

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**LACEY SMITH, et al.,** )  
 )  
 **Plaintiffs** )  
 )  
 v. )  
 )  
 **MAINE SCHOOL ADMINISTRATIVE** )  
 **DISTRICT NO. 6, et al.,** )  
 )  
 **Defendants** )

**Docket No. 00-284-P-C**

**RECOMMENDED DECISION ON DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

The defendants, Maine School Administrative District Number 6 (“MSAD No. 6”), Martha Corkery, Ansel Stevens and Linda Linnell, move for summary judgment on the remaining counts<sup>1</sup> of the plaintiffs’ complaint in this action alleging violation of the federal Americans with Disabilities Act (“ADA”) and Rehabilitation Act, the Maine Human Rights Act and the constitutional right to equal protection under the law and seeking damages for state-law claims of negligent infliction of emotional distress and negligent supervision. I recommend that the court grant the motion in part and deny it in part.

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<sup>1</sup> On motion of the defendants, the court has dismissed all claims asserted against defendants Corkery, Stevens and Linnell in their individual capacities in Counts I-IV of the complaint and all claims asserted against defendant MSAD No. 6 in Count III to the extent that such claims are based on statute or the constitutional doctrine of due process. Order Affirming Recommended Decision of the Magistrate Judge. Docket No. 28.

## **I. Summary Judgment Standard**

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

## **II. Factual Background**

The summary judgment record includes the following appropriately supported material facts. MSAD No. 6 is the school administrative district that serves the communities of Buxton, Bar Mills, Hollis, Standish, Frye Island and Limington, Maine. [Defendants’] Statement of Undisputed Material

Facts (“Defendants’ SMF”) (Docket No. 21) ¶ 1; Plaintiff’s [sic] Objection and Responses to Defendants’ Statement of Undisputed Material Facts (“Plaintiffs’ Responsive SMF”) (Docket No. 34) ¶ 1. The middle school in MSAD No. 6, known as Bonny Eagle Middle School (“the School”), includes the sixth, seventh and eighth grades. *Id.* Each grade is divided into smaller groups known as “clans” and bearing a name of Scottish origin. *Id.* Defendants Stevens and Corkery were at all relevant times respectively the principal and a vice-principal of the School. *Id.* Defendant Linnell directed the chorus at the School. *Id.*

Plaintiff Lacey Smith is multi-handicapped and has been identified as a student with a disability entitled to special educational services at MSAD No. 6. *Id.* ¶ 2. Her parents, Martha and David Smith, are also plaintiffs in this action. Complaint (Docket No. 1) at 1. Lacey became a student at the School in the fall of 1998. Defendant’s SMF ¶ 4; Plaintiffs’ Responsive SMF ¶ 4. Rosie Rinaldi was her special education resource room teacher that year. *Id.*

For the 1998-99 school year, MSAD No. 6 had put into place a special education program for certain students at the School. *Id.* ¶ 3. The program was overseen by a single special education teacher and included students in both the sixth and seventh grades. *Id.* All students in the program were assigned to the seventh grade “Edinburgh Clan,” and the program was located in the seventh grade wing of the School. *Id.* Lacey was assigned to the seventh grade Edinburgh Clan when she became a student at the School. *Id.* ¶ 5. Mrs. Rinaldi’s class included students who were in their first year at the School and students who were in their second year at the School. *Id.* ¶ 6.

#### **A. The Dance**

The first school dance of the 1998/99 school year was held on October 9, 1998. *Id.* ¶ 7. The School’s policy regarding dances at the time, as set forth in the School’s student handbook, was the following:

Dances and activities are a privilege. School dances are held each year for seventh and eighth graders only. Because of limited capacity and our discomfort with supervising students we do not know, guests are not allowed to attend. Dances are from 7:00-9:30 p.m.

*Id.* Students who were not in the seventh or eighth grade were not permitted to attend dances. *Id.* ¶ 8.

At almost every school dance, some students were asked to leave for this reason. *Id.* Stevens and Corkery were both in attendance at the October 9, 1998 dance. *Id.* ¶ 10. During that evening, Stevens asked at least one student who was not a seventh or eighth grader to leave the dance. *Id.* ¶ 12.

