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
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

DEFENDANT L.D., A MINOR'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO F.R.C.P. 12(b)(6)

AND NOW, comes the Defendant, L.D., a minor, by and through his undersigned attorneys, Johnson, Duffie, Stewart & Weidner, P.C., and files this Brief in Support of Motion to Dismiss Plaintiffs' First Amended Complaint with prejudice pursuant to Federal Rules of Civil Procedure and 12(b)(6).

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I. FACTS AND PROCEDURAL HISTORY

This matter arises out of alleged middle school and high school bullying in the Red Lion Area Junior High School and Red Lion Area Senior High School during the 2019/2020 and 2020/2021 school years when student Zachary Kirchner was in the eighth and nineth grades. On February 17, 2023, Plaintiffs filed their Complaint **(Doc. 2)**. On April 19, 2023, Plaintiffs filed their Amended Complaint. **(Doc. 18)**.

In their First Amended Complaint, Plaintiffs allege that Zachary Kirchner was an 8th grade, then 9th grade, student at Red Lion Area Junior High School and Red Lion Area Senior High School during the 2019/2020 and 2020/21 school years. **(Doc. 18, ¶ 30)**. Plaintiffs also assert that Zachary Kirchner was previously diagnosed with Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder, Anxiety, Oppositional Defiance Disorder, Obsessive Compulsive Disorder, and "Mood Disorder Not Otherwise Specified." **(Doc. 18, ¶ 31, 38)**. Plaintiffs also allege that Zachary Kirchner was a homosexual. **(Doc. 18, ¶ 34)**. Plaintiffs bring multiple causes of action against Defendants in connection with the death of Zachary Kirchner which occurred on April 20, 2021.

Specifically, against six (6) Student Defendants, including Defendant L.D., a minor (hereinafter "Defendant L.D."), Plaintiffs bring claims for Gross Negligence and/or Recklessness (without alleging Negligence) and two (2) counts of Intentional Infliction of Emotional Distress. **(Doc. 18, Counts 5-7)**. The gravamen of Plaintiffs claims against the Student Defendants is that the Student Defendants allegedly harassed and bullied Zachary Kirchner for being gay to the point where Zachary Kirchner tragically took his own life. Under these allegations, however, Pennsylvania law does not impose a duty

upon an eighth or nineth grade student to refrain from bullying, using insulting language and/or making inappropriate comments about another student's sexuality. Furthermore, Pennsylvania law does not provide a cause of action to an eighth or nineth grade student who is bullied or called disparaging names by fellow classmates. In short, Plaintiff's First Amended Complaint fails to identify an applicable standard of care owed by the Student Defendants, including Defendant L.D., as well as fails to identify any breach of an applicable standard of care. Accordingly, Plaintiffs' gross negligence/ recklessness claim is legally insufficient as it fails to state a claim entitling Plaintiffs to relief and it should be dismissed, with prejudice.

Moreover, Plaintiffs' factual averments fail to attribute any clear, specific actions to Defendant L.D. Instead of pleading clear and direct factual allegations against Defendant L.D., Plaintiffs allege that Defendant L.D. was part of a group of six (6) students who "routinely bullied" Zachary Kirchner by calling him "gay", "faggot", "gay boy", and allegedly taunted him to kill himself. **(Doc. 18, ¶ 40-49, 96)**. Indeed, there are no individual allegations against Defendant L.D. averred anywhere in Plaintiffs' Amended Complaint, nor do the allegations state any specific time, manner, or context as to Defendant L.D.'s communications made as part of the group of Student Defendants. Furthermore, Plaintiffs' allegations of bullying and harassment fail to identify any factual support for how Defendant L.D. allegedly had knowledge of Zachary Kirchner's state of mind or Plaintiff Matthew Kirchner's state of mind at any time. Based on these deficiencies, Plaintiff's claims for gross negligence/ recklessness and intentional infliction of emotional distress fail as a matter of law. Accordingly, Plaintiffs'

First Amended Complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(6).

Defendant L.D., a minor, has filed a Motion to Dismiss Plaintiffs' First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). This Brief in offered in support thereof.

II. QUESTIONS PRESENTED

1. **SHOULD PLAINTIFFS' CLAIM OF GROSS NEGLIGENCE/ RECKLESSNESS AGAINST DEFENDANT L.D. BE DISMISSED, WITH PREJUDICE, PURSUANT TO F.R.C.P. 12(b)(6) BECAUSE PLAINTIFFS HAVE FAILED TO IDENTIFY A DUTY TO PREVENT VERBAL BULLYING BETWEEN ONE MINOR STUDENT TO ANOTHER?**

   SUGGESTED ANSWER: AFFIRMATIVE.

