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**SHORT FORM ORDER**

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU

PRESENT: **HON. ANTHONY L. PARGA, J.S.C.**

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**In the Matter of the Application of JESSICA GREBOSZ, an infant under the age of 18 years by her father and natural guardian, MARC GREBOSZ,**

Claimant,

- against -

**for permission to serve a late Notice of Claim upon**

**SEAFORD UNION FREE SCHOOL DISTRICT,**

Respondent.

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**Sequence #001**
Motion Date: 10/24/02
**Index # 15028/02**
XXX
**Part 22**

Notice of Petition, Pet. & Exs. . . . . 1
Answer & Affirmation in Opposition . . . . . 2
Reply Affirmation . . . . . 3
Sur-Reply Affirmation . . . . . 4

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Upon the foregoing papers, the application by the petitioner, for an order seeking leave to serve a late notice of claim pursuant to General Municipal Law §50-e(a), is granted. The notice of claim dated September 5, 2002, shall be deemed served upon the service of a copy of this order with notice of entry.

The petitioner seeks to file a late notice of claim based upon an accident involving petitioner's daughter, Jessica, on October 4, 2001, during her lunch recess at respondent's Seaford Harbor Elementary School in Seaford, N.Y. Jessica fractured her left humerus after she fell from a hand ring apparatus in the playground. Jessica was first taken to the school nurse, who filled out a medical claim form for Pupil Benefits Plan, Inc., located in Glenville,

New York. Petitioner contends that he was unaware that a notice of claim was required to be filed with the School District within 90 days of the accident, and that he believed that the medical claim form served that purpose based upon his conversations with school officials. The notice of claim (along with the papers at bar) were served on the respondent on September 17, 2002, more than eleven months after the accident. Petitioner maintains that the area where Jessica fell had an insufficient amount of resilient ground cover and that a prior accident involving another student occurred in the same area of the playground. He further contends that the accident site has remained in the same, purportedly defective, condition and furnished photographs and an expert's report to bolster his allegation.

General Municipal Law §50-e (1)(a) provides that a notice of claim must be filed with a municipality within ninety days of the date on which the claim arose. If the notice of claim is not filed within that 90 day time period, a claimant must make an application to the Court, within one year and 90 days from the time the cause of action accrued, for permission to file a late notice or claim (General Municipal Law §50-i (1) (c); *Pierson v. City of New York*, 56 NY2d 950, 954). However, when the claimant is an infant, this one year and 90 day Statute of Limitations is tolled during the period of infancy (*Cohen v. Pearl Riv. Union Free School Dist.*, 51 NY2d 256, 259, 262-263; see, General Municipal Law §50-e (5); CPLR 208). "The decision to grant or deny [a late notice of claim] is still purely a discretionary one, and the courts remain free to deny an application for an extension in the interests of fairness to the potentially liable public corporation. The incorporation of the toll into the period of limitations specified in [General Municipal Law] §50-e (subd. 5) merely confers upon the courts the authority to entertain the otherwise untimely applications of disabled claimants; it does not, however, dictate that such applications automatically be granted" (*Cohen v. Pearl Riv. Union Free School Dist., supra* at 265-266; see also *Knightner v. City of New York*, 269 AD2d 397).

Nineteen years after it made the foregoing pronouncement in *Cohen v. Pearl River Union Free School District,* the Court of Appeals in *Henry v. City of New York,* 94 NY2d 275, emphasized "that CPLR 208 tolls a Statute of Limitations for the period of infancy, and the toll is not terminated by the acts of a guardian or legal representative in taking steps to pursue the infant's claim" (*Henry v. City of New York,* 94 NY2d 275, 278). In *Henry*, the parent timely filed a notice of claim on behalf of her two sons, but did not commence a personal injury action and serve a summons and complaint on their behalf within the time limit that the City of New York argued was applicable pursuant to General Municipal Law §50-i, to wit, one year and 90 days. In holding that the infant plaintiffs' complaint was not time barred, even though it was served two years after the tort causes of action arose, the Court of Appeals specifically relied on an earlier Second Department case and "noted that 'because of the disability of infancy, the bar of the statute never became effective'" (*Henry v. City of New York, supra* at 280, quoting *Abbatemarco v. Town of Brookhaven,* 26 AD2d 664). The Court further proclaimed that "the special status that is accorded an infant plaintiff by virtue of the infant's tender age . . . is not altered by the action or inaction of the infant's parent or guardian [citations omitted]" (*Henry v. City of New York, supra* at 279-280). In conclusion, the Court declared that "[i]nfant plaintiffs should not be penalized by a parent's compliance with General Municipal Law §50-e in an effort to protect a right to recovery. Infancy itself, the state being 'a person [under] the age of eighteen' (CPLR 105[j]), is the disability that determines the toll. An interpretation of the infancy toll which measures the time period of infancy based on the conduct of the infant's parent or guardian cuts against the strong public policy of protecting those who are disabled because of their age (see, *Valdimer v. Mount Vernon Hebrew Camps,* 9 NY2d 21, 25; see also, CPLR art. 12). Because plaintiffs here were under the age of 18 when their causes of action accrued, they are entitled to the benefit of the infancy toll, and their claims against the City are not time-barred." (Id. at 283).

Despite *Henry's* broad implications that a parent's delay in filing a notice of claim or action should not be held against an infant claimant, the policy in the Appellate Division, Second Department, continues to be that trial courts must consider the following factors set forth in General Municipal Law §50-e (5) when an infant claimant seeks permission to file a late notice of claim: (1) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter, (2) whether the claimant was an infant or mentally or physically incapacitated, (3) whether the claimant had a reasonable excuse for the delay in filing a notice of claim, and (4) whether the municipality was prejudiced by the delay (*Perre v. Town of Poughkeepsie,* __AD2d__, __NYS2d__, 2002, N.Y. App. Div., LEXIS 11975 [2nd Dept., Dec. 9, 2002]). Moreover, the Second Department reiterated again last week in *Berg v. Town of Oyster Bay,* 2002 N.Y. App.Div. LEXIS 11916 (Dec. 9, 2002), the principle it proclaimed in a post-Henry case, *Matter of Knightner v. City of New York,* 269 AD2d 397: that "the infancy of the injured [petitioner], standing alone, does not compel the granting of an application for leave to serve a lete notice of claim" (*see, also, Matter of Soto v. Brentwood Union Free School*, 296 AD2d 552, 745 NYS2d 912, 913; *Matter of Brown v. County of Westchester*, 293 AD2d 748). In *Knightner* the Appellate Division expressly refused to follow *Henry* and excuse an eight month delay in filing a notice of claim on the ground of infancy. However, in a case decided one month later, *Abramson v. Lawrence Union Free Sch. Dist.*, 270 AD2d 370, the Appellate Division relied solely on *Henry* and permitted both the filing of a late notice of claim and the amendment of the complaint (to add as a party defendant another school district) since "[t]he infant plaintiff's time . . . had not expired (see, *Henry v. City of New York,* 94 NY2d 275; General Municipal Law §50-e[5]." Thereafter, in *Russo v. Monroe-Woodbury Cent. Sch. Dist.*, 282 AD2d 465, the Appellate Court acknowledged *Henry* and the tolling of the one year and 90 day Statute of Limitations, and granted the application to file the late notice of claim because (1) the failure to timely serve the notice "was related to

the infancy of the infant petitioners", (2) the municipality "had actual notice of the facts underlying the claims within 90 days of when the claims arose" and (3) the "failure to establish a nexus between the delay and the petitioner's infancy is not fatal in cases where, as here, knowledge of the facts alleged in the claims was received contemporaneously and there is not prejudice due to the delay" (*Russo v. Monroe-Woodbury Cent. Sch. Dist.*, 282 AD2d 465, 466).

Consequently, in evaluating applications under General Municipal Law §50-e(5) for filing late notices of claim, the Court "must strike an 'equitable balance . . . between a public corporation's reasonable need for prompt notification of claims against it and an injured party's interest in just compensation'" (*Matter of Reisse v. County of Nassau,* 141 AD2d 649, 650, quoting *Camarella v. East Inondequoit Cent. School Bd.*, 34 NY2d 139, 142-143).

Although ignorance of the need to serve a timely notice of claim will not generally excuse a failure to do so (*see, Washington v. City of New York*, 72 NY2d 881), "it is also well settled that petitioner's failure to allege a reasonable excuse for the delay is not necessarily fatal to his application" (*In re Welch*, 287 AD2d 761, 762; *Weiss v. City of New York,* 237 AD2d 212, 213). Here the respondent acquired actual knowledge of the essential facts of the incident which constitute the claim since its agents (1) provided the infant petitioner with medical treatment, (2) filled out a medical claim form and (3) had the opportunity to immediately investigate the accident which occurred on their premises during a supervised activity (*see, In re Welch, supra*, at 763; *Bird v. Port Byron Cent. Sch. Dist.,* 231 AD2d 916; *Zimmet v. Huntington,* 187 AD2d 436; *see, also Russo v. Monroe-Woodbury Cent. Sch. Dist., supra; compare, Johnson v. Katonah-Lewisboro Sch. Dist.,* 285 AD2d 490; *Matter of Rusiecki v. Clarkstown Cent. School Dist.,* 227 AD2d 493). Moreover, in view of the respondent's failure to substantiate its bald claim of prejudice, this Court will not penalize the infant claimant because of her parent's eleven-month delay in filing a notice of claim on her behalf (*see, Henry v. City of New York, supra; In re Welch, surpa; Bird v.*

*Port Byron Cent. Sch. Dist., supra; Sanna v. Bethpage Pub. Schools Union Free School Dist. 21*, 193 AD2d 606, 607; *compare, Matter of Brown v. County of Westchester, supra*; *Rabanar v. City of Yonkers*, 290 AD2d 428). Accordingly, the Court in its discretion and in the interests of justice grants the application by the petitioner for leave to file a late notice of claim, which shall be deemed serve upon the service of a copy of this order on the respondent.

Dated: December 17, 2002.

Anthony L. Parga, J.S.C.