Case No. 15-2154

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Quentin Scott,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
City of Albuquerque, et al.,	)
	)
Defendants - Appellees.	)

On Appeal from the United States District Court
For the District of New Mexico
Honorable Scott W. Skavdahl, presiding

No. 1:14-CV-0665-SWS-WPL

APPELLANT'S OPENING BRIEF

Respectfully Submitted,

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF PRIOR APPEALS

There are no prior appeals in this matter. The issue raised as Issue I herein is also raised in A.M. v. City of Albuquerque, No. 14-CV-2183. Specifically, Plaintiff in A.M raises an issue of whether student misbehavior (burping in class) violates the interference with education statute.

STATEMENT OF JURISDICTION

Plaintiff, Quentin Scott, brought claims under 42 U.S.C. Sec. 1983 and Title II of the American with Disabilities Act. Scott's claims arise from Officer Damon Hensley's [hereafter "Officer Hensley"] January 16, 2009 arrest of him when he was thirteen years old, for interference with the educational process, NMSA 1978, Section 30-20-13(D), because Officer Hensley believed he had skipped class. Scott filed his Complaint for Recovery of Damages due to Deprivation of Civil Rights June 12, 2014 in the Second Judicial District Court for the State of New Mexico. [Aplt. App. at 000011]. The Defendants properly removed this case to the Federal District Court for the District of New Mexico on July 23, 2014. [Aplt. App. at 000008]. The basis for removal arose pursuant to the District of New Mexico's jurisdiction as codified in 28 U.S.C. § 1331 and 1343(a)(3) and (4). [Aplt. App. at 000009].

On August 17, 2015, the District Court, Honorable Judge Scott W. Skavdahl presiding, entered summary judgment in favor of the City of Albuquerque and

Defendant Hensley. [Aplt. App. at 000249-000258]. Scott filed his Notice of Appeal on September 16, 2015. [Aplt. App. at 000399]. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court err in entering summary judgment for Defendants on Plaintiff's Fourth Amendment claims stated in Count I of his Complaint?

2. Did the District Court err in entering summary judgment for Defendants on Plaintiff's Fourteenth Amendment claims stated in Count II of his Complaint?

3. Did the District Court err in entering summary judgment for Defendants on Plaintiff's American with Disabilities Act claims stated in Counts III and IV of his Complaint?

4. Did the District Court err in entering summary judgment for Defendants on Plaintiff's supervisory liability claims stated in Count VII of his Complaint?

STATEMENT OF THE CASE

In January of 2009, Quentin Scott was a seventh grade student at Grant Middle School. [Aplt. App. at 000243]. In January of 2009, Officer Hensley served as the School Resource Officer for Grant Middle School. [Aplt. App at 000063, 000064]. Officer Hensley knew that Scott attended special education classes, that he had been staying on the street, and that he had been diagnosed with bipolar disorder. [Aplt. App. at 000065, 000067]. Officer Hensley was also aware that Scott was in a "specially supervised classroom" and that his teacher's name was

Nancy Wiggins. Officer Hensley was aware that Ms. Wiggins' class was "smaller in class size" and that "she had a little padded room in there." [Aplt. App. at 000076, 000077].

At the time of Scott's arrest, he was 13 years old and was 5'4," 115 lbs. [Aplt. App. at 000078]. Scott's IEP noted that he had "been diagnosed with bi-polar disorder and oppositional defiant disorder, which affect his ability to function in a large classroom setting." [Aplt. App. at 000213]. Scott had a "504 plan" in place at all material times. [Aplt. App. at 000208]. One of Scott's special needs was related to auditory processing, which influenced how his bipolar diagnosis affected him in the school setting. [Aplt. App. at 000208]. When Scott is entering a manic or depressive episode, being touched startles him. [Aplt. App. at 000208]. The instruction not to touch Scott is documented in his IEP. [Aplt. App. at 000222].

As part of Scott's accommodations at school, his IEP allowed him to move about his classroom when feasible, he was encouraged to take a deep breath when frustrated, or get a drink of water. [Aplt. App. at 000222]. Scott's mother testified that Scott was also permitted to leave his classroom with teacher approval. [Aplt. App. at 000208-000209].

Scott's mother testified that one of the places that Scott was verbally permitted to go was to the janitor's office because "it was a safe place for him." [Aplt. App. at 000209]. It was a "safe place" because

> there was nobody else around. Like the janitors, you know, were in a space where there was no traffic. There was nothing. So people couldn't see him having a hard time. So when you go into the office, people are still there, and they watch you having a hard time, and Ms. Nash wasn't always there, and Mr. Briggs wasn't always there to go in behind a closed door for him to have a breakdown. So that was established. They really liked Quentin. If Quentin needed to do some sweeping to burn some steam off, then that's what they had him do. So that was considered a safe place for him.

[Aplt. App. at 000209].

Scott testified that he had the janitor's permission to be in their office on January 16, 2009. [Aplt. App. at 000202]. The janitors were very understanding with Scott. [Aplt. App. 000202].

According to Officer Hensley, prior to arresting Scott, he was seated in his office when he heard the school secretary, Lupe Griego, call out Scott's name. [Aplt. App. at 000069, 000079]. Ms. Griego reported that "she had just run into Quentin Scott or saw him in the hallway and was trying to question him about what are you doing out of class." [Aplt. App. at 000071]. According to Officer Hensley, Scott reported to Ms. Griego that he was helping the custodians. [Aplt. App. at 000071, 000079].

