaint. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (finding that plaintiff's reliance on a document in drafting a complaint is the most significant factor for a court to consider in looking beyond the four corners of the complaint on a motion to dismiss).

argument, to engage in the examination and cross-examination of witnesses, and otherwise to support their respective positions." (*Id.* at 2).

The 3020-a proceedings charged Plaintiff with "insubordination, neglect of duty, [and] conduct unbecoming her position[.]" (*Id.* at 3). The eight "specifications" against Plaintiff included:

> "Specification 3: Beginning on or about September 13-15, 2010, [Plaintiff] refused to 'bathroom' the students in her assigned Kindergarten class 113, as directed.
>
> Specification 4: On or about September 12, 2010, [Plaintiff] contacted parents of kindergarten class 113, without authorization from the Principal, regarding [Plaintiff's] claims against the school and told them in sum and substance that classroom 113 was:
>
> 1. Filthy
> 2. Without a bathroom
> 3. Unsuitable for children
> 4. With furniture that was not age appropriate.
>
> Specification 5: Beginning on or about September 13, 2010, [Plaintiff] informed parents around dismissal time, in sum and substance, that:
>
> 1. I will not take your children to the bathroom.
> 2. I am not a babysitter.
>
> Specification 6: Beginning on or about September 20, 2010, [Plaintiff] refused the Principal's directive that [Plaintiff] teach newly assigned kindergarten class 133.

> Specification 7: On or about November 22, 2010, [Plaintiff] refused the Principal's directive that [Plaintiff] conduct a tutoring teaching assignment called "Circular 6" in room 358.
>
> Specification 8: [Plaintiff] failed to report to her designated assignment on or about September 20, 2010 through March 11, 2011, as directed."

(Ex. A at 3-4).

The Hearing Officer ultimately concluded that there was just cause for Plaintiff's termination as she was insubordinate, neglected her duties, was unfit to perform her obligations, violated by-laws, rules, or regulations of the Chancellor, engaged in conduct unbecoming a teacher, and was incompetent and inefficient in her service. (Ex. A at 4).

Among the relevant issues decided by the Hearing Officer were:

> Background
>
> - Plaintiff did not request an accommodation for air conditioning for the 2010-11 school year. Plaintiff was informed that she would need to do more than submit a letter to the principal and that an accommodation request needed to be made to the Medical Bureau. (*Id* at 10).
>
> Specification 3
>
> - Plaintiff ignored numerous written and verbal directives that she was to bathroom her students. (*Id.* at 26). Plaintiff was in a classroom without a bathroom because the administration had attempted to defer to her health concerns about air conditioners. (*Id.* at 23). Plaintiff

was physically able to monitor bathrooming and was aware that this was part of the responsibilities of a kindergarten teacher. (*Id.* at 24-25).

Specification 4

- The manner and substance of the messages left by Plaintiff to her students' parents were "alarming" and inappropriate because she did not advise the administration of her issues before reaching out to the parents. (*Id.* at 26-27). Those actions were "unprofessional and unbecoming her position and the [DOE] had just cause for discipline." (*Id.* at 27).

Specification 6

- Principal Cunningham moved Plaintiff to air-conditioned Room 133 because of Plaintiff's refusal to bathroom students and her contacting of the students' parents. (*Id.* at 28-29). Plaintiff was to blame for being put in Room 133 and nonetheless refused to provide instruction in Room 133, ignored directives to report to that classroom, and engaged in continuing insubordination. (*Id.* at 29). There were no safety issues with the classroom justifying Plaintiff's refusal to teach. (*Id.* at 29). "Although [Plaintiff] testified that air conditioning made her hoarse and that she had previously submitted a doctor's note to the prior principal, she did not apply for an accommodation for air conditioning from the Medical Bureau. Although the Principal initially deferred to [Plaintiff s] preference for the old wing, she was not prohibited from assigning [Plaintiff] to the new wing. In an attempt to appease her, Principal Cunningham

offer to turn off the air conditioning in the room. Even so, [Plaintiff] still refused to teach in Room 133[.]" (*Id.* at 29).

Specification 7

- When Plaintiff was assigned and then refused a third teaching assignment in Room 358 during the 2010-11 school, "[t]he totality of the evidence support[ed] the finding that [Plaintiff] had no reasonable basis for her belief that assignment to Room 358 posed a threat to her health or safety." (*Id.* at 30). Plaintiff was given three warnings to report to her assignment in Room 358, and her failure to adhere to those directives constituted insubordination and warranted discipline. (*Id.* at 32-33).

Specification 8

- After being deemed fit for duty, Plaintiff was given the option to teach a tutoring course ("Circular 6") in the cafeteria. (*Id* at 33). Plaintiff refused to teach there for "safety" reasons, even though there was no reasonable imminent harm. (*Id.* at 34). Plaintiff was found guilty of failing to report to any of her designated assignments between September 20, 2010 and May 11, 2011. (*Id.* at 35).

Summary

- Overall, Plaintiff attempted to justify her numerous insubordinate acts by claiming that there were health and safety reasons excusing her non-compliance. However, those Plaintiff's excuses were "unsubstantiated and did not justify her refusal to bathroom her students,

teach in Room 133[,] with or without air conditioning, Room 358[,] and the cafeteria because the assignments posed a threat of physical harm to her health or safety is not supported by the evidence." (*Id.* at 34).

