No. _____

# In the Supreme Court of the United States

C.C., Individually by and through his next friends, Charles Cripps and Kristie Cripps; KRISTIE CRIPPS; CHARLES CRIPPS,

*Petitioners*,

v.

HURST-EULESS BEDFORD INDEPENDENT SCHOOL DISTRICT,

*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

We want our teachers and administrators to help children remain in school, learn and prosper. Unfortunately for some children, more those with disabilities and behavioral problems, they are pushed out of the classroom, into what is now termed the *Schoolhouse To Prison House Pipeline*. When that student with a disability has been pushed out of school for the very same behaviors that are part of his disability, that student may have a claim of discrimination based upon disability pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. The various Courts across the United States have established a standard that the student must show that school district officials acted in *bad faith* or *gross misjudgment* to his educational plan or that educators *grossly deviated from professional standards of care* for liability to affix.

In this cause the Fifth Circuit Court of Appeals failed to address or analyze at all C.C.'s claim that educators *grossly deviated from professional standards of care* when steering him into the criminal justice system, and becoming a victim of discrimination based upon disability thereby. In addition, the Panel failed in any case, to adhere to the correct standards of review when analyzing a *Motion To Dismiss* pursuant to Fed. R. Civ. P. 12(b)(6) when construing a claim that the conspiracy of school officials steering C.C. into the criminal justice system, created a *hostile educational environment*, such that he was a victim of discrimination based upon disability thereby.

In regard to all the above, the Fifth Circuit created a precedent and a heightened standard of review, that

if left to stand "as-is," would assure that virtually no student with a disability, and a victim of the *Schoolhouse To Prison House Pipeline* because of their behaviors, could ever maintain a claim predicated upon discrimination based upon disability.

Accordingly, the question presented for this Court, and very possibly, an issue of *first impression*, is what are the correct standards of review for courts when construing claims of discrimination based upon disability, when a student is a victim of a conspiracy by school district officials to steer the student out of the public schools and into the criminal justice system?

## PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b) of the Supreme Court Rules, Petitioners hereby certify that they know of no persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this particular case other than the parties noted in the styling and caption above, and their counsel.

## TABLE OF CONTENTS

QUESTION PRESENTED . . . . . i

PARTIES TO THE PROCEEDINGS . . . . . iii

TABLE OF CONTENTS . . . . . iv

TABLE OF CITED AUTHORITIES . . . . . vi

PETITION FOR WRIT OF CERTIORARI . . . . . 1

OPINIONS BELOW . . . . . 1

STATEMENT OF THE JURISDICTION . . . . . 2

STATUTORY PROVISIONS INVOLVED . . . . . 2

STATEMENT OF THE CASE . . . . . 3

A. Factual Resume . . . . . 3

B. Procedural Resume-The Decisions Below . 12

REASONS FOR ALLOWANCE OF THE WRIT . . 19

I. This Court Should Grant This *Petition For Certiorari* Because To Do Otherwise Would Create A Precedent That Is Morally Repugnant And Offensive . . . . . 21

II. This *Petition* Should Be Granted As The Decision By The 5th Circuit Is Clearly Erroneous . . . . . 24

A. It Is Clearly Erroneous Because It Failed To Provide All Reasonable Inferences To The Non-Movant, C.C. . . . . 24

B. It Is Clearly Erroneous Because It Failed To Address C.C.'s Argument He Was A Victim Of Discrimination Based Upon Disability Due To The Gross Deviation From Professional Standards Of Care By School Officials . . . . . 29

CONCLUSION . . . . . 31

APPENDIX

Appendix A Opinion and Judgment in the United States Court of Appeals for the Fifth Circuit (March 9, 2016) . . . . . App. 1

Appendix B Memorandum Opinion and Order and Final Judgment in the United States District Court, Northern District of Texas, Fort Worth Division (January 8, 2015) . . . . . App. 10

Appendix C Order Denying Petition for Rehearing En Banc in the United States Court of Appeals for the Fifth Circuit (April 26, 2016) . . . . . App. 26

## TABLE OF AUTHORITIES

**CASE LAW**

Ashcroft v. Iqbal,
556 U. S. 662 (2009) . . . . . 28

Barnes v. Gorman,
536 U.S. 181 (2002) . . . . . 29, 30

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) . . . . . 24, 28

Boag v. MacDougall,
454 U.S. 364 (1982) . . . . . 20

Bowlby v. City of Aberdeen, Miss.,
681 F.3d 215 (5th Cir. 2012) . . . . . 28

Brosseau v. Haugen,
543 U.S. 194 (2004) . . . . . 20

Carmichael v. Galbraith,
2014 WL 267590 (5th Cir., June 19, 2014) . . . . 28

D.A. ex rel. Latasha A., v. Houston Indep. Sch. Dist.,
629 F.3d 450 (5th Cir. 2010) . . . . . 15

Davis v. Monroe County Board Of Education,
526 U.S. 629 (1999) . . . . . 29

Deep East Texas Regional Mental Health & Mental Retardation Services v. Kinnear, 550 S.W.2d 550, 563 (Tex. App. – Beaumont, 1994) ) . . . . . 32

Delano-Pyle v. Victoria County, Texas,
302 F.3d 567 (5th Cir. 2002) . . . . . 29, 30

Estate of Lance v. Lewisville Independent School District,
743 F.3d 982 (5th Cir. 2014) . . . . . 15, 25, 28, 29

Furstenfeld v. Rogers,
No. 03-02 CV 0357 L, 2002 U.S. Dist. LEXIS 11823 (N.D. Tex. Jul. 1, 2002) . . . . . 24

K.M. v. Hyde Park Cent. Sch. Dist.,
381 F. Supp. 2d 343 (S.D. N.Y. 2005) . . . . . 26

Lamb v. Qualex, Inc.,
33 Fed. Appx. 49 (4th Cir. 2002) . . . . . 27

Marvin H. v. Austin Indep. Sch. Dist.,
714 F.2d 1348 (5th Cir.1983) . . . . . 29, 30

Matsushita Elec. Indus. v. Zenith Radio Corp.,
475 U.S. 574 (1986) . . . . . 24

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) . . . . . 27

Rideau v. Keller Indep. Sch. Dist.,
819 F.3d 155 (5th Cir. 2016) . . . . . 20

Roger Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) . . . . . 32

Scott v. Harris,
550 U.S. 372 (2007) . . . . . 3

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) . . . . . 32

Stewart v. Waco Indep. Sch. Dist.,
711 F.3d 513 (5th Cir. 2013) . . . . . 31

Swierkiewicz v. Sorema N. A.,
534 U. S. 506 (2002) . . . . . 27, 28

Tchereepnin v. Knight,
389 U.S. 332 (1967) . . . . . 32

Tolan v. Cotton,
134 S.Ct. 1861; 188 L. Ed2d 895 (2014) . . . . . 24

Willis v. Roche Biomedical Labs., Inc.,
61 F3d 313 (5th Cir. 1995) . . . . . 24

Youngberg v. Romeo,
457 U.S. 307 (1982) . . . . . 29

**STATUTES**

20 U.S.C. §1400 *et seq.* (Individuals With Disabilities Education Act) . . . . . *passim*

20 U.S.C. §1401(3) . . . . . 4, 8

20 U.S.C. §1401(30) . . . . . 8

20 U.S.C. §1412(a)(5) . . . . . 8

20 U.S.C. §1414(b)(6) . . . . . 8

20 U.S.C. §1414 (d)(1)(A) . . . . . 5, 8

20 U.S.C. §1414(d)(3)(B)(i) . . . . . 6

20 U.S.C. §1414 (d)(6) . . . . . 8

20 U.S.C. §1415(l) . . . . . 13

28 U.S.C. §1254 . . . . . 2

28 U.S.C. §1291 . . . . . 2

29 U.S.C. §794 (Section 504 of the Rehabilitation Act of 1973) . . . . . *passim*

42 U.S.C. §1983 . . . . . 2

**REGULATIONS**

34 C.F.R. §300.8 . . . . . 4

34 C.F.R. §300.34 . . . . . 4

34 C.F.R. §300.114 . . . . . 8

34 C.F.R. §300.304 . . . . . 8

34 C.F.R. §300.305 . . . . . 8

34 C.F.R. §300.306 . . . . . 8

34 C.F.R. §300.307 . . . . . 8

34 C.F.R. §300.308 . . . . . 8

34 C.F.R. §300.309 . . . . . 8

34 C.F.R. §300.310 . . . . . 8

34 C.F.R. §300.311 . . . . . 8

34 C.F.R. §300.320 . . . . . 5, 8

34 C.F.R. §300.324(a)(2)(i) . . . . . 6

64 Fed. Reg. 12,620 (1999) . . . . . 6

## PETITION FOR WRIT OF CERTIORARI

Petitioners, including C.C., a student with a disability by and through his natural parents and guardians, Charles Cripps and Kristie Cripps, respectfully petition the Supreme Court for a *Writ of Certiorari* to review the judgment of the Fifth Circuit Court Of Appeals, which affirmed a lower court ruling in the Federal District Court of Texas, Northern District- Fort Worth Division based upon a 12(b)(6) *Motion To Dismiss.*

## OPINIONS BELOW

There are three (3) relevant opinions below, first in the District Court and later the Court Of Appeals ruling that is the subject of this petition. In chronological order they are as follows; the *Memorandum Opinion And Order and Final Judgment* issued by the United States District Court for the Northern District of Texas, Fort Worth Division. In this opinion (App. B, p. 10) the District Judge confirmed, among other things, that the conspiracy C.C. experienced was not based upon his disability and rejected his claims pursuant to Section 504 of the Rehabilitation Acts of 1973. That opinion and order is cited at *2015 U.S. Dist. LEXIS 2615* (Northern Dist., Texas, January 8, 2015). It is not reported but is included with this Petition in the Appendix. It was the basis of the appeal to the Fifth Circuit and is relevant to the filing of this Petition. The second opinion (App. A, pg. 1) is from the Fifth Circuit and affirms the District Court's granting of the School District's *Motion To Dismiss.* It is considered "unreported" but is otherwise available at *2016 U.S. App. LEXIS 4416* and is dated March 9, 2016. It is of this opinion that C.C.

filed his petition. C.C. filed a *Petition For Rehearing* that is not attached but is correctly cited to the appellate record below (DE# 00513434512). This second document from the Fifth Circuit reports a denial of this request (App. C, p. 26 ). That order is dated April 26, 2016 and is not reported or cited (DE# 00513348074, p. 1-2).