According to Officer Hensley, he asked Nancy Wiggins, Scott's special education teacher, where Scott was supposed to be; to which she responded that he was supposed to be in health class and was probably ditching. [Aplt. App. at 000072, 000079]. Officer Hensley did not check with Scott's health teacher to determine whether Scott was permitted to be in the hallway or help the custodians. [Aplt. App. at 000073].

According to Officer Hensley, he then went to the custodians' office, where he located Scott. [Aplt. App. at 000072, 000079].

When Officer Hensley arrived at the janitors' office, Scott was reading a car catalog and eating sunflower seeds with them. [Aplt. App. at 000085]. Scott told Officer Hensley that he was allowed to be with the custodians numerous times. [Aplt. App. at 000084]. Officer Hensley ordered Scott to stand up so he could be handcuffed. Scott complied. [Aplt. App. at 000203]. Officer Hensley handcuffed Scott inside the janitors' office. [Aplt. App. at 000202]. There were three janitors present in the office when Scott was handcuffed, one female and two males. [Aplt. App. at 000202].

Officer Hensley made the handcuffs "very uncomfortably tight." [Aplt. App. at 000203]. Officer Hensley then "dragged" Scott to his office in handcuffs during a passing period, and Scott perceived his peers looking at him in handcuffs. [Aplt. App. at 000202, 000203]. Scott perceived Officer Hensley's actions as wanting his

peers to see him in handcuffs "being dragged around." [Aplt. App. at 000198]. Scott reported the tightness of his handcuffs to numerous people. [Aplt. App. at 000203, 000204]. Scott's wrists were bruised and swollen for at least a week after he was handcuffed by Officer Hensley. [Aplt. App. at 000204]. In his office, Officer Hensley asked Scott "[h]ow does it feel to not be able to grab a tissue to wipe your face, to wipe your nose, to cry? You can't even cry because your hands are behind your back." [Aplt. App. at 000203]. Scott attempted to wipe his face with his shoulder. [Aplt. App. at 000204]. Scott was crying and "scared shitless" while sitting in handcuffs. [Aplt. App. at 000203]. Scott sat handcuffed in Officer Hensley's office for an hour to two hours prior to being transported to the Bernalillo County Juvenile Detention Center ("JDC") while Officer Hensley completed his charging document and paperwork. [Aplt. App. at 000204, 000069]. Officer Hensley then transported Scott to the JDC and booked him in. [Aplt. App. at 000069, 000079].

Officer Hensley always handcuffs children he is transporting, regardless of the reason for their transport, pursuant to Albuquerque City policy. [Aplt. App. at 000225]. Grant Middle School is located at 1111 Easterday NE, Albuquerque, NM 87112, which is located near the intersection of Moon and Constitution. [Aplt. App. at 000243]. The JDC is located at 5100 2nd St. NW, Albuquerque New Mexico 87107. [http://www.nmjustice.net/nmsc/ juvenile/program.php?id=350].

According to Google Maps, the distance between Grant Middle School and the JDC is approximately 8 miles.[1]

Scott was released from the JDC to his father, Fletcher Scott, the same day of his arrest. [Aplt. App. at 000082]. Officer Hensley charged Scott with the crime of interference with the educational process of Grant Middle School. [Aplt. App. at 000075, 000079]. Sergeant Archibeque, Officer Hensley's supervisor, approved Scott's arrest. [Aplt. App. at 000227].

Juvenile Probation Officers are available to officers in the schools via telephone to aid in the determination of whether a child merits detention under Section 32A-2-11(A). NMSA 1978, § 32A-2-5(B)(1-2). Ms. Martha Todd, a Juvenile Probation Officer, testified that the Albuquerque Police Department had a pattern and practice of charging children under Section 30-20-13(D) as, at the time her deposition was taken, she saw anywhere between 2-5 children charged with the offense per month. [Aplt. App. at 000229].

Ms. Todd testified that children, ages 5 to 14, were being charged with NMSA § 30-20-13 for minor instances of classroom disruption such as "bothering other kids," or "talking back to the teacher." [Aplt. App. at 000232]. Ms. Todd

[1]<https://www.google.com/maps/dir/Grant+Middle+School,+Easterday+Drive+Northeast,+Albuquerque,+NM/Bernalillo+County,+5100+2nd+St+NW,+Albuquerque,+NM+87107/@35.1101045,-106.6092125,14z/data=!3m1!4b1!4m13!4m12!1m5!1m1!1s0x87220a9924f78737:0x96134c8d4a29eabe!2m2!1d-106.541517!2d35.091931!1m5!1m1!1s0x87227365215b9473:0xd08079117d45e612!2m2!1d-106.638287!2d35.133171>.

testified that at all material times Albuquerque School Resource Officers are not adequately trained on how to deal with children and that officers used Section 30-20-13 in an arbitrary and inconsistent manner. [Aplt. App. at 000231].

