APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1753

JULIE ELLEN WARTLUFT, f/k/a Julie Ellen Bartels;
FREDERICK L. BARTELS, JR., Individually and as Administrators of the Estate of Abrielle Kira Bartels, Deceased,
Appellants

v.

THE MILTON HERSHEY SCHOOL AND SCHOOL TRUST;
THE HERSHEY TRUST COMPANY, as Trustee of the Milton Hershey School Trust

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 1:16-cv-02145)
District Judge: Honorable John E. Jones, III

Argued: November 16, 2020

Before: AMBRO, BIBAS, and ROTH, *Circuit Judges*

(Filed: February 1, 2021)

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OPINION*

BIBAS, *Circuit Judge*.

A death by suicide is tragic. But not every tragedy leads to legal liability. Soon after Abrielle Bartels came home from boarding school, she took her own life. Her parents sued the School. But the care the School offers is limited. It is not a licensed mental-health or residential-treatment center. Nor do its psychologists have admitting privileges at any in-patient psychiatric hospital. Instead, the School leaves high-level care to outside experts. So we will affirm the District Court's grant of summary judgment for the School.

I. BACKGROUND

The Milton Hershey School is a private, nonprofit boarding school for poor children. It is completely free. And it covers all its students' needs: room, board, clothing, supplies, medical care, even an allowance.

* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

From kindergarten on, Abrielle Kira Bartels (known as Abbie) was a good, well-liked student at the School. But beginning in sixth grade, she started becoming anxious and depressed, struggled with suicidal thoughts, and, in seventh grade, even tried to suffocate herself. For a while, she told no one. But late in eighth grade, in April 2013, she began confiding in Dr. Herr, a School psychologist.

When she did, the School jumped into action. It started with therapy. In the month of May, Dr. Herr met with Abbie six times so he could gauge her mood and treat her. But those efforts failed. Abbie's condition worsened. She developed suicidal thoughts. The School decided that weekly therapy was not enough, so it moved Abbie into the Health Center for observation.

Even that was not enough. Less than a week later, Abbie reported that she had been thinking of ways to kill herself, but just lacked the means. The School decided that she needed intensive care. Because it is not a licensed mental-health treatment center, it sent her to an inpatient hospital, Philhaven.

Dr. Herr and Abbie's mother checked her into Philhaven on May 28. She stayed there for just over a week. Though Dr. Herr visited sometimes, Abbie stayed in the hospital's sole care. But once the hospital decided that she posed no risk of hurting herself, it discharged her back to the School on June 5.

Her return to school was brief. Two days in, she told a classmate that she had scissors in her pocket and wanted to hurt herself. She rated her desire to die as a 9 on a scale of 1 to 10. And she reported that her reasons to live no longer meant anything to her. So the School put her in the Health Center again. But she grew worse. She repeated that she wanted to die but lacked the means. The School's doctors consulted and agreed that Abbie needed to go back to a hospital. They put her on round-the-clock observation and settled on the Pennsylvania Psychiatric Institute.

Dr. Herr and Abbie's mother checked Abbie into the Institute on June 11. While she was there, school officials discussed whether she could return to the School. Though it seemed unlikely, they had not yet made an official decision and planned to discuss that over the summer break, ten days away. The prospect of not returning to School upset Abbie.

The Institute discharged Abbie to her parents' care on June 19, two days before she was supposed to graduate from eighth grade. But the Institute did not notify the School of Abbie's discharge. The School learned of it only when Dr. Herr called Abbie's mother to ask about visiting the hospital.

Before Abbie's discharge, however, the School had made clear to her mother that she could not attend her upcoming eighth-grade graduation or the barbecue at her student house. The School had decided that it could not support the level of care that Abbie needed right then. Though that was disappointing, her father's girlfriend reported that Abbie seemed to understand the decision.

Tragically, Abbie then took her own life at home. It was ten days after her discharge, and just over a week after graduation.

Abbie's parents sued the School both on their own behalf and as representatives of Abbie's estate. They claimed violations of the Fair Housing Act, negligence, and intentional infliction of emotional distress. They also invoked Pennsylvania's Wrongful Death and Survival Act. The District Court granted summary judgment for the School on all counts. Abbie's parents appeal. We review de novo. *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 176 (3d Cir. 2019).

II. The School Did Not Violate The Fair Housing Act

Abbie's parents claim that the School violated the Fair Housing Act by barring Abbie from her eighth-grade graduation and disinviting her from her house's graduation barbecue based on her mental illness. They raise these claims under two paragraphs of the Act: 42 U.S.C. § 3604(f)(1) and (f)(2). Each claim fails.

A. Because Abbie was not a renter under the Act, § 3604(f)(1) does not apply

Section 3604(f)(1) is the heart of the Act. It forbids "mak[ing] unavailable or deny[ing], a dwelling to any buyer or renter because of a handicap of—(A) that buyer or renter." " 'To rent' includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant." *Id.* § 3602(e). This claim turns on whether Abbie "rente[d]" her housing from the School. Both parties agree that she did not formally lease or sublease it. But her parents argue that the chores she had to do around the student house counted as consideration.

They did not. Consideration is "[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something." *Consideration*, *Black's Law Dictionary* (11th ed. 2019). Consideration need not be in cash. For instance, if a landlord gives a building's superintendent an apartment in exchange for managing and maintaining the apartment building, the Act would cover that quid pro quo. *Dixon v. The Hallmark Cos.*, 627 F.3d 849, 858 (11th Cir.

2010). But in that example, the landlord provides the apartment *because* the superintendent agreed to work. The housing is a bargained-for payment for a job. *Id.*

Here, by contrast, Abbie provided no consideration for her housing. Though the School made her do chores, the chores did not help Abbie get housing and were not part of a bargain. Instead, the chores were more like homework: a core part of her educational experience to prepare her for life after school. Indeed, as the School's counsel explained at oral argument, if a student could not physically perform chores, the School would not deny her education or housing. The School housed Abbie out of charity. That free student-housing model falls outside the Act.

B. Because the graduation ceremony was not a service related to Abbie's housing, § 3604(f)(2) does not apply

Abbie's parents next focus on § 3604(f)(2), which bans discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling." The parents first claim the School violated the ban by denying Abbie access to her graduation ceremony. We disagree.

A graduation ceremony is not a term, condition, or privilege of *renting*. Though it is perhaps a service, it is not offered "in connection with" housing, as required by paragraph (f)(2). The School offered the graduation ceremony not as a housing benefit, but as part of the School experience. Day schools have graduations too.

C. Because the parents' § 3604(f)(2) claim for the barbecue repackages their § 3604(f)(1) claim, it also fails

The parents' second § 3604(f)(2) claim, about the house barbecue, is closer to the mark. Unlike the graduation ceremony, the barbecue arguably happened in connection with

Abbie's dwelling. And because paragraph (f)(2) is broader than (f)(1), covering "any person" and not just a "buyer or renter," it does not matter whether she gave consideration. Yet this claim still fails because it just repackages their failed (f)(1) claim.

The School disinvited Abbie from the barbecue. The barbecue was for its student residents, and Abbie was no longer attending classes. So the School's ban on Abbie attending house activities was incidental to its denying her housing. But paragraph (f)(2) does not cover discrimination incidental to the complete denial of housing. That discrimination is covered by paragraph (f)(1), which focuses on *access* to a dwelling. By contrast, (f)(2) focuses on services and facilities offered *in connection with* a dwelling once a person has access to that dwelling. They are not inherently tied to who uses them. *See, e.g.*, *Astralis Condominium Ass'n v. Sec'y, U.S. Dep't. of Hous. & Urb. Dev.*, 620 F.3d 62, 67–68 (1st Cir. 2010). A tenant's disabled guest, for example, could sue the landlord for denying her services or facilities she needs to visit her friend.

If (f)(2) did cover discrimination incidental to the complete denial of housing, it would swallow up (f)(1) and its limitations. Technically, one "facilit[y] in connection with [a] dwelling" is the housing space itself, so any denial of housing covered by (f)(1) would also violate (f)(2). But that would read (f)(1)'s limit of its coverage to "buyer[s] or renter[s]" out of the statute. And as the District Court correctly noted, we avoid reading one part of a statute to render other parts meaningless. *Rep. of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019). So the Act does not apply. Summary judgment was proper.

III. The School Did Not Owe Abbie a Duty of Care After She Was Admitted to the Institute or over the Summer Break

The District Court properly held that the School was not negligent because it owed her no duty of care after she was admitted to the Institute. When she died over the summer break, she was in her parents' custody, not the School's.

A. The School's *in loco parentis* duty ended when Abbie was admitted to the Institute

To be liable for negligence, a defendant must owe the plaintiff a duty and breach that duty. Abbie's parents claim that the School owed Abbie a duty because it stood *in loco parentis*: in the place of a parent. But while that was true at School, it was not once Abbie left. That duty typically depends on physical custody of a child. *See* Restatement (Second) of Torts § 314A (1965). Once the child is out of a school's control, the school no longer stands in the shoes of the parents. *Watson v. PennDOT*, 1996 WL 942124, at *5 (Pa. Ct. Cmn. Pl. Mont. Cnty. 1996). When a student returns to her parents, it is typically the parents who are responsible for her, not the school.

Once Abbie's mother checked her into the Institute, the School's duty *in loco parentis* ended. The Institute discharged Abbie to her mother, not to the School. It did not even notify the School. In any event, the duty could not extend over the summer break, when Abbie was back with her parents full-time.

B. Abbie's parents did not timely claim a continuing duty of care

Seeking to escape this lack of duty, Abbie's parents claimed for the first time at summary judgment that the School owed Abbie a "continuing duty" of care even after it released her to the Institute. But the District Court properly refused to consider that belated claim because it did not appear in their complaint. Not once does the complaint use the phrase "continuing duty of care." Nor did the parents ever allege it before their summary-judgment briefs, even though they discussed the duty *in loco parentis* at length.

IV. The Other Claims Fail Too

A. There is no evidence that the School intentionally inflicted emotional distress

Intentional infliction of emotional distress is very hard to prove. And as the District Court rightly found, Abbie's parents have not proven it.

Pennsylvania reserves this tort for the worst conduct imaginable. "[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." *Hoy v. Angelone*, 720 A.2d 745, 754 (Pa. 1998) (quoting *Buczek v. First Nat'l Bank of Mifflintown*, 531 A.2d 1122, 1125 (Pa. Super. 1987)). No such conduct happened here. On the contrary, the School acted reasonably: it put Abbie in the care of licensed mental-health professionals. None of its actions was reprehensible. There is nothing intolerable about making sure a suicidal student gets professional treatment before returning to campus.

B. Because the state-law tort claims fail, there is no cause of action under the Wrongful Death and Survival Act

Pennsylvania's Wrongful Death and Survival Act is just a way for plaintiffs to recover for unlawful conduct that results in death. It does not create a standalone cause of action. Rather, it ensures that if the decedent had a personal cause of action but did not bring it while alive, that right survives for her heirs or estate. *See Carroll v. Skloff*, 202 A.2d 9, 10–

11 (Pa. 1964), *overruled on other grounds by Amadio v. Levin*, 501 A.2d 1085, 1089 (Pa. 1985). Because the other claims fail, the Wrongful Death and Survival Act claim fails too.

* * * * *

Abbie Bartels's passing was a tragic loss. But in the weeks and days before her death, the Milton Hershey School owed her no duty to do more. We will affirm.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1753

JULIE ELLEN WARTLUFT, f/k/a Julie Ellen Bartels;
FREDERICK L. BARTELS, JR., Individually and as Administrators of
the Estate of Abrielle Kira Bartels, Deceased,
Appellants

v.

THE MILTON HERSHEY SCHOOL AND SCHOOL TRUST;
THE HERSHEY TRUST COMPANY, as Trustee of the
Milton Hershey School Trust

On Appeal from the United States District Court
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(D.C. No. 1:16-cv-02145)
District Judge: Honorable John E. Jones, III

Argued: November 16, 2020

Before: AMBRO, BIBAS, and ROTH, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was argued on November 16, 2020.

On consideration whereof, it is now **ORDERED** and **ADJUDGED** that the District Court's judgment entered on March 18, 2020, is hereby **AFFIRMED**. Costs to be taxed against Appellants. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: February 1, 2021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1753

JULIE ELLEN WARTLUFT, formerly known as Julie Ellen Bartels;
FREDERICK L. BARTELS, JR., Individually and as Administrators
of the Estate of Abrielle Kira Bartels, Deceased,

Appellants

v.

THE MILTON HERSHEY SCHOOL AND SCHOOL TRUST;
THE HERSHEY TRUST COMPANY.,
as Trustee of the Milton Hershey School Trust

(District Court No.: 1-16-cv-02145)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY and PHIPPS, Circuit Judges and ROTH*, Senior Judge

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

*Honorable Jane R. Roth's vote is limited to panel rehearing only.

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ THOMAS L. AMBRO
Circuit Judge

Dated: March 16, 2021

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Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

Julie Ellen WARTLUFT et al., Plaintiffs,
v.
The MILTON HERSHEY SCHOOL AND SCHOOL TRUST et al., Defendants.

1:16-cv-2145
|
Signed 03/18/2020

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MEMORANDUM

Hon. John E. Jones III, District Judge

***1** Presently pending before the Court are cross-motions for summary judgment filed by the parties in the above-captioned case. (Docs. 293, 297). Both motions have been fully briefed, (Docs. 293, 294, 332, 336; Docs. 297, 298, 312-1, 337), and are ripe for disposition. For the reasons that follow, Plaintiffs' motion, (Doc. 293), shall be denied, and Defendants' motion, (Doc. 297), shall be granted. Moreover, because we shall order the Clerk of Court to close the file on this case, we shall deny as moot F. Frederic Fouad's First Motion to Intervene. (Doc. 334).

I. BACKGROUND

The underlying facts of this case have been discussed at length in several previous Memoranda and Orders issued by this Court, (Docs. 62, 216, 230, 258, 279), but we reiterate herein several important details revealed in discovery relevant to the instant motions.

Defendants the Milton Hershey School and the Hershey Trust Company, as Trustee for the Milton Hershey School Trust (collectively, "Defendants" or "the School"), operate a cost-free, not-for-profit, residential academy. (Doc. 294-1 at ¶ 1; Doc. 299 at ¶¶ 19–20). Plaintiffs Julie Wartluft ("Wartluft") and Frederick Bartels, Jr. ("Bartels") are the mother and father of Abrielle Kira Bartels ("Abrielle"), a former student. (Doc. 29 at ¶ 1). In the instant case, Plaintiffs Wartluft and Bartels seek relief in their individual capacities and in their capacities as administrators of the Estate of Abrielle Kira Bartels ("the Estate").[1]

Abrielle attended the Milton Hershey School since kindergarten. (Doc. 294-1 at ¶ 2). Abrielle was a good student. (*Id.* at ¶ 3). In April 2013, however, Abrielle began to express feelings of anxiety, depression, and thoughts of self-harm to the School's psychologist, Dr. Benjamin Herr ("Dr. Herr"). (*Id.* at ¶¶ 4–5). Abrielle admitted that she had struggled with suicidal ideations since at least the sixth grade, (Doc. 299 at ¶ 64), and that she had unsuccessfully acted on those impulses. (*Id.* at ¶ 75). As a result of these statements, and others, Abrielle was in and out of the student health center for several weeks. On May 21, 2013, Dr. Herr conducted an assessment of Abrielle during which Abrielle admitted that she planned to stab herself with a knife from the kitchen of her student home. (*Id.* at ¶ 90 (citing Def. Ex. 1 at Bartels 00160)). Abrielle also admitted to having tried to kill herself in the past by strapping a pillow over her face with a belt. (*Id.*). As a result of Dr. Herr's assessment, Abrielle was once again admitted to the health center but soon after returned to her student home. (Doc. 299 at ¶¶ 102–103). Nonetheless, over the following weekend, Abrielle again expressed "intense suicidal ideations" and, on May 28, 2013, Dr. Herr drove Abrielle to Philhaven Mental and Behavioral Healthcare Facility ("Philhaven") for inpatient mental health treatment. (Doc. 294-1 at ¶ 6; Doc. 295-1 at 2). Abrielle was signed into Philhaven by her mother. (*Id.*). Abrielle was discharged from Philhaven on June 5, 2013 and returned to the School. (*Id.*). In discharge notes, Philhaven recommended that Abrielle

> ***2** receive aftercare in the supportive environment of in the structured support of returning [*sic*] to Milton Hershey School ... develop a safety/support plan with Milton Hershey School Therapist and staff ... include[ing] weekly therapy sessions; weekly check-ins with house parents and the therapist or other identified support staff ... return to medication management with a psychiatrist ... participate in a community/school service or organization *i.e.* church youth group, school programs (sports, clubs,

assisting a teacher, etc ...) to help build her sense of belonging to a community and strengthen her self esteem. Without this level of care, it is possible that Abrielle could decompensate and require future hospitalizations.

(Doc. 295-4 at 2).

Upon Abrielle's return to campus, she spent the night in the student health center but returned to class and other activities on June 6, 2013. (Doc. 294-1 at 12). The following day, however, Abrielle told a classmate that she was again experiencing suicidal ideations and that she had scissors in her pocket. (Doc. 299 at ¶ 137). Abrielle met with Dr. Herr and, during that session, reported that she was again experiencing suicidal urges. (*Id.* at ¶¶ 139; Doc. 296 at 99). Abrielle was again admitted to the student health center. (Doc. 299 at ¶ 143–44). On June 10, 2013, Dr. Jeannette Morales-Brandt, a psychiatric consultant, conducted an evaluation of Abrielle. (Doc. 299 at ¶ 155). Dr. Morales-Brandt recommended that Abrielle be readmitted to a psychiatric hospital for support and stabilization. (*Id.* at ¶ 156). On June 11, 2013, Dr. Herr drove Abrielle to the Pennsylvania Psychiatric Institute ("PPI") where she met her mother and signed herself in voluntarily for inpatient hospitalization. (Doc. 294-1 at 12).

On June 12, 2013, Dr. Herr spoke with Abrielle's mother and recounted to her "as [he] had before initiating this second hospitalization, that it is highly unlikely that Abbie will be permitted to return to [the School] after her time at PPI is concluded." (Doc. 296-1 at 1). Dr. Herr also noted that "a meeting of staff will occur on Friday[, June 14, 2013], with the goal of determining Abbie's future" at the School, with two likely outcomes, either "cessation of enrollment" or a "leave of absence." (*Id.*). Although Dr. Herr informed Abrielle's mother that he would recommend a leave of absence, Dr. Herr reiterated that "the senior division staff would ultimately make the decision." (*Id.*). Also on June 12, 2013, one of the School's administrators, Heather Teter ("Teter"), called PPI to notify them that "it is most likely we will be recommending that [Abrielle] not return [to the School] following PPI ... due to high level of need currently beyond our programming." (Doc. 296-1 at 4–7). Thus, Teter recommended that PPI begin planning to discharge Abrielle to her family and her home community rather than back to the School. (*Id.*).

On June 13, 2012, Dr. Herr conferred with Abrielle's treating physician at PPI, Dr. Lidija Petrovic-Dovat. During the call, Dr. Petrovic-Dovat noted that Abrielle's mother had informed Abrielle that she would not likely be returning to the School. (*Id.* at 2). Dr. Petrovic-Dovat reported to Dr. Herr that Abrielle was upset. (*Id.*). Dr. Herr informed Dr. Petrovic-Dovat that, although he "agreed with [her] concerns ... [School] staff must determine if Abbie's psychological needs could be met within the scope of [the School's] programming." (*Id.* at 2). According to Dr. Herr, "the question is purely one of level of services needed vs. what [the School] can provide." (*Id.*).

On June 17, 2013, Abrielle reported that she "ha[d] been doing well," that she was "looking forward to be[ing] discharged," and that she wanted "to go live with her step mom until dad gets out of jail for DUI." (Def. Ex. 15 at PPI 150). Although Abrielle would have preferred to return to the School, she reported that "[s]he is OK with going to a different school for a year and then returning to [the Milton Hershey School] after she is stable." (*Id.*).

***3** On June 19, 2013, Abrielle was discharged from PPI to her family in accordance with a discharge plan developed by PPI. (Doc. 296 at 99; Doc. 299 at ¶¶ 214–62). Because Abrielle was discharged to her family's care and was no longer under the School's care, home-life administrator Mic Stewart decided that Abrielle was not permitted to attend her on-campus eighth grade graduation or a subsequent after-party at her student family home on June 21, 2013. (Doc. 295-3 at 170–86). Several administrators expressed displeasure with this decision. (*Id.*). Nonetheless, Abrielle and her family were notified of the same and Abrielle did not attend either event. (*Id.*).

Between June 19, 2013 and June 29, 2013, Abrielle spent time with her family in Newport, Pennsylvania and with her family in Steelton, Pennsylvania. Abrielle spent time with her friend and engaged in ordinary adolescent activities. (Doc. 299 at ¶ 295, 303–306). Sadly, on June 29, 2013, Abrielle hanged herself in a bedroom closet. (Doc. 294-1 at ¶ 27).

Plaintiffs filed a Complaint in this Court on June 29, 2016, (Doc. 1), and an Amended Complaint on October 28, 2016. (Doc. 29). In their Amended Complaint, Plaintiffs allege that, despite knowing that Abrielle suffered from depression and suicidal ideations, Defendants discharged her from their care under a "shadow policy" which mandated that students be expelled from the School after two mental health hospitalizations, even if those hospitalizations were recommended by school staff. (Doc. 29 at ¶ 108). Following several rulings from this Court,[2] the following Counts alleged in Plaintiffs' Amended Complaint, (Doc. 29), remain viable. In Count I, the Estate contends that Defendants violated two provisions of the Fair Housing Act ("FHA") by dismissing Abrielle from the School and by barring her from attending her eighth-grade graduation and the subsequent after-party at her student family home because of her mental disability. In Count III, the Estate avers that Defendants were negligent in dismissing Abrielle from their care thereby forcing her into an assertedly unstable environment resulting in her death. In Count V, Individual Plaintiffs allege a wrongful death action, and in Count VI, the Estate alleges a survival action. In Counts IX and X, the Estate alleges intentional and negligent infliction of emotional distress. In Count XII, the Estate alleges that Defendants breached their fiduciary duty of care and of good faith in failing to enact certain policies and/or measures that a person of ordinary prudence would use in overseeing the care of children.

On December 17, 2019, Plaintiffs filed the instant motion for partial summary judgment seeking a ruling that Defendants failed to comply with their own policies and procedures when they dismissed Abrielle from the School and barred her from her eighth-grade graduation and from the subsequent after party. (Doc. 293). That motion was fully briefed. (Docs. 294, 332, 336). On the same day, Defendants filed a joint cross-motion for summary judgment and a brief in support thereof seeking summary judgment as to all still-viable Counts of Plaintiffs' Amended Complaint. (Docs. 297, 298). Defendants' motion was fully briefed. (Docs. 298, 312-1, 337). Both motions are now ripe for disposition. For the reasons that follow, Plaintiffs' motion shall be denied and Defendants' motion shall be granted. Moreover, and as aforestated, because we shall Order the Clerk of Court to close the file on this case, we shall also deny as moot F. Frederic Fouad's First Motion to Intervene. (Doc. 334).

II. STANDARD OF REVIEW

***4** Summary judgment is appropriate if the moving party establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" only if there is a sufficient evidentiary basis for a reasonable jury to find for the non-moving party, and a fact is "material" only if it might affect the outcome of the action under the governing law. *See Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 172 (3d Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A court should view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences therefrom, and should not evaluate credibility or weigh the evidence. *See Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 772 (3d Cir. 2013) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)).

Initially, the moving party bears the burden of demonstrating the absence of a genuine dispute of material fact, and upon satisfaction of that burden, the non-movant must go beyond the pleadings, pointing to particular facts that evidence a genuine dispute for trial. *See id.* at 773 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). In advancing their positions, the parties must support their factual assertions by citing to specific parts of the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

A court should not grant summary judgment when there is a disagreement about the facts or the proper inferences that a factfinder could draw from them. *See Reedy v. Evanson*, 615 F.3d 197, 210 (3d Cir. 2010) (citing *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 84 (3d Cir. 1982)). Still, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 211 (3d Cir. 2011) (quoting *Anderson*, 477 U.S. at 247-48) (internal quotation marks omitted).

III. DISCUSSION

In their partial motion for summary judgment, Plaintiffs essentially seek a declaration that Defendants' failed to comply with their own applicable policies and procedures when they dismissed Abrielle from the School and barred her from attending her eighth-grade graduation and the subsequent after-party at her student family home. Simultaneously, Defendants move for summary judgment on all still-viable Counts of Plaintiffs' Amended Complaint. We first address Plaintiffs' motion and then address Defendants' arguments *seriatim.* In closing, we address Intervenor F. Frederic Fouad's First Motion to Intervene.

a. Plaintiffs' Motion for Summary Judgment

In their motion and accompanying brief, Plaintiffs contend that Defendants' decision to dismiss Abrielle from the School and then prohibit her from attending her eighth-grade graduation and the subsequent after party at her student family home violated Defendants' own policies and procedures. According to Plaintiffs, it is undisputed that Abrielle was "terminated"[3] from the School and that the School "had certain policies and procedures in place that set forth criteria for a student resident's termination for psychological reasons," including: (1) conducting "an internal 'SPT' meeting;" (2) conducting a meeting between home-life, the principle, and the coordinator of student health; (3) completing a "termination packet;" (4) advising the family that a termination request has been forwarded to the division head; (5) preparing a transition plan; and (6) preparing a final decision from the division heads and vice president of student programs. (Doc. 294 at 13–14). In Plaintiffs' views, Defendants failed to do any of these things. Indeed, the only thing Plaintiffs allege Defendants did which in any way demonstrated that they intended to follow any procedure at all prior to terminating Abrielle was to draft a leave of absence letter—a letter which was never actually provided to Abrielle's family. Thus, "Plaintiffs simply request that the Court enter summary judgment on the issue of whether [Defendants] complied with its policies and procedures when it determined that Abbie could not return to school. The undisputed facts demonstrate that such a judgment in Plaintiffs' favor is warranted." (Doc. 294 at 16–17). For reasons both procedural and practical, we disagree.

***5** Federal Rule of Civil Procedure 56 provides that "[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense —on which summary judgment is sought." Fed.R.Civ.P. 56(a). Thus, by its terms, summary judgment under Rule 56(a) may not be used to render judicial determinations on purely factual questions. *Siegel v. Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995) (reiterating that "[c]ourts must not resolve factual disputes or make credibility determinations" when ruling upon summary judgment motions); *Martin v. City of Reading*, 118 F. Supp. 3d 751, 783 (E.D. Pa. 2015) ("Rule 56 ... 'does not allow a party to bring a motion for a mere factual adjudication' ") (quoting *SEC v. Thrasher*, 152 F.Supp.2d 291, 297 (S.D.N.Y. 2001)); *see also Little v. Lower Bucks Restoration Servs., Inc.*, No. 2:17-CV-03446-AB, 2019 WL 936644, at *1 (E.D. Pa. Feb. 26, 2019) ("[A] motion for summary judgment may not properly seek to dispose of only a factual allegation or element of a single indivisible claim for relief.") (quoting *Collins v. Cottrell Contracting Corp.*, 733 F. Supp. 2d 690, 698 (E.D. N.C. 2010)).

Under Federal Rule of Civil Procedure 56(g), however, "[i]f the court does not grant all the relief requested by [a properly presented summary judgment] motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case." Fed.R.Civ.P. 56(g). The advisory committee notes to the 2010 Amendment to Rule 56 explains, however, that subdivision (g) "becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion." *Id.* at 2010 Amendment. That is, it is only after the Court's duty to rule upon the parties' entitlement to judgment as a matter of law is discharged that "the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute." *Id.* Nonetheless, "[e]ven if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established." *Id.* "The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event." *Id.* Therefore, it goes without saying that, "[t]he question whether to exercise that authority is within the court's discretion." 10B Fed. Prac. & Proc. Civ. § 2737 (4th ed.).

In their motion for partial summary judgment, Plaintiffs are plainly seeking a pretrial factual determination notwithstanding their efforts to characterize their request as "probative" of Defendants' fourth affirmative defense that Defendants "fulfilled any duties, responsibilities, and obligations owed to [Abrielle] and Plaintiffs within the scope of their educational and child welfare mission." (Doc. 222 at 66). Tellingly, Plaintiffs specify in their opening brief that they "are not asking the Court to delve into issues of liability and causation." (Doc. 294 at 16). It is not until Plaintiffs' Reply that they even mention that their request is probative of one of Defendants' affirmative defenses and we assume that they only did so in an effort to find some attenuated connection to a relevant claim or defense and in response to Defendants' arguments that Plaintiffs' request was procedurally improper for failing to do so earlier. Moreover, although the judicial determination that Plaintiffs seek may be in some way tangentially related to one of Defendants' defenses, the notion that such a determination is in any way "dispositive" of even a part of that defense is specious at best and, therefore, we find it improper to resolve Plaintiffs' request on summary judgment. *See Little,* 2019 WL 936644, at *1 ("Because deciding this question would not dispose of all or part of a 'claim or defense,' Fed. R. Civ. P. 56(a), it is not subject to disposition on summary judgment.").

***6** To the extent Plaintiffs could have pursued their request via Rule 56(g), we find that argument to be waived. Moreover, even were we inclined to have reviewed a request under Rule 56(g) had it been properly presented, we would have denied it. First, Plaintiffs' only request in their motion for partial summary judgment was for this factual determination. They never sought disposition as to any actual claims or defenses. As such, under Rule 56(g), the Court could never have even entertained Plaintiffs' request for a factual declaration. *See* Fed.R.Civ.P. 56(g) at 2010 Amendment (stating that it is only once the Court's summary judgment "duty is discharged," that "the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute"). Furthermore, whether Defendants complied with their own policies and procedures appears to be in dispute inasmuch as Defendants insist that Abrielle was never "terminated" but was instead placed on a temporary leave of absence during which she passed away. (*See* Doc. 332 at 6–14). Thus, Defendants aver that the policies to which Plaintiffs cite were never applicable and a genuine issue of material fact would preclude the entry of summary judgment as to that issue. Finally, even if Plaintiffs' request was not in genuine dispute, in our view, "the cost of determining whether [these] potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial." *See* Fed.R.Civ.P. 56(g) at 2010 Amendment. As such, even had Plaintiffs presented their request in the context of Rule 56(g), we would have exercised our discretion and would have denied Plaintiffs' motion. Accordingly, because Plaintiffs' request is procedurally improper under Rule 56(a), because Plaintiffs did not frame their request under Rule 56(g), and because we would have denied their request even if so presented, Plaintiffs' motion for partial summary judgment, (Doc. 293), shall be denied.

b. Defendants' Motion for Summary Judgment

1. Count I FHA Claim – 42 U.S.C. §§ 3406(f)(1), 3406(f)(2)

In Count I, the Estate contends that Defendants violated two provisions of the FHA by discriminating against Abrielle based upon her mental disability. Specifically, the Estate points to Abrielle's dismissal from the School and her concurrent loss of housing and the fact that she was barred from attending her eighth-grade graduation and the subsequent after-party at her student family home immediately after undergoing two mental health hospitalizations. Because we find herein that Abrielle was not a "buyer or renter" under the terms of the FHA, we shall grant summary judgment in favor of Defendants as to Count I to the extent it is predicated upon Section 3406(f)(1) of the FHA. Moreover, because the Estate avers only that Abrielle was denied housing—and not that she was discriminated against "in the provision of services or facilities in connection with such dwelling"—we shall also grant summary judgment in favor of Defendants as to Count I to the extent it is predicated upon Section 3406(f)(2). Because prior rulings from this Court limited Plaintiffs' claims in Count I to only Sections 3406(f)(2) and 3604(f)(2), we shall grant Defendants summary judgment as to Count I in its entirety.

Under Section 3406(f)(1) of the FHA, it is unlawful to (1) "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3406(f)(1). To establish a *prima facie* case of discrimination under Section 3604(f)(1), a plaintiff must demonstrate: (1) that he or she was discriminated against; (2) that such discrimination occurred in the sale or rental of a dwelling, or that such dwelling was made unavailable or denied; (3) that he or she was a buyer or renter; and (4) that such discrimination occurred because of a handicap of that buyer or renter, a person residing in or intending to reside in that dwelling, or any person associated with that buyer or renter." 42 U.S.C. § 3406(f)(1).

A claimant is said to be a "buyer or renter" under the FHA when he or she supplies consideration in exchange for an interest in property. *See* 42 U.S.C. § 3602 (defining "to rent" for purposes of the FHA as "to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant"); *Growth Horizons, Inc. v. Delaware Cty., Pa.*, 983 F.2d 1277, 1283 n.10 (3d Cir. 1993) ("Because the handicapped individuals in this case are not supplying the funds nor seeking a proprietary interest in the property, they are neither buyers nor renters."); *Defiore v. City Rescue Mission of New Castle*, 995 F.Supp.2d 413, 419 (W.D. Pa. 2013) ("What qualifies as consideration under the FHA has been examined by a limited number of courts and this Court finds that resolution of the issue will turn on whether [the housing facility at issue] receives consideration for a resident's stay.").

***7** Under Pennsylvania law,[4] "[c]onsideration consists of a benefit to the promisor or a detriment to the promisee." *Weavertown Transp. Leasing, Inc. v. Moran*, 834 A.2d 1169, 1172 (Pa. Super. 2003) (citing *Stelmack v. Glen Alden Coal Co.*, 14 A.2d 127, 128 (Pa. 1940)).

> It is not enough, however, that the promisee has suffered a legal detriment at the request of the promisor. The detriment incurred must be the "*quid pro quo*", or the "price" of the promise, and the inducement for which it was made.... If the promisor merely intends to make a gift to the promisee upon the performance of a condition, the promise is gratuitous and the satisfaction of the condition is not consideration for a contract. The distinction between such a conditional gift and a contract is well illustrated in Williston on Contracts ... where it is said: "If a benevolent man says to a tramp—'If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit,' no reasonable person would understand that the short walk was requested as the consideration for the promise, but that in the event of the tramp going to the shop the promisor would make him a gift."

Stelmack, 14 A.2d at 128 (internal citations omitted). Universally, consideration must be actually bargained for and "[n]othing is consideration that is not regarded as such by both parties." *Philpot v. Gruninger*, 81 U.S. 570, 577 (1871).

In this case, the Estate contends that Abrielle was a "buyer or renter" under the terms of the FHA because she was "required"[5] to perform chores while attending the School, an activity which the Estate argues constitutes valid consideration. Defendants disagree, arguing that Abrielle's chores were wholly gratuitous. We agree with Defendants. In our view, Abrielle's chores were performed as part of a conditional gift—admission to the School; those chores are analogous to the tramp's short walk to the store. *See Stelmack*, 14 A.2d at 128 ("If the promisor merely intends to make a gift to the promisee upon the performance of a condition, the promise is gratuitous and the satisfaction of the condition is not consideration for a contract."). The School's Deed of Trust specifies that "under no circumstances shall any charge be made to any scholar, or any fees, rewards, or compensation be accepted by the Managers from or on account of any scholar." (Def. Ex. 55 at ¶ 18). Likewise, the enrollment agreement that Abrielle's guardian signed when she enrolled in the School specifies that "a home, food, clothing, health care, and an education" shall be provided "at no cost to you [the parents or guardians] or your child." (Def. Ex. 7 at ¶ 1). Indeed, Plaintiffs Amended Complaint highlights that the School is "cost-free," and includes housing. (Doc. 29 at ¶ 12). Thus, the fact that Abrielle was "required" to perform chores, does not render those chores consideration. In our view, Abrielle was "required" to perform chores in the same way that she was "required" to do her homework. Abrielle's chores were a learning tool implemented as part of a broad-based curriculum. Those chores were not offered as *quid pro quo* consideration for her living arrangement.

***8** Accordingly, because Abrielle's chores were not consideration as a matter of law, we conclude that she cannot be considered a "buyer or renter" under the FHA. *See* 42 U.S.C. § 3602 (defining "to rent" for purposes of the FHA as "to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant"); *Growth Horizons, Inc.*, 983 F.2d at 1283 n.10 ("Because the handicapped individuals in this case are not supplying the funds nor seeking a proprietary interest in the property, they are neither buyers nor renters."); *Defiore*, 995 F.Supp.2d at 419 ("What qualifies as consideration under the FHA has been examined by a limited number of courts and this Court finds that resolution of the issue will turn on whether [the housing facility at issue] receives consideration for a resident's stay."). Therefore, the Estate has failed to demonstrate a *prima facie* case of discrimination under Section 3406(f)(1) of the FHA and we shall grant Defendants summary judgment as to Count I to the extent it is premised thereon.

Under Section 3406(f)(2) of the FHA, it is unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap," 42 U.S.C. § 3406(f)(2). To establish a *prima facie* case under Section 3604(f)(2), a plaintiff must demonstrate: (1) that he or she was discriminated against; (2) that such discrimination occurred in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling; and (3) that such discrimination occurred because of a handicap of that person, a person residing in or intending to reside in that dwelling, or any person associated with that person. 42 U.S.C. § 3604(f)(2).

Although the common law in this Circuit has not specifically outlined the contours of what is included within "the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling," federal regulations have included "denying or limiting services or facilities" as one way that an individual could so discriminate against another. 24 C.F.R. § 100.65 (relating to discrimination in terms, conditions and privileges and in services and facilities). Generally speaking, however, courts have found that to raise a claim under Subsection (f)(2), a litigant must demonstrate "that their terms, conditions or privileges of the rental differed from other tenants," *Congdon v. Strine*, 854 F.Supp. 355, 360–62 (E.D. Pa. 1994), or that they were subject to "more burdensome application procedures." *Corey v. Sec'y, U.S. Dep't of Hous. & Urban Dev. ex rel. Walker*, 719 F.3d 322, 327 (4th Cir. 2013). According to the Third Circuit, "[b]y its express terms, this section applies to 'the provision of services or facilities' to a dwelling, such as sewer service...." *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir. 2005).

As we noted in our Memorandum and Order of August 13, 2019 granting in part Defendants' Motion for Judgment on the Pleadings, (Doc. 279), an expansive reading of 24 C.F.R. § 100.65 together with Section 3604(f)(2) "may, in some cases, render Subsection (f)(2) indistinguishable from Subsection (f)(1)." (*Id.* at 27). That is, if an individual could discriminate against another in "the provision of services or facilities in connection with [a] dwelling" by denying access to the facilities entirely, any violation of Subsection (f)(2) would also necessarily violate Subsection (f)(1) and the two provisions would be superfluous. *Compare* 42 U.S.C. § 3406(f)(1) (stating that it shall be unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap") *with* 42 U.S.C. § 3406(f)(2) (stating that it shall be unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap").

***9** In this case, Defendants reason that they are entitled to summary judgment as a matter of law to the extent the Estate's FHA claim is premised upon Subsection (f)(2) because, having already established that Abrielle was not a "buyer or renter," the Estate has failed to demonstrate that Abrielle was discriminated against "in the provision of services or facilities in connection with such dwelling." Rather, Defendants reason, the Estate contends only that Abrielle denied access to the School *in toto* and was told that she was not allowed to return to the School and was not permitted to attend her eighth-grade graduation or the after party at her student family home. We agree.

Although at the motion for judgment on the pleadings stage we declined to dismiss the Estate's claims under Subsection (f)(2) based upon the deferential standard of review in effect at that time, having received detailed briefing on the issue on summary judgment, we are not so constrained at this juncture. At this point, we are cognizant of our Supreme Court's guidance that courts should not "adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185–86 (2011); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988). Were we to include the Estate's contentions that Abrielle was denied access to her student home and barred from school activities *in toto* as falling within the ambit of Subsection (f)(2), we would render Subsections (f)(1) and (f)(2) distinct without a difference and violate the well-settled aforementioned jurisprudential principle. We decline to do so here and shall grant Defendants summary judgment as to Count I on that basis to the extent it is premised upon Section 3604(f)(2).

Our decision is also influenced by the distinct claimants authorized by Subsections (f)(1) and (f)(2); Subsection (f)(1) permits claims by only "buyers or renters" whereas Subsection (f)(2) permits claims by "any person." *See* 42 U.S.C. §§ 3406(f)(1), (f)(2). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, we must assume that Congress did not intend to allow "any person" to raise a claim under Subsection (f)(1) and shall not allow "any person" to do so herein by hyper-expanding the scope of Subsection (f)(2). In other words, allowing the Estate to proceed under Subsection (f)(2) for the same conduct that we explicitly rejected as recoverable under Subsection (f)(1) because Abrielle was not a "buyer or renter" would nullify Congress' intentional and purposeful choice to distinguish between "any person" in Subsection (f)(2) and a "buyer or renter" in Subsection (f)(1). Accordingly, and for the aforementioned reasons, we shall grant summary judgment in favor of Defendants as to Count I to the extent it is premised upon 42 U.S.C. § 3604(f)(2).

2. Defendants' Motion for Summary Judgment – Count III Negligence Claim

In Count III, the Estate avers that Defendants were negligent in dismissing Abrielle from their care and in barring her from her eighth-grade graduation and from the subsequent afterparty at her student family home thereby forcing her into an assertedly unstable home environment which resulted in her death. Because we find herein that Defendants' duty of care ended when Abrielle was admitted to PPI and then discharged to her family, we find that the Estate has failed to demonstrate a *prima facie* case of negligence and we shall grant Defendants summary judgment as to Count III.

***10** Plaintiffs' Amended Complaint and briefing throughout this litigation clarified that the Estate's negligence claim outlined in Count III is premised upon the duty incurred by Defendants when they opted to stand *in loco parentis* to Abrielle. (Doc. 29 at ¶¶ 36, 184–85) ("An affirmative duty on the Defendants' part to care for Abbie and protect her from harm arose from the special custodial relationship that existed between Defendants and Abbie.... Abbie was dependent on Defendants to meet her basic needs ... [which] deprived Abbie of her normal opportunities for protection.").[6] Although the concept of *in loco parentis* is generally used in Pennsylvania jurisprudence to refer to a party's standing to pursue custody of a child, *see Peters v. Costello*, 891 A.2d 705, 710 (Pa. 2005), the phrase *in loco parentis* has been used in the context of Pennsylvania negligence law to refer to the heightened duty owed by an individual who voluntarily takes custody of another as outlined in Section 314A of the Restatement (Second) of Torts. *See* Restatement (Second) of Torts § 314A (1965) (assigning a heightened of care to "[o]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection"); *Gress v. Philadelphia & R. Ry. Co.*, 77 A. 810, 811 (Pa. 1910); *Knaupp v. Bolen*, 83 Pa.D.&C.4th 323, 329 (Pa. Com. Pl. Adams Cty. 2006) ("Although Knaupp's claims against Bolen recognize that a parent-child relationship did not exist, the allegations in the complaint establish that Bolen was acting *in loco parentis*. It would appear, therefore, that the reasoning ... is equally applicable to the current circumstance in clarifying the theory of liability."); *Atias v. Trocki Hebrew Acad.*, No. CV 05-6102, 2007 WL 9617936, at *2 (E.D. Pa. Feb. 14, 2007) ("While it is true that schools and teachers have generally been held *in loco parentis* to their students, the duty that status creates 'is coextensive with the physical custody and control over the child and does not ordinarily extend beyond the area of control of school authority, so that the duty ceases when the child passes out of the orbit of the school district's authority.' "). Both parties appear to agree that, under Pennsylvania law, a party standing *in loco parentis* has an affirmative duty to protect the other as outlined in Section 314A of the Restatement (Second) of Torts.

***11** Nonetheless, the parties do not agree when or how an *in loco parentis* duty ends. According to Defendants, in the context of a school-student relationship, an *in loco parentis* duty "is coextensive with the physical custody and control over the child and does not ordinarily extend beyond the area of control of school authority, so that the duty ceases when the child passes out of the orbit of the school district's authority." (Doc. 298 at 22 (quoting *Atias*, 2007 WL 9617936, at *2)). According to Plaintiffs, however, the special *in loco parentis* relationship between a school and its students comes "with an attendant independent social obligation to provide reasonable care for and to maintain the safety of vulnerable minor children in its care"—a duty which does not end simply because the student leaves campus. (Doc. 312-1 at 20). Indeed, Plaintiffs reason, such a finding "would defy common sense" inasmuch as Defendants could "cut off treatment in contravention of the standard of care and then be absolved of any responsibility for the consequences of their actions." (*Id.*).

In this case, neither party has pointed to clearly binding precedent which identifies when an *in loco parentis* duty ends. Rather, Defendants rely upon a single unpublished district court decision and two Pennsylvania Courts of Common Pleas decisions. (Doc. 298 at 22) (citing *Atias*, 2007 WL 9617936, at *2; *Watson v. PennDOT*, 33 Pa.D.&C.4th 325, 333 (Pa. Com. Pl. Mont. Cnty. 1996); *Stetler v. Piecyk*, 61 Pa.D.&C.4th 181, 185–86 (Pa. Com. Pl. Phila. Cnty. 2002)). In *Atias*, the district court found that, under Pennsylvania law, an *in loco parentis* duty "is coextensive with the physical custody and control over the child and does not ordinarily extend beyond the area of control of school authority, so that the duty ceases when the child passes out of the orbit of the school district's authority." *Atias*, 2007 WL 9617936 at *2–*3. Thus, the *Atias* Court concluded, once a school expelled a student and "he stopped physically coming to campus ... [the school] could no longer stand *in loco parentis*." *Id.* In *Watson*, the Montgomery County Court of Common Pleas reasoned that the student-plaintiff was not entitled to relief on his negligence claim when he "was not acting within the scope of any special relationship at the time of his accident," "[h]e had completed the day's schoolwork and had physically exited the school grounds," and "was standing on a public sidewalk and was not *en route* to a school-sponsored activity." *Watson*, 33 Pa.D.&C.4th at 333. In *Stetler*, the Philadelphia County Court of Common Pleas relied upon *Watson* to conclude that "a private school has no duty to provide a safe means of crossing a public street, at least in the case where classes have ended for the day, the child is beyond the school's property and on his or her way home, and is not *en route* to a school-sponsored activity." *Stetler*, 61 Pa.D.&C.4th at 185–86. Plaintiffs have not presented a single case relevant to when an *in loco parentis* duty ends but only argue for a nebulous ongoing duty of care based upon principles of foreseeability. (*See supra* n.5).

Our review of the *in loco parentis* doctrine as it relates to the duty owed by a school to its students suggests that any duty Defendants owed to Abrielle ended when Abrielle was admitted to PPI for treatment and was no longer under Defendants' custody or control. Section 314A of the Restatement (Second) of Torts—the operative provision to which the Estate cite in support of a duty owed by the School to Abrielle—provides that, one "who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection" faces a duty to: (a) protect the individual over whom they have taken custody "against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others." Restatement (Second) of Torts § 314A (1965). Thus, by its terms, any duty that attaches under Section 314A remains only until the individual over whom one has taken voluntary custody "can be cared for by others." *Id.* In line with this interpretation, comment c to Section 314A notes that:

> ***12** The rules stated in this Section apply only where the relation exists between the parties, and the risk of harm, or of further harm, arises in the course of that relation. A carrier is under no duty to one who has left the vehicle and ceased to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises. Nor is a possessor of land under any such duty to one who has ceased to be an invitee.

Id. at comment c. Likewise, comment f specifies that:

> In the case of an ill or injured person, [the individual that owes a duty] will seldom be required to do more than ... turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance.

Id. at comment f. In other words, as Defendants highlight, an *in loco parentis* duty appears to be coextensive with physical custody and control and, therefore, a school's duty of care owed to its students terminates when that school relinquishes custody and/or control of the student to another guardian. *See Atias*, 2007 WL 9617936, at *2; *Watson*, 33 Pa.D.&C.4th at 333; *Stetler*, 61 Pa.D.&C.4th at 185–86.

In our view, the Estate's attempt to impose upon Defendants an ongoing duty of care that extends beyond the period when Defendants maintained custody and control over Abrielle confuses the line between duty and causation. That is, Plaintiffs' insistence that the School's decision to bar Abrielle from campus in some way contributed to her death is not dispositive of whether the School owed Abrielle a legal duty in the first instance or whether that duty had terminated upon Abrielle's admission to PPI. This is so, notwithstanding Plaintiffs' contention that Abrielle's suicide was foreseeable and notwithstanding the vulnerable position in which Abrielle found herself upon her admission to PPI. Although Plaintiffs press that "[s]uch a conclusion would defy common sense," (Doc. 312-1 at 40), we find the opposite to be true. If Abrielle's admission to PPI did not sever the duty Defendants owed to her, then, theoretically, Defendants could have been liable for practically anything that occurred to Abrielle, or that Abrielle did to another, at a time when, arguably, the Defendants had no way of even knowing what she was doing. We decline to find such an expansive duty at this juncture nor do we find such a duty imposed by Pennsylvania law.

To the extent that the Estate has pleaded that the School pressured Abrielle to be admitted for a second inpatient hospitalization "so that [the School] could effectuate its two-institution expulsion policy" while Abrielle was still in the care and custody of the School, (Doc. 29 at ¶ 188), we find that Defendants' conduct in that vein could not constitute a breach sufficient to support a negligence action. Other than their own unsubstantiated allegations, Plaintiffs have not presented any basis to conclude that Defendants admitted Abrielle to PPI for any nefarious reason. Clearly, Defendants were presented with a student who was suffering from increasing suicidal ideations with a history of depression and suicidal tendencies. Providing that student with an opportunity to seek professional medical help could not amount to a breach of any duty incurred. Just the opposite. Had Defendants *not* provided Abrielle with such an opportunity, they would have unquestionably breached their *in loco parentis* duty.

***13** Likewise, we find Plaintiffs' assertion that Defendants breached their duty to Abrielle by failing to provide her with a follow-up plan after her discharge from PPI misguided. (Doc. 312-1 at 43–44). We reiterate, once Abrielle was admitted to PPI, Defendants' *in loco parentis* duty was discharged. Thus, regardless of Defendants' conduct *after* Abrielle was discharged from PPI, Defendants could not have breached a duty which they no longer owed. Once again, Plaintiffs' argument appears to confuse the duty Defendants owed and whether Defendants were arguably a contributing factor to Abrielle's death.[7] Accordingly, because Plaintiffs' negligence claim in Count III is premised upon Defendants' conduct *after* Abrielle had been admitted to PPI and after Defendants relinquished custody and control of Abrielle, and any conduct that could be attributed to the Defendants *before* Abrielle was admitted to PPI could not constitute a breach, we find that Plaintiffs have failed to demonstrate essential elements of their negligence claim and we shall grant Defendants summary judgment as to Count III.[8]

3. Count IX – IIED

A claim for intentional infliction of emotional distress ("IIED") 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. *Brown v. Muhlenberg Township*, 269 F.3d 205, 217–18 (3d Cir. 2001) (quoting Restatement (Second) of Torts § 46, cmt. d). Whether conduct could reasonably be regarded as extreme and outrageous is a threshold inquiry for the Court. *M.S. ex rel. Hall v. Susquehanna Twp. Sch. Dist.*, 43 F. Supp. 3d 412, 430 (M.D. Pa. 2014) (citing *Reimer v. Tien*, 514 A.2d 566, 569 (Pa. Super. 1986)). The Supreme Court of Pennsylvania has cited approvingly the Superior Court's 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." *Hoy v. Angelone*, 720 A.2d 745, 754 (Pa. 1998) (alteration in original) (quoting *Buczek v. First Nat'l Bank of Mifflintown*, 531 A.2d 1122, 1125 (Pa. Super. 1987)).

In this case, although the Court found previously that the Estate had pleaded sufficient facts in its IIED claim which, if taken as true, were sufficient to state a plausible claim for relief and survive a motion to dismiss, we now find on summary judgment that the Estate has failed to substantiate those allegations in discovery and has failed to demonstrate that Defendants' conduct was sufficiently extreme or outrageous to support its IIED claim. At the motion to dismiss stage, the Court concluded that the following pleaded facts—if taken as true—were sufficient to support the Estate's IIED claim: (1) "the School threatened to expel Abrielle due to her mental impairments and did, in fact, suspend her for at least ninth grade the day after she was discharged from inpatient treatment for severe depression and suicidal ideation ... on the heels of a settlement with the Department of Justice regarding the School's mistreatment of students with disabilities;" (2) "The School ... forced Abrielle to be discharged back to her natural family, who had their own mental health, legal, and substance abuse issues that were the driving factors in Abrielle's severe depression ... [and] knowingly removed Abrielle from her campus home of nine years and put her in the exact environment that was causing her depression and suicidal tendencies;" and (3) "the School encouraged Abrielle to get inpatient mental health care while knowing that such treatment would result in automatic expulsion or suspension under the two hospitalization policy." (Doc. 216 at 16–17). Accordingly, in its brief in opposition to Defendants' motion for summary judgment, the Estate argues:

> ***14** Plaintiff has shown that [the School] essentially expelled Abbie due to her mental health and, suspended her from [the School] the day after she was discharged from inpatient treatment for suicidal ideation and severe depression, without any regard for the treatment she received at PPI. Discovery has shown that [the School] foisted Abbie back into a home with parents who had their own mental, legal, and substance abuse issues—all factors known by [the School] to contribute to Abbie's depression and suicidal ideation.

(Doc. 312-1 at 48). However, as Defendants note, the Estate has failed to provide a single citation to the record supporting any of these purported demonstrations. In fact, as Defendants also note in their brief, many of these claims have been expressly disproven in discovery. For example, the Estate alleged that the School "essentially expelled" Abrielle "due to her mental health" and that the School encouraged Abrielle to admit herself to a treatment program so that the School could effectuate her dismissal under its two-hospitalization policy. In discovery, however, the evidence of record demonstrates that the School engaged in an individualized assessment of Abrielle's condition, determined that Abrielle required a higher level of care, and then made a clinical judgment call that it would be unable to meet Abrielle's mental health needs upon her discharge thereby necessitating her return to her family. (*See* Doc. 298-4 at ¶¶ 27–29 ("While she was on campus, [Abrielle] was provided individualized treatment by [the School's] licensed clinical staff and, consistent with best practices for providers in a school.... [Abrielle] required treatment off campus by Philhaven, an independent inpatient, twenty-four (24) hour psychiatric hospital ... [and then] required treatment off campus by the Pennsylvania Psychiatric Institute."); Def. Ex. 40 at 70:6–10 ("Q: Was coming back to school after completing her time at the second hospital an option? A: Yes. It would have been an option. It depended on a lot of factors. It is an individualized situation for every child."); Def. Ex. 39 at 40:6–10 ("Every single student who presents with suicide ideation is given a full independent, individualized assessment ... those decisions are made and treatment plans are based on individual evaluations."); Pl. Ex. 26 ("I clarified that we are not intending to treat Abbie differently b/c she struggles with depression; rather, we had to determine if her level of emotional need falls within the scope of our programming.")). Indeed, the Estate has not presented any evidence demonstrating that the School did not conduct an independent evaluation of Abrielle's condition or that there was some concerted effort to discriminate against Abrielle based upon her mental health by forcing her to voluntarily enter a treatment program thereby triggering the School's "shadow policy" to expel students who undergo more than one mental health hospitalization.

The Estate's efforts to construe what appears to be a reasoned decision by Defendants as leaving PPI with "no choice" but to discharge Abrielle to her parents is misguided. Simply because Defendants refused to allow Abrielle to return to the School following her discharge from PPI does not indicate in and of itself that Defendants made that decision nefariously. The record only supports the Estate's assertion that the School "forced" Abrielle to return to her parents to the extent that they did not permit her to return to the School's care.

***15** On a less granular level, and setting aside for a moment the allegations that the Court found dispositive at the motion to dismiss stage, we find that the Estate has failed to demonstrate that Defendants engaged in conduct that is "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*, 720 A.2d at 754 (quoting *Buczek*, 531 A.2d at 1125). In short, the Estate's IIED claim is predicated upon Defendants' decision to bar Abrielle from returning to the School after being discharged from PPI which in turn meant that she had no place else to go but to her parents home, an assertedly-unsafe environment, and meant that she was not allowed to attend her eighth-grade graduation and the subsequent after party. Thus, at bottom, the Estate contends that Defendants' decision to bar Abrielle from returning to school was so extreme and outrageous as to go beyond all possible bounds of decency. Based upon the record before us, we cannot so find. Schools throughout this country frequently decide to remove students from their programs for myriad reasons. Given the undisputed facts, Defendants' decision to bar Abrielle from returning to school or preclude her from attending her graduation, in and of itself, could not as a matter of course constitute extreme and outrageous conduct that goes "beyond all possible bounds of decency" and cannot be "regarded as atrocious, and utterly intolerable in a civilized society." *See Hoy*, 720 A.2d at 754 (quoting *Buczek*, 531 A.2d at 1125). Were we to so find, we would unduly neuter the standard for extreme and outrageous conduct under Pennsylvania law or hyper-expand its scope. To the extent that the Estate attempts to label Defendants' decision as extreme and outrageous based upon their view that Defendants' decision was a concerted effort to discriminate against Abrielle or that Defendants' decision was made nefariously, the Estate has failed to provide evidence demonstrating the same other than their own bald and unsupported assertions. Thus, the Estate's claims are both factually deficient and insufficient as a matter of law and Defendants are entitled to summary judgment as to Count IX.

4. Count XIII – Breach of Fiduciary Duty

Under Pennsylvania law, "[t]he general test for determining the existence of ... a [fiduciary] relationship is whether it is clear that the parties did not deal on equal terms." *Frowen v. Blank*, 425 A.2d 412, 416 (Pa. 1981). A fiduciary relationship will be found to exist "when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible." *Id.* "[I]n order to breach a fiduciary duty, the dominant party must act for his or her own personal gain or to his or her own advantage," *Manning v. Temple Univ.*, 2004 WL 3019230, at *10 (E.D. Pa. 2004), and to establish a breach of fiduciary duty under Pennsylvania law, a plaintiff must prove that a fiduciary duty was in place and "(1) that the defendant negligently or intentionally failed to act in good faith and solely for the benefit of plaintiff in all matters for which he or she was employed; (2) that the plaintiff suffered injury; and (3) that the agent's failure to act solely for the plaintiff's benefit ... was a real factor in bring[ing] about plaintiff's injuries." *Dinger v. Allfirst Fin., Inc.*, 82 Fed.App'x. 261, 265 (3d Cir. 2003).

In their Amended Complaint, the Estate avers that Defendants owed Abrielle fiduciary duties of care and good faith "to provide a safe environment" and to "apply the highest moral, legal, and ethical standards in their conduct" based upon the special and all-encompassing relationship between the School and its students. (Doc. 29 at ¶¶ 246–47). According to the Estate, Defendants breached these duties by: (1) "failing to appoint childcare and mental health experts to their boards;" (2) "failing to hire qualified senior [School] administrators;" (3) "failing to implement policies or institutional controls that would prevent incidents of discrimination;" (4) "not following through on the ADA settlement agreement, the Equal Opportunity Policy, or the Handbook by failing to properly train staff on the requirements of Title III of the ADA;" and (5) failing to monitor and comply with the ADA settlement agreement, the Equal Opportunity Policy, the Handbook and/or Title II of the ADA. (*Id.* at ¶ 248).

In the Estate's responsive brief to Defendants' motion for summary judgment, however, the Estate does not cite to any evidence of record to support the aforementioned breaches. Rather, the Estate simply reiterates the standard for the existence of a fiduciary relationship and concludes that such a fiduciary relationship did exist and that Defendants "clearly breached that duty and caused harm for all the reasons set forth." (Doc. 312-1 at 51). Thus, the Estate appears to argue that, because it believes it has demonstrated that Defendants acted negligently, it has also demonstrated that Defendants breached their fiduciary duties to Abrielle.

***16** Setting aside the fact that we have concluded *supra* that the Estate has failed to demonstrate an ordinary negligence claim against Defendants, assuming *arguendo* that a fiduciary relationship existed between Defendants and Abrielle, we conclude as well that the Estate has failed to demonstrate that Defendants breached any fiduciary duties that stemmed therefrom. First, as Defendants note in their briefs, the Estate has failed to substantiate the allegations which form the basis of their breach of fiduciary duty claim outlined in its Amended Complaint. Other than a reference to other sections of its brief related to different causes of action, the Estate has not cited to any evidence demonstrating that Defendants (1) "fail[ed] to appoint childcare and mental health experts to their boards;" (2) "fail[ed] to hire qualified senior [School] administrators;" (3) "fail[ed] to implement policies or institutional controls that would prevent incidents of discrimination;" (4) failed to follow "through on the ADA settlement agreement, the Equal Opportunity Policy, or the Handbook by fail[ed] to properly train staff on the requirements of Title III of the ADA;" or (5) failing to monitor and comply with the ADA settlement agreement, the Equal Opportunity Policy, the Handbook and/or Title II of the ADA. (Doc. 29 at ¶ 248). Second, even had the Estate substantiated said allegations in discovery, it has not provided any basis to conclude that such failures amount to a breach of fiduciary duty. In other words, the Estate has not provided any basis to conclude that these failures: (1) were negligent or intentional, (2) were done in bad faith, (3) were done solely for their own benefit, and (4) were the actual and proximate cause of Abrielle's injuries. *See Dinger*, 82 Fed.App'x. at 265. For example, the Estate has failed to express why it was incumbent upon Defendants to "appoint childcare and mental health experts to their boards," why the School administrators whom it did hire were "unqualified" or why its "policies or institutional controls" were insufficient to "prevent incidents of discrimination," and the specific ways in which Defendants failed to follow through on its ADA settlement agreement. Likewise, the Estate has also failed to demonstrate that these acts were done in bad faith or solely for Defendants' own benefit or how said failures were the actual or proximate cause of Abrielle's injuries. Thus, the Estate has failed entirely to substantiate its breach of fiduciary duty claim in discovery and we shall grant Defendants summary judgment as to Count XIII.

5. Count V and VI – Wrongful Death and Survival Action

Under Pennsylvania law, "wrongful death and survival actions are not substantive causes of action; rather, they provide a vehicle through which plaintiffs can recover for unlawful conduct that results in death." *Sullivan v. Warminster Twp.*, 765 F.Supp.2d 687, 707 (E.D. Pa. 2011) (citing 42 Pa.C.S.A. § 8301(a)) ("An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime and any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery."); *Carroll v. Skloff*, 202 A.2d 9, 10-11 (Pa. 1964), *overruled on other grounds by Amadio v. Levin*, 501

A.2d 1085, 1089 (Pa. 1985) ("The cause of action created by the survival statute is strictly derivative. It is, as it is named, a surviving action. It is grounded upon an existing personal cause of action which the deceased could have but did not institute during his or her lifetime."). "Because wrongful death and survival actions are not independent claims, a plaintiff asserting these claims must assert some other independent, cognizable claim to survive a motion to dismiss the wrongful death and survival claims." *Lansberry v. Altoona Area Sch. Dist.*, 356 F.Supp.3d 486, 504 (W.D. Pa. 2018) (citing *Salvio v. Amgen, Inc.*, 810 F.Supp.2d 745, 757 (W.D. Pa. 2011) (dismissing wrongful death and survival claims because they "cannot be brought ... as claims in-and-of themselves, because an underlying claim, such as negligence, is needed for these claims to be cognizant.")). Accordingly, because we shall grant summary judgment in favor of Defendants as to all still-viable Counts in Plaintiffs' Amended Complaint thereby leaving Plaintiffs with no other independent causes of action, we are compelled to grant Defendants summary judgment as to Individual Plaintiffs' wrongful death action in Count V and as to the Estate's survival action in Count VI.

c. F. Frederic Fouad's Motion to Intervene

On February 4, 2020, F. Frederic Fouad ("Fouad")[9] filed a motion to intervene in the instant action for "the limited purposes of protecting [his] enduring rights of privacy and opinion work-product protections from [the School]'s ongoing misuse and any trial in this case." (Doc. 334 at 1–2). Fouad's motion was fully briefed. (Docs. 335, 342, 347). Because for the reasons discussed *supra* we shall Order the Clerk of Court to close the file on this case, there will be no trial in this case and any concerns related to the use or misuse of any alleged work product are necessarily moot. Accordingly, we shall deny Fouad's motion as moot.

IV. CONCLUSION

***17** The panoply leading to Abrielle's suicide, and her death itself, as revealed through the abundant discovery that has been conducted in this case, are undeniably tragic. But in the end, Plaintiffs' causes of action were undergirded by certain factual assumptions that could not be substantiated. Abrielle's death is manifestly heartbreaking. Sadly, however, and as is often the case in our system of civil justice, we find that this is simply not an actionable demise.

For the aforementioned reasons, Plaintiffs' motion for partial summary judgment, (Doc. 293), shall be denied and Defendants' motion for summary judgment, (Doc. 297), shall be granted. Moreover, F. Frederic Fouad's First Motion to Intervene, (Doc. 334), shall be denied as moot. An appropriate Order shall issue.

All Citations

Slip Copy, 2020 WL 1285332

Footnotes

1 We refer to Plaintiffs Wartluft, Bartels, and the Estate collectively as "Plaintiffs" and refer to Plaintiffs Wartluft and Bartels collectively in their individual capacities as "Individual Plaintiffs."

2 On December 7, 2019, Chief Judge Christopher C. Connor dismissed Counts III, VII, VIII, IX, X, XI, XII of Plaintiffs' amended complaint. (Doc. 63). Following reconsideration, on December 7, 2018, Chief Judge Connor reinstated Counts III, IX, X, XI, and XII. (Doc. 217). This matter was subsequently reassigned to the undersigned on January 23, 2019. On August 13, 2019, this Court dismissed Counts I, III, IX, and XII to the extent those claims sought relief on behalf of Plaintiffs Wartluft and Bartels in their individual capacities and dismissed Counts XI and XIII in their entirety.

3 In their opposition brief, Defendants contend that, at the time of her death, Abrielle was not "terminated" but was rather in the process of being placed on a temporary leave of absence for one year after which she would be re-evaluated for return to the School. According to Defendants, Abrielle passed away before any such plans could be formalized.

4 Because this case comes before us on federal question jurisdiction, (*see* Doc. 29 at ¶ 8–9), but necessarily involves creatures of state law—namely, consideration—and involves predominantly state law claims, and because the parties look to Pennsylvania law when arguing the same, we look to Pennsylvania jurisprudence when determining whether Abrielle's chores constituted valid consideration to warrant a finding that she was a buyer or renter under the terms of the FHA.

5 Plaintiffs have cited to various points in the record to suggest that Abrielle's chores were a "requirement." (Def. Ex. 7 at ¶ 6 ("You agree that your child must obey all School rules and policies while enrolled at the School. These rules address behavior, program requirements, visiting privileges, vacations, studies, **chores,** substance abuse and all other matters

to your child's conduct at the School.") (emphasis added) (capitalization in original); Def. Ex. 4 at 4 ("Each student home will determine a developmentally and age appropriate Chore program, that will be linked to a Merit Program. Chore programs should remain consistent with programs taught by HLPD.") (capitalization in original); Pl. Ex. 4 at 46:17–20 ("There are very high expectations within a student home setting. There are chores to be completed. There are behavioral expectations."); Pl. Ex. 39 (explaining that "students engage in kind of typical family activities that would be scheduled throughout the course of the week like meals, maybe devotions in the morning, **doing chores**, obeying rules, following instructions, doing study, homework....") (emphasis added)).

6 The Estate also references in passing in their brief in response to Defendants' motion for summary judgment that Defendants owed Abrielle a duty to provide "continuity of care" which they imply is different than the duty Defendants owed because of their *in loco parentis* status. (Doc. 312-1 at 41 ("Even assuming that *in loco parentis* status expired upon Abbie's admission to PPI—which it did not—a school can still owe its student an independent duty despite the absence of an *in loco parentis* relationship.... Here, the facts establish the continued need for continuity of care.") (citing *Hawkins v. Waynesburg Coll.*, No. CIV.A. 07-5, 2008 WL 2952888, at *6 (W.D. Pa. July 30, 2008) ("Although these considerations may inform the District Court's deliberations, they are unnecessary to the denial of summary judgment in connection with the *in loco parentis* theory. The law has long been clear that colleges may be liable to their students under ordinary negligence principles."))). However, as Defendants point out in their briefs, Plaintiffs have always relied upon Defendants' *in loco parentis* status as the duty upon which their negligence claim is based, (*see* Doc. 82 at 8, 12), and the Court accepted the same. (Doc. 216 at 11–12). Thus, we agree with Defendants that it would be inappropriate at this juncture to allow Plaintiffs to effectively amend their complaint by alleging some new, nebulous duty owed by the Defendants. *Warfield v. SEPTA*, 460 F.App'x 127, 132 (3d Cir. 2012) ("A plaintiff may not amend a complaint by raising arguments for the first time in a brief in opposition to a motion for summary judgment.") (citing *Shanahan v. City of Chi.*, 82 F.3d 776, 781 (7th Cir. 1996); *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 641–42 (3d Cir. 1993)). Such a shift in strategy is particularly troublesome in this case where Defendants argue that the Estate's attempt to change the duty from an *in loco parentis* duty to a "continuity of care" duty appears to transform the claim from ordinary negligence to medical negligence. Specifically, Defendants highlight, the Estate did not name the expert upon which it relies in support of this "continuity of care" duty and did not cite to anything in the record in support thereof. According to Defendants, the only Plaintiffs-side expert that opined as to the standard of care Defendants owed was Dr. John Gavazzi who, according to Defendants, limited his discussion to the duty owed by Dr. Herr to Abrielle within the context of their psychologist-patient relationship. (*See* Doc. 337 at 31–32). To be clear, we render no opinion herein as to whether Defendants actually owed a duty to provide "continuity of care" or whether a "continuity of care" duty is limited to medical negligence claims as a matter of law but rather hold only that, if such a duty did apply, the Estate's failure to pursue that theory earlier waived any argument in connection therewith at summary judgment. *See Warfield*, 460 F.App'x at 132.

7 Because we shall grant summary judgment to Defendants based upon Plaintiffs' failure to demonstrate duty and breach, we do not address the parties' arguments related to causation and issue no ruling thereupon.

8 Because we find that Plaintiffs have failed to demonstrate a negligence claim in Count III, we also necessarily find that they have failed to demonstrate a claim of negligent infliction of emotional distress as outlined in Count X. *See Brown v. Philadelphia Coll. of Osteopathic Med.*, 760 A.2d 863, 868 (Pa. Super. 2000) ("In order to recover under ... negligent infliction of emotional distress ... [a party] must prove the elements of a cause of action for negligence."). Accordingly, we shall grant summary judgment to Defendants as to Count X.

9 Fouad is the organizer of Protect The Hersheys' Children, Inc., a non-profit organization seeking to reform the Milton Hershey School. Although Fouad is a party in a related action currently pending in this district, Fouad seeks to intervene in the instant case to preclude Defendants from using or in any way citing to an assertedly confidential memo that he alleges Defendants intercepted in 1999 after Fouad faxed the memo to himself while a guest at The Hotel Hershey.

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

JULIE ELLEN WARTLUFT *et al.*,	:	1:16-cv-2145
Plaintiffs,	:	Hon. John E. Jones III
v.	:	
THE MILTON HERSHEY SCHOOL AND SCHOOL TRUST *et al.*,	:	
Defendants.	:	

ORDER

March 18, 2020

In conformity with the Memorandum issued on today's date, **IT IS HEREBY ORDERED THAT:**

1. Plaintiffs' Motion for Partial Summary Judgment, (Doc. 293), is **DENIED**.

2. Defendants' Motion for Summary Judgment, (Doc. 297), is **GRANTED**.

3. The Clerk of the Court **SHALL CLOSE** the file on this case.

4. F. Frederic Fouad's First Motion to Intervene, (Doc. 334), is **DENIED** as moot.

/s/ John E. Jones III
John E. Jones III
United States District Judge

400 F.Supp.3d 91
United States District Court, M.D. Pennsylvania.

Julie Ellen WARTLUFT et al., Plaintiffs,
v.
The MILTON HERSHEY SCHOOL AND SCHOOL TRUST et al., Defendants,

1:16-cv-2145
|
Filed 08/13/2019

Synopsis
Background: Parents of student, in their individual capacities and as administrators of student's estate, brought action against operators of private, nonprofit residential school, alleging claims including violation of the Fair Housing Act (FHA) and seeking injunctive relief under the FHA, and claims under Pennsylvania law for civil conspiracy, negligence per se, and breach of fiduciary duty of care and good faith, arising out of student's suicide after being discharged from school's care following her second mental health hospitalization. Operators filed motions for judgment on the pleadings.

Holdings: The District Court, John E. Jones, J., held that:

[1] parents adequately alleged that they suffered injury in fact under FHA;

[2] parents' alleged injuries did not fall within FHA zone of interests;

[3] parents adequately alleged discrimination in violation of FHA based on disparate treatment theory;

[4] parents adequately alleged discrimination in violation of FHA based on refusal to accommodate theory;

[5] parents adequately alleged that student was "renter" under FHA;

[6] parents' civil conspiracy claim failed given lack of predicate statute with private right of action;

[7] parents adequately alleged existence of fiduciary relationship between operators and student; and

[8] claim for injunctive relief under the FHA was rendered moot by student's death.

Motions granted in part and denied in part.

West Headnotes (34)

[1] **Federal Civil Procedure** Judgment on the Pleadings

When the basis of the moving party's motion for judgment on the pleadings is that the plaintiff has allegedly failed to state a claim upon which relief can be granted, the motion is properly analyzed under the same standard of review applicable to motions to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6), (c).

[2] **Civil Rights** Property and housing

Sole requirement for standing to sue under the Fair Housing Act (FHA) is the Article III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered a distinct and palpable injury. U.S. Const. art. 3, § 2, cl. 1; Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

[3] **Federal Civil Procedure** Rights of third parties or public

So long as the requirement of Article III injury in fact is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. U.S. Const. art. 3, § 2, cl. 1.

[4] **Federal Civil Procedure** In general; injury or interest

A claimant is only considered an “aggrieved person” with Article III standing if they assert the violation of an interest arguably sought to be protected by the statute at issue. U.S. Const. art. 3, § 2, cl. 1.

[5] **Civil Rights** Property and housing

A plaintiff has standing to pursue claims under the Fair Housing Act (FHA) provided he or she can demonstrate that he or she suffered an injury in fact that falls within the zone of interests contemplated by the FHA; that is, that as a result of the defendant's actions he or she has suffered a distinct and palpable injury, and that said injury falls within the zone of interests implicated by the FHA. U.S. Const. art. 3, § 2, cl. 1; Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

[6] **Civil Rights** Property and housing

Allegations by parents of student who committed suicide following discharge from care of private residential school after second mental health hospitalization that parents suffered loss of support, loss of aid, loss of services, loss of companionship, loss of consortium and comfort, loss of counseling, and loss of guidance of student as result of actions of school's operators were sufficient to allege that parents suffered injury in fact, as required for Article III standing to bring Fair Housing Act (FHA) claim against operators. U.S. Const. art. 3, § 2, cl. 1; Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

[7] **Civil Rights** Property and housing

Alleged injuries to parents of student who committed suicide for loss of student's services did not fall within zone of interests contemplated by the Fair Housing Act (FHA), and thus parents lacked Article III standing to bring FHA claim against operators of private residential school, which had discharged student from their care after her second mental health hospitalization, though parents asserted that but for student's dismissal from school, she would not have been forced to return home, and would not have died, such that they would not have been injured; FHA was designed to combat discrimination in sale or rental of housing, parents' claims sounded in tort and were entirely untethered to

FHA or student's housing situation, and relationship between student's housing claim and parents' injuries was too attenuated. U.S. Const. art. 3, § 2, cl. 1; Civil Rights Act of 1968, §§ 802, 804, 805, 806, 813, 42 U.S.C.A. §§ 3602(i)(1, 2), 3604, 3605, 3606, 3613(a)(1)(A).

[8] **Civil Rights** Housing

A plaintiff can demonstrate that he or she was discriminated against, and thereby satisfy the first element of the prima facie Fair Housing Act (FHA) case, by demonstrating that he or she suffered (1) intentional discrimination (also called disparate treatment); (2) indirect discrimination (also called disparate impact or discriminatory effect); or (3) that the defendant refused to make reasonable accommodations necessary to afford him or her equal opportunity to use and enjoy the dwelling at issue. Civil Rights Act of 1968, § 804, 42 U.S.C.A. § 3604(f)(1, 2).

1 Cases that cite this headnote

[9] **Civil Rights** Housing

A plaintiff can establish a prima facie case of intentional discrimination under the Fair Housing Act (FHA) by showing that discriminatory intent against a protected group was a motivating factor for the challenged action. Civil Rights Act of 1968, § 804, 42 U.S.C.A. § 3604(f)(1, 2).

1 Cases that cite this headnote

[10] **Civil Rights** Housing

Discriminatory purpose need not be malicious or invidious, nor need it figure in solely, primarily, or even predominantly into the motivation behind the challenged action for a plaintiff to demonstrate a prima facie case of intentional discrimination under the Fair Housing Act (FHA); the plaintiff is only required to show that a protected characteristic played a role in the defendant's decision to treat him or her differently. Civil Rights Act of 1968, § 804, 42 U.S.C.A. § 3604(f)(1, 2).

[11] **Civil Rights** Housing

To establish Fair Housing Act (FHA) liability under the discriminatory effect theory, a plaintiff must establish a prima facie case that the challenged action has a discriminatory effect on a protected class. Civil Rights Act of 1968, § 804, 42 U.S.C.A. § 3604(f)(1, 2).

[12] **Civil Rights** Discrimination by reason of handicap, disability, or illness

To establish a claim for violation of the Fair Housing Act (FHA) based on refusal to make reasonable accommodations, a plaintiff need only plausibly plead enough facts to make out the three statutorily-enumerated elements: refusal, reasonable accommodation, and necessity/equal opportunity. Civil Rights Act of 1968, § 804, 42 U.S.C.A. § 3604(f)(1), (2), (3)(B).

1 Cases that cite this headnote

[13] **Civil Rights** Discrimination by reason of handicap, disability, or illness

Allegations by estate of student who committed suicide following her discharge from care of private residential school after her second mental health hospitalization that operators of school denied student housing at school on basis of her mental health hospitalizations, and intentionally took away student's housing as result of facially discriminatory school policy requiring expulsion after student was twice admitted to outside mental health institution, adequately alleged that operators discriminated against student in violation of the Fair Housing Act (FHA) based on disparate treatment theory. Civil Rights Act of 1968, § 804, 42 U.S.C.A. § 3604(f)(1, 2).

2 Cases that cite this headnote

[14] **Civil Rights** Housing

To survive a motion to dismiss as to a disparate treatment theory for violation of the Fair Housing Act (FHA), the plaintiff need only demonstrate that a protected characteristic played a role in the defendant's decision to treat her differently. Civil Rights Act of 1968, § 804, 42 U.S.C.A. § 3604(f)(1, 2).

[15] **Civil Rights** Discrimination by reason of handicap, disability, or illness

Allegations by estate of student who committed suicide that operators of private residential school were aware of student's precarious mental health circumstances, that they treated her mental disabilities on two prior occasions, that they knew that student had threatened suicide in past, and that operators failed to enter into dialogue concerning reasonable accommodations and instead denied her continued residence at school following her second mental health hospitalization, adequately alleged that student was discriminated against in violation of the Fair Housing Act (FHA) based on refusal to accommodate theory. Civil Rights Act of 1968, § 804, 42 U.S.C.A. § 3604(f)(1), (2), (3)(b).

[16] **Civil Rights** Discrimination by reason of handicap, disability, or illness

Estate of student who committed suicide following her discharge from care of private residential school following her second mental health hospitalization adequately alleged that student's housing was made unavailable or denied at school after her second mental health hospitalization, and that said denial constituted discrimination in the provision of facilities in connection with such dwelling, as required to establish prima facie case of violation of the Fair Housing Act (FHA) against operators of school. Civil Rights Act of 1968, § 804, 42 U.S.C.A. § 3604(f)(1, 2); 24 C.F.R. § 100.65.

[17] **Civil Rights** Discrimination by reason of handicap, disability, or illness

Allegation that student performed chores and other tasks in exchange for residency in student home adequately alleged that student was a "renter," as required for student's estate to state a claim for violation of Fair Housing Act (FHA) against operators of private residential school, which allegedly discharged student from its care after her second mental health hospitalization, after which she committed suicide, notwithstanding fact that school was "cost-free." Civil Rights Act of 1968, §§ 802, 804, 42 U.S.C.A. §§ 3602, 3604(f)(1).

[18] **Civil Rights** Discrimination by reason of handicap, disability, or illness

Estate of student who committed suicide following discharge from care of private residential school following her second mental health hospitalization adequately alleged that the discrimination she faced occurred because of her handicap, and that the school's actions in denying her access to her housing was a result of the school's facially discriminatory policy requiring expulsion after a student was twice admitted to an outside mental health institution, as required to state claim for violation of the Fair Housing Act (FHA) against school. Civil Rights Act of 1968, § 804, 42 U.S.C.A. § 3604(f)(1, 2).

[19] **Action** Statutory rights of action
Conspiracy Nature, form, and right of action
Parents of student who committed suicide following her discharge from care of private residential school after her second mental health hospitalization could not claim that operators of school committed civil conspiracy to endanger children under Pennsylvania law, in light of parents' failure to identify a predicate statute with private right of action upon which their civil conspiracy claim was based.

[20] **Action** Criminal acts
Criminal statutes do not generally provide a private cause of action nor basis for civil liability.

1 Cases that cite this headnote

[21] **Action** Criminal acts
Under Pennsylvania law, there is no private right of action for the statute criminalizing the endangering of the welfare of children.

[22] **Conspiracy** Nature, form, and right of action
When a statute does not provide a private right of action, a plaintiff cannot pursue a civil remedy for conspiracy to violate that statute.

1 Cases that cite this headnote

[23] **Education** Pupils or Students
Fraud Fiduciary or confidential relations
Allegations by parents of student who committed suicide following her discharge from care of private residential school after her second mental health hospitalization that school was created to serve severely underprivileged children, a particularly vulnerable group, that school marketed its program as creating a “family-like atmosphere” for students, that school openly described itself as a private residential school with surrogate parenting responsibilities, that school exerted control over every aspect of students' lives, and that school confirmed in settlement agreement that it stood in loco parentis to its students, adequately alleged existence of fiduciary relationship between operators of school and student, as required to state claim for breach of fiduciary duty under Pennsylvania law.

2 Cases that cite this headnote

[24] **Fraud** Fiduciary or confidential relations
Under Pennsylvania law, the general test for determining the existence of a fiduciary relationship is whether it is clear that the parties did not deal on equal terms.

[25] **Fraud** Fiduciary or confidential relations
Under Pennsylvania law, it is clear that the parties did not deal on equal terms, so as to indicate a fiduciary relationship, when on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible.

[26] Education ⊶ Self-inflicted injuries; suicide

Neither Fair Housing Act (FHA) nor Americans with Disabilities Act (ADA) prohibitions on discrimination could serve as basis of Pennsylvania law negligence per se claim brought by parents of student who committed suicide following her discharge from care of private residential school after her second mental health hospitalization, in their individual capacities, against operators of school, since parents were not disabled; in absence of disability, parents were not within class of people designed to be protected by either the ADA or the FHA. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[27] Negligence ⊶ Violations of statutes and other regulations

Under Pennsylvania law, "negligence per se" is conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances.

[28] Negligence ⊶ Violations of statutes and other regulations

Under Pennsylvania law, a violation of a statute or ordinance may serve as the basis for negligence per se.

[29] Negligence ⊶ Violations of statutes and other regulations

Negligence ⊶ Violations of statutes or other regulations

Under Pennsylvania law, to prove a claim based on negligence per se, the following four requirements must be met: (1) the purpose of the statute must be, at least in part, to protect the interest of a group of individuals, as opposed to the public generally; (2) the statute or regulation must clearly apply to the conduct of the defendant; (3) the defendant must violate the statute or regulation; and (4) the violation of the statute or regulation must be the proximate cause of the plaintiff's injuries.

[30] Negligence ⊶ Standard established by statute or regulation

Negligence ⊶ Violations of statutes and other regulations

Under Pennsylvania law, a claim for negligence per se which relies upon a statute to provide the standard of care is virtually indistinguishable, substantively, from a direct claim under that same statute.

[31] Civil Rights ⊶ Education

Request for prospective injunctive relief by parents of student who committed suicide following her discharge from care of private residential school after her second mental health hospitalization, in their individual capacities and as administrators of student's estate, seeking to remedy discrimination student purportedly suffered by through injunction mandating that operators of school avoid damage to other children by providing special care for students who suffered from mental impairments and might need additional help, was rendered moot by student's death; because student had passed away, neither she nor her parents would ever be subjected to policies and procedures implemented by operators, and estate's claim for prospective injunctive relief could not be redressed by requested relief. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

[32] **Federal Civil Procedure** In general; injury or interest

Personal stake requirement for Article III standing requires a litigant to demonstrate that he or she has sustained or is immediately in danger of sustaining some direct injury. U.S. Const. art. 3, § 2, cl. 1.

[33] **Federal Courts** Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

Past exposure to illegal conduct does not in itself show a present case or controversy, as required under Article III, if unaccompanied by any continuing, present adverse effects. U.S. Const. art. 3, § 2, cl. 1.

[34] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

Federal Courts Case or Controversy Requirement

As part of the live case and controversy inquiry under Article III, plaintiffs must demonstrate that they have standing to pursue their claim; to do so, a plaintiff must show that he or she has suffered an injury in fact, that the injury is traceable to the challenged action of the defendant, and that the injury can be redressed by a favorable decision. U.S. Const. art. 3, § 2, cl. 1.

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MEMORANDUM AND ORDER

John E. Jones III, United States District Judge

Presently pending before the Court are two motions for judgment on the pleadings ***97** filed by Defendants the Milton Hershey School and the Hershey Trust Company ("the Motions"). (Docs. 240, 242). Both matters have been fully briefed, (Docs. 241, 242, 251, 252, 261, 262), and are ripe for disposition. For the reasons that follow, the Motions shall be granted in part and denied in part.

I. BACKGROUND

The underlying facts of this case have been discussed at length in several previous Memoranda and Orders issued by this Court. (Docs. 62, 216, 230, 258). To reiterate, Defendants the Milton Hershey School and the Hershey Trust Company, as Trustee for the Milton Hershey School Trust (collectively, "Defendants" or "the School"), operate a cost-free, not-for-profit, residential academy. Plaintiffs Julie Wartluft ("Wartluft") and Frederick Bartels, Jr. ("Bartels") are the parents of Abrielle Kira Bartels ("Abrielle"), a former student.

In their amended complaint, Plaintiffs allege that, despite knowing that Abrielle suffered from depression and suicidal ideations, Defendants discharged her from their care under a "shadow policy" which mandated that students be expelled from the School after two mental health hospitalizations, even if those hospitalizations were recommended by school staff. (Doc. 29 at ¶ 108). Abrielle committed suicide shortly after her discharge. Wartluft and Bartels, in their individual capacities and in their capacities as administrators of the Estate of Abrielle Kira Bartels ("the Estate"), sought damages.[1]

1 We refer to Plaintiffs Wartluft, Bartels, and the Estate collectively as "Plaintiffs."

Following several rulings from this Court,[2] the following counts alleged in Plaintiffs' amended complaint remain viable. In Count I, Plaintiffs contend that Defendants violated several provisions of the Fair Housing Act ("FHA") by dismissing Abrielle from the School and by barring her from entering what had been her home for several years and from participating in various school functions on the basis of her mental disability. In Count III, Plaintiffs aver that Defendants were negligent in dismissing Abrielle from their care thereby forcing her into an unstable environment resulting in her death. In Count V, Plaintiffs Wartluft and Bartels in their individual capacities (collectively, "Individual Plaintiffs") allege a wrongful death action, and in Count VI, the Estate, represented by the Individual Plaintiffs in their capacities as administrators of the Estate, alleges a survival action. In Counts IX and X, Plaintiffs allege intentional and negligent infliction of emotional distress. In Count XI, Plaintiffs allege a civil conspiracy amongst the Defendants to endanger children under Pennsylvania law. In Count XII, Plaintiffs allege that Defendants breached their fiduciary duty of care and of good faith. In Count XIII, Plaintiffs aver that Defendants were negligent *per se* predicated upon asserted violations of the Americans with Disabilities Act ("ADA") and the FHA.

2 On December 7, 2019, Chief Judge Christopher C. Connor dismissed Counts III, VII, VIII, IX, X, XI, XII of Plaintiffs' amended complaint. (Doc. 63). Following reconsideration, on December 7, 2018, Chief Judge Connor reinstated Counts III, IX, X, XI, and XII. (Doc. 217). This matter was subsequently reassigned to the undersigned on January 23, 2019.

On April 18, 2019, Defendants filed two motions for judgment on the pleadings. The first sought judgment on the pleadings as to Wartluft and Bartels in their individual capacities. (Doc. 240). The second sought judgment on the pleadings as to the Estate. (Doc. 242). Both matters have been fully briefed, (Docs. 241, 242, ***98** 251, 252, 261, 262), and are ripe for disposition. As aforestated, and for the reasons that follow, the Motions shall be granted in part and denied in part.

II. STANDARD OF REVIEW

[1] Federal Rule of Civil Procedure 12(c) provides "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). When, as here, the basis of the moving party's Rule 12(c) motion is that the plaintiff has allegedly failed to state a claim upon which relief can be granted, the motion is properly analyzed under the same standard of review applicable to Rule 12(b)(6) motions to dismiss. *See Revell v. Port Authority*, 598 F.3d 128, 134 (3d Cir. 2010) ("A motion for judgment on the pleadings based on the defense that the plaintiff has failed to state a claim is analyzed under the same standards that apply to a Rule 12(b)(6) motion.").

In considering a Rule 12(b)(6) motion, courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)). In resolving a motion pursuant to Rule 12(b)(6), a court generally should consider only the allegations in the complaint, as well as "documents that are attached or submitted with the complaint, ... and any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).

A Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirements of Rule 8(a). Rule 8(a)(2) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

While a complaint attacked by a Rule 12(b)(6) motion to dismiss need not contain detailed factual allegations, it must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). To survive a motion to dismiss, a civil plaintiff must allege facts that "raise a right to relief above the speculative level ...." *Victaulic Co. v. Tieman*, 499 F.3d 227, 235 (3d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). Accordingly, to satisfy the plausibility standard, the complaint must indicate that defendant's liability is more than a "sheer possibility." *Iqbal*, 129 S. Ct. at 1949. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.*

III. DISCUSSION

Because the instant Motions overlap as to several lines of inquiry, for purposes of at least a modicum of brevity, we group relevant argument together and identify divergent issues where appropriate. We address Defendants' arguments as to each count in Plaintiffs' amended complaint *seriatim*.

a. Count I – Fair Housing Act

Defendants first argue that Count I should be dismissed as to both the Individual ***99** Defendants and the Estate. We first address Defendants' arguments as to the Individual Plaintiffs and then address Defendants' arguments as to the Estate.

1. Individual Plaintiffs' Claims under the Fair Housing Act

In their first issue, Defendants argue that the Individual Plaintiffs have failed to demonstrate that they have Article III standing to pursue their claim under the FHA and that Count I must be dismissed to the extent it seeks a remedy on their behalf. Specifically, Defendants contend, although Plaintiffs' amended complaint outlines the harms that Abrielle allegedly suffered as a result of her dismissal from the School, Plaintiffs have failed to plead that Wartluft or Bartels suffered any injury sufficient to confer upon them Article III standing. (Doc. 241 at 11 (citing *Fair Hous. Council v. Main Line Times*, 141 F.3d 439, 441 (3d Cir. 1998) (holding that a plaintiff must allege a "distinct and palpable' injury sufficient to satisfy Article III standing requirements under the Fair Housing Act"); *O'Malley v. Brierley*, 477 F.2d 785, 789 (3d Cir. 1973) ("[O]ne cannot sue for the deprivation of another's civil rights.")).

In response, the Individual Plaintiffs do not address Article III standing specifically. Rather, the Individual Plaintiffs contend that they are "aggrieved persons" under the Fair Housing Act who "have been injured by a discriminatory housing practice." (Doc. 252 at 16 (citing 42 U.S.C. § 3613(a)) ("An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice."); 42 U.S.C. § 3602(i)(1) (" 'Aggrieved person' includes any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.")). The Individual Plaintiffs further argue that "[t]he Supreme Court has held that the definition of 'aggrieved person' reflects a congressional intent to expand standing under the FHA to the full extent permitted by the Constitution's Article III," (*Doc.* 252 at 16 (citing *Thompson v. North American Stainless, LP*, 562 U.S. 170, 176, 131 S.Ct. 863, 178 L.Ed.2d 694 (2011)), and that the Fair Housing Act was intended to be "liberally construed." (*Id.* (citing *San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998)). In this case, Individual Plaintiffs conclude, Wartluft and Bartels were "aggrieved persons" because they suffered the loss of Abrielle's companionship and services as a result of the School's discriminatory conduct and, therefore, they have Article III standing to pursue their claims under the FHA. (Doc. 252 at 16–17 (citing Doc. 29 at ¶¶ 200–202)).

In their Reply, Defendants challenge Plaintiffs' contention that simply being an "aggrieved person" under the FHA confers Article III standing. Moreover, Defendants explain, the sparse factual assertions related to Plaintiffs' alleged loss-of-services injury is discussed under their wrongful death claim, not their FHA claim. Thus, because " 'a plaintiff must demonstrate standing for each claim he seeks to press,' and here, the Amended Complaint does not contain a single allegation regarding injury directly suffered by [the Individual] Plaintiffs that is 'fairly traceable to a 'discriminatory housing practice,' " the Individual Plaintiffs' FHA claim fails as a matter of law. (Doc. 262 at 14 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006)). We agree with Defendants' conclusion but base our decision upon a different rationale.

***100 [2] [3]** "Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims, and they must be dismissed." *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006). "The sole requirement for standing to sue under the Fair Housing Act is the [Article] III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered 'a distinct and palpable injury.' " *Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 75 (3d Cir. 1998) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)). "[S]o long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

[4] In 2011, in the context of Title VII, our Supreme Court narrowed the scope of who is entitled to seek relief considered an "aggrieved person" in *Thompson v. North American Stainless, LP.* In short, the High Court held that, in order to constitute an "aggrieved person" under Title VII, a claimant must allege an injury in fact that falls "within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his [or her] complaint." *Thompson*, 562 U.S. at 177, 131 S.Ct. 863. In other words, a claimant is only considered an "aggrieved person" with Article III standing if they assert the violation of an interest "arguably [sought] to be protected by the statute" at issue. *Id.* at 178, 131 S.Ct. 863.

In so holding, the Court expressed disapproval with the Third Circuit's discussion in *Hackett v. McGuire Bros.*, 445 F.2d 442, 446 (3d Cir. 1971) which referenced in *dicta* that Congress' use of the term "aggrieved person" in the context of the Fair Housing Act "showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.' " *Hackett*, 445 F.2d at 446. The Supreme Court reasoned in *Thompson* that the Third Circuit's reading of Congress' intent "was too expansive" and the Court signaled that future decisions should utilize the "zone of interests" analysis discussed therein. *Thompson*, 562 U.S. at 176, 131 S.Ct. 863.

Recently, in *Bank of America Corp. v. City of Miami, Fla.*, ––– U.S. ––––, 137 S. Ct. 1296, 197 L.Ed.2d 678 (2017), the Supreme Court applied the "zone of interests" analysis outlined in *Thompson* to address standing under the FHA. *Id.* at 1305. In *Bank of America*, the Court held that the City of Miami had standing to pursue claims against Bank of America under the FHA because the City's claims "arguably fall within the FHA's zone of interests." *Id.* at 1304–1305 (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972) (allowing suit by white tenants claiming that they were deprived benefits when discriminatory rental practices kept minorities out of their apartment complex); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) (allowing suit by a village that alleged that it had lost tax revenue and had the racial balance of its community undermined by racial-steering practices); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (allowing suit by a nonprofit organization that spent money to combat housing discrimination)). Specifically, the Court reasoned, Bank of America "intentionally targeted predatory practices ***101** at African–American and Latino neighborhoods and residents," which "led to a 'concentration' of 'foreclosures and vacancies' in those neighborhoods," which, in turn, "caused 'stagnation and decline in African-American and Latino neighborhoods,' " "hindered the City's efforts to create integrated, stable neighborhoods," and "reduced property values, diminishing the City's property-tax revenue and increasing demand for municipal services." *Id.* Finding that these injuries were within the zone of interests contemplated by the FHA, the Supreme Court held that the City of Miami had Article III standing to pursue its claims as an "aggrieved person" under the statute.

In a dissent joined by Justices Kennedy and Alito, Justice Thomas disagreed, arguing that the City of Miami's injuries fell outside the FHA's zone of interests because those injuries were only "marginally related to or inconsistent with the purposes" of the FHA, which, in the Dissent's view, was not "concerned about decreased property values, foreclosures, and urban blight, much less about strains on municipal budgets that might follow." *Id.* at 1308–1310. Thus, according to the Dissent, the City of Miami was not similarly situated to the plaintiffs in *Trafficante*, *Gladstone*, or *Havens*, and the City's injuries fell outside the FHA's zone of interests.

[5] In light of *Bank of America*, it is clear that a plaintiff has standing to pursue claims under the FHA provided he or she can demonstrate that he or she suffered an injury in fact that falls within the zone of interests contemplated by the FHA. That is, "that as a result of the defendant's actions [he or she has] suffered 'a distinct and palpable injury,' " *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 75 (quoting *Havens Realty Corp.*, 455 U.S. at 372, 102 S.Ct. 1114), and that said injury falls within the zone of interests implicated by the FHA. *Bank of America Corp.*, ––– U.S. ––––, 137 S. Ct. at 1305.

[6] In their amended complaint and as noted in their briefs before this Court, the Individual Plaintiffs aver that they suffered "loss of support, loss of aid, loss of services, loss of companionship, loss of consortium and comfort, loss of counseling and loss of guidance" as a result of Defendants' actions. (Doc. 29 at ¶ 200). While we acknowledge that Plaintiffs did not technically incorporate this provision by reference into Count I's FHA claim because these loss-of-services allegations were discussed in Count V under Plaintiffs' wrongful death claim, we find that Plaintiffs' allegations as to Count V can be imputed to Count I for purposes of establishing standing. In our view, Plaintiffs' allegations were sufficient to place the Defendants on notice of all of the factual predicates upon which Plaintiffs' thirteen counts were based, whether those factual predicates were outlined in Count I or Count V. *See Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (2007) (finding that Rule 8(a)(2) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.").

Even were we inclined to favor form over substance and find fatal Plaintiffs' failure to include their allegations concerning loss of services within Count I, we note that the ordinary remedy in such a case would be an amended filing. *See* Fed.R.Civ.P. 12(e); *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1280 (11th Cir. 2006) ("[W]e disagree that dismissal was the appropriate course of action for the district court to take at this juncture in the litigation. As the district court concluded, 'the problem was not that Plaintiffs did ***102** not allege enough facts, or failed to recite magic words; the problem lay in the fact that while Plaintiffs introduced a great deal of factual allegations, the amended complaint did not clearly link any of those facts to its causes of action.' We disagree with the dismissal of this case because these observations sound more clearly in Rule 12(e)'s remedy of ordering repleading for a more definite statement of the claim, rather than in Rule 12(b)(6)'s remedy of dismissal for failure to state a claim."); *Cates v. Int'l Tel. & Tel. Corp.*, 756 F.2d 1161, 1180 (5th Cir. 1985) (finding that pleadings that are "extremely conclusory, confused, and unclear" are normally subject to amendment rather than dismissal); *Belizaire v. Whitecap Inv. Corp.*, No. CV 2013-66, 2014 WL 4961599, at *3 (D.V.I. Oct. 3, 2014). Because this case has been pending since 2016 and because the instant case comes before us on a motion for judgment on the pleadings which necessitates a deferential standard of review, rather than demanding repleader, we simply find that Plaintiffs have stated sufficient facts in their amended complaint to demonstrate that they have suffered an injury in fact.

[7] However, we also find that the Individual Plaintiffs have failed to plead that their injuries fall within the zone of interests contemplated by the FHA and we are thus constrained to conclude that they lack standing to pursue those claims.

As noted by Justice Thomas in his dissent in *Bank of America*:

> The FHA permits "[a]n aggrieved person" to sue, § 3613(a)(1)(A), if he "claims to have been injured by a discriminatory housing practice " or believes that he "will be injured by a discriminatory housing practice that is about to occur." §§ 3602(i)(1), (2) (emphasis added). Specifically, the FHA makes it unlawful to do any of the following on the basis of "race, color, religion, sex, handicap, familial status, or national origin": "refuse to sell or rent ... a dwelling," § 3604(a); discriminate in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith," § 3604(b); "make, print, or publish ... any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination," § 3604(c); "represent to any person ... that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," § 3604(d); "induce any

> person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of" certain characteristics, § 3604(e); or discriminate in the provision of real estate or brokerage services, §§ 3605, 3606. The quintessential "aggrieved person" in cases involving violations of the FHA is a prospective home buyer or lessee discriminated against during the home-buying or leasing process. Our cases have also suggested that the interests of a person who lives in a neighborhood or apartment complex that remains segregated (or that risks becoming segregated) as a result of a discriminatory housing practice may be arguably within the outer limit of the interests the FHA protects.

Bank of America, 137 S.Ct. at 1308–1309 (internal citations omitted).

In this case, the Individual Plaintiffs have failed entirely to explain how "loss of support, loss of aid, loss of services, loss of companionship, loss of consortium and comfort, loss of counseling and loss of guidance," (Doc. 29 at ¶ 200), is in any way within the zone of interests contemplated by the FHA—a statute designed to combat discrimination in the sale or rental of housing. ***103** At bottom, the Individual Plaintiffs' claims sound in tort and are entirely untethered to the FHA specifically or Abrielle's housing situation generally. Although we understand Plaintiffs' argument that, but for Abrielle's dismissal from the School (and her housing therein) she would not have been forced to return home and thereby would not have died and, in turn, the Individual Plaintiffs' would not have suffered their loss of services, the relationship between Abrielle's housing claim and the Individual Plaintiffs' injury is too attenuated to find that said claims are within the zone of interests contemplated by the FHA. Accordingly, Count I shall be dismissed to the extent it seeks relief for injuries sustained by the Individual Plaintiffs.

2. The Estate's Claims under the FHA

Defendants also argue that the Estate has failed to plead the statutory elements of an FHA claim and that Count I fails as a matter of law. First, Defendants contend generally that the Estate's allegations are not tied to housing specifically, but rather, those claims are moored to Abrielle's enrollment at the School; "[t]he Estate ignores controlling legal precedent, seeking to fit a round claim into a square hole by asking this Court to remove the 'Housing' requirement from the 'Fair Housing Act.' " (Doc. 242 at 7).

Second, Defendants argue, the Estate's FHA claim fails to demonstrate that Abrielle was a "buyer or renter" such that the FHA would even apply. (Doc. 242 at 8 (citing 42 U.S.C. § 3604) ("[I]t shall be unlawful ... [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap.")). In this case, Defendants reason, because the complaint specifies that Abrielle received housing from the school cost-free, Abrielle could not be considered a buyer or renter under the FHA and cannot pursue a claim thereunder.

Finally, Defendants aver, the Estate has failed to plead that Abrielle was treated differently as a result of her purported disability and has thus failed to satisfy an essential element of its FHA claim. "Defendants did not impose any 'extra conditions' on [Abrielle's] housing that were not imposed on every other MHS student and did not provide housing services to other students that it did not provide to [Abrielle], which is why the Estate fails to plead any such factual allegations." (Doc. 242 at 12). Indeed, according to Defendants, Plaintiffs' contention that Abrielle was treated differently is wholly undermined by its simultaneous assertion that Defendants applied its two-hospitalization "shadow policy" of dismissal "robotically" and "mechanical[ly]." (Doc. 29 at ¶¶ 108–112). Accordingly, Defendants conclude, the Estate's claims under the FHA outlined in Count I fail as a matter of law and Count I must be dismissed in its entirety.

In response, the Estate insists that it has made out a *prima facie* case of discrimination under the FHA. First, according to the Estate, Abrielle was denied housing and the ability to participate in various housing-related activities as a result of her disability. Second, the Estate contends, Abrielle was a "renter" under the FHA "because she was required to perform significant chores as a condition of residing in the student home, a form of consideration just [like] money." (Doc. 251 at 13 (emphasis removed) (citing *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp.2d 413, 419 (W.D. Pa. 2013) ("What qualifies as consideration under the FHA has been examined by a limited number of courts and this Court finds that resolution of the issue will turn on whether [the housing facility at issue] receives consideration for a resident's stay—whether it be ***104** from federal or other funding directed to subsidizing the costs of providing housing to the homeless or whether shelter residents provide some form of consideration for their stay."). Third, the Estate argues, the amended complaint is rife with factual averments outlining the clear discrimination Abrielle suffered. Specifically, the Estate points out, Abrielle was kicked out of the School and removed from her home at the School and was denied access to her room prior to graduation. Likewise, Abrielle was denied entry to various School functions and was denied reasonable accommodations that would have permitted her to remain at the School. (Doc. 252 at 12–13). Thus, the Estate reasons, the School "imposed terms and conditions on her housing, and the enjoyment of MHS facilities that were not imposed on any other student," and the allegations raised in Count I under the FHA are sufficient to survive the instant motion for judgment on the pleadings. (*Id.*).

In their Reply, Defendants contend that, simply because the property where Abrielle lived amounted to "a rental" inasmuch as Abrielle was asked to perform various chores while living there, does not mean that Abrielle was "a renter" sufficient to satisfy the predicates of Subsection (f)(1) of the FHA. In so contending, Defendants rely upon *Hunter on behalf of A.H. v. D.C.*, 64 F. Supp. 3d 158, 177 (D.D.C. 2014). In *Hunter*, a plaintiff filed suit against a local homeless shelter alleging violations of the FHA. Although the district court allowed plaintiff's FHA claim to proceed under § 3604(f)(2) inasmuch as the facility where plaintiff lived was a "rental," the district court dismissed plaintiff's claim under § 3604(f)(1) finding that the "renter" in that case was not the plaintiff, but rather the federal agency that provided funds to the homeless shelter which allowed plaintiff to reside there. Here, Defendants extrapolate, even if the Estate can demonstrate that Abrielle lived in a "rental," the Estate cannot demonstrate that Abrielle was "a renter," and her claim under Subsection (f)(1) fails as a matter of law. We disagree.

Under the FHA, it is unlawful to (1) "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap," 42 U.S.C. § 3604(f)(1), or (2) "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap," 42 U.S.C. § 3604(f)(2). Under the statute, "[f]or purposes of this subsection, discrimination includes ... a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3).

To establish a *prima facie* case under Section 3604(f)(1), a plaintiff must demonstrate: (1) that he or she was discriminated against; (2) that such discrimination occurred in the sale or rental of a dwelling, or that such dwelling was made unavailable or denied; (3) that he or she was a buyer or renter; and (4) that such discrimination occurred because of a handicap of that buyer or renter, a person residing in or intending to reside in that dwelling, or any person associated with that buyer or renter." 42 U.S.C. § 3604(f)(1). A claimant is said to be a "buyer or renter" under the FHA when he or she supplies consideration in exchange for an interest in property. *See* 42 U.S.C. § 3602 (defining "to rent" for purposes of the FHA as "to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant"); *Growth Horizons, Inc. v. Delaware Cty., Pa.*, 983 F.2d 1277, 1283 n.10 (3d Cir. 1993) ("Because ***105** the handicapped individuals in this case are not supplying the funds nor seeking a proprietary interest in the property, they are neither buyers nor renters."); *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413, 419 (W.D. Pa. 2013) ("What qualifies as consideration under the FHA has been examined by a limited number of courts and this Court finds that resolution of the issue will turn on whether [the housing facility at issue] receives consideration for a resident's stay.").

To establish a *prima facie* case under Section 3604(f)(2), a plaintiff must demonstrate: (1) that he or she was discriminated against; (2) that such discrimination occurred in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling; and (3) that such discrimination occurred because of a handicap of that buyer or renter, a person residing in or intending to reside in that dwelling, or any person associated with that buyer or renter." 42 U.S.C. § 3604(f)(2). Although the common law in this Circuit has not specifically outlined the contours of what is included within "the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling," federal regulations have illustrated several examples, including: (1) using different lease or contract provisions; (2) failing or delaying repairs; (3) failing to process an offer; (4) limiting use privileges; (5) denying or limiting services or facilities; and (6) conditioning the terms, conditions, or privileges relating to the sale or rental of a dwelling, or denying or limiting the services or facilities in connection therewith. 24 C.F.R. § 100.65 (relating to discrimination in terms, conditions and privileges and in services and facilities).

[8] **[9]** **[10]** Under both Subsections (f)(1) and (f)(2), a plaintiff can demonstrate that he or she was discriminated against and thereby satisfy the first element of the *prima facie* FHA case by demonstrating that he or she suffered (1) intentional discrimination (also called disparate treatment); (2) indirect discrimination (also called disparate impact or discriminatory effect); or (3) that the defendant refused to make reasonable accommodations necessary to afford him or her equal opportunity to use and enjoy the dwelling at issue. *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir. 2005). “Under the first theory, a plaintiff can establish a *prima facie* case of intentional discrimination by showing that discriminatory intent against a protected group was a motivating factor for the challenged action.” *Eastampton Ctr., L.L.C. v. Twp. of Eastampton*, 155 F. Supp. 2d 102, 111 (D.N.J. 2001) (citing *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995)). “The discriminatory purpose need not be malicious or invidious, nor need it figure in ‘solely, primarily, or even predominantly’ into the motivation behind the challenged action .... The plaintiff is only required to ‘show that a protected characteristic played a role in the defendant's decision to treat [him or her] differently.’ ” *Cmty. Servs., Inc.*, 421 F.3d at 177.

[11] Second, “[t]o establish liability under the discriminatory effect theory, a plaintiff must establish a *prima facie* case that the challenged action has a discriminatory effect on a protected class.” *Id.* (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977)).

[12] Third, to establish a claim of refusal to make reasonable accommodations, a plaintiff “need only plausibly plead enough facts to make out the three elements set forth in § 3604(f)(3)(B): refusal, reasonable accommodation, and necessity/equal ***106** opportunity,” where “necessity” means “that an accommodation be essential, not just preferable.” 42 U.S.C. § 3604(f)(3)(B) (“For purposes of this subsection, discrimination includes ... a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”); *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 107–11 (3d Cir. 2018). “To evaluate these claims under the [Fair Housing Act], courts have typically adopted the analytical framework of their analogues in employment law, including their coordinate burden-shifting analyses once plaintiff has made a *prima facie* showing of discrimination under a specific claim.” *Cmty. Servs., Inc.*, 421 F.3d at 176.

[13] Taking as true all of the Estate's factual averments, we find that it has pleaded sufficient facts to survive a motion for judgment on the pleadings as to its Sections 3604(f)(1) and (f)(2) FHA claims, under both an intentional discrimination theory of liability and under a refusal to make reasonable accommodations theory.[3] In Plaintiffs' amended complaint, the Estate contends that Defendants discriminated against Abrielle “by denying her housing at [the School] on the basis of her mental handicap” and by failing “to investigate, engage in an interactive dialog[ue] with, and/or offer any reasonable accommodations to [Abrielle].” (Doc. 29 at ¶¶ 162, 163). The Estate also avers that Defendants barred Abrielle from her graduation ceremony and from related celebratory gatherings, “denied [her] continued residence at the School,” and “intentionally” took away Abrielle's housing as a result of “a policy requiring expulsion after a student is twice admitted to an outside mental health institution.” (*Id.* at ¶ 165–169). We find that these allegations are sufficient to make out a *prima facie* discrimination claim under Sections 3604(f)(1) and (2) of the FHA.

3 We do not perceive the Estate to be raising a disparate impact claim. Rather, the Estate appears to focus only upon an intentional/disparate treatment theory and refusal to accommodate theory.

[14] In order to survive a motion to dismiss as to its disparate treatment theory, the Estate need only demonstrate “that a protected characteristic played a role in the defendant's decision to treat [Abrielle] differently.” *Cmty. Servs., Inc.*, 421 F.3d at 177. Taking as true all of Plaintiffs' factual averments—as is our duty at this juncture—Defendants have plainly pleaded as much by alleging that Abrielle was denied access to her home as a result of her mental health hospitalizations. *See Cmty. Servs., Inc.*, 421 F.3d at 177 (“The discriminatory purpose need not be malicious or invidious, nor need it figure in ‘solely, primarily, or even predominantly’ into the motivation behind the challenged action .... The plaintiff is only required to ‘show that a protected characteristic played a role in the defendant's decision to treat her differently.’ ”).

[15] Likewise, the Estate has also pleaded sufficient facts to support its refusal to accommodate theory. To establish a claim predicated upon a refusal to make reasonable accommodations, the Estate need only plausibly plead enough facts to make out "the three elements set forth in § 3604(f)(3)(B): refusal, reasonable accommodation, and necessity/equal opportunity," where "necessity" means "that an accommodation be essential, not just preferable." *Vorchheimer*, 903 F.3d at 107–11. We find that the Estate has done so. First, Plaintiffs have pleaded that Defendants refused to enter ***107** a dialogue concerning reasonable accommodations. (Doc. 29 at ¶ 162). Thus, drawing all reasonable inference in Plaintiffs' favor—as is our duty at this juncture—we find that Plaintiffs have pleaded that Abrielle's accommodation was refused. A refusal to even enter into a dialogue concerning reasonable accommodations certainly implies that the reasonable accommodation sought to be discussed was refused. Second, because the Estate has pleaded that the School was aware of Abrielle's precarious mental health circumstance and had treated her mental disabilities on two prior occasions, Plaintiffs have pleaded that an accommodation would have been available and reasonable. Indeed, Defendants have not contended that it would have been unreasonable to accommodate her. Third, as to the necessity of the accommodation, Plaintiffs have pleaded that the School knew that Abrielle suffered from a mental impairment and that she had threatened suicide in the past. Accordingly, an accommodation was "essential," and "not just preferable," inasmuch as Plaintiffs have pleaded that instituting the reasonable accommodation would have saved Abrielle's life. (Doc. 29 at ¶ 174). Therefore, the Estate has pleaded sufficient facts to support the first prong of its FHA claims under both Subsection (f)(1) and (f)(2).

We are unpersuaded by Defendants' arguments that the Estate has failed to demonstrate that Abrielle was treated differently as a result of her disability because the policy which necessitated her dismissal applied to every student at the School. Put simply, this argument is ludicrous. An intentionally discriminatory policy does not become non-discriminatory simply because it applies across the board. That is, the policy at issue is discriminatory on its face. The Estate contends that Defendants' policies and actions were discriminatory because they mandated that students with mental disabilities be dismissed whereas students without mental disabilities should not. This resulted in Abrielle being treated differently than other students on the basis of her disability. Finally, because this alleged policy discriminates against students with mental disabilities on its face, it need not be challenged by a disparate impact theory designed to challenge policies that are facially neutral yet discriminatory in effect. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442, 467 (3d Cir. 2002) (explaining the essential elements of a *prima facie* case of disparate impact under the FHA).

[16] Plaintiffs have also satisfied the second prong of their (f)(1) and (f)(2) claims. As already noted, Plaintiffs have pleaded that Abrielle's housing "was made unavailable or denied," thereby satisfying prong two of the Estate's (f)(1) claim. In so contending, the Estate has also satisfied prong two of its (f)(2) claim because said denial also constitutes discrimination "in the provision of ... facilities in connection with such dwelling." *See* 42 U.S.C. §§ 3604(f)(1)–(f)(2). According to 24 C.F.R. § 100.65 (relating to discrimination in terms, conditions and privileges and in services and facilities), "denying or limiting services or facilities" is an example of discrimination in the terms, conditions and privileges and in services and facilities. Therefore, the Estate's allegations that Defendants denied Abrielle various services or denied her access to the facilities are sufficient to satisfy the Estate's FHA pleading requirements under Section 3604(f)(2). Thus, at this preliminary stage, we find that the Estate has sufficiently demonstrated the second prong of its (f)(1) and (f)(2) claims.

***108** We acknowledge that our reading of 24 C.F.R. § 100.65 and Section 3604(f)(2) may, in some cases, render Subsection (f)(2) indistinguishable from Subsection (f)(1). Nonetheless, because this case comes before us as a motion for judgment on pleadings, we are constrained to take as true the Estate's factual averments and draw all reasonable inferences in its favor. As such, and because the parties have not fully briefed this narrow issue, we decline to dismiss the Estate's claims on that basis.

[17] We also find that the Estate has sufficiently pleaded that Abrielle was a "renter" thereby satisfying the third prong of her (f)(1) claim. A claimant is said to be a "buyer or renter" under the FHA when he or she supplies consideration in exchange for an interest in property. *See* 42 U.S.C. § 3602 (defining "to rent" for purposes of the FHA as "to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant"); *Growth Horizons, Inc.*, 983 F.2d at 1283 n.10 ("Because the handicapped individuals in this case are not supplying the funds nor seeking a proprietary interest in the property, they are neither buyers nor renters."); *Defiore*, 995 F. Supp.2d at 419 ("What qualifies as consideration under the FHA has been examined by a limited number of courts."). In their amended complaint, the Estate pleads that Abrielle performed chores and other tasks in exchange for residency in the student home. Taking the Estate's averments as true, and for the reasons that follow, it has sufficiently pleaded that Abrielle was a "renter" for purposes of the FHA.

We first note that Defendants' position that Abrielle's chores were insufficient to bestow upon her the title of "renter" is unpersuasive. In short, we reject Defendants' argument that Abrielle's chores meant that she lived in "a rental" but that she was not "a renter" sufficient to satisfy the predicates of Subsection (f)(1). The FHA defines "to rent" as "to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant." 42 U.S.C. § 3602. It would be nonsensical to suggest that one could "rent" a property or reside in a "rental" for purposes of the FHA, yet still not be considered a "renter" thereunder. As aforementioned, both the statute and the common law are clear that, a person is a "renter" for purposes of the FHA if that person provides consideration in exchange for some interest in property. Because the Estate has pleaded that Abrielle supplied consideration in exchange for her housing, the Estate has demonstrated that Abrielle was a renter under the FHA.

Defendants' reliance upon *Hunter on behalf of A.H. v. D.C.*, 64 F. Supp. 3d 158, 177 (D.D.C. 2014) is misguided. In *Hunter*, a plaintiff filed suit against a local homeless shelter alleging violations of the FHA. Although the district court allowed plaintiff's FHA claim to proceed under Section 3604(f)(2), the district court dismissed plaintiff's claim under Section 3604(f)(1), finding that the "renter" in that case was not the plaintiff, but rather the federal agency that provided funds to the homeless shelter which allowed plaintiff to reside there. Here too, just like the federal agency at issue in *Hunter*, the Estate has pleaded that Abrielle provided the School with consideration to cover her living accommodation.

[18] Finally, the Estate has demonstrated that the discrimination Abrielle faced occurred because of her handicap thereby satisfying the fourth prong of the Estate's (f)(1) and (f)(2) claims. The amended complaint plainly alleges that Abrielle suffered from a handicap within the meaning of the FHA, (Doc. 29 at ***109** ¶¶ 168–72), and we have already established that the Estate has pleaded that the Defendants' actions were the result of that disability. Thus, we find that the Estate has sufficiently pleaded a claim under (f)(1) and (f)(2) of the FHA under a theory of disparate treatment and refusal to accommodate. Accordingly, Defendants' motion for judgment on the pleadings shall be denied to the extent it seeks dismissal of the Estate's FHA claims in Count I.

b. Count IX – Civil Conspiracy

[19] In their next issue, Defendants contends that Plaintiffs' civil conspiracy claim fails as a matter of law because "Pennsylvania courts have uniformly held that the legislature did not intend to create an implied private right of action" under Pennsylvania's endangering the welfare of a child statute. (Doc. 241 at 16 (citing *Doe v. Archdiocese of Philadelphia*, 31 Pa.D&C.5th 83 (Pa. Com. Pl. 2013) (holding that "[t]here is no evidence that [Pennsylvania's criminal child endangerment statute] was designed or intended to provide monetary remedies for victims of abuse," and that there is "nothing in the legislative history from which the court could 'imply a private remedy for civil damages' ").

In response, Plaintiffs aver that Defendants' arguments unduly narrow the scope of their amended complaint. Specifically, Plaintiffs argue, their amended complaint "contains 259 paragraphs describing a pattern and practice of discrimination and wrongful conduct by Defendants." (Doc. 252 at 18). Thus, "[w]hile a specific reference is made to the Pennsylvania statute at ¶ 239, Defendants ignore all the other allegations that go beyond the statute." (*Id.*). Therefore, without identifying the specific cause of action upon which their civil conspiracy claim rests, Plaintiffs conclude that they have adequately pleaded a claim of civil conspiracy. Finally, Plaintiffs conclude, "[a]s Chief Judge Conner explicitly held in his December 7, 2018 Memorandum, reinstating this claim, the Amended Complaint contains sufficient allegations showing that School officials and administrators knowingly conspired to endanger the welfare of its students by implementing discriminatory and dangerous mental health policies despite the foreseeable risks such conduct posed to students with disabilities." (Doc. 251 at 16 (citing Doc. 216 at 13)). We disagree.

[20] [21] [22] "Criminal statutes do not generally provide a private cause of action nor basis for civil liability." *Concert v. Luzerne Cty. Children & Youth Servs.*, No. 3:08-CV-1340, 2008 WL 4753709, at *3 (M.D. Pa. Oct. 29, 2008); *see also Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 190, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) ("We have been quite reluctant to infer a private right of action from a criminal prohibition alone."). Indeed, as Defendants note, Pennsylvania courts have held that there is no private right of action for Pennsylvania's statute criminalizing the endangering of the welfare of children. *Doe v. Archdiocese of Phila.*, 31 Pa.D&C.5th 83 (Pa. Com. Pl. 2013). When a statute does not provide a private right of action, a plaintiff cannot pursue a civil remedy for conspiracy to violate that statute. *See In re Orthopedic Bone Screw Prod. Liab. Litig.*, No. MDL 1014, 1997 WL 186325, at *10 (E.D. Pa. Apr. 16, 1997), *aff'd sub nom. In re Orthopedic Bone Screw Prod. Liab. Litig.*, 193 F.3d 781 (3d Cir. 1999) ("It follows that most states would not recognize a claim for civil conspiracy alleging that the object of the conspiracy was to violate a federal statute that did not provide for a private right of action."); *Hasu Shah v. Harristown Dev. Corp.*, No. 1:12-CV-2196, 2013 WL 6567764, at *12 (M.D. Pa. Dec. 13, 2013) (citing ***110** *Boyanowski v. Capital Area Intermed. Unit*, 215 F.3d 396, 405 (3d Cir.2000) ("As a predicate to liability for civil conspiracy, the complaint must allege a distinct underlying tort."); *Livingston v. Shore Slurry Seal, Inc.*, 98 F. Supp. 2d 594, 597 (D.N.J. 2000) ("Because there is no private right of action under the Davis–Bacon Act, plaintiffs' claim that defendants conspired to violate the Act must be dismissed."); *Deitrick v. Costa*, No. 4:06-CV-01556, 2015 WL 1605700, at *19 (M.D. Pa. Apr. 9, 2015) ("Civil conspiracy cannot be predicated upon criminal acts that do not otherwise give rise to a cognizable private right of action.") (citing *Pelagatti v. Cohen*, 370 Pa.Super. 422, 536 A.2d 1337, 1342 (1987) (finding no cause of action for civil conspiracy predicated upon obstruction of justice); *Homer v. Ciamacco*, 2 Pa.D.&C.3d 755, 757 (Pa. Com. Pl. 1977) (finding no cause of action for civil conspiracy predicated on perjury)). It thus follows that, because Plaintiffs have failed to identify a predicate statute with a private right of action upon which their civil conspiracy claim rests, Count IX must be dismissed, and we shall grant Defendants' motion premised thereon.

We are unpersuaded by Plaintiffs' assertion that Chief Judge Conner ruled previously that Plaintiffs' civil conspiracy claim was sufficient to survive a motion for judgment on the pleadings. This is an incorrect reading of his rationale. In Chief Judge Connor's Memorandum accompanying his Order reinstating several of Plaintiffs' tort claims, our esteemed colleague noted that "plaintiffs aver that School officials and administrators knowingly conspired to endanger the welfare of its students by implementing discriminatory and dangerous mental health policies despite the foreseeable risks such conduct posed to students with disabilities." (Doc. 216 at 13). Thus, Chief Judge Conner concluded, "[t]he gravamen of these claims implicates a more fulsome social duty to all individuals not falling within the ambit of any contractual duty that may exist between plaintiffs and the School," and that "the gist of the action doctrine does not bar plaintiffs' challenged tort claims." (*Id.*). When read in context, it is clear that Chief Judge Conner did *not* find Plaintiffs' claim viable. Rather, the Court simply found that dismissal was not warranted based upon the gist of the action doctrine. Indeed, at no point (until now) was the viability of Plaintiffs' civil conspiracy before the Court based upon anything but the gist of the action doctrine and, thus, our colleague did not, in fact, rule thereon. It is instead our duty to do so, and, as aforestated, Count IX shall be dismissed.

c. Count XII – Breach of Fiduciary Duty

[23] In their next issue, Defendants argue that Plaintiffs have failed to plead any facts demonstrating that Defendants breached a fiduciary duty owed to Abrielle. Rather, Defendants aver, Plaintiffs only allege that Defendants breached "a purported fiduciary relationship that '[o]fficers and key employees of Defendants' have 'with the School and School Trust.' " (Doc. 241 at 18 (citing Doc. 29 at ¶ 247)). Therefore, Defendants reason, Plaintiffs have failed to allege any fiduciary relationship between Abrielle and the School and Count XII's breach of fiduciary duty claim must be dismissed.

Moreover, Defendants argue, even had Plaintiffs alleged the existence of a fiduciary relationship between Abrielle and the School, a breach of fiduciary duty claim "is not cognizable under Pennsylvania law between a private school, like MHS, and a student." (Doc. 243 at 17). Indeed, according to Defendants, "Pennsylvania federal courts have explained ... that a private school or a trustee of a school trust does not owe a fiduciary duty to an enrolled ***111** student." (*Id.* (citing *Gjeka v. Delaware Cty. Cmty. Coll.*, No. CIV.A. 12-4548, 2013 WL 2257727, at *11 (E.D. Pa. May 23, 2013)).

In response, Plaintiffs point out that their amended complaint alleges that "Defendants owed [Abrielle] fiduciary duties of care and good faith to provide a safe environment for all children in their care, requiring them to exercise the kind of reasonable inquiry, skill and diligence that a person of ordinary prudence would use in overseeing the care of young at-risk children and protecting them from known dangers." (Doc. 251 at 20 (citing Doc. 29 at ¶ 246)).

Moreover, Plaintiffs contend, Defendants' reliance upon *Gjeka* is misplaced and Pennsylvania law does not preclude a student from bringing suit against a private school for breach of fiduciary duty. In *Gjeka*, a student at a community college sued the college and her professor, alleging that her professor sexually harassed her over a three-year period. Relevant to the instant case, plaintiff alleged that both the college and her professor breached a fiduciary duty owed to her. On a motion to dismiss, the district court dismissed plaintiff's breach of fiduciary duty claim, finding the claim against her professor barred by the statute of limitations and the claim against the college barred by the Political Subdivision Tort Claims Act. Nonetheless, the court discussed whether a school can be found to owe a fiduciary duty to its students under Pennsylvania law and concluded that courts in various districts "have reached different results about the existence of a fiduciary duty to an enrolled student by a university, and this issue is unresolved in Pennsylvania." *Gjeka*, 2013 WL 2257727, at *11. Indeed, the *Gjeka* Court found, "it is possible that a fiduciary relationship existed between [the professor] and Plaintiff." *Id.* at *10.

Accordingly, Plaintiffs reason, not only is *Gjeka* inapposite, but several of its legal findings demonstrate that a fiduciary duty existed in this case between Abrielle and the School. (Doc. 251 at 21 (citing *Gjeka*, 2013 WL 2257727, at *10)). "[T]o say that Defendants had no fiduciary duty to protect and care for [Abrielle] who had a mental disability, notwithstanding that it had 24/7 control over every aspect of her life as a young child would be to utterly ignore the core allegations in the Amended Complaint." (*Id.*). We agree.

[24] **[25]** "The general test for determining the existence of ... a [fiduciary] relationship is whether it is clear that the parties did not deal on equal terms." *Frowen v. Blank*, 493 Pa. 137, 425 A.2d 412, 416 (1981). This is particularly true when "on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible." *Leedom v. Palmer*, 274 Pa. 22, 117 A. 410, 411 (1922). In this vein, this Court has found that "a breach of fiduciary duty claim requires the plaintiff to establish some 'special relationship' between himself and the defendant 'which is one "involving confidentiality, the repose of a special trust or fiduciary responsibilities." ' " *Steele v. First Nat. Bank of Mifflintown*, 963 F. Supp. 2d 417, 424 (M.D. Pa. 2013) (quoting *Coplay Aggregates, Inc. v. Bayshore Soil Mgmg. LLC*, 2011 WL 2003689, at *7–8 (E.D.Pa. May 23, 2011)).

In the instant case, Plaintiffs have pleaded in their amended complaint that the School was created to serve severely underprivileged children—a particularly vulnerable group, (Doc. 29 at ¶ 21)—and that the School markets its program as creating a "family-like atmosphere for students." (*Id.* at ¶ 26). According to Plaintiffs, "MHS openly describes itself as 'a private residential school with surrogate ***112** parenting responsibilities.' " (*Id.* at ¶ 27). Plaintiffs also outline the extent of control that the School exerts over its students, alleging that "[t]he School monitors and regulates every aspect of children's lives." (*Id.* at ¶ 35). Indeed, Plaintiff even references a settlement agreement wherein the School confirmed that it stood *in loco parentis* to its students. (*Id.* at ¶ 32).

Accordingly, Plaintiffs have plainly alleged that "the parties did not deal on equal terms," *Frowen*, 425 A.2d at 416, and that "on the one side there is an overmastering influence, [and], on the other, weakness, dependence, or trust, justifiably reposed." *Leedom*, 117 A. 410 at 411. Plaintiffs have thus demonstrated "some 'special relationship' between [Abrielle as a student] and the defendant[s] 'which is one "involving confidentiality, the repose of a special trust or fiduciary responsibilities." ' " *See Steele*, 963 F. Supp. 2d at 424. Taking Plaintiffs' factual averments as true and drawing all reasonable inferences in their favor, Plaintiffs have adequately pleaded the existence of a fiduciary relationship between Abrielle and the School under Pennsylvania law.

We are unpersuaded by Defendants' reliance upon *Gjeko* in support of their view that Pennsylvania does not recognize the existence of a fiduciary relationship between a private school and its students as a matter of law. Indeed, the *Gjeko* Court explicitly noted that courts in various districts "have reached different results about the existence of a fiduciary duty to an enrolled student by a university," that "this issue is unresolved in Pennsylvania," and that "it is possible that a fiduciary relationship existed between [the professor] and Plaintiff." *Gjeka*, 2013 WL 2257727, at *10–11. Thus, absent guidance from our Court of Appeals or the Pennsylvania courts, we decline to dismiss Plaintiffs' breach of fiduciary duty claim based upon Defendants' erroneous view that *Gjeko* serves to wholesale exclude such claims in Pennsylvania as a matter of law. It does not do so. Accordingly, Defendants' motion for judgment on the pleadings as to Count XII shall be denied.

d. Count XIII – Negligence *Per Se*

[26] In their next issue, Defendants argue that Plaintiffs' negligence *per se* claim fails as a matter of law because neither the FHA nor the ADA can serve as the basis of a negligence *per se* case. (Doc. 241 at 19–20 (citing *McCree v. Se. Pennsylvania Transp. Auth.*, No. CIV.A. 07-4908, 2009 WL 166660, at *12 (E.D. Pa. Jan. 22, 2009) ("[V]iolation of an ADA regulation may not be used as evidence of negligence *per se* in a personal injury action.") (citing *Levin v. Dollar Tree Stores, Inc.*, No. 06-0605, 2006 WL 3538964, at *2 (E.D.Pa. Dec.6, 2006) (holding that the plaintiff may not "borrow" ADA regulations for use as evidence of the standard of care to prove negligence *per se* in a personal injury action, since to do so would "allow for recovery of damages for personal injuries for violations of the ADA, which are specifically not permitted under the ADA itself")); *Aponik v. Verizon PA., Inc.*, 106 F. Supp.3d 619, 624 (E.D. Pa. 2015) ("Because the ADA was not designed to protect those with disabilities from personal injuries, [p]laintiff is unable to state a claim for negligence *per se*."); *Hunter v. District of Columbia*, 64 F.Supp.3d 158 (D.D.C. 2014) (concluding that the FHA cannot serve as the basis for a negligence *per se* claim)).

In response, Plaintiffs contend the opposite. According to Plaintiffs, "[i]n a recent case, [a federal] court determined that plaintiffs stated a claim for negligence *per se* when they alleged that: (1) defendants violated the FHA, FEHA, and Unruh Civil Rights Act (the "Acts") by discriminating against them in the provision of basic ***113** maintenance services; (2) these violations were a substantial factor in bringing about harm to plaintiffs; (3) the Acts were intended to prevent actions like those of defendants; and (4) the Acts were intended to protect persons like the individual plaintiffs." (Doc. 252 at 19–20 (citing *Martinez v. Optimus Properties, LLC*, 2017 WL 1040743, at *8 (C.D. Cal. 2017)). According to Plaintiffs, "[t]his is the trend of various jurisdictions." (*Id.* (citing various out-of-state cases)). In its Reply, Defendants distinguish the various cases cited by Plaintiffs, contending that Plaintiffs "misrepresent[ ] ... to this Court" the holdings of the various out-of-state cases they cite. (Doc. 261 at 17).

[27] **[28]** **[29]** **[30]** Under Pennsylvania law, negligence *per se* is "conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances." *Mahan v. Am-Gard, Inc.*, 841 A.2d 1052, 1059 (Pa. Super. 2003) (alterations in original). "Pennsylvania recognizes that a violation of a statute or ordinance may serve as the basis for negligence *per se*." *Id.*

In order to prove a claim based on negligence *per se*, the following four requirements must be met:

(1) The purpose of the statute must be, at least in part, to protect the interest of a group of individuals, as opposed to the public generally;

(2) The statute or regulation must clearly apply to the conduct of the defendant;

(3) The defendant must violate the statute or regulation;

(4) The violation of the statute or regulation must be the proximate cause of the plaintiff's injuries.

Id. (quoting *Wagner v. Anzon, Inc.*, 453 Pa.Super. 619, 684 A.2d 570, 574 (1996)).

> A claim for negligence *per se* which relies upon a statute to provide the standard of care is virtually indistinguishable, substantively, from a direct claim under that same statute. This "close relationship" between a private cause of action and a claim for negligence *per se* exists "because both private causes of action and negligence *per se* 'address the question of whether the policy behind the legislative enactment will be appropriately served by using it to impose and measure civil damages liability.' "

Nichols v. Ferguson, No. CIV.A. 03-824, 2004 WL 868222, at *11 (E.D. Pa. Apr. 21, 2004) (quoting *Wagner*, 684 A.2d at 574). Accordingly, several Courts in this Circuit have found that statutes like the ADA cannot serve as the basis of a negligence action seeking civil remedies because that statute was promulgated to combat discrimination and was not designed to protect those with disabilities, or their families, from personal injuries. *See Aponik v. Verizon Pennsylvania Inc.*, 106 F. Supp. 3d 619, 624 (E.D. Pa. 2015) ("As the ADA lists specific remedies and physical injury is not among them, and we will not read into the ADA a remedy that Congress was at pains not to mention. We find persuasive the reasoning of those district court decisions, in this Circuit and elsewhere[,] that conclude there is no recovery for personal injury under the ADA because its express language excludes it."); *Levin,* 2006 WL 3538964, at *4 ("Because the ADA was not designed to protect those with disabilities from personal injuries, [p]laintiff is unable to state a claim for negligence *per se*."); *McCree*, 2009 WL 166660, at *12 n.11. ("[V]iolation of an ADA regulation may not be used as evidence of negligence *per se* in a personal injury action like this one."). At least one Court has also found that the ADA cannot serve as the basis of a negligence *per se* action when the plaintiff was not within the ***114** class of people the ADA was designed to protect. *See Nichols*, 2004 WL 868222, at *12 ("Based upon the same rationale which underpinned my holding in *Nichols I* that plaintiff did not have standing to bring a claim under the ADA because it was not a disabled individual, plaintiff cannot pursue a negligence *per se* claim based upon defendants' alleged violation of a statute which was not enacted to 'protect a class of persons which includes plaintiffs.' ").

Accordingly, because the Individual Plaintiffs are not disabled, they are not within the class of people designed to be protected by either the ADA or the FHA and Count XIII must be dismissed to the extent it seeks relief on their behalf. Moreover, the Courts in this circuit have been clear that anti-discrimination statutes like the ADA and the FHA cannot serve as the basis of a negligence *per se* action. Indeed, Plaintiffs have not identified a single case from this Circuit suggesting otherwise. This Court does not find the various out-of-circuit cases cited by Plaintiffs persuasive absent further guidance from our Court of Appeals. Rather, we are persuaded by the reasoning delineated by the *Levin* Court that allowing Plaintiffs to pursue a negligence action predicated upon a violation of the anti-discrimination provisions of either the FHA or the ADA would "allow for recovery of damages for personal injuries for violations of [a statute], which are specifically not permitted" under the statutes themselves. *Levin*, 2006 WL 3538964, at *4. As aforestated, the Estate has successfully pleaded a claim under the FHA sufficient to survive a motion for judgment on the pleadings. We will not permit Plaintiffs to potentially recover twice by repleading this claim as a negligence *per se* action.

As a final matter, we note that, other than a cursory assertion that "Defendants have violated the ADA," (Doc. 29 at ¶ 255), Plaintiffs have not alleged any facts in support of their assertion that Defendants, in fact, violated the ADA. Indeed, despite pleading thirteen counts over nearly 90 pages, Plaintiffs did not plead an ADA violation. Thus, even were we to assume that the ADA could serve as a basis of Plaintiffs' negligence *per se* action we would find that Plaintiffs have failed entirety to substantiate that claim. We will not permit Plaintiffs to back door an unsubstantiated ADA claim as negligence *per se*. Accordingly, Plaintiffs have failed to demonstrate a *prima facie* case of negligence *per se* under Pennsylvania law and we shall grant Defendants' motion for judgment on the pleadings as to Count XIII.

e. Other Issues – Prospective Injunctive Relief

[31] In their final issue, Defendants argue that Plaintiffs' request for injunctive relief is moot because they cannot demonstrate that they are likely to suffer future harm. According to Defendants, because Abrielle is deceased, "neither [Abrielle] nor the Plaintiffs will be enrolling at [the School] in the future, and therefore [Abrielle], and certainly [Individual] Plaintiffs, 'will not again be subjected' to [the School's] policies and/or conduct." (Doc. 241 at 21 (quoting *Mirabella By Mirabella v. William Penn Charter Sch.*, 752 F. App'x 131, 134 (3d Cir. 2018)).

In response, Plaintiffs aver that they are entitled to injunctive relief under the plain meaning of the Fair Housing Act. According to Plaintiffs, "[t]he FHA is 'worded as a broad mandate to eliminate discrimination against and equalize housing opportunities for disabled individuals," and "that when a plaintiff who has standing to bring suit shows a substantial likelihood that a defendant has violated specific fair housing statutes and regulations, that alone, if unrebutted, is sufficient to support an injunction ***115** remedying those violations." (Doc. 251 at 19). Thus, Plaintiffs conclude, "[t]he language of the statute itself recognizes injunctions can be issued in response to past action," "[t]he violation alleged by Plaintiffs will exist in perpetuity unless the Court exercises equitable remedies," and Plaintiffs are entitled to the relief they seek. (Doc. 252 at 20). We disagree.

[32] **[33]** "Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case." *Burke v. Barnes*, 479 U.S. 361, 363, 107 S.Ct. 734, 93 L.Ed.2d 732 (1987). Article III requires that litigants have "a legally cognizable interest in the outcome" of the litigation. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). This concept is referred to as the "personal stake requirement," and requires a litigant to demonstrate that he or she "has sustained or is immediately in danger of sustaining some direct injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). "Past exposure to illegal conduct does not in itself show a present case or controversy ... if unaccompanied by any continuing, present adverse effects." *Id.* at 102, 103 S.Ct. 1660. This requirement "serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving," *Geraghty*, 445 U.S. at 397, 100 S.Ct. 1202, and ensures "concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions." *Lyons*, 461 U.S. at 101, 103 S.Ct. 1660.

[34] As part of the live case and controversy inquiry, plaintiffs must also demonstrate that they have standing to pursue their claim. To do so, a plaintiff must show that he or she has suffered an injury in fact, that the injury is traceable to the challenged action of the defendant, and that the injury can be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 179, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

In *Mirabella By Mirabella v. William Penn Charter School*, a former high school student and his parents sued the student's former school for violations of the ADA after the student had graduated. The district court dismissed that claim as moot and the Third Circuit affirmed. In so holding, our Court of Appeals stated:

> The Constitution commands that we consider actual cases and controversies only, not moot ones. Our "ability to grant effective relief lies at the heart of the mootness doctrine." Developments that "eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief" render a case moot, irrespective of when the developments occur during federal judicial proceedings.
>
> Graduation is one such development: When a student challenges the legality of a school's conduct, the student's "graduation typically moots her claim for injunctive or declaratory relief." In *Donovan* [*ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003)], we held that a student's graduation mooted her request to enjoin her high school from denying her Bible club certain privileges. So too here. [Plaintiff's] graduation means that any injunctive relief under the ADA "would have no impact on [him] whatsoever."
>
> A longstanding but "extremely narrow" exception applies when a student's claims are "capable of repetition, yet evading review." For the exception to apply, "the challenged action [must be] too short in duration to be fully litigated ***116** before the case ... become[s] moot" and "there [must be] a reasonable expectation that the complaining party will be subjected to the same action again." As in *Donovan*, the exception does not apply to [Plaintiff]: As a high school graduate presently enrolled in university, he will not be returning to high school and will not again be subjected to [the Defendant's behavior which gave rise to the instant action].

Mirabella, 752 F. App'x at 133 (internal citations and footnotes omitted).

In this case, Plaintiffs seek prospective injunctive relief under the FHA to remedy the discrimination Abrielle purportedly suffered. In short, Plaintiffs seek an injunction mandating that Defendants avoid damage to other children by providing special care for students that suffer from mental impairments and may need additional help. Laudable as this purpose may be, because Abrielle has since passed away, neither she nor her parents will ever be subjected to the policies and procedures implemented by Defendants, and the Estate's claim for prospective injunctive relief cannot be redressed by the relief Plaintiffs request. *See Mirabella*, 752 F. App'x at 133; *Cohen v. Twp. of Cheltenham, Pennsylvania*, 174 F. Supp. 2d 307, 311 (E.D. Pa. 2001) ("Plaintiffs originally sought injunctive relief compelling defendants to grant plaintiffs' requested zoning variance so they could sell their property to Safe Haven. Because plaintiffs no longer own their home, their claim for injunctive relief is rendered moot."); *Harris v. Itzhaki*, 183 F.3d 1043, 1052 (9th Cir. 1999) (granting only retrospective relief under the FHA when plaintiff moved out of the housing unit at issue into a new place 3000 miles away). That is, Plaintiffs cannot seek a prospective remedy under the FHA from which neither the litigants themselves nor the individual the litigants represent will receive any benefit. Accordingly, Count I shall be dismissed as moot to the extent it seeks prospective injunctive relief.

IV. CONCLUSION

For the foregoing reasons, Defendants Motions for Judgment on the Pleadings, (Docs. 240, 242), shall be granted in part and denied in part.[4]

4 In their brief, Plaintiffs clarify that their negligence and breach of duty of care claims outlined in Count III and their breach of fiduciary duty of care and good faith claims outlined in Count XII pertain to only Abrielle. Thus, we shall dismiss those Counts as withdrawn to the extent they could be interpreted to seek relief on behalf of the Individual Plaintiffs. Likewise, because Chief Judge Connor previously held that Individual Plaintiffs' emotional distress claims in Counts IX and X failed to allege physical harm and were, therefore, dismissed, we need not address Defendants' arguments as to those claims.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendants' Motions for Judgment on the Pleadings, (Docs. 240, 242), are **GRANTED** to the following extent:

   a. Count I of Plaintiffs' amended complaint is **DISMISSED** to the extent it seeks relief on behalf of Plaintiffs Wartluft and Bartels in their individual capacities and to the extent it seeks prospective injunctive relief.

   b. Counts III, IX, X, and XII of Plaintiffs' amended complaint are **DISMISSED** as withdrawn to the extent those Counts could be interpreted to seek relief on behalf of Plaintiffs Wartluft and Bartels in their individual capacities.

   c. Counts XI and XIII of Plaintiffs' amended complaint are **DISMISSED** ***117** for failure to state a claim.

2. Defendants' Motions for Judgment on the Pleadings, (Docs. 240, 242), are **DENIED** in all other respects.

All Citations

400 F.Supp.3d 91, 371 Ed. Law Rep. 131

End of Document

42 USC 3602: Definitions
Text contains those laws in effect on July 13, 2021

From Title 42-THE PUBLIC HEALTH AND WELFARE
CHAPTER 45-FAIR HOUSING
SUBCHAPTER I-GENERALLY

§3602. Definitions

As used in this subchapter-

(a) "Secretary" means the Secretary of Housing and Urban Development.

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title.

(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

(h) "Handicap" means, with respect to a person-

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21).

(i) "Aggrieved person" includes any person who-

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

(j) "Complainant" means the person (including the Secretary) who files a complaint under section 3610 of this title.

(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with-

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

(l) "Conciliation" means the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary.

(m) "Conciliation agreement" means a written agreement setting forth the resolution of the issues in conciliation.

42 USC 3604: Discrimination in the sale or rental of housing and other prohibited practices
Text contains those laws in effect on July 13, 2021

From Title 42-THE PUBLIC HEALTH AND WELFARE
CHAPTER 45-FAIR HOUSING
SUBCHAPTER I-GENERALLY

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§3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful-

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of-

(A) that buyer or renter,[1]
(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of-

(A) that person; or
(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes-

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.[2]

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that-

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
(III) reinforcements in bathroom walls to allow later installation of grab bars; and
(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term "covered multifamily dwellings" means-

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and
(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(Pub. L. 90–284, title VIII, §804, Apr. 11, 1968, 82 Stat. 83 ; Pub. L. 93–383, title VIII, §808(b)(1), Aug. 22, 1974, 88 Stat. 729 ; Pub. L. 100–430, §§6(a)–(b)(2), (e), 15, Sept. 13, 1988, 102 Stat. 1620 , 1622, 1623, 1636.)

Amendments

1988-Pub. L. 100–430, §6(e), inserted "and other prohibited practices" in section catchline.

Subsecs. (a), (b). Pub. L. 100–430, §6(b)(2), inserted "familial status," after "sex,".

Subsecs. (c) to (e). Pub. L. 100–430, §6(b)(1), inserted "handicap, familial status," after "sex,".

Subsec. (f). Pub. L. 100–430, §6(a), added subsec. (f).

Subsec. (f)(3)(A). Pub. L. 100–430, §15, which directed the substitution of "except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted." for the period at the end of subpar. (A) was executed by making the substitution for a semicolon as the probable intent of Congress because subpar. (A) ended with a semicolon, not a period.

1974-Pub. L. 93–383 inserted ", sex" after "religion" wherever appearing in cls. (a) to (e).

Effective Date of 1988 Amendment

Amendment by Pub. L. 100–430 effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as a note under section 3601 of this title.

[1] *So in original. The comma probably should be a semicolon.*

[2] *So in original. The period probably should be a semicolon.*

The Legal Intelligencer

Milton Hershey School Lawyer Finds Guidance in Dismissal of Student Suicide Case

“The defense of this lawsuit never questioned the extent of the tragedy. Rather, the school sought to demonstrate that it did everything in its power to support Abbie and acted responsibly by providing her the opportunity to seek additional care, and we're grateful that several court rulings have now affirmed that," said defense attorney Jarad W. Handelman of Elliott Greenleaf in Harrisburg.

By Katheryn Tucker | February 11, 2021

Jarad W. Handelman, managing partner with Elliott Greenleaf. Courtesy photo

A new opinion from the U.S. Court of Appeals for the Third Circuit could have applications for other live-in educational institutions even as it vindicates the Milton Hershey School, according to the winning defense attorney.

Judge Stephanos Bibas ruled that the school is not responsible for the suicide death of 14-year-old Abrielle Kira Bartels, known as Abbie, while she was at home in the care of her parents.

“A death by suicide is tragic. But not every tragedy leads to legal liability,” Bibas said in a unanimous Feb. 1 opinion, joined by Judges Thomas Ambro and Jane Roth. “Soon after Abrielle Bartels came home from boarding school, she took her own life. Her parents sued the school. But the care the school offers is limited. It is not a licensed mental-health or residential-treatment center. Nor do its psychologists have admitting privileges at any in-patient psychiatric hospital. Instead, the school leaves high-level care to outside experts.”

Bartels had been a student at the Hershey School since she was 5, from kindergarten on, Bibas said. When she began showing signs of depression and suicidal thoughts, the school provided her with counseling and therapy. When her condition worsened, the school arranged and paid for in-patient psychiatric treatment—twice. She died in 2013 during summer break after the hospital determined she was no longer at risk and released her to her parents—without even notifying the school. The parents sued the school in 2016, making 13 claims. Among them, they alleged Bartels died because she could not return to school and attend her eighth grade graduation and barbecue.

The panel affirmed a grant of summary judgment in favor of the school from U.S. District Judge John Jones III of the Middle District of Pennsylvania. Jones threw out some but not all of the claims on procedural grounds in 2019. He dismissed the rest March 18, 2020, when he granted summary judgment to the school.

“Milton Hershey School mourns the tragic death of Abbie Bartels every day, and it always will,” said defense attorney Jarad W. Handelman of Elliott Greenleaf in Harrisburg. “The defense of this lawsuit never questioned the extent of the tragedy. Rather, the school sought to demonstrate that it did everything in its power to support Abbie and acted responsibly by providing her the opportunity to seek additional care, and we’re grateful that several court rulings have now affirmed that.”

Handelman cited two key points in the recent opinions refuting claims that the school breached its duty.

“On the contrary,” Bibas said, “the school acted reasonably: it put Abbie in the care of licensed mental-health professionals. None of its actions was reprehensible. There is nothing intolerable about making sure a suicidal student gets professional treatment before returning to campus.”

Previously, Jones had said, “Clearly, defendants were presented with a student who was suffering from increasing suicidal ideations with a history of depression and suicidal tendencies. Providing that student with an opportunity to seek professional medical help could not amount to a breach of any duty incurred. Just the opposite. Had defendants not provided Abrielle with such an opportunity, they would have unquestionably breached their in loco parentis duty.”

Even though the latest opinion is not precedential because it’s not from the full court, Handelman said it’s an important decision for the Milton Hershey School and possibly other institutions that provide residential programs for at-risk students. The crucial ruling, he said, is that a boarding school cannot stand in the shoes of the parents when the student is at home.

Bibas did not mention the parents’ allegation that their daughter had been expelled, which the school denied. Bibas also dispensed with an unusual claim that not returning Bartels to school after she left the hospital in her parents’ care amounted to denying her housing for which she paid rent by doing chores. Jones at first allowed the Fair Housing Act claim on procedural grounds, but then dismissed it on summary judgment. The Third Circuit affirmed.

“Though the school made her do chores, the chores did not help Abbie get housing and were not part of a bargain,” Bibas said. “Instead, the chores were more like homework: a core part of her educational experience to prepare her for life after school. Indeed, as the school’s counsel explained at oral argument, if a student could not physically perform chores, the school would not deny her education or housing. The school housed Abbie out of charity. That free student housing model falls outside the act.”

The parents were represented by John Schmehl, Gregory Cirillo and John Higson of Dilworth Paxson in Philadelphia.

“We are very disappointed in the panel’s decision and believe it is a blow to the civil rights of children, who are required to perform chores at the Milton Hershey School to remain in residence that would otherwise be done by adults, and yet their labor is not deemed consideration or valued by the Third Circuit under the Fair Housing Act,” Schmehl said Thursday. “This is despite the chores being required in the initial enrollment agreement. We also believe the court erred in not allowing the continuing duty of care arguments to be considered, despite a complaint replete with factual allegations of negligence after the school barred Abbie from campus, but we must respect the court’s decision.”

Business

Lisa Scullin statement on the Milton Hershey School

by Ellen Dunkel, External or Unknown
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Lisa Scullin is a spokeswoman for the Milton Hershey School

In 2014-15 members of the school's leadership team, at the request of the Board, explored various possibilities which they identified to expand MHS's mission in the future. The Board ultimately voted to expand the existing campus to serve hundreds more students in Hershey. Construction starts this month on 32 new student homes.

In addition to the Board's decision to grow enrollment, we proposed introducing a program to provide greater support to our young graduates. The board approved the recommendation, and we have created a new division called Graduate Programs for Success to provide academic, career, and other support for our young graduates to better ensure their success after they leave MHS.

It is important to keep in mind who we serve. It is also important to keep in mind those obligations required by the school's founder about how to serve the students enrolled. Children from poverty deserve the best education and care we can provide. They need extra support because of their backgrounds and the struggles which poverty brings.

The education we provide is comparable to the best private boarding schools in the nation. In addition, we provide everything middle-class families would typically provide, cost free.

A premier boarding school like MHS, offering similar academic programming/class size, charges students approximately $60,000 per year without providing all of these additional services. "All-in" costs at most private colleges reach $85,000. Our cost per student is $80,000. That includes costs not recognized by our peer schools such as extensive medical, dental, psychological and social work services for children/families, medications, sports, visual and performing arts and related costs, clothing, year-round transportation, career technical programming, technology expenses, etc.

Given the complexity of the services and supports we provide to not just students, but families and young graduates, this is a very effective use of resources. * Because of intensive MHS supports, parents have been empowered to change their own lives and break the cycle of poverty for their family unit in many cases.

In addition, the school estimates that 60-70% of its student body has one or more physical or psychological impairments that may meet the ADA's definition of a disability. Many of these are attributable to the backgrounds of poverty and need. I would point you to our white paper which breaks down medical, psychological, and dental costs as well as immunizations and medications for everything from asthma to cancer treatment.

It is responsible to continuously explore options to educate and care for as many children as possible who deserve a chance at a better life. Any consideration to pursue one of these options could be supported only if it could be accomplished without sacrificing the school's core model and current programming. If and when the Board decides what is appropriate, we are confident they would always be respectful of our regulators and seek their approval as well as include our key stakeholders in the discussions.

* The cost per student you have focused on includes investment fees, depreciation, and college scholarships. Currently, MHS supports more than 500 young graduates in their ongoing effort to break the cycle of poverty and live fulfilling and productive lives.

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Ellen Dunkel, External or Unknown