## STATEMENT OF THE JURISDICTION

The is case is a civil rights case. Jurisdiction in the District Court below was originally pursuant to the 14th Amendment to the United States Constitution as contemplated by 42 U.S.C. §1983 and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794a ("Rehabilitation Act"). C.C. appealed the Section 504 claims to the Court of Appeals for the Fifth Circuit, which had jurisdiction for the appeal pursuant to 28 U.S.C. §1291. The panel issued their decision on March 9, 2016. C.C. timely filed a *Petition For Rehearing* which was rejected on April 26, 2016. Jurisdiction in this Court is pursuant to 28 U.S.C. §1254.

## STATUTORY PROVISIONS INVOLVED

This case arises under *Section 504 of the Rehabilitation Act of 1973*, 29 U.S.C. §794, which states in part:

> "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity

> conducted by any Executive agency or by the United States Postal Service."

In addition, because C.C. is a student with a disability who received special education services during the period in question, the Petition also contemplates:

The *Individuals With Education Act of 1973* ("IDEA"), 20 U.S.C. §1400, which states (in part):

> (d) Purposes The purposes of this chapter are— (1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (B) to ensure that the rights of children with disabilities and parents of such children are protected.

## STATEMENT OF THE CASE

As the District Court dismissed C.C.'s claim on a motion to dismiss, which was later affirmed by the 5th Circuit Court of Appeals, what follows are "the Plaintiff's version of the facts" Scott v. Harris, 550 U.S. 372, 378 (2007).

### A. Factual Resume

C.C. was born on April 6, 2000 and during most of the relevant period in this cause was 12 years old and considered a student with a disability, as contemplated by the *Individuals With Disabilities Educational Act* ("IDEA"), 20 U.S. C. §1400 et seq. and Section 504 of

the Rehabilitation Act of 1973, 29 U.S.C. §794. At various times he has been diagnosed with attention deficit hyperactivity disorder[1], anxiety and having behavioral problems with related impoverished social skills[2] with both his peers and teachers. (DE# 00513109422, p. 18-19).

In the Fall of 2012 C.C. began to get a number of disciplinary referrals due to his various untreated

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[1] *Attention deficit hyperactivity disorder* (ADHD), is a psychiatric disorder of the neuro-developmental type causing significant problems of acting impulsively. An individual who has ADHD, is easily distracted, has difficulty completing assignments, doesn't seem to listen when spoken to, can't process information as quickly and accurately as others, struggles to follow instructions and will often blurt out inappropriate comments and act without regard for consequences. A child with ADHD has difficulty with what is termed *executive functions* which refers to the mental processes required to regulate, control, and manage daily life tasks including and especially social behaviors. It is not specifically listed as a specific eligibility criteria for special education services under IDEA, but in concert with other disabling conditions and behaviors, would satisfy the OHI eligibility criteria. 20 U.S.C. §1401(3), 34 C.F.R. §300.8. *see also* http://www.nimh.nih.gov/healthealth/publications/attention-deficit-hyperactivity-disorder-easy-to-read/index.shtml.

[2] Social skill is any skill that facilitates appropriate interaction and communication with others, in both verbal and nonverbal ways. The process of learning such skills is called socialization. Interpersonal skills are sometimes also referred to as people skills or communication skills and include persuasion, active listening, delegation, and leadership. It is not specifically addressed in the IDEA but is considered a *related service* that may be provided to a student with a disability. 34 C.F.R. §300.34; *see also* https://ies.ed.gov/ncee/wwc/pdf/intervention_reports/wwc_socialskills_020513.pdf.

behaviors[3] and his parents met with staff to provide him an accommodation plan pursuant to Section 504 to address those needs; including and especially blurting out inappropriate comments and acting without regard for consequences. Unfortunately the plan was insufficient to address both his educational needs and ongoing problems with behavioral infractions. His parents met with school officials, including the School Principal Scott Hurbough and Vice-Principal Damon Emery in an effort to address the referrals and lack of educational support but were unsuccessful. (DE# 00513109422, p. 19).

The Cripps then retained an Educational Advocate, Ms. Deb Liva, a person known to have with a very assertive and aggressive style, in an effort to have C.C. accepted as a student able to receive Special Education services pursuant to the *Individuals With Disabilities Education Act* ("IDEA"). The family and advocate met with school officials, Emery and Hurbough in particular, on a number of occasions to address C.C.'s disability, behaviors related disciplinary referrals and related educational needs but all to no avail. They did agree to meet in mediation and on November 12th, forged an agreement including the duty for the District to address C.C.'s various behavioral and disciplinary problems, both in and out of class and to develop what

[3] Later the School District assessed C.C.'s behavior and developed an Individualized Educational Plan ("IEP") on how to decrease their frequency and intensity. 20 U.S.C. §1414 (d)(1)(A); 34 C.F.R. §300.320.

is termed a *functional behavioral assessment*. (DE# 00513109422, p. 19-20).[4]

Unfortunately, the report was not ready in a timely manner and C.C.'s educational experience worsened, his inappropriate behaviors continued and not surprisingly, increased disciplinary measures were required. The parents and the Advocate continued to vehemently complain. The relationship between the parties worsened. (DE# 00513109422, p. 20-21).

What is termed the ARD Committee[5] finally met on the 31st of January to address, among other things, whether or not C.C. satisfied criteria to be eligible for Special Education services pursuant to the *Individuals Disabilities Education Act* ("IDEA"). A *Neurogistics*

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[4] The IDEA itself does not define the term "functional behavioral assessment." The student's *Admission, Review & Dismissal* ("ARD") Committee needs to be able to address the various situational, environmental and behavioral circumstances raised in individual cases." 64 Fed. Reg. 12,620 (1999) A functional behavioral assessment ("FBA") searches for the purpose behind a problem behavior. Its intent is to isolate that behavior and develop a hypothesis regarding the function of the behavior. A target behavior is one that interferes with a student's ability to progress in the curriculum and to achieve their IEP goals. Once the target behavior is identified and hypothesis developed, a positive behavior intervention plan ("BIP") can be prepared by the ARD Committee to address target behaviors with appropriate strategies and interventions. While the IDEA itself does not define the term its intent is address the various situational, environmental and behavioral circumstances raised in individual cases." 64 Fed. Reg. 12,620 (1999); *see also* 20 U.S.C. §1414(d)(3)(B)(i); 34 C.F.R. §300.324(a)(2)(i).

[5] In other parts of the county it is termed the IEP ("Individualized Educational Plan") Team Meeting.

report was provided that discussed C.C.'s neurotransmitter results and brain chemistry, noting, among other things, that he also has significant Anxiety[6]. In regard to C.C.'s behavioral problems in class and his interactions with peers, the Committee agreed his multiple disabilities which included blurting out inappropriate comments and acting without regard for consequences, affected his behaviors and also agreed to provide him social skills training in effort to help C.C. behave better both in and out of class. (DE# 00513109422, p. 20)

With this significant effort in testing now completed and in support, C.C. became eligible[7] for Special

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[6] Anxiety is an emotion characterized by an unpleasant state of inner turmoil, often accompanied by nervous behavior, such as pacing back and forth, somatic complaints and rumination. It is the subjectively unpleasant feelings of dread over anticipated events, such as the feeling of imminent death. Anxiety is not the same as fear, which is a response to a real or perceived immediate threat; whereas anxiety is the expectation of future threat. Anxiety is a feeling of fear, worry, and uneasiness, usually generalized and unfocused as an overreaction to a situation that is only subjectively seen as menacing. It is often accompanied by muscular tension, restlessness, fatigue and problems in concentration. Anxiety can be appropriate, but when experienced regularly the individual may suffer from an anxiety disorder. http://en.wikipedia.org/wiki/Anxiety.

[7] The eligibility criteria for a student to receive special educational services are a child having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment ("OHI"), a specific learning disability ("SLD"), deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related

Education services, under the criteria of "Learning Disability"[8] and an *Individualized Educational Plan* ("IEP")[9] was developed for C.C. in furtherance of these worthy goals. (DE# 00513109422, p. 21).

During this same period that the educational team was testing C.C., and meeting to develop an appropriate educational plan for him, and beginning to implement it, Hurbough, with Emery and with the support of other school staff, initiated a concerted plan to have C.C. removed from school One such way to

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service. 20 U.S.C. §1401(3), 1401(30); 34 C.F.R. §300.304 through 300.311. While anxiety by itself would not support a need for special educational services, in concert with other disabling conditions, it would satisfy the OHI eligibility criteria.

[8] Nonverbal Learning Disorder (NLD) effects students so that they seem unprepared for class, have difficulty following directions, can't write an essay, continually misunderstand both their teachers and their peers, and are often anxious in public and angry at home. http://www.nldontheweb.org/. This is also an eligibility criteria for acceptance into special education services. 20 U.S.C §1401(30); 1414(b)(6); 34 C.F.R. §300.309.

