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UNITED STATES DISTRICT COURT for the MIDDLE DISTRICT OF PENNSYLVANIA	
HOPE AMSPACHER, ADMINISTRATOR OF THE ESTATE OF ZACHARY KIRCHNER, and MATTHEW KIRCHNER, <p style="text-align: center;">Plaintiffs</p> <p style="text-align: center;">v.</p> 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.W., a minor, <p style="text-align: center;">Defendants</p>	No. 1:23-cv-00286-CCC CIVIL ACTION JURY TRIAL DEMANDED
BRIEF IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF DEFENDANT, T.F., A MINOR	

Respectfully submitted,

MARGOLIS EDELSTEIN

Date: May 17, 2023

By:



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I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs commenced this case by filing a Complaint with this Honorable Court. On April 19, 2023, Plaintiffs filed an Amended Complaint that is now before this Honorable Court. Though most of Plaintiffs' allegations are against the Defendant School District and two of its employees, Plaintiffs also allege that certain 8th and 9th grade classmates of Plaintiffs' Decedent ("Decedent") that Plaintiffs collectively identify as "Student Defendants," harassed and verbally abused the Decedent at mostly unidentified points in time, causing him harm. *See Doc. 18 at ¶¶ 24 and 29.*

Under the heading "Background," Plaintiffs allege that the Decedent was enrolled at the Defendant School District's junior high school for 8th grade during the 2019-2020 school year and was a student at the senior high school in 9th grade during the 2020-2021 school year. *See id.* ¶ 30. Plaintiffs concede that the Decedent was diagnosed with a variety of mental health disorders including:

- autism spectrum disorder;
- attention deficit hyperactivity disorder;
- anxiety;
- opposition defiance disorder; and
- mood disorder not otherwise specified.

See id. ¶ 31.

By way of further background, Plaintiffs allege that Plaintiffs' Decedent identified openly as gay in 8th grade during the 2019-2020 school year. Plaintiffs allege, once again, in a collective fashion, that the Student Defendants "bullied" Decedent "routinely," calling him "gay," "faggot," "gay boy," and other verbally abusive terms. *See id.* ¶ 40.

However, neither dates, times, nor context with regard to these alleged comments are pled. Moreover, though Plaintiffs have included T.F. in the array of the six individual minor students collectively identified as “Student Defendants,” few of Plaintiffs’ allegations against T.F. are specifically alleged against him. Moreover, none of the allegations specifically against T.F. allege any direct communication, nor do they state the specific time, manner or context of T.F.’s alleged communications.

With limited exceptions, Plaintiffs routinely identify Defendant T.F. only in connection with his role as a Student Defendant. *See generally Doc. 18.* However, Plaintiffs do allege that in 8th grade, T.F. “repeatedly called decedent a faggot.” *See id.* ¶ 42. Once again, no context, nor specific date, nor manner with regard to these alleged “repeated” comments are pled.

During the same timeframe, Defendant T.F. along with other Student Defendants are alleged to have “told decedent to kill himself” *over “text message or other messaging services”* and made similar posts on social media for Decedent and other classmates to see. *See id.* ¶¶ 43-44. Once again, Defendant T.F.’s conduct is lumped together with that of other Student Defendants L.D., D.M., and C.A. making no specific reference to context, manner, means or date. Nevertheless, in keeping with the chronological approach to their claims, Plaintiffs further allege that as early as 8th grade Decedent made it known to his “bullies” that he was going to commit suicide. *See id.* ¶ 44. Nowhere in Plaintiffs’ Amended Complaint do Plaintiffs plead any facts to establish that T.F. had actual knowledge of Plaintiffs’ Decedent’s state of mind, nor do they attribute any other specific conduct to Defendant T.F. For example, Plaintiffs allege that

unflattering graffiti was scratched in large letters in the bathroom stall. *Id.* ¶ 51. This act is not attributed to any Defendant, much less to T.F.

Notably, Plaintiffs allege that the verbal abuse and remarks were delivered by “text message” or “other messaging services.” However, with one exception, none of these “repeated” text messages or messages through other services are pled. *See e.g., id.* ¶ 43, *but see also, id.* ¶ 126. The one message that is specifically pled at Paragraph 126, is again ascribed generally to the Student Defendants. *Id.* T.F. strenuously denies all of these allegations and notes that, once again, no facts are pled linking T.F. to this or any other alleged text or social media posting. Though Plaintiffs allege generally that on or about April 19, 2021, the “Student Defendants” continued to harass, make fun of, and bully the Decedent, and encourage the Decedent to kill himself, Plaintiffs make no specific reference to any conduct by T.F. *See id.* ¶ 93. Similarly, Plaintiffs plead, in a conclusory fashion, that the Student Defendants saw Decedent’s suicidal social media posts. *See id.* ¶ 95.

Based on these vague allegations, purportedly rooted in specific documents, only one of which is specifically pled and none of which are specifically pled with respect to T.F., Plaintiffs allege in conclusory fashion, that T.F. and the other Student Defendants are liable on the basis of gross negligence and/or recklessness. *See Count V.* Crucially however, nowhere in Plaintiffs’ Amended Complaint do Plaintiffs plead or attempt to identify any specific duty owed by any of the Student Defendants to Plaintiffs’ Decedent.

In the absence of a legal duty, Plaintiffs’ claim against the Student Defendants must fail as a matter of law. In addition, Plaintiffs attempt to assert claims for Intentional

Infliction of Emotional Distress (IIED) against the Student Defendants. In order to state an IIED claim, a plaintiff must establish that the conduct at issue is extreme and that the conduct is intentional or reckless. However, all that is pled in the instant case are mostly vague references to social media posts purportedly made by Plaintiffs' Decedent's 8th and 9th grade classmates, most or all of which were apparently made from a distance in both space and time from the tragic loss of Plaintiffs' Decedent's life. While these comments were unquestionably unkind, they are insufficient as a matter of law to establish a claim for IIED. At a minimum, Plaintiffs should be required to state the specific facts attributable to T.F. to show a duty owed by T.F. to Plaintiffs and to establish that the breach of this duty caused Plaintiff's harm in accordance with F.R.C.P. 12(e).

In view of the foregoing, Defendant T.F., a minor, was constrained to move this Honorable Court for an Order dismissing Plaintiffs' Complaint against T.F., a minor, for failure to state a claim upon which relief can be granted. This Brief is offered in support of that Motion.

II. STATEMENT OF QUESTIONS PRESENTED

- A. WHETHER PLAINTIFFS HAVE FAILED TO IDENTIFY A DUTY OR A CAUSE OF ACTION ASSOCIATED WITH VERBAL ABUSE FROM ONE MINOR STUDENT TO ANOTHER WARRANTING DISMISSAL OF COUNT V OF THEIR AMENDED COMPLAINT?**

(Suggested Answer in the Affirmative.)

- B. WHETHER ALLEGATIONS OF UNKIND COMMENTS EXCHANGED AMONG MINORS THROUGH DIGITAL MEANS ARE INSUFFICIENT TO STATE AN IIED CLAIM AS A MATTER OF LAW?**

(Suggested Answer in the Affirmative.)

III. ARGUMENT

Standard of Review

A motion to dismiss pursuant to the Federal Rules of Civil Procedure addresses the legal sufficiency of the Complaint. In *Reisinger v. Luzerne County*, 712 F. Supp. 2d 332, 343-344 (M.D. Pa. 2010), this Honorable Court restated the appropriate standard of review for assessing a motion to dismiss pursuant to F.R.C.P. 12(b)(6). Specifically, the *Reisinger* Court acknowledged the analysis established by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 433 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009). In accordance with the Supreme Court precedent, in order “to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, ‘to state a claim that relief is plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). In *Twombly*, the Court emphasized that “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 1950.

Moreover, the *Twombly* Court noted that “[d]etermining whether a complaint states a plausible claim for relief ... will be a context-specific task that requires the reviewing court to draw upon its judicial experience and common sense.” *Id.* (citations omitted). In *McTernan v. City of York*, 577 F.3d 521, 530, (3d Cir. 2009), the Third Circuit noted that it has repeatedly discussed the importance of *Twombly* and *Iqbal*, and that these decisions provide a “roadmap” for district courts presented with motions to dismiss for failure to state a claim. As articulated by the Court in *Reisinger*, the roadmap may be properly described as follows: district courts should conduct a two-part analysis. First, the factual and legal elements of the claim should be separated.

The district court must accept the complaint's well-pled facts as true but may disregard any legal conclusions. See *Iqbal*, 129 S. Ct. at 1949. Second, the district court must then determine whether facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." *Id.* at 1950. In other words, a complaint must do more than allege a plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with facts. See *Phillips v. Co. of Allegheny*, 515 F. 3d 224, 234-35 (3d Cir. 2008). As the Supreme Court noted in *Iqbal*, "[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but has not 'shown' – 'that the pleader is entitled to relief.'" *Iqbal*, 129 S. Ct. at 1949.

This plausibility determination involves a context-specific task that requires the reviewing court to draw upon its judicial experience and common sense. *Id.* *Fowler*, 578 F. 3d at 210-11. Based upon the foregoing, the Third Circuit has made it clear that conclusory allegations are not entitled to the same deference as well-pled facts. In other words, this Honorable Court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Guirguis v. Movers Specialty Services, Inc.*, No. 09-1104, 2009 WL 3041992, at p. 2 (3d Cir. Sept. 24, 2009) (not precedential, quoting *Twombly*, 550 U.S. at 555). Against this well-established standard, the facts pled in Plaintiffs' Amended Complaint fail to state a claim upon which relief may be granted warranting judgment in favor of T.F. and against Plaintiffs with prejudice.

A. PLAINTIFFS HAVE FAILED TO IDENTIFY A DUTY OR A CAUSE OF ACTION ASSOCIATED WITH VERBAL ABUSE FROM ONE MINOR STUDENT TO ANOTHER WARRANTING DISMISSAL OF COUNT V OF THEIR AMENDED COMPLAINT.

In Count V of their Complaint, Plaintiffs attempt to state a claim against Plaintiffs' Decedent's minor classmates based upon theories of gross negligence and recklessness. As a matter of law, this claim must be based upon a duty either created by statute or common law imposed upon one minor student to refrain from making unkind, uncivil, or otherwise insulting comments to another minor student. However, in support of this claim, Plaintiffs fail to cite any statute or common law suggesting that such a duty exists. Nationwide research committed by the undersigned failed to discover a recognized legal basis for these claims. In the absence of a duty to refrain from such conduct or a cause of action cognizable in Pennsylvania associated with student-on-student unkindness, Plaintiff has failed to state a claim upon which relief can be granted as a matter of law.

As a society, we hope for greater civil discourse as a necessary lubricant to a thriving democracy. However, this hope is not manifested in a legal duty or cause of action associated with unkind and insensitive remarks between our children. If such a cause of action exists, Plaintiffs, in their Brief in Opposition will surely bring it to the Court's attention and T.F. will respond through its Brief in Reply. However, in the absence of such authority, Plaintiffs' claim must fail as a matter of law.

B. ALLEGATIONS OF UNKIND COMMENTS EXCHANGED AMONG MINORS THROUGH DIGITAL MEANS ARE INSUFFICIENT TO STATE AN IIED CLAIM AS A MATTER OF LAW.

In their first Amended Complaint, Plaintiffs attempt to assert a claim for Intentional Infliction of Emotional Distress. *See Counts VI and IX*. To establish a claim for IIED in Pennsylvania, a plaintiff must plead facts to establish four elements: (1) extreme and outrageous conduct; (2) that is intentional or reckless; (3) that is the cause in fact of emotional distress; and (4) that the distress is severe. *See Hoy v. Angelone*, 456 Pa. Super. 596, 691 A.2d 476, 482 (Pa. Super. 1997) (affirmed *Hoy v. Angelone*, 554 Pa. 134, 720 A.2d 745, 754 (Pa. 1998)). The outrageousness of the conduct sufficient to state a claim for IIED, “must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.” *Hoy v. Angelone*, 554 Pa. 134, 720 A.2d 745, 754 (Pa. 1998) (quoting *Buczek v. First Nat’l Bank of Mifflintown*, 366 Pa. Super. 551, 531 A.2d 1122, 1125 (Pa. Super. 1987)).

For liability to be imposed against an individual on an IIED claim, there must be “knowledge on part of the [individual] that severe emotional distress is substantially certain to be produced by his conduct.” *Hoffman v. Memorial Osteopathic Hosp.*, 342 Pa. Super. 375, 492 A.2d 1382, 1386 (Pa. Super. 1985) (quoting *Forster v. Manchester*, 410 Pa. 192, 189 A.2d 147, 151 (Pa. 1963) (Emphasis in original)). This high burden is difficult to satisfy under Pennsylvania law. *See Hoy*, 720 A.2d at 753-54. The Pennsylvania Superior Court has held that for conduct to rise to the level of outrageousness necessary for an IIED claim it must be such that “the recitation of the facts to an average member of the community would arouse his resentment against the

actor, and lead him to exclaim, 'Outrageous!'" *Strickland v. Univ. of Scranton*, 700 A.2d 979, 987 (Pa.Super. 1997).

Conduct which does **not** meet the requisites for liability is described in comment (d) of the *Restatement (Second) of Torts Sec. 46*:

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The 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 some one'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. (cited with approval in *Reimer v. Tien*, 356 Pa. Super. 192, 514 A.2d 566, 569 (Pa. Super. 1986)). Against this backdrop of substantive precedent, it notable that it is for the Court to determine, in the first instance, whether the actor's conduct can reasonably be regarded as so extreme and outrageous as to permit recovery. *Dawson v. Zayre Dept. Stores*, 346 Pa. Super. 357, 499 A.2d 648 (1985); *Restatement (Second) of Torts Sec. 46*, comment (h) (1965).

Crucially, in the instant case, the same failure to identify a duty among minor students to refrain from schoolyard insults, threats and other verbal acts of unkindness that is fatal to Plaintiffs' gross negligence and recklessness claims, is also fatal to their IIED claim. This is because the law does not impose the same kind of burden upon our children that it does when adults interact with children. This distinction was the key determining factor in this Honorable Court's decision in *Price ex rel. O.P. v. Scranton Sch. Dist.*, 2012 U.S. Dist. LEXIS 1651, 2012 WL 37090, (M.D. Pa. Jan. 6, 2012). In

Price, this Honorable Court recognized the enormous importance of the relationship of the parties and their ages in the context of an IIED claim based upon insults and abuse among school students. Like the instant case, *Price* involved a claim by a minor who alleged she was the subject of prolonged and intense verbal abuse by her minor classmates. In *Price*, the minor was a female, identified as (“O.P.”). O.P. was almost precisely the same age as the Plaintiffs’ Decedent in the instant case. At some point during her 7th grade year, O.P. developed a yeast infection with its attendant itching. Classmates of O.P. noticed her scratching herself to relieve the itchiness and were relentlessly unkind for an entire school year with taunts and insults including calling her a “bitch,” a “skank,” a “slut,” a “tramp,” and a “whore.” *Id. at * 10.*

Unfortunately, the frequency of the comments made by these student defendants to O.P. was even more severe than in the instant case. The record developed in *Price* established that O.P. endured these comments *every day and multiple times a day*. Additionally, O.P.’s classmates made scratching sounds to mock and humiliate O.P. and spread the word around school regarding the meaning of the scratching sound causing other students to do likewise. As a result, O.P. was forced to hide in the restrooms to avoid the taunting. O.P. considered suicide and was treated for Post-Traumatic Stress Disorder, depression, anxiety and other emotional sequela of the abuse. *Id. at * 14.*

As in the instant case, the Plaintiffs in *Price* filed suit against the school district and against various student defendants. Among the claims asserted, were claims against the student defendants for IIED. After the *Price* Court observed the caselaw, including some of the cases cited above supporting the general proposition that verbal

abuse alone is insufficient to state an IIED claim, this Honorable Court acknowledged that in the context of adult-on-student interactions, more is expected of the adult warranting closer scrutiny of motions to dismiss IIED claims filed on behalf of the adults. The *Price* Court noted that in *DiSalvio v. Lower Merion High School District*, 158 F. Supp. 2d 553, 555-56 (E.D. Pa. 2001), the Eastern District Court allowed an IIED claim to survive a motion to dismiss in circumstances involving sexual harassment by a school employee for several months leading to the student eventually leaving the school and relapsing into bulimia. *Price* at * 41-42. However, in addressing the IIED claims asserted against O.P.'s classmates, this Honorable Court noted that even the *DiSalvio* Court acknowledged a distinction between interactions between teachers and students as opposed to those between students and students as follows:

Teacher on student sexual harassment has a character totally distinct from harassment among peers because of the differences in the parties' age and relative power.

Price at *42 (quoting *DiSalvio*, at 561). The *Price* Court dismissed the IIED claim against O.P.'s fellow students, even in a light most favorable to her because the relationship between students cannot be viewed with the same lens used to examine claims against adults as follows:

The power imbalance present in *DiSalvio* is simply absent here. Student Defendants are O.P.'s peers. While O.P. may have suffered harassment by her classmates, the conduct of the Student Defendants does not rise to the requisite level of outrageousness under Pennsylvania law. Student Defendants' Motion to Dismiss the intentional infliction of emotional distress claim will be granted.

Id. at * 42. As in *Price*, in the instant case, Plaintiffs have attempted to assert IIED claims against young children. As in *Price*, Plaintiffs have failed to identify any legal

support for the proposition that a cause of action for Intentional Infliction of Emotional Distress can be based solely upon generalized allegations of verbal insults from one minor student to another. Unlike *Price*, where much of the taunting appears to have been quite specific and face to face, the claim against T.F. lacks reference to any specific fact establishing the time, manner or means of the verbal abuse attributed to him. Instead, Plaintiffs merely plead conduct ascribed generally to a group of Student Defendants without pleading any facts to establish that T.F. participated in any of the conduct alleged. However, even if the conduct ascribed to T.F. took place, viewing the allegations contained in the Amended Complaint in a light most favorable to Plaintiffs, in the words of the Restatement, 2d of Torts, at most, the rough edges of society were on display. However, verbal expression between young students on the schoolyard, or in cyber space, does not form the basis of an IIED cause of action. As cautioned by the editors of the Restatement of Torts, “Plaintiffs must necessarily be expected and are required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.” This standard protects against a flood of litigation that would flow were the standard more lenient, as verbal restraint is often a skill many hope to acquire later in life and some never do. The law places appropriate expectations upon adults to refrain from making knowingly harsh comments that are virtually certain to cause harm and imposes remedies for those harmed in the event those expectations are not met. The law wisely refrains from imposing such a burden upon our youth. Accordingly, even viewing the allegations of Plaintiffs’ Amended Complaint in a light most favorable to the Plaintiffs, they have failed to state a claim for IIED upon which relief can be granted against T.F. Additionally, T.F. is constrained to

note that there is no allegation of a physical manifestation in support of Plaintiffs' alleged IIED injuries which stands as an independent basis for denial of this claim. See *Kratsky v. King David Memorial Park Inc.* 527 A.2d 788 (Pa. Super. 1999).

In the alternative, should this Court be unpersuaded that Plaintiffs have failed to state a claim, Plaintiffs should, at a minimum, be required to plead facts to establish that T.F. played a role in conduct alleged against the Student Defendants with sufficient specificity to satisfy the requirements of Federal Rule of Civil Procedure 8. In the instant case, Plaintiffs attempt to state an individual claim against T.F. as an individual Defendant. Yet throughout the Amended Complaint, Plaintiffs improperly conflate the claims of all other students with the conduct of T.F. There are no facts set forth in the Amended Complaint to identify any conspiracy or any intention to act in concert. Instead, individual acts are alleged against T.F. without reference to timing, method, manner, means or context. This forces T.F. to prove a negative against a claim that is so nebulous and ill-defined as to be illusive and ephemeral. Such a pleading is an anathema to the pleading requirements of Rule 8. Accordingly, if this Honorable Court is not inclined to dismiss Plaintiffs' claims outright, it is respectfully submitted that Plaintiffs should be required to amend their Complaint against T.F. with the specificity required by the Federal Rules of Civil Procedure to establish the role T.F. played, if any, in the harm alleged by Plaintiffs.

IV. CONCLUSION

In light of the arguments and authorities cited herein, T.F. respectfully requests that this Honorable Court enter judgment in his favor and against Plaintiffs with cost of suit assessed to Plaintiffs.

Respectfully submitted,

MARGOLIS EDELSTEIN

Date: May 17, 2023

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