Lacey first learned about the dance when she saw a poster in the School hall and saw it on Bonny Eagle Television. Opposing Statement of Material Facts Pursuant to Local Rule 56(c) (“Plaintiffs’ SMF”), included in Plaintiffs’ Responsive SMF, ¶ 18; Defendants’ Response to Plaintiff’s [sic] Opposing Statement of Material Facts, etc. (“Defendants’ Responsive SMF”) (Docket No. 37) ¶ 18. A teacher went into all seventh and eighth grade classrooms to tell the students about the dance and where they could buy tickets. *Id.* On Wednesday, October 7, 1998, Lacey brought home a note from school, signed by Cheryl Ann Bailey, an educational technician who worked with her, which read:

Dear Mrs. Smith,  
Lacey is allowed to go to the school dance as far as the school is concerned. She is in a 7th grade clan and considered a 7th grader. The cost is \$3 a ticket if bought before Friday night. It will be \$4 at the door. Time: 7-9:30 Friday 10/9/98.

*Id.* ¶¶ 21-22.<sup>2</sup> On the day of the dance, Lacey’s mother called the School to talk to Mrs. Rinaldi about the dance. *Id.* ¶ 26. She spoke with Frank Jewett, an educational technician who worked with Lacey.

*Id.* Jewett told Mrs. Smith that Lacey’s home room teacher knew that Lacey was going to the dance

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<sup>2</sup> The defendants purport to qualify their response to paragraph 21 of the plaintiffs’ statement of material facts, but that qualification is not accompanied by any citation to the summary judgment record, Defendants’ Responsive SMF ¶ 21, and accordingly paragraph 21 of the plaintiffs’ statement of material facts is deemed admitted, because it is supported by the record citations given. Local Rule 56(d) & (e).

and that the home room teacher would be a chaperone at the dance. *Id.* ¶ 27. On the evening of the dance, Lacey’s parents dropped her off in the School parking lot and Lacey went into the dance with an eighth grade teacher. *Id.* ¶ 31.

Also attending the dance were Melanie, a student in Mrs. Rinaldi’s class who was in her second year at the School, and Amanda, Sarah and Tonya, who were special education students in their first year at the School. Defendants’ SMF ¶ 11, Plaintiffs’ Responsive SMF ¶ 11; Plaintiffs’ SMF ¶¶ 33, 35-36, Defendants’ Responsive SMF ¶¶ 33, 35-36.

Corkery became aware that some sixth grade students who had been placed in a seventh grade clan were at the dance. Plaintiffs’ SMF ¶ 34; Defendants’ Responsive SMF ¶ 34. Around 7:30 p.m., Corkery went to Stevens and told him that there might be four sixth graders from Mrs. Rinaldi’s class at the dance. *Id.* ¶ 36. Stevens understood that the students were in a seventh grade clan but stated that they were sixth grade students and had to go home. *Id.* ¶ 38. He asked Corkery to remove the students from the dance and to call their parents to have them picked up. *Id.* Corkery told Lacey that she had to leave the dance because she was a sixth grader and told all four of the students to come with her to her office so that she could call their parents. *Id.* ¶ 39. The students told Corkery that they were seventh graders, were in a seventh grade clan, and had permission from Mrs. Bailey to be at the dance. *Id.* ¶ 41. Corkery went back to the dance to tell Stevens that she believed the students were given permission to be at the dance and that they claimed to be seventh graders. *Id.* ¶ 42. Stevens told Corkery that it did not matter; the students could not stay at the dance. *Id.*

Mrs. Smith testified that when Corkery reached her by telephone, Corkery “told me that Lacey was a sixth grader and that the dance was allowed — was only allowing seventh and eighth graders at the dance and that she wasn’t allowed to be there.” Defendants’ SMF ¶ 16; Plaintiffs’ Responsive SMF ¶ 16. Corkery also told Mrs. Smith that Lacey would be welcome at a sixth grade dance. *Id.*

After Mr. and Mrs. Smith arrived in response to the telephone call, Stevens told them that Lacey was not allowed to be at the dance because it was her first year in the School. *Id.* ¶ 18. Stevens and Corkery insisted to the Smiths that Lacey did not belong at the dance by virtue of the policy limiting dances to seventh and eighth graders. *Id.* Mrs. Smith told Stevens that he was breaking the law by throwing Lacey out of the dance, but he remained adamant in his decision that Lacey did not belong at the dance. Plaintiffs' SMF ¶¶ 61-62; Defendants' Responsive SMF ¶¶ 61-62. The Smiths spoke with Stevens from 8:45 to 9:30 p.m., when the dance ended. *Id.* ¶¶ 60, 64.