[9] 34 C.F.R. §300.320 defines an *Individualized Education Program*. It is a written statement for each child with a disability that is developed, reviewed, and revised in what is termed an Admission, Review & Dismissal ("ARD") Committee, which includes the parents of the student. It is cooperative effort to develop an educational plan for the student commensurate with their unique and individualized needs intended to enable the child to be make progress in the general education curriculum. One duty of this committee is to find the correct placement for the student and to provide the IEP, with necessary accommodations and modifications to the educational system to assure such placement, 20 U.S.C. §1414(d)(1)(A) and (d)(6), in what is termed the least restrictive environment ("LRE"). 20 U.S.C. §1412(a)(5); 34 C.F.R. §300.114.

assure that C.C. would be removed was to have one of his behavioral infractions re-characterized as committed a felony, and thus grounds for automatic removal. (DE# 00513109422, p. 21).

In furtherance of this conspiracy, Hurbough began to follow C.C. around school and even peered at him through a classroom door window. It became so widely known at the school that the School Principal Hurbough and the Vice-Principal Emery intended to rid the school of C.C. that on one occasion C.C. even heard two teachers in the hall talking about him, and noting that when he rubbed his pencil on the wall they could now get him for destroying school property. (DE# 00513109422, p. 21-22).[10]

On or about February 11th C.C. asked a girl in his class "if she was making porn," which was consistent with his disabling condition, where he blurted out statements without thinking of consequences.

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[10] In early February Hurbough told Mrs. Cripps that he had another student follow C.C. with the goal for that student to report back to Hurbough and Emery, any potential infractions that could be used against C.C. This was a retaliatory threat that Hurbough later followed through on. He also told Mrs. Cripps he had a camera watching C.C. and was already preparing for Court. During this same time period when C.C. gave another student a "wet willy." Emery attempted to have the parents of the students file sexual assault charges against C.C. for exchange of bodily fluids but they chose not to do so. He later told Mrs. Cripps that a parent could file charges against C.C. and he could not do anything about it. All this additional information in support of C.C.'s claim that the School Principal was purposefully attempting to find other people to support him, in the attempt to rid the school of C.C., was provided in an amended complaint but that request to replead was denied by the District Court. (DE# 00513109422, p. 21-22).

Nevertheless, with that socially inappropriate statement with a sexual connotation as additional fodder, Emery attempted to have the girl's parents file sexual harassment charges against C.C. but they chose not to do so. (DE# 00513109422, p. 22).

Hurbough and Emery also had Ms. McNosky, a teacher at the school, follow C.C. with the intent to have a criminal charge filed against him. Specifically, she was directed by Hurbough or Emery, or both, to have some minor physical contact with C.C. to give support to file assault charges, a felony being absolute grounds for removal from school. On a number of occasions she attempted to have contact with C.C. but he avoided contact. On two occasions he could not, once on or about February 14th and again on or about the 20th of 2013. (DE# 00513109422, p. 22). There is nothing in the educational record at all as to why McNosky was following C.C. or why she was even in the same class as him.

On February 19th Mrs. Bowen, the keyboarding teacher, reported that C.C. was extremely disruptive that day. He was roughhousing with other students, was rolling around the class in a chair, and yelled across the room that another male's penis was so small that you couldn't even see it. Emery spoke to this boy's parents, attempting to characterize this statement as one of sexual harassment and attempted to get them to file charges against C.C., for felony sexual harassment but they too refused. All these socially inappropriate behaviors continued to evidence C.C.'s diminished social skills, the blurting out of comments without thought of consequences and the need for more time for

the behavioral intervention plan and IEP to take effect. (DE# 00513109422, p. 22).

In addition, and on that very same day, C.C. was also seen bumping into another student's chair, leaning over its side, grunting loudly and belching in a student's face. Emory again attempted to characterize this incident as one of sexual harassment and investigated it as such, all in the hope of using it to rid the school of C.C. for committing a felony. It was during these investigations that he learned that C.C. had photographed a student in a restroom, likely on the 14th. Specifically, that R.L. (C.C.'s friend) purposefully went to an open toilet stall with no door, and let C.C. and a few other students know he was defecating and let them take his picture. Importantly R.L. had a history of "mooning people" and was known to do "crazy things." While in the open stall R.L. continued to laugh and even struck a pose with his palms up while making a funny face. He also made "grunting noises" to further exaggerate defecation for not only all to see but also to hear. R.L. wiped himself and showed the feces stained toilet paper to C.C. and a number of other students who were present. C.C. and at least one other student took a picture of R.L. in the stall. R.L. saw the picture and laughed. (DE# 00513109422, p. 23-24)

After the investigation was completed, Emery and Hurbough now believed they had their felony to support expelling C.C. from school for violating the Texas Penal Code of taking the picture of a person in the bathroom as an invasion of privacy. They finally found a parent willing to file felony charges against C.C. with the local juvenile justice authority. Hurbough and Emery now made the easy decision to throw C.C.

out of school for committing a felony. They had obtained their goal. (DE# 00513109422, p. 24).

On March 12th McNosky was also directed by Hurbough, or Emery or both to file felony charges C.C. for the contact that she forced, on or about the 14th and 20th, both well after the incidents in question. The officer at the police station refused to file it as a felony and reduced it to a misdemeanor. (DE# 00513109422, p. 25).

Fortunately, the Juvenile Justice Authority in Fort Worth decided not to process the case at all against C.C., easily recognizing that the pictures were the immature acts of adolescent and not felonious activities. Even though Emery and Hurbough knew that the Juvenile Authorities would not prosecute the issue at all, and knew there no "felony," like those of biblical yore, who "hardened their hearts" they continued to keep C.C. from returning to the regular education environment, depriving him of academic and non-academic opportunities otherwise given his non-disabled peers. (DE# 00513109422, p. 25).

**B. Procedural Resume-The Decisions Below**

During the 2013 school year C.C. was a student with a disability and received services pursuant to the *Individuals With Disabilities Education Act* ("IDEA"), 20 U.S.C. §1401 et seq. He believed his rights under IDEA were violated by the School District, including the Middle School Principal, Scott Hurbough and the Vice-Principal, Damon Emery (DE# 00513109422, p. 11-12).

On January 13, 2014 and in order to satisfy the administrative exhaustion requirements in the

operative law, 20 U.S.C. §1415(l)[11], C.C. filed what is termed a *Request For A Due Process Hearing* with the Texas Education Agency ("TEA"). The Hearing Officer ruled in favor of the School District on all relevant grounds. (DE# 00513109422, p. 12).

On October 19, 2014 C.C. filed his *First Amended Complaint* [ROA. 146]. There C.C. further alleged and clarified claims that the HEB School District violated his rights pursuant to *Section 504 of the Rehabilitation Act* by creating a hostile educational environment as to him and [ROA. 174-175] and by professional staff grossly deviating from operative standards of care in regard to the educational program provided. It reiterated language that he was also a victim of retaliation based upon the advocacy undertaken by his parents, on his behalf (DE# 00513109422, p. 13).[12]

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[11] The appeal of the Special Education Hearing Officer decision was severed from this case and is not before the 5th Circuit for review (App. 11) through the underlying facts in that cause are relevant here.

[12] C.C. also claimed violations of his constitutional rights, pursuant to the Due Process Clause of the 14th Amendment to the United States Constitution, when having an investigation that was steered and directed to a finding that he committed a felony (when he did not) and then by failing to have a process to review the allegations when the School District learned the felony allegations were not going to be prosecuted by the local Juvenile Justice Authority. He also claimed that School District personnel participated in a conspiracy against him pursuant to 42 U.S.C. §1985. Last, that the School District itself and Hurbough and Emery, Individually, violated his rights pursuant Equal Protection Clause of the 14th Amendment, on a *class of one* theory. (App. 16-19). None of these claims have been carried forward.

The then Appellees including Hurbough, Emery and the District itself on October 23, 2014 filed their respective *Motions To Dismiss* with the required Brief. Of particular note and relevant to this current *Petition* was the District's response that:

> ".... In fact, Plaintiffs' Complaint fails to tie any of the alleged action of HEB ISD to C.C.'s disability; to the contrary, Plaintiffs actually plead that the District took the alleged action against C.C. in retaliation for Plaintiffs' advocacy ... (DE# 00513109422, p. 14-15). ]."

C.C. later filed his *Response* as to Emery, Hurbough and the School District on December 2, 2104 based solely upon the *First Amended Complaint*. Among other things he did include an argument he was a victim of discrimination based upon his parent's advocacy, a *retaliation claim* [(DE# 00513109422, p. 15-16).

The School District, Hurbough and Emery soon filed their respective *Reply Briefs* to C.C.'s *Response.* The School District failed to respond to C.C.'s *retaliation claim,* except to note it was not in Plaintiffs live pleading, their *First Amended Complaint.* (DE# 00513109422, p. 15-16).

Later and on December 24th, the TEA appeal was also severed from this case ordering C.C. to file a new Complaint on the severed action. (DE# 00513109422, p. 16).

On January 8, 2015, the District Judge denied all of C.C.'s constitutional and statutory claims including C.C.'s claims pursuant to Section 504. In regard to the claim he was a victim of discrimination based upon

disability the Judge also gave this claim short shrift, noting that the (mis)treatment of C.C. was not based upon his disabilities. The Court wrote that any claims related to retaliation were not properly presented in the *First Amended Complaint*.[13] In this section the Judge relied upon D.A. ex rel. Latasha A. v. Houston Independent School District, 629 F.3d 450, 455 (5th Cir. 2010) and Estate of Lance v. Lewisville Independent School District, 743 F.3d 982, 990 (5th Cir. 2014). (App. 17-21; DE# 00513109422, p. 16-18).

