COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1677CV01590 C

PEGGIE and THOMAS RITZER, Individually, and others[1]

vs.

TOWN OF DANVERS, and others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

This action came before the Court on August 9, 2018, for a hearing on motions to dismiss plaintiffs' Complaint With Jury Demand (Paper No. 1) ("Complaint") filed by each of the three defendants. The action involves the heartbreaking, violent death of Colleen Ritzer ("Colleen"),[3] a high school teacher employed by defendant Town of Danvers ("Town"),[4] at the hands of one of her students, Phillip Chism ("Chism"), on October 22, 2013, on the grounds of Danvers High School ("School").

The Town filed Motion Of Defendants, Town Of Danvers And Danvers Public Schools, To Dismiss Counts II & III Of Plaintiffs' Complaint Under Rule 12(b)(6), And For Entry Of Separate And Final Judgment Under Rule 54(B) (Paper No. 14) ("Town's Motion") in which it argues that Counts II and III of the Complaint should be dismissed, *inter alia*, because it is immune from suit pursuant to various provisions of the Massachusetts Tort Claims Act at G.L. c. 258, § 1, *et seq.* ("MTCA"). Defendant DeNisco Design Partnership ("DDP") filed DeNisco Design Partnership's Motion To

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[1] Peggie and Thomas Ritzer, as Personal Representatives of the Estate of Colleen Ritzer; Daniel Ritzer; and, Laura Ritzer.

[2] Danvers Public Schools; SJ Services, Inc.; and, DeNisco Design Partnership.

[3] Given that the plaintiffs and Colleen Ritzer share the same last name, the Court will refer to each of them by their first names.

[4] Although the Complaint names both the Town and Danvers Public Schools, there is no dispute that the latter acts solely through the former. Thus, the Court will reference said defendants, collectively, as "the Town."

Dismiss The Plaintiffs' Complaint (Paper No. 13) ("DDP's Motion") in which it argues that Counts I and II of the Complaint should be dismissed because, *inter alia*, the Complaint fails to sufficiently allege that the surveillance system it designed at the high school contributed to Colleen's death or the individual plaintiffs' emotional distress. Defendant SJ Services, Inc. ("SJ Services"), filed Defendant SJ Services, Inc.'s Motion To Dismiss Count III Of The Plaintiffs' Complaint Against SJ Services, Inc. Pursuant To Mass.R.Civ.P. 12(b)(6) (Paper No. 8) ("SJ Services' Motion") in which it argues that Count III of the Complaint should be dismissed because, *inter alia*, the Complaint fails to sufficiently allege that it owed a duty of care to the plaintiffs. The plaintiffs filed oppositions to each motion.

As more fully explained below, the Town's Motion is **ALLOWED**; DDP's Motion is **ALLOWED in part** and **DENIED in part**; and, SJ Services' Motion is **ALLOWED**.

BACKGROUND

The Complaint alleges the following:

Peggie and Thomas were Colleen's parents. Daniel and Laura were her siblings. Colleen had been residing at the family home with Peggie and Thomas at the time of the attack.

In 2010, the Town commenced renovations of the School. The Town retained DDP to "design and implement" a "state of the art" security system for the School.[5] The security system was intended to ensure the safety of, *inter alia*, teachers and students at the School. The renovations were complete prior to the 2013/2014 school year. The security system included a video surveillance system that captured and recorded video images of the interior and exterior of the School. Video images from the surveillance camera were displayed on a computer monitor located in the School's central office.

On October 22, 2013, Colleen, 24 years-old, was working as a math teacher at the School. She was in her second school year teaching at the School. At the conclusion of the school day (i.e., 1:55 p.m.) Chism remained in Colleen's classroom

[5] The Complaint does not allege that DDP installed the security system, including the video surveillance system. Rather, the Complaint alleges that DDP "designed" and "implemented" the security system. To be sure, the definition of implemented is to carry-out and accomplish. See https://www.merriam-webster.com/dictionary/implement, last accessed on September 14, 2018.

during a time period set aside for students to obtain extra help from their teachers. Chism was a student at the School and was nearly a foot taller than Colleen. At 2:55 p.m. Colleen exited her classroom, walked to the women's restroom, and entered it. Chism, wearing a hood over his head and gloves on his hands, followed Colleen from the classroom and entered the restroom behind Colleen. Chism immediately brutally attacked Colleen in the restroom, slashing her repeatedly with a box cutter, and raped her. Chism inflicted serious injuries to Colleen's throat which resulted in a significant amount of blood loss in the restroom. Chism remained in the restroom with Colleen for 12 minutes (i.e., until 3:07 p.m.) at which time he exited the restroom carrying Colleen's pants under his arm. His hands were visibly bloody. Chism briefly exited the School and was observed inside some shrubs near the entrance. He appeared to be changing clothes.

At 3:10 p.m., Chism entered Colleen's classroom and exited at 3:14 p.m. carrying a backpack, as well as items belonging to Colleen. Upon exiting the classroom, Chism secured a recycling barrel and took it on the elevator. He travelled on the elevator, exited the elevator with the recycling barrel, and reentered the women's restroom at 3:16 p.m. Chism exited the restroom at 3:22 p.m. with the barrel which now contained Colleen and clearly appeared to be heavier than when Chism entered the restroom. He exited the School and removed Colleen from the barrel in a nearby wooded area. At 4:00 p.m., now more than an hour after he brutally attacked Colleen, Chism reentered the School wearing bloody jeans and no shoes or socks. He entered a men's restroom, changed the bloody jeans he was wearing, changed his clothes again, and exited the School still barefoot, while carrying the bloody jeans he had been wearing. Chism reentered the wooded area, returned to the School, changed his clothing, collected additional belongings, and exited School. It was now sometime after 4:21 p.m.

The video surveillance system captured much of the aforementioned events on October 22. However, no school personnel appear to have been in the hallways or wing of the School building Chism travelled. No school personnel observed Chism's obvious suspicious behavior during the more than one-hour time period involved. No one monitored the video images captured live on the computer monitor in the School's central office.