Albuquerque Police Officers had a pattern and practice of arresting children for childish acts pursuant to Section 30-20-13(D). [Aplt. App. at 000235-000238, 000239-000240]. During the relevant time frame of Scott's arrest, the City of Albuquerque engaged in a practice of arresting young school children for acts of disobedience and misbehavior. For instance, police officers arrested a twelve (12) year old refusing to sit down. [Aplt. App. at 000235; April 23, 2009 arrest of J.C.]; a twelve (12) year old for using profane language and refusing to participate in class [Alt. App 000236; August 25, 2009 arrest of S.P.] a twelve (12) year old for refusing to do his assignment and arguing with his teacher [Aplt. App. at 000237; January 15, 2009 arrest of J.H.]; a fourteen (14) year old for blowing up a condom in class [Aplt. App. at 000238; February 11, 2010 arrest of A.B.]; and a thirteen (13) year old for burping in class [Aplt. App. at 0000238; May 19, 2011 arrest of F.M.]

Scott filed a complaint against Officer Hensley, Chief of Police Ray Schultz and the City of Albuquerque. Scott made claims under the Fourth Amendment, Fourteenth Amendment and the Americans with Disabilities Act. Scott's Fourth Amendment claims assert that Officer Hensley lacked probable cause to arrest him

and that the arrest was carried out in an unnecessarily humiliating manner for a minor child who did not need transport to the Juvenile Detention Center (JDC). Scott also claimed that the City of Albuquerque custom and practice of arresting children for misbehavior in school caused his constitutional deprivation.

Scott also raised a claim under the Americans with Disabilities Act alleging that his leaving the classroom to spend time with the janitors was a result of his disability and that the City of Albuquerque should have accommodated his disability by instructing officers to simply call parents for non-violent offenses as the policy of arresting children has a disparate impact on disabled children.

Scott filed a motion for summary judgment on the probable cause issue. The Defendants filed a motion for summary judgment on all issues. On August 17, 2015, the District Court granted Defendants' Motion for Summary Judgment.

SUMMARY OF THE ARGUMENTS

The New Mexico Legislature enacted Section 30-20-13(D) of the New Mexico Statutes to punish those who willfully disrupt and actually impair the functioning of a public school. State v. Silva, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d. The statute is appropriately employed only when a child intentionally and materially interferes with a school's lawful mission. The statute is not intended to criminalize a child's non-disruptive conduct, such as ditching class. The City of Albuquerque, until recently, has been

using the statute to handcuff, arrest and transport children from school to address normal childhood misbehavior. The arrest of Quentin Scott took him away from school, depriving Scott of the very ability to be educated or even counseled by educational professionals. Officer Hensley acted objectively unreasonably when he placed Scott under custodial arrest and charged him with interference with the educational process. The City of Albuquerque's policy of charging children caused the constitutional violation.

The Tenth Circuit has stated that a "reasonable officer" is one who is "prudent, cautious, and trained." U.S. v. Martin, 613 F.3d 1295, 1300 (10th Cir. 2010) (quoting United States v. Salazar, 609 F.3d 1059, 1067 (10th Cir. 2010). Any prudent and cautious police officer faced with the facts in this case would not have arrested Scott for interfering with the educational process of Grant Middle School. It is clearly established that part of a child's education is school-based discipline. Morse v. Frederick, 551 U.S. 393, 413 (2007) ("Through the legal doctrine of in loco parentis, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order."). Also, the state handles truancy of any kind with counseling intervention at the outset. NMSA § 22-12-8. Logically, a student who is found ditching class should be returned to class, and the educational process should proceed accordingly with traditional scholastic punishments such as detention of simply counseling. Arresting a child for ditching

class and transporting the child away from his school causes the opposite result; the child is removed from the educational setting and denied the opportunity to be counseled for his alleged conduct so as to learn from it in a constructive academic environment. In a civilized society, thirteen year old children should not be confronted with handcuffs and a cell for walking out of class. It is absure for any person educated in the United States to believe otherwise. Many members of the Bar of the Tenth Circuit may well have spent time in handcuffs if such standards were applied in our formative years. Scott did not interfere with the educational process of Grant Middle School, Officer Hensley did.

ARGUMENT

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A] judge's function at summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Tolan v. Cotton, 572 U.S. ---, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014) (citation and internal quotation marks omitted).

Whether a civil defendant is entitled to qualified immunity is a pure question of law. Romero v. Fay, 45 F.3d 1472, 1475 (10th Cir. 1995); see Holland ex rel.

Overdorff v. Harrington, 268 F.3d 1179, 1185 (10th Cir. 2001). "In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry. The first asks whether the facts, '[t]aken in the light most favorable to the party asserting the injury... show the officers' conduct violated a [federal] right[.]'" Tolan, 572 U.S. --- at 5(quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

"The second prong of the qualified-immunity analysis asks whether the right in question was 'clearly established' at the time of the violation." Tolan, 134 S. Ct. at 1866 (citing Hope v. Pelzer, 536 U.S. 730, 739 (2002)). "'[T]he salient question ... is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" Id. (citing Hope at 741). "[E]ven as to action less than an outrage, 'officials can still be on notice that their conduct violates established law in novel factual circumstances.'" Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377-78 (2009); Fancher v. Barrientos, 723 F.3d 1191, 1201 (10th Cir. 2013); Casey v. City of Federal Heights, 509 F.3d 1278, 1284 (10th Cir. 2007); Estate of Booker v. Gomez, 745 F.3d at 427 (10th Cir. 2014); Cortez v. McCauley, 478 F.3d 1108, 1119 (10th Cir. 2007). "The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that '[t]he easiest cases don't even arise.'" Safford, 557 U.S. at 377 (citation omitted).