C.C. appealed in a timely manner and filed his Appellant's Brief alleging that the District Court erred when dismissing his claim that School District personnel grossly deviated from professional standards of care as to him, violating Section 504 of the Rehabilitation Act of 1973 thereby. He also argued that the District Court erred when failing to find he was a victim of discrimination because the School District failed to provide him a non-hostile educational environment. (DE# 00513109422, p. 11).[14]

The School District responded and argued, as they have throughout, that any (mis)treatment C.C. received at the School District was not based upon his disabilities. Moreover, claims for a violation of Section 504 must be predicated upon the failure of the school

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[13] The Judge also addressed claims of civil conspiracy [ROA. 685]. C.C. has abandoned those contentions.

[14] At the time C.C. also alleged the District Court erred by not permitting him to replead regarding allegations of retaliation; that his procedural and substantive due process rights were violated as was an equal protection claim. They have all since been abandoned.

district to comply with the requisites of IDEA. (DE# 00513148375, p. 55-56).

In his *Reply Brief* C.C noted that a student need not show that a failure to adhere to their *Individualized Educational Plan* was the sole manner to seek and obtain liability based upon Section 504 (DE#00513184971, p. 10). Moreover that the acts and omissions of the Principal Hurbough and Vice-Principal Emery clearly raised an inference that such acts and omissions were a gross deviation from professional standards of care for educators. (DE#00513184971, p. 12-15) and that in any case, such actions were taken against C.C., because of his behaviors, an extension of his disabling conditions. (DE#00513184971, p. 16-18).

On January 8, 2016, Oral Argument was held before the Fifth Circuit Court of Appeals. Counsel for C.C. reiterated that this case had strong public policy implications in what is termed the *School House To The Jailhouse Pipeline* (DE#00513434512, p. 27) and that we want our teachers to help kids stay in school and not steer them into the criminal justice system[15].

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[15] Texas Education Agency (TEA) data show that of the 5,205,659 students that participated in K-12th grade during the 2012-2013 school year, 499,289 of them qualified for special education services, or 9.5% of the general population of students. However when the TEA disciplinary action data is teased out it reveals that the cohort of special education students received over 15% of the in-school suspension (ISS) actions, nearly 20% of the out-of-school suspension (OSS) actions, over 18% of the disciplinary alternative education program (DAEP) actions, over 18% of the juvenile justice alternative education program (JJAEP) actions, and almost 16% of all expulsion actions. *See also* (https://rptsvr1.tea.texas.gov/adhocrpt/Disciplinary_Data_Products/DAG_Summaries/Download_State_DAG_Summaries.html).

(DE#00513434512, p. 32). A member of the Panel noted that the District Judge failed to spend much time on C.C.'s claims based upon Section 504 except to note that the conspiracy was not based upon C.C.'s disability but rather upon various behavioral infractions. (DE#00513434512, p. 35). Counsel suggested that everywhere in the pleadings where the term "disability" was used, we should consider also using the term, "behaviors." Further, that the key issue was not whether a particular diagnostic criteria (like ADHD) was alleged but rather were C.C.'s behaviors, a manifestation of his disabling conditions, the moving force behind Hurbough's and Emery's conspiracy and that there were sufficient "inferences" in the factual resume of the case to support such a position. (DE#00513434512, p. 37). A Panel member noted to Counsel for the School District that based upon the pleadings, there appeared to be a relationship between conduct and disability. (DE#00513434512, p. 50). Further, that by getting felony charges filed against the student the district was not treating the disability. Counsel for the School District had little to say as a response to these comments. (DE#00513434512, p. 46).

Notwithstanding the apparent understanding by at least one panel member of the interconnectedness between behaviors and disability, that Panel for Fifth Circuit Court of Appeals affirmed the District Court's decision, specifically noting that:

> "The Plaintiffs did not sufficiently plead discrimination under § 504. In their first amended complaint, the Plaintiffs alleged that the Defendants formed a conspiracy to remove

> CC from school by categorizing his infractions as felonies. Taking the Plaintiffs' conspiracy allegations as true, the Plaintiffs did not sufficiently plead that this conspiracy was based on CC's disability. ... The Plaintiffs did not allege facts suggesting that the Defendants acted against CC for any reason other than his multiple behavioral infractions.
>
> The Plaintiffs also did not plead facts sufficient to establish that these behavioral infractions were the result of CC's ADHD. The Plaintiffs' complaint merely states that his ADHD resulted in CC having difficulty "Executing Functioning, which [a]ffects his ability to manag[e] his social environment, make good decisions and communicate in an appropriate manner." If that conclusory statement were enough to plead discrimination, any plaintiff with ADHD could attribute any misconduct, no matter how severe, to the disability."
>
> (DE#00513413282, p. 5).

C.C. filed a *Petition For Rehearing* first arguing that the Panel Decision failed to address the Section 504 claim related to a gross deviation from a professional standard of care, as compared to a Section 504 claim related to a hostile educational environment. Further, that even though the Panel Decision recognized that C.C. had committed multiple behavioral infractions, incorrectly wrote that C.C. had failed to show those infractions were a result of his ADHD. Moreover, that the Panel had failed to use the correct standard of review in regard to a 12(b)(6) *Motion To Dismiss*. (DE# 00513434512, p. 16-19). In addition, C.C. argued that

the Panel Decision, left "as-is" would reinforce the worst types of behaviors by school officials at the expense of a child with a disability. C.C. wrote that the Panel seemed to be more concerned that if they found in his favor, it would open up the floodgates for similar lawsuits. (DE# 00513434512, p. 19-20). Of course, the floodgates of children going from school to jail, are already open[16]. If the Supreme Court granted the *Writ* in this cause, it would go a long way in closing those gates, even if it opened another.

In any case, the Fifth Circuit denied the rehearing request. (DE# 0051348074, p. 1-2).

## REASONS FOR ALLOWANCE OF THIS WRIT

There are a number of reasons why this Petition should be granted. This writer is under no illusion as to the difficulty in having a case like this heard before the Supreme Court. It is not reported below and to the knowledge of this writer, there is no major "split in the circuits" as of yet, on the issue presented. In fact, as construed as a case based upon a "School House To Jailhouse" and hostile educational environment relative to a student with a disability, it very likely is a *case of first impression.* The Circuits are noticeably silent on the issue because of the paucity of cases,

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[16] On March 31, 2015, the Department of Justice opened an investigation in Texas using its authority under Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994 and Title II of the Americans with Disabilities Act that focuses on whether some Truancy and Juvenile District Courts in the state are providing "due process...and meaningful access to the judicial process for children with disabilities." *See also* (https://www.justice.gov/opa/pr/department-justice-announces-investigation-dallas-county-truancy-court-and-juvenile-district)

passing though the district courts and even the appellate circuits, that have gone beyond summary judgment and onto trial. Rather these types of cases are much more likely to be disposed of and decided by a *Motion To Dismiss* meaning students with disabilities like C.C. will never see the light of a courtroom and nor will a School District feel the heat from that light. In fact, this writer, who significantly works in this area of the law, is only aware of one case that has even gone past a *Motion For Summary Judgment* and to trial in the United States, on a Section 504 claim creating a hostile educational environment, Rideau v. Keller Indep. Sch. Dist., 819 F.3d 155 (5th Cir. 2016). Here a jury, finally getting to hear similar facts, not surprisingly easily found in favor of the student.

Considered together, the facts as presented below will lead to the inescapable conclusion that the Fifth Circuit credited the evidence of the party seeking a motion to dismiss and failed to properly to acknowledge key evidence offered by C.C., the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal courts," Boag v. MacDougall, 454 U. S. 364, 366, 102 S. Ct. 700, 70 L. Ed. 2d 551 (1982) [O'Connor, J., concurring], this Court should now intervene here because the opinion below reflects a clear misapprehension of dispositive motion standards in light of this Court's prior precedents. Brosseau v. Haugen, 543 U.S. 194, 197-198, 125 S. Ct. 596, 160 L. Ed. 2d 583 and leads to a result that is in absolute conflict with public policy and is manifestly unjust as to students with disabilities who are steered into the criminal justice system. While C.C. is the Petitioner in this cause, he truly speaks for all those thousands upon

thousands of students, who have been equally mistreated.

## I. This Court Should Grant This *Petition* Because To Do Otherwise Would Create A Precedent That Conflicts With Public Policy, Is Morally Repugnant And Offensive

This writer's first ground for appeal is simply based upon strong public policy considerations, fundamental fairness and moral grounds.

There is not a week, often even a day, that goes by where there is not some media story about the plight of a young person, especially those perceived as different because of nationality, race or religion, disability, or gender stereotypes, who are bullied, harassed or assaulted at their school because of those differences. Frankly, it has become somewhat of a national epidemic. Unlike the task of containing the spread of a flu virus by means of vaccines and treatment, this type of epidemic is particularly difficult to treat because often the school district itself, as in C.C.'s situation, is part of the illness and worse, refuses to recognize its responsibility in permitting this virus to spread.

The early data and treatises reported that much of the problem was inadvertent, with failure to identify the student as one with a disability as the main problem or the failure to implement correctly the student's *Individualized Educational Plan* ("IEP") or *Behavioral Intervention Plan* ("BMP"). Today we know that the problem is much more insidious, some school administrators purposefully push students with disabilities who have behavior problems out of their schools, because it's easier to do that, then serve them.

C.C. is quite obviously one such student. (DE# 00513109423, p. 17-18).

What occurred in this case is much more nefarious that what is alleged in the typical student upon student bullying and harassment. Rather, it is School District personnel, even the Principal and Vice-Principal, who were the people actually bullying and harassing C.C., a student with a disability. Not only did they do it individually but used their official roles to conspire with other school personnel to have C.C. removed from the school environment and forced into the criminal justice system. In short, this is a case that epitomizes the very, very worst of what is termed, the *Schoolhouse To The Jailhouse Pipeline*. There is one silver lining in this cloud, the evidence of conspiracy is overt and uncontroverted.

