

**IN THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF PENNSYLVANIA**

HOPE AMSPACHER, ADMINISTRATOR	:
OF THE ESTATE OF ZACHARY KIRCHNER,	:
and MATTHEW KIRCHNER,	: NO. 1:23-cv-00286
Plaintiffs,	:
	:
v.	: CIVIL ACTION
	:
RED LION AREA SCHOOL DISTRICT,	:
JASON M. HOFFMAN, M.A., OFFICER	:
MARC GREENLY, L.D., a minor, D.M.	:
a minor, T.F., a minor, C.H., a minor,	:
W.G., a minor, and C.A., a minor,	: JURY TRIAL DEMANDED
Defendants	:

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2023, upon consideration of Defendant, W.G.’s Motion to Dismiss Plaintiffs’ First Amended Complaint and any response thereto, it is hereby ORDERED and DECREED that Defendant’s Motion to Dismiss is hereby granted in favor of Defendant, W.G., and against Plaintiffs. It is further **ORDERED** that Plaintiffs’ First Amended Complaint as it pertains to Defendant, W.G., is hereby **dismissed with prejudice**.

**BY THE COURT:**

\_\_\_\_\_  
J.

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**DEFENDANT, W.G.'S,  
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

Defendant, W.G., by and through his attorneys, Griffith, Lerman, Lutz & Scheib, and Saxton & Stump, respectfully moves this Honorable Court to Dismiss Plaintiffs' First Amended Complaint as it pertains to Defendant, W.G., and, in support thereof, avers the following:

1. On or about February 17, 2023, Plaintiffs filed a Complaint against the above-named Defendants (Doc. No. 1).
2. On or about April 19, 2023, Plaintiffs filed a First Amended Complaint against the above-named Defendants (Doc. No. 18), asserting multiple causes of action in connection with the death of Zachary Kirchner that occurred on April 20, 2021.

3. Pursuant to the allegations as set forth in the First Amended Complaint as it relates to minor Defendant, W.G., Plaintiffs assert a claim of Gross Negligence and/or Recklessness (without alleging Negligence) and two (2) counts of Intentional Infliction of Emotional Distress.

4. The First Amended Complaint as prepared and filed is deficient with respect to any alleged wrongdoing and/or negligent conduct on behalf of Defendant, W.G.

5. The only paragraph in Plaintiffs' First Amended Complaint that makes a specific reference to W.G. is paragraph forty-one (41), which states "At one time, for example, during class time in 8<sup>th</sup> grade, Defendant W.G. went up to Decedent with a lollipop making sexual gestures and making gay jokes such as "I got a lollipop for you." See First Amended Complaint at ¶ 41. This alleged incident occurred when the Decedent was in eighth (8<sup>th</sup>) grade, more than one (1) year before he tragically took his own life.

6. The First Amended Complaint, as written, does not link W.G. to any specific actions, as the remaining factual averments refer to unnamed and unspecified "Student Defendants." See First Amended Complaint at ¶ 45, *et seq.*

**Plaintiffs' Gross Negligence and/or Recklessness Count V must be Dismissed**

7. Plaintiffs' claim for gross negligence/recklessness must be dismissed because Plaintiffs have failed to identify an applicable duty of care.

8. Plaintiffs allege that the student Defendants “bullied and abused” the Decedent. There, however, is no case law in Pennsylvania which imposes a duty upon an eighth grade or ninth grade student to refrain from bullying, insulting and/or making inappropriate comments about another student’s sexuality. Similarly, Pennsylvania law does not provide a cause of action to an eighth or ninth grade student who is allegedly bullied and/or called a name/insult by a fellow classmate.

9. Further, Plaintiffs’ claim for gross negligence/recklessness must be dismissed because Plaintiffs have failed to allege sufficient facts tying Decedent’s death to Defendant, W.G.’s alleged actions.

10. Punitive damages may be awarded to punish a defendant for outrageous acts and to deter him or others from engaging in similar conduct. However, if no cause of action exists, then no independent action exists for a claim of punitive damages since punitive damages is only an element of damages. *See Fiedler v. Spencer*, 231 A.2d 831 (Pa. Super. 2020), citing *DiGregorio v. Keystone Health Plan E*, 840 A.2d 361, 369 (Pa. Super. 2003); *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 802 (Pa. 1989).

11. For this reason, Plaintiffs have failed to state a plausible claim seeking punitive damages.

12. Plaintiffs' Count V of the First Amended Complaint must be dismissed, as gross negligence is merely an extension of a count of negligence, which Plaintiffs have failed to allege against Defendant, W.G.

13. Additionally, Plaintiffs' Count V of the First Amended Complaint must be dismissed as it pertains to Defendant, W.G., as Plaintiffs have failed to allege conduct that is sufficiently reckless and/or outrageous to meet the legal standard.

