2019 IL App (1st) 181046-U

THIRD DIVISION
March 27, 2019

No. 1-18-1046

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SARAVELIA URBINA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 17 L 7058
	)	
NOBLE NETWORK OF CHARTER SCHOOLS	)	Honorable
d/b/a/ NOBLE STREET CHARTER SCHOOL,	)	John H. Ehrlich,
	)	Judge Presiding.
Defendant-Appellee.		

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County dismissing plaintiff's complaint with prejudice as untimely is affirmed; defendant charter school is entitled to the protection of the statute of limitations in the Illinois Governmental and Governmental Employees Tort Immunities Act; therefore, plaintiff's complaint, alleging injuries sustained while plaintiff was a student and a minor, was untimely when it was not filed within one year of plaintiff reaching majority.

¶ 2 Plaintiff, Saravelia Urbina, filed a complaint and then an amended complaint against defendant, Noble Network of Charter Schools doing business as Noble Street Charter School (Noble) alleging both negligence and willful and wanton misconduct related to the conduct of a physical education class in which plaintiff participated as a student in defendant's school. Defendant filed a motion to dismiss

based on the complaint being untimely under the statute of limitations applicable to local government entities, which defendant claims to be, and for failing to state a claim for willful and wanton misconduct. The circuit court of Cook County granted defendant's motion to dismiss based on the complaint being untimely filed under the statute of limitations applicable to local government entities. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff's amended complaint (complaint) is based on events alleged to have occurred on June 4, 2013, at Pritzker College Prep (Pritzker), a Noble campus. According to the complaint, plaintiff was 15-years old at the time and a student at Pritzker, "and there existed a special relationship between [plaintiff] and [defendant.]" Count I of the complaint alleges plaintiff defendant, through its agents, breached its duty "to avoid negligence while conducting school activities" in that defendant:

> "(a) Carelessly and negligently failed to adequately determine the qualifications of person coordinating, monitoring, teaching, and/or supervising the physical activities at the school;
>
> (b) Carelessly and negligently routed children participating in physical education (PE) class to run through an alley in disregard for [plaintiff's] safety;
>
> (c) Carelessly and negligently failed to exercise care to prevent [plaintiff's] injury."

Count II of the complaint alleged defendant "had a duty to avoid willful and wanton misconduct while conducting school activities," and that on or about June 4, 2013, defendant "directed children participating in physical education (PE) class to run in an alley that was in an unsafe condition and/or wherein the circumstances of the runners passing through the alley was unsafe." Plaintiff alleged defendant breached its duty to avoid willful and wanton misconduct in that defendant:

> "(a) Willfully and wantonly permitted children participating in physical education (PE) class to run through an alley that was in disrepair and were aware of the possibility of serious injury associated with its physical education program and demonstrated a negligent disregard for [plaintiff's] safety;
>
> (b) Recklessly permitted children participating in physical education (PE) class to run through an alley that was in disrepair and were aware of the possibility of serious injury associated with its physical education program and demonstrated a negligent disregard for [plaintiff's] safety[;]
>
> (c) Willfully and wantonly created circumstances for runners in the alley that were knowingly or recklessly unsafe including having lots of runners that could become grouped together, thus, creating a tripping hazard;
>
> (d) Willfully and wantonly failed to exercise care to prevent [plaintiff's] injury."

Count I and count II of the complaint allege plaintiff "suffered injuries including, but not limited to, a dislocation fracture of the right knee, as well as torn tendons/ligaments, following a fall in an alley during her physical education (PE) class."

¶ 5 Defendant filed a motion to dismiss plaintiff's complaint on four grounds. Defendant attached to its motion a copy of plaintiff's complaint and amended complaint, and an exhibit (produced *in camera*) demonstrating plaintiff's date of birth. First, defendant moved to dismiss all of plaintiff's claims against it pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2016)) as barred by the one-year statute of limitations provided for in section 8-101(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/8-101(a) (West 2016)). Defendant's motion argues that "[a]s a public charter school" it is subject to section 27A-5(g)(3) of the Charter Schools Law (Law) (105 ILCS 5/27A-5(g)(3) (West 2016)), which

states that charter schools are *not* exempt from the Tort Immunity Act. Defendant's motion to dismiss argues that as a local public entity under the Tort Immunity Act, claims against it must be commenced within one year from the date the cause of action accrues, and plaintiff filed her complaint more than one year after her 18th birthday.