SJ Services performed janitorial services at the School. At some point on the afternoon of October 22, an employee of SJ Services entered the women's restroom where Colleen had been attacked, observed significant blood splashed throughout (which he later described as "looking like a scene of a slaughter"), and reported what he observed to School personnel. Due to a language barrier, the School official apparently believed the restroom had been splashed with blue ink, rather than blood, and instructed the SJ Services employee to clean it up. The employee did so.

At approximately 6:00 p.m. on October 22, 2013, concerned that Colleen had not returned home, Thomas travelled to the School, observed Colleen's vehicle parked outside, and went to Colleen's classroom. After looking for Colleen elsewhere at the School, Thomas drove back to the family home in Andover. Continuing to be concerned with Colleen's unaccounted for whereabouts, Thomas, Peggy, and Laura (collectively "the Ritzers") travelled to the School at 9:30 p.m. Police and school personnel were present with whom the Ritzers communicated. The police requested that the Ritzers go to the Danvers Police station and formally report that Colleen was missing. While at the police station, the Ritzers called Daniel and told him that Colleen was missing.

At approximately midnight, Chism's mother appeared at the police station and reported that she was the mother of "the missing 14 year-old" (i.e., Chism). The Ritzers agonized about Colleen's whereabouts while at the police station for the next several hours. At approximately 4:00 a.m., the police told the Ritzers that Colleen had been killed, likely by Chism, and that her body had been found. Peggy called Daniel and provided him with the horrible news. The police then drove the Ritzers home.

As discussed in further detail below, the plaintiffs assert in the Complaint that the defendants' acted negligently in various respects, and that their negligence caused them emotional distress and, in the case of DDP, contributed to Colleen's death.

STANDARD OF REVIEW

In Iannacchino v. Ford Motor Co., 451 Mass. 623 (2008), the Supreme Judicial Court refined the standard applicable to motions to dismiss a complaint pursuant to M.R.Civ.P. 12(b)(6), adopting the standard articulated by the United States Supreme Court in Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The S.J.C. essentially "retired" the previously "often quoted language [that] a complaint should not be

dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Iannacchino, 451 Mass. at 635-636 (citation omitted).

The Iannacchino standard is as follows:

> "While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . . **What is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect[] the threshold requirement of [Rule] 8(a)(2) that the plain statement possess enough heft to sho[w] that the pleader is entitled to relief.**"

Iannacchino, 451 Mass. at 636 (citations omitted) (emphasis added); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

Thus, in analyzing a motion to dismiss, this Court must "consider whether the factual allegations in the complaint are sufficient, as a matter of law, to state a recognized cause of action or claim, and whether such allegations plausibly suggest an entitlement to relief." Town of Dartmouth v. Greater New Bedford Reg'l Voc. Tech. High School, 461 Mass. 366, 374 (2012).

The Court must accept the factual allegations of the Complaint, "even if doubtful in fact," as well as inferences that may be reasonably drawn from them, in favor of the nonmoving party. Iannacchino, 451 Mass. at 625 n. 7; Nader v. Citron, 372 Mass. 96, 98 (1977). However, "[t]hreadbare recitals of the legal elements, supported by mere conclusory statements, do not suffice," Ashcroft, 556 U.S. at 678; and the Court disregards legal conclusions cast in the form of factual allegations. Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). Moreover, a "formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555.

At bottom, "[a] rule 12(b)(6) motion may be allowed only when the complaint's factual allegations (and reasonable inferences therefrom), accepted as true, do not plausibly suggest an entitlement to relief." Fraelick v. PerkettPR, Inc., 83 Mass. App. Ct. 698, 699-700 (2013).

DISCUSSION

I. THE TOWN'S MOTION

The Complaint alleges two causes of action against the Town. In Count II, the individual plaintiffs (i.e., Peggie and Thomas in their individual capacities; and, Laura and Daniel) allege that the Town negligently inflicted emotional distress on each of them by: (a) "fail[ing] to keep Colleen safe"; and, (b) failing to "alert [them] of an ongoing situation after Colleen was attacked by Chism."

In Count III of the Complaint, the individual plaintiffs allege that the Town negligently inflicted emotional distress on each of them by: (a) allowing SJ Services to clean up the scene of the attack (i.e., the women's bathroom) before it was observed and processed by law enforcement personnel; and, (b) failing to tell authorities in a timely manner about the scene.

In support of its motion to dismiss, the Town claims Counts II and III of the Complaint must be dismissed because: (a) it is immune from suit pursuant to three subsections in Section 10 of the MTCA; (b) the plaintiffs failed to present sufficient notice of their claims to the Town as required by Section 4 of the MTCA; and, (c), the allegations in the Complaint fail to satisfy the requirement of Dziokonski v. Babineau, 375 Mass. 555 (1978), that claims for negligent infliction of emotional distress may only be brought by a close relative of an injured person that "either witnesses the accident or soon comes on the scene while the [injured relative] is still there." Id. at 568.

Regardless of whether immunity applies, survival of the plaintiffs' claims against the Town rests on issues addressed in Dziokonski; thus, the Court will address the Town's argument regarding bystander liability first.

A. Counts II And III Of The Complaint As They Apply To The Town Of Danvers Must Be Dismissed Because They Fail To State A Legally Recognized Negligence Claim On Behalf Of The Plaintiffs As "Bystanders"

In support of its motion to dismiss, the Town argues that the allegations in the Complaint regarding the alleged negligent infliction of emotional distress fail to satisfy "the proximately requirements" required for "bystanders" as announced in Dziokonski v. Babineau, 375 Mass. 555 (1978).