After the dance, the superintendent of MSAD No. 6 established an investigative panel which concluded, *inter alia*, that "administrators should have consulted more closely with special education staff prior to, and during the dance" and that "this was an adult (policy) issue and should have been decided in advance of the dance, but since it wasn't, should have waited until after the dance and been solved at an adult level." *Id.* ¶ 65. After the dance, MSAD No. 6 changed its policy to allow students in multi-age groups, like that in which Lacey was placed during the 1998/99 school year, to attend school dances. Defendants' SMF ¶ 20; Plaintiffs' Responsive SMF ¶ 20. Both Corkery and Stevens received letters of discipline as a result of the incident at the dance. Plaintiffs' SMF ¶¶ 68-69; Defendants' Responsive SMF ¶¶ 68-69.

### **B. The Concert**

Lacey attended a choral concert at the School on April 15, 1999 as a member of the chorus. Defendants' SMF ¶ 22; Plaintiffs' Responsive SMF ¶ 22. Before the concert started, the student performers entered the gymnasium and took seats in a section of the bleachers. *Id.* ¶ 23. When Lacey, Amanda and Tonya entered, they stood in front of the bleachers while other students took their seats. *Id.* ¶ 24. They stood and looked up as the bleachers became full. *Id.* A woman named Mrs. Jack approached the three students and pointed to a second set of bleachers next to the set where the other

children were sitting. *Id.* ¶ 25. After Mr. Smith, Lacey’s father, pointed out to Stevens where the three students were sitting, Stevens brought them to the set of bleachers where the other students were sitting and had the other children make room for them. *Id.* ¶ 26.

During the concert Lacey sang loudly and her voice was distinguishable over the other students. *Id.* ¶ 27. Mrs. Smith heard students laughing at Lacey. *Id.* Another student tapped Lacey on the shoulder. *Id.* Mrs. Smith spoke with Linnell later about the concert. *Id.* ¶ 28. She testified at deposition that:

Mrs. Linnell indicated to me that she was concerned for the other students because it was a performance concert and that Lacey was ruining the concert for the other students, that the students were upset with Lacey for their poor performance and that, in fact, the audience was laughing at Lacey during the concert because of her singing.

*Id.*

Lacey did not suffer any pecuniary losses as a result of either of the incidents described above.

*Id.* ¶¶ 21, 29.

### **III. Discussion**

#### **A. Initial Matters**

The defendants have moved for summary judgment on the claims asserted against Stevens, Corkery and Linnell in their official capacities in Counts I-IV of the complaint “in light of the fact that MSAD 6 is named as a defendant,” assertedly making such claims redundant. Defendants’ Summary Judgment Motion, etc. (“Motion”) (Docket No. 20) at 17. They have also moved for summary judgment on any demands made by the plaintiffs for injunctive relief. *Id.* at 11-12. The plaintiffs have not responded to either of these requests. As a result, the plaintiffs are deemed to have waived opposition to the motions.

Because the defendants seek summary judgment, it is nonetheless necessary that the court consider the requests on their merits. *FDIC v. Bandon Assoc.*, 780 F. Supp. 60, 62 (D. Me. 1991). Here, the defendants' point with respect to Counts I-IV is well taken. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). The individual defendants are entitled to summary judgment on Counts I-IV. The motion with respect to the claims for injunctive relief also has merit. The plaintiffs have made no attempt to show that they will suffer irreparable harm, a necessary element of a claim for injunctive relief, *e.g.*, *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1271 (1st Cir. 1996), or a likelihood that they will suffer future discrimination at the hands of the defendants, a necessary element of standing to seek injunctive relief, *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997). Accordingly, the defendants are entitled to summary judgment on any claims for injunctive relief asserted by the plaintiffs in this action.

### **B. Statutory Claims (Counts I, II, & IV)**

The defendants seek summary judgment on the plaintiffs' claims of discrimination in violation of the Rehabilitation Act (Count I), the ADA (Count II) and the Maine Human Rights Act (Count IV). Claims arising under the Rehabilitation Act and the ADA are analyzed in the same manner. *EEOC v. Amego, Inc.*, 110 F.3d 135, 143 (1st Cir. 1997); *Katz v. City Metal Co.*, 87 F.3d 26, 31 n.4 (1st Cir. 1996). Federal interpretation of the ADA informs the interpretation of analogous provisions of the Maine Human Rights Act. *Abbott v. Bragdon*, 912 F. Supp. 580, 591 (D. Me. 1995). Accordingly, unless otherwise indicated, all three statutory claims raised in this proceeding will be considered together.