2. **SHOULD PLAINTIFFS' CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ("IIED") AGAINST DEFENDANT L.D. BE DISMISSED, WITH PREJUDICE, PURSUANT TO F.R.C.P. 12(b)(6) BECAUSE PLAINTIFFS' ALLEGATIONS ARE LEGALLY INSUFFICIENT TO SUPPORT A PRIMA FACIE IIED CLAIM?**

   SUGGESTED ANSWER: AFFIRMATIVE.

III. STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(6)

To determine whether dismissal is proper under Federal Rule of Civil Procedure 12(b)(6), a complaint must include factual allegations that "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 697, 129 S. Ct. 1937, 173 L. Ed.

2d 868 (2009). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint and in making this determination, a court must read the complaint in the light most favorable to the plaintiff and all factual allegations must be considered true. Estelle v. Gamble, 429 U.S. 97, 99, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Furthermore, in determining whether a plaintiff has met this standard, the reviewing court must ignore legal conclusions, "[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements[,]" . . . "labels and conclusions[,]" and "naked assertions [that are] devoid of 'further factual enhancement.'" Iqbal, 556 U.S. at 677 (citations omitted). Such allegations are "not entitled to the assumption of truth." Id. at 679. Thus, "a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009).

Furthermore, federal notice and pleading rules require the Complaint to "give the defendant notice of what the . . . claim is and the grounds upon which it rests." Sershen v. Cholish, No. 3:07-CV-1011, 2007 U.S. Dist. LEXIS 79627, 2007 WL 3146357, at *4 (M.D. Pa. Oct. 26, 2007) (*quoting* Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)). The plaintiff must present facts that, if true, demonstrate a plausible right to relief. See, F.R.C.P. 8(a) (stating that the complaint should include "a short and plain statement of the claim showing that the pleader is entitled to relief"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007) (requiring plaintiffs to allege facts sufficient to "raise a right to relief above the speculative level"); Victaulic Co. v. Tieman, 499 F.3d 227, 234 (3d Cir. 2007).

IV. ARGUMENT

A. Plaintiffs Have Failed To Identify A Duty Associated With Verbal Bullying Between One Minor Student To Another.

Plaintiff cannot state a valid claim for gross negligence/ recklessness against Defendant L.D. because Plaintiffs have failed to identify any applicable standard of care in this matter. Accordingly, Plaintiffs' gross negligence/ recklessness claim should be dismissed with prejudice under Federal Rule of Civil Procedure 12(b)(6).

A prima facie case for negligence requires the plaintiff to plead the following: (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages. Sheil v. Regal Entmt't Group, 563 Fed. Appx. 216 (3rd Cir. 2014). In any negligence action, **"establishing a breach of a legal duty is a condition precedent** to a finding of negligence." Estate of Swift by Swift v. Northeastern Hosp., 456 Pa. Super. 330, 690 A.2d 719, 722 (1997) (emphasis added). However, "gross negligence is more egregiously deviant conduct than ordinary carelessness, inadvertence, laxity or indifference." Benn v. Universal Health Sys. 371 F.3d 165, 175 (3rd Cir. 2004). "[G]ross negligence requires conduct that is flagrant, **grossly deviating from the ordinary standard of care**." Id. (emphasis added), *quoting* Albright v. Abington Memorial Hospital, 548 Pa. 268, 696 A.2d 1159, 1164 (Pa. 1997). Gross negligence "also has been defined as a **failure to perform a duty** in reckless disregard of the consequences or with such want of care and regard for the consequences as to justify a presumption of willfulness of wantonness." Backer v. Pocono Tranquil Gardens, LLC, 2017 U.S. Dist. LEXIS 121523, *8-9 (M.D. Pa. 2017) (*quoting* Williams v. State Civil Serv.

Comm'n, 9 Pa. Cmwlth. 437, 306 A.2d 419, 422 (1973), *aff'd*, 457 Pa. 470, 327 A.2d 70 (1974)) (emphasis added).

Conversely, "r]ecklessness is distinguishable from negligence on the basis that recklessness requires conscious action or inaction which creates a substantial risk of harm to others, whereas negligence suggests unconscious inadvertence." Tayar v. Camelback Ski Corp., 47 A.3d 1190, 1200 (2010). Reckless conduct "requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man." Krivijanski v. Union R. Co., 357 Pa. Super. 196, 204, 515 A.2d 933, 937 (1986). Additionally, recklessness requires a showing that the actor knew or had reason to know of facts which created a high degree of risk of physical harm to another, and that the actor deliberately proceeded to act, or failed to act, in conscious disregard of, or indifference to, that risk. SHVCoal, Inc. v. Cont'l Grain Co., 587 A.2d 702, 704 (Pa. 1991).