In Dziokonski, the S.J.C. abandoned the so called "impact rule" of Spade v. Lynn & B. R. Co., 168 Mass. 285 (1897), "which denies recovery for physical injuries arising solely from negligently caused mental distress." Dziokonski, 375 Mass. at 556.[6] There, the mother of a child killed by a passing motor vehicle after exiting a school bus brought a claim seeking compensation for the infliction of emotional distress caused by her witnessing her daughter shortly after the accident. Id. at 556 - 557. In abrogating the "impact rule" the S.J.C. held that "the allegations concerning a parent who sustains substantial physical harm as a result of severe mental distress over some peril or harm to his minor child caused by the defendant's negligence state a claim for which relief might be granted, **where the parent either witnesses the accident or soon comes on the scene while the child is still there**." Id. at 568 (emphasis added).[7]

The Complaint does not allege that any of the plaintiffs witnessed Chism's attack, came upon the crime scene (i.e., the bathroom) while Colleen was still there, or even observed the horrifically bloody crime scene. Thus, the dispositive issues in this case under Dziokonski are whether the plaintiffs may recover against the Town in the absence of actually witnessing Chism's attack, or coming on the crime scene while

[6] More specifically, the "impact rule" prevented persons from bringing claims in tort for emotional distress "where there is no injury to the person from without." Spade, 168 Mass. at 290.

[7] The parties do not dispute that the holding in Dziokonski was later expanded to apply to other close relatives. See Migliori v. Airborne Freight Corp., 426 Mass. 629, 637 (1998) ("Persons bearing close 'familial or other relationship' to the directly injured third person comprise a discrete and well-defined class, membership in which is determined by preexisting relationships."). Moreover, the Town does not contest that Colleen's siblings, Daniel and Laura, are sufficiently close relatives under Dziokonski.

Colleen was still present; and, if so, whether the Complaint sufficiently alleges facts that support such a claim.

As the S.J.C. observed:

> Not every bystander plaintiff who can show emotional injury, the defendant's negligence, and the causal connection between the two states a cognizable claim.[8] **We have imposed relational, temporal, and spatial limits on the scope of liability for emotional harm**: Only a bystander plaintiff who is closely related to a third person directly injured by a defendant's tortious conduct, and **suffers emotional injuries as the result of witnessing the accident or coming upon the third person soon after the accident,** states a claim for which relief may be granted.

Migliori v. Airborne Freight Corp., 426 Mass. 629, 632 (1998) (emphasis added).

In Migliori, "[t]he plaintiff ask[ed the S.J.C.] to include rescuers in the class of bystanders who state a cognizable claim for negligent infliction of emotional harm." Id. at 636. In that case, the S.J.C. was confronted with a legal question not at issue here; namely, whether a nonrelative may recover under Dziokonski. The Court in Migliori answered that question in the negative. Id. at 638. However, it is important to note that as of the Migliori decision in 1998, the S.J.C. "beg[a]n by affirming [its] reluctance to expand the class of bystanders who may recover for emotional distress or the circumstances in which the members of that class may recover." Id. at 633 (citing Stockdale v. Bird & Son, 399 Mass. 249, 251 – 252 (1987) (mother who did not see son's injured body until twenty-four hours after accident at funeral home not entitled to recover); Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 339 – 343 (1983) (executor of estate of mother who did not learn of her son's death in airplane crash until seven hours after the crash could not recover); Miles v. Edward O. Tabor, M.D., Inc., 387 Mass. 783, 787 - 789 (1982) (mother who suffered emotional distress as the result of doctor's negligence at her son's birth, which led to the son's death two months later, did not have a cause of action)). Furthermore, it is equally important to note that the Migliori Court also observed that "[it] stated in Dziokonski that whether a bystander can

[8] The Town does not challenge the sufficiency of the allegations in the Complaint pertaining to whether the Town owed the plaintiffs a duty of care or whether the breach of any such duty caused the plaintiffs' harm.

recover depends on 'a number of factors, such as where, when, and how the injury, to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person.'" Id. at 634 n. 3 (quoting Dziokonski, 375 Mass. at 568, citing Dillon v. Legg, 68 Cal. 2d 728, 740-741, 69 Cal. Rptr. 72, 441 P.2d 912 (1968)).

Here, neither the Town nor the plaintiffs have cited any case law that addresses the issue that appears to have been unsettled at least until the Migliori decision in 1998; namely, whether the plaintiffs in this case (i.e., close family members) may recover in negligence for emotional distress suffered in the absence of witnessing the attack, learning of the attack within a short period of time, observing Colleen's injuries near the scene, or even observing the crime scene, itself. The Court has not uncovered any reported decisions in Massachusetts that directly address this issue; thus, the Court will apply the aforementioned factors set forth in Dziokonski (and reaffirmed in Migliori). As the Dziokonski Court observed,

> The focus should be on underlying principles. [] In cases of this character, there must be both a substantial physical injury and proof that the injury was caused by the defendant's negligence. Beyond this, the determination whether there should be liability for the injury sustained depends on a number of factors, such as where, when, and how the injury, to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person. . . . It does not matter in practice whether these factors are regarded as policy considerations imposing limitations on the scope of reasonable foreseeability . . ., or as factors bearing on the determination of reasonable foreseeability itself. The fact is that, in cases of this character, such factors are relevant in measuring the limits of liability for emotionally based injuries resulting from a defendant's negligence. In some instances, it will be clear that the question is properly one for the trier of fact, while in others the claim will fall outside the range of circumstances within which there may be liability.

Dziokonski, 375 Mass. at 568 (internal citations omitted). Therefore, "[a]mong the pragmatic judgments applied to claims of emotional distress are those imposing requirements of spatial and temporal proximity upon plaintiffs." Krasnecky v. Meffen, 56 Mass. App. Ct. 418, 422 (2002).

What is clear to the Court is that our appellate courts have been reluctant to expand liability under Dziokonski. See e.g., Parker v. Bank of Am., NA, 2011 Mass. Super. LEXIS 270, *40 (December 15, 2011) ("Departures from this paradigmatic fact pattern have been rare."). For example, as referenced above, the S.J.C. has denied recovery in negligence where a mother died after learning of her son's death in an airplane crash seven hours earlier, Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 339 – 343 (1983); and, where a mother did not learn of her son's death until four hours after it occurred and did not view his body until the next day. Stockdale v. Bird & Son, Inc., 399 Mass. 249, 251 - 252 (1987).