#### *1. Applicable Statutes.*

The Rehabilitation Act, invoked by Count I of the complaint, provides in relevant part:

No 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 . . . .

29 U.S.C. § 794(a). For purposes of their motion, the defendants do not contend that Lacey is not a qualified individual with a disability or that MSAD No. 6 does not receive federal financial assistance.

Count II of the complaint alleges violation of the ADA, which provides in relevant part:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. This section is often referred to as Title II of the ADA. Again, for purposes of their motion, the defendants do not contend that Lacey is not a qualified individual with a disability or that MSAD No. 6 is not a public entity.

The alleged violation of the Maine Human Rights Act set forth in Count IV of the complaint arises out of the following statutory language:

It is unlawful educational discrimination in violation of this Act solely on the basis of physical or mental disability to:

A. Exclude from participation in, deny the benefits of or subject to discrimination under any educational program or activity any otherwise qualified individual with physical or mental disability . . . .

5 M.R.S.A. § 4602(2)(A). For purposes of their motion, the defendants do not contend that Lacey is not a qualified individual with a mental disability.

2. *The choral concert.*

With respect to the concert given by the School chorus in April 1999, the plaintiffs have not submitted sufficient evidence to establish liability under the applicable statutes. In their statement of material facts, the plaintiffs do not refer to the concert at all. In their response to those paragraphs in the defendants' statement of material facts that refer to the concert, the plaintiffs do not provide

evidence that the person who directed the three special education students to sit in the separate bleachers was a teacher or an employee of MSAD No. 6 or was in any way an agent of MSAD No. 6. They do not provide evidence that the student who tapped Lacey on the shoulder during the concert was directed to do so by any defendant or employee or agent of MSAD No. 6.<sup>3</sup> The fact that students — it is not clear whether these were students in the chorus, the audience, or both — laughed at Lacey is not a matter for which MSAD No. 6 may be held liable, as it is an action clearly beyond the school district’s possible control. Under these circumstances, the evidence presented to the court concerning the concert cannot provide a basis for consideration by the factfinder of any claim of discrimination arising out of that incident. Accordingly, the defendants are entitled to summary judgment on Counts I-IV with respect to any claims arising out of the concert.

### 3. *The dance.*

The defendants contend that they are entitled to summary judgment on the statutory claims of discrimination arising out of the October 9, 1998 school dance because the plaintiffs cannot show that the actions of Stevens and Corkery constituted intentional discrimination. Motion at 6-10. The plaintiffs respond that proof of intentional discrimination is not required and, in the alternative, that sufficient evidence of intentional discrimination has been presented. Plaintiffs’ Objection to Defendants’ Motion for Summary Judgment, etc. (“Plaintiffs’ Objection”) (Docket No. 33) at 4-13.

The plaintiffs’ initial argument is incorrect. They rely solely on *Franklin v. Gwinnett County Public Schs.*, 503 U.S. 60 (1992), and the contention that enactment of the ADA pursuant to the commerce clause of the Constitution differentiates it from Title IX of the Civil Rights Act, which was at issue in *Franklin*, to support their position that proof of intentional discrimination is not required

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<sup>3</sup> The unverified complaint does allege that Linnell “had directed the student to tap Lacey on the shoulder when the student believed that Lacey was singing too loudly,” Complaint ¶ 37, but the only material the court will consider in connection with a motion for summary judgment is that which the parties have included and properly supported in their statements of material facts. Local Rule (*continued on next page*)

for claims under either the Rehabilitation Act or the ADA. Plaintiffs' Objection at 5. This argument was rejected by the Ninth Circuit in *Ferguson v. City of Phoenix*, 157 F.3d 668, 674-75 (9th Cir. 1998), for reasons which I find persuasive. Because the plaintiffs seek compensatory damages under each of the statutes at issue, they must prove intentional discrimination. *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 331 (2d Cir. 1998) (ADA and Rehabilitation Act), *vacated in part on other grounds*, 527 U.S. 1031 (1999); *Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214, 1219 (11th Cir. 1992) (Rehabilitation Act).

The plaintiffs may prove intentional discrimination in either of two ways. They may show that the defendants acted out of personal animosity or ill will or discriminatory animus, *see Ferguson*, 157 F.3d at 675, or that they acted "with at least deliberate indifference to the strong likelihood that a violation of federally protected rights [would] result" from their action. *Bartlett*, 156 F.3d at 331 (for Rehabilitation Act claim; apparently extending analysis to ADA claim as well); *accord, Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999).<sup>4</sup> In this case, there is no evidence of personal animosity or ill will directed at Lacey by the defendants due to her disability, or indeed for any reason. Contrary to the plaintiffs' argument, Plaintiffs' Objection at 6-8, the facts that Corkery may have referred to Lacey and the other three special education students as "Rosie's<sup>5</sup> kids" and that either Stevens or Corkery, or both, told Mrs. Smith that Lacey did not belong at the dance, *id.* at 7-8,

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56(e).