Penalty

- "From the time she did not get her first choice of Pre-K, the evidence established that Ms. Leon embarked on a collision course with the Principal and engaged in outright defiance and refused, not just [once], but disobeyed four teaching assignments. The terms of the assignments were clearly communicated to her verbally and, in writing, and she was repeatedly warned that her failure to perform her duties was insubordinate and could lead to discipline. Her obstinate behavior remained unchanged despite the warnings and numerous opportunities to correct her behavior. With each and every assignment, [Plaintiff] showed no understanding that the Principal, and not she, was in charge with respect to teaching assignments, student welfare and building safety. However, when [Plaintiff] voiced concerns, the Principal attempted to give her options to allay her fears which she consistently rebuffed. At the end of the day, Ms. Leon was unable to identify a single classroom in a 53 room building in which she would be willing to teach other than in the Pre-K classroom." (*Id.* at 35).

The Hearing Officer held that termination was the appropriate penalty under the facts and circumstances, and that the DOE had established that Plaintiff was unfit to continue in her position. (*Id.* at 36).

Plaintiff's repeated neglect of her duties, persistent insubordination, and consecutive refusals to perform her assigned teaching positions became, in effect, a refusal to work for six months. (*Id.* at 36).

Following her dismissal, Plaintiff brought a Notice of Verified Petition in New York Supreme Court, New York County, initiating an Article 75 proceeding challenging the holdings of the 3020-a proceedings. (Dkt. 48-1 (Decl. of Shakera Khandakar Exhibit B, Lillie Leon's Notice of Verified Petition (Aug. 1, 2011)) ("Ex. B")). Plaintiff (1) argued that the 3020-a decision was unenforceable because it was issued more than thirty days beyond the last date of the hearing (as directed by statute), (2) disagreed with the Hearing Officer's conclusions, and (3) asserted that the Hearing Officer was biased against her because of her age. (Dkt. 48-1 (Decl. of Shakera Khandakar Exhibit C, *Leon v. Dep't of Ed of the City of New York*, No. 108822/11 (Sup. Ct. N.Y. Cnty. Apr. 12, 2012) (Huff, J.)) ("Ex. C") at 2-3).

DOE moved to dismiss the petition. (*Id.* at 3). After reviewing the Hearing Officer's findings and determining that the "penalty [was] not shocking to one's sense of fairness," the Article 75 court granted the motion holding that Petitioner had "failed to demonstrate that the [3020-a proceeding] should be overturned." (*Id.* at 3).

D. The Motion to Dismiss the Amended Complaint

Less than two weeks after the adverse, final decision in the Article 75 proceedings, Plaintiff filed her Amended Complaint in this case adding her 2010-11 allegations. (Dkt. 39). Plaintiff alleged that Defendants' conduct violated the ADEA, the Americans

with Disabilities ("Act"), New York Executive Law § 206 ("NYSHRL"), the New York City Administrative Code, the First Amendment of the Constitution, and two state-law torts. Defendants DOE and Paul Cunningham have filed this motion to dismiss, arguing that Plaintiff's claims are either precluded by collateral estoppel and *res judicata* or insufficiently pled.

II Analysis

A. Plaintiff's 2010-11 Claims Are Barred by Collateral Estoppel

Defendants argue that Plaintiff's claims are barred by collateral estoppel and *res judicata*. According to Defendants, the issue of why Plaintiff was terminated from P.S. 117 has already been determined in the 3020-a and Article 75 proceedings. This Court agrees. Because the issue at the heart of Plaintiff s 2010-11 claims—whether the cause of her termination was discrimination—was already decided during prior state court proceedings, Plaintiff is estopped from now bringing those claims in this Court.

1. Collateral Estoppel Standard

"A federal court must apply the collateral estoppel rules of the state that rendered a prior judgment on the same issues currently before the court[,]" *LaFleur v. Whitman,* 300 F.3d 256, 271 (2d Cir. 2002). Collateral estoppel in New York "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action are the same." *Ryan v. NY. Tel. Co.,* 62 N.Y.2d 494, 500 (1984); *El-Shabazz*

v. State of New York Comm. on Character & Fitness, 428 F. App'x. 95, 96-97 (2d Cir. 2011) (collateral estoppel applies in the subsequent action "irrespective of whether the tribunals or causes of action are the same"). Under New York law, collateral estoppel applies when (1) the issue in question was actually and necessarily decided in a prior proceeding; (2) is decisive in the current proceeding; and (3) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding. *See Evans v. Ottimo*, 469 F.3d 278, 281 (2d Cir. 2006). The party asserting preclusion carries the burden of establishing the first two elements, whereas the party opposing preclusion must demonstrate that there was not a full and fair opportunity to litigate. *Id.* at 281-82.

"[F]ederal courts must give state-court judgments the same preclusive effect as they would receive in courts of the same state." *Burkybile v. Bd of Ed. of the Hastings-on-the-Hudson Union Sch. Dist.*, 411 F.3d 306, 310 (2d Cir. 2005). Findings reached through section 3020-a hearings, which are quasi-judicial administrative actions, are entitled to preclusive effect. *Id.* at 308, 311-12; *Smith v. New York City Dep't of Educ.*, 808 F.Supp.2d. 569, 578 (S.D.N.Y. 2011) (Buchwald, J.). Additionally, notwithstanding the limited judicial review by an Article 75 court of a 3020-a proceedings, "a state court has the authority to consider claims alleging a violation of due process with respect to the conduct of the [3020-a] proceeding in an Article 75 proceeding." *Saunders v. New York City Dep't of Ed*, No. 07-CV-2725, 2010 WL 2816321, at *18 (E.D.N.Y. July 15, 2010) (Feuerstein, J.) (citing *Giardina v. Nassau County*, No. 08-CV-2007, 2010 WL

1850793, at *4-5 (E.D.N.Y. May 7, 2010) (Bianco, J.) (holding that the state court had the ability to consider the plaintiffs' claims regarding a lack of due process in the arbitration and could examine whether the procedures used in the arbitration itself complied with due process)). There is no question that the 3020-a and Article 75 proceedings here are afforded preclusive effect.

