


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

JOHN DOE,	:	NO. 4:22-cv-01387-MWB
Plaintiff	:	
	:	
v.	:	(Hon. Matthew W. Brann, Chief
	:	Judge)
	:	
WILLIAMSPORT AREA SCHOOL	:	<i>Electronically Filed</i>
DISTRICT, LYCOMING	:	
COUNTY, DR. BRANDON	:	JURY TRIAL DEMANDED
PARDOE, ROGER FREED, SEAN	:	
McCANN, RYAN MILLER, FRED	:	
A. HOLLAND, ESQ., WILLIAM	:	
WEBER, in his individual and	:	
official capacity, and JOHN and	:	
JANE DOEs #1-#20 (fictitious	:	
names), whose true identities are	:	
currently unknown to Plaintiff,	:	
Defendants	:	

**BRIEF IN SUPPORT OF DEFENDANT WILLIAM WEBER'S MOTION  
TO DISMISS PLAINTIFF'S COMPLAINT**

Respectfully submitted,

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AND NOW, comes Defendant William Weber<sup>1</sup> (“Weber”) by and through his attorneys, Donald L. Carmelite, Esquire, and Marshall Dennehey Warner Coleman & Goggin, and files the following Brief in Support of his Motion to Dismiss Complaint, and in support thereof states as follows:

**I. STATEMENT OF THE CASE**

Plaintiff commenced this civil action on September 6, 2022, asserting federal and state law claims against Weber based upon allegations that he failed to investigate, report, and/or otherwise act upon information that a male student sexually assaulted him while on an out-of-state school-sponsored trip. (*See generally* ECF 1) Plaintiff filed an eleven Count Complaint against Williamsport Area School District (“WASD”); Lycoming County (County); Dr. Brandon Pardoe, head principal of Williamsport Area High School (“WAHS”); Roger Freed, assistant principal of WAHS; Sean McCann, athletic director of; WAHS, Ryan Miller head

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<sup>1</sup> Plaintiff asserts claims against Defendant Weber in both his individual and official capacities. An official capacity claim against a police officer is deemed to be a claim against the government agency which employs the officer -- in this case, the Lycoming County, which is also named as a Defendant. *See, Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (explaining that suits against a government employee in his official capacity “generally represent only another way of pleading an action against [a government] entity of which an officer is an agent,” such that “an official-capacity suit is, in all respects other than name, to be treated as a suit against the [government] entity”); *Hafer v. Melo*, 502 U.S. 21, 25 (1991)(same). Accordingly, the instant Brief will address only the individual capacity claims against Officer Weber, and the official capacity claim will be addressed by the County.

baseball coach for WAHS; Fred A. Holland, Esq., solicitor for WASD; Weber; and John and Jane Does #1-#20 including the following nine counts against Weber:

- Civil Rights Conspiracy (II);
- Fourteenth Amendment Equal Protection (III);
- Vicarious Liability (IV)<sup>2</sup>;
- Negligence (VI);
- Negligent Infliction of Emotional Distress (VII);
- Intentional Infliction of Emotional Distress (VIII);
- Negligent Failure to Rescue (IX)
- Negligence Per Se (X); and
- Civil Conspiracy (XI).

The allegations contained in Plaintiff's Complaint, viewed in a light most favorable to Plaintiff for purposes of this motion only, provide as follows:<sup>3</sup> Plaintiff, a John Doe, now an adult individual, claims injury, as minor, as a result of the negligent acts and failures of the Defendants. (**Id.** ¶6). The County oversees and/or controls the Lycoming County Office of the District Attorney ("DA or DA's

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<sup>2</sup> Plaintiff merges the individual and municipal defendants throughout the complaint. This instances exemplifies the error. Weber cannot be vicariously liable to himself.

<sup>3</sup> Weber specifically denies that the factual recitation in Plaintiff's Complaint accurately represents the factual history. Weber challenges Plaintiff's recitation of facts. The following recitation is taken from Plaintiff's Complaint and accepted as true for the limited purposes of this motion. *Cudjoe v. Dep't of Veterans' Affairs*, 426 F.3d 241, 244 (3d Cir. 2005); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). Weber does not concede that all the allegations in the Complaint are supported by a factual basis, following a reasonable investigation.