<sup>4</sup> Other circuits have described the standard of proof, particularly in cases involving special education, as requiring a showing of "bad faith or an exercise of gross misjudgment." *Thompson v. Board of Special Sch. Dist. No. 1*, 144 F.3d 574, 580 (8th Cir. 1998); *Sellers v. School Bd. of City of Manassas*, 141 F.3d 524, 529 (4th Cir. 1998). For the purposes of this case, I find the two formulations of the standard to be essentially the same.

<sup>5</sup> The plaintiffs' objection uses the phrase "Rinaldi's kids," Plaintiff's Objection at 7, but the paragraph of the plaintiffs' statement of material facts cited by the plaintiffs in support of that assertion, Plaintiffs' SMF ¶ 36, uses the phrase "Rosie's kids," which is the term used in the document cited by the statement of material facts, Exh. 14 to Plaintiffs' SMF. I note further that the plaintiffs' additional assertion that "Stevens and Corkery clearly identified [the four students] as disabled students and grouped them together," Plaintiffs' Objection at 8, is not supported by the proffered citations to the plaintiffs' statement of material facts.

would not allow a factfinder to draw a reasonable inference of discriminatory animus directed toward Lacey due to her disability under the circumstances of this case.<sup>6</sup>

With respect to the deliberate indifference version of the standard, however, the result is different. The plaintiffs have offered evidence that Stevens and Corkery had received training “in school law, including . . . the ADA,” Plaintiffs’ SMF ¶¶54, 56; Defendants’ Responsive SMF ¶¶ 54, 56, and that they were aware that the four students they were excluding from the dance were special education students, *id.* ¶¶ 35-37, and that the students had been assigned to a seventh grade clan and had been given permission to attend the dance by an educational technician, *id.* ¶¶ 38, 41-42, 52, 59-60. The only students in the seventh-grade Edinburgh clan who might otherwise have been classified as sixth grade students were disabled students. *Id.* ¶ 37. Mrs. Smith also told Stevens that he was breaking the law by forcing Lacey to leave the dance. *Id.* ¶ 61. Under these circumstances, a factfinder could reasonably conclude that Stevens or Corkery, or both, acted with deliberate indifference to the strong possibility that a violation of Lacey’s rights under the ADA would result from their actions. Accordingly, MSAD No. 6 is not entitled to summary judgment on Counts I, II and IV.

The decision of the First Circuit in *Schultz v. Young Men’s Christian Ass’n of the United States*, 139 F.3d 286 (1st Cir. 1998), does not require a different result. In that case, in which the appeal was based solely on the Rehabilitation Act, *id.* at 288, the plaintiff sought only emotional distress damages for an injury that the First Circuit found to be unintentional, *id.* at 290. The court stated:

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<sup>6</sup> The citations to case law and regulations interpreting the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*, offered by the plaintiffs in support of their argument on this point, Plaintiffs’ Objection at 6-7, are not helpful to the court. The plaintiffs’ claims of violation of the IDEA have been dismissed from this action, and the plaintiffs do not attempt to show how those regulations and case law might reasonably inform the discussion of claims raised under distinct and separate statutory schemes.

There is not the slightest hint that the national YMCA was prompted by malice or hostility toward [the plaintiff] or toward the disabled. On the contrary, whether or not it erred in its judgment, its concerns — for the safety of swimmers and the reliability of its endorsement — were legitimate. This is not a case where damages for emotional distress can be justified to punish patent misbehavior or the deliberate infliction of humiliation.