In the instant case the School Principal Hurbough and Vice-Principal Emery went out of their way to speak with at least three sets of parents, in an attempt to have any of them file felony sexual assault charges against C.C., knowing that such a filing would automatically give them permission to remove C.C. from the public school. Their intent was so well known that C.C. heard two teachers in the hall talking about filing criminal charges against him. They even had another teacher purposefully arrange to have physical contact with C.C. with the intent that teacher file felony assault on a public servant charges against C.C. This all occurred within about a two-week period.

The core of the School District's defense, at the District Court stage, and later before the Fifth Circuit Court of Appeals, was that the acts and omissions of Hurbough and Emery were not based upon C.C.'s

disability. Of course, if they are not based upon his disability, i.e., his behaviors that they were tired of dealing with, what else could they be based on? Not in any pleading filed by the School District, or at Oral Argument, did they ever give a plausible reason for such actions by Hurbough and Emery. Of course, how could they? There are no good reasons for treating a child this way. Especially one with a known disability.[17]

This Petition should be granted because the underlying opinion, if left to stand *as-is,* would now give School District personnel the perfect cover to continue in their discriminatory practices. They now have the ratification of the Fifth Circuit Court of Appeals that it is OK to push kids out of school and into jail, as long as they can say with a "straight face" that it was because of the student's behaviors and not due to their disabling conditions (that gave rise to the behaviors in the first instance), a distinction, in this writer's opinion, without a difference.

In addition and in a related vein, it should be granted because the Court of Appeals failed to use the correct standard of review when construing a case adjudicated upon a 12(b)(6) *Motion To Dismiss.*

[17] In fact, they did admit that it could have been retaliatory. (DE# 00513109422, p. 14-15).

## II. This *Petition* Should Be Granted As The Decision By The 5th Circuit Is Clearly Erroneous

### A. It Is Clearly Erroneous Because It Failed To Provide All Reasonable Inferences To The Non-Movant, C.C.

First and foremost, the Court of Appeals erred by not following well-settled jurisprudence regarding cases based upon a 12(b)(6) *Motion To Dismiss*. *See* Tolan v. Cotton, 134 S.Ct. 1861; 188 L.Ed 2d. 895 (2014). It is well-settled that all allegations in a complaint are deemed true, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) [complaint simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement];[18] and as such, all reasonable inferences that flow from such facts inure to the benefit of the non-movant. Willis v. Roche Biomedical Labs., Inc., 61 F3d 313, 315 (5th Cir. 1995); *see also* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Fifth Circuit failed to follow these standards when determining that C.C. was not able to show that the treatment he received at the hands of Hurbough and Emery were based upon his disabilities.[19]

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[18] In support of that proposition, liberal discovery rules and summary judgment motions, not motions to dismiss, should be used to define disputed facts and issues and to dispose of unmeritorious claims. Furstenfeld v. Rogers, No. 03-02 CV 0357 L, 2002 U.S. Dist. LEXIS 11823, at *5 (N.D. Tex. Jul. 1, 2002).

[19] C.C. argued he was a victim of discrimination based upon disability because he was not provided a non-hostile educational environment, alleging it violated his rights pursuant to Section 504 of the Rehabilitation Act of 1973. The Panel Decision correctly

First and foremost, it is absolutely uncontroverted that C.C. is a student with a disability and suffered from attention deficit hyperactivity disorder ("ADHD"), anxiety and a learning disability. C.C., as function of his ADHD, not surprisingly had problems acting impulsively, and *blurting out* (emphasis added) inappropriate comments and does so without regard to consequences. (DE# 00513109422, p. 18).

Because of this and his other disabling conditions, all when acting together, it caused C.C. to misbehave and have continued problems with disciplinary referrals. The staff involved with the provision of special education services were well aware of all these problems, including and especially the relationship between his behaviors, his stated disabilities and problems with receiving disciplinary referrals. In fact, because of these related issues, C.C. was assessed for special education services, was provided a functional behavioral assessment and had an *Individualized Educational Plan* ("IEP") developed, which accented the need for social skills development and better socialization with others (DE# 00513109422, p. 18-21)[20].

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cited Estate of Lance v. Lewisville Independent School District, 743 F.3d 982, 990 (5th Cir. 2014) for the proposition that C.C. must show (1) he was an individual with a disability; (2) was harassed because of that disability and (3) it was severe and pervasive; (4) that Defendants knew of the harassment and were deliberately indifferent to it. As noted above, the District Court determined that C.C. could not show the treatment he received by School Officials was due to his disability. The Panel Decision only addressed that issue, as well. (App. 5-7).

[20] The behavioral assessment demonstrated that the student's behaviors were directly related to his disability and the school

When C.C. blurted out an inappropriate comment about a girl and porn, a behavior reasonably related to his ADHD, Emery the Vice-Principal, asked the girl's family to file felony sexual harassment charges against C.C. (DE# 00513109422, p. 22).

When C.C. blurted out an inappropriate comment that another student's penis was so small you couldn't even see it, again a behavior reasonably related to his ADHD, Emery the Vice-Principal, asked the boy's family to file felony sexual harassment charges against C.C. (DE# 00513109422, p. 22).

When C.C. belched in a student's face, another comment and behavior reasonably related to his ADHD, Emery the Vice-Principal, investigated the incident as one of sexual harassment, in the hope of using that to file felony charges against C.C. (DE# 00513109422, p. 22).

The District Court erred, as did the Fifth Circuit, when not providing C.C., the reasonable inference, which he rightfully deserves at the 12(b)(6) stage, that Hurbough and Emery conspired against C.C. because of his behaviors, clearly a manifestation of his disabling conditions. Such an inference is particularly well founded, in light of the fact there was no other reason for the conspiracy provided. *See* K.M. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343, 358 (S.D.N.Y. 2005) [jury could reasonably infer that harassment was based on disability where no other reason was presented]. Moreover, the close temporal proximity between C.C.'s behaviors, and their obvious relation

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district agreed to address those behaviors in his IEP with social skills training and a behavior intervention plan.

back to his disabling conditions including ADHD, in concert with Hurbough and Emory asking parents to file charges against him, plausibly evidence his mistreatment was based upon his disabilities. *See* Lamb v. Qualex, Inc., 33 Fed. Appx. 49, 60 (4th Cir. 2002) [discrimination may be proved by either an unusually suggestive temporal proximity between the activity and the allegedly retaliatory action, or a pattern of antagonism]. In C.C. there were both temporal proximity and animus, sufficient to show he was a victim of discrimination based upon disability.

Morever and in a related vein, the Panel erred when stating that C.C. had a duty to show that Hurbough and Emery discriminated against him due to a specific disability. (App. 6). First, the proposition that a Complainant at the pleading stage make such a showing flies in the face of common sense and common experience. Does a person who is in a wheelchair really have to show that the discrimination they received is based upon cerebral palsy as compared to whether it's due to a car accident, or even merely a broken leg caused from an athletic event? This type of heightened pleading requirement, at the 12(b)(6) stage, has long been discredited by this Court. Swierkiewicz v. Sorema N. A., 534 U. S. 506, 508 (2002) [held that "a complaint in an employment discrimination lawsuit need not contain specific facts establishing a prima facie case of discrimination under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)." We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege "specific facts" beyond those

necessary to state his claim and the grounds showing entitlement to relief. Id. at 508].

As C.C. has shown the conspiracy he experienced was due to his disabling conditions and related behavioral problems, he has satisfied criteria he was a victim of a hostile educational environment. *See* Estate of Lance v. Lewisville Independent School District, 743 F.3d 982, 990 (5th Cir. 2014).

The failure to accept such facts by the Panel, and all the reasonable inferences drawn therein, conflict with well-settled Supreme Court Law. Ashcroft v. Iqbal, 556 U. S. 662, 678 (2009), *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) as well as Fifth Circuit Law, on same. Bowlby v. City of Aberdeen, Miss., 681 F.3d 215, 219 (5th Cir. 2012); *see also* Carmichael v. Galbraith, 2014 WL 267590 (5th Cir., June 19, 2014). As such, C.C. believes that not only has he provided an inference that the retaliation/ discrimination he experienced was predicated upon his disabilities/conduct/behaviors but has provided actual evidence in support of same.

For this reason as well, this *Writ* should be granted.

In addition and in the alternative to the above, the Panel also erred when failing to address allegations C.C. was a victim of discrimination based upon disability, as the staff grossly deviated from professional standards of care, in the treatment he received.

### B. It Is Clearly Erroneous Because It Failed To Address C.C.'s Argument That He Was A Victim Of Discrimination Based Upon Disability Due To The Gross Deviation Of Professional Standards Of Care By School Officials

While the Panel did address C.C.'s hostile educational environment claim, he also alleged he was a victim of discrimination based upon disability as staff grossly deviated from professional standards of care. The Fifth Circuit panel absolutely failed to address this issue.

As noted above, the focus of the analysis for violations of Section 504, as to a hostile educational environment theory, is predicated upon the test in the above noted section regarding a *deliberate indifference* standard, relying upon Davis v. Monroe County Board Of Education, 526 U.S. 629 (1999) and Lance.

In contrast, a cause of action related to a *gross deviation of professional standards of care* rejects this *deliberate indifference* standard, as noted in Youngberg v. Romeo, 457 U.S. 307 (1982) and more closely focuses on the acts and omissions of professional staff. As such, it is more akin to the standard review of discrimination based upon disability, as noted in Barnes v. Gorman, 536 U.S. 181 (2002) [city refused to provide necessary accommodations to person who was in a wheelchair] and in Delano-Pyle v. Victoria County, Texas, 302 F.3d 567(5th Cir. 2002) [county refused to provide necessary accommodations for person who was hearing impaired].