¶ 6 Second, defendant moved to dismiss Count I(a) of plaintiff's complaint, which alleges negligent hiring, based on immunity under section 2-201 of the Tort Immunity Act. Defendant argues that "hiring by a school involves discretionary decision making and such claims are barred by the [Tort Immunity Act.]" Defendant cited *Collins v. Board of Education*, 792 F. Supp. 2d 992 (N.D. Ill. 2011), in support of that assertion. Defendant's motion also asserts that section 2-201 "immunizes [defendant] from the allegations contained in Count I (negligence) and Count II (willful and wanton misconduct)." Section 2-201 provides immunity for "a public employee serving in a position involving the determination of policy or the exercise of discretion *** for an injury resulting from his act or omission in *determining policy when acting in the exercise of such discretion* even though abused." (Emphasis added.) 745 ILCS 10/2-201 (West 2016).

¶ 7 Third, defendant moved to dismiss count I of plaintiff's complaint to the extent count I attempts to plead "negligent failure to supervise" pursuant to section 3-108 of the Tort Immunity Act. Section 3-108 of the Tort Immunity Act immunizes "a local public entity" or a "public employee" from liability for injury proximately caused by its supervision, or failure to supervise where it has a duty to provide supervision, unless "the local public entity or p*ublic employee is guilty of w*illful or wanton conduct" in its supervision or in its failure to supervise. 745 ILCS 10/3-108 (West 2016).

¶ 8 Finally, defendant moved to dismiss count II of plaintiff's complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)) on the grounds plaintiff failed "to state a claim for damages against *** defendant for willful and wanton conduct." Defendant argues count II fails to set forth facts

as to how defendant was on notice of the alleged danger or disrepair in the alley, how the alley was dangerous or in disrepair, or who was allegedly aware of this danger or disrepair. Defendant argues that plaintiff's allegations concerning creating a tripping hazard are conclusory and lack egregiousness, and that plaintiff's allegations merely "adding the phrase, 'willfully and wantonly' " are insufficient to support a cause of action for an intentional tort. Defendant argues plaintiff's "catchall allegations" that defendant failed to exercise care to prevent plaintiff's injuries must also be dismissed.

¶ 9 The trial court entered a briefing schedule. Plaintiff filed a response to defendant's motion to dismiss in which plaintiff argued that section 27A-5(g)(3) of the Law is vague, and "the only reasonable reading is to permit charter schools immunity only for acts and omissions *** that were (1) discretionary and (2) involved a policy choice." Plaintiff suggests the acts and omissions alleged in the complaint were not discretionary nor involved a policy choice and, therefore, "the applicable statute of limitations is the 2-year limitations period found in 735 ILCS 5/13-202." Next, plaintiff refuted defendant's claims it is entitled to immunity under section 2-201 of the Tort Immunity Act, because none of plaintiff's allegations "describe an injury resulting from an act or omission in determining policy." Plaintiff argued defendant failed to attach any affidavit in support of its motion to demonstrate "any 'affirmative matter' of any alleged 'determination of policy.' " Plaintiff argued that nothing suggests a "discretionary policy determination" on the face of plaintiff's allegations defendant failed to adequately determined the qualifications of the person in charge of physical activities at the school; and, "given the lack of any evidence in support of any policy determination that caused *** plaintiff's injuries, *** defendant fails to meet its burden on its affirmative defense to show it was immune from suit." Finally, plaintiff argued the complaint properly alleges her claims of willful and wanton conduct.

¶ 10 Defendant filed its reply in which defendant argues it is "a public school and a public entity, as mandated by state law and as is consistent with its Renewal and Charter Agreement." Defendant

attached its Renewal and Charter School Agreement to its reply in support of its motion to dismiss. Defendant argues the Law does not "limit the application of the [Tort Immunity Act]" but instead the plain language of the Law "dictates that the [Tort Immunity Act] in its entirety applies to public charter schools." Defendant also argues in its reply that it is immune from plaintiff's claim of negligent hiring and failure to supervise. Defendant also argues it is be "immune from liability for its discretionary decisions as to whether to have the students run and where to run during gym class." Finally, defendant argues plaintiff failed to sufficiently plead a claim for willful and wanton conduct. Defendant argues the use of the term "disrepair" is vague and notes plaintiff did not allege defendant was aware of prior injuries caused by having students run in the alley.

¶ 11 The trial court granted defendant's motion to dismiss with prejudice on the ground the complaint was not timely filed.

¶ 12 This appeal followed.