*Id.* at 291. As I have already noted, the instant case is also one in which evidence of malice, hostility or the deliberate infliction of humiliation is absent. However, the concern of Stevens for the sanctity of the School policy limiting attendance at the dance to seventh and eighth graders was not of a similar degree of importance to the concerns of the YMCA discussed in *Schultz*, particularly given the fact that the plaintiffs had been told that Lacey was a seventh grader; at least, the policy considerations are not sufficiently similar to justify entry of summary judgment on the defendants' behalf in this case.<sup>7</sup>

### **C. The Equal Protection Claim**

In Count III, the plaintiffs contend that MSAD No. 6 violated Lacey's constitutional right to equal protection. The defendants contend that summary judgment is appropriate on this claim because the plaintiffs cannot make the necessary showing of intentional discrimination, Lacey is not a member of a suspect class, and Lacey has no constitutional right to participate in a school dance. Motion at 13. "In order to avoid summary judgment on her Equal Protection Clause claim, [the plaintiff] ha[s] to tender competent evidence that a state actor intentionally discriminated against her because she

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<sup>7</sup> To the extent that the parties' discussion of the theories of disparate treatment and disparate impact, Plaintiffs' Objection at 12-13, Defendants' Reply Memorandum in Support of Motion for Summary Judgment ("Defendants' Reply") (Docket No. 36) at 2-4, have relevance in this context, the summary judgment record includes evidence demonstrating that this is not a disparate impact case. Specifically, at least one other disabled student attended the dance and was apparently not asked to leave, Defendants' SMF ¶ 11, Plaintiffs' Responsive SMF ¶ 11, and one student who apparently was not disabled was asked to leave the dance, *id.* ¶ 12 & Affidavit of Ansel Stevens (Docket No. 23) ¶ 10. The disparate impact type of discrimination results "from otherwise neutral policies and practices that, when actuated in real-life settings, operate to the distinct disadvantage of certain classes of individuals." *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 601 (1st Cir. 1995). The disparate impact approach "roots out" policies "that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another." *Id.* Here, the policy of allowing only seventh and eighth graders to attend School dances did not fall more harshly on disabled students, the only group suggested by the plaintiffs to be relevant for purposes of this court's analysis of their claims.

belonged to a protected class.” *Alexis v. McDonald’s Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 354 (1st Cir. 1995).

Contrary to the plaintiffs’ assumption, Plaintiffs’ Objection at 16, “intentional discrimination” in this context is not defined in the same manner as it is for purposes of the ADA and the Rehabilitation Act. “In order to state a claim under the Equal Protection Clause, a plaintiff must allege not only that the defendants were aware of her [protected status] at the time of their actions, but also that defendants acted because of [that status].” *Judge v. City of Lowell*, 160 F.3d 67, 75 (1st Cir. 1998). Obviously, what must be alleged by a plaintiff must also be proved in order for her to recover. “[P]laintiffs must adduce competent evidence of purposeful discrimination.” *Hayden v. Grayson*, 134 F.3d 449, 453 (1st Cir. 1998) (citation and internal quotation marks omitted).

The burden is an onerous one: “ ‘Discriminatory purpose’ . . . implies that the decisionmaker . . . selected or reaffirmed a course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” [*Personnel Adm’r of Mass. v. Feeney*, 442 U.S. [256], 279 [1979] (emphasis added; citation omitted); *Soto [v. Flores]*, 103 F.3d [1056], 1067 [(1st Cir. 1997)]. Thus, unless these plaintiffs established the requisite discriminatory intent, their equal protection claim cannot succeed even assuming the [defendant’s action] lacked a “rational basis.”

*Id.* at 453. Assuming *arguendo* that the plaintiffs can establish that Lacey was a member of a protected class, this is a standard that the plaintiffs’ proffered evidence, even with the benefit of the expansive standard mandated at the summary judgment stage, cannot meet. There is no evidence in the summary judgment record that could reasonably allow the drawing of an inference that Corkery or Stevens acted because of Lacey’s status as a disabled student rather than in spite of the adverse effect those actions would have on the group of disabled students who were in their first year at the School yet assigned to a seventh grade clan. Accordingly, there is no need to consider what the classification at issue might be, *see* Plaintiffs’ Objection at 16-17 & Defendants’ Reply at 6-7, and whether that

classification is rationally related to a legitimate state interest and is neither arbitrary, unreasonable nor irrational. *See LCM Enters., Inc. v. Town of Dartmouth*, 14 F.3d 675, 679 (1st Cir. 1994).

The defendants are entitled to summary judgment on the remaining claim asserted in Count III.

#### **D. Negligent Infliction of Emotional Distress**

Count V of the complaint alleges that all of the defendants negligently inflicted emotional distress on Lacey and her parents with respect to both incidents. Complaint ¶¶ 68-73. The defendants contend that none of the plaintiffs have produced evidence of a sufficient degree of emotional distress to allow them to present those claims to a jury and that Mr. and Mrs. Smith do not meet the requirements for recovery as bystanders. Motion at 17-19.

