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

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

MEMORANDUM AND ORDER

August 13, 2019

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

I. BACKGROUND

The underlying facts of this case have been discussed at length in several previous Memoranda and Orders issued by this Court. (Docs. 62, 216, 230, 258). To reiterate, Defendants the Milton Hershey School and the Hershey Trust Company, as Trustee for the Milton Hershey School Trust (collectively,

"Defendants" or "the School"), operate a cost-free, not-for-profit, residential academy. Plaintiffs Julie Wartluft ("Wartluft") and Frederick Bartels, Jr. ("Bartels") are the parents of Abrielle Kira Bartels ("Abrielle"), a former student.

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

Following several rulings from this Court,[2] the following counts alleged in Plaintiffs' amended complaint remain viable. In Count I, Plaintiffs contend that Defendants violated several provisions of the Fair Housing Act ("FHA") by dismissing Abrielle from the School and by barring her from entering what had been her home for several years and from participating in various school functions

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

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

on the basis of her mental disability. In Count III, Plaintiffs aver that Defendants were negligent in dismissing Abrielle from their care thereby forcing her into an unstable environment resulting in her death. In Count V, Plaintiffs Wartluft and Bartels in their individual capacities (collectively, "Individual Plaintiffs") allege a wrongful death action, and in Count VI, the Estate, represented by the Individual Plaintiffs in their capacities as administrators of the Estate, alleges a survival action. In Counts IX and X, Plaintiffs allege intentional and negligent infliction of emotional distress. In Count XI, Plaintiffs allege a civil conspiracy amongst the Defendants to endanger children under Pennsylvania law. In Count XII, Plaintiffs allege that Defendants breached their fiduciary duty of care and of good faith. In Count XIII, Plaintiffs aver that Defendants were negligent *per se* predicated upon asserted violations of the Americans with Disabilities Act ("ADA") and the FHA.

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

II. STANDARD OF REVIEW

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

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

record, orders, [and] items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).

A Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirements of Rule 8(a). Rule 8(a)(2) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint attacked by a Rule 12(b)(6) motion to dismiss need not contain detailed factual allegations, it must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, a civil plaintiff must allege facts that "raise a right to relief above the speculative level . . . ." *Victaulic Co. v. TIeman*, 499 F.3d 227, 235 (3d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). Accordingly, to satisfy the plausibility standard, the complaint must indicate that defendant's liability is more than a "sheer possibility." *Iqbal*, 129 S. Ct. at 1949. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.*

III. DISCUSSION

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

a. Count I – Fair Housing Act

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

1. Individual Plaintiffs' Claims under the Fair Housing Act

In their first issue, Defendants argue that the Individual Plaintiffs have failed to demonstrate that they have Article III standing to pursue their claim under the FHA and that Count I must be dismissed to the extent it seeks a remedy on their behalf. Specifically, Defendants contend, although Plaintiffs' amended complaint outlines the harms that Abrielle allegedly suffered as a result of her dismissal from the School, Plaintiffs have failed to plead that Wartluft or Bartels suffered any injury sufficient to confer upon them Article III standing. (Doc. 241 at 11 (citing *Fair Hous. Council v. Main Line Times*, 141 F.3d 439, 441 (3d Cir. 1998) (holding that a plaintiff must allege a "distinct and palpable' injury sufficient to satisfy

Article III standing requirements under the Fair Housing Act"); *O'Malley v. Brierley*, 477 F.2d 785, 789 (3d Cir. 1973) ("[O]ne cannot sue for the deprivation of another's civil rights.")).

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

because they suffered the loss of Abrielle's companionship and services as a result of the School's discriminatory conduct and, therefore, they have Article III standing to pursue their claims under the FHA. (Doc. 252 at 16–17 (citing Doc. 29 at ¶¶ 200–202)).

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

"Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims, and they must be dismissed." *Taliaferro v. Darby Twp. Zoning Bd*., 458 F.3d 181, 188 (3d Cir. 2006). "The sole requirement for standing to sue under the Fair Housing Act is the [Article] III minima of injury in fact: that the plaintiff allege that as a result of the defendant's

actions he has suffered 'a distinct and palpable injury.'" *Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 75 (3d Cir. 1998) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982)). "[S]o long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

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

In so holding, the Court expressed disapproval with the Third Circuit's discussion in *Hackett v. McGuire Bros.*, 445 F.2d 442, 446 (3d Cir. 1971) which

referenced in *dicta* that Congress' use of the term "aggrieved person" in the context of the Fair Housing Act "showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" *Hackett*, 445 F.2d at 446. The Supreme Court reasoned in *Thompson* that the Third Circuit's reading of Congress' intent "was too expansive" and the Court signaled that future decisions should utilize the "zone of interests" analysis discussed therein. *Thompson*, 562 U.S. at 176.

Recently, in *Bank of America Corp. v. City of Miami, Fla*., ___ U.S. ___, 137 S. Ct. 1296 (2017), the Supreme Court applied the "zone of interests" analysis outlined in *Thompson* to address standing under the FHA. *Id*. at 1305. In *Bank of America*, the Court held that the City of Miami had standing to pursue claims against Bank of America under the FHA because the City's claims "arguably fall within the FHA's zone of interests." *Id*. at 1304–1305 (citing *Trafficante v. Metro. Life Ins. Co*., 409 U.S. 205 (1972) (allowing suit by white tenants claiming that they were deprived benefits when discriminatory rental practices kept minorities out of their apartment complex); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979) (allowing suit by a village that alleged that it had lost tax revenue and had the racial balance of its community undermined by racial-steering practices); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (allowing suit by a nonprofit organization that spent money to combat housing discrimination)).

Specifically, the Court reasoned, Bank of America "intentionally targeted predatory practices at African–American and Latino neighborhoods and residents," which "led to a 'concentration' of 'foreclosures and vacancies' in those neighborhoods," which, in turn, "caused 'stagnation and decline in African-American and Latino neighborhoods,'" "hindered the City's efforts to create integrated, stable neighborhoods," and "reduced property values, diminishing the City's property-tax revenue and increasing demand for municipal services." *Id*. Finding that these injuries were within the zone of interests contemplated by the FHA, the Supreme Court held that the City of Miami had Article III standing to pursue its claims as an "aggrieved person" under the statute.

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

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

In their amended complaint and as noted in their briefs before this Court, the Individual Plaintiffs aver that they suffered "loss of support, loss of aid, loss of services, loss of companionship, loss of consortium and comfort, loss of counseling and loss of guidance" as a result of Defendants' actions. (Doc. 29 at ¶ 200). While we acknowledge that Plaintiffs did not technically incorporate this provision by reference into Count I's FHA claim because these loss-of-services allegations were discussed in Count V under Plaintiffs' wrongful death claim, we find that Plaintiffs' allegations as to Count V can be imputed to Count I for purposes of establishing standing. In our view, Plaintiffs' allegations were sufficient to place the Defendants on notice of all of the factual predicates upon which Plaintiffs' thirteen counts were based, whether those factual predicates were outlined in Count I or Count V. *See Twombly*, 550 U.S. at 555 (2007) (finding that

Rule 8(a)(2) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.").

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

has been pending since 2016 and because the instant case comes before us on a motion for judgment on the pleadings which necessitates a deferential standard of review, rather than demanding repleader, we simply find that Plaintiffs have stated sufficient facts in their amended complaint to demonstrate that they have suffered an injury in fact.

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

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

> The FHA permits "[a]n aggrieved person" to sue, § 3613(a)(1)(A), if he "claims to have been injured by a discriminatory housing practice " or believes that he "will be injured by a discriminatory housing practice that is about to occur." §§ 3602(i)(1), (2) (emphasis added). Specifically, the FHA makes it unlawful to do any of the following on the basis of "race, color, religion, sex, handicap, familial status, or national origin": "refuse to sell or rent . . . a dwelling," § 3604(a); discriminate in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith," § 3604(b); "make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination," § 3604(c); "represent to any person . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," § 3604(d); "induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of" certain characteristics, § 3604(e); or discriminate in the provision of real estate or brokerage services, §§ 3605, 3606. The quintessential "aggrieved person" in cases involving violations of the FHA is a prospective home buyer or lessee discriminated against during the home-buying or leasing process. Our cases have also suggested that the interests of a person who lives in a

> neighborhood or apartment complex that remains segregated (or that risks becoming segregated) as a result of a discriminatory housing practice may be arguably within the outer limit of the interests the FHA protects.

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

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

2. The Estate's Claims under the FHA

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

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

Finally, Defendants aver, the Estate has failed to plead that Abrielle was treated differently as a result of her purported disability and has thus failed to satisfy an essential element of its FHA claim. "Defendants did not impose any 'extra conditions' on [Abrielle's] housing that were not imposed on every other

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

In response, the Estate insists that it has made out a *prima facie* case of discrimination under the FHA. First, according to the Estate, Abrielle was denied housing and the ability to participate in various housing-related activities as a result of her disability. Second, the Estate contends, Abrielle was a "renter" under the FHA "because she was required to perform significant chores as a condition of residing in the student home, a form of consideration just [like] money." (Doc. 251 at 13 (emphasis removed) (citing *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp.2d 413, 419 (W.D. Pa. 2013) ("What qualifies as consideration under the FHA has been examined by a limited number of courts and this Court finds that resolution of the issue will turn on whether [the housing facility at issue] receives consideration for a resident's stay—whether it be from federal or other funding directed to subsidizing the costs of providing housing to the homeless or

whether shelter residents provide some form of consideration for their stay."). Third, the Estate argues, the amended complaint is rife with factual averments outlining the clear discrimination Abrielle suffered. Specifically, the Estate points out, Abrielle was kicked out of the School and removed from her home at the School and was denied access to her room prior to graduation. Likewise, Abrielle was denied entry to various School functions and was denied reasonable accommodations that would have permitted her to remain at the School. (Doc. 252 at 12–13). Thus, the Estate reasons, the School "imposed terms and conditions on her housing, and the enjoyment of MHS facilities that were not imposed on any other student," and the allegations raised in Count I under the FHA are sufficient to survive the instant motion for judgment on the pleadings. (*Id*.).

In their Reply, Defendants contend that, simply because the property where Abrielle lived amounted to "a rental" inasmuch as Abrielle was asked to perform various chores while living there, does not mean that Abrielle was "a renter" sufficient to satisfy the predicates of Subsection (f)(1) of the FHA. In so contending, Defendants rely upon *Hunter on behalf of A.H. v. D.C.*, 64 F. Supp. 3d 158, 177 (D.D.C. 2014). In *Hunter*, a plaintiff filed suit against a local homeless shelter alleging violations of the FHA. Although the district court allowed plaintiff's FHA claim to proceed under § 3604(f)(2) inasmuch as the facility where plaintiff lived was a "rental," the district court dismissed plaintiff's claim under §

3604(f)(1) finding that the "renter" in that case was not the plaintiff, but rather the federal agency that provided funds to the homeless shelter which allowed plaintiff to reside there. Here, Defendants extrapolate, even if the Estate can demonstrate that Abrielle lived in a "rental," the Estate cannot demonstrate that Abrielle was "a renter," and her claim under Subsection (f)(1) fails as a matter of law. We disagree.

Under the FHA, it is unlawful to (1) "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap," 42 U.S.C. § 3406(f)(1), or (2) "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap," 42 U.S.C. § 3406(f)(2). Under the statute, "[f]or purposes of this subsection, discrimination includes . . . a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3406(f)(3).

To establish a *prima facie* case under Section 3604(f)(1), a plaintiff must demonstrate: (1) that he or she was discriminated against; (2) that such discrimination occurred in the sale or rental of a dwelling, or that such dwelling was made unavailable or denied; (3) that he or she was a buyer or renter; and (4)

that such discrimination occurred because of a handicap of that buyer or renter, a person residing in or intending to reside in that dwelling, or any person associated with that buyer or renter." 42 U.S.C. § 3406(f)(1). A claimant is said to be a "buyer or renter" under the FHA when he or she supplies consideration in exchange for an interest in property. *See* 42 U.S.C. § 3602 (defining "to rent" for purposes of the FHA as "to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant"); *Growth Horizons, Inc. v. Delaware Cty., Pa.*, 983 F.2d 1277, 1283 n.10 (3d Cir. 1993) ("Because the handicapped individuals in this case are not supplying the funds nor seeking a proprietary interest in the property, they are neither buyers nor renters."); *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413, 419 (W.D. Pa. 2013) ("What qualifies as consideration under the FHA has been examined by a limited number of courts and this Court finds that resolution of the issue will turn on whether [the housing facility at issue] receives consideration for a resident's stay.").

To establish a *prima facie* case under Section 3604(f)(2), a plaintiff must demonstrate: (1) that he or she was discriminated against; (2) that such discrimination occurred in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling; and (3) that such discrimination occurred because of a handicap of that

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

Under both Subsections (f)(1) and (f)(2), a plaintiff can demonstrate that he or she was discriminated against and thereby satisfy the first element of the *prima facie* FHA case by demonstrating that he or she suffered (1) intentional discrimination (also called disparate treatment); (2) indirect discrimination (also called disparate impact or discriminatory effect); or (3) that the defendant refused to make reasonable accommodations necessary to afford him or her equal opportunity to use and enjoy the dwelling at issue. *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir. 2005). "Under the first theory, a plaintiff

can establish a *prima facie* case of intentional discrimination by showing that discriminatory intent against a protected group was a motivating factor for the challenged action." *Eastampton Ctr., L.L.C. v. Twp. of Eastampton*, 155 F. Supp. 2d 102, 111 (D.N.J. 2001) (citing *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995)). "The discriminatory purpose need not be malicious or invidious, nor need it figure in 'solely, primarily, or even predominantly' into the motivation behind the challenged action . . . . The plaintiff is only required to 'show that a protected characteristic played a role in the defendant's decision to treat [him or her] differently.'" *Cmty. Servs., Inc.*, 421 F.3d at 177.

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

Third, to establish a claim of refusal to make reasonable accommodations, a plaintiff "need only plausibly plead enough facts to make out the three elements set forth in § 3604(f)(3)(B): refusal, reasonable accommodation, and necessity/equal opportunity," where "necessity" means "that an accommodation be essential, not just preferable." 42 U.S.C. § 3604(f)(3)(B) ("For purposes of this subsection, discrimination includes . . . a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to

afford such person equal opportunity to use and enjoy a dwelling."); *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 107–11 (3d Cir. 2018). "To evaluate these claims under the [Fair Housing Act], courts have typically adopted the analytical framework of their analogues in employment law, including their coordinate burden-shifting analyses once plaintiff has made a *prima facie* showing of discrimination under a specific claim." *Cmty. Servs., Inc.*, 421 F.3d at 176.

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

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

student is twice admitted to an outside mental health institution." (*Id*. at ¶ 165–169). We find that these allegations are sufficient to make out a *prima facie* discrimination claim under Sections 3604(f)(1) and (2) of the FHA.

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

Likewise, the Estate has also pleaded sufficient facts to support its refusal to accommodate theory. To establish a claim predicated upon a refusal to make reasonable accommodations, the Estate need only plausibly plead enough facts to make out "the three elements set forth in § 3604(f)(3)(B): refusal, reasonable accommodation, and necessity/equal opportunity," where "necessity" means "that an accommodation be essential, not just preferable." *Vorchheimer*, 903 F.3d at

107–11. We find that the Estate has done so. First, Plaintiffs have pleaded that Defendants refused to enter a dialogue concerning reasonable accommodations. (Doc. 29 at ¶ 162). Thus, drawing all reasonable inference in Plaintiffs' favor—as is our duty at this juncture—we find that Plaintiffs have pleaded that Abrielle's accommodation was refused. A refusal to even enter into a dialogue concerning reasonable accommodations certainly implies that the reasonable accommodation sought to be discussed was refused. Second, because the Estate has pleaded that the School was aware of Abrielle's precarious mental health circumstance and had treated her mental disabilities on two prior occasions, Plaintiffs have pleaded that an accommodation would have been available and reasonable. Indeed, Defendants have not contended that it would have been unreasonable to accommodate her. Third, as to the necessity of the accommodation, Plaintiffs have pleaded that the School knew that Abrielle suffered from a mental impairment and that she had threatened suicide in the past. Accordingly, an accommodation was "essential," and "not just preferable," inasmuch as Plaintiffs have pleaded that instituting the reasonable accommodation would have saved Abrielle's life. (Doc. 29 at ¶ 174). Therefore, the Estate has pleaded sufficient facts to support the first prong of its FHA claims under both Subsection (f)(1) and (f)(2).

We are unpersuaded by Defendants' arguments that the Estate has failed to demonstrate that Abrielle was treated differently as a result of her disability

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

Plaintiffs have also satisfied the second prong of their (f)(1) and (f)(2) claims. As already noted, Plaintiffs have pleaded that Abrielle's housing "was made unavailable or denied," thereby satisfying prong two of the Estate's (f)(1) claim. In so contending, the Estate has also satisfied prong two of its (f)(2) claim because said denial also constitutes discrimination "in the provision of . . . facilities in connection with such dwelling." *See* 42 U.S.C. §§ 3604(f)(1)–(f)(2). According

to 24 C.F.R. § 100.65 (relating to discrimination in terms, conditions and privileges and in services and facilities), "denying or limiting services or facilities" is an example of discrimination in the terms, conditions and privileges and in services and facilities. Therefore, the Estate's allegations that Defendants denied Abrielle various services or denied her access to the facilities are sufficient to satisfy the Estate's FHA pleading requirements under Section 3604(f)(2). Thus, at this preliminary stage, we find that the Estate has sufficiently demonstrated the second prong of its (f)(1) and (f)(2) claims.

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

We also find that the Estate has sufficiently pleaded that Abrielle was a "renter" thereby satisfying the third prong of her (f)(1) claim. A claimant is said to be a "buyer or renter" under the FHA when he or she supplies consideration in exchange for an interest in property. *See* 42 U.S.C. § 3602 (defining "to rent" for purposes of the FHA as "to lease, to sublease, to let and otherwise to grant for a

consideration the right to occupy premises not owned by the occupant"); *Growth Horizons, Inc*., 983 F.2d at 1283 n.10 ("Because the handicapped individuals in this case are not supplying the funds nor seeking a proprietary interest in the property, they are neither buyers nor renters."); *Defiore*, 995 F. Supp.2d at 419 ("What qualifies as consideration under the FHA has been examined by a limited number of courts."). In their amended complaint, the Estate pleads that Abrielle performed chores and other tasks in exchange for residency in the student home. Taking the Estate's averments as true, and for the reasons that follow, it has sufficiently pleaded that Abrielle was a "renter" for purposes of the FHA.

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

the Estate has pleaded that Abrielle supplied consideration in exchange for her housing, the Estate has demonstrated that Abrielle was a renter under the FHA.

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

Finally, the Estate has demonstrated that the discrimination Abrielle faced occurred because of her handicap thereby satisfying the fourth prong of the Estate's (f)(1) and (f)(2) claims. The amended complaint plainly alleges that Abrielle suffered from a handicap within the meaning of the FHA, (Doc. 29 at ¶¶ 168–72), and we have already established that the Estate has pleaded that the Defendants' actions were the result of that disability. Thus, we find that the Estate has sufficiently pleaded a claim under (f)(1) and (f)(2) of the FHA under a theory of disparate treatment and refusal to accommodate. Accordingly, Defendants'

motion for judgment on the pleadings shall be denied to the extent it seeks dismissal of the Estate's FHA claims in Count I.

b. Count IX – Civil Conspiracy

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

In response, Plaintiffs aver that Defendants' arguments unduly narrow the scope of their amended complaint. Specifically, Plaintiffs argue, their amended complaint "contains 259 paragraphs describing a pattern and practice of discrimination and wrongful conduct by Defendants." (Doc. 252 at 18). Thus, "[w]hile a specific reference is made to the Pennsylvania statute at ¶ 239, Defendants ignore all the other allegations that go beyond the statute." (*Id*.). Therefore, without identifying the specific cause of action upon which their civil conspiracy claim rests, Plaintiffs conclude that they have adequately pleaded a

claim of civil conspiracy. Finally, Plaintiffs conclude, "[a]s Chief Judge Conner explicitly held in his December 7, 2018 Memorandum, reinstating this claim, the Amended Complaint contains sufficient allegations showing that School officials and administrators knowingly conspired to endanger the welfare of its students by implementing discriminatory and dangerous mental health policies despite the foreseeable risks such conduct posed to students with disabilities." (Doc. 251 at 16 (citing Doc. 216 at 13)). We disagree.

"Criminal statutes do not generally provide a private cause of action nor basis for civil liability." *Concert v. Luzerne Cty. Children & Youth Servs*., No. 3:08-CV-1340, 2008 WL 4753709, at *3 (M.D. Pa. Oct. 29, 2008); *see also Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 190 (1994) ("We have been quite reluctant to infer a private right of action from a criminal prohibition alone."). Indeed, as Defendants note, Pennsylvania courts have held that there is no private right of action for Pennsylvania's statute criminalizing the endangering of the welfare of children. *Doe v. Archdiocese of Phila.*, 31 Pa.D&C.5th 83 (Pa. Com. Pl. 2013). When a statute does not provide a private right of action, a plaintiff cannot pursue a civil remedy for conspiracy to violate that statute. *See In re Orthopedic Bone screw Prod. Liab. Litig*., No. MDL 1014, 1997 WL 186325, at *10 (E.D. Pa. Apr. 16, 1997), *aff'd sub nom. In re Orthopedic Bone Screw Prod. Liab. Litig*., 193 F.3d 781 (3d Cir. 1999) ("It follows that most

states would not recognize a claim for civil conspiracy alleging that the object of the conspiracy was to violate a federal statute that did not provide for a private right of action."); *Hasu Shah v. Harristown Dev. Corp*., No. 1:12-CV-2196, 2013 WL 6567764, at *12 (M.D. Pa. Dec. 13, 2013) (citing *Boyanowski v. Capital Area Intermed. Unit*, 215 F.3d 396, 405 (3d Cir.2000) ("As a predicate to liability for civil conspiracy, the complaint must allege a distinct underlying tort."); *Livingston v. Shore Slurry Seal, Inc.*, 98 F. Supp. 2d 594, 597 (D.N.J. 2000) ("Because there is no private right of action under the Davis–Bacon Act, plaintiffs' claim that defendants conspired to violate the Act must be dismissed."); *Deitrick v. Costa*, No. 4:06-CV-01556, 2015 WL 1605700, at *19 (M.D. Pa. Apr. 9, 2015) ("Civil conspiracy cannot be predicated upon criminal acts that do not otherwise give rise to a cognizable private right of action.") (citing *Pelagatti v. Cohen*, 536 A.2d 1337, 1342 (Pa. Super. 1987) (finding no cause of action for civil conspiracy predicated upon obstruction of justice); *Homer v. Ciamacco*, 2 Pa.D.&C.3d 755, 757 (Pa. Com. Pl. 1977) (finding no cause of action for civil conspiracy predicated on perjury)). It thus follows that, because Plaintiffs have failed to identify a predicate statute with a private right of action upon which their civil conspiracy claim rests, Count IX must be dismissed, and we shall grant Defendants' motion premised thereon.

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

c. Count XII – Breach of Fiduciary Duty

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

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

In response, Plaintiffs point out that their amended complaint alleges that "Defendants owed [Abrielle] fiduciary duties of care and good faith to provide a safe environment for all children in their care, requiring them to exercise the kind

of reasonable inquiry, skill and diligence that a person of ordinary prudence would use in overseeing the care of young at-risk children and protecting them from known dangers." (Doc. 251 at 20 (citing Doc. 29 at ¶ 246)).

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

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

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

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

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

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

d. Count XIII – Negligence *Per Se*

In their next issue, Defendants argue that Plaintiffs' negligence *per se* claim fails as a matter of law because neither the FHA nor the ADA can serve as the basis of a negligence *per se* case. (Doc. 241 at 19–20 (citing *McCree v. Se. Pennsylvania Transp. Auth.*, No. CIV.A. 07-4908, 2009 WL 166660, at *12 (E.D. Pa. Jan. 22, 2009) ("[V]iolation of an ADA regulation may not be used as evidence of negligence *per se* in a personal injury action.") (citing *Levin v. Dollar Tree*

Stores, Inc., No. 06–0605, 2006 WL 3538964, at *2 (E.D.Pa. Dec.6, 2006) (holding that the plaintiff may not "borrow" ADA regulations for use as evidence of the standard of care to prove negligence *per se* in a personal injury action, since to do so would "allow for recovery of damages for personal injuries for violations of the ADA, which are specifically not permitted under the ADA itself")); *Aponik v. Verizon PA., Inc.*, 106 F. Supp.3d 619, 624 (E.D. Pa. 2015) ("Because the ADA was not designed to protect those with disabilities from personal injuries, [p]laintiff is unable to state a claim for negligence *per se*."); *Hunter v. District of Columbia*, 64 F.Supp.3d 158 (D.D.C. 2014) (concluding that the FHA cannot serve as the basis for a negligence *per se* claim)).

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

state cases)). In its Reply, Defendants distinguish the various cases cited by Plaintiffs, contending that Plaintiffs "misrepresent[] . . . to this Court" the holdings of the various out-of-state cases they cite. (Doc. 261 at 17).

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

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

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

> A claim for negligence *per se* which relies upon a statute to provide the standard of care is virtually indistinguishable, substantively, from a direct claim under that same statute. This "close relationship" between a private cause of action and a claim for negligence *per se* exists "because both private causes of action and negligence *per se* 'address

> the question of whether the policy behind the legislative enactment will be appropriately served by using it to impose and measure civil damages liability.'"

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

to protect. *See Nichols*, 2004 WL 868222, at *12 ("Based upon the same rationale which underpinned my holding in *Nichols I* that plaintiff did not have standing to bring a claim under the ADA because it was not a disabled individual, plaintiff cannot pursue a negligence *per se* claim based upon defendants' alleged violation of a statute which was not enacted to 'protect a class of persons which includes plaintiffs.'").

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

the FHA sufficient to survive a motion for judgment on the pleadings. We will not permit Plaintiffs to potentially recover twice by repleading this claim as a negligence *per se* action.

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

e. Other Issues – Prospective Injunctive Relief

In their final issue, Defendants argue that Plaintiffs' request for injunctive relief is moot because they cannot demonstrate that they are likely to suffer future harm. According to Defendants, because Abrielle is deceased, "neither [Abrielle] nor the Plaintiffs will be enrolling at [the School] in the future, and therefore [Abrielle], and certainly [Individual] Plaintiffs, 'will not again be subjected' to [the

School's] policies and/or conduct." (Doc. 241 at 21 (quoting *Mirabella By Mirabella v. William Penn Charter Sch.*, 752 F. App'x 131, 134 (3d Cir. 2018)).

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

"Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case." *Burke v. Barnes*, 479 U.S. 361, 363 (1987). Article III requires that litigants have "a legally cognizable interest in the outcome" of the litigation. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980). This concept is referred to as the "personal stake requirement," and requires a litigant to demonstrate that he or she "has sustained or is immediately in danger of sustaining some direct injury." *City of*

Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983). "Past exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects." *Id*. at 102. This requirement "serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving," *Geraghty*, 445 U.S. at 397, and ensures "concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions." *Lyons*, 461 U.S. at 101.

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

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

> The Constitution commands that we consider actual cases and controversies only, not moot ones. Our "ability to grant effective relief lies at the heart of the mootness doctrine." Developments that "eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief" render a case moot,

> irrespective of when the developments occur during federal judicial proceedings.
>
> Graduation is one such development: When a student challenges the legality of a school's conduct, the student's "graduation typically moots her claim for injunctive or declaratory relief." In *Donovan*, we held that a student's graduation mooted her request to enjoin her high school from denying her Bible club certain privileges. So too here. [Plaintiff's] graduation means that any injunctive relief under the ADA "would have no impact on [him] whatsoever."
>
> A longstanding but "extremely narrow" exception applies when a student's claims are "capable of repetition, yet evading review." For the exception to apply, "the challenged action [must be] too short in duration to be fully litigated before the case . . . become[s] moot" and "there [must be] a reasonable expectation that the complaining party will be subjected to the same action again." As in *Donovan*, the exception does not apply to [Plaintiff]: As a high school graduate presently enrolled in university, he will not be returning to high school and will not again be subjected to [the Defendant's behavior which gave rise to the instant action].

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

In this case, Plaintiffs seek prospective injunctive relief under the FHA to remedy the discrimination Abrielle purportedly suffered. In short, Plaintiffs seek an injunction mandating that Defendants avoid damage to other children by providing special care for students that suffer from mental impairments and may need additional help. Laudable as this purpose may be, because Abrielle has since passed away, neither she nor her parents will ever be subjected to the policies and procedures implemented by Defendants, and the Estate's claim for prospective injunctive relief cannot be redressed by the relief Plaintiffs request. *See Mirabella*,

752 F. App'x at 133; *Cohen v. Twp. of Cheltenham, Pennsylvania*, 174 F. Supp. 2d 307, 311 (E.D. Pa. 2001) ("Plaintiffs originally sought injunctive relief compelling defendants to grant plaintiffs' requested zoning variance so they could sell their property to Safe Haven. Because plaintiffs no longer own their home, their claim for injunctive relief is rendered moot."); *Harris v. Itzhaki*, 183 F.3d 1043, 1052 (9th Cir. 1999) (granting only retrospective relief under the FHA when plaintiff moved out of the housing unit at issue into a new place 3000 miles away). That is, Plaintiffs cannot seek a prospective remedy under the FHA from which neither the litigants themselves nor the individual the litigants represent will receive any benefit. Accordingly, Count I shall be dismissed as moot to the extent it seeks prospective injunctive relief.

IV. CONCLUSION

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

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

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendants' Motions for Judgment on the Pleadings, (Docs. 240, 242), are **GRANTED** to the following extent:
    a. Count I of Plaintiffs' amended complaint is **DISMISSED** to the extent it seeks relief on behalf of Plaintiffs Wartluft and Bartels in their individual capacities and to the extent it seeks prospective injunctive relief.
    b. Counts III, IX, X, and XII of Plaintiffs' amended complaint are **DISMISSED** as withdrawn to the extent those Counts could be interpreted to seek relief on behalf of Plaintiffs Wartluft and Bartels in their individual capacities.
    c. Counts XI and XIII of Plaintiffs' amended complaint are **DISMISSED** for failure to state a claim.
2. Defendants' Motions for Judgment on the Pleadings, (Docs. 240, 242), are **DENIED** in all other respects.

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