¶ 13 ANALYSIS

¶ 14 Section 2-619(a)(5) of the Code "permits dismissal if the suit was not 'commenced within the time limited by law.' 735 ILCS 5/2-619(a)(5) (West 2016)." *Maniscalco v. Porte Brown, LLC.*, 2018 IL App (1st) 180716, ¶ 15. When ruling on a motion to dismiss pursuant to section 2-619 the court accepts all well-pleaded facts in the complaint as true and draws all reasonable inferences from those facts in favor of the nonmoving party. *Id.* "A motion for involuntary dismissal pursuant to section 2-619(a) admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matter which avoids the legal effect or defeats a plaintiff's claim." *Betts v. City of Chicago*, 2013 IL App (1st) 123653, ¶ 14. An affirmative matter is "something in the nature of a defense that negates the cause of action completely." *Id.* "Once a defendant satisfies the initial burden of presenting affirmative

matter, the burden then shifts to the plaintiff to establish that the defense is 'unfounded or requires the resolution of an essential element of material fact before it is proven.' [Citations.]" *Id.*

> "Since the failure to act within the time provided by law is an affirmative matter, no affidavit is required to support a section 2-619 motion if the affirmative matter asserted is apparent on the face of a pleading. [Citations.] Moreover, 'in ruling on a section 2–619 motion, where the facts are undisputed and only one conclusion is evident, the court may determine the date of the commencement of the statute of limitations as a matter of law.' [Citations.]" *Maniscalco*, 2018 IL App (1st) 180716, ¶ 17.

We review orders dismissing a complaint under section 2-619 *de novo*. *Id.* ¶ 15.

> "A circuit court should dismiss a complaint under section 2-615 only when it is apparent that no set of facts can be proved that will entitle a plaintiff to relief. [Citation.] Illinois is a fact-pleading state, and a pleader must state facts essential to his cause of action that reasonably inform the opposing party of the nature of his claim. [Citation.] To withstand a motion to dismiss, the characterization of acts as willful and wanton conduct is insufficient; rather, the misconduct must be manifested by well-pleaded facts. [Citation.] A reviewing court will determine *de novo* whether the allegations of the complaint, with all well-pleaded facts taken as true, are sufficient to state a cause of action. [Citation.]" *Ozuk v. River Grove Board of Education*, 281 Ill. App. 3d 239, 244-45 (1996).

See also *Ledeaux by Ledeaux v. Motorola Inc.*, 2018 IL App (1st) 161345, ¶ 49 (to state a claim based on willful and wanton misconduct "a plaintiff must plead the elements of negligence together with facts establishing that the negligent conduct created an extreme risk of harm to others and that the defendant knew of the extreme risk but proceeded anyway"); *Fennerty v. City of Chicago*, 2015 IL App (1st) 140679, ¶ 17 ("willful and wanton misconduct must be manifested by the well-pled facts contained in

the complaint"). "A plaintiff's failure to set forth factual allegations of willful and wanton conduct when required to do so is fatal to his or her complaint." *Cochran v. Securitas Security Services USA, Inc.*, 2016 IL App (4th) 150791, ¶ 33.

¶ 15 Because the issue of whether plaintiff's complaint was filed within the applicable limitations period may be dispositive of the case, we will consider that issue first. As plaintiff notes, it is undisputed that the limitations period did not begin to run until plaintiff reached the age of majority. See 735 ILCS 5/13-202 (West 2016); 735 ILCS 5/13-211(a) (West 2016). Plaintiff argues that plaintiff had until two years after reaching majority to file her complaint. Section 13-211 of the Code states: "If the person entitled to bring an action, specified in Sections 13-201 through 13-210 of this Code, at the time the cause of action accrued, is under the age of 18 years *** then he or she may bring the action within 2 years after the person attains the age of 18 years." 735 ILCS 5/13-211(a) (West 2016). Defendant argues the applicable limitations period is the one-year statute of limitations applicable to local public entities. Section 8-101 of the Tort Immunity Act reads, in pertinent part, as follows:

> "No civil action other than an action described in subsection (b) may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued." 745 ILCS 10/8-101(a) (West 2016).

¶ 16 Defendant argues it "operates under the auspices of 105 ILCS 5/27A-5 of the Law and, as such, it is a "local public entity" for purposes of the Tort Immunity Act. Section 27A-5 of the Law states, in pertinent part, as follows:

> "(a) A charter school shall be a public, nonsectarian, nonreligious, non-home based, and non-profit school. A charter school shall be organized and operated as a nonprofit

> corporation or other discrete, legal, nonprofit entity authorized under the laws of the State of Illinois.
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> * * *
>
> (g) A charter school shall comply with all provisions of this Article, the Illinois Educational Labor Relations Act, all federal and State laws and rules applicable to public schools that pertain to special education and the instruction of English learners, and its charter. A charter school is exempt from all other State laws and regulations in this Code governing public schools and local school board policies; however, a charter school is not exempt from the following:
>
> * * *
>
> (3) the Local Governmental and Governmental Employees Tort Immunity Act." 105 ILCS 5/27A-5(g) (West 2016).