First, there is no evidence in the summary judgment record that any of the individual defendants was involved in any of the actions alleged to have caused any of the plaintiffs emotional distress at the chorus concert. There is no evidence that Linnell was involved in any way with the events at the dance. Accordingly, Linnell is entitled to summary judgment on Count V and the individual defendants are entitled to summary judgment on Count V insofar as it may be construed to assert claims against them arising out of the chorus concert. With respect to MSAD No. 6, there is no evidence in the summary judgment record that either the person who initially directed Lacey and her friends to sit in a separate section of the bleachers or the student who tapped Lacey on the shoulder during the concert did so at the direction of MSAD No. 6, its agents or employees or that they were agents or employees of MSAD No. 6 themselves. Therefore, MSAD No. 6 is also entitled to summary judgment on Count V with respect to the chorus concert.

Under Maine law, a plaintiff may recover for negligent infliction of emotional distress if she proves

one, that the defendant was negligent, that is that the defendant acted or failed to act in a manner which a reasonably prudent person . . . would act in the

management of their affairs taking into account all of the circumstances of [the] case; two, that emotional distress to the plaintiff was a reasonably foreseeable result of the defendant's negligent act; and, three, that the plaintiff suffered serious emotional distress as a result of the defendant's negligence.

*Gayer v. Bath Iron Works Corp.*, 687 A.2d 617, 622 (Me. 1996) (quoting *Packard v. Central Maine Power Co.*, 477 A.2d 264, 268 (Me. 1984)). The defendants contend, without citation of authority, that the events that occurred at the dance do not “arise [sic] to the level of an ‘accident’ required to give rise to liability for infliction of emotional distress,” and that there is no evidence of any negligent act by any of the defendants. Motion at 19. The latter contention is incorrect; the evidence of deliberate indifference to the possibility that Stevens and Corkery were acting in a manner that violated Lacey's statutory rights, discussed above, and Stevens' insistence on his position in the face of evidence that Lacey had been given specific permission to attend the dance, would both allow a finding of negligence. The former contention incorporates an incorrect presentation of Maine law; there need only be a negligent act, not necessarily an act that may be termed an “accident.” *See, e.g., Town of Stonington v. Galilean Gospel Temple*, 722 A.2d 1269, 1271 (Me. 1999) (continuing operation of quarry on neighboring land); *Nelson v. Flanagan*, 677 A.2d 545, 549 (Me. 1996) (medical misdiagnosis; specifically rejecting argument that precipitating event must be an “accident”).

The defendants do not address the second element of the claim. Their next argument — that none of the plaintiffs have presented evidence of sufficiently severe emotional distress — goes to the third element of the claim and presents a closer question than their first argument but also fails. Under Maine law, serious emotional distress exists “where a reasonable person normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the event.” *Town of Stonington*, 722 A.2d at 1272 (citation and internal quotation marks omitted). Here, the plaintiffs have presented evidence, albeit contested by the defendants, that Lacey was “disappointed, sad and angry” as well as embarrassed when she was “kicked . . . out of the dance” and that “[i]t still

makes me sad inside my heart,” Plaintiffs’ SMF ¶ 79 & Exh. 4 (Affidavit of Lacey Smith ¶ 17); that Lacey has difficulty expressing her feelings, but has fixated on the fact that Corkery and Stevens did not believe her on the night of the dance and would become emotionally distraught more easily after the dance, with frustration and anger interfering with her ability to function socially and to learn, Affidavit of Martha Smith, Exh. 5 to Plaintiffs’ SMF, ¶¶ 14-17; that Mr. Smith felt that he had failed Lacey and was “utterly helpless because I had been unable to correct [the] situation” at the dance, has lost many nights of sleep and suffered extreme anxiety as a result and continues to suffer a “great deal” of anxiety when Lacey goes off to school each day, Affidavit of David Smith, Exh. 3 to Plaintiffs’ SMF, ¶¶ 12-13, 16; and that Mrs. Smith felt “incredibly frustrated and angry” the night of the dance and finds it hard to send Lacey to school every day, has “lost countless nights of sleep” as a result of the events at the dance, and has experienced “extreme distress, headaches, fatigue and anxiety” as a result of the defendants’ actions, Affidavit of Martha Smith ¶¶ 12-13, 28.<sup>8</sup> This evidence is sufficient to allow a jury to determine whether the plaintiffs’ emotional distress was severe. *See Town of Stonington*, 722 A.2d at 1272 (evidence that one plaintiff suffered from throbbing headaches and depression and that other plaintiff’s neck muscles had tightened sufficient to support finding of serious emotional distress).