2. ADEA Standard

Plaintiff's first cause of action against Defendants alleges that she was subjected to an adverse employment action and disparate treatment, a hostile work environment, and retaliation because of her age in violation of the ADEA. (Compl. at ¶¶ 81-83). "To establish a prima facie case of age discrimination under the ADEA, a plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination." *Smith,* 808 F.Supp.2d at 579; *James v. N.Y. Racing Ass'n,* 233 F.3d 149, 153-54 (2d Cir. 2000). If the plaintiff can establish this prima facie case, the burden of proof is then shifted to the defendants to offer legitimate, nondiscriminatory justifications for their actions. *Smith,* 808 F.Supp.2d at 579 (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506-07 (1993); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-03 (1973)). After the defendant articulates a legitimate reason for the action, the plaintiff must demonstrate that the proffered reason is pretextual by demonstrating that the defendants' reasons are false and that the adverse action was motivated by unlawful discrimination. *Smith,* 808 F.Supp.2d at 579

(citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981); *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 401 (2d Cir. 1998)). In sum, "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009); *DiGirolamo v. MetLife Grp., Inc.*, 494 F. App'x 120, 122 (2d Cir. 2012).

3. ADA Standard

Plaintiff also alleges that she was discriminated against because of her arthritis and allergies, and that Defendants failed to reasonably accommodate her disabilities. (Compl. ¶¶ 84-103). To state a claim for ADA discrimination, the plaintiff must demonstrate that: "(1) plaintiff's employer is subject to the ADA; (2) plaintiff was disabled within the meaning of the ADA; (3) plaintiff was otherwise qualified to perform the essential functions of her job, with or without reasonable accommodation; and (4) plaintiff suffered an adverse employment action because of her disability." *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 198 (2d Cir. 2004) (citing *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 63 (2d Cir. 2003)).

In the same vein, to state a claim for ADA failure to accommodate, the plaintiff must demonstrate that: "(1) [she] is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of [her] disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations." *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 97 (2d Cir.

2009). "The same burden-shifting framework that applies to [Plaintiff's] age discrimination claims under the ADEA applies to . . . [her] disability discrimination claims under the ADA." *Smith*, 808 F.Supp.2d at 580 (citing *McBride*, 583 F.3d at 96).

4. Plaintiff's Discrimination and Retaliation Claims Are Precluded

Defendants assert that Plaintiff's ADA and ADEA claims must be dismissed because "a Hearing Officer [has] found [P]laintiff guilty of misconduct, the parties have already actually litigated and decided that any adverse employment action was justified, and therefore, could not have been a pretext for unlawful discrimination." (Def.'s Br. at 4.)

In nearly identical circumstances, the court in *Smith* held that after a 3020-a Hearing Officer found that the plaintiff was guilty of misconduct, time and attendance abuse, insubordination, and neglect of duty, the issue of why the plaintiff was terminated was precluded from further litigation. *Smith*, 808 F.Supp.2d at 579-80. The court determined that the ultimate issue was the same both in the case before it and the 3020-a proceeding. *Id.* "[I]n both contexts, it becomes necessary to resolve whether [the plaintiff] was subjected to adverse employment actions because of his own conduct or because of other factors, such as impermissible discrimination by defendants." *Id.* at 580. After the 3020-a Hearing Officer found the plaintiff guilty of misconduct, "the parties [had] actually litigated and the hearing officers actually decided that any adverse employment action was justified and not based on impermissible discrimination. Thus, because the hearing officers concluded that

there existed just cause for the adverse employment actions, those officers actually decided that [plaintiff] cannot make out a prima facie case of discrimination nor can he put forth evidence of pretext." *Id.* The court held that the "doctrine of collateral estoppel in fact bars the federal discrimination claims raised in [that] action." *Id.* at 579.

Here, as in *Smith*, "it is well-settled that the [hearing], which [was] conducted in accordance with section 3020—a of the Education Law, may be afforded preclusive effect." *Smith*, 808 F.Supp.2d at 580 (citing *Burkybile*, 411 F.3d at 308). Accordingly, Plaintiff's ADA and ADEA discrimination and retaliation claims, as far as they relate to the 2010-11 school year, are collaterally estopped.

The question before the Court is whether Plaintiff was terminated because of improper conduct or Defendants' discrimination or retaliation against her. But during the 3020-a proceedings, the parties actually litigated this very issue, (Ex. A at 2), and the Hearing Officer actually decided that Plaintiff's termination was caused by Plaintiff's insubordinate conduct, not by impermissible discrimination or retaliation. (*Id.* at 36). The Hearing Officer's determination that there was cause for Plaintiff's termination precludes Plaintiff from making a prima facie case of discrimination or retaliation.