Undersigned counsel has found no relevant case law within Pennsylvania Courts or in the Third Circuit standing for the proposition that a minor owes a duty of care to another minor to refrain from insults, teasing, sexual innuendo or even bullying. To be clear, School Districts, under requisite facts, can be held liable for student harassment as School Districts do have the authority to regulate most harassing speech and discipline students for inappropriate conduct. *See*, Davis v. Monroe County Board of Edu., 526 U.S. 629 (1999); B.D. v. Cornwall Leb. Sch. Dist., 2021 U.S. Dist. LEXIS 65543 (M.D. Pa. April 5, 2021) (Kane, J.) However, this line of jurisprudence is based on a School District's statutory authority to control and discipline students and a School

District's status as a state actor. Neither of these designations apply to individual minor students.[1]

Given the dearth of relevant caselaw, it appears that the analysis conducted by the Pennsylvania Supreme Court in Althaus v. Cohen, 756 A.2d 1166 (2000) would be employed if the Pennsylvania Supreme Court were confronted with the question of whether one minor student owes a duty of care to refrain from insulting another minor student. The factors are: 1) the relationship between the parties; 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. at 1169.

In the instant matter, nearly every Althaus factor weighs against finding that a minor student has a duty to refrain from making mean, insulting, or even bullying comments toward a peer. With respect to the first factor ("relationship of the parties"), the eighth and nineth grade students in the instant matter are minors and peers. There are no facts implicating any of the Student Defendants as having a supervisory or surety role over the Plaintiffs. In short, there is no indication that the students at issue in this case are anything other than equal peers.

With respect to the second factor ("social utility"), there is no social utility to bullying behavior. However, the remaining Althaus factors weigh heavily against imposing a duty upon the Student Defendants. Regarding the third factor ("nature of risk imposed and foreseeability of harm incurred"), the facts alleged in the Plaintiffs' First

[1] Parents have also been found liable for the tortious conduct of their minor children on the basis that Parents have a duty to exercise reasonable control over their minor children. J.H. ex rel. Hoffman v. Pellak, 764 A.2d 64, 67 (Pa. Super. 2005) (holding that a parent has a duty to exercise reasonable care to control his or her minor child when the parent knows or should know of the necessity to exercise control, and has the ability and opportunity to exercise parent control at the relevant time.)

Amended Complaint are akin to immature and unkind behavior that is exhibited on a daily basis in schools across the country. The range out outcomes from such unkind behavior are myriad and could result in students merely ignoring unkind comments to even extreme measures like fighting and, sadly, self-harm. However, the significance as applied to this Althaus factor is that there is virtually no foreseeability of any specific harm. Put simply, any individual student would react in a unique manner and incredibly extreme reactions like self-harm are cannot be predicted or foreseen with any reasonable certainty. The fourth Althaus factor ("consequences of imposing a duty upon the actor") would almost certainly achieve absurd results. Bullying or harassing behavior is subjective and lawsuits could foreseeably result from nearly every social interactions that occur at school from childish teasing, social slights, or nearly any interaction imaginable. The practical result of imposing such a duty here would be a cluttering of the Court's docket with lawsuits based on common, immature behavior of children. With respect to the fifth Althaus factor ("overall public interest in the proposed solution"), there is almost no public interest in hauling children into court to litigate the consequences of immature behavior. Indeed, doing so would achieve nothing as children are typically judgment-proof.

The Honorable Judge Brann's recent decision in Jean v. Bucknell University, 534 F. Supp. 3d 404 (M.D. Pa. 2021) is instructive this this Court's analysis. In Jean, the plaintiff alleged that he was hazed at a fraternity event and subsequently brought a negligence claim against the University defendant on the basis that a new common law duty should be imposed against the University to prevent hazing. In granting the University defendant's Motion to Dismiss, the Honorable Judge Brann conducted an

analysis of the Althaus factors and determined that the factors weighed heavily against imposing a duty on the University because, *inter alia*, the foreseeable harm was speculative and imposing such a duty would impose an unreasonable burden upon the University's resources and capabilities. Id. at 412. In sum, this Honorable Court stated "just because a court *may* create a new duty does not necessarily mean that it should. In fact, the Supreme Court of Pennsylvania has cautioned courts that they should not 'enter into the creation of new common law duties lightly,' given that 'the adjudicatory process does not translate readily into the field of broad-scale policymaking.' Its 'default position' is thus that, 'unless the justifications for and consequences of judicial policymaking are reasonably clear with the balance of factors favorably predominating, [the Court] will not impose new affirmative duties'". Id. (emphasis in original) (internal citations omitted.)

In the instant matter, there is no reasonable basis for this Honorable Court to conclude that the Pennsylvania Supreme Court would create a new duty of care between minor students to refrain from acting immaturely or insulting each other. Accordingly, Count V of Plaintiffs' First Amended Complaint should be dismissed, with prejudice.

B. Plaintiffs' Allegations Are Legally Insufficient To Support A Prima Facie Intentional Infliction Of Emotional Distress ("IIED") Claim.