"In deciding the 'clearly established law' question [the Tenth Circuit] employs a 'sliding scale' under which 'the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'" Browder v. City of Albuquerque, 787 F.3d 1076 (10th Cir. June 2, 2015).

> After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.

Id. (citation omitted).

"We cannot find qualified immunity wherever we have a new fact pattern." Fancher, 723 F.3d at 1201(quoted authority omitted). Indeed, "even as to action less than an outrage, officials can still be on notice that their conduct violates established law in novel factual circumstances." Safford, 557 U.S. at 377-78 (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)); accord Fancher, 723 F.3d at 1201; Casey, 509 F.3d at 1284; Cortez, 478 F.3d at 1119. "The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason… that the easiest cases don't even arise." Safford, 557 U.S. at 377 (citation omitted). This case is an easy one. It is plain that arresting a child for ditching class violates the child's clearly established Fourth and Fourteenth Amendment rights.

Of course, qualified immunity applies only to Scott's constitutional claims under the Fourth and Fourteenth Amendments. In other words, Scott's claims under the Americans with Disabilities Act (ADA) are not subject to it, see, e.g., Robertson v. Las Animas County Sheriff's Dept., 500 F.3d 1185, 1195 (10th Cir. 2007). Also, Scott's Monell and supervisory liability claims are not subject to qualified immunity. Hinton v. City of Elwood, Kan., 997 F.2d 774, 782 (10th Cir. 1993).

I. THE DISTRICT COURT ERRED IN GRANTING QUALIFIED IMMUNITY TO OFFICER HENSLEY AS NEW MEXICO LAW CLEARLY ESTABLISHED HE HAD NO PROBABLE CAUSE TO ARREST SCOTT AS A MATTER OF LAW.

"The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'" Maryland v. Pringle, 540 U.S. 366, 371 (2003) (citing Brinegar v. United States, 338 U.S. 160, 176 (1949)).

"Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." Keylon v. City of Albuquerque, 535 F.3d 1210, 1216 (10th Cir. 2008); 1216 (quoting Romero, 45 F.3d at 1476); see also Manzanares v.

Higdon, 575 F.3d 1135, 1144 (10th Cir. 2009); Baptiste v. J.C. Penney Co., 147 F.3d 1252, 1255 (10th Cir. 1998); Albright v. Rodriguez, 51 F.3d 1531, 1536 (10th Cir. 1995).

In this case, Officer Hensley charged and arrested Scott for interfering with the educational process pursuant to NMSA 1978, Section 30-20-13(D). The statute states:

> No person shall willfully interfere with the educational process of any public or private school by committing, threatening to commit or inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school.

Id. Violation of Section 30-20-13(D) is a misdemeanor offense. NMSA 1978, § 30-20-13(F).

In State v. Silva, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888, the state charged the defendants, college students, with violating the statute after staging a sit-in in the office of the university president to protest decisions relating to the funding of an "Ethic Studies Program" and refusing to leave after more than four hours. Id., ¶ 2. In reviewing the state's application of the statute to the Silva defendants, the New Mexico Court of Appeals found the students had "substantially interfered" with the president's business by refusing to leave and by staging a sit-in in his office, which materially disrupted the functions of the university. Id., ¶ 23. The Court thereby established

that, in the context of an educational setting, a violation of NMSA §30-20-13(D) (or its historical counterpart) requires "interference with the actual functioning of the [school]" which it held was more than merely "disturb[ing] its peace." Id. at ¶ 19. ("Conduct which does not interfere with the functioning of the school may nonetheless disturb its peace. The present statute, however, requires interference with the actual functioning of the University."). In the context of Silva, the disturbance caused by the students' presence was "easily measured by their impact on normal school activities." Id. at ¶ 9.

The District Court failed to cite to or discuss the Silva decision. The Silva decision is critical to gain any understanding of the necessary limits the New Mexico judiciary has placed on interference with public education. The District Court simply applied the language of the statute and found that Scott's ditching class "involved the time and attention of three school officials, including disrupting Wiggins' preparation for her next class and the class itself." [Aplt. App. at 000314]. The "disruption" the District Court referenced is the time away from class preparations to which Ms. Wiggins was able to devote time, not to any intentional activity from Scott that was directed towards preventing Ms. Wiggins from preparing for class. Indeed, there is no evidence that Officer Hensley had any awareness of the "disruption" of Ms. Wiggins' lesson plan.

The District Court's failure to analyze the Silva decision leaves the analysis

of Scott's arrest half baked. The Silva decision carefully explained why the breadth of the language of the interference with public education statute cannot be applied as the District Court applied the language. Otherwise, any activity that takes a teacher away from a lesson plan or distracts him in a lesson plan would violate the statute and enforcement of the law would naturally fall to the whims of the individual School Resource Officer and teacher as the opportunity to arrest would present itself hundreds of times through a typical school year.