Plaintiff had a full and fair opportunity to litigate the issue of her termination. Plaintiff was given a three-day evidentiary hearing in which she was represented by counsel and was given every opportunity to present evidence, argue her view of the facts, and cross-examine witnesses. (Ex. A at 2). Further, the cause of Plaintiff's termination was necessary to the

final judgment in the 3020-a proceeding. The crucial questions in the proceeding were whether the DOE's alleged specifications were true and whether they supported terminating a tenured teacher. The Hearing Officer unequivocally and validly held that at least five of the specifications were proven by the DOE and that the insubordinate acts justified the termination of Plaintiff. (*See* Ex. A). These findings were given a second consideration on appeal in the Article 75 court, which affirmed the Hearing Officer. *Saunders*, 2010 WL 2816321, at *18 ("By denying the petition pursuant to Article 75, the state court actually and necessarily decided both that [Hearing Officer's] decision was supported by adequate evidence and that the decision was in accord with due process.").

Plaintiff argues that the holding in another Southern District case, *Senno v. Elmsford Union Free Sch. Dist.*, 812 F.Supp.2d 454 (S.D.N.Y. 2011) (Wood, J.), dictates a different result. The court in *Senna* held that the plaintiff's retaliation claim had not been considered in the 3020-a proceeding and was therefore not collaterally estopped from being re-litigated in the federal lawsuit. *Id.* at 471. However, the retaliation claim in *Senno* is distinguishable from Plaintiff's claim here, as the plaintiff in *Senno* alleged retaliation based on his disparate treatment compared to one other school district employee who engaged in the same conduct as plaintiff, but was not terminated. *See id.* at 461 ("[Plaintiff's retaliation] claim will turn on whether Plaintiff and [the other employee] were similarly situated 'in all material respects,' which, in turn, depends in part upon whether they engaged in misconduct that was 'of comparable seriousness.'"). The court in *Senno* was unable to give

preclusive effect to the 3020-a proceeding because the Hearing Officer did not do a comparative evaluation or decide any issue related to the school district's treatment of the other employee. *Id.* at 471. That issue is not present here as the acts of discrimination and retaliation that were before Plaintiff's Hearing Officer are the very same acts of discrimination and retaliation alleged in the Amended Complaint. Unlike in *Senno,* Plaintiff's 3020-a proceeding addressed all of the same facts relevant to her federal claims in determining that the cause of Plaintiff's termination was her own inappropriate conduct.

The Hearing Officer's findings, upheld in a subsequent Article 75 proceeding, foreclose Plaintiff's ability to make a prima facie case for discrimination or retaliation concerning her termination during the 2010-11 school year under either the ADA or ADEA. Plaintiff cannot allege in this proceeding that she was terminated because of discrimination or retaliation when prior State Proceedings have held otherwise. Plaintiff's First and Second Causes of Action, as far as they relate to the 2010-11 school year, are therefore dismissed with prejudice.

5. Plaintiff's Failure to Accommodate Claims

Plaintiff's Third Cause of Action alleges that Defendants denied Plaintiff's request for reasonable accommodations for her allergies. Again, the Hearing Officer was faced with this very question and decided the issue in Defendants' favor. In determining that Plaintiff was guilty of Specification 6, the Hearing Officer determined that Plaintiff failed to make a proper request for an allergy accommodation for the

2010-11 school year. (Ex. A at 28-29). The Hearing Officer found that Plaintiff "did not apply for an accommodation for air conditioning from the Medical Bureau" and that Principal Cunningham "was not prohibited from assigning [Plaintiff] to the new wing[.]" (Ex. A at 29). In fact, the Plaintiff herself admitted during the 3020-a proceeding that she was initially given a non-air-conditioned room only because the principal was attempting to appease her despite the lack of an official request for an accommodation. (Ex. A at 29) (Plaintiff "testified that . . . she did not apply for an accommodation for air conditioning from the Medical Bureau."). Plaintiff cannot allege that she was denied a reasonable accommodation when she did not actually request one. *See Thorner—Green v. New York City Dept. of Corrs.*, 207 F.Supp.2d 11, 14-15 (E.D.N.Y. 2002) (Gershon, J.) (an "employee cannot hold an employer liable for failing to provide an accommodation that the employee has not requested in the first place"); *Falchenberg v. New York City Dept of Ed.*, 375 F.Supp.2d 344, 348 (S.D.N.Y. 2005) (Sweet, J.).

The question of whether Plaintiff requested an accommodation was actually litigated and decided in the 3020-a proceedings. The Hearing Officer needed to determine whether Plaintiff was guilty of Specification 6 (failure to report to her teaching assignment in the air-conditioned Room 133), and if Plaintiff had a health or safety reason for not reporting to her teaching assignment, she would not have been insubordinate. (Ex. A at 28-29). Yet, the Hearing Officer found that Plaintiff did not have such a justification, *i.e.* a proper request for an accommodation, and therefore was insubordinate. (Ex. A at 29). As

the Hearing Officer necessarily held that Plaintiff failed to make such a request, Plaintiff is collaterally estopped from alleging a necessary element of her failure to accommodate claim.[5]

Accordingly, the Defendants' motion to dismiss the Third Cause of Action, as it applies to the 2010-11 school year, is granted.