The 5th Circuit has further stated, in Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348, 1356 (5th Cir.

1983) that "A cause of action is stated under §504 when it is alleged that a school district has *refused* to provide reasonable accommodations for the handicapped plaintiff to receive the full benefits of the school program."

In the instant case, and at this stage of the pleadings C.C. only need show he was a person with a disability and he did not receive accommodations by School District personnel commensurate with unique and individualized needs and was denied a public service afforded others, as noted in Barnes, and Delano-Pyle. Specifically, C.C. has provided significant factual support the School District personnel failed to accommodate his disability, when, and among other things, they refused to return him to the public school when the juvenile justice authority dropped charges against him on multiple occasions; refused to see his various adolescent behaviors as manifestations of the very same conditions he was receiving special education services for; refused to treat his disabilities pursuant to his individual education plan; and instead asked other parents and even a school teacher to file felony criminal charges against him. (DE# 00513434512, p. 18).[21]

As this Court has repeatedly reaffirmed "bad faith or gross misjudgment" are just alternative ways to plead the refusal to provide reasonable accommodations . . . In this view, it is immaterial

[21] In regard to this issue and under questioning the ISD's Counsel admitted, based upon C.C.'s pleadings at the 12(b)(6) stage, the allegation the ISD was refusing to deal with disability when steering parents to file criminal charges against him "was true." [App'x at p. 23, l. 1-4].

whether the District explicitly refused to make reasonable accommodations, professionally unjustifiable conduct suffices. Stewart v. Waco Indep. Sch. Dist., 711 F.3d 513 (5th Cir. 2013). Surely, the number of "refusals" noted above, would satisfy relevant criteria at the 12(b)(6) stage of the pleadings. Of course if there is still any uncertainty as to whether or not the acts and omissions of Appellees Hurbough and especially Emery, satisfied the standard of "professionally unjustifiable conduct" we look no further, than the other facts pled, taken as true that not only did they steer C.C. into prison and away from the classroom, but conspired with others in doing so. (DE# 00513184971, p. 18). The facts as presented by C.C. clearly evidence he was the victim of professionally unjustifiable conduct.

For this reason as well as the reasons noted above, this Writ should be granted.

## CONCLUSION

The Supreme Court now has the opportunity to send a strong message across this country, that we want our teachers to help kids stay in school, and for those that purposefully push them into the criminal justice system, liability awaits. These strong public policy considerations are even more appropriate when dealing with children who have disabilities.

> "Statutes of rehabilitation should be construed in a liberal and humanitarian mode thus effectuating successfully the legislature's objective intentions. Such construction of rehabilitative statutes promote the public interest, public welfare, public health, public

> state policy and the police powers. Such salutary constructions properly disregard technical and meaningless distinctions but give the enactment the most comprehensive application of which the enactments are susceptible without violence to the language therein. Deep East Texas Regional Mental Health & Mental Retardation Services v. Kinnear, 550 S.W.2d 550, 563 (Tex. App. – Beaumont, 1994);" *see also* Tchereepnin v. Knight, 389 U.S. 332, 336 (1967) [remedial legislation should be construed broadly to effectuate its purpose].

Importantly, the Supreme Court underscored in Roger Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148; 120 S. Ct. 2097, 147 L.Ed 2d 105 (2000), that lower Courts should not treat discrimination cases with more scrutiny than other cases dealing with questions of facts, *citing* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 524; 125 L. Ed. 2d 407; 113 S. Ct. 2742 (1993), as the Fifth Circuit has done with C.C.

For any and all the above noted reasons, Petitioners respectfully request their *Petition For Writ Of Certiorari* be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX

## TABLE OF CONTENTS

Appendix A Opinion and Judgment in the United States Court of Appeals for the Fifth Circuit (March 9, 2016) . . . . . App. 1

Appendix B Memorandum Opinion and Order and Final Judgment in the United States District Court, Northern District of Texas, Fort Worth Division (January 8, 2015) . . . . . App. 10

Appendix C Order Denying Petition for Rehearing En Banc in the United States Court of Appeals for the Fifth Circuit (April 26, 2016) . . . . . App. 26

## APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

**No. 15-10098**

**[Filed March 9, 2016]**

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|---|---|
| C.C., Individually, by and through his next friends, Charles Cripps and Kristie Cripps; KRISTIE CRIPPS; CHARLES CRIPPS, Plaintiffs - Appellants | ) |
| v. | ) |
| HURST-EULESS-BEDFORD INDEPENDENT SCHOOL DISTRICT; SCOTT HURBOUGH; DAMON EMERY, Defendants - Appellees | ) |

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:14-CV-646

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:[*]

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

CC, by and through his next friends, Charles Cripps and Kristie Cripps, appeals the district court's dismissal of claims against CC's former school district and the principal and vice principal of CC's former school. CC was a student in the school district who had been diagnosed with a disability pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. This case primarily concerns the school district's decision to transfer CC to Disciplinary Alternative Educational Placement ("DAEP") for sixty days following one particular instance where CC took a picture of a student using the bathroom. On appeal, the Plaintiffs argue that the district court erred in dismissing their claims brought under section 504 of the Rehabilitation Act, 29 U.S.C. § 794. For the following reasons, we AFFIRM.

## I.

The following facts are consistent with the Plaintiffs' pleadings. During the relevant time period, CC was a twelve-year-old male student at Bedford Junior High School, a school within Hurst-Euless-Bedford Independent School District. Scott Hurbough was Bedford's Principal, and Damon Emery was Bedford's Vice Principal. CC suffered from severe Attention Deficit Hyperactivity Disorder ("ADHD"), which qualified him as a student with a disability pursuant to the IDEA and the Rehabilitation Act. Under these statutes, CC received special education services. Despite these services, CC exhibited several "school problems" during the course of the relevant year. These problems included: disobeying teachers; running into a teacher; roughhousing in the classroom;

belching in a student's face; and insulting students with vulgar language, such as asking a female student "if she was making porn." CC alleged that the District, Hurbough, and Emery conspired to remove CC from school by categorizing these instances as felonies and encouraging the victims of CC's actions to file criminal charges against him.[1]

The instance at the center of this case occurred when CC took a picture of another student, RL, while he was using the bathroom at school. CC and another student saw RL laughing and using the bathroom in a stall without a door. RL said "look a[t] this!" and held up toilet paper smeared with feces. The students all laughed, and CC took a picture of RL. Emery conducted an investigation of the incident, and as alleged by the Plaintiffs, Emery concluded that CC's acts were an invasion of privacy and a felony warranting suspension from school. At the encouragement of Emery, RL's father filed a criminal charge against CC. Emery then convened a Manifestation Determination Review ("MDR") meeting to determine whether CC's behavior was the manifestation of his disability, ADHD. The MDR committee concluded that the incident was not the result of CC's ADHD. CC was placed in DAEP for sixty days.

Despite reopening the investigation to determine whether another student also took pictures during the incident, and discovering that the criminal charge had been dismissed, the MDR committee did not revoke CC's placement in DAEP. The Plaintiffs later filed a

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[1] The teacher that CC ran into did file a criminal charge of assault, which the officer classified as a misdemeanor.

claim with the Office of Civil Rights, which determined that the Defendants had a legitimate reason for acting against CC and, thus, the retaliation claim failed. The Plaintiffs then filed a petition for a due process hearing under the IDEA, and the hearing officer dismissed each of the Plaintiffs' claims that was not brought under the statute. Following the hearing, the hearing officer issued an order upholding the District's decision.

The Plaintiffs filed a complaint in the Northern District of Texas appealing the result of the due process hearing and alleging substantive and procedural due process violations, a violation of the equal protection clause, and violations of section 504 of the Rehabilitation Act. The Defendants filed a motion to dismiss the complaint for failure to state a claim upon which relief may be granted. The Plaintiffs then filed their first amended complaint, and the Defendants filed a subsequent motion to dismiss. The district court severed the Plaintiffs' appeal of the due process hearing, denied Plaintiffs leave to file a second amended complaint, and granted the Defendants' motion to dismiss the Plaintiffs' remaining claims. The Plaintiffs timely appealed. During oral argument, counsel clarified that the Plaintiffs limited their challenge to the district court's dismissal of their claims brought under section 504 of the Rehabilitation Act.

## II.

### A.

We review the dismissal of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure de novo. *Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162,

164 (5th Cir. 1997). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For relief to be plausible, the facts must be more than consistent with unlawful conduct; the facts must suggest liability. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

B.

The Plaintiffs argue that the district court erred in dismissing their claim that the Defendants violated § 504 by discriminating against CC due to his disability. Section 504 protects disabled students of school districts receiving federal grants from discrimination "solely by reason of her or his disability." 29 U.S.C. § 794(a); *see Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 990 (5th Cir. 2014). Taking the allegations in the light most favorable to the Plaintiffs, the complaint attempts to allege discrimination in the form of hostile environment. To sufficiently allege harassment in the form of a hostile environment under § 504, the Plaintiffs must allege:

> (1) [CC] was an individual with a disability, (2) [CC] was harassed based on his disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his education and created an abusive educational environment, (4) [Defendants] knew about the harassment, and (5) [Defendants were] deliberately indifferent to the harassment.

*Estate of Lance*, 743 F.3d at 996 (quoting *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 454 (6th Cir. 2008)). This court has also held that "facts creating an inference of professional bad faith or gross misjudgment are necessary to substantiate a cause of action for intentional discrimination under § 504." *D.A. ex rel. Latasha A. v. Hous. Indep. Sch. Dist.*, 629 F.3d 450, 455 (5th Cir. 2010).