**Plaintiffs' claims of Intentional Infliction of Emotional Distress must be Dismissed**

14. Liability for intentional infliction of emotional distress ("IIED") has been limited to cases in which the conduct complained of was extreme and outrageous, and the liability did not extend to mere insults, threats, annoyances, and petty trivialities. Dawson v. Zayre Dep't Stores, 499 A.2d 648 (Pa. Super. 1985).

15. Assuming, *arguendo*, that Defendant, W.G., was a participant in certain "bullying" as alleged, "[t]he rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam." Id., citing Restatement (Second) of Torts § 46.

16. In Vazquez v. Co Dorta, 2023 Westlaw 2879411 (Pa. Cmwlth. 2023), the court concluded that the alleged insults and taunts such as “faggot” did not rise to the level of extreme and outrageous conduct necessary to support Vasquez's intentional infliction of emotional distress claim. *Citing* Kazatsky v. King David Memorial Park, 527 A.2d at 991-92 (Pa. 1987); Jones v. Nissenbaum, Rudolph & Seidner, 368 A.2d 770, 773 (Pa. Super. 1976) (citing Restatement (Second) of Torts § 46, Comment d (1965)).

17. Similarly, Defendant, W.G.’s, alleged making of a sexual joke with a lollipop falls far outside of the conduct identified by courts to constitute IIED.

18. Indeed, there are numerous decisions in the Third Circuit in which courts have dismissed IIED claims that were supported by allegations far more egregious than those raised against W.G. in the First Amended Complaint.<sup>1</sup>

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<sup>1</sup> See e.g., Price ex rel. O.P. v. Scranton Sch. Dist., Civ. A. No. 11-0095, 2012 WL 37090 (M.D. Pa. Jan. 6, 2012) (dismissing student’s IIED claim against classmate defendants who directed slurs at the student—including calling her a skank, slut, tramp, and whore—for an entire school year, which resulted in the student “contemplate[ing] suicide on several occasions” because “the conduct of [s]tudent [d]efendants [did] not rise to the requisite level of outrageousness under Pennsylvania law.”); Eck v. Oley Valley Sch. Dist., Civ. A. No. 19-1873, 2019 WL 3842399, at \*8 (E.D. Pa. Aug. 15, 2019) (dismissing students’ IIED claim because allegations that teacher bullied them by “demeaning, intimidating, and humiliating them in the presence of their peers and by encouraging their peers to engage [in the same behavior]” did not rise to the level of “extreme and outrageous” conduct that could support an IIED claim); L.H. v. Pittston Area Sch. Dist., 130 F. Supp. 3d 918 (M.D. Pa. 2015), *aff’d*, 666 F. App’x 213 (3d Cir. 2016) (dismissing IIED claim against schoolteacher who “verbally abused” a student, noting that “[t]he standard for IIED is generally not satisfied by allegations of “insults, indignities, threats, or other similar conduct.”).

19. Plaintiffs' Counts VI and IX of the First Amended Complaint must also fail, as the Plaintiffs have failed to allege a physical manifestation of their alleged injuries. See Hantman v. Wesselt, 1999 Phila. Ct. Com. Pl. LEXIS 10 (Phila. Cty. 1999), citing Kazatsky v. King David Memorial Park, Inc., 527 A.2d 988 (Pa. 1987); Wecht v. PG Publishing Co., 725 A.2d 788 (Pa. Super. 1999).

20. In light of the foregoing, Defendant, W.G., is entitled to dismissal of the First Amended Complaint with respect to his alleged involvement in the events as stated therein.

21. Plaintiffs' counsel does not concur with the filing of this Motion.

22. Defendant, W.G., will file a Brief in Support of this Motion to Dismiss within the time limits as prescribed by Middle District Local Rule 7.5.

WHEREFORE, Defendant, W.G., respectfully requests that this Honorable Court grant a dismissal of the First Amended Complaint in his favor and against Plaintiffs, and dismiss this case against Defendant, W.G., with prejudice.

RESPECTFULLY SUBMITTED,  
GRIFFITH, LERMAN, LUTZ & SCHEIB

Dated: May 3, 2023

By:



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Dated: May 3, 2023

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**CERTIFICATE OF NON-CONCURRENCE**

Pursuant to Local Rule 7, I hereby certify that I sought the concurrence of Plaintiffs' counsel with regard to the filing of this Motion on May 2, 2023, and Plaintiffs' counsel does not concur with the filing of this Motion.

GRIFFITH, LERMAN, LUTZ & SCHEIB

Dated: May 3, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss was served upon the below-listed counsel via the Court’s ECF Notification system with respect to the above-captioned matter:

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Dated: May 3, 2023

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