6. Plaintiff's New York Human Rights Law Claims

Plaintiff alleges violations of New York Executive Law § 296 ("NYSHRL") for unlawful discrimination, retaliation, and failure to engage in interactive negotiation as well as the aiding and abetting of such violations. (Compl. ¶¶ 104-22). "New York State disability discrimination claims are governed by the same legal standards as federal ADA claims." *Rodal v. Anesthesia Group of Onondaga*, 369 F.3d 113, 117 n.1 (2d Cir. 2004) (noting that its decision on ADA claims "pertain[ed] equally to . . . parallel state claim"); *Abdu-Brisson v. Delta Air Lines, Inc.*, 239

---

[5] It is also worth noting that Plaintiff's claim that the school officials "refused to enter into an interactive process of negotiation" is without merit. The Hearing Officer determined that despite not having requested an accommodation for her allergies, the P.S. 117 administration nonetheless deferred to Plaintiff's preferences by first giving her a kindergarten classroom without air conditioning, Room 113, and then offering to turn off the air conditioning in Room 133 when she was re-assigned there (after insubordinately refusing to bathroom her students in Room 113). (Ex. A at 29). It was Plaintiff who ultimately testified that only one of the 53 rooms in P.S. 117 was suitable for her to teach in. (Ex. A at 35). In essence, when Plaintiff was not given the pre-K teaching assignment that she wanted, she refused to engage in interactive, reasonable negotiation with the administration.

F.3d 456, 466 (2d Cir. 2001) ("age discrimination suits brought under the State HRL . . . are subject to the same analysis as claims brought under the ADEA"). Accordingly, the Court will evaluate Defendants' motion to dismiss the Plaintiff's NYSHRL claims using the same legal standards as her ADA and ADEA claims.

As with her federal claims, Plaintiff is estopped from bringing her § 296 claims by the legal findings of the 3020-a Hearing Officer, as far as they relate to the 2010-11 termination. For the same reasoning as discussed above, the Hearing Officer necessarily decided that Plaintiff's termination was a result of her insubordination, not the result of any discriminatory or retaliatory Treatment towards her. (Ex. A at 36). Therefore, Plaintiff is precluded from asserting that she was terminated because of Defendants' discrimination or retaliation towards her in violation of the NYSHRL.

Plaintiff's Fourth and Fifth Causes of Action are dismissed to the extent they concern the 2010-11 school year termination.

B. Plaintiff's First Amendment Claim and Pre-2010-11 Allegations of Discrimination, Retaliation, Failure to Accommodate, and Hostile Work Environment Fail as a Matter of Law

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl v. Twombly*, 550 U.S. 544, 570 (2007)). A sufficiently pled complaint must provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Pension Ben. Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717 (2d Cir. 2013)

(quoting *Iqbal*, 556 U.S. at 678). If a complaint merely offers labels and conclusions, a formulaic recitation of the elements, or "naked assertions devoid of further factual enhancement," it will not survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). The Court must accept all factual allegations in the complaint as true, but is "not bound to accept as true legal conclusion couched as factual allegation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Legal conclusions must be supported by factual allegations. *Iqbal*, 556 U.S. at 678; *Pension Ben. Guar.*, 712 F.3d at 717.

1. Plaintiff's First Amendment Claim Fails as Her Speech was Made as a DOE Employee

Plaintiff's First Amendment claim rests on her allegation that the speech in question—Plaintiff s statements to her students' parents that Room 113 was "deplorable, filthy, and unsafe" and lacked age-appropriate furniture—was made outside of her DOE employment and as a public citizen. (*See* Pl.'s Br. at 23). To determine whether or not a plaintiff's speech is protected by the First Amendment, a court must begin by asking whether the employee spoke as a citizen on a matter of public concern. *Sousa v. Roque,* 578 F.3d 164, 170 (2d Cir. 2009). "If the court determines that the plaintiff either did not speak as a citizen or did not speak on a matter of public concern, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Id.* (internal citations omitted). If the subject of an employee's speech is a matter of public concern, her speech is nonetheless unprotected by the First Amendment if it is made in her capacity as a govern-

ment employee. *See id*; *see also Jackler v. Byrne*, 658 F.3d 225, 237 (2d Cir. 2011); *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 115-16 (2d Cir. 2011).

The Supreme Court has recognized that a public employee must "by necessity . . . accept certain limitations on his or her freedom," because, her speech can "contravene governmental policies or impair the proper performance of governmental functions." *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006). Furthermore, an employee's speech can be found to be made as part of an employee's official duties even if it is not expressly required, "so long as the speech is in furtherance of such duties." *Weintraub v. Bd. Of Ed. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196, 202 (2d Cir. 2010). The inquiry is "a practical one" as "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Garcetti*, 547 U.S. at 424-25. Because, the determination of whether a public employee is speaking pursuant to her official duties "is not susceptible to a brightline rule," the Second Circuit has held that "[c]ourts must examine the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two." *Ross v. Breslin*, 693 F.3d 300, 306 (2d Cir. 2012). A teacher's communication with a student's parents concerning "what occurred in the classroom" has been held to be made in the plaintiff's capacity as a teacher. *Marchi v. Bd of Coop. Ed. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999).