The Plaintiffs did not sufficiently plead discrimination under § 504. In their first amended complaint, the Plaintiffs alleged that the Defendants formed a conspiracy to remove CC from school by categorizing his infractions as felonies. Taking the Plaintiffs' conspiracy allegations as true, the Plaintiffs did not sufficiently plead that this conspiracy was based on CC's disability. *See Estate of Lance*, 743 F.3d at 996. The Plaintiffs did not allege facts suggesting that the Defendants acted against CC for any reason other than his multiple behavioral infractions. The Plaintiffs also did not plead facts sufficient to establish that these behavioral infractions were the result of CC's ADHD. The Plaintiffs' complaint merely states that his ADHD resulted in CC having difficulty "Executing Functioning, which [a]ffects his ability to manag[e] his social environment, make good decisions and communicate in an appropriate manner." If that conclusory statement were enough to plead discrimination, any plaintiff with ADHD could attribute any misconduct, no matter how severe, to the disability. In addition, the Plaintiffs' allegations show that the Defendants did not transfer CC until after the MDR determination, which concluded that CC's behavior was not a result of his disability. The Plaintiffs did not sufficiently plead that any of the

Defendants' acts were based on CC's disability; therefore, the Plaintiffs did not sufficiently plead that the Defendants violated § 504 by discriminating against CC.

## III.

Because we conclude that the Plaintiffs did not sufficiently plead a violation of section 504 of the Rehabilitation Act, we AFFIRM the district court's dismissal of the Plaintiffs' claims.

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**No. 15-10098**
**D.C. Docket No. 4:14-CV-646**

**[Filed March 9, 2016]**

| | |
|---|---|
| C.C., Individually, by and through his next friends, Charles Cripps and Kristie Cripps; KRISTIE CRIPPS; CHARLES CRIPPS, Plaintiffs - Appellants | ) |
| v. | ) |
| HURST-EULESS-BEDFORD INDEPENDENT SCHOOL DISTRICT; SCOTT HURBOUGH; DAMON EMERY, Defendants - Appellees | ) |

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

## APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

**NO. 4:14-CV-646-A**

**[Filed January 8, 2015]**

| | |
|---|---|
| C.C. INDIVIDUALLY, BY AND THROUGH HIS NEXT FRIENDS, CHARLES CRIPPS AND KRISTIE CRIPPS, Plaintiff, | ) |
| VS. | ) |
| HURST-EULESS-BEDFORD INDEPENDENT SCHOOL DISTRICT, ET AL., Defendants. | ) |

MEMORANDUM OPINION
and
ORDER

Now before the court for consideration and decision are the motions of defendants, Scott Hurbough ("Hurbough"), Damon Emery ("Emery"), and Hurst-Euless-Bedford Independent School District ("the District"), to dismiss the complaint of plaintiff, C.C. individually, by and through his next friends, Charles Cripps and Kristie Cripps, for failure to state a claim

upon which relief may be granted.[1] Plaintiff filed responses to the motions, and defendants filed replies. After having considered all the parties' filings and applicable legal authorities, the court concludes that the motions to dismiss should be granted.

I.

Plaintiff's Complaint

Plaintiff's live pleading is his first amended complaint, filed October 9, 2014, in which, pursuant to the authority of 42 U.S.C. § 1983, he complains of violations by all three defendants of his Fourteenth Amendment rights of Due Process and Equal Protection, he asserts a claim of civil conspiracy pursuant to 42 U.S.C. § 1985, and he asserts a claim under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, against the District.[2]

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[1] As originally filed, the District's motion was a motion for partial dismissal. Now that plaintiff's appeal pursuant to the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1415(i)(2), has been severed into a separate civil action, the District's motion has become a motion for dismissal as to all claims and causes of action now being asserted against it in the above-captioned action.

[2] In addition to the claims and causes of action to which the motions to dismiss are directed, the first amended complaint contained an appeal by plaintiff from a Texas Education Agency Special Education Hearing Officer in favor of the District on the issue of whether plaintiff received educational benefit from the District's Individualized Educational Plan. Because the appeal is unrelated from a legal standpoint from the causes of action that are the subjects of the motion to dismiss, the appeal and related allegations have been severed into a separate action, leaving in the

In summary form, the historical allegations of the first amended complaint are as follows:

Plaintiff, who was twelve years old at the time of the events described in the complaint, suffered from difficulties with executive functioning as a symptom of his Attention Deficit Hyperactivity Disorder. He was a student at the Bedford Junior High School, a school within the District. Hurbough was the principal of that school, and Emery was the vice principal.

Plaintiff engaged in inappropriate conduct and indiscretions from time-to-time while attending school. Over time, a conspiracy arose to kick plaintiff out of school by treating some of his conduct as felonies. In response to plaintiff's behavior problems, the school contacted parents of other students to encourage them to file felony charges against plaintiff because a felony charge would automatically remove plaintiff from school.

Around February 2013, plaintiff followed fellow student R.L. into the school restroom where plaintiff and another student took photos of R.L. seated on the toilet. After an investigation, Emery spoke with R.L.'s father and asked him to file felony charges, which he did. Hurbough determined that the taking of the photos and displaying them was a Title V Felony, which warranted suspension from school.

On March 4, 2013, Hurbough appointed and Emery chaired a "Manifestation Determination Review" ("MDR") committee to determine if plaintiff's

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above-captioned action only the claims and causes of action that are the subjects of the motions to dismiss.

"behaviors" had been "caused by or had a direct and substantial relationship to [plaintiff's] behavioral issues and disability." Compl. at 16, ¶ 61. The committee determined that the taking of the photos was not caused by or related to plaintiff's behavioral issues and disability, so the committee recommended removal of plaintiff from school. Plaintiff was removed from school and placed in Disciplinary Alternative Educational Placement ("DAEP") for sixty days.[3]

In the summer of 2013, plaintiff filed a complaint against the District with the Office of Civil Rights ("OCR"), which contended that plaintiff was a victim of retaliation due to his parents' advocacy on his behalf. The OCR initially found that plaintiff established a prima facie case of retaliation. In response, the District was allowed to provide a legitimate non-discriminatory reason for its actions. Emery made purposeful misstatements to the OCR in the District's response. The OCR ultimately found that the District did in fact have non-discriminatory reasons for the punishment of plaintiff, and plaintiff's complaint was denied as unfounded.

Hurbough and Emery permitted plaintiff to be punished more harshly than other students. Also, plaintiff was discriminated against by defendants as a class of one pursuant to the Equal Protection Clause of

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[3] It is unclear to the court whether plaintiff spent sixty days in DAEP. The Texas Education Agency Special Education Hearing Officer, at ¶¶ 15-16 on page 4 of his decision (which is attached to plaintiff's Motion to Remand), noted that as of May 13, 2014, plaintiff had not spent one day in DAEP. Pl.'s Br. in Supp. of Mot. to Remand, Doc. 20, Attach. Exs., Bates No. 000258.

the Fourteenth Amendment. Defendants conspired to violate plaintiff's civil rights in violation of 42 U.S.C. § 1985,[4] and the District discriminated against him in violation of the Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

II.

Grounds of the Motions

Hurbough, Emery, and the District argue that there are no factual allegations in the complaint that support any of plaintiff's asserted causes of action. They argue that the plaintiff's Due Process claims fail because moving plaintiff to DAEP did not infringe upon plaintiff's right to a public education, and, his conclusory allegations are insufficient to support plaintiff's equal protection claim. Further, they argue that plaintiff's conspiracy claim fails because the District and its employees cannot be considered to have conspired together. Lastly, they argue that the complaint does not state sufficient facts to plead intentional discrimination.

In addition, the District seeks summary judgment as to the § 1983 claims against it on the ground that as a municipality it cannot be held liable under § 1983 based on a theory of respondeat superior for the actions

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[4] The only defendants named in the civil conspiracy count are Hurbough and Emery, Compl. at 29, ¶¶ 133-138. Inasmuch as plaintiff adopts in that count all other paragraphs of the complaint, the court considers possible that the District is being accused along with Hurbough and Emery of being a co-conspirator. Id., ¶ 133. The court is assuming in this memorandum opinion and order that plaintiff is accusing all three defendants as being co-conspirators.

of its employees, and that plaintiff has failed to allege any facts that would establish municipal liability against the District for the alleged constitutional violations. The District asserts, specifically, that plaintiff has failed to allege facts that show that the alleged constitutional violations were the direct result of the execution of an official "custom" or "policy" that was approved or sanctioned by the District's final policy maker, that the final policy maker acted with deliberate indifference, and that such a custom or policy was the "moving force" behind the violation.

Defendants Hurbough and Emery also assert as grounds of their motion their entitlement to a qualified immunity defense, asserting that such is not overcome by any facts alleged by plaintiff in the complaint. According to those defendants, plaintiff does not allege a violation of a clearly established constitutional right nor does plaintiff allege that the conduct of either of those defendants about which plaintiff complains was objectively unreasonable.

III.

Analysis

The excessively verbose complaint, which inappropriately combined an appeal from an administrative ruling with the claims that are now under consideration, provided in one of its 165 paragraphs a succinct statement of plaintiff's claims that are the subjects of the motions to dismiss. On page 5 of the complaint, plaintiff alleged:

> C.C. by and through his next friends and natural parents, Charley [sic] and Kristie Cripps, bring [sic] forth claims on his behalf pursuant to the

> *Due Process Clause* of the Fourteenth Amendment to the Constitution of the United States, as contemplated by the Civil Rights Acts, 42 U.S.C. § 1983 as well as civil conspiracy claims pursuant to 42 U.S.C. § 1985. In addition, because C.C. is a person with a disability, his parents likewise bring forth claims pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Rehabilitation Act").