¶ 17 Plaintiff argues section 27A-5 is vague and can only reasonably be read as limited to matters concerning policy. Plaintiff relies on the initial exemption from state law provided in section 27A-5(g), to wit: "A charter school is exempt from all other State laws and regulations in this Code governing public schools and local school board *policies*." (Emphasis added.)), followed by exceptions to that broad exemption. Plaintiff argues section 27A-5(g)(3) should be construed to mean that charter schools are only exempt from immunities provided by the Tort Immunity Act for policy determinations. Plaintiff argues that nothing in the Tort Immunity Act or the Law "makes clear that a 'charter school' fall[s] under the umbrella of entitlement to all 'immunities and defenses' that a 'local public entity' receives under the Tort Immunity Act." Section 2-201 of the Tort Immunity Act states that

> "[e]xcept as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an

> injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2016).

Plaintiff argues that none of the allegations in the complaint "describe an injury resulting from an act or omission in determining policy," therefore the exemption is not applicable to the allegations in the complaint.

¶ 18 Defendant cites *Northern Kane Educational Corp. v. Cambridge Lakes Education Ass'n, IEA-NEA*, 394 Ill. App. 3d 755 (2009) for the proposition that section 27A-5(g) of the Law is clear and that the "[Tort Immunity Act] applies to charter schools by virtue of the express words of the statute." Defendant asserts the *Northern Kane Educational Corp.* court rejected the argument that tort immunity applies only to discretionary acts and policy decisions as "too narrow an interpretation of the [Law]." See *Northern Kane Educational Corp.*, 394 Ill. App. 3d at 759.

¶ 19 In *Northern Kane Educational Corp.*, a union sought to represent certain employees of a charter school pursuant to the Illinois Educational Labor Relations Act (Educational Labor Relations Act). *Northern Kane Educational Corp.*, 394 Ill. App. 3d at 756. The governing body of the charter school objected on the ground the Illinois Educational Labor Relations Board (Board) lacked jurisdiction over the governing body. *Id*. At the time the *Northern Kane Educational Corp.* case was decided, the Educational Labor Relations Act was not one of the statutes enumerated in the Law as being excepted from the blanket exemption, and section 27A-5(g) provided:

> "(g) A charter school shall comply with all provisions of this [a]rticle [(which is the article of the School Code dealing only with charter schools)] and its charter. A charter school is exempt from all other [s]tate laws and regulations in the School Code [(105 ILCS 5/1 through 36) (West 2008)] governing public schools and local school board policies, except the following:

(1) Sections 10-21.9 and 34-18.5 of the School Code [(105 ILCS 5/10-21.9, 34-18.5 (West 2008))] regarding criminal history records checks and checks of the Statewide Sex Offender Database of applications for employment;

(2) Sections 24-24 and 34-84A of the School Code [(105 ILCS 5/24-24, 34-84A (West 2008))] regarding discipline of students;

(3) The Local Governmental and Governmental Employees Tort Immunity Act [(745 ILCS 10/1-101 through 1-210 (West 2008))];

(4) Section 108.75 of the General Not For Profit Corporation Act of 1986 [(805 ILCS 105/108.75 (West 2008))] regarding indemnification of officers, directors, employees, and agents;

(5) The Abused and Neglected Child Reporting Act [(325 ILCS 5/1 through 11.7 (West 2008))];

(6) The Illinois School Student Records Act [(105 ILCS 10/1 through 10 (West 2008))]; and

(7) Section 10-17a of the School Code [(105 ILCS 5/10-17a (West 2008))] regarding school report cards." *Id*. at 757.

¶ 20 The Board found it did have jurisdiction because the governing body was an educational employer under the Educational Labor Relations Act. *Id*. On appeal, the issue was whether section 27A-5(g) of the Law exempted charter schools from the Educational Labor Relations Act and, even if the Educational Labor Relations Act did apply to charter schools, whether the governing body was an educational employer as that term is defined in the Educational Labor Relations Act. *Id*. On appeal the

appellate court held the Educational Labor Relations Act did not apply to charter schools. *Id*. at 758.[1] The court held "[t]he plain language of section 27A–5(g) is clear. Charter schools are exempt from 'all other [s]tate laws' with limited, specified exceptions, of which the [Educational Labor Relations Act] is not one." *Id*. at 759. The court found support for its conclusion in the fact section 27A-5(g) expressly excludes specific laws from the otherwise blanket exemption provided to charter schools from "other state laws," including government tort immunity. *Id*.