Reading the Amended Complaint in the light most favorable to Plaintiff, she has failed to sufficiently allege that she was speaking outside her capacity as an employee of the DOE when she told the parents that Room 113 was "deplorable, filthy and unsafe." (Compl. ¶ 113). Here, the practical inquiry set forth in *Garcetti* leads to only one conclusion: a teacher discussing classroom conditions with students' parents is wholly within the scope of the teacher's core duties. *See Weintraub*, 593 F.3d at 202-03 (holding that a teacher's union grievance "was pursuant to his official duties because it was part-and-parcel of his concerns about his ability to properly execute his duties as a public school teacher") (internal citations omitted); *see also Marchi*, 173 F.3d at 476 (holding that a note sent to a parent as a "thank you" for providing religious music that would calm a special needs student was sent in the plaintiff's capacity as a teacher). Just as maintaining classroom discipline "is an indispensable prerequisite to effective teaching and classroom learning," *Weintraub*, 593 F.3d at 203, having a clean classroom with proper furniture for the students is equally vital to the educational experience. Plaintiff's speech to the parents concerning the attributes of their children's classroom was "undertaken in the course of performing [her] primary employment responsibility of teaching." *Id.* (internal citations and quotations omitted).[6]

---

[6] Plaintiff's only argument in defense of her claim is that Defendants took the position in the 3020-a hearing that Plaintiff was "insubordinate" when she contacted the parents and therefore they conceded that she was acting outside her role as an employee. (Pl.'s Br. at 23). But even if a finding of insubordination were dispositive, no such argument or determination was made. Rather, Defendants argued, and the Hearing Officer found, that Plaintiff's

Furthermore, Plaintiff exercised her speech through means with no relevant civilian analogue. *See id.* at 204 ("[T]he lack of a citizen analogue is not . . . dispositive [but] it does bear on the perspective of the speaker—whether the public employee is speaking as a citizen[.]") (internal citations omitted). When speech is made in a form and context that is only available to public employees—and not to members of the public in general, such as submitting a letter to the editor of a newspaper or an elected official—it is indicative that the speech was made in the speaker's capacity as a public employee. *Id.* Here, Plaintiff communicated with the parents by calling them at their homes and speaking with them at the end-of-the-day student pick up location. Both are circumstances created solely by her position as the children's schoolteacher and by function of her DOE responsibilities. Plaintiff's communiques lack "a relevant analogue to citizen speech" and demonstrate that she was speaking in her role as a public employee. *Id.*

Because a practical inquiry into the nature of Plaintiff's professional duties clearly demonstrates that communications made to her students' parents about the condition of the children's classroom fall squarely within the scope of Plaintiff's DOE employment, Plaintiff has failed to state a claim for the violation of her First Amendment rights. Accordingly, Plaintiff's First Amendment claim is dismissed,

---

conduct was "unprofessional and unbecoming her position" when she contacted the parents without first requesting that the administration deal with her alleged classroom issues. (Ex. A at 27-28).

2. Plaintiff Has Failed to State a Claim for Discrimination or Retaliation

Beyond the facts of the 2010-11 school year, the Amended Complaint alleges a number of earlier, discrete events that Plaintiff argues constitute adverse employment actions under the ADA and ADEA. These events are not estopped by the 3020-a proceeding and must be considered separately under the Fed. R. Civ. P. 12(b)(6) motion to dismiss standard. Specifically, Plaintiff alleges that over a five-year period Defendants openly stated that she should retire, attempted to force her to sign a statement as to when she would retire, assigned her teaching assignments inconsistent with her top preference, placed discipline letters in her files, provided her with an "unsatisfactory" evaluation, placed troublesome students in her class, made her write out long lesson plans, "microscopically monitored and baselessly reprimanded her," excluded her letter from a ceremony program, cancelled her class's field trips in 2007 and 2010, and excluded her class from a ceremony. (Pl.'s Br. at 12-13). Defendants respond that none of these actions constitute an adverse employment action under the ADA, ADEA, or NYSHRL and therefore must be dismissed as Plaintiff cannot make out a prima facie case for discrimination or retaliation.

An essential element under both the federal and state statutes is that Plaintiff must allege an adverse employment action. *See, supra*, Sections II.A.2-3, 6. "A plaintiff sustains an adverse employment action if he or she endures a 'materially adverse change' in the terms and conditions of employment." *Galabya v. New York City Bd. of Ed.*, 202 F.3d 636, 640 (2d Cir. 2000) (*abrogated on other grounds*). "To be materially adverse a change in working conditions must be more

disruptive than a mere inconvenience or an alteration of job responsibilities." *Id.* (internal quotations omitted). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Id.*

Plaintiff has not alleged a materially adverse employment action in the years prior to the 2010-11 school year. Plaintiff argues that deprival of her top-choice teaching assignment, negative performance evaluations, exclusion from certain extracurricular school activities, and questioning as to when she would retire constitute adverse employment actions. But, none of those acts rises to the level of a materially adverse change in the terms and conditions of her employment sufficient to state a claim under the ADA, ADEA, or NYSHRL. *See Mills v. S. Conn. State Univ.*, 519 F. App'x 73, 75 (2d Cir. 2013) (finding that various incidents including intimidating behavior, shunning by colleagues, refusals to allow plaintiff to teach upper-level courses, and refusals to accommodate scheduling requests did not constitute adverse actions as they did not reflect "a materially adverse change in the terms and conditions of employment"); *Williams v. R.H. Donnelley Corp.*, 368 F.3d 123, 128 (2d Cir. 2004) (concluding that the denial of an employee's request for transfer is not an adverse employment action unless the denial "created a materially significant disadvantage in her working conditions"); *Weeks v. N. Y State Div. of Parole*, 273 F.3d 76, 86 (2d Cir. 2001) ("It hardly needs saying that a criticism of an employee . . . is not an adverse employment action.")

(*abrogated on other grounds*); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) (holding that denying an employee the use of an office or telephone to conduct a job hunt once he had notice of his termination was not "sufficiently deleterious to constitute adverse employment action prohibited by the ADEA"); *Hurt v. Donahoe*, No. 07-CV-4201, 2011 WL 10526984, at *7-8 (E.D.N.Y. Feb. 24, 2011) (Vitaliano, J.) *affd*, 464 F. App'x 40 (2d Cir. 2012) (holding that a supervisor's comment that if plaintiff walked through a specific area and injured herself that she would be left there was "not a change in the terms and conditions of [plaintiff's] employment" and therefore was not an adverse employment action); *Mabry v. Neighborhood Defender Serv.*, 769 F.Supp.2d 381, 393 (S.D.N.Y. 2011) (Castel, J.) ("Negative evaluations or reviews, without accompanying tangible harm or consequences, do not constitute materially adverse action altering the conditions of employment."). Without a materially adverse employment action, Plaintiff's discrimination and retaliation claims fail as a matter of law.

Furthermore, Plaintiff has failed to sufficiently plead that any of Defendants' actions during the relevant time period were motivated by discriminatory or retaliatory animus. Plaintiff's continued allegations that "younger similarly situated teachers" were treated differently than she are conclusory and amount to little "more than an unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Iqbal*, 556 U.S. at 678. "[N]aked assertions devoid of further factual enhancement," will not survive a motion to dismiss. *Id.* (quoting *Twombly*, 550 U.S. at 557). Plaintiff's Complaint does not include specific factual references

to transform her general allegations that these actions were motivated by discriminatory animus into cognizable claims for discriminatory or retaliatory treatment.

Plaintiff's claims of discrimination and retaliation for Defendants' alleged conduct prior to the 2010-11 school year fail as a matter of law and are hereby dismissed.

3. Plaintiff Has Failed to State a Claim for a Hostile Work Environment

Plaintiff alleges that she was subjected to a hostile work environment at P.S. 117 prior to the 2010-11 school year because of her age and disabilities. (Compl. at ¶¶ 83, 117). To state a claim for a hostile work environment, the Plaintiff must show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim's employment." *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 240 (2d Cir. 2007) (citations and quotations omitted); *Fordham v. Islip Union Free Sch. Dist.*, 662 F.Supp.2d 261, 271 (E.D.N.Y. 2009) (Hurley, J.).

Further, Plaintiff must prove that: "(1) [s]he was subjected to harassment, based on [her] age, that was sufficiently severe or pervasive to alter the conditions of [her] employment and create an abuse working environment; and (2) that a specific basis exists for imputing the objectionable conduct to the employer." *Alleva v. New York City Dep't of Investigation*, 696 F.Supp.2d 273, 283 (E.D.N.Y. 2010) (Block, J.), *aff'd*, 413 F. App'x 361 (2d Cir. 2011) (citing *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir. 2001)). For Defendants' conduct to be sufficiently "severe or pervasive," Plaintiff must show that the

conduct was: "(1) objectively severe or pervasive . . . creating an environment that a reasonable person would find hostile or abusive, subjectively severe or pervasive, in that [Plaintiff] must have perceived it as hostile or abusive, and (3) on account of [Plaintiff s] age." *Id.* (quoting *Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2007)) (internal quotations omitted). "Objective severity is assessed on a 'totality of the circumstances,' which may include: (1) frequency of the discriminatory conduct; (2) its severity; whether it is physically threatening and humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

In light of these principles, Plaintiff has failed to state a claim for a hostile work environment. Plaintiff's claim fails for a number of reasons, including that the Amended Complaint does not raise a plausible inference that Defendants' conduct was related to Plaintiff's age or disabilities, or that the P.S. 117 work environment was "so severely permeated with discriminatory intimidation, ridicule, and insult" so as to alter the conditions of Plaintiff's employment. *Mills*, 519 F. App'x at 75-76 (emphasis added); *see also Joseph v. Brooklyn Developmental Disabilities Servs. Office*, 12-CV-4402, 2013 WL 151197, at *10 (E.D.N.Y. Jan. 15, 2013) (Gleeson, J.). Plaintiff has alleged a series of discrete, unrelated events, spanning over a number of years, unlinked to any specific allegations of discriminatory motive, which were neither severe nor pervasive. *See Taylor v. New York City Dep't of Educ.*, No. 11-CV-3582, 2012 WL 3150388, at *8 (E.D.N.Y. Aug. 2, 2012) (Gleeson, J.) (finding teacher's allegations of being yelled at for not fitting in, being

denied a transfer, and receiving negative performance evaluations at the end of two school years were insufficient to state a hostile work environment claim).

Further, Plaintiff's allegations that she was asked when she would retire and requested to fill out a form stating her intended date of retirement are not indicative of a discriminatory, hostile work environment. (Compl. at ¶¶ 27-28, 41). The Second Circuit's decision in *Kassner* makes clear that such conduct does not constitute a hostile work environment. In *Kassner,* one plaintiff alleged that she was subjected to "repeated" and "degrading" comments including "drop dead," "retire early," "take off all of that make-up," and "take off your wig," while the second plaintiff merely alleged that she was "pressured" by defendants to retire from employment. 496 F.3d at 240-41. The court held that the first plaintiff had stated a hostile work environment claim, while the second had not. *Id.* Plaintiff's claim here is analogous to the second *Kassner* plaintiff and fails as a matter of law.

