IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

DAVID and TINA LONG, individually, and as Natural Parents of TYLER LEE Long, Deceased,	)	
Plaintiffs,	)	CIVIL ACTION NO.: 4:10-CV-00015-HLM
v.	)	
MURRAY COUNTY SCHOOL DISTRICT, and GINA LINDER, etc.,	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS GINA LINDER AND MURRAY COUNTY SCHOOL DISTRICT

Plaintiffs, David and Tina Long, (hereafter "Plaintiffs"), seek compensatory and punitive damages against Defendants, Murray County School District (hereafter, "MCSD" or "School District"), and Gina Linder, Principal of Murray County High School (hereafter "MCHS"), for the suicide of their 17 year old son, Tyler, on October 17, 2009. Despite Tyler's diagnosis with several serious mental health conditions, including Asperger's Syndrome, Plaintiffs allege that his suicide was the

result of "egregious bullying," without defining that term.[1] The causes of action that such allegations supposedly support are stated in Counts I-III of Plaintiffs' Amended Complaint [Doc. # 3] in which Plaintiffs assert federal claims under (a) 42 U.S.C. § 1983 ("§ 1983"); (b) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a ("§ 504"); and (c) the Americans with Disabilities Act, 42 U.S.C. § 12132 ("ADA").[2] Plaintiffs seek damages for Tyler's wrongful death and the emotional harm that Tyler suffered during his life.

To defeat this motion, Plaintiffs must produce competent evidence that Linder and the School District either **intended** to discriminate against Tyler or had **actual notice** of a **serious risk** of harm or injury to Tyler to which they were **deliberately indifferent**. In addition, Plaintiffs must show through qualified expert testimony that the Defendants proximately caused a legally cognizable harm to Tyler. Plaintiffs' expert witness testimony on this issue is the subject of Daubert motions to exclude. If either the present motion or the Daubert motions are granted, this case must be dismissed.

[1] For purposes of discovery, Plaintiffs insisted on using the term "bullying" to include conduct ranging from physical assault to teasing, joke playing and practical jokes. They erroneously believe that the U.S. Constitution and various federal laws require school officials to monitor and actively regulate the smallest details of every student interaction throughout the school day.

[2] Count IV is a supplemental claim under Georgia law for "public nuisance," which is barred by state sovereign immunity. Canfield v. Cook County, 213 Ga. App. 625 (1994). Counts V and VI seek punitive damages and attorney's fees respectively and are predicated on establishing liability based on Counts I through III. Plaintiffs apparently seek to recover for their own pain and suffering but cannot do so in the absence of an alleged violation of their own constitutional or federal statutory rights. See Doc. # 3, ¶ 51; Doc. # 56, p. 3.

STATEMENT OF THE FACTS

A. Tyler Long's Suicide

On Friday evening October 16, 2009 after returning home from his part time job, Tyler Long spoke to his mother before she went bed around 11:00 p.m. They discussed his grades and his recently wrecked car. He spoke briefly with his father around midnight. [Statement of Undisputed Material Facts ("SMF") ## 5-6]

Tyler twice attempted to call a friend, N.F., and then at 1:12 a.m. sent him a text message:

> N. by the time u read this message I have killed myself man u were a good friend and ill miss u tell everyone in ro 4 me goodbye my friend.

He also left a note to his family:

> Dear Family,
>
> If you are reading this I am DEAD. I don't want to live any longer with this burden I have. **I don't have a supporting family or friends for that matter. You think I am worthless and pathetic. All I wanted was acceptance and kindness, but no I didn't get love.** Maybe I'll see you in the afterlife or not. I want to end this pain I have and to live in eternal hapiness [sic]. I hate myself because I don't make everyone happy. Tr.,[3] I love you because we share a battle of disabilities. Te., You will be great someday. Tina, Your personality is what helped me. David, I looked up to you for all my life and I love you the most. This World will be a better place without me.

[3] Tr. And Te. refer to Tyler's younger twin siblings.

Sincerely,
Tyler Lee Long
1992-2009

(Emphasis added).

Early Saturday morning, Mr. Long found Tyler hanging by one of the belts in his bedroom closet. Neither the text message nor Tyler's note[4] uses the word "bullying" or refers to problems at school. [SMF ## 7-11]

B. Events Preceding Tyler's Suicide in Fall 2009

Shortly after school began at MCHS on September 8, 2009, the Longs became aware that Tyler was a suicide risk. Tyler's father found Tyler in his room "messing" with belts and asked Tyler directly about any intent to commit suicide. Tyler assured him he had no such intention. Mr. Long discussed this discovery with his wife, who expressed confidence that Tyler would not do such a thing because "he loves us." [SMF ## 13-15]

On September 25, 2009, three weeks before his death, the Longs took Tyler to a clinical psychologist. They did so partly at Tyler's request. Mr. Long discovered that Tyler was wearing adult diapers at home and had been urinating in them. Tyler wanted to continue this practice and hoped the psychologist would convince his parents not to worry. As a part of his evaluation, the psychologist **explicitly ruled**

[4] As Defendants' expert suicidologist explains in his supplemental report, a suicide note represents very important evidence about a person's reasons for committing suicide. Supplemental Disclosure of Morton Mayer Silverman, M.D., Doc. # 99-1 at 22-24.

out any concern that Tyler might harm himself. Here it is important to note what is **not** in the psychologist's records and what was **not** otherwise disclosed to him. First, the Longs did not reveal their concern about suicide or, more specifically, finding Tyler "messing with belts" in his room.[5] Second, neither Tyler nor his parents reported mistreatment at school even though specific questions were asked about school and Tyler's peer relationships. In this vein, Ms. Long commented favorably that Tyler's Asperger's symptoms had gotten better since he started high school. [SMF ## 16-27]

At Tyler's request, the psychologist agreed to reassure Tyler's parents regarding the diaper problem on the condition that Tyler agree to continued therapy and counseling. [SMF # 23] The Longs scheduled a follow up appointment for Tyler on October 12th. [SMF # 28] According to the psychologist's records, Tyler "did not show up" for the appointment. Neither the Longs nor Tyler cancelled or rescheduled the session. Ms. Long's excuse was that Tyler had wrecked his car. Despite having a large extended family in the Chatsworth area, the Longs did not arrange alternative transportation. [SMF ## 33-35] Tyler died five days later.

[5] The failure to provide this information to the psychologist is important. In a timeline prepared by Ms. Long, she **explicitly linked** her husband's discovery about the adult diapers with their concern about Tyler's potential for suicide. They discovered that Tyler was wearing diapers at about the same time they found him "messing" with belts in his closet. [SMF # 17]

At no time prior to Tyler's death did the Longs provide any information to MCHS officials about these events or their suicide concern. More specifically, they did not inform them about the psychological counseling, the belts, the diaper problem, or their anxiety about Tyler's potential for suicide. [SMF # 36] In marked contrast, from the MCHS's vantage point, Tyler was doing well. His GPA was 91.44; his attendance was nearly perfect; and he was an active and successful participant in JROTC. [SMF ## 37, 246-247] Moreover, from January 2009 until Tyler's death, neither Tyler nor his parents made a single report that MCHS students had mistreated him. Nor did any student or teacher report that Tyler was the victim of mistreatment. [SMF ## 47, 67-69, 239, 248-250].

Much to the contrary, the Longs' written communications with MCHS staff throughout 2009 reveal their satisfaction with the school environment, the faculty, and Tyler's performance. For example, in a March 2009 e-mail, Ms. Long commented:

> I know you are all busy, but I wanted to drop an e-mail about something that has been on my mind. Ms. Thomason, not many administrators take the time to correct a situation. What impresses me most is that you supported Mr. Greeson. Some take another road. Some tell the parent what she wants to hear. You handled the situation like a professional. You let me know that while mistakes are sometimes made, people are human. You let me know that my children would be lucky to have Mr. Greeson as their advisor. You did not demean him in any way,

> but the issue was resolved. I respect you for that. I told my husband that you could sell me any car on the lot! You are in the perfect job. Mr. Greeson, you talked to Tyler, and he respected you for that. You wrote a wonderful note to me. It takes a real man to be genuine in your response. Not many can.
>
> I wanted to say the good. We sometimes only hear the bad. Several "people" have personally called me asking that one or both of my kids could go to the new high school. As I explained to the kids, it's not about one or two teachers. It's not about friends. It's about the support in that school as a whole that will make you a success. **I feel honored that the kids will be attending school with people such as yourselves.** My kids will get into trouble. They will be troubled. But, **I believe they will get the help they need.** Sometimes parents don't make the most popular choice, but hopefully we make the best choice. **I feel confident that we have the tools in you to get them through anything that may come.**
>
> **Honestly, thank you all. Instead of the situation being terrible, it helped confirm that my kids are right where they should be.** Tina Long

(Emphasis added). [SMF ## 88, 241-242]

Then, in a September 14, 2009 e-mail, after having Tyler removed from all honors and AP classes to preserve his Hope Scholarship eligibility, Ms. Long wrote:

> NO ONE hates this more than I do. I was thrilled when I learned of an AP Spanish class. He just doesn't have room in his HOPE GPA. **He's doing so well. He has worked for over a year now at his job (at an Asperger's convention, we were told he can't handle some jobs such as fast food, but he is!**) I don't want to go in reverse with him. It is very hard to know what is best

> sometimes. All we can do is try… I am a firm believer that David and I can't do it alone. Mr. Greeson, thanks for your help.

(Emphasis added). Sent less than two weeks before Tyler's upcoming appointment with the psychologist, this message says nothing about Tyler's deteriorating psychological condition,[6] never uses the word "bullying," and does not mention problems at school.[7] [SMF ## 38-46]

Given this history, it came as a shock just days after Tyler's suicide when the Longs fixed the blame on the MCSD and its employees, including Linder. The first hint came when three of Tyler's teachers were made to feel unwelcome or asked to leave the visitation for Tyler. Then, at Tyler's funeral, with numerous MCHS students and faculty present, including Linder, Mr. Long spoke. He attributed Tyler's suicide to mistreatment by MCHS students and the school's failure to protect him. [SMF ## 70-73] Shock turned to bewilderment once the police report was made public. It quoted Tyler's suicide note and the text message to his friend in full. Neither used the word "bullying" or referred to any problems at school.

No one doubts the pain the Longs felt upon finding their son dead and reading his heartbreaking note. While casting blame on others may be an understandable

[6] The Longs repeatedly remarked, both at their depositions and to the media, that Tyler's condition changed for the worse once school started on September 8, 2009.

[7] Yet during this same period of time in the fall of 2009, Ms. Long e-mailed several of Te.'s and Tr.'s teachers. These e-mails are complimentary of these teachers' efforts. They do not mention "bullying," although in one case the matter involved an injury to Te. as a bystander to a fight. Te. claimed at her deposition that this incident was an example of her experience of "bullying." [SMF #48]

response to such grief, the facts in this case do not support the Longs' harsh and unfounded accusations. As will be seen, there is a great disparity between their **public** narrative and the actual facts **privately known to them** (but never disclosed to Defendants). That disparity is fundamental to the Court's understanding of this case**.**

C. The Longs' Subsequent Allegations about Tyler's Suicide

The Longs literally had **no firsthand knowledge** about how Tyler's classmates had treated him at school. After Tyler's funeral, they took their cause to the media. [SMF # 74] They asked witnesses to come forward with information about bullying at MCHS and set up an e-mail address where they could be contacted. Meanwhile, they searched Tyler's computer and personal effects, finding nothing to indicate that Tyler had been the target of bullying of any nature, including "cyberbullying." [SMF # 66] The Longs also demanded a criminal investigation. Their initial focus was student mistreatment of Tyler in the days immediately before his suicide. They gave local police the names of suspects who allegedly (a) abused Tyler on the school bus on Friday afternoon October 16th, (b) assaulted him in the hall by pushing his head into his locker, and (c) bullied Tyler in guitar class.

This initial salvo of allegations proved to be groundless.

For years, video cameras have been installed in all MSCD school buses. One such camera recorded Tyler's bus ride home the Friday afternoon prior to the suicide later that night. Both MCHS Assistant Principal Chris Thornbury and a police detective reviewed this videotape. They did not detect any acts of bullying or mistreatment involving Tyler or anyone else. In fact, contrary to the Longs' specific allegation that Tyler fled to the back of the bus to protect himself from bullies, [Amended Complaint ¶ 29], the video shows that Tyler did so in response to teasing from his sister. [SMF # 63-65]

While Tyler was a student at MCHS, forty two (42) video cameras were positioned throughout all public areas of the school building and grounds, including the hallway near the JROTC classroom where Tyler's locker was located. [SMF # 110] The police detective reviewed the video of this area – several weeks of which were available – and again observed nothing showing that anyone pushed Tyler's head into his locker on the Friday before his death. In fact, they did not observe any student misconduct in that area for the entire time period reviewed. [SMF ## 61-62]

The Longs contended that the incident in guitar class involved A.H. who allegedly subjected Tyler to "egregious bullying" on the Thursday and Friday before his death.[8] According to the teacher, Mike Weaver, the only interaction he observed

[8] In their original Complaint, Plaintiffs also accused Z.H. of participating with A.H. in the "bullying" which included "being beaten" by both boys who were identified by their full names. Complaint ¶ 26. Because Plaintiffs learned that

between A.H. and Tyler either day was some "jawing." He never saw any "bullying" of Tyler who generally appeared "comfortable" with his classmates. The only witness to this alleged incident who testified with personal knowledge is J.R., one of Tyler's friends. J.R. explained that he, Tyler, and two other students were practicing their guitars when Tyler abruptly approached A.H. J.R. described A.H. as "pretending" to take Tyler's guitar away from him. When told to stop, A.H. did so "immediately." According to J.R., the same thing happened both days, with **Tyler initiating** each encounter. After class on Friday, J.R. went to lunch with Tyler, as he had done each day in the fall of 2009. Tyler did not appear to be upset with A.H., depressed or in a bad mood. J.R. never saw anyone spit in Tyler's food and he never heard Tyler complain about bullying. [SMF ## 51-58]

As previously noted, the Longs engaged in a media campaign accusing MCHS school officials of ignoring repeated pleas to protect Tyler against a pattern of physical and emotional abuse by other students. They gave numerous interviews. In one television interview, Ms. Long said that when she went into Tyler's room, "I saw him hanging there and I knew he had enough." Speaking of MCHS officials, she added, "**I think they killed my son**, I think they led him to do what he did." In

Z.H. was not even enrolled in the class and that Tyler had not been "beaten," they modified this allegation substantially in ¶ 26 of their Amended Complaint.

another television interview, Mr. Long recalled Tyler's emotional decline saying that "during the last two weeks, he wasn't there, he was a hollow person." [SMF # 74]

Not once during this media campaign, however, did the Longs mention anything that might contradict their public narrative: (a) finding Tyler "messing" with belts in his closet; (b) their September discussion with Tyler about suicide; (c) their discovery that Tyler had been wearing adult diapers; (d) the September 25 appointment with the psychologist at which the Longs did not mention any school related problems or their concern about Tyler's potential for suicide; (e) their failure to keep Tyler's follow up appointment with the psychologist just days before his death; (f) their failure to alert school officials to Tyler's deteriorating psychological condition; or (g) Tyler's suicide note which said nothing about mistreatment at school. Nor did the Longs mention the e-mails to MCHS officials in March and September of 2009 expressing satisfaction with Tyler's academic performance and experience at MCHS.[9] [SMF ## 74-75]

The Longs' January 27, 2010 Complaint echoes the narrative in their media campaign.[10] Without acknowledging the definition of bullying under Georgia law[11] or offering an alternative definition, it asserts that Tyler was "ridiculed and

[9] While the Longs waged this media campaign, the MCSD could not respond because of the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.
[10] Plaintiffs amended their complaint on February 25, 2010 but the amendments did not substantially modify their basic allegations.
[11] This law is discussed infra. in section D. 1.

emotionally bullied and physically beaten by other High School students on a regular basis." The facts developed by the Plaintiffs, however, do not match the complaint's inflamed rhetoric.[12] Among the incidents and acts identified in paragraphs 17, 18, 19, 20, 26, 27, 28 and 29 of the Complaint, not one is supported by competent proof. They either did not occur or if they did, Plaintiffs were simply wrong about the failure of MCHS officials to intervene.

In response to their public solicitation, Plaintiffs found nine MCHS students who claimed to have firsthand knowledge that Tyler was bullied. All were recruited by the Longs **after the fact** to confirm their pre-existing narrative. Unlike J.R. and other students (who knew Tyler reasonably well, who did not observe him being mistreated, and who never heard him complain about being bullied), few of these recruited witnesses claimed to have been friends with Tyler.[13] Despite describing Tyler as the victim of **daily** student torment, not one of these students reported this pattern of misconduct to Linder or to any MCHS administrator.[14] Most did not know or could not remember who the alleged perpetrators were. These alleged incidents occurred in school locations where security cameras were operational and teachers and SROs were regularly assigned. If their testimony is accurate, it is implausible in

[12] It describes the bullying as "constant," "regular," "continual and pervasive," "obvious, flagrant, rampant and continued," "unrelenting," "brutal and systemic," and "egregious."

[13] At the September 25, 2009 session, Tyler told the psychologist that he had ten friends. The Longs insisted that Tyler had no friends or were unaware that he had friends.

[14] In fact, only two claimed to have reported anything to teachers, and only one of the two could even identify the teacher. [SMF ## 315-316]

the extreme that MCHS officials would never, not once, have noticed such pervasive misconduct. [SMF ## 300-321]

D. Murray County School District Policies, Rules, Practices and Procedures Relating to Student Conduct and Students with Disabilities

Plaintiffs refer to a "culture of bullying" at MCHS. They assail MCHS's policies, rules, practices, and procedures governing student conduct while Tyler was a student, suggesting that they were inadequate at best and non-existent at worst. These contentions are based on a fundamental ignorance of the extensive protections afforded to all students at MCHS.

1. MCHS Policies and Practices Relating to Student Discipline and Behavior Generally

Georgia law, in effect for the years Tyler attended MCHS, prohibited "bullying" which it defined as follows:

> Bullying is any willful attempt to or threat to inflict injury to another person, when accompanied by the apparent ability to do so or any intentional display of force, such as would give the victim reason to expect immediate bodily harm.

O.C.G.A. § 20-2-751.4.[15] As was true in every school district in Georgia, the MCSD enforced a detailed Code of Student Conduct and Discipline Procedures (hereafter, "Student Code" or "Code"). Not only did the Student Code ban "bullying" as defined above, it also prohibited other serious categories of peer-on-peer misconduct.

[15] This statute was amended during the 2010 legislative session.

All of the misconduct identified is consistent in substance with any reasonable definition of "bullying" that any school or school system might choose to adopt anywhere. Among the enumerated categories of misconduct are: (a) acts of physical violence committed against other students (including sexual harassment); (b) fighting; (c) pushing, shoving, kicking, or other physically aggressive behaviors; (d) endangering the well being of self and/or others through jokes, pranks, tricks, games, or actions of poor judgment, etc.; (e) sexual harassment and sexual violence; (f) acts of a threatening nature or verbal abuse directed toward student, staff/school employee/substitute including vulgar, offensive or profane language; (g) bullying, electronic bullying, threatening, and hazing; (h) verbal abuse or disrespectful conduct toward other students; (i) gang related activity; and (j) harassment based on national origin or ethnic background. [SMF ## 89-93]

Effective enforcement of the Student Code was a high priority at MCHS. At the beginning of each school year, Linder and her assistant principal for discipline discussed the Code of Conduct and the various discipline procedures and strategies they expected the faculty to implement.[16] Each faculty member served as an advisor to a small class of students and was expected to make the MCHS behavioral expectations known to students within the **first three days** of class. Students and their parents were also required to certify that they had read and understood the Code.

[16] There were status reports and updates as needed throughout the school year.

Not only were MCHS teachers expected to enforce discipline in their classrooms during instructional time, they were also **required** to monitor the hallways before classes began each morning and during class changes throughout the day.[17] [SMF ## 94-96, 109, 115]

In addition to the video cameras throughout the school building and grounds, student conduct was also monitored by two School Resource Officers ("SRO") who patrolled the halls and public areas at MHCS when students were not in class. The SROs also monitored the cafeteria during lunch, as did the assistant principal for discipline. The SROs also got video feeds at their work stations as did all MCHS administrators, including Linder. These video feeds were in real time or as recorded for the previous two to three weeks. [SMF ## 110-114, 116-118]

Following this Court's order of September 29, 2010, the MCSD pulled the records of approximately 2,000 cases where MCHS administrators responded to (and in some instances punished quite severely) student-on-student misconduct and other disruptive behavior. One cannot review these records and conclude that any administrator or teacher at MCHS would ignore misconduct of any description, much less the mistreatment that Plaintiffs have characterized as "brutal and systemic," "egregious," "unrelenting" and "obvious, flagrant, rampant and continued." Given the vitriol of this language, it is revealing that Plaintiffs chose **not** to review these

[17] The standing rule at MCHS was for teachers to monitor the hallway area immediately outside their classrooms.

disciplinary records except for the few involving Tyler. It is also noteworthy that none of Plaintiffs' designated experts[18] asked to see these records despite condemning MCHS for tolerating a "culture of bullying." [SMF ## 105-108]

Apart from monitoring and disciplinary practices, MCHS administrators and teachers took affirmative steps to promote positive interpersonal relationships among all students. This would include the Teachers As Advisors program and, in 2008, a pilot program to supplement Teachers As Advisors called "Positive Behavioral Interventions and Support" ("PBIS"). Designed to improve overall student behavior, **including peer relationships**, PBIS was implemented at all MCHS grade levels in the fall of 2009.[19] [SMF ## 97-104] The efficacy of MCHS's efforts can be gauged from the annual student survey done as part of the Safe and Drug Free Schools program. This survey asks students whether they feel safe in school and whether they believe they have been bullied (without providing any definition of bullying.) The 2010 survey was administered in fall 2009 shortly **after** Tyler's death and in the midst of Plaintiffs' media campaign. The results for MCHS were within plus or minus three percentage points of the average for all Georgia schools. [SMF ## 119-123]

[18] Defendants have filed separate motions under Daubert challenging both the competency of the Plaintiffs' designated experts as well as the adequacy of the factual basis for their opinions.

[19] PBIS was similarly implemented in all the School District's schools in 2009, including the recently opened North Murray High School.

2. Additional Protection for MCSD Students with Disabilities

Students with disabilities like Tyler Long are entitled to unique services and procedures to insure that they have full access to the educational opportunities offered to their non-disabled peers. The primary mechanism to achieve this goal is the Individual Educational Program ("IEP"), which is developed collaboratively by an IEP "team" composed of school system professionals (and often outside professionals), the student's parents, and where appropriate, the student as well. The team meets at least once annually to review student progress and to plan for the upcoming year. Parents and students like Tyler, however, can ask to meet with their IEP team **at any time** to address **any** concern, including peer mistreatment. If dissatisfied with any IEP decision, parents can challenge it administratively in what is known as a due process hearing. Tyler and his parents actively participated in the development of his IEPs over the years and were aware of their due process hearing rights. Plaintiffs **never requested** a due process hearing to challenge the content of Tyler's IEPs or the appropriateness of the educational services he received **at any time** while he was student in the MCSD. [SMF ## 124-131]

E. Tyler's Educational Experience in the MCSD

1. Elementary and Middle School

Starting in first grade,[20] Tyler began receiving special education services pursuant to the Individuals with Disabilities Act ("IDEA"), specifically speech/language services designed to address the communication-based disorder diagnosed by a private psychologist.[21] Later, in the sixth grade, a psychiatrist evaluated Tyler and made several new and educationally significant diagnoses: (a) ADHD (Attention Deficit Hyperactivity Disorder); (b) ODD (Oppositional Defiant Disorder); (c) Bipolar Disorder; and (d) Asperger's "Disorder." In addition to therapeutic counseling, he prescribed Risperdol. At that same time, a psychologist also diagnosed Tyler as having moderately severe social anxiety disorder. A few months later without any apparent consultation with the psychiatrist, Tyler's pediatrician added Zoloft to Tyler's medication regimen. He also assumed responsibility for monitoring Tyler's Risperdol because the Longs did not continue therapy with either the psychiatrist or psychologist. In light of these diagnoses and its own comprehensive psycho-educational evaluation, the MCSD determined that Tyler was eligible for special education services as "Other Health Impaired" ("OHI"). An

[20] For a comprehensive review of the services Tyler received throughout elementary school, see SMF ## 251-261.
[21] The psychologist completed an evaluation that also diagnosed an adjustment disorder with depression and obsessive compulsive features, as well as "significant disruption in home -- ill brother and father out of the country."

IEP team, including the Longs,[22] drafted an IEP to address "adaptive behavior," including social skills training. Speech and language services were also resumed. [SMF ## 262-278]

In the middle of seventh grade, the Longs claimed that Tyler was being mistreated by students. Even though they rarely identified the students or specific incidents, Tyler's IEP team accepted the Longs' representations[23] and met with them to develop strategies to help Tyler. When the IEP team met later to review Tyler's progress, the Longs indicated that Tyler had had an "**extremely successful**" seventh grade year. Among Tyler's accomplishments, he received the Presidential Award for straight A's and had perfect attendance. [SMF ## 279-291]

Tyler's eighth grade year was essentially trouble free. [24] The Longs did not inform the IEP team, his teachers or his counselor of any unaddressed problems with peer mistreatment. Nor did they request meetings to address other issues. Academically, Tyler continued to do well. His GPA was 91.8 and he was absent only two full days. One sign that the Longs believed that Tyler was doing very well came in the summer before Tyler enrolled at MCHS. Ms. Long decided that Tyler no

[22] One or both of Tyler's parents attended every IEP meeting from 6th grade to the last one in the spring of 10th grade before his death in October of 11th grade.
[23] Of course, the Longs were not present during any of the incidents alleged and were reporting only Tyler's perception of events as he related them to his parents.
[24] At Ms. Long's request, a middle school counselor and one of Tyler's teachers attended a training seminar for teachers on Asperger's during the summer before Tyler began the 8th grade year in fall 2006. [SMF # 292]

longer needed the medications that he had taken throughout middle school—Risperdol and Zoloft.[25] [SMF ## 293-298]

2. <u>Murray County High School</u>

a. Ninth Grade – 2007-2008

All MCHS ninth graders were assigned to the Ninth Grade Academy ("NGA") which was separate from the main campus. Although Linder was the MCHS Principal, Assistant Principal Keith Swilling managed the NGA on a day-to-day basis. Tyler's IEP for ninth grade had been drafted the previous March with the assistance of Marelle Bowers, the lead special education teacher and Tyler's case manager. Bowers met with Tyler's teachers in early August to explain his disability, his IEP and the accommodations he needed. No alteration to Tyler's course content or teaching methodology was necessary. Ms. Long communicated regularly with Bowers in the fall of 2007. In September, Tyler's first and second semester teachers attended an IEP meeting with the Longs. The team met again in October and discussed Tyler's speech/language services (which he no longer needed) and the anxiety associated with his Asperger's. They decided to allow Tyler to leave each class early and, in the mornings, to go to Bowers' classroom rather than assembling

[25] Although Ms. Long testified that withdrawal of Tyler's medication was monitored by the pediatrician, the pediatrician's records do not support that. [SMF # 299] Of course, withdrawal of medication can lead to the return of the symptoms of depression and anxiety that significantly increase the risk of suicide as described in the Defendants' various expert witness reports.

with other students before classes. Based on Ms. Long's subsequent e-mails, she appeared to be pleased with this arrangement. [SMF ## 133-148]

On the subject of Tyler's treatment by his classmates, Ms. Long made several complaints in the first semester of the ninth grade.[26] As MCHS officials understood them, her primary concern was with Coach Archie, Tyler's weight training instructor who she alleged was not adequately supervising Tyler. Although both Bowers and Swilling attempted to resolve this concern, Ms. Long sent an e-mail on November 8, 2008 requesting Linder's intervention. Linder met with Archie that very day and issued a written reprimand the following day "stressing the importance of following IEPs and providing a safe environment for our students." Linder's reprimand also instructed Archie to permit Tyler to "shadow" him during weight lifting class. [SMF ## 152-154] The Longs made no further complaints about Archie. And they reported no peer mistreatment at all during the second semester of ninth grade. [SMF ## 85, 163-186]

Tyler himself made only two reports of mistreatment. In November 2007, he said that some boys in the gym were picking on him. With Bowers's assistance, the counselor resolved the issue by getting Tyler to explain to the boys why he reacted as he did. [SMF ## 149-151]. Tyler did not have any more difficulties with

[26] They are described in SMF ## ¶¶ 139, 143, 158. The responses of Swilling and Bowers to these reports are described in SMF ## 140-142, 144.

those students. Finally, in March 2008, Tyler reported that T.M. was sexually harassing him. Swilling met with Tyler and T.M. separately to hear their versions of what had happened. MCHS records reflect that Swilling "warned [T.M] to stop or severe consequences" would be imposed. Again, this approach was apparently effective because neither Tyler nor the Longs complained about any subsequent problems with T.M. that year. [SMF ## 174-177]

Academically, Tyler's ninth grade year went well. His GPA was 92.63 and he missed only two days of school. [SMF # 184] In Bowers' opinion, Tyler made progress adjusting to the new high school environment. His social anxiety diminished noticeably. [SMF ## 185-186] The Longs agreed as their communications with MCHS officials consistently show. Several examples are worthy of note. On November 26, 2007, the Longs met with Linder and Assistant Principal Jennifer Thomason. According to Ms. Long, the meeting went "extremely well." She was especially pleased about Thomason's familiarity with autism and Asperger's Syndrome. [SMF ## 159-161] In January 2008, the Longs met with Tyler's second semester teachers. Ms. Long e-mailed Bowers that she was pleased with the teachers and their concern for Tyler. [SMF ## 168-169, 171-

172] She singled out Sgt. Gainey, Tyler's JROTC instructor.[27] [SMF # 177] Ms. Long continued to communicate with Bowers during the second semester. [SMF ## 165-167, 170, 173] In none of her e-mails did she mention peer mistreatment of Tyler. Indeed, in March 2008, Ms. Long wrote, "[Tyler] has been happier than I have seen him in a long time" and that she had "been coming down hard on him because of his grades," which were "actually ok, but he doesn't study." She concluded, "**we have never seen him smile as much as he is at present. Compared…he has had a great year.**" (Emphasis added). [SMF ## 171-172]

At the end of the ninth grade, Tyler's IEP team met to plan Tyler's transition to the MCHS main campus. The team decided that Kevin Tackett, lead special education teacher at MCHS, would be Tyler's case manager and that to minimize Tyler's anxiety, the accommodations used in the 9th grade would continue. The minutes of this meeting reflect no discussion about peer mistreatment of Tyler or "bullying." The Longs did not object to any of the decisions made at the IEP meeting. Nor did they request a due process hearing under the IDEA. [SMF ## 179-183]

The school year concluded with this e-mail from Ms. Long to Linder:

[27] Tyler participated in JROTC activities with Sgt. Gainey in 10th and 11th grades, including at least one summer camp, when he was not the primary instructor as he was in 9th grade. Gainey testified that he never witnessed anyone "bullying" Tyler and that Tyler never reported that he was being "bullied." [SMF # 178]

> **You have given us the help that we have needed. I can't believe the wonderful faculty that we have encountered this year.** I hope that when Tyler graduates, we will all have a great success story to share with others. I know that we may need your help and support in the next few years, but I have no doubt that we can depend on you.
> Please thank all of Tyler's teachers for me. Please feel free to share our feelings. **Everyone needs praise for a job well done. Tyler had a very rough time in middle school. We struggled and had to fight for so much. How easy you made it for him to grow.**

(Emphasis added). [SMF ## 87, 177] Needless to say, Linder had good reason to believe that Tyler had adjusted well to the ninth grade and that her staff had conscientiously and competently helped him achieve that goal.

b. Tenth Grade – 2008-2009

Tyler's transition to tenth grade was relatively smooth. Though he was involved in some minor incidents, MCHS teachers and administrators responded to all and **none** of the students involved ever bothered Tyler again.[28] One other incident warrants discussion as it figures prominently in Plaintiffs' Amended Complaint.

On September 8, 2008, Tyler reported to Assistant Principal Thornbury that J.B. and B.M. pushed him on the cafeteria stairs and punched him. Thornbury took written statements from Tyler, J.B., B.M., and J.M., a witness to the incident.

[28] These incidents include (1) "horseplay" with a friend in the hall during which the boy kicked him, [SMF 219-223] (2) excessive talking in class to other students who responded in kind, [SMF ## 210-214] (3) a student was "unkind" to Tyler in Spanish class when he refused to work with Tyler, [SMF ## 215-218] (4) another friend hit Tyler's fingers because Tyler was sleeping in class, [SMF ## 224-233] and (5) Tyler's report to his counselor about T.M.'s conduct which she understood referred to the incident in ninth grade. [SMF ## 190-194]

According to J.B., Tyler initiated the altercation by calling B.M., who was J.B.'s girlfriend, a "pregnant bitch." Thornbury explained that name-calling was not justification for the physical encounter with Tyler. Accordingly, he charged J.B. and B.M with the Student Code violation of "bullying" and assigned them to In-School Suspension ("ISS") for five days. Tyler was not disciplined. Because of FERPA, Thornbury could not release this information to the Longs.[29] Ms. Long apparently assumed that J.B. and B.M. were not disciplined. She insisted that the school press criminal charges. The SRO refused but did tell her how to file a criminal complaint. The Longs pressed criminal charges against both students.[30] This was J.B.'s only disciplinary infraction in his four years at MCHS. The Longs admit that he never bothered Tyler again. B.M.'s records reveal no further reports of mistreatment of Tyler or any other student. Despite the Longs' insistence that B.M. continued to harass Tyler, they did not report this to MCHS officials and when deposed could not describe what B.M. is supposed to have done. [SMF ## 195-208]

Similarly, when Tyler told his counselor in December 2008 that he was picked on daily but was "used to it" and "had been putting up with it for years," he was unable to identify the students bothering him or describe what they did. He

[29] Ms. Long was not the only parent upset about this incident. Thornbury also had to respond to B.M.'s mother who called and wrote him a note strenuously complaining about the assignment of B.M. to ISS when, in her view, Tyler initiated the altercation and was not disciplined for it. [SMF # 201]

[30] At the magistrate hearing, the Longs agreed not to pursue the charges against J.B. [SMF # 208] Because B.M. was a juvenile, neither the Longs nor the school district are aware of the disposition of the accusation against her.

complained that B.M. and T.M. were not supposed to talk to him. [31] Eventually, Tyler explained they were not actually talking to him, but were only "looking" at him.[32] [SMF ## 228-231] In Bowers' opinion, Tyler's inability to articulate who or what was bothering him was more reflective of his difficulty understanding social cues than it was an accurate account about the behavior of his peers. [SMF # 186]

Apart from the J.B. and B.M. incident, the Longs had limited communication with MCHS teachers and administrators during the balance of the school year. One notable communication was with Tyler's case manager in March 2009. Ms. Long reported that Tyler was "stressing" and failing AP History. In a separate but related e-mail to the AP History teacher, Ms. Long explained that "Tyler has Asperger's Syndrome (a form of autism). **(He doesn't like for his teachers to know). He has an IEP, which I try not to use.**" [Emphasis added.] She also mentioned that Tyler "is grounded from everything he holds dear until I see his grade come up." The teacher knew about Tyler's autism yet expressed confidence Tyler could meet the challenge. Tyler's final AP History grade was 95. [SMF ## 235-240]

At the spring 2009 meeting to plan for 11th grade, Tyler's IEP team, including Ms. Long, decided to continue his tenth grade accommodations if Tyler wanted or

[31] B.M. and T.M are siblings. The Longs admitted that there was hostility between their family and the M. family, stemming from youth sports teams that Mr. Long coached. That hostility apparently spilled over to the children. [SMF # 209]

[32] This conversation occurred in connection with the report that Tyler's friend had aggravated him as he slept in Spanish class. It should also be noted that the counselor learned that there was no court order prohibiting the two students from talking to Tyler but nevertheless she instructed them to stay away from Tyler. [SMF # 232]

needed them. During the tenth grade, Tyler left class only twice because of anxiety. Most of the discussion centered on Tyler's career and college choices and the possibility of dual enrollment at Dalton State College for Tyler's senior year. Neither Tyler nor Ms. Long expressed concern about peer mistreatment. Mr. Tackett would remain case manager. [SMF ## 243-245]

Ms. Long's upbeat email to Phillip Greeson in March 2009 (quoted previously) not only captured the outlook of everyone involved with Tyler at MCHS but apparently the Longs as well. As she said of MCHS**, "my kids are right where they should be."**[33] [SMF ## 241-242] Tyler's academic performance bore this optimism out. Tyler finished the tenth grade strongly earning a GPA of 91.44, missing only one day of class. He rose to the rank of Master Sergeant in JROTC. Outside of school, Tyler worked part time at Captain D's. During the summer before eleventh grade, he began preparing to test for the black belt in karate. [SMF ## 27, 246-247]

Standard of Review

Rule 56(a) of the Federal Rules of Civil Procedure permits the entry of summary judgment "if the movant shows that there is no genuine dispute as to any material fact and that the [defendant] is entitled to judgment as a matter of law." Because the Plaintiff, the non-movant, will bear the burden of proof at trial,

[33] See supra. at pages 6-7 for the entire contents of the message.

Defendants in this motion need to show the Court only that there is an absence of evidence to support the Plaintiff's case -- that is, the evidence is insufficient to establish an essential element of the Plaintiff's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Once the moving party discharges its burden of identifying the basis of its contention of a right to judgment as a matter of law, the nonmoving party must present specific evidence of a material issue of fact or that the moving party is not otherwise entitled to judgment as a matter of law. 477 U.S. at 324-326. The Eleventh Circuit has also stated that the district court "need not permit a case to go to a jury, however, when the inferences that are drawn from the evidence, and upon which the non-movant relies, are 'implausible.'" Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 743 (11th Cir. 1996). Indeed, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 322.

ARGUMENT AND CITATION OF AUTHORITY

I. Introduction

Defendants will first address the Plaintiffs' case for **individual liability** against Linder and then discuss **entity liability** against the MCSD. As will be demonstrated,

not only is the Plaintiffs' case against Linder fatally deficient under § 1983,[34] those factual deficiencies illuminate and support MCSD's motion for summary judgment under (a) 42 U.S.C. § 1983 and (b) § 504 and the ADA.

II. §1983 Claim Against Defendant Linder

A. No Evidence of a Violation of Tyler's Constitutional Rights[35]

1. Substantive Due Process

a. No Intent to Harm on Part of Defendant Linder

The substantive due process component of the Fourteenth Amendment prohibits official conduct so aggravated that it "shocks the conscience." County of Sacramento v. Lewis, 523 U.S. 833 (1998). In a case arising from a player's death during football practice, the Eleventh Circuit distinguished this standard from the less rigorous but still heightened "deliberate indifference" standard. To establish a denial of substantive due process, a § 1983 plaintiff must have evidence of conduct "'**intended to injure** in some way unjustifiable by any government interest.'" Davis v. Carter, 555 F.3d 979, 982 (11th Cir. 2009)(quoting Lewis, 523 U.S. at 849)(emphasis added).

[34] Defendant Linder cannot be held liable in her individual capacity under § 504 or the ADA. See infra. at n. 48.

[35] Instead of deciding whether a constitutional right was violated, this Court may, but is not required to, proceed directly to the issue of whether the constitutional right in question is "clearly established." Pearson v. Callahan, 555 U.S. 223 (2009), overturning Saucier v. Katz, 533 U.S. 194, 201 (2001).

Despite its overblown language, Plaintiffs' complaint does **not** allege that Linder acted with the "intent to injure" Tyler Long. More important, Plaintiffs do not have a shred of evidence to that effect. They use the term "bullying" loosely to apply to a wide range of sometimes unpleasant student-on-student conduct, **none** of which would rise to the level of a constitutional violation even if perpetrated by a state actor, which a public school student clearly is not. Stripping the Plaintiffs' allegations of hearsay and rumor, one proposition is clear: None of the alleged acts of mistreatment reflects the intent to injure required under Lewis. Not on the part of any student. Not on the part of any MCHS administrator or teacher. See Dacosta v. Nwachukwa, 304 F.3d 1045 (11th Cir. 2002)(teacher's **intentional** battery not substantive due process violation).[36]

Understandably wary of the Lewis decision, Plaintiffs appear to rely on two theories of § 1983 liability derived from DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989): (a) an affirmative duty to protect based on Tyler's status as a student; and (b) the state created danger theory. As will be seen, both theories have been rejected by the Eleventh Circuit.

[36] See also T.W. v. Sch. Bd. of Seminole County, 610 F.3d 588 (11th Cir. 2010)(teacher's use of force, including tripping student and physical restraint, not substantive due process violation).

b. Affirmative Duty to Protect Theory Inapplicable

Plaintiffs contend that Linder had an affirmative duty to protect Tyler from mistreatment by other students and to protect him from committing suicide.[37] While the Court in DeShaney acknowledged this duty in favor of persons in state custody, only three classes of persons are entitled to such protection: (a) prisoners, Estelle v. Gamble, 429 U.S. 97 (1976); (b) arrestees, City of Revere v. Mass. Gen. Hosp., 463 U.S. 239 (1983); and (c) persons involuntarily committed to mental institutions, Youngberg v. Romeo, 457 U.S. 307 (1982).

Several circuit courts, including the Eleventh Circuit, have addressed the affirmative duty issue in the public school setting. They have consistently held that public school students subject to compulsory attendance laws are **not** in state custody, and thus, a school system does **not** have an affirmative duty to protect against **privately inflicted harm**. Wyke v. Polk County Sch. Bd., 129 F.3d 560, 568 (11th Cir. 1997).[38] Nor do compulsory attendance laws create a "special relationship" between public school students and a school system that somehow gives rise to such an affirmative duty. Graham v. Indep. Sch. Dist., 22 F.3d 991 (10th Cir. 1994). According to one Eleventh Circuit decision, a duty does not arise even when a

[37] They assert that Defendants acted with deliberate indifference to this duty. See Amended Complaint ¶¶ 10, 20, 34.
[38] See also Priester v. Lowndes County, 354 F.3d 414 (5th Cir. 2004)(no duty to protect high school football player from racially motivated violence of another player); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir.1990); but see Doe v. Covington County Sch. Dist., 649 F.3d 335 (5th Cir. 2011), reh'g en banc granted, 659 F.3d 358 (2011).

student is disabled and, at least arguably, has a limited capacity for self protection. Worthington v. Elmore County Bd. of Educ., 160 Fed. Appx. 877 (11th Cir. 2005).[39]

Finally, at least three circuit courts, including the Eleventh Circuit, have considered the affirmative duty issue in the context of a student suicide. Each concluded that public schools do **not** have a duty to protect students from self-inflicted harm, including suicide. See Wyke v. Polk County Sch. Bd., 129 F.3d 560, 568 (11th Cir. 1997); Hasenfus v. LaJeunesse, 175 F.3d. 68 (1st Cir. 1999); Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701 (7th Cir. 2002). As the court in Hasenfus emphasized:

> [T]he due process clause is not a surrogate for local tort law or state statutory and administrative remedies. The federal courts have no general authority to decide when school administrators should introduce suicide prevention programs, or whether an unruly or upset school child should be sent out of class…. Substantive due process is not a license for judges to supersede the decisions of local officials and elected legislators on such matters.

175 F.3d. at 74.

c. State Created Danger Theory Not Recognized in 11th Circuit

Language in DeShaney has been read to suggest that a duty to protect might arise when the state, by its affirmative acts, creates the danger that makes the plaintiff

[39] See also Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999)(no duty to protect disabled student from sexual assault by student with intellectual disabilities); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir.1993)(same and specifically rejecting argument that student's disability affected analysis); D.R. v. Middle Bucks Area Voc. Tech. Sch., 972 F.2d 1364 (3d Cir.1992)(no duty to protect disabled student from sexual assault by other students).

more vulnerable to harm. DeShaney, 489 U.S. at 199-201. Plaintiffs cannot invoke the state created danger theory for two reasons. First, the Eleventh Circuit has rejected the theory.[40] Explicitly overruling Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), the court in White v. Lemacks, 183 F.3d 1253, 1259 (11th Cir. 1999), rejected the constitutional claim of nurses who argued that they were in special danger when assigned to a jail to care for violent inmates who brutally assaulted them. The court held that the "special relationship" and "special danger" doctrines applied in Cornelius "are no longer good law…."

Second, as will be discussed below, even if the state created danger theory were applicable, thus creating an affirmative duty, Linder would still be entitled to summary judgment.

d. Even assuming an affirmative duty to protect Tyler Long from harm, Plaintiffs have no evidence of a constitutional violation.

In the limited circumstances where courts have recognized an affirmative duty to protect against private harm, the standard of culpability is demanding. For example, in cases of harm inflicted by inmates in jails and prisons, Farmer v. Brennan, 511 U.S. 825 (1994), in prison suicide cases, Gish v. Thomas, 516 F.3d 952

[40] Two circuit courts have discussed the potential applicability of the state created danger theory in student suicide cases. Sanford v. Stiles, 456 F.3d 298 (3rd Cir. 2006)(granting summary judgment to school counselor, noting that case was more about the failure to "prevent" suicide rather than affirmative creation of suicide risk); Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253 (10th Cir. 1998)(denying summary judgment where a special education student was suspended from school and driven home while still upset. School officials were aware: (a) parents were not at home; (2) student had access to guns; and (3) student had made recent suicide threats).

(11th Cir. 2008),[41] and in foster care settings, Ray v. Foltz, 370 F.3d 1079 (11th Cir. 2004), summary judgment is granted unless there is evidence that a state actor had (a) **subjective knowledge** of a risk of **serious harm** and (b) **deliberately disregarded that risk**. Plaintiffs cannot satisfy that standard here.

Linder and her subordinates consistently addressed all of Plaintiffs' concerns about Tyler's education and treatment at MCHS. Whenever they believed that Tyler was the target of student mistreatment or had academic issues, the Longs were not timid. [SMP # 39] Over the eleven years Tyler was a MCSD student, they made their views known – often quite bluntly – to teachers, IEP teams and school administrators such as Linder. In every instance at MCHS where Tyler was allegedly mistreated or had a dispute with another student, the school's intervention was conscientious and effective; the students involved did not bother Tyler again. Neither Linder nor her subordinates had any information that Tyler was potentially suicidal, **particularly in the fall of 2009 when Plaintiffs had a specific concern about suicide and took Tyler to a psychologist because of that very concern**. Moreover, even after Tyler's September 25, 2009 session with the psychologist, Plaintiffs still did not alert Linder or her staff to be especially watchful. During Tyler's critical final two weeks, Mr. Long described his son's mental decline: "He wasn't there. He was a hollow person."

[41] See also Fowler v. Chattooga County, Ga., 307 Fed. Appx. 363 (11th Cir. 2009)(affirming this Court's order granting summary judgment in a prison suicide case on grounds evidence established subjective knowledge of, at best, "mere possibility" of suicide).

Yet Plaintiffs failed to take Tyler back to the psychologist for his follow-up appointment just days before he died and continued to fail to notify anyone, including Linder, of the growing concern. How can they now blame Linder (or the MCSD) for Tyler's suicide on these facts? Indeed, based on the communications from Plaintiffs throughout 2009, Linder had good reason to believe that MCHS was doing an effective job educating and protecting Tyler.

This analysis also disposes of Plaintiffs' attempt to package this as a failure to supervise case. Amended Complaint ¶¶ 35, 37. Plaintiffs do not allege that any MCHS teacher or administrator actually inflicted constitutional harm on Tyler Long. The alleged harm was inflicted by Tyler's classmates. Thus, **assuming** that Linder had a duty to protect Tyler against such harm, Plaintiffs' case is premised on her alleged failure to supervise her subordinates who, in turn, failed to supervise their students. No matter how Plaintiffs' evidence is viewed, Linder is still entitled to summary judgment.

The Eleventh Circuit has characterized the standard for supervisory liability in §1983 cases as "extremely rigorous." See Mercado v. City of Orlando, 407 F.3d 1152, 1158 (11th Cir. 2005). Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003); Gonzalez v. Reno, 325 F.3d 1228, 1234 (11th Cir. 2003). In Dalrymple v. Reno, the Court elaborated:

> Supervisory liability "occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional violation." Id. at 802 [other citations omitted]. A causal connection can be established "when a **history of widespread abuse** puts the responsible supervisor on **notice** of the need to correct the alleged deprivation and he fails to do so," id., [[or when the supervisor's]] improper "custom or policy . . . resulted in deliberate indifference to constitutional rights," Rivas v. Freeman, 940 F.2d 1491, 1495 (11th Cir. 1991). A causal connection can also be established by facts which support an inference that the supervisor directed the subordinates to act unlawfully or **knew that the subordinates would act unlawfully and failed to stop them from doing so**.

334 F.3d 991, 995-96 (11th Cir. 2003)(emphasis added). In short, this requires proof that Linder (a) was subjectively aware of constitutional violations on the part of her subordinates and (b) was deliberately indifferent to the risk that those violations would continue.[42] See Maldonado v. Snead, 168 Fed. Appx. 373 (11th Cir. 2006). For reasons already discussed in detail, Plaintiffs have no evidence that even remotely supports their supervisory liability theory of recovery.

No doubt Plaintiffs will point to nine student witnesses recruited by the Plaintiffs after Tyler's death. All were aware that Plaintiffs had filed the present

[42] The Eleventh Circuit has addressed supervisory liability in two § 1983 cases involving alleged sexual abuse of a student by a teacher. See Hartley v. Parnell, 193 F.3d 1263, 1269 (11th Cir. 1999)("widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences."); Dale v. White County Sch. Dist., 238 Fed. Appx. 481 (11th Cir. 2007)(supervisory liability standard under § 1983 same as for entity liability under Title IX). See Section III. B. of this Brief, infra, at p. 44.

lawsuit and needed testimony to confirm their preexisting public narrative. Ms. Long did not tape record or make notes of her conversations with these students and when deposed, she remembered little about what they said.[43] These students testified in general terms that Tyler was "bullied" regularly in the halls and cafeteria. Recall that the halls and cafeteria at MCHS were monitored continuously by video cameras as well as by teachers and administrators. Only two of these students claim to have reported the mistreatment of Tyler and both reported to a teacher instead of an administrator. One could not even name the teacher she told. Curiously, none of these students described bullying involving anyone besides Tyler. Their conclusory testimony – calibrated to minimize contradiction – simply does not show that Linder or her staff had **subjective knowledge** of any mistreatment of Tyler, much less constant or relentless mistreatment. Viewing this testimony most favorably to the Plaintiffs, it is insufficient to support a finding of negligence, deliberate indifference or intent to harm by anyone, including Linder.

B. Equal Protection

Plaintiffs' equal protection claim is difficult to understand. Tyler was not a member of a suspect class, entitled to heightened protection under the Fourteenth Amendment. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). Under

[43] In many cases, the students did not come forward to provide evidence at all or their testimony bore little relationship to what Plaintiffs alleged in the Complaint and claimed at their depositions.

both federal and state law, **because of his disabilities**, he was a member of a class that receives special educational services at public expense. In short, rather than being a victim of discrimination, Tyler was a member of a favored class. When he was a student at MCHS, there were from 143 to 250 such students at MCHS. In addition, the MCSD enforced a Student Code of Conduct that protected all students, including students with disabilities, against mistreatment or abuse. This obligation was taken seriously at MCHS as reflected in the school's implementation of the PBIS program involving both teachers and students and the extensive system of video and human monitoring of student conduct each school day. This seriousness is also reflected in the MCHS disciplinary records for 2007-2009. They provide a detailed account of the day to day enforcement of the Student Code and directly repudiate the "culture of bullying" argument which is central to their equal protection theory.[44]

For the foregoing reasons, Linder is entitled to summary judgment on Counts I and II of the Complaint.

C. Qualified Immunity

Even if Plaintiffs could attribute a constitutional violation to Linder, they cannot show that her actions violated clearly established constitutional law on or before October 17, 2009. The absence of an affirmative constitutional duty to protect

[44] Plaintiffs asked for these records in discovery, obtained an order from this Court to produce them, but chose not to obtain them for reasons of cost. They are among the many pertinent records that Plaintiffs' experts did not review or independently request.

students from private harm as discussed above is dispositive of her entitlement to qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800 (1982); Doe v. Sch. Bd. of Broward County, 604 F.3d 1248 (11th Cir. 2010)(granting qualified immunity to principal in teacher-on-student sexual harassment case)

III. Governmental Liability Claims Against MCSD Under 42 U.S.C. § 1983 or § 504 of Rehabilitation Act and the Americans with Disabilities Act

A. MCSD Liability Under Section 1983

As previously discussed, Plaintiffs cannot establish the first element of a § 1983 claim—the violation of a constitutional right. Proving that such a violation occurred is a legal prerequisite to the imposition of liability against the MCSD. City of Los Angeles v. Heller, 475 U.S. 796 (1986); Wyke, 129 F.3d at 569 (before addressing failure to train employees question, court "must first determine whether those employees violated any of Wyke's constitutional rights. . . "). Summary judgment in favor of MCSD should be granted on that basis alone.

However, even if Plaintiffs had colorable evidence that someone at MCHS violated Tyler Long's constitutional rights, they would still need to establish that the alleged violation is directly attributable to a policy, practice or custom of the MCSD. Under § 1983, governmental liability cannot be established based on respondeat superior. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Collins v. City of

Harker Heights, 503 U.S. 115, 120 (1992). Plaintiffs must have affirmative proof that a final policy maker such as the superintendent or the Board of Education acted with **deliberate indifference** to the violation of constitutional rights by making **conscious policy choices** that caused the violations. Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 405 (1997); City of Canton v. Harris, 489 U.S. 378, 389 (1989). Plaintiffs cannot meet this exacting standard.

First, Plaintiffs do not assert and have not shown that any of MCSD's policies or practices are facially unconstitutional. Indeed, Plaintiffs have not shown or even attempted to show that the MCSD's policies and practices are deficient in comparison to policies and practices adopted by other school districts in Georgia or in school districts nationally.

Second, in the absence of a facially unconstitutional policy or practice, Plaintiffs must establish that the MCSD implemented an official policy or practice with deliberate indifference to the known or obvious consequence that constitutional violations would result. In McDowell v. Brown, 392 F.3d 1283, 1291 (11th Cir. 2004), the Eleventh Circuit cautioned that "**rigorous standards of culpability and causation must be applied** to ensure that the municipality is not held liable **solely** for the actions of its employee." (quoting Bd. of the County Comm'rs v. Brown, supra at 405). "A '**showing of simple or even heightened negligence is not enough**.'"

McDowell, supra at 1291 (internal citations omitted)(emphasis added). Plaintiffs have no evidence that the policies and practices in force at MCHS constitute deliberate indifference by the MCSD to a known or obvious risk that they could cause a student to commit suicide, much less restrict access to the educational opportunities of any student including Tyler Long. Only the Plaintiffs had any reason to believe that Tyler might be suicidal and they told no one about (a) this concern or (b) any problems he was having at school – not the psychologist asked to evaluate Tyler two weeks before his death, not Linder nor anyone else at MCHS.

Third, if the culture of bullying narrative had any substance, why did Plaintiffs fail to review thousands of student discipline records from the 2007-2009 school years which show that MCHS officials investigated and responded to violations of the Student Code of Conduct? An objective review of these records reveals that MCHS regularly took disciplinary action in circumstances that are consistent with any reasonable definition of bullying that the Plaintiffs might embrace.[45]

Fourth, as pointed out earlier, Plaintiffs cannot show that student misconduct at MCHS deviated in any material respect from general patterns of misconduct at other high schools in Georgia or throughout the nation. If Plaintiffs' sordid characterizations about MCHS were true, one would expect it to be conspicuously worse than other high schools annually surveyed about student safety. It is not.

[45] See Rule 26 Report of Christopher B. Erwin, Ed.S., Doc. # 86-1 at 9.

Fifth, oddly in a case asserting governmental liability under § 1983, Plaintiffs did not depose any member of the Murray County Board of Education or the Superintendent of the MCSD. Despite having taken a Rule 30(b)(6) deposition of the School District, Plaintiffs literally have no evidence about the institutional knowledge of MCSD, the governmental entity supposedly responsible for violating Tyler Long's constitutional rights. In the absence of evidence showing the risks the MCSD knew about, the risks it ignored and the conscious choices it made, Plaintiffs' Monell claim collapses.

Although Plaintiffs assert a failure to train claim, it is not an alternative basis for Monell liability. It fails for all of the reasons just enumerated, the most basic of which is the lack of proof of an underlying constitutional violation. See Collins v. City of Harker Heights, supra More telling still is the shallowness of this argument, which is essentially that the MCSD just did not do enough regarding "bullying," harassment, and the treatment of students with disabilities, including students with Asperger's or autism spectrum disorders. Yet, Plaintiffs have offered no evidence, including competent expert testimony, describing the training programs or training curricula needed to satisfy the minimum requirements of the Constitution. Nor have they shown or attempted to show the training given in other high schools in Georgia or around the nation; or attempted to explain how such training would remedy

educational deficiencies at MCHS during the years Tyler was a student.[46] Finally, Plaintiffs are wholly dismissive of the knowledge and professional experience of MCHS teachers and administrators, who **collectively** had significant expertise in the management of adolescent behavior about which the Plaintiffs are now so critical. Plaintiffs' heated rhetoric about the MCHS training deficiencies collides with an inescapable fact. By any objective measure, the MCHS was the one place in Tyler's life where he was doing well as his parents repeatedly acknowledged in various e-mails and correspondence.

B. § 504 and Americans with Disabilities Act Claims

Section 504 and the ADA are modeled after Title IX of the Education Act Amendments of 1972, 20 U.S.C. § 1681. Like Title IX, to recover damages under § 504 or the ADA, the Eleventh Circuit requires proof that the defendant acted with the **intent** to discriminate on the basis of disability. Wood v. President & Trs. of Spring Hill Coll., 978 F.2d 1214, 1219 (11th Cir.1992).[47]

[46] In Gold v. City of Miami, 151 F.3d 1346 (11th Cir. 1998), the Eleventh Circuit held that a governmental entity's failure to train must result from a "conscious" choice among alternatives. Id. at 1350-51. Then, and only then, can the failure to train support the dual inference that (a) a governmental policy, practice or custom existed and (b) it reflected deliberate indifference to a known risk. Id. In cases like the present one, this evidentiary void represents an insurmountable barrier to Monell liability. See also West v. Tillman, 496 F.3d 1321 (11th Cir. 2007); Gray v. Bostic, 458 F.3d 1295 (11th Cir. 2006).

[47] See also T.W. v. Sch. Bd. of Seminole County, 610 F.3d 588, 603 (11th Cir. 2010)(requiring in ADA case proof of intent to discriminate on basis of disability).

Plaintiffs do not allege that the MCSD or a particular employee such as Linder **intentionally** discriminated against Tyler on the basis of his disability.[48] Rather Plaintiffs claim that Tyler was subjected to **intentional** mistreatment by other students because he was disabled; this caused him to commit suicide and the MCSD did not do enough to protect him. In short, this case is analogous to peer-on-peer sexual harassment claims under Title IX. For the purpose of this motion only, Defendants assume that case law and reasoning governing Title IX peer-on-peer sexual harassment claims applies to causes action under § 504 and the ADA.

In Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992), the Supreme Court recognized an implied cause of action for monetary damages under Title IX against educational institutions receiving federal funds. In Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998), a case involving **teacher/student** sexual harassment, the Court articulated the standard of liability. To prevail, the plaintiff must establish that an official with authority to institute corrective measures (a) had **actual notice** of the teacher's misconduct and (b) was **deliberately indifferent** in responding to it. The Court made clear that a school district, such as MCSD, could **not** be liable under Title IX for teacher misconduct based solely on

[48] Neither of these claims may be brought against Defendant Linder in her personal capacity. See Hartley v. Parnell, 193 F.3d 1263 (11th Cir. 1999)(Title IX, and presumably by analogy, § 504) and Shotz v. City of Plantation, 344 F. 3d 1161, 1170, n. 12 (11th Cir. 2003)(remedies available under Title VI applicable to violations of Title II of ADA); Grzan v. Charter Hosp. of Nw. Ind., 104 F.3d 116 (7th Cir. 1997); Whitfield v. Notre Dame Middle Sch., 412 Fed. Appx. 517 (3rd Cir. 2011)(Title VI).

respondeat superior liability or constructive notice. Id. at 285. In Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999), the Court addressed an issue left open in Gebser: Title IX liability for **peer-on-peer** sexual harassment. Extending Gebser's rationale to those facts, the Court in Davis reasoned that the plaintiff had to prove "actual notice" of the **peer-on-peer** sexual harassment to which an official[49] responded with "deliberate indifference." To bolster its holding, the Court in both Gebser and Davis explicitly looked to the governmental liability standard in § 1983 cases such as City of Canton v. Harris and Bd. of the County Comm'rs v. Brown discussed in the previous section above. Gebser, supra. at 290-291; Davis, supra. at 642.

As the Eleventh Circuit has correctly recognized, the Supreme Court in Davis imposed a "**more rigorous** standard when a Title IX plaintiff seeks damages against a school district for **student-on-student** harassment." Sauls v. Pierce County Sch. Dist., 399 F.3d 1279, 1284 (11th Cir. 2005)(emphasis added). To be actionable, the harassment must be "so severe, pervasive, and objectively offensive that it can be said **to deprive the victims of access to the educational opportunities or benefits provided by the school**." Davis, 526 U.S. at 650(emphasis added). In other words,

[49] The Eleventh Circuit has held that for purposes of teacher-on-student sexual harassment under Title IX, notice to a school principal would be sufficient. Doe v. Sch. Bd. of Broward County, 604 F.3d 1248 (11th Cir. 2010). Although the Court has not yet addressed this issue in a disability harassment case, Defendants assume for the purpose of this motion that the same rule would apply here. Thus, the issue is whether Linder had actual notice of student-on-student disability harassment.

the discriminatory intent of the student is not automatically imputed to the school district. The test is actual notice of the severity of the harassment and the extent of the educational deprivation suffered. Defendants assume that the Eleventh Circuit will extend the Davis rationale to peer-on-peer disability harassment under § 504 and the ADA as at least one other circuit has. See S.S. v. E. Ky. Univ., 532 F.3d 445 (6th Cir. 2008).

Since 1999, circuit courts, including the Eleventh, have applied the Davis standard in Title IX peer-on-peer cases with varying facts.[50] The language the court uses to explain the standard in Hawkins v. Sarasota County Sch. Bd., 322 F.3d 1279 (11th Cir. 2003)—a Title IX sexual harassment case—is particularly relevant here. The case involved the conduct of an eight-year-old boy directed at girls in his class. It included extremely vulgar, sexually related taunting, chasing the girls and touching them on the chest and trying to kiss them, grabbing them and trying to look up their dresses and jumping onto them and rubbing his body against them. This conduct occurred over several months. While the court assumed the behavior was severe, pervasive and objectively offensive, it held that "it was not *so* severe, pervasive, and objectively offensive that it had the systemic effect of denying the girls equal access

[50] See e.g. Watkins v. La Marque Indep. Sch. Dist., 308 Fed. Appx. 781 (5th Cir. 2009)(student exposing himself, kissing plaintiff and lifting skirt not so severe, pervasive and objectively offensive to deprive plaintiff of access to education); Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163, 315 F.3d 817 (7th Cir. 2003) (male kindergarten student openly fondling himself and placing hand in pants of several students not sufficient for Title IX claim).

to education." Hawkins, 322 F.3d at 1288 (italics in original). In so holding, the court explained, "[d]amages are not available for simple acts of teasing and mere name-calling among school children[,] **even where these comments target differences in gender.**" Id at 1288 (emphasis added). "[T]he real world of school discipline is a **rough-and-tumble place where students practice newly learned vulgarities, erupt with anger, tease and embarrass each other, share offensive notes, flirt, push and shove in the halls, grab and offend.**" Id. (emphasis added). The girls' grades did not suffer and their teachers did not observe changes in their demeanor or classroom participation. The court concluded that plaintiffs had not been deprived of educational opportunity, a necessary element of a Title IX claim. See also C.C. v. Bartow County Sch. Dist., 418 Fed. Appx. 826 (11th Cir. 2011)(summarily affirming this Court's decision that any harassment by male high school wrestler's teammates did not deprive him of educational opportunities or benefits of wrestling on team).

If Tyler Long were alive today, Plaintiffs would not have enough evidence to state a claim under § 504 or the ADA.[51] Neither Linder nor any other teacher or

[51] The present case should be compared to Doe v. Big Walnut Local Sch Dist. Bd. of Educ., 2011 WL 3204686, *2-6 (S.D. Ohio, July 27, 2011), where the court **rejected** similar claims under § 1983 and the ADA to those asserted by the Longs: substantive due process, state created danger and affirmative duty. The student in Doe suffered an extended series of abusive acts at the hands of fellow students – some repeat abusers – to which the school consistently but sometimes ineffectively responded. Tyler Long's experience at MCHS in contrast was very mild and the school's response was consistently effective. Doe illustrates the hurdle facing plaintiffs in peer-on-peer harassment cases. See also S.S. v. E. Ky. Univ., supra., affirming summary judgment for the university and relied on by the court in Doe. In S.S. the Sixth Circuit applied the Title IX deliberate indifference standard set forth in Davis to § 504 and ADA peer-on-

administrator had notice of any actionable mistreatment of Tyler under current case law. First, there is no evidence that Tyler's fellow students ever mistreated him (or any other student for that matter) **because of disability**. Second, for all the reasons discussed above related to the § 1983 claim, Plaintiffs cannot meet the "actual notice" and "deliberate indifference" standard. But even more importantly, Plaintiffs have no evidence that anything Tyler experienced at MCHS **deprived him of access to the educational opportunities or benefits provided by the school**. As has been noted repeatedly, his academic performance was impressive; his attendance was excellent; and his participation in JROTC was successful. A school cannot be the guarantor of each student's emotional well being. The only thing a school is required to and can do is give each student reasonable and equal access to the educational opportunities and benefits that it has to offer. MCHS teachers and administrators did that for Tyler Long – conscientiously, competently and, one might say, admirably. They do not deserve the vitriol that the Plaintiffs have directed at them since October 17, 2009. Plaintiffs' public narrative is far different from the truth as the record in this case establishes.

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peer harassment claims: "actual knowledge" of harassment "that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." Id. at 650.

CONCLUSION

Plaintiffs have failed to come anywhere close to presenting evidence sufficient to meet the rigorous standard of culpability required for proof of the constitutional or statutory claims they assert. Defendants are entitled to summary judgment on those claims for that reason alone. Of course, to prevail on their wrongful death claim, Plaintiffs would also have to present evidence that the Defendants' conduct **caused** Tyler to commit suicide. In this regard, Plaintiffs have offered the opinions of two alleged "expert" witnesses who are not qualified to offer expert testimony on the causes of suicide and whose opinions are entirely unreliable. These opinions are the subject of Daubert motions previously filed in this case. If those motions are granted, Plaintiffs have no competent evidence of causation and their wrongful death claim fails for that independent reason as well.

Respectfully submitted this 20th day of December, 2011.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

DAVID and TINA LONG, individually, and as Natural Parents of TYLER LEE Long, Deceased,	)	
Plaintiffs,	)	CIVIL ACTION NO.: 4:10-CV-00015-HLM
v.	)	
MURRAY COUNTY SCHOOL DISTRICT, and GINA LINDER, etc.,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2011, I electronically filed the *Brief in Support of Motion for Summary Judgment on Behalf of Defendants Gina Linder and Murray County School District* with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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