¶ 21 Defendant argues the exceptions to the broad exclusions of law applicable charter schools encompass only laws that govern public school and local school board policies. The *Northern Kane Educational Corp.* court rejected the argument which defendant has raised in this appeal. In *Northern Kane Education Corp.* the Board reasoned it had jurisdiction because the exemptions only applied to public school and local school board policies, and found as follows:

> "Section 27A–5(g) states that '[a] charter school is exempt from all other [s]tate laws and regulations in the School Code governing public schools and local school board policies, except the following[,]' and it enumerates those [s]tate laws. The [Educational Labor Relations Act] is not one of those [s]tate laws. However, *** the [Educational Labor Relations Act] does not 'govern public schools and local school board policies.' Rather, the [Educational Labor Relations Act] governs relations between educational employers and their employees." (Internal quotation marks omitted.) *Id*. at 760.

¶ 22 From the Board's explanation of its finding it is clear the Board reasoned that the enumerated exceptions to charter schools' exemption from state laws only extended so far as the enumerated laws

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[1] The legislature subsequently amended the Law to make clear that the governing body of a charter school is an educational employer and to require charter schools to comply with the Education Labor Act. *Northern Kane Educational Corp.*, 394 Ill. App. 3d at 761.

applied to matters of public school and local school board policies. See *id*. (" 'the [Education Labor Act] does not "govern public schools and local school board policies." ' ").

¶ 23 The *Northern Kane Educational Corp.* court rejected the Board's rationale in that case. *Id*. The court held the Board's view that the exceptions from the exemption encompass only laws that govern public school and local school board policies was "too narrow an interpretation of the Charter Schools Law." *Id*. The court held:

> "[the] flaw in the Board's decision is that section 27A-5(g) exempts charter schools from two things: (1) 'regulations in the School Code governing public schools and local school board policies' *and* (2) all other [s]tate laws.' [Citation.] This is demonstrated by the fact that the exceptions to the charter school's exemptions include state laws *other than those involving the School Code*, such as the Local Governmental and Governmental Employees Tort Immunity Act [citation], the General Not for Profit Corporation Act of 1986 [citation], the Abused and Neglected Child Reporting Act [citation], and the Illinois School Student Records Act [citation]." (Emphasis in original and emphasis added.) *Id*.

¶ 24 In this case, plaintiff similarly argues that the exemption for the Tort Immunity Act only goes so far as the Tort Immunity Act provided immunity from matters of policy. In other words, plaintiff argues that we should read section 27A-5(g)(3) of the Law to only provide an exception for (and thus the applicability of) certain provisions of the Tort Immunity Act. We agree with the *Northern Kane Educational Corp.* court's construction of section 27A-5(g). Plaintiff's construction of section 27A-5(g)(3) is contrary to the plain language of the statute. This court may not "depart from the plain language of a statute by reading into it exception, limitations, or conditions that the legislature did not express." *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 16. Where the legislature intended to limit the scope of the exception to the exemption from "other state laws," *i.e.*,

laws other than those in the School Code governing public school and local school board policies, it did so expressly. Section 27A-5(g) provides and exception to the exemption for, specifically, "[s]ection 108.75 of the General Not For Profit Corporation Act of 1986," (105 ILCS 5/27A-5(g)(4) (West 2016)). The legislature did *not* include a similar limitation on the exception to the exemption for the Tort Immunity Act by, for example, writing section 27A-5(g)(3) to read "*section 2-201* of the Local Governmental and Governmental Employees Tort Immunity Act." "The fact that the legislature chose not to include a similar express limitation in section [27A-5(g)(3)] strongly suggests that no such limitation was intended." *Joiner v. Illinois Workers' Comp. Comm'n*, 2017 IL App (1st) 161866WC, ¶ 38 (citing *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*, 2015 IL 117418, ¶ 28). In *Illinois State Treasurer*, our supreme court wrote:

> "Where, as here, the legislature uses certain language in some instances and wholly different language in another, settled rules of statutory construction require us to assume different meanings or results were intended. [Citation.] Moreover, no rule of construction authorizes us to declare that the legislature did not mean what the plain language of the statute imports [citation], nor may we rewrite a statute to add provisions or limitations the legislature did not include [citation]." *Illinois State Treasurer*, 2015 IL 117418, ¶ 28.