Compl. at 5, ¶ 9. Those are the claims that are being dealt with by the court in this memorandum opinion and order.

A. Standards Applicable to the Motions to Dismiss

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides, in a general way, the applicable standard of pleading. It requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks and ellipsis omitted). Although a complaint need not contain detailed factual allegations, the "showing" contemplated by Rule 8 requires the plaintiff to do more than simply allege legal conclusions or recite the elements of a cause of action. Id. at 555 & n.3. Thus, while a court must accept all of the factual allegations in the complaint as true, it need not credit bare legal conclusions that are unsupported by any factual underpinnings. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.")

Moreover, to survive a motion to dismiss for failure to state a claim, the facts pleaded must allow the court to infer that the plaintiff's right to relief is plausible. Id. To allege a plausible right to relief, the facts pleaded must suggest liability; allegations that are merely consistent with unlawful conduct are insufficient. Twombly, 550 U.S. at 566-69. "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679.

B. None of the Claims Are Supported by Facts Alleged in the Complaint

1. The Due Process Claims

The Due Process claim grows out of disciplinary action taken by reason of the photographs plaintiff took of the child on the toilet. Assuming, arguendo, that plaintiff has correctly asserted in his responses to Emery and Hurbough's motion to dismiss that his complaint states that his right to due process was denied when the school took away his constitutionally cognizable property right to a public education, the complaint still fails to state a claim upon which relief may be granted. The parties agree that "[a] State's extending the right to education creates a property interest protected by the Due Process Clause of the Fourteenth Amendment . . . ." Harris ex rel. Harris v. Pontotoc Cnty. Sch. Dist., 635 F.3d 685, 690 (5th Cir. 2011). However, "[a] student's transfer to an alternate education program does not deny access to public education and therefore does not violate a Fourteenth Amendment interest." Id. Because plaintiff has not plausibly alleged a violation of a constitutionally

protected property or liberty interest, he cannot maintain a due process claim, whether it be procedural or substantive. Therefore, defendants' motions to dismiss are granted as to this claim.

2. The Equal Protection Claims

The Supreme Court has "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that []he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). In support of his complaint that he was punished more harshly than other students with no rational basis for the difference in punishment, plaintiff's complaint mentions other students disciplined by the school, and compares their punishments with his own.

The determination of the similarity of situations of comparators "is case-specific and requires [the court] to consider the full variety of factors that an objectively reasonable decisionmaker would have found relevant in making the challenged decision." Lindquist v. City of Pasadena Tex., 669 F.3d 225, 234 (5th Cir. 2012) (citation and internal quotation marks omitted). Plaintiff alleged no facts in the complaint that would establish that there was no rational basis for the differences in treatment. None of the other infractions involved violations of another child's privacy rights as egregious as the making and publishing of photographs of the child sitting on a toilet. No facts are alleged that would support a conclusion that there was no rational basis to treat plaintiff differently from the other

students. Therefore, this ground of defendants' motions has merit.[5]

3. The Civil Conspiracy Claims under 42 U.S.C. § 1985

Plaintiff alleged that defendants engaged in a civil conspiracy under 42 U.S.C. § 1985 to violate plaintiff's civil rights. In order to state a claim for civil conspiracy under § 1985,

> a plaintiff must allege facts demonstrating (1) a conspiracy; (2) for the purpose of depriving a person of equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or a deprivation of any right or privilege of a citizen of the United States.

Lockett v. New Orleans City, 607 F.3d 992, 1002 (5th Cir. 2010). Because defendants are a school district and its employees, plaintiff cannot plead facts sufficient to demonstrate a conspiracy. "[A] school and its officials constitute a single entity which cannot conspire with itself." Hankins v. Dallas Indep. Sch. Dist., 698 F.Supp.

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[5] The court agrees with the District that the constitutional claims asserted against it would in any event be barred by the failure of plaintiff to plead facts establishing municipal liability. However, the court need not further discuss that subject considering that plaintiff has failed to allege facts establishing that plaintiff's constitutional rights were violated.

Also, the court agrees with Hurbough and Emery that the allegations of the complaint are insufficient to overcome their qualified immunity defenses. Again, the court need not further discuss that subject, bearing in mind the rulings made in the text of this memorandum opinion and order.

1323, 1330 (N.D. Tex. 1988), cited with approval in Hilliard v. Ferguson, 30 F.3d 649, 653 n.17 (5th Cir. 1994) ("We follow the reasoning of the other courts on this question and hold that a school board and its employees constitute a single entity which is incapable of conspiring with itself for the purposes of § 1985(3)."). Because the District, Emery, and Hurbough are considered a single entity, they are incapable of conspiring. Therefore those claims are also to be dismissed.[6]

4. The Section 504 Rehabilitation Act Claims

Lastly, plaintiff alleged a cause of action against the District under Section 504 of the Rehabilitation Act. He stated that the District created a hostile educational environment and grossly deviated from professional standards of care as to plaintiff. Plaintiff's response to the District's motion also asserted that plaintiff was retaliated against for his parents' advocacy on his behalf; however, that claim was not alleged in the first amended complaint and thus is not properly before the court.

The factual assertions of the complaint included descriptions of various alleged actions of the District's employees which plaintiff states amounted to a conspiracy to have plaintiff removed from the school based on his disabilities and that the employees acted in furtherance of such conspiracy by (1) mischaracterizing evidence before the Office of Civil

[6] Even if the court were to assume that plaintiff intended to allege his conspiracy claims against only Hurbough and Emery, the outcome would be the same.

Rights and the Texas Education Agency Hearing Officer, (2) contacting parents of other students to have them file criminal charges against plaintiff, (3) having a teacher file assault charges against plaintiff, (4) failing to appropriately investigate the photo taking incident, (5) having plaintiff followed by a fellow student, (6) telling plaintiff a camera was watching him, and (7) by not returning plaintiff to school when the felony charges were dropped. Plaintiff states that owing to this conspiracy, the District intentionally discriminated against him.

Plaintiff cannot sustain a cause of action under Section 504 of the Rehabilitation Act because, aside from a conclusory allegation that the above described activities were undertaken due to his disability, there are no underlying factual allegations to support such statement. Section 504 of the Rehabilitation Act

> mandates that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 990 (5th Cir. 2014). In order to sustain a cause of action under the Rehabilitation Act, "the statute requires intentional discrimination against a student on the basis of his disability." D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist., 629 F.3d 450, 454 (5th Cir. 2010). Plaintiff's complaint alleged no facts which, taken as true, would support a finding that the District intentionally discriminated against him

based on his disability. Plaintiff's complaint lists a litany of behavioral infractions, which may have caused the above described actions, but plaintiff pleaded that such actions were based on his disability only in a conclusory fashion. Because plaintiff has failed to plead sufficient facts to support a plausible claim under the Rehabilitation Act, such claim must be dismissed.

5. Whatever Claims Might Have Been Asserted on Behalf of Charles Cripps and Kristie Cripps are Being Dismissed

The wording of the first amended complaint suggests that all of the claims asserted therein are being pursued on behalf of C.C. individually, acting through his next friends, Charles Cripps and Kristie Cripps. However, asserted in paragraph 16 on page 6 of the complaint is a statement that Charles and Kristie Cripps bring "forward this complaint accordingly, not only as next friends, but for in their own Individual Capacity for out-of-pocket expenses incurred as a result of Respondent's actions." So that there will be no uncertainty concerning any allegations in the first amended complaint that might purport to assert individual claims on behalf of Charles Cripps and Kristie Cripps based on any of the theories of recovery that remain in the complaint after the severance out of the administrative appeal, the court, for reasons already discussed, is ordering that whatever claims and causes of action purport to be asserted by Charles Cripps and Kristie Cripps, individually, also are being dismissed.

V.

Order

Therefore,

The court ORDERS that the motions to dismiss filed by defendants be, and are hereby, granted, and that all claims and causes of action asserted by C.C. individually, by and through his next friends, Charles Cripps and Kristie Cripps, or by Charles Cripps and Kristie Cripps, individually, against defendants be, and are hereby, dismissed with prejudice.

SIGNED January 8, 2015.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

**NO. 4:14-CV-646-A**

**[Filed January 8, 2015]**

| | |
|---|---|
| C.C. INDIVIDUALLY, BY AND THROUGH HIS NEXT FRIENDS, CHARLES CRIPPS AND KRISTIE CRIPPS, Plaintiff, | ) |
| VS. | ) |
| HURST-EULESS-BEDFORD INDEPENDENT SCHOOL DISTRICT, ET AL., Defendants. | ) |

FINAL JUDGMENT

Consistent with the order signed by the court in the above-captioned action on the date of the signing of this final judgment,

The court ORDERS, ADJUDGES, and DECREES that all claims and causes of action asserted in the above-captioned action by plaintiff, C.C. individually, by and through his next friends, Charles Cripps and Kristie Cripps, or by Charles Cripps and Kristie Cripps, individually, against defendants, Scott Hurbough, Damon Emery, and Hurst-Euless-Bedford Independent School District, be, and are hereby, dismissed with prejudice.

SIGNED January 8, 2015.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

## APPENDIX C

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**No. 15-10098**

**[Filed April 26, 2016]**

| | |
|---|---|
| C.C., Individually, by and through his next friends, Charles Cripps and Kristie Cripps; KRISTIE CRIPPS; CHARLES CRIPPS, Plaintiffs - Appellants | ) |
| v. | ) |
| HURST-EULESS-BEDFORD INDEPENDENT SCHOOL DISTRICT; SCOTT HURBOUGH; DAMON EMERY, Defendants - Appellees | ) |

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING EN BANC

(Opinion: March 9, 2016 , 5 Cir., ___ , ___ , F.3d ___ )

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE