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

HOPE AMSPACHER, ADMINISTRATOR OF THE ESTATE OF ZACHARY KIRCHNER, and MATTHEW KIRCHNER, Plaintiffs	:	No. 1:23-cv-00286 (Judge Christopher C. Conner)
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, Defendants	:	JURY TRIAL DEMANDED

BRIEF IN SUPPORT OF DEFENDANT W.G.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Respectfully submitted,

GRIFFITH, LERMAN, LUTZ & SCHEIB

Dated: May 17, 2023

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I. INTRODUCTION AND PROCEDURAL HISTORY

On April 19, 2023, Plaintiffs, Hope Amspacher (as Administrator of the Estate of Zachary Kirchner) and Matthew Kirchner, filed their First Amended Complaint (Doc. No. 18) against Red Lion Area School District ("the District"), two (2) adult employees of the District and six (6) minors, in connection with the tragic death, by suicide, of Zachary Kirchner ("Decedent") in April 2021. Plaintiffs, his mother and brother, allege that the minor Defendants, including W.G., are subject to civil liability for gross negligence and for Intentional Infliction of Emotional Distress ("IIED") for bullying Decedent, and are likewise liable to Matthew Kirchner for IIED. Plaintiffs seek compensatory and punitive damages.

As detailed below, Plaintiff Amspacher's gross negligence claim (Count V) is insufficient as a matter of law because (1) W.G. did not owe the Decedent a duty of care (2) there is no allegation in the First Amended Complaint that explains how the incident caused the Decedent to take his own life one (1) year later, and (3) the First Amended Complaint describes numerous intervening events that (if proven), would interrupt the line of causation between W.G.'s alleged actions and the suicide.

Turning to the two IIED claims (Counts VI and IX), the only conduct specifically ascribed to W.G. in the First Amended Complaint is a joke involving a lollipop and a sexual gesture. Not only is the use of vague phrasing such as "sexual gestures" and "gay jokes" insufficient to identify what the joke entailed, but even if

the worst is assumed, the isolated lollipop incident would not rise to the level of "extreme and outrageous" conduct as that standard is understood in the Third Circuit.

For those reasons, W.G. moves for his dismissal as a Defendant from this matter, with prejudice.

II. STATEMENT OF FACTS PERTINENT TO DEFENDANT W.G.

Plaintiffs' First Amended Complaint alleges generally that Decedent was bullied by the named minor Defendants during his eighth grade (2020-2021) and ninth grade (2021-2022) years while a student in the school district. (Doc. No. 18 at ¶¶ 29-30). There is only one action ascribed to W.G. in the entire First Amended Complaint. Specifically, Plaintiffs allege that "during class time in 8th 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.'"[1] (Id. at ¶ 41). At least one (1) year after that incident, in April 2021, Decedent regrettably took his own life. (See id. at ¶ 97 *et seq.*; ¶ 30).

III. STATEMENT OF QUESTIONS INVOLVED

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

[1] For the record, W.G. denies that this ever occurred.

and because Plaintiffs have failed to allege sufficient facts tying Decedent's death to W.G.'s actions?

Suggested answer: In the affirmative.

B. Whether Plaintiffs' claims for intentional infliction of emotional distress must be dismissed because Plaintiffs have failed to allege conduct that is sufficiently severe and outrageous to meet the legal standard?

Suggested answer: In the affirmative.

IV. LEGAL STANDARD

This Court is no doubt well-aware of the standard applicable when ruling on a motion pursuant to Rule 12(b)(6), which authorizes the dismissal of a complaint for "failure to state a claim upon which relief can be granted." As stated by the Third Circuit, federal courts have long since rejected liberal pleadings standards that embraced the "no set of facts" rule set forth in Conley v. Gibson, 355 U.S. 41 (1957). Rather:

> [s]tandards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), continuing with our opinion in Phillips v. County of Allegheny, 515 F.3d 224 (3d Cir. 2008) and culminating recently with the Supreme Court's decision in Ashcroft v. Iqbal, 556 U.S. 662 (2009), pleadings standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.

Fowler v. UPMC Shadyside, 578 F.3d 203, 209-10 (3d Cir. 2009). Stated differently, to survive a motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570.

V. ARGUMENT

All three of the claims that Plaintiffs assert against W.G. in the instant matter must be dismissed for failure to meet the pleadings standard set forth in Twombly and its progeny.

A. Count V—Plaintiffs' Claim for "gross negligence and/or recklessness" —must be dismissed as a matter of law, as Plaintiffs have failed to identify an applicable duty of care.

It is well established that "[a] cause of action in negligence requires allegations that establish the breach of a legally recognized duty or obligation that is causally connected to the damages suffered by the complainant." Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270, 280 (Pa. 2005) (citing Sharpe v. St. Luke's Hospital, 821 A.2d 1215, 1218 (2003)). In determining whether a plaintiff owes a defendant a duty of care, the primary element in every cause of action sounding in negligence (gross or not), courts typically look to statutory and common law. Absent clear guidance from these sources, courts in Pennsylvania are required to assess discrete public policy factors. See Althaus v. Cohen, 756 A.2d 1166, 1168 (2000).

Defendant's review of relevant case law has uncovered no case in the Pennsylvania courts or in the Third Circuit suggesting that a minor owes a duty of care to another minor to refrain from insults, jokes, sexual innuendo or even bullying. The lack of jurisprudence suggesting that a minor has a duty of care

creating civil liability for verbal bullying comes as no surprise. It has long been recognized that school districts may, under the right circumstances, be held liable for student-on-student harassment and that, notwithstanding the First Amendment, districts are empowered to discipline students for inappropriate speech. See Davis v. Monroe County Board of Ed., 526 U.S. 629 (1999); Kowalski v. Berkeley County Schools, et al, 652 F.3d 565 (4th Cir. 2011).[2]

Given the above-referenced background, for Plaintiffs' apparent negligence claim to proceed in the instant matter, this Court would have to conclude the Pennsylvania Supreme Court would, if confronted with the question, hold that eighth grade students owe a duty of care to one another to refrain from insults, jokes, sexual innuendo and/or bullying. In conducting that analysis, the factors laid out by the Pennsylvania Supreme Court in Althaus, 756 A.2d at 1168, guide the inquiry. The factors are:

(1) The relationship between the parties;

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[2] As one would expect, cases assessing liability for the tortious conduct of minors in Pennsylvania rightly focus on the elements required to establish a cause of action against ***the adults who supervise them***. See, e.g., Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013) (en banc) (concluding that a school does not have a "special relationship" with students giving rise to a constitutional duty to protect them from harm by other students); Bridges ex rel D.B. v. Scranton School Dist., 66 F.Supp.3d 570 (M.D. Pa. 2014) (applying Morrow); Simonetti by Simonetti v. School Dist. of Philadelphia, 454 A.2d 1038 (Pa. Super. 1982) (considering whether a teacher was appropriately found negligent for deficient classroom supervision when a student was struck in the eye by a pencil thrown by another student); J.H. ex rel. Hoffman v. Pellak, 764 A.2d 64, 67 (Pa. Super. 2005) (holding, in a matter involving a minor's negligent use of a gun, that "a parent has a duty to exercise reasonable care to control his or her minor child under [Restatement of Tort (2d)] Section 316 when the parent knows or should know of the necessity to exercise control, and has the ability and the opportunity to exercise parental control at the relevant time." (citations omitted)).

(2) the social utility of the actor's conduct;

(3) the nature of the risk imposed and foreseeability of the harm incurred;

(4) the consequences of imposing a duty upon the actor; and

(5) the overall public interest in the proposed solution.

Id. 1169.

In this matter, nearly every factor dictates against a finding that a minor has a duty to refrain from unkind, mean or even bullying behavior. To assess the first factor, the "relationship between the parties," would presuppose that a minor, who has not yet reached the age of legal independence, is an appropriate party to a civil suit seeking monetary damages. Putting this hurdle aside, the "relationship" between two minors is not of a nature requiring heightened legal scrutiny.

There is no dispute that there is no "social utility" to bullying behavior under the second factor. However, the third, fourth and fifth Althaus factors weigh so heavily against imposing a duty that the second factor has little, if any, significance. Turning to the third Althaus factor, the harm that comes from immature behavior is not specifically foreseeable because it can range from virtually nothing (like shrugging off an insult) to extreme measures such as suicide. Sadly, immature and unkind behavior is exhibited daily at schools nationwide, yet the extreme step of suicide is not a common result of other students' misbehavior.

The fourth Althaus factor requires examination of the consequences of imposing a duty on a minor to refrain from bullying. The consequences would be

disastrous. Bullying would require a workable definition, which would still be subject to interpretation by purported victims, and the result would be lawsuits for everything from broken friendships to social slights; the subjection of children to the burdensome legal process, including discovery; and the attendant removal of students from the classroom to appear in court and at depositions to answer to demands for monetary damages they cannot pay. Moreover, if courts were to get into the business of policing the immature behavior of children, the strain on the system could prove very substantial.

Under the fifth factor, the overall public interest in hauling children into court to litigate the consequences of immature behavior is non-existent. Children are typically judgment proof. Thus, holding a child liable for damages is likely to achieve nothing. That would seemingly explain why no legal authority holds, states, or implies that children owe a duty of care to one another to refrain from immature behavior.

Comparing this case to the Honorable Judge Brann's recent decision in Jean v. Bucknell University, 534 F.Supp.3d 404 (M.D. Pa. 2021), is instructive. In Jean, the plaintiff asked the Court to apply the Althaus factors to create a duty of care on behalf of "colleges to regulate and control fraternities that the college specifically knows are likely to engage in hazing of new initiates and pledges." Id. at 412. After noting the Pennsylvania Supreme Court's instruction that new common law duties

should not be created "lightly" and should only be created if the "consequences of judicial policymaking are reasonably clear with the balance of factors favorably predominating" creation of a new duty, Judge Brann denied the plaintiff's request and ruled in Bucknell's favor. Id. at 412-413. In this case, the argument in favor of creating a new duty of care between children is even more tenuous than the argument made by the plaintiff in Jean.

In sum, the First Amended Complaint fails to raise allegations that tend to suggest W.G. owed a duty of care to the Decedent. Bilt-Rite Contractors, Inc., 866 A.2d at 280, citing Sharpe, 821 A.2d at 1218. Nor is there any good or valid reason for this Court to conclude the Pennsylvania Supreme Court would create a duty of care between children to refrain from acting immaturely toward one another. For those reasons, Count V of the First Amended Complaint against W.G. should be dismissed.

B. Plaintiffs have failed to allege sufficient facts tying W.G.'s alleged actions to Decedent's death.

In addition to failing to allege facts that would suggest W.G. owed a duty of care to the Decedent, the First Amended Complaint is devoid of factual allegations suggesting that W.G.'s actions were the proximate cause of Decedent's tragic death. In this respect, too, the Complaint fails to state a claim for negligence.

As alluded to above, the sole allegation in the First Amended Complaint relating to the conduct of W.G. appears in Paragraph 41, which alleges that "at one

time, for example, during class time in 8th 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.'" First Am. Compl. ¶ 41. The Complaint goes on to allege that Decedent committed suicide in April of his ninth-grade year – one year, if not more, from the time of the alleged lollipop incident. Id. at ¶¶ 97-119.

The First Amended Complaint is not specific enough to understand what the alleged lollipop incident entailed, let alone to understand how that incident caused the Decedent to commit suicide over a year later. Merely alleging "sexual gestures" and "gay jokes" were made during an isolated incident a year or more before the Decedent committed suicide does not provide a plausible basis on which to conclude the "gestures" and "jokes" caused the Decedent to take his life.

Nor can the alleged conduct ascribed to the "Defendant Students" sustain the claim of gross negligence against W.G. To withstand a motion to dismiss, a complaint must "identify which Defendants [we]re responsible for which conduct." See Prater v. American Heritage Federal Credit Union, 351 F.Supp.3d 912 (E.D. Pa. 2019); Torres v. Oliver, Civ. A. No. 3:21-cv-02039, 2022 WL 2806846 at *2-3 (M.D. Pa. July 18, 2022) (finding that plaintiff's claim did not satisfy federal pleading standards because it "ascribes no particular conduct whatsoever to *any* individual defendant. All allegedly wrongful conduct is attributed only generally to "the defendants" or "the officers." (emphasis in original)). This pleading

requirement takes on added significance in this case, where the Plaintiffs allege a sequence of misbehaviors by different individuals or groups caused the Decedent to commit suicide. With respect to W.G., assuming his alleged misbehavior was limited to the isolated lollipop incident, any one of the subsequent acts committed by any of the other "Defendant Students" or any of the other Defendants (whether alone or jointly) could be an intervening cause that interrupted any line of causation between the lollipop incident and the suicide.

While the First Amended Complaint contains allegations of conduct during Decedent's ninth grade year, including taunts that Decedent should "kill himself," these allegations are linked to minors L.D., D.M., T.F., and C.A., who purportedly "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 First Am. Compl. at ¶¶ 43, 48. Allegations against other Defendants cannot sustain a claim against W.G.

For these reasons, the First Amended Complaint fails to plead facts sufficient to establish that W.G.'s alleged participation in the lollipop incident was the proximate cause of the Decedent taking his life a year after the incident allegedly occurred. Accordingly, Count V of the First Amended Complaint against W.G. should be dismissed.

C. Plaintiffs' Count of Gross Negligence and/or Recklessness must be dismissed, as there is not an independent cause of action for punitive damages without alleging negligence.

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, 241 A.3d 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).

In Hilbert v. Roth, 149 A.2d 648 (Pa. 1959), the Pennsylvania Supreme Court stated that an award of punitive damages is not appropriate if actual damages have not been suffered. The plaintiff in Hilbert attempted to pursue an independent cause of action for punitive damages since the cause of action for compensatory damages had been dismissed. The Court held that since punitive damages are an element of damages arising out of the initial cause of action, if that cause of action is dismissed, the punitive damages which are incident to actual damages cannot stand.

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. 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 severe and/or outrageous to meet the legal standard.

D. Plaintiff Kirchner's Claim for Intentional Inflection of Emotional Distress Does Not Meet Applicable Legal Requirements.

Count VI of Plaintiffs' First Amended Complaint asserts that W.G. is liable to Plaintiff Kirchner, Decedent's brother, for Intentional Infliction of Emotional Distress. This Court analyzed the requirements to support a claim of intentional infliction of emotional distress under Pennsylvania law in Dobson v. Milton Hershey School, 356 F.Supp.3d 428 (M.D. Pa. 2018). There, it noted:

> A claim for intentional infliction of emotional distress requires proof that: (1) the defendant's conduct was extreme and outrageous; (2) the conduct caused the plaintiff severe emotional distress; and (3) the defendant acted intending to cause such distress or with knowledge that same was "substantially certain" to occur. Whether conduct could reasonably be regarded as extreme and outrageous is a threshold inquiry for the court's determination.

Id. at 439 (citations omitted). This Court went on to cite the Supreme Court of Pennsylvania's approval of the requirement that "[t]he conduct 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." Id. (citing Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998)). In order for a bystander plaintiff to recover for intentional infliction of emotional distress, that bystander must be present when the outrageous conduct is directed at a third person. Johnson v. Caparelli, 625 A.2d 668, 672 (Pa. Super. 1993).

Plaintiff Kirchner's claim fails to meet the legal requirements for recovery. First, as stated *supra*, the First Amended Complaint contains a single factual allegation pertaining to W.G. – that one (1) year or more before Decedent's suicide, he made a sexual joke with a lollipop. As a matter of law, even crediting Plaintiffs' allegations about the lollipop incident as true, the incident would not rise to the level of extreme and outrageous conduct. Indeed, there are numerous decisions in the Third Circuit in which courts have dismissed IIED claims that were supported by allegations that were far more egregious than those raised against W.G. in the First Amended Complaint.[3]

For example, in Eck v. Oley Valley Sch. Dist., the Court dismissed an IIED claim raised against a teacher alleging the teacher bullied, and encouraged students

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[3] 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."); Timmons v. Issac, 1:20-CV-02035, 2023 WL 348992 (M.D. Pa. Jan. 20, 2023) (appeal filed February 27, 2023) (dismissing inmate's IIED claim where, among other things, a correctional officer told the inmate "I don't care[,] kill yourself" because "the conduct allegedly committed by [d]efendants [was] not sufficiently extreme or outrageous to support an intentional infliction of emotional distress claim.").

to bully, the plaintiff student. Civ. A. No. 19-1873, 2019 WL 3842399 (E.D. Pa. Aug. 15, 2019). In Timmons v. Issac, the Court dismissed an IIED claim raised by an inmate in which the inmate alleged, among other things, a corrections officer urged the inmate to kill himself. Civ. A. No. 1:20-CV-02035, 2023 WL 348992 (M.D. Pa. Jan. 20, 2023).

Both the Eck and Timmons decisions involved allegations raised against ***adults*** that are clearly more severe in nature than the allegations raised in the Amended Complaint against W.G. – a ***minor***. Thus, upholding the IIED claims against W.G. in the Amended Complaint would arguably create inconsistency in the Third Circuit about what level of conduct can be considered extreme and outrageous.

Second, there is no allegation in the Complaint, and no reasonable basis on which to conclude, that W.G. acted intending to cause Plaintiff Kirchner distress or with knowledge that the same was "substantially certain" to occur.

Finally, the First Amended Complaint acknowledges that, during Decedent's eighth grade year, Plaintiff Kirchner was in high school and therefore in a different building entirely when the alleged lollipop joke was made. First Am. Compl. at ¶¶ 34, 37, 41. Plaintiff Kirchner was, therefore, not present when the allegedly tortious conduct occurred, barring him from recovery under Johnson.[4]

[4] Even if "insults, indignities, threats, or other similar conduct" could rise to the level of extreme and outrageous conduct, it would be against public policy to hold children liable for IIED based on their verbal conduct alone. Under Pennsylvania law, "[f]or liability to be imposed against an

Consequently, Plaintiff Kirchner's claim against W.G. under Count VI of the First Amended Complaint must also be dismissed.

E. The Estate's Claim for Intentional Infliction of Emotional Distress Does Not Meet Applicable Legal Requirements.

For the same reason that Plaintiff Kirchner's claim for IIED must be dismissed, the claim made on behalf of the Estate in Count IX of the First Amended Complaint also fails. A single joke with a lollipop cannot be reasonably regarded as "extreme and outrageous" at the threshold level.[5] There is no allegation that W.G. acted intending to cause Decedent severe emotional distress or with knowledge that the same would occur. Finally, Plaintiffs allege that Decedent's severe emotional distress was evidenced by his suicide – which took place one (1) or more years after the alleged lollipop joke, removing all causal connection between the alleged joke and Decedent's death. For those reasons, Count IX of the First Amended Complaint against W.G. should also be dismissed.

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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.'" L.H., 130 F. Supp. 3d at 927 (citing Hoffman v. Memorial Osteopathic Hosp., 492 A.2d 1382, 1386 (Pa. Super 1985)). It is highly unlikely that school-aged students are capable of meeting this high knowledge standard for IIED. Students are still in the process of developing emotional intelligence and cannot fully comprehend the impact of their actions on others. See J.D.B. v. North Carolina, 564 U.S. 261 (2011) ("even where a 'reasonable person' standard otherwise applies, the common law has reflected the reality that children are not adults."). Moreover, it would be against public policy to expect school-age students to have the necessary maturity and insight to understand that their conduct is "substantially certain" to produce severe emotional distress.

[5] Please refer to footnote 3 *supra* and the cases cited therein.

VI. CONCLUSION

Decedent's suicide was undoubtedly tragic. Minor Defendant W.G., however, has only been accused of making a joke about a lollipop one (1) or more years before Decedent took his own life. The law unequivocally does not support the imposition of civil liability against a minor for this, or even worse, verbal conduct. As such, Plaintiffs' First Amended Complaint against W.G. should be dismissed, with prejudice.

Respectfully submitted,

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Dated: May 17, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF IN SUPPORT OF DEFENDANT W.G.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** 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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CERTIFICATE OF WORD COUNT COMPLIANCE

I, MICHAEL B. SCHEIB, ESQUIRE, counsel for W.G., minor Defendant, hereby certify that the foregoing Brief complies with the word count limits of Pa. M.D. Local Rule 7.08. Pursuant to the word processing system used to prepare the Brief, the word count is 4,618.

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