Office”). (Id. ¶9). The County employed Weber, as a County Detective, during the times relevant to the allegations. Plaintiff describes the lawsuit as “about an educational institution that had special responsibilities and obligations to protect the most innocent among us -children and students from sexual abuse and the complete and abject failures of that same educational institution to fulfill those responsibilities and obligations.” (Id. ¶19). Specifically, as a member of the WAHS baseball team, Plaintiff attended a trip to Myrtle Beach, South Carolina, to participate in a baseball tournament (MB Trip). (Id. ¶23). Several administrators from the WAHS and WASD attended the MB Trip as chaperones, including the WAHS principal and athletic director. (Id. ¶¶25, 30). One evening during the MB Trip, a teammate, B.M., assaulted Plaintiff while he slept by placing his penis on Plaintiff’s face, making skin-to-skin contact while another teammate video recorded it with his phone (the “Incident”). (Id. ¶31). Before the Incident, teammates directed slurs at Plaintiff “who is black”. (Id. ¶32). After the Incident, B.M. and/or other teammates “threatened to lynch Plaintiff if he told anyone about” the Incident. (Id.).

While still on the MB Trip, agents, employees, administrators and/or coaches of the WASD learned of video recordings (“Video”) related to the Incident and instructed students on the baseball team to delete any videos of the Incident. (Id. ¶36).

B.M. shared the Video with other students in the WAHS cafeteria. (**Id.** ¶36) The WAHS team called an emergency meeting and again instructed the baseball team to delete any videos of the Incident. (**Id.** ¶39). In the “days and weeks” after returning to Williamsport, students, who Plaintiff believes watched the Video, called Plaintiff derogatory names. (**Id.** ¶40).

On or about May 18, 2018, Lycoming County Children and Youth Services (“CYS”) received a report of the Incident. (**Id.** ¶42). CYS reported the Incident to Childline. (**Id.** ¶43). CYS contacted Weber, and Weber contacted Pardoe. (**Id.**)

Weber authored an investigative report, in October of 2018 (Report), based on limited note-taking and memory, that provided:

- Weber informed CYS that he would look into the matter due to his familiarity with the WASH baseball team and the MB Trip. (**Id.** ¶44);
- Weber informed Pardoe that he (Weber) had no jurisdiction over what happened at Myrtle Beach “but would make referrals if need be.” (**Id.** ¶45);
- Weber informed Pardoe that he was aware of the MB Trip and what usually went on during the annual trip. (**Id.**);
- Falsely stated that Plaintiff said that he did not feel like the Video of the Incident was passed around much as nobody at school had mentioned it. (**Id.** ¶51);

- Concluded that the Incident was “[c]learly . . . [a] hazing/bullying issue that the school properly handled” and, therefore, “there was no referral to be made.” (Id. ¶¶52, 87);

Weber obtained the Video in May of 2018 but did not make a report to Childline or advise the County DA or law enforcement in Myrtle Beach. (Id. ¶¶47-48). However, Weber did send the Report and Video to Myrtle Beach Police Department “MBPD” on October 11, 2018. (Id. ¶85).

Weber, Pardoe, and Freed met with Plaintiff and his family on May 30, 2018, in Pardoe’s office. Plaintiff described the Incident, identified the individuals involved, and confirmed the video was already in possession of the County as the Video. Pardoe and Weber told Plaintiff and his mother they would keep them informed after speaking to the individuals involved in the Incident. (Id. ¶52). Weber never met with the person Plaintiff identified as video recording the Incident. (Id. ¶53); In contemporaneous notes from a meeting, Weber recorded B.M.’s admission. (Id. ¶54).

Pardoe, in conjunction with Freed, McCann, Miller, Holland, and Weber, conducted a biased and discriminatory investigation that included attempts to destroy evidence and silence witnesses. (Id. ¶71).

On August 24, 2018, Todd Bartley (“Bartley”) published “Millionaire Mayhem” discussing the Incident. (Id. ¶74). MBPD first learned of the incident from Bartley. (Id. ¶75). At an unknown date between August 24, 2018, and September 2018, Weber told Lycoming County ADA Jeff Yates that he had no knowledge of the allegations published by Bartley. (Id. ¶¶75, 81). On October 3, 2018, Weber told MBPD Det. Porter that he learned about the incident in May 2018 after receiving a ChildLine report. (Id. ¶82) Weber further advised Det. Porter that he “facilitated the handling of the incident with the [WAHS],” did not draft a report, did not see anything criminal with the Incident “based on Pennsylvania standards,” and believed the matter “appeared resolved.” (Id.)

On May 8, 2020, Lycoming County DA Ryan Gardner referred the Incident to the Pennsylvania Attorney General’s Office (AG) for investigation. (Id. ¶95). On July 1, 2021, the AG declined to file criminal charges after conducting an investigation that involved serving multiple search warrants – including on Weber – and interviewing several key witnesses – including Weber. (Id. ¶97-98, 100-101).

Plaintiff alleges he suffered physical and emotional injury as a result of the Incident and the Defendants’ actions. (Id. ¶109-111).

## **II. QUESTIONS PRESENTED**

**A. Whether the Court should dismiss Plaintiff's Equal Protection Claim?**

*Suggested Answer:* Yes.

**B. Whether the Court should dismiss Plaintiff's Civil Rights Conspiracy Claim?**

*Suggested Answer:* Yes.

**C. Whether Weber has Qualified Immunity from Plaintiff's Federal Claims?**

*Suggested Answer:* Yes.

**D. Whether Weber has Immunity from Plaintiff's State Claims?**

*Suggested Answer:* Yes.

**E. (Alternative) Whether the Court should dismiss Plaintiff's IIED Claim?**

*Suggested Answer:* Yes.

**F. (Alternative) Whether the Court should dismiss Plaintiff's Negligence *Per Se* Claim?**

*Suggested Answer:* Yes

### III. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) requires dismissal for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). A 12(b)(6) motion tests the legal sufficiency of the complaint and "streamline[s] litigation by dispensing with needless discovery and factfinding." *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989); *Holder v. City of Allentown*, 987 F.2d 188, 194 (3d Cir. 1993).

To avoid dismissal, a pleading party's complaint must provide "enough factual matter" to allow the case to move beyond the pleading stage of litigation; the pleader must "nudge [his or her] claims across the line from conceivable to plausible." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234-35 (3d Cir. 2008) (quoting *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted). Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements [are] not suffic[ient]" to defeat a Rule 12(b)(6) motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The plausibility standard "asks for more than a sheer possibility that a [party] has acted unlawfully." *Id.* at 678. "Determining whether a complaint states [on its



face] a plausible claim for relief [which can survive a motion to dismiss] will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. However, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]' – that the pleader is entitled to relief." *Id.* (quoting Fed.R.Civ.P. 8(a)(2)).

#### **IV. ARGUMENT**

Plaintiff asserts various Constitutional and State law claims to obfuscate his true claim that Weber failed to adequately investigate and/or address the Incident. Plaintiff's creative pleading cannot overcome the facts and law that do not support his basic claim. Further, Plaintiff knowingly or unwittingly attempts to confuse Weber, in his individual capacity, with his public entity County employer. For the reasons set forth herein, Weber respectfully requests that this Court dismiss any and all claims asserted against him in Plaintiff's Complaint, with prejudice.

##### **A. Civil Rights Claims**

###### ***1. Weber did not violate Plaintiff's Equal Protection Due Process Rights***

The Due Process Clause of the Fourteenth Amendment provides: "No State shall...deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause is "phrased as a limitation on

the State's power to act, not as a stricture on the behavior of private persons or a guarantee that the State provide minimal levels of safety and security." *Leidy v. Borough of Glenolden*, 277 F.Supp.2d 547, 557 (E.D. Pa. 2003)(internal quotations omitted)(citing *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989)). The Supreme Court explained:

[The Due Process Clause] forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation of the state to ensure that those interests do not come to harm through other means....[It] generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.....

*Id.* at 558 (citations omitted). Consistent with these principles, it is well-established that the federal courts do not recognize a cause of action under the Due Process Clause for inadequate police protection. *See Bright v. Westmoreland County*, 443 F.3d 276, 284 (3d Cir. 2006). Similarly, "courts in this Circuit have stated without qualification that there is no constitutional right to a police investigation. *Orgod v. City of Phila.*, 2022 WL 1093128 at \*8 (E.D. PA, April 12, 2022) citing *Thomas v. City of Phila.*, 290 F. Supp. 3d. 371, 386 (E.D. PA, 2018); *Lewis v. City of Phila.*, Civ. A. No. 19-2847, 2020 WL 1683451, at \*11 (E.D. Pa. Apr. 6, 2020); *Outlaw v. City of Phila.*, 2021 WL 3471168, at \*6-7.

The Supreme Court and Third Circuit Court recognize a narrow exception to this general rule that the state has no affirmative duty to protect a citizen (who is not in state custody). The “state-created danger” doctrine<sup>4</sup> applies where affirmative acts taken by a state actor render a citizen more vulnerable to injury by a third party than the citizen would have been in the absence of the state’s intervention. *Bright*, 443 F.3d 276. Plaintiff, however, does not assert a state-created danger claim. Rather, Count III pleads a hodgepodge of allegations against “All Defendants,” making it difficult to discern which individual acts of Weber violated which rights of Plaintiff. Of the deficiencies alleged in paragraph 142, only the allegation of “failing to properly investigate claims of child abuse” could possibly apply to Weber, with the remainder aimed at the public entities County and WASD. (ECF 1 ¶142). As noted, failing to “properly investigate” is not an equal protection claim viable against Weber. *Sanders v. Downs*, 420 Fed.Appx. 175 at 180 (3d Cir. March 22, 2011) (affirming and vacating in part *Sanders v. Downs*, 2010 WL 817475, (M.D. PA., Mar. 09, 2010)).

The Third Circuit stated that “an equal protection analysis concerns whether government actors discriminated against an individual for an impermissible reason,

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<sup>4</sup> The “special relationship” theory, does not apply to Plaintiff. See *D.R. by L.R. v. Middle Bucks Area Vo. Tech*, 972 F.2d 1364 at 1370 (3d Cir. 1992); *Moore v. Richman*, 797 F.Supp.2d 572, 586-87 (W.D. Pa. 2011)(Fischer, J.)(citing *D.R. by L.R.*, 972 F.2d 1364).

such as race, religion, or some other unjustifiable classification.” *Id.* Certainly, as a black individual, Plaintiff belongs to a protected class. However, other than mentioning his race in paragraphs 32 and 107, Plaintiff fails to connect race to his equal protection claim. Further, “minor children [do] not constitute [a] protected class for purposes of Equal Protection Clause. *Magnum v. Archdioceses of Philadelphia*, 253 Fed.Appx. 224, Nov. 6, 2007.

Accordingly, this Court must dismiss Plaintiff’s equal protection claim against Weber with prejudice.

**2. *Weber did not Conspire to deprive Plaintiff of a Federal right.***

The Third Circuit describes “[a] civil conspiracy [as] a combination of two or more persons to do an unlawful or criminal act, or to do a lawful act by unlawful means or for an unlawful purpose.” *Ammlung v. City of Chester*, 494 F.2d 811, 814 (3d Cir. 1974). To establish a conspiracy claim under 42 U.S.C. § 1983, a “plaintiff must demonstrate (1) the existence of a conspiracy involving state action; and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy.” *Muth v. Woodring*, 2015 WL 7717123, at \*12 (M.D. Pa. Nov. 30, 2015). As to the first element, a plaintiff “must assert facts from which a conspiratorial agreement can be inferred.” *Id.* (quoting *Great W. Mining & Mineral Co v. Fox Rothschild LLP*, 615 F.3d 159, 178 (3d Cir. 2010)). Furthermore, a

pleading “must contain ‘enough factual matter (taken as true) to suggest that an agreement was made.’ . . . Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.” *Id.* (internal citations omitted).

As noted in Part B. 1. above, Plaintiff does not establish an equal protection claim against Weber. Thus, Plaintiff cannot satisfy the most basic element of a civil rights conspiracy claim. Further, to the extent the Court finds a viable equal protection claim exists, Plaintiff fails to plead sufficient factual matter to suggest an agreement was made. *Id.*

Therefore, the Court must dismiss Plaintiff’s civil rights conspiracy claim against Weber with prejudice.

### ***3. Qualified Immunity Shields Weber***

Qualified immunity is “an entitlement not to stand trial or face the other burdens of litigation.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). In order to determine if qualified immunity applies, the United States Supreme Court has established a two-prong test: (1) whether the facts alleged by the plaintiff show the violation of a constitutional right, and (2) whether the law was clearly established at the time of the violation. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Courts have discretion in deciding which of the two prongs of the qualified immunity

analysis should be addressed first in light of the circumstances in the particular case at hand. *Id.* Here, Weber meets both prongs, which entitle him to qualified immunity – Plaintiff failed to state a claim for a constitutional violation<sup>5</sup> and the specific right at issue was not clearly established at the relevant time. As a result, this Court should dismiss all federal claims against Weber.

The second prong of a qualified immunity analysis is whether the conduct violated constitutional rights clearly established at the time in question. *al-Kidd*, 563 U.S. at 735; *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)(qualified immunity protects government officials from civil liability as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known"). Analysis of the second prong begins "with identifying 'the specific constitutional right' alleged to have been infringed." *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019); *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019)("Under our cases, the clearly established right must be defined with specificity."). "The dispositive question is 'whether the violative nature of particular conduct is clearly established'" and the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 577 U.S. at 12. A right is clearly established if it is "sufficiently clear that every reasonable

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<sup>5</sup> Weber addresses this argument in parts B. 1 and 2 above. This qualified immunity argument focuses on the clearly established element.

officer would have understood that what he is doing violates that right." *Id.* at 11; see also *Plumhoff v. Rickard*, 572 U.S. 765, 778-779 (2014)(for a right to be clearly established, its "contours [must be] sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.").

To determine whether a right was clearly established, a court must consider the state of the existing law at the time of the alleged violation and the circumstances confronting the officer to determine whether a reasonable state actor could have believed his conduct was lawful. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The "clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017); see also *Mullenix*, 577 U.S. at 12 (the law may not be defined "at a high level of generality"). More specifically, there must be "sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put defendant on notice that his or her conduct is constitutionally prohibited." *Mammaro v. N.J. Div. of Child Prot. and Permanency*, 814 F.3d 164, 169 (3d Cir. 2016). As the United States Supreme Court has instructed, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 740-741. By design, qualified immunity presents an "exacting standard" for plaintiffs. *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 611 (2015).

Here, the gravamen of Plaintiff's equal protection claim is that Weber failed "to properly investigate claims of child abuse." (ECF 1, ¶142). As argued in Part B. 1. above, Plaintiff lacks a due process right to a proper police investigation. To the extent the Court now finds one exists, then it most certainly was not "clearly established" during Weber's investigation of the Incident.

As such, the Court must apply Qualified Immunity to shield Weber from Plaintiff's federal civil rights claims.

### **B. State Claims**

Plaintiff asserts numerous state tort claims but makes no attempt to overcome the immunity provided by or the requirements of the Political Subdivision Tort Claims Act, 42 Pa. C.S. § 8541, *et al* (PSTCA).

#### ***1. The Political Subdivision Tort Claims Act Immunizes Weber***

The PSTCA affords immunity from suit to an employee of a local governmental agency like Weber. The PSTCA grants general immunity to political subdivisions, stating "no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa. C.S. § 8541. In order to overcome governmental immunity, the Plaintiff has the burden to prove a common law negligence claim for damages that also falls within one of the nine (9) enumerated exceptions set forth in



Section 8542(b) of the Act. *See Mascaro v. Youth Study Center*, 523 A.2d 1118, 1120 (Pa. 1987); *Miseo v. Ross Township Police Department*, 607 A.2d 806 (Pa. Commw. 1992); *Joner v. Bd. of Ed. of the School Dist. of Phila.*, 496 A.2d 1288 (Pa. Commw. 1985). If a plaintiff cannot establish his negligence claim, then the claim must be dismissed prior to even undergoing an analysis as to whether or not the claim fits within an enumerated exception. *See Miseo, supra; Joner, supra*. Further, the Pennsylvania Supreme Court has repeatedly specified that “because of the clear intent [of the Political Subdivision Tort Claims Act] to insulate government from exposure to tort liability, the exceptions to immunity are to be strictly construed.” *Walker v. Eleby*, 577 Pa. 104, 110, 842 A.2d 389, 392 (Pa. 2004).

None of Plaintiff’s state law claims fall within the nine exceptions to immunity. Presumably, Plaintiff relies on the ninth exception, which provides:

(9) Sexual abuse.--Conduct which constitutes an offense enumerated under section 5551(7) (relating to no limitation applicable) if the injuries to the plaintiff were **caused** by actions or omissions of the local agency which constitute negligence.

42 Pa. C.S. § 8542(b) (**emphasis added**). Offenses under section 42 Pa. C.S.A. § 5551(7) include sex trafficking, sexual servitude, rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, institutional sexual assault, aggravated indecent assault, or incest.

Plaintiff fails to allege that Weber **caused** any offense enumerated in § 5551(7). Thus, the PSTCA does not except any of the state law claims asserted, and the Court must dismiss the same against Weber with prejudice.<sup>6</sup>

***2. Weber didn't act with willful misconduct, and Plaintiff failed to establish an intentional infliction of emotional distress(IIED) claim.***

Additionally, although an exception to a municipal employee's immunity arises where he allegedly engages in acts of "willful misconduct," that term is construed to mean an "intentional tort." *Kuzel v. Krause*, 658 A.2d 856 (Pa. Commw.1995)("[F]or purposes of the Tort Claims Act, 'willful misconduct' is synonymous with the term 'intentional tort.'"). As such, conduct which is allegedly reckless or deliberately indifferent is not sufficient to overcome immunity. *Bright v. Westmoreland County*, 443 F.3d 276, 287 (3d Cir. 2006).

Plaintiff alleges the intentional tort: IIED. The Pennsylvania Supreme Court has never explicitly recognized the tort of IIED. *Reardon v. Allegheny College*, 926 A.2d 477, 487, 488 (Pa. Super. Ct. 2007)(noting that the Pennsylvania Supreme Court has not formally adopted Restatement Second of Torts §46 but applying §46(1) as the appropriate legal standard in reviewing a claim for IIED). Section 46(1) provides:

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<sup>6</sup> Weber also asserts that Plaintiff cannot meet his burden of establishing a common law claim, but due to limitation on length, we reserve that argument for the Reply Brief if needed.

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

“The availability of recovery under section 46 is highly circumscribed.” *Kazatsky v. King David Mem'l Park, Inc.*, 527 A.2d 988, 991 (Pa. 1987). Thus, a claim for IIED may be sustained only where “the conduct [is] so outrageous in character, and so extreme in degree, so as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.” *Hoy v. Angelone*, 554 Pa 134, 151, 720 A 2d 745, 754 (1998); see also *Hoy v. Angelone*, 691 A.2d 476, 482-83 (Pa. Super. 1998)(in which the Pennsylvania Superior Court explained that, “[W]e have allowed recovery [for IIED] in only very egregious cases.”).

The court makes the “initial determination of whether a defendant’s conduct was so extreme and outrageous that recovery may be justified.” *Sostarecz v. Misko*, No. CIV. A. 97-CV-2112, 1999 WL 239401, at \*12 (E.D. Pa. Mar. 26, 1999); *Strickland v. University of Scranton*, 700 A.2d 979, 987 (Pa. Super. 1997). The court must be mindful that recovery for IIED has generally been “reserved for only the most abominable cases.” *Sostarecz*, supra, at \*12, citing *Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970). Accordingly, “[c]onduct that Pennsylvania courts have deemed sufficiently outrageous to constitute IIED includes: (1) killing the

plaintiff's son with an automobile and then burying the body, rather than reporting the incident to the police; (2) intentionally fabricating documents that led to the plaintiff's arrest for murder; and (3) knowingly releasing to the press false medical records diagnosing the plaintiff with a fatal disease.” *Dull v. W. Manchester Twp. Police Dep't*, 604 F. Supp. 2d 739, 756 (M.D. Pa. 2009)(citing *Hoy*, 720 A.2d at 754). In addition to establishing outrageous conduct, “a plaintiff must suffer some type of resulting physical harm [resulting from the] outrageous conduct.” *Hatfield v. Allegheny Cty. Exec. Rich Fitzgerald*, No. CV 13-26, 2016 WL 4010966, at \*10 (W.D. Pa. 2016)(Fischer, J.)(citing *Reedy v. Evanson*, 615 F.3d 197, 231 (3d Cir. 2010)).

Importantly, like the allegations against Weber, “courts have found that allegations of a failure to act do not generally establish a claim for IIED.” *L.H. v. Pittston Area Sch. Dist.*, 130 F. Supp. 3d 918, 930–31 (M.D. Pa. 2015), *aff'd*, 666 F. App'x 213 (3d Cir. 2016). See, *M.S. ex rel. Hall v. Susquehanna Twp. Sch. Dist.*, 43 F.Supp.3d 412, 431 (M.D.Pa.2014) (citing, *Jackson v. Sun Oil Co.*, 521 A.2d 469, 471 (Pa. Super. 1987) (there is no liability for intentional infliction of emotional distress where the claim is based on the failure to act)). See also, *Page ex rel. Page v. School District of Phila.*, 45 F.Supp.2d 457, 469 (E.D.Pa.1999) (school teachers’

failure to act to prevent the assault of a student did not subject them to liability for intentional infliction of emotional distress).

Here, as addressed in detail already, Plaintiff complains about the adequacy of Weber's investigation into the Incident. No matter how Plaintiff tries to describe this claim otherwise, the core allegations of the Complaint fail to demonstrate any intentional act on his part. Moreover, the allegations regarding Weber's conduct fall short of the types of affirmative acts that the Pennsylvania courts have recognized as sufficiently outrageous to impose liability under an IIED theory. See *Dull*, supra.

Additionally, aside from boilerplate claims like "great pain of mind and body" or "physical manifestation of emotional distress" the Complaint fails to describe in factual terms the physical harm he allegedly sustained as a result of the emotional distress caused by Weber's conduct.

Accordingly, the Court must dismiss Plaintiff's IIED claim against Weber with prejudice.

**3. Plaintiff fails to plead a negligence per se claim against Weber.<sup>7</sup>**

"The concept of negligence *per se* establishes the elements of duty and breach of duty where an individual violates an applicable statute, ordinance, or regulation designed to prevent a public harm. However, a plaintiff, having proven

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<sup>7</sup> Weber contends that the PSTCA immunizes him from Plaintiff's negligence *per se* claim for the reasons argued in Part B 1 above.

negligence *per se* cannot recover unless it can be proven that such negligence was the proximate cause of the injury suffered.” *Schemberg v. Smicherko*, 85 A.3d 1071, 1074 (Pa.Super, 2014). Further, to establish negligence *per se*, a plaintiff must satisfy four criteria:

- (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.

*Id.*

Plaintiff asserts negligence *per se* claims based on Weber's alleged violation of: Unsworn Falsification to Authorities, 18 Pa.C.S.A. §4904; Tampering with or Fabricating Physical Evidence, 18 Pa.C.S.A. §4910; Intimidation of Witnesses or victims, 18 Pa.C.S.A. §4952; Obstructing administration of law or other governmental function; 18 Pa.C.S.A. §5101; Official Oppression, 18 Pa.C.S.A. §5301; Persons required to report suspected child abuse, 23 Pa.C.S.A. §6311(a) and (b), and; “Educator Discipline Act,” 24 P.S. §§2070.1, et seq.

Plaintiff's Complaint makes no effort to establish the prima facie elements for any negligence *per se* claim, and thus, the Court must dismiss all related claims against Weber with prejudice.

**V. CONCLUSION**

For the foregoing reasons, Plaintiff's Complaint must be dismissed against Weber with prejudice.

Respectfully submitted,

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By:



Date: January 3, 2022

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**CERTIFICATE OF WORD COUNT COMPLIANCE**

I hereby certify that this Brief in Support of Motion to Dismiss First Amended Complaint complies with the word limitation of 5,000 words. Excluding the cover page, tables, and certifications, but including its footnotes, this brief contains 4,959 words as calculated by Microsoft Word.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served upon the following known counsel and parties of record this 3<sup>rd</sup> day of January, 2023, via ECF filing:


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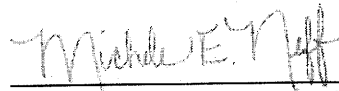
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