Finally, the defendants argue that Mr. and Mrs. Smith were only bystanders, or indirect victims, with respect to the dance. Motion at 18-19. Under Maine law,

[i]n order for a bystander to recover for emotional distress proximately caused by a defendant’s negligence toward another person, the bystander must demonstrate that she was present at the scene of the accident; that she suffered serious mental distress as a result of contemporaneously perceiving the accident; and that she was closely related to the victim.

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<sup>8</sup> Use of allegations setting forth legal conclusions in a statement of material facts supported by citations to the summary judgment record where the necessary supporting factual allegations may be found is inappropriate. Counsel for the plaintiffs are reminded that the court expects the factual allegations themselves to appear in the statement of material facts required by Local Rule 56.

*Champagne v. Mid-Maine Med. Ctr.*, 711 A.2d 842, 846 (Me. 1998). Here, Mr. and Mrs. Smith are excluded by this statement of the law only if the “accident” was the first time that Lacey was told that she had to leave the dance. That is simply not the case. The evidence in the summary judgment record shows that Corkery and Stevens told Mr. and Mrs. Smith repeatedly that Lacey must leave, in discussions that extended over a period of at least 45 minutes. Mr. and Mrs. Smith attempted to reverse Stevens’ decision; they directly perceived his refusal to do so. It was certainly foreseeable that the parents of a child expelled from a school dance who were called to come and pick her up would be upset by the telephone call, particularly under the circumstances present here and known to Corkery and Stevens, and, upon their arrival at the school, by seeing their child isolated from other students and by viewing the defendants’ intransigence and refusal to consider the parents’ arguments, all of which apparently occurred in Lacey’s presence. To limit the causatory negligence for purposes of a claim for negligent infliction of emotional distress to the period before Mr. and Mrs. Smith arrived at the School in this case would be to adopt an unduly restrictive interpretation of Maine law.

The defendants, other than Linnell, are not entitled to summary judgment on Count V, although their claims will be limited to those arising out of the October 9, 1998 school dance.

### **E. Negligent Supervision**

Count VI of the complaint, which is asserted only against Stevens and MSAD No. 6, alleges that these defendants negligently failed to train and supervise Stevens and Corkery<sup>9</sup> and that this negligence resulted in injury to the plaintiffs. The Maine Law Court has not yet explicitly recognized such a tort, but in *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441 (Me. 1997), it discussed the elements of the tort as set forth in the Restatement (Second) of Agency without

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<sup>9</sup> Allegations in the complaint that these defendants negligently failed to train and supervise Linnell and Mrs. Jack, Complaint ¶ 78, refer to the chorus concert and will not be considered further for the reasons already discussed.

suggesting that it would not adopt that formulation when presented with an appropriate case, *id.* at 444 & n.5. The Restatement sets forth the elements of the claim as follows:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless;

- (a) in giving improper or ambiguous orders or in failing to make proper regulations; or
- (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others;
- (c) in the supervision of the activity; or
- (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Restatement (Second) of Agency § 213 (1958). The plaintiffs contend that because Corkery and Stevens both claim that Corkery was just following Stevens' orders they have presented sufficient evidence to allow a jury to consider this claim. Plaintiffs' Objection at 20. In fact, the only record evidence cited by the plaintiffs in support of this argument which they themselves do not dispute is the statement that, "[c]omplying with Mr. Stevens' instructions," Corkery took Lacey to her office where she called Lacey's parents. Plaintiffs' Objection at 20; Defendants' SMF ¶ 14; Plaintiffs' Responsive SMF ¶ 14. This is far too slender a reed upon which to hang a claim of negligent supervision, assuming that the Law Court would recognize such a claim. Nothing about Corkery's taking of Lacey to her office and the act of calling Lacey's parents, in themselves, suggests that she was improperly trained or supervised by Stevens or he by MSAD No. 6. The plaintiffs' discussion of this claim, limited to a single paragraph, offers the court insufficient substance upon which to base a determination whether any of the alternative bases for liability set forth in section 213 of the Restatement are applicable in this case.

The defendants are entitled to summary judgment on Count VI.

#### **IV. Conclusion**



Lacey Smith  
plaintiff

[COR LD NTC]

v.

MAINE SCHOOL ADMINISTRATIVE    MELISSA A. HEWEY  
DISTRICT NO 6                      772-1941  
defendant                            [COR LD NTC]

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