In Count VI of Plaintiff's First Amended Complaint, Plaintiff Matthew Kirchner, Decedent's brother, brings a cause of action for Intentional Infliction of Emotional Distress against the Student Defendants. In Count VII (misidentified as Count IX), the Estate brings a cause of action for Intentional Infliction of Emotional Distress on behalf of Decedent Zachary Kirchner against the Student Defendants.

This Honorable Court analyzed the requirements of IIED claims in Dobson v. Milton Hershey School, 356 F. Supp. 3d 428 (M.D. Pa. 2018) (Conner, J.). In Dobson, this Honorable Court stated:

> 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 the 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.
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> Id. at 439 (internal citations omitted.)

In Dobson, this Honorable Court also cited the Pennsylvania Supreme Court'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 regarding as atrocious, and utterly intolerable in a civilized society." Id. (citing Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998). Furthermore, in order for a bystander plaintiff to recover from intentional infliction of emotional distress, that bystander must be present when the allegedly outrageous conduct occurred. Johnson v. Caparelli, 625 A.2d 668, 672 (Pa. Super. 1993).

Plaintiff Matthew Kirchner's IIED claim fails as a matter of law. From the outset, there are no specific, individual allegations as to Defendant L.D., a minor, engaging in any tortious activity. Rather, Plaintiffs' allegations against Defendant L.D. are merely grouped allegations against L.D. and the other student defendants. Therefore, it is entirely unclear as to how an analysis could be conducted into individual statements by L.D. as being "so extreme in degree as to go beyond all possible bounds of decency" when Plaintiffs have not specifically alleged anything attributable to L.D. other than

being part of a student group that, Plaintiffs argue, bullied Zachary Kirchner. It is respectfully submitted that this lack of direct allegations against L.D. is fatal to all of Plaintiffs' IIED claims.

Importantly, there are no allegations anywhere in Plaintiffs' First Amended Complaint that demonstrate any interactions between L.D. and Plaintiff Matthew Kirchner. There are no allegations that Defendant L.D. and Matthew Kirchner were in school together to interacted in any way. Therefore, Plaintiff Matthew Kirchner is not alleged to be present during any of the bullying activity averred against the Student Defendants. Plaintiffs do, however, allege that Plaintiff Matthew Kirchner somehow received a text message that was disparaging toward Zachary Kirchner. Importantly, this allegation is entirely vague as to how Matthew Kirchner received the text message and which, if any, of the Student Defendants Plaintiffs allege were the author(s) of the text message. In short, this allegation, again, does not attribute anything to Defendant L.D. **(Doc. 18, ¶ 125-130).** Accordingly, Plaintiff Matthew Kirchner's IIED claim fails as a matter of law because it does not attribute any tortious activity directly to Defendant L.D. and because it fails to allege any interactions where Plaintiff Matthew Kirchner was present during alleged tortious activity by Defendant L.D.

Similarly, the Estate's IIED claim on behalf of Zachary Kirchner also fails as a matter of law. From the outset, there are no specific allegations against Defendant L.D. Moreover, even the allegations against the Student Defendants lack any sort of context or descriptive material which could be used to conduct an IIED analysis. Notably, there is no allegation anywhere in Plaintiffs' First Amended Complaint that Defendant L.D. acted intending to cause Zachary Kirchner severe emotional trauma or with knowledge

that the same was 'substantially certain' to occur. This lack of factual allegations against Defendant L.D., coupled with a complete absence of any allegations that Defendant L.D. acted with intent to cause severe distress, is fatal to the Estate's IIED claim on behalf of Zachary Kirchner. Accordingly, Count IX of Plaintiffs' First Amended Complaint fails as a matter of law and should be dismissed, with prejudice.

V. CONCLUSION

Decedent Zachary Kirchner's suicide was tragic. However, Plaintiffs' First Amended Complaint fails to assert any prima facie causes of action against Defendant L.D. For the above-stated reasons, Defendant, L.D., a minor, respectfully requests that this Honorable Court grant his Motion and dismiss Plaintiff's First Amended Complaint, with prejudice.

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WORD COUNT CERTIFICATION

In accordance with M.D. Pa. L.R. 7.8(b), the undersigned counsel hereby certifies that this Brief contains 3,135 words. As permitted by L.R. 7.8(b), the undersigned counsel has relied upon the word count feature of the word-processing software used to prepare this Brief.

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CERTIFICATE OF SERVICE

AND NOW, this 22nd day of May 2023, the undersigned does hereby certify that she did this date serve a copy of the foregoing ***Defendant, L.D., a Minor's Brief in Support of Motion to Dismiss Plaintiffs' First Amended Complaint F.R.C.P. 12(b)(6)*** upon the other parties of record by e-filing through the United States District Court – Middle District's electronic filing system, addressed as follows:

JOHNSON, DUFFIE, STEWART & WEIDNER

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