The defendant in Silva challenged the breadth of the predecessor statute with the same observation that the words "disrupt, impair, interfere with or obstruct" were unconstitutionally vague and that the statute was overbroad. The Silva Court applied the reasoning of Grayned v. City of Rockford, 408 U.S. 104 (1972) to uphold the statute from a vagueness and overbreadth challenge. The Silva Court distinguished the statute at issue in Grayned. The Silva Court noted that the Grayned Court approved a statute that prohibited conduct that was "neither violent nor physically disruptive". Silva 1974-NMCA-072 at ¶ 18. The Silva Court stated that the New Mexico statute was not as broad; "It's operative verbs (disrupt, impair (as construed), interfere with, obstruct), read as a whole, denote a more substantial, more physical invasion." Id.

The Silva Court then went on to find explicitly that violation of the statute requires an "interference with the actual functioning of the [school]". Again, this

was contrasted with the Grayned statute, which "applied when merely the peace of the school session is disturbed." Id. at 19.

In this case, Scott's effect on the normal school activities of Grant Middle School is entirely absent. In Silva students took the affirmative actions of protesting in the office of the university president and refusing to leave. These actions caused the president to cancel meetings and vacate his office for hours. Obviously, the absence of a university president from his office will disrupt the educational process because the president is unable to do his job – administering to the educational process itself. In this case, Scott interfered with no school administrator's ability to administer to the educational process.

Although Silva is the only New Mexico appellate case addressing Section 30-20-13(D), appellate decisions from Colorado, Florida, and North Carolina, which have all interpreted statutes that are substantively comparable to NMSA 1978, § 30-20-13, show Officer Hensley's arrest to be unreasonable. Colorado courts require an act that can actually disrupt the function of the school itself. For example, in People ex rel. J.P.L., 49 P.3d 1209 (Colo. Ct. App., Div. V, 2002), the Colorado Court of Appeals found a student's conduct in creating a "hit list" and indicating to fellow student that she was "number one on his list" sufficient to uphold a conviction under the statute.[2] Id. at 1211. Similarly, in People ex rel. C.F.,

[2] See C.R.S.A. § 18-9-109 (West 2012) ("No person shall, on the premises of any educational

279 P.3d 1231, 1235 (Colo. Ct. App., Div. II, 2012), the Colorado Court of Appeals upheld the trial Court's finding that the child there violated its interference statute when he called in a bomb threat to school.

Holding in line with the New Mexico courts, Florida has determined that their version of the statute[3] requires a showing of intent to "materially disrupt" normal school functions or activities. For example, in S.L. v. State, 96 So.3d 1080, 1084 (FL. Ct. App., 3rd Dist., 2012), there was no material disruption to the school day because of how the situation was handled by teachers and no showing that the student knowingly intended to disrupt school even though the student had called out insults, obscenities and made rude gestures towards an Officer. Likewise, in L.T. v. State, 941 So.2d 551 (FL. Ct. App., 2nd Dist., 2006), the court found no evidence of intention to disrupt a school function when a student joined an ongoing fight to protect her sister and did not instigate the fight or otherwise try to disrupt campus activities. The A.M.P. v. State, 927 So.2d 97 (FL. Ct. App., 5th Dist.,

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institution or at or in any building or other facility being used by any educational institution, willfully impede the staff or faculty of such institution in the lawful performance of their duties or willfully impede a student of the institution in the lawful pursuit of his educational activities through the use of restraint, abduction, coercion, or intimidation or when force and violence are present or threatened… [and] [a]ny person who violates any of the provisions of this section, except subsection (6) of this section, commits a class 3 misdemeanor.").

[3] See F.S.A. § 877.13 (West 2012) ("It is unlawful for any person … [k]nowingly to disrupt or interfere with the lawful administration or functions of any educational institution, school board, or activity on school board property in this state… [and] [a]ny person who violates the provisions of this section is guilty of a misdemeanor of the second degree…").

2006), court similarly held that fighting with another student in a bathroom and bumping into the assistant principal on the way out the door did not constitute a violation because there was no showing that the behavior was intended to disrupt the institution and in fact no evidence that the educational function of the institution had been disrupted. In contrast, in M.M. v. State, 997 So.2d 472 (FL. Ct. App., 5th Dist., 2008), the court held a student had interfered with the educational process where the student knowingly disrupted a bus schedule resulting in disruption of other bus schedules. Similarly, in J.J. v. State, 944 So.2d 518 (FL. Ct. App., 4th Dist., 2006), a student interfered with the educational process when the student willfully incited female students to fight, despite repeated requests to stop, resulting in the disruption of the school's breakfast service.

North Carolina Courts decline to find violations of their version of the educational interference statute[4] where the student's conduct amounts to "foolish mischief." see In re S.M., 660 S.E.2d 653 (N.C. Ct. App. 2008) (two girls laughing, giggling, and running from administrators and school resource personnel was insufficient to establish a violation). In S.M.'s predecessor, In re Brown, 562

[4] See N.C. Gen. Stat. Ann. § 14-288.4 (West 2012) ("Disorderly conduct is a public disturbance intentionally caused by any person who does any of the following: …[d]isrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto… [and] any person who willfully engages in disorderly conduct is guilty of a Class 2 misdemeanor.").

S.E.2d 583, 586 (N.C. Ct. App. 2002), a student was taken to another room to finish a test after being told he would receive a zero on it for talking, thereafter invited the teacher to give him a zero, slammed the door in the teacher's face, and tried to prevent the teacher from reaching the office to write up a referral slip. Id. Under these facts, the court did not find a violation of the statute. The rationale was simple:

> when students act as respondents in this case, they are troublesome and a burden in the classroom. These are the trials faced by teachers in today's schools. But if we were to hold that the present actions are of such gravity that they warrant a conviction of disorderly conduct, every child that is sent to the office for momentary lapses in behavior could be convicted under such precedent.

Id.; see, e.g., In re K.F., 606 S.E.2d 459 (N.C. Ct. App. 2005) (unpublished) (no violation where student changed the channel on a TV, argued with the assistant principal, and said "fuck this shit" within earshot of an officer).

The cases from other jurisdictions show that application of Section 30-20-13(D) is a matter of common sense. Common sense dictates that school children should be disciplined by school teachers and administrators unless their actions actually pose a threat to the functioning of an institution. Multiple courts have followed this reasoning, finding violations only in the case of intentional acts directed at disrupting the school day, or actual administrative function of a school. Ditching class is simply not analogous to staging a sit-in in an administrator's

office, calling in a bomb threat, or inciting a fight.

The term "educational process" must be examined. In Futrell v. Ahrens, 1975-NMSC-044, 88 N.M. 284, 286, 540 P.2d 214, 216, the New Mexico Supreme Court noted that part and parcel of the educational process was the regents of New Mexico State University's ability to prohibit "visitation by persons of the opposite sex in residence hall, or dormitory, bedrooms maintained by the Regents on the University campus." Id., ¶¶ 1, 7; see also, ¶ 10 ("we agree that personal intercommunication among students at schools, including universities, is an important part of the educational process, it is not the only, or even the most important, part of that process. In any event, we cannot believe that the restraint imposed by the regulation in question appreciably interferes—if at all—with the intercommunication important to the education of the students at the University."). The logical inference from Futrell is that "educational process" encompasses the ability of a school to impose rules and discipline for violations of its rules. To wit, the Supreme Court of the United States has consistently stated that an essential role of our schools – part and parcel of the educational process – is the discipline of school children. Morse, 551 U.S. at 413 ("Through the legal doctrine of in loco parentis, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order."); See also Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, dissenting) ("School discipline, like parental

discipline, is an integral and important part of training our children to be good citizens—to be better citizens."). Scott's act of ditching did not interfere with Grant Middle School's educational process, Officer Hensley's arrest did. Officer Hensley denied the administration the opportunity to serve one of its essential purposes - disciplining Scott for the violation of a school rule.

In the light most favorable to Scott, Officer Hensley had no probable cause to arrest him under Section 30-20-13(D). Scott was permitted to leave class and spend time with the janitors to calm himself. Officer Hensley also had no evidence that Scott interfered with the function of the school. Therefore, Officer Hensley's seizure of Scott was unreasonable and his arrest of Scott for violating Section 30-20-13(D) was unlawful.

The District Court found that multiple school personnel, including Officer Hensley himself, had to stop what they were doing to find out where Scott was supposed to be, and that, thus, his actions violated Section 30-20-13(D). Defendants provided no evidence below that Ms. Griego or Ms. Wiggins had to stop what they were doing – or that Scott in some way disrupted Ms. Wiggins' class. Further, assuming *arguendo* that Ms. Griego and Ms. Wiggins in fact had to stop what they were doing, Defendants' position intimates that looking for Scott was not part of either Ms. Griego or Ms. Wiggins' responsibilities. Defendants' position would render every childish act in school subject to criminal prosecution,

including failure to do homework, making spit balls, talking in class, and passing notes. The discipline, counseling and correction of school children is part and parcel of the educational process. That process was not disrupted by Scott in this case, it was disrupted by Officer Hensley, who removed Scott from school grounds preventing the school's staff from doing their jobs.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN GRANTING QUALIFIED IMMUNITY TO OFFICER HENSLEY FOR HIS USE OF FORCE.

Police seizures of children on school grounds must be reasonable and not constitutionally excessive as a matter of clearly established law. C.B. v. City of Sonora, 769 F.3d 1005, 1026 (9th Cir. 2014) cert. denied sub nom. City of Sonora, Cal. v. C.B., 135 S. Ct. 1482 (2015) ("At the time of C.B.'s seizure, the law was clearly established that, at a minimum, police seizures at the behest of school officials had to be reasonable in light of the circumstances and not excessively intrusive.") (citing, *inter alia*, New Jersey v. T.L.O., 469 U.S. 325, 341-2 (1985)). In addition to requiring probable cause, custodial arrests must not be made in an "extraordinary manner,…unusually harmful to [a suspect's] privacy or even physical interests." Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (citing Whren v. United States, 517 U.S. 806, 818 (1996)). Whether an arrest is extraordinary "turns, above all else, on the manner in which [the search or seizure] is executed." Id. "What is reasonable, of course, 'depends on all of the

circumstances surrounding the search or seizure and the nature of the search or seizure itself…. Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (citations omitted). "[T]he determination whether excessive force was used turns on the totality of the circumstances of each particular case, 'including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" Chavez v. City of Albuquerque, 402 F.3d 1039, 1045 (10th Cir. 2005) (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

As applied to this case, the totality of the circumstances show the force Officer Hensley used – in parading him through the school's halls in handcuffs and transporting him to the JDC – to be excessive. Even if Scott violated Section 30-20-13(D), it is a misdemeanor offense. And Scott at no time posed a threat to any person or attempted to evade arrest by flight.

Defendants incorrectly assert that Scott has only pled *de minimus* injury insufficient to plead excessive force. As an initial matter, Scott has pled more than a *de minimus* injury here, as he asserts that Officer Hensley handcuffed him in a manner that left him with severe bruising that did not dissipate for a week. Scott

also claims emotional distress related to Officer Hensley's act of parading him though the school halls in front of his peers, and berating him while he was crying and handcuffed in Officer Hensley's office. This is sufficient to state a claim for excessive force arising from handcuffing:

> In some circumstances, unduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored a plaintiff's timely complaints (or was otherwise made aware) that the handcuffs were too tight… We believe that a claim of excessive force requires some actual injury that is not de minimus, be it physical or emotional.

Cortez v. McCauley, 478 F.3d at 1129 (citations omitted).

More importantly, Defendants' *de minimus* argument is contrary to law. "The problem with this reasoning… is that it implicitly sanctions an officer's use of force, albeit resulting in only minor injury, that was wholly unnecessary to carry out the arrest." Grass v. Johnson, 322 Fed. Appx. 586, 589 (10th Cir. 2009) (unpublished). This is because physical contact is not required for an excessive force claim—patently unreasonable conduct is. Cortez v. McCauley, 478 F.3d at 1131-32 ("Considering the factors as a whole in the light most favorable to the Plaintiffs, there was a substantial and unjustified invasion of Tina Cortez's personal security that hardly can be considered *de minimus*."). The concept of a *de minimus* injury in the context of a constitutional violation is contrary to the very purpose of Section 1983:

> Physical injury may be the most obvious injury that flows from the use of excessive force. Yet the interests protected by the Fourth Amendment are not confined to the right to be secure against physical harm; they include liberty, property and privacy interests—a person's "sense of security" and individual dignity.

Holland, 268 F.3d at 1195; see Fontana v. Haskin, 262 F.3d 871, 880 (9th Cir. 2001) ("Gratuitous and completely unnecessary acts of violence by the police during a seizure violate the Fourth Amendment."). This is not simply a matter of advocacy on counsel's part. Judge Browning echoed the rationale of the Grass decision in resolving the J.H. case: "[t]he cases make clear that 'actual injury,' not 'physical injury,' is required to sustain a claim of excessive use of force." J.H. ex rel. J.P. v. Bernalillo Cnty., CIV 12-0128 JB/LAM, 2014 WL 3421037, at *60-61 (D.N.M. July 8, 2014) (Browning, J.) (unpublished) (citations omitted). Nothing in the case law requires an injured person to seek medical care to prove excessive force. It is sufficient that the person suffers an actual injury. In the light most favorable to Scott, he has adequately pled such an injury.

Additionally, the Tenth Circuit has specifically cautioned against the use of excessive force in seizing children. See Holland, 268 F.3d at 1192. In the Holland case, the Tenth Circuit iterated that even the use of "harsh language" could be considered excessive force under the totality of the circumstances. Id. at 1194 ("The whole course of conduct of an officer in making an arrest or other seizure—

including verbal exchanges with a subject—must be evaluated for Fourth Amendment reasonableness in light of the totality of the circumstances.").

> [E]xpletives communicate very little of substance beyond the officer's own personal animosity, hostility or belligerence. Such animus would be entirely misplaced in dealing with bystanders or children, particularly where they have offered no resistance to the officers' initial show of force. One can be firm and direct without being foul and abusive.

Id. at 1194. In addition to this statement, the Tenth Circuit has explicitly noted that a child's age and size are "certainly factors in the totality-of-the-circumstances reasonableness calculation." Hawker v. Sandy City Corp., 591 Fed. Appx. 669, 675 (10th Cir. 2014) (unpublished) (citing Holland, 268 F.3d at 1193). These factors were applied in the Holland and Hawker decisions; however, those cases are fairly distinct from this one factually. On the other hand, the Ninth Circuit recently addressed facts that more closely mirror this case. See generally C.B. v. City of Sonora, 769 F.3d 1005, 1027 (9th Cir. 2014) cert. denied sub nom. City of Sonora, Cal. v. C.B., 2015 WL 731950 (U.S. Feb. 23, 2015).

In C.B. an eleven-year-old sixth grade student, diagnosed with ADHD, arrived at school without taking his medicine. C.B., 769 F.3d at 1010. The child subsequently experienced a "shut down" during recess, remained unresponsive, and refused to leave the playground. Id. at 1010-1011. Officers were dispatched to the school in response to a report of "an out of control juvenile." Id. at 1011. When they arrived, a school coach informed the officers that the child had been yelling

and cussing, was a "runner," and had not taken his medicine. Id. However, the officers did not observe this behavior, as the child remained completely quiet and unresponsive. Id. Nonetheless, when the child did not respond to the officers he was ordered to stand up and place his hands behind his back. Id. The child complied, and was handcuffed and placed in the back of a police car - despite the fact that he obeyed every order the officers issued to him. Id. The officers did not explore any other options besides handcuffing the child prior to doing so. Id. The child was then taken to his uncle's place of business, handcuffed throughout the nearly half-hour transport period even though the officer's vehicle was equipped with safety locks, "making it impossible for [the child] to escape," as most patrol units are. Id. at 1012.