"The purpose of rule 12 (b) (6) is to permit prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." The Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 748 (2006) (citations omitted). Here, for the reasons explained, Counts II and III of the Complaint fail to "state a recognized cause of action or claim," Town of Dartmouth, 461 Mass. at 374. Accordingly, so much of the Town's Motion that argues that Counts II and III of the Complaint should be dismissed because it fails to state a claim for the negligent infliction of emotional distress under Dziokonski is **ALLOWED**.[9]

B. The Town's Other Arguments

In addition to the bystander liability argument, the Town argues the plaintiffs' claims are barred under the MTCA. First, it contends it is immune from suit pursuant to three subsections of Section 10 of the MTCA.[10] Second, the Town argues the plaintiffs failed to present sufficient notice of their claims to the Town, as required under Section

[9] Given the result, the Court does not reach the Town's argument that the Complaint fails to set forth sufficient facts showing the plaintiffs suffered legally cognizable injuries under Payton v. Abbott Labs, 386 Mass. 540, 547 (1982).

[10] "Consistent with the reasons underlying the qualified immunity defense, it [i]s important that the immunity issue be resolved at the earliest possible stage of litigation, preferably before any discovery, on a motion to dismiss or for summary judgment." Caron v. Silvia, 32 Mass. App. Ct. 271, 273 (1992) (citations omitted); see also Brum v. Town of Dartmouth, 428 Mass. 684, 687 (1999) ("In light of the desirability of resolving immunity issues quickly, it is preferable to dispose of the question before discovery, as on a motion to dismiss.") (citing Caron). Thus, the issue of whether the Town is immune from suit under the MTCA is properly before the Court at this point in the proceedings.

4 of the MTCA. The Court need not address these arguments, as it has determined the plaintiff's claims must be dismissed pursuant to the analysis outlined in Dziokonski. Nevertheless, it does so, to ensure a clear record in the case of an appeal.

C. Immunity In General

"Ordinarily, the Commonwealth is immune from suit unless it waives its right to sovereign immunity and consents to being sued. . . . Where the Commonwealth does choose to waive its sovereign immunity, it can be sued 'only in the manner and to the extent expressed [by the] statute.' . . . In short, sovereign immunity protects the Commonwealth from the burden of having to go to trial, unless the Commonwealth consents to do so." Irwin v. Commonwealth, 465 Mass. 834, 840 – 841 (2013) (internal citations omitted) (citing McArthur Bros. Co. v. Commonwealth, 197 Mass. 137, 138 (1908)).

Generally speaking, under the MTCA, a municipality such as the Town (i.e., a "public employer") consents to being sued for up to $100,000.00 in damages. G.L. c. 258, § 2. However, before the injured party may file suit, she must present notice of her claims to "the executive officer" of the municipality in a timely manner and the municipality must deny the claims. G.L. c. 258, § 4. Further, notwithstanding the aforementioned general "consent" to be sued, the MTCA bars certain claims brought against a municipality (i.e., the municipality is "immune" from liability for specific types of claims) such as "any claim arising out of an intentional tort." G.L. c. 258, § 10(c); see also G.L. c. 258, §§ 10(a) – (j).

D. The Town Is Not Immune From Suit Under G.L. c. 258, § 10(j) (Statutory Public Duty Immunity) For Allegedly Failing To Prevent Harm Caused By Chism

The Town first argues that, under the MTCA, Counts II and III of the Complaint must be dismissed because claims brought against a municipality for failing to prevent harm caused by a third party, such as Chism, are barred by G.L. c. 258, § 10(j).

Section 10(j) bars the following, in pertinent part:

> (j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, **including the violent or tortious conduct of a third person, which is not originally caused by the public employer** or any

other person acting on behalf of the public employer. **This exclusion shall not apply to:**

(1) **any claim based upon explicit and specific assurances of safety or assistance**, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances. A permit, certificate or report of findings of an investigation or inspection shall not constitute such assurances of safety or assistance; and

. . .

(3) **any claim based on negligent maintenance of public property**.

G.L. c. 258, § 10(j) (emphasis added).

This provision has been referred to as "the statutory public duty rule," Brum v. Town of Dartmouth, 428 Mass. 684, 691 (1999); and, a "statutory public duty rule providing governmental immunity." Carleton v. Framingham, 418 Mass. 623, 627 (1994). "The principal purpose of the provision, . . ., must be taken to be announced in its opening clause: to exclude liability for 'an act or failure to act to prevent or diminish' certain 'harmful consequences.' Which harmful consequences? All those 'including the violent or tortious conduct of a third person.'" Brum, 428 Mass. at 692.

The Town argues that this case "is indistinguishable" from Brum in which the S.J.C. held that "§ 10 (j) excludes the defendants' liability for their failure to prevent the killing" of the plaintiff's son, a student at Dartmouth High School. Id. at 696. In so holding, the S.J.C. rejected the plaintiff's argument that Section 10(j) was inapplicable because the "original cause" of the dangerous condition or situation that led to her son's death was the school's failure to adopt a security policy. Id. at 691. More specifically, the S.J.C. observed that "[t]he plaintiff['s] argu[ment] that § 10 (j) does not bar her claim because the condition that led to her son's death was the lack of security on the school premises, which was originally caused by the defendants' failure to adopt security policies as they were required to do by G. L. c. 71, § 37." Id. at 691.

In Brum, the S.J.C. further observed "it is also true that those killings came about because the defendants 'failed to prevent' them." Id. at 692. Consequently, the S.J.C. was "forced to construe the first sentence of § 10 (j) to give meaning both to what appears to be its announced principal purpose, which is to confer immunity on public

employees for harm that comes about as a result of their 'failure . . . to prevent' the 'violent or tortious conduct of a third person,' and to do so in the presence of the clause which removes that immunity where the 'harmful consequences' were 'originally caused by the public employer.'" Id. "Thus, there is immunity in respect to all consequences except where 'the condition or situation' was 'originally caused by the public employer.'" Id.[11]

On its face, the holding in Brum appears to foreclose the plaintiffs' claims against the Town:

> **In sum, the principal purpose of § 10 (j) is to preclude liability for failures to prevent or diminish harm, including harm brought about by the wrongful act of a third party**. And to interpret, as the Appeals Court did, the subordinate clause referring to "originally caused" conditions, to include conditions that are, in effect, failures to prevent harm, would undermine that principal purpose. **Accordingly, we conclude that in [this case], § 10 (j) excludes the defendants' liability for their failure to prevent the killing**.

Brum, 428 Mass. at 696 (emphasis added).

Here, however, the plaintiffs argue that the Complaint sufficiently alleges that the Town made specific assurances of safety to Colleen in the Danvers School District Policy Manual ("Manual").[12] Thus, the plaintiffs argue that their claims are "based upon explicit and specific assurances of safety or assistance" which are excepted from public duty immunity pursuant to G.L. c. 254, § 10(j)(1). The Court disagrees.

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[11] To be sure, "[t]he particular issue in question in [Brum], the meaning of the 'originally caused' clause in § 10 (j) ha[d] not to date been directly addressed by [the S.J.C.]." Brum, 428 Mass. at 692.

[12] The plaintiffs submitted portions of the Manual in support of their argument in opposition to the Town's Motion. The Manual is not referenced in the Complaint. However, the Town declined when given an opportunity to do so by the Court at the hearing to seek to strike plaintiffs' references to the Manual as being outside the four corners of the Complaint. A motion to strike may have been successful if sought by the Town given the absence of any indication in the Complaint that the Manual was relied upon in drafting the Complaint. See e.g., Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n. 4 (2004) ("Where, as here, the plaintiff had notice of these documents and relied on them in framing the complaint, the attachment of such documents to a motion to dismiss does not convert the motion to one for summary judgment, as required by Mass. R. Civ. P. 12(b)(6)"). Thus, given the absence of an objection or motion to strike by the Town, the Court will consider the portions of the Manual cited by the plaintiffs in their opposition.

Even a cursory reading of the provisions of the Manual cited by the plaintiffs evinces no reasonable allegation of an "explicit and specific assurance[] of safety or assistance" made by the Town to Colleen. See Thomas v. Town of Chelmsford, 267 F. Supp. 3d 279, 313 (D.Mass. 2017) ("Under section 10(j)(1), 'by 'explicit' the Legislature meant a spoken or written assurance, not one implied from the conduct of the parties or the situation, and by 'specific' the terms of the assurance must be definite, fixed, and free from ambiguity.' . . . Superintendent Tiano's statement that 'We have teachers in the hallways that monitor things and he will be fine,' . . . meets that standard.") (quoting Lawrence v. City of Cambridge, 422 Mass. 406, 410 (Mass. 1996)).

The plaintiffs also argue that the Complaint sufficiently alleges that the Town negligently maintained the school's security system; thus, they argue that their claims are excepted from the statutory public duty immunity pursuant to G.L. c. 254, § 10(j)(3). Although it is close call, the Court agrees. The Complaint alleges that the security system at Danvers High School "was deficient in many ways" and alleges two specific deficiencies. (Complaint at ¶ 34).

Although an argument can be made that Counts II and III of the Complaint, as directed at the Town, fail to explicitly tie the alleged negligent maintenance to the plaintiffs' causes of action against the Town, at bottom, "[a] rule 12(b)(6) motion may be allowed only when the complaint's factual allegations (and reasonable inferences therefrom), accepted as true, do not plausibly suggest an entitlement to relief." Fraelick v. PerkettPR, Inc., 83 Mass. App. Ct. 698, 699-700 (2013); see also Iannacchino, 451 Mass. at 636 (the moving party is entitled to judgment under Rule 12(b)(6) when a complaint fails to provide factual allegations sufficient to raise a right to relief above the "speculative level."). The Complaint here, read in the light most favorable to the plaintiffs, sufficiently sets forth factual allegations that its claims against the Town are "claim[s] based on negligent maintenance of public property," G.L. c. 258, §10(j)(3), and are thus excepted from the statutory public duty immunity.[13]

[13] The Town cites the case of Moore v. Town of Billerica, 83 Mass. App. Ct. 729 (2013), in support of its argument that the property maintenance immunity exclusion of §10(j)(3) does not apply. In Moore, in the context of a motion for summary judgment, the Appeals Court found that injuries sustained by a child at a municipal baseball field "were not caused by the town's negligent maintenance of the playground." Id. Here, however, the Court is mindful of the more

As such, so much of the Town's Motion that argues that Counts II and III of the Complaint should be dismissed because it is immune from suit pursuant to G.L. c. 258, §10(j) is **DENIED**.

E. The Town Is Not Immune From Suit Under G.L. c. 258, § 10(h)

The Town next argues that Counts II and III of the Complaint must be dismissed because the claims are barred by G.L. c. 258, § 10(h). Section 10(h) bars the following, in pertinent part:

> (h) **any claim based upon the failure to** establish a police department or a particular police protection service, or if police protection is provided, for failure to provide adequate police protection, **prevent the commission of crimes**, investigate, detect or solve crimes, identify or apprehend criminals or suspects, arrest or detain suspects, or enforce any law. . .

G.L. c. 258, § 10(h) (emphasis added).

Conceding an absence of reported decisions involving the application of Section 10(h) to actions (or inaction) of non-law enforcement personnel, the Town argues that Section 10(h) applies because "[t]he plaintiffs expressly fault the Town for failing to prevent Chism's crimes with more security personnel." Also without citing case law, the plaintiffs argue that Section 10(h) is not applicable because it "covers issues related to police decision making."

The Court has failed to uncover any reported decisions that address whether a municipality is immune from suit under Section 10(h) for the inaction of government actors not employed in a law enforcement capacity. However, based on the plain reading of the statute, the Court agrees with the plaintiffs that this section applies to decisions and actions made by, or affecting, law enforcement personnel. As such, so much of the Town's Motion that argues that Counts II and III of the Complaint should be dismissed because it is immune from suit pursuant to G.L. c. 258, §10(h) is **DENIED**.

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favorable (to the plaintiffs) standard under Rule 12(b)(6) than under Rule 56. Moreover, unlike the "state of the art security system" alleged in the instant Complaint, in Moore, the town had no "maintenance" in place at all that addressed errant baseballs hitting spectators.

F. The Town Is Not Immune From Suit Under G.L. c. 258, § 10(b) (Discretionary Function Immunity)

The Town next argues that Counts II and III of the Complaint must be dismissed because the claims are barred by G.L. c. 258, § 10(b), the discretionary function immunity statute. Section 10(b) bars the following, in pertinent part:

> (b) **any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function** or duty on the part of a public employer or public employee, acting within the scope of his office or employment, **whether or not the discretion involved is abused**.

G.L. c. 258, § 10(b) (emphasis added).

"Analysis under § 10 (b) follows a two-prong test. . . . The first inquiry is 'whether the governmental actor had any discretion at all as to what course of conduct to follow.' [] The second inquiry is 'whether the discretion that the actor had is that kind of discretion for which § 10 (b) provides immunity from liability.' [] The demarcation between the types of functions described in the second prong is guided by our opinions predating the enactment of § 10 (b)." Shapiro v. City of Worcester, 464 Mass. 261, 270 (2013) (quoting Harry Stoller & Co. v. Lowell, 412 Mass. 139, 141 (1992)) (internal citations omitted) ("Stoller test"). Thus, under the first prong of the test, "[d]iscretionary function immunity does not apply in cases in which a government official's actions were mandated by statute or regulation." Brum, 428 Mass. at 690 (citing Dobos v. Driscoll, 404 Mass. 634, 652 (1989)).

Here, the Town concedes that G.L. c. 71, § 37H, clearly mandated its adoption of some security measures. However, the Town argues that the first prong of the Stoller test is met because § 37H did not "usurp the Town's discretion as to the nature and/or extent of the security that must be provided." The Court agrees.

The Town's argument that the claims asserted by the plaintiffs against the Town pass the first prong of the Stoller test is supported by the following passage from the Brum decision: "[G. L. c. 71, §] 37H clearly mandates the adoption of some measures, and, therefore, school officials have no discretion in that matter. Thus, if the school in fact had failed to adopt any security measures at all, claims based on this failure would not be barred by § 10 (b)." Brum, 428 Mass. at 690. Here, § 37H granted the Town

some discretion "as to what course of conduct to follow" in setting the security policies for the high school.

The version of § 37H in place on the date of Colleen's tragic death required "[t]he superintendent of every school district [to] publish the district's policies pertaining to the conduct of teachers and students." G.L. c. 71, § 37H, 1st para. It mandated certain content and topics to be published such as the prohibition against the use of tobacco products within school buildings and the result of certain illegal conduct on school premises such as the possession of dangerous weapons. However, it left the Town with significant discretion regarding how to effectuate security policies at the school.

Having met the first prong of the Stoller test for the invocation of discretionary function immunity under § 10(b), the question remains "'whether the discretion that the [school superintendent] had is that kind of discretion for which § 10 (b) provides immunity from liability.'" Shapiro, 464 Mass. at 270 (citation omitted). The more narrow question is whether the conduct of the Town alleged in the Complaint "rise[s] to the level of 'public policy or planning' decisions warranting protection' under § 10 (b)." Stoller, 412 Mass. at 144 (citations omitted).

Here, reading the allegations in the Complaint in the light most favorable to the plaintiffs, and accepting their references to the Manual which are outside the four corners of the Complaint,[14] "the conduct [alleged] to have been negligent was not the exercise of choice regarding public policy and planning but, instead, was the negligent carrying out of previously established policies or plans." Onofrio v. Department of Mental Health, 408 Mass. 605, 611 (1990). For example, the "Security Policy" set forth in the Manual presupposes that security personnel would be responsible for monitoring, at a minimum, a surveillance camera outside the main entrance to the school. See Manual at Exhibit A to plaintiffs' opposition (a bell and camera system must be in place which "are controlled by the secretary/greeter.").

Thus, applying the second prong of the Stoller test, the Court concludes that the Town is not immune from suit pursuant to G.L. c. 258, § 10(b), and so much of the Town's Motion that argues that Counts II and III of the Complaint should be dismissed because it is immune from suit pursuant to that provision is **DENIED**.

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[14] See note 12, *supra*.

G. The Plaintiffs Properly "Presented" Their Claims To The Town Pursuant To G.L. c. 258, § 4

The Town next argues that Counts II and III of the Complaint must be dismissed because the plaintiffs failed to present sufficient notice of their claims to the Town as required by Section 4 of the MTCA. Section 4 states, in pertinent part:

> **A civil action shall not be instituted** against a public employer on a claim for damages **under this chapter unless the claimant shall have first presented his claim in writing to the executive officer of such public employer within two years after the date upon which the cause of action arose**, and such claim shall have been finally denied by such executive officer in writing.
> . . .
> Notwithstanding the provisions of the preceding paragraph, **in the case of a city or town, presentment of a claim pursuant to this section shall be deemed sufficient if presented to any of the following**: mayor, city manager, town manager, corporation counsel, city solicitor, town counsel, city clerk, town clerk, chairman of the board of selectmen, or executive secretary of the board of selectmen

G.L. c. 258, § 4 (emphasis added).

Thus, "[b]efore any civil action for damages may be brought against a [municipality], the claimant must present his claim to the [municipality]'s executive officer; only if the claim is denied, or if the executive officer fails to deny the claim within six months of its presentment, may the claimant file a civil suit. The claimant must present his claim to the executive officer 'within two years after the date upon which the cause of action arose.'" Pruner v. Clerk of Superior Court, 382 Mass. 309, 315 (1981) (quoting G.L. c. 258, § 4). "The purpose of the presentment requirement is to 'ensure[ ] that the responsible public official receives notice of the claim so that that official can investigate to determine whether or not a claim is valid, preclude payment of inflated or nonmeritorious claims, settle valid claims expeditiously, and take steps to ensure that similar claims will not be brought in the future.'" Rodriguez v. City of Somerville, 472 Mass. 1008, 1010 - 1011 (2015) (citations omitted).

The plaintiff sent two letters to the Town that purport to be presentment letters sent pursuant to § 4. The first letter is dated July 2, 2015 ("First Letter"), and the second letter is dated September 11, 2015 ("Second Letter"). The Town argues both letters failed to provide sufficient information to it about the nature of the claim under § 4 and,

in the case of the Second Letter, failed to be presented to the proper Town official. The Town does not contest the timeliness of the letters under § 4.

"A letter purporting to constitute presentment does not have to be absolutely precise. . . . The letter does, however, have to 'identify[ ] the legal basis of a plaintiff's claim' and must 'not [be] so obscure that educated public officials ... find themselves baffled or misled with respect to [whether] a claim' is being asserted 'which constitutes a proper subject for suit' under G. L. c. 258.'" Rodriguez, 472 Mass. at 1011 (internal citations omitted). In Rodriguez the S.J.C. found that "[t]he plaintiff's letter d[id] not meet these requirements" because:

> [T]he letter in this case did nothing more than state that the minor son was injured in an accident at a public school in the city and that counsel was seeking a copy of the school's report of the incident as well as reports of any other incidents at the same school. The letter also stated that any bill for photocopying or related fees should be sent to counsel's office. It appeared to be, in essence, a public records request, and reasonably could have been interpreted by the city as a precursor to a potential claim, where plaintiff's counsel was simply gathering information to determine whether the plaintiff might have a claim to press. **It did not identify any legal basis for a claim against the city, much less actually 'present' a claim that the city could reasonably be expected to investigate**.

Rodriguez, 472 Mass. at 1011 (emphasis added).

Here, the First Letter, unlike the letter in Rodriguez, identified the specific incident at issue and legal bases for the claim (i.e., negligent security measures and response to the attack). Given this conclusion, no analysis of the content of the Second Letter is necessary.

Although the Court finds that the First Letter met the requirements of § 4, the Court must address one other issue under that section not raised by the Town.

"Because proper presentment is a condition precedent, [Mass.R.Civ.P. 9(c)] requires the plaintiff to plead performance of the condition in his complaint." Rodriguez v. City of Somerville, 472 Mass. 1008, 1010 n. 3 (2015). Rule 9(c) states that "it is sufficient to aver generally that all conditions precedent have been performed or have occurred." Mass.R.Civ.P. 9(c). Here, the plaintiffs failed to plead performance of the condition precedent. Therefore, the Town's Motion must be allowed on this basis. As

such, so much of the Town's Motion that argues that Counts II and III of the Complaint should be dismissed because it fails to comply with the presentment requirements of G.L. c. 258, §4 is **ALLOWED**, although on grounds not raised by the Town.[15]

II. SJ SERVICES' MOTION

As stated, the Complaint alleges one cause of action against SJ Services. In Count III of the Complaint, the individual plaintiffs allege that SJ Services negligently inflicted emotional distress on each of them by: (a) cleaning up the crime scene before it was observed and processed by law enforcement personnel; and, (b) failing to tell authorities in a timely manner about the scene.

In support of its motion to dismiss, SJ Services argues Counts III of the Complaint should be dismissed because: (1) SJ Services did not owe a duty of care to the plaintiffs; and, (2) the Complaint fails to sufficiently allege that SJ Services' conduct caused the plaintiffs' harm. The Court agrees with former argument and does not reach the latter argument.

A. SJ Services Did Not Owe A Duty Of Care To The Plaintiffs

"'To recover for the tort of negligent infliction of emotional distress, a plaintiff must prove: '(1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case.'" Shea v. Cameron, 92 Mass. App. Ct. 731, 739 (2018) (quoting Conley v. Romeri, 60 Mass. App. Ct. 799, 801 (2004) (quoting Payton v. Abbott Labs, 386 Mass. 540, 557(1982)). In turn, "[t]he elements of a negligence claim are that 'the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, that damage resulted, and that there was a causal relation between the breach of the duty and the damage.'" Correa v. Schoeck, 479 Mass. 686, 693 (2018) (quoting Jupin v. Kask, 447 Mass. 141, 146 (2006)). "At issue here is whether [the plaintiffs] can establish a legal duty of care on [SJ Services'] part. '[T]he existence or nonexistence of a duty is a question of law, and is

[15] In the absence of other grounds warranting dismissal of Counts II and III of the Complaint on behalf of the Town, the Court would typically allow the plaintiffs to seek leave to amend the Complaint to comply with Rule 9(c). However, the Court declines to do so here given its decision in §1(A), *infra*.

thus an appropriate subject of summary judgment.'" Id. (quoting Jupin, 447 Mass. at 146).

"'The concept of 'duty' ... 'is not sacrosanct in itself, but is only an expression of the sum total of ... considerations of policy which lead the law to say that the plaintiff is entitled to protection. ... No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.' . . . The duty of care is derived from 'existing social values and customs and appropriate social policy.' . . . Accordingly, 'imposition of a duty generally responds to changed social conditions.'" Id. (internal citations omitted).

For substantially the same reasons set forth in SJ Services' memorandum of law, the Court rules that, as a matter of law, SJ Services did not owe the individual plaintiffs a duty of care. Moreover, given the Court's analysis in § 1(A), *supra*, the Court rules that "reasonable persons would [not] recognize [such a duty] and agree that it exists" under the circumstances of this case. Correa, 479 Mass. at 693. As such, so much of SJ Services' Motion that argues that Count III of the Complaint should be dismissed because it did not owe a duty of care to the plaintiffs is **ALLOWED**.[16]

[16] Given its ruling, the Court does not reach SJ Services' argument regarding causation. However, the Court notes the following: To survive a motion to dismiss under Rule 12(b)(6), a complaint alleging negligent infliction of emotional distress must set forth sufficient allegations to establish that SJ Services' negligence caused the plaintiffs' emotional distress. The Court agrees with the plaintiffs that "[g]enerally, questions of causation, proximate and intervening, present issues for the jury to decide." Solimene v. B. Grauel & Co., KG, 399 Mass. 790, 794 (1987) (citing several cases). However, "contrary to [the plaintiffs'] assertion, lack of proximate cause is appropriate for determination under rule 12(b)(6), where the complaint itself demonstrates that causation, as alleged, was not proximate." Fletcher Fixed Income Alpha Fund, Ltd. v. Grant Thornton LLP, 89 Mass. App. Ct. 718, 726 (2016) (citing Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 44-45, 907 N.E.2d 213 (2009). To be sure, to survive a motion to dismiss, a complaint must provide factual allegations sufficient to raise a right to relief above the "speculative level." Iannacchino, 451 Mass. at 636. It appears to the Court that the allegations in the Complaint may not rise above the level of speculation regarding whether the purported negligence by SJ Services legally caused the plaintiffs' emotional distress.

B. Count III Of The Complaint As It Applies To SJ Services Must Be Dismissed Because It Fails To State A Legally Recognized Negligence Claim On Behalf Of The Plaintiffs As "Bystanders"

Although SJ Services neither raised the issue nor joined the Town's argument, for the same reasons stated in § 1(A), supra, the Court rules that Count III of the Complaint fails to state a recognized cause of action or claim. As such, SJ Services' Motion is **ALLOWED** on that basis, too.

III. DDP'S MOTION

As stated, the Complaint alleges two causes of action against DDP. In Count I, Colleen's estate asserts a cause of action under the wrongful death statute at G.L. c. 229, § 2, alleging that DDP negligently designed, and failed to implement, "proper and effective security measures at the School" that would have "provide[d] a safe and secure [work] environment" for Colleen. Read in the light most favorable to the plaintiffs, Count II of the Complaint alleges that DDP negligently inflicted emotional distress on each of the individual plaintiffs by: (a) failing to keep Colleen safe from harm while on school grounds; and, (b) "fail[ing] to alert the Ritzer Family of an ongoing situation after Colleen was attacked by Chism."

In support of its motion to dismiss, DDP claims Counts I and II of the Complaint should be dismissed because the Complaint fails to sufficiently allege that DDP's acts or omissions caused Colleen's death. More specifically, DDP argues that "[t]he design, function, and monitoring of the video surveillance system [it designed and installed at the school] did not cause, contribute to or fail to prevent the events of October 22, 2013." The Court disagrees, but grants DDP's Motion on other grounds.

A. The Complaint Sufficiently Alleges That DDP's Negligence Caused Colleen's Death

DDP argues that Counts I and II must be dismissed because the Complaint fails to set forth a sufficient basis to establish its negligence caused Colleen's death. DDP claims that the Complaint establishes that the video surveillance system it designed for the school was functioning properly given the delineation in the Complaint of the timeline for the events that is attributed to the recording of the events captured by the surveillance system. DDP further argues the claim in the Complaint that its security

system design failed to require monitoring of the cameras fails because the lack of monitoring did not contribute to Colleen's death.

However, taking the factual allegations in the light most favorable to the plaintiffs, the Court rules that the Complaint sets forth sufficient facts to establish that DDP's negligent design and implementation of the security system as a whole was a substantial contributing factor in causing Colleen's death.[17] As such, DDP's Motion must be **DENIED** on the basis argued by DDP. Nevertheless, the Court will address another basis for dismissal not raised by DDP.

B. Count II Of The Complaint As It Applies To DDP Must Be Dismissed Because It Fails To State A Legally Recognized Negligence Claim On Behalf Of The Plaintiffs As "Bystanders"

Like SJ Services, DDP neither raised the issue nor joined the Town's argument under Dziokonski. However, for the same reasons stated in § 1(A), supra, the Court rules that Count II of the Complaint fails to state a recognized cause of action or claim. As such, DDP's Motion is **ALLOWED**.[18]

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[17] Given the Complaint alleges multiple causes and tortfeasors were responsible for Colleen's death, "substantial contributing factor" causation, rather than "but for" causation applies. See Matsuyama v. Birnbaum, 452 Mass. 1, 30 – 31 and n. 47 (2008) ("The 'substantial contributing factor' test is useful in cases in which damage has multiple causes, including but not limited to cases with multiple tortfeasors in which it may be impossible to say for certain that any **individual** defendant's conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm.") (original emphasis).

[18] Notwithstanding the "abstract posture" of this case, the Court recognizes the emotional injuries sustained by the plaintiffs given the extremely tragic events and significant agony they likely experienced. See Lawrence v. City of Cambridge, 422 Mass. 406, 412 (1996) (reversing grant of summary judgment on behalf of municipality that asserted immunity under § 10(j) and noting that "[t]he case comes to us in an unfortunately abstract posture. The most minimal discovery by either party would very likely have resolved the difficulties."). However, in the absence of being shown otherwise, the Court does not believe our appellate courts recognize a claim for negligent infliction of emotional distress in the circumstances of this case for the reasons stated in § 1(A), *supra*.

ORDER

For the above reasons, the Court **HEREBY ORDERS** the following:

1. So much of the Town's motion to dismiss (Paper No. 14) that argues that Counts II and III of the Complaint should be dismissed because it fails to state a recognized claim for the negligent infliction of emotional distress under Dziokonski is **ALLOWED**. Further, there being no just reason for delay, so much of the Town's Motion that requests Entry of Separate and Final Judgment under Rule 54(b) is **ALLOWED**. The Town's Motion is otherwise **DENIED**.

2. So much of SJ Services' motion to dismiss (Paper No. 8) that argues that Count III of the Complaint should be dismissed because it did not owe a duty of care to the plaintiffs is **ALLOWED**. Further, said motion is also **ALLOWED** because Count III of the Complaint fails to state a recognized cause of action or claim for the negligent infliction of emotional distress under Dziokonski. SJ Services' Motion is otherwise **DENIED**.

3. DDP's motion to dismiss (Paper No. 13) is **DENIED** on the basis argued by DDP. However, said motion is **ALLOWED** as to Count II of the Complaint because it fails to state a recognized cause of action or claim for the negligent infliction of emotional distress under Dziokonski.

4. Counts II and III of the Complaint are hereby **DISMISSED**.

5. Separate and Final **JUDGMENT OF DISMISSAL** shall **ENTER** on Counts II and III of the Complaint as they apply to the Town of Danvers and Danvers Public School System.

6. Separate and Final **JUDGMENT OF DISMISSAL** shall **ENTER** on Count III of the Complaint as it applies to SJ Systems, Inc.

7. The sole count of the Complaint that remains is Count I.

Jeffrey T. Karp
Associate Justice, Superior Court
Dated: September 21, 2018