¶ 25 In this instance, the legislature used certain language in section 27A-5(g)(4) that it did not use in section 27A-5(g)(3), (g)(5), (g)(6), or (g)(8), all of which provide exceptions from the exemption for "other state laws" other than the School Code. 105 ILCS 5/27A-5(g) (West 2016). We must assume a different meaning was intended, and we may not read a limitation into those sections the legislature did not include. Plaintiff would have us do just that and read a limitation into section 27A-5(g)(3) to limit the application of the Tort Immunity Act to charter schools only where an injury results from a policy

determination and an exercise of discretion (*Harinek v. 161 N. Clark St. Limited Partnership*, 181 Ill. 2d 335, 341 (1998) ("The statute is equally clear, however, that immunity will not attach unless the plaintiff's injury results from an act performed or omitted by the employee in determining policy and in exercising discretion."); see also *Andrews v. Metropolitan Water Reclamation District of Greater Chicago*, 2018 IL App (1st) 170336, ¶ 20.). That, we may not do.

¶ 26 The plain language of section 27A-5(g)(3) provides that charter schools are not exempt from the Tort Immunity Act. The Tort Immunity Act protects "local public entities." 745 ILCS 10/1-101.1(a) (West 2016). Under the Tort Immunity Act, a "local public entity" includes "any not-for-profit corporation organized for the purpose of conducting public business." 745 ILCS 10/1-206 (West 2016). In *Caroll v. Paddock*, 199 Ill. 2d 16, 25-27 (2002), our supreme court held "a not-for-profit corporation must be 'organized for the purpose of conducting public business' in order to satisfy the definition of a '[l]ocal public entity,' " and set forth criteria to determine when a not-for-profit corporation is conducting public business for purposes of the Tort Immunity Act. The *Caroll* court held that "to conduct 'public business' under the Tort Immunity Act, a corporation must pursue an activity that benefits the entire community without limitation. In addition, the phrase "public business" is also today commonly understood to mean the business of the government." *Id*. at 26. The court also held that "[w]ithout evidence of local governmental control, it cannot be said that a not-for-profit corporation conducts 'public business' for purposes of the Tort Immunity Act. Thus, in order to receive the benefits of the Tort Immunity Act, the not-for-profit corporation must also be subject to the kinds of organizational regulations and control that are typical of other governmental units." *Id*. at 26. The court provided examples of "indicia of the requisite control" (*id.* at 26) and concluded that "a not-for-profit is involved in the operation of the government's public business if and only if the not-for-profit is tightly

enmeshed with government either through direct governmental ownership or operational control by a unit of local government." *Id*. at 27.

¶ 27 We find the legislature's provision of an exception for the Tort Immunity Act to the exemption of charter school from state laws is a clear indication of the legislature's intent that charter schools qualify as "local public entities." Nonetheless, plaintiff argues that "[o]n the record before this Court *** there is insufficient evidence to support [defendant's] contention that it is a 'local public entity' *** under the [Tort Immunity Act.]" Plaintiff notes defendant failed to attach any materials in support of its contention it is a "local public entity" to its motion, thus there is no evidence defendant was "organized for the purpose of conducting public business," what portion of defendant's revenue comes from government funds, or that defendant "benefits the entire community without limitation."

¶ 28 We reject plaintiff's argument there is insufficient evidence on this record to establish that defendant is a "local public entity" for purposes of the Tort Immunity Act. Plaintiff admits defendant is a 501(c)(3) not-for-profit corporation and that defendant is a charter school under the Law (105 ILCS 5/27A-1 *et seq.* (West 2016)). As demonstrated below, the Law provides sufficient evidence to find defendant is a "local public entity." *Maniscalco,* 2018 IL App (1st) 180716, ¶ 17; *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 377 (2003) ("the 'affirmative matter' asserted by the defendant must be apparent on the face of the complaint; *otherwise*, the motion must be supported by affidavits or certain other evidentiary materials" (emphasis added)). Defendant also attached its "Renewal of Charter and Charter School Agreement" (Renewal) to its reply in support of its motion to dismiss. A court may consider documents attached to a reply memorandum in ruling in a motion to dismiss pursuant to section 2-619 of the Code. See, *e.g., O'Hare Truck Service, Inc., v. Illinois State Police*, 284 Ill. App. 3d 941, 945-46 (1996). The Renewal provided further evidence defendant qualifies as a "local public entity" under the Tort Immunity Act.

¶ 29 Initially we find any lack of information about the sources of defendant's revenue is not dispositive. The *Carroll* court held that "[i]rrespective of the degree of government funding, a not-for-profit corporation must be 'organized for the purpose of conducting public business' in order to satisfy the definition of a '[l]ocal public entity.' 745 ILCS 10/1–206 (West 2000)." *Carroll*, 199 Ill. 2d at 25. Thus, we turn our attention to whether defendant is organized for the purpose of conducting public business under the framework identified by the *Carroll* court. *Id.*; see also *Brugger v. Joseph Academy, Inc.*, 202 Ill. 2d 435, 436 (2002) (adhering to the decision in *Carroll* regarding the criteria for identifying local public entities under the Tort Immunity Act); *O'Toole v. Chicago Zoological Society*, 2015 IL 118254, ¶ 18 (following *Carroll* and *Brugger*).

¶ 30 We find that charter schools conduct public business. The legislature stated that its intent in authorizing charter schools was "to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of education children *within the public school system*." (Emphasis added.) 105 ILCS 5/27A-2(c) (West 2016). Charter schools are publicly funded. 105 ILCS 5/27A-11, 11.5 (West 2016). This case is immediately distinguishable from *Brugger*, in which our supreme court held that a private, not-for-profit corporation serving special education students did not qualify as a local public entity in part because that school was "only obliged to satisfy [certain] regulatory schemes and contractual requirements it [relied on in support of its position it was a local public entity] because it chooses to contract with public schools for students." *Brugger*, 202 Ill. 2d at 447. In this case, defendant is bound to certain regulations and requirements under the Law; it did not choose not to be bound by the Law. *Cf. id.*

¶ 31 The *Brugger* court also took issue with the contention by the private school in *Brugger* that it "serves the public at large by stepping directly into the shoes of local public schools that are unable to provide appropriate services to disabled children." *Id.* at 449. Our supreme court found that because the

school in *Brugger* was "privately operated and controlled, it can feely reject any applicant for any reason. *** In contrast, genuinely 'public' schools must serve the eligible public at large and cannot choose their students. For this reason alone, the academy is not open to the public at large." *Id.* The same is not true in this case because defendant is bound by the Law. Under the Law, a charter school is "subject to all federal and State laws and constitutional provisions prohibiting discrimination on the basis of disability, race, creed, color, gender, national origin, religion, ancestry, marital status, or need for special education services." 105 ILCS 5/27A-4 (West 2016). The Law also contains the following provisions that are relevant to our finding that charter schools are open to the public at large:

> "(d) Enrollment in a charter school shall be open to any pupil who resides within the geographic boundaries of the area served by the local school board, provided that the board of education in a city having a population exceeding 500,000 may designate attendance boundaries for no more than one-third of the charter schools permitted in the city if the board of education determines that attendance boundaries are needed to relieve overcrowding or to better serve low-income and at-risk students. Students residing within an attendance boundary may be given priority for enrollment, but must not be required to attend the charter school.
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> * * *
>
> (h) If there are more eligible applicants for enrollment in a charter school than there are spaces available, successful applicants shall be selected by lottery." 105 ILCS 5/27A-4 (West 2016).

¶ 32 Additionally, the *Brugger* court found a lack of "operational control by a unit of local government" over the private school in that case because "[p]ursuant to the contracts in effect between the academy and the school district, the academy is permitted to run its day-to-day operations as it

chooses, and its board is not subject to any outside governmental control." *Brugger*, 202 Ill. 2d at 447. Charter schools are different. "A charter school shall be administered and governed by its board of directors or other governing body in the manner provided in its charter." 105 ILCS 5/27A-5(c) (West 2016). The charter is a binding contract between the charter school and a local school board "under the terms of which the local school board authorizes the governing body of the charter school to operate the charter school on the terms specified in the contract." 105 ILCS 5/27A-6(a) (West 2016). The school's charter "may not waive or release the charter school from the State goals, standards, and assessments established pursuant to Section 2-3.64a-5 of [the School] Code." 105 ILCS 5/27A-6 (West 2016). Under the Law, defendant is required to "administer any other nationally recognized standardized tests to its students that the chartering entity administers to other students, and the results on such tests shall be included in the chartering entity's assessment reports." *Id.* Therefore, unlike the private school in *Brugger*, here, defendant is not "permitted to run its day-to-day operations as it chooses." *Brugger*, 202 Ill. 2d at 447.

¶ 33 Also in contrast to the school in *Brugger*, the governing body of a charter school is subject to outside government control. See *id.* The Law requires all local school boards with a charter school to develop and maintain policies and practices "in all major areas of authorizing responsibility[2], including *** [o]ngoing charter school oversight and evaluation." 105 ILCS 5/27A-7.10(3)(4) (West 2016). Moreover, "[a] charter must meet all standards and goals for academic, organizational, and financial performance set forth by the authorizer in order to be renewed ***." 105 ILCS 5/27A-9(a) (West 2016). The Law also provides:

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[2] " 'Authorizer' means an entity authorized under this Article to review applications, decide whether to approve or reject applications, enter into charter contracts with applicants, oversee charter schools, and decide whether to renew, not renew, or revoke a charter." 105 ILCS 5/27A-3 (West 2016).

> "A charter may be revoked or not renewed if the local school board or the Commission, as the chartering entity, clearly demonstrates that the charter school did any of the following, or otherwise failed to comply with the requirements of this law:
>
> (1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter.
>
> (2) Failed to meet or make reasonable progress toward achievement of the content standards or pupil performance standards identified in the charter.
>
> (3) Failed to meet generally accepted standards of fiscal management.
>
> (4) Violated any provision of law from which the charter school was not exempted." 105 ILCS 5/27A-9(c) (West 2016).

Charter schools may not choose to forego the Law and eliminate the "governmental interventions" provided for by the Law. *Cf.*, *Brugger*, 202 Ill. 2d at 448.

¶ 34 We also consider defendant's Renewal of its charter. The Renewal is defendant's contract with the Chicago Board of Education. Defendant's charter is subject to final certification by the State Board of Education and contains similar provisions to those in the Law requiring that the school be open to the public. The Renewal states that defendant is required to "pursue and make reasonable progress toward" goals listed in an Accountability Plan" attached as an exhibit to the Renewal. The Renewal also states that defendant "shall be held accountable by the [Chicago Board of Education] in accordance with" the Accountability Plan. The Accountability Plan states that defendant and the Chicago Board of Education "have determined that it is in the best interests of the Board, [defendant,] students, parents and the public to articulate clear standards for [defendant] and to annually publish the level of achievement of [defendant] with respect to those standards." The Accountability Plan sets forth requirements for annual

performance reports, student testing and assessment, and financial management. The Accountability Plan further states:

> "The [Chicago School Board] shall hold [defendant] accountable in these Categories (Pupil Performance and Financial Management/Compliance) through the Indicators contained in the annual Performance Reports. The [Chicago School Board] shall give fair consideration to all Indicators for the current year in comparison to the previous years of [defendant's] history when acting to renew, not renew, or revoke [defendant's] charter."

¶ 35 Defendant is required to inform the Chicago Board of Education of any changes to its curriculum. Under the Renewal the Chicago Board of Education must review and may make reasonable request changes to defendant's system of student discipline. The Renewal requires defendant to "grant reasonable access to, and cooperate with, the [Chicago Board of Education] including allowing site visits *** for the purpose of allowing [Chicago Board of Education] to fully evaluate the operations and performance of the Charter School pursuant to the Accountability Plan and the Charter Schools Law."

¶ 36 "Control" means "to exercise restraining or directing influence over" or "to have power over." https://www.merriam-webster.com/dictionary/control (visited Feb. 15, 2019); *Maschek v. City of Chicago*, 2015 IL App (1st) 150520, ¶ 56 ("When a statute does not define its own terms, a reviewing court may use a dictionary to ascertain the plain and ordinary meaning of those terms."). The foregoing provisions of the Law and defendant's charter clearly establish that charter schools generally and defendant specifically conduct "public business" and are "tightly enmeshed with government" through "operational control by a unit of local government." *Brugger*, 202 Ill. 2d at 445 (quoting Carroll, 199 Ill. 2d at 27). Accordingly, we hold defendant is a "local public entity" within the meaning of the Tort Immunity Act.

¶ 37 Having found that defendant is not exempt from the Tort Immunity Act and qualifies as a local public entity under the Tort Immunity Act, we hold that all of the provisions of the Tort Immunity Act apply to defendant. The Tort Immunity Act imposes a one-year statute of limitations on claims against those that are subject to its provisions. 745 ILCS 10/8-101(a) (West 2016). Plaintiff does not dispute that the complaint was not filed within one year of her reaching the age of majority. Accordingly, the trial court properly granted defendant's motion to dismiss the complaint in its entirety with prejudice. *Callico v. City of Belleville*, 99 F. App'x 746, 749 (7th Cir. 2004) (time-barred claims subject to dismissal with prejudice); see also *Elmore v. Henderson*, 227 F.3d 1009, 1011 (7th Cir. 2000) ("if the statute of limitations has run the dismissal is effectively with prejudice"). Because of our disposition in this case, it is unnecessary to consider the parties' other arguments.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 40 Affirmed.