Plaintiff has failed to state a claim for a hostile work environment under either the ADEA or NYSHRL and those causes of action are hereby dismissed.

4. Plaintiff Has Failed to State a Claim for Failure to Accommodate

As discussed in Section II.A.5, *supra,* a failure to accommodate claim under the ADA fails as a matter of law if the Plaintiff has failed to allege that she made a request for an accommodation. The Amended Complaint is devoid of any non-conclusory allegation that, during the pre-2010-11 school year period, Plaintiff actually requested an accommodation according to DOE procedures. Plaintiff alleges that she "complained" of

the temperatures in the new wing of P.S. 117, (Compl. at ¶ 19) and "provided" documentation concerning her arthritis, knee trauma, and allergies. (*Id.* at ¶ 38, 40). But notably absent in the record is a request to the Medical Bureau for an accommodation for these disabilities or a rejection of such accommodation by the Defendants. Without a proper request for an accommodation, Plaintiff has failed to state a claim for failure to accommodate under the disability laws and her claims are hereby dismissed. *See Falchenberg*, 375 F.Supp.2d at 348.

C. The Court Declines to Exercise Jurisdiction Over Plaintiff's Remaining State Law Claims

Plaintiff also brings claims for intentional infliction of emotional distress, defamation, and violations of New York City Administrative Code § 8-107. Prior to a revision by the New York City Council in 2005, claims under the Code were analyzed identically to federal and state law discrimination claims. *Mihalik v. Credit Agricole Cheuvreux N Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013). However, the 2005 Restoration Act created broader liability than exists under federal and state law, and the Second Circuit has instructed that discrimination claims under the Code be construed "separately and independently from any federal and state law claims." *Id.* (citing Restoration Act § 1; *Hernandez v. Kaisman,* 103 A.D.3d 106 (1st Dep't 2012)). Therefore this Court cannot apply the same analysis to Plaintiff's New York Administrative Code claims as it did to the federal and state discrimination claims.

Accordingly, along with Plaintiff's intentional infliction of emotional distress and defamation claims,

the Court declines to exercise supplemental jurisdiction over the remaining municipal and state law claims.

When the federal claims in an action based on supplemental jurisdiction are dismissed, the state claims should be dismissed as well. 28 U.S.C. § 1367(c)(3); *see also United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 61 (2d Cir. 1998). While the dismissal of supplemental state claims is discretionary at this juncture, the usual case "will point toward declining jurisdiction over the remaining state-law claims." *In re Merrill Lynch,* 154 F.3d at 61 (quoting *Carnegie—Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n.7 (1988)). Once a district court has dismissed all claims over which it has original jurisdiction, it still balances the traditional "values of judicial economy, convenience, fairness, and comity" while maintaining the guiding directive that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting *Cohill*, 484 U.S. at 350).

In this case, discovery is still pending and there is no reason that any of the discovery would need to be repeated if Plaintiff's pendent claims were brought in state court. *Murray v. Visiting Nurse Servs. of N.Y.,* 528 F.Supp.2d 257, 281 (S.D.N.Y. 2007) (Sullivan, J.); *see also Kelsey v. City of New York,* No. 03-CV-5978, 2006 WL 3725543, at *11 (E.D.N.Y. Sept 18, 2006) (Bianco, J.) (declining to exercise pendent jurisdiction where "it [was] not clear

to the [c]ourt why the discovery would need to be repeated if the [state law] negligence claim [were to be] litigated in state court"). Furthermore, a trial date has not been set in this matter and this is the first dispositive motion. *Cf. Nowak v. Ironworkers Local 6 Pension Fund,* 81 F.3d 1182, 1192 (2d Cir. 1996) (upholding the exercise of jurisdiction over state claims where federal claim was dismissed only nine days before trial); *Raucci v. Town of Rotterdam,* 902 F.2d 1050, 1055 (2d Cir. 1990) (upholding exercise of jurisdiction over state claims where discovery was completed, three dispositive motions were decided, and case was ready for trial). Finally, Plaintiff's state and city claims will not be time-barred in New York state court because of this dismissal, and Plaintiff will suffer no undue prejudice by this Court's refusal to exercise supplemental jurisdiction over her state and municipal law claims. *See* N.Y. C.P.L.R. § 205(a) (permitting a plaintiff to bring a new action upon the same transaction "within six months after [the prior action's] termination.").[7]

In accordance with the guiding principle that district courts will not typically maintain state claims once the anchoring federal claims are dismissed, this Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state and municipal law claims. *See* 28 U.S.C. § 1367(c)(3). Those causes of action are dismissed without prejudice.

---

[7] If a plaintiff's claims are dismissed by "voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits[,]" she cannot avail herself of § 205(a). N.Y. C.P.L.R. § 205 (a).

III. Conclusion

Defendants DOE and Paula Cunningham's motion to dismiss the Amended Complaint is GRANTED in its entirety. The claims related to the 2010-11 school year are barred by principles of collateral estoppel and are dismissed with prejudice. The First Amendment and pre-2010-11 school year claims are dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6), and are dismissed without prejudice. Plaintiff's remaining state and municipal law claims are dismissed for lack of pendent jurisdiction and are dismissed without prejudice.

SO ORDERED

/s/ Hon. William F. Kuntz, II

Dated: Brooklyn, New York
April 29, 2014

BLANK PAGE


SUPREME COURT
PRESS