The Ninth Circuit denied the officers qualified immunity based on these facts and found that the child's Fourth Amendment right to be free from unreasonable seizures was unquestionably violated. C.B., 769 F.3d at 1024. The court so found because:

> [d]uring the entire time police were present, the child did nothing threatening or disobedient. Although Coach Sinclair mentioned that C.B. was a "runner" who had not taken his medication, the officers did not ask a single follow-up question to learn what Coach Sinclair meant and never inquired what had prompted the dispatch. Nor did they consider any less intrusive solutions, such as ordering C.B. to return inside the school building, or asking a guardian to pick up the child… When viewed in relation to these circumstances, the officers' decision to seize C.B. and remove him from school grounds was not reasonable.

Id. The court further rejected the officers' suggestion that immediate action was necessary to prevent the child's escape. Id. at 1025-1026. The court also found the use of handcuffs on the child to be unconstitutionally excessive in light of the totality of the circumstances:

> Other than an assertion that they were told C.B. might run away, Chief McIntosh and Officer Prock offer no justification for their decision to use handcuffs on C.B. During the entire incident, C.B. never did anything that suggested he might run away or that he otherwise posed a safety threat. He weighed about 80 pounds and was approximately 4′8″ tall—by no means a large child. Moreover, he was surrounded by four or five adults at all times… In these circumstances, we conclude that the decision to use handcuffs on C.B. was unreasonable, notwithstanding Coach Sinclair's unexplained statement that C.B. was a "runner." The further decision to leave C.B. in handcuffs for the duration of the half-hour commute to his uncle's business—a commute that took place in a vehicle equipped with safety locks that made escape impossible-was clearly unreasonable.

Id. at 1030. The C.B. rationale applies to this case.

Assuming *arguendo* that Scott could reasonably be charged with violating Section 30-20-13(D), Officer Hensley's seizure, handcuffing, and transportation of Scott to the JDC, in handcuffs, was unreasonable and excessively intrusive. When Officer Hensley found Scott at the custodian's office, Scott complied with all orders he was given, first exiting the custodian's office, then placing his hands behind his back, and allowing Officer Hensley to lead him away in handcuffs. As in C.B., Officer Hensley's handcuffing of Scott, a compliant child who Officer

Hensley had not observed commit an offense, was objectively unreasonable. Scott was small in stature. Defendants present no evidence that Scott ever attempted to run, and he was contained on school grounds.

Officer Hensley also roughly paraded Scott through the halls of the school in handcuffs, ignored Scott's complaints that the handcuffs were too tight, and unnecessarily berated Scott while he was seated in Officer Hensley's office, crying into his shirt. In the light most favorable to Scott, he was compliant throughout this abuse. Therefore, these actions, and the harm suffered by Scott, show Officer Hensley's use of force in this case to be unreasonable.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON SCOTT'S ADA CLAIMS.

The facts relating to Scott's ADA claims are disputed, especially in regard to Officer Hensley's knowledge of Scott's disability. The facts, when viewed in the light most favorable to Scott, evince prima facie showings that Officer Hensley violated the ADA by arresting Scott for a manifestation of his disability and failing to accommodate him in his arrest.

"Title II of the ADA provides that 'no 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.'" Robertson, 500 F.3d at 1193

(citing 42 U.S.C. § 12132). "To state a claim under Title II, the plaintiff must allege that (1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability." Id. at 1193.

As applied to this case, Scott asserts: (1) that he was disabled as defined under Section 12102(1)(A) of the Americans with Disabilities Act at all material times because had been diagnosed with Bipolar Disorder, depression and ADHD and these impairments interfered with his major life functions, namely, learning and communicating. 42 U.S.C.A. § 12102(2)(A); (2) that, by his arrest, he was denied the state-mandated benefit of a free public education. As further argued below, Officer Hensley's arrest was motivated by Scott's disability.

> Title II claims in the scope of an arrest take two different forms:
>
> > The first is that police wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity… The second is that, while police properly investigated and arrested a person with a disability for a crime unrelated to that disability, they failed to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees.

Gohier v. Enright, 186 F.3d 1216, 1220-21 (10th Cir. 1999). Reasonableness under the ADA is assessed under the totality of the circumstances facing officers. See Waller ex rel. Estate of Hunt v. Danville, VA, 556 F.3d 171, 175 (4th Cir. 2009).

As an initial matter, Defendants assert that "Hensley neither knew nor had reason to know" that Scott had a disability. [Aplt. App. at 000104]. However, based on the facts stated above, there is a genuine issue of fact as to whether or not Officer Hensley was aware that Scott had a disability. A reasonable jury could find that Officer Hensley's knowledge sufficiently put him on notice that Scott was disabled as defined under Section 12102(1)(A) of the Americans with Disabilities Act at all material times because had been diagnosed with Bipolar Disorder, Depression and ADHD and these impairments interfered with his major life functions, namely, learning and communicating. 42 U.S.C.A. § 12102(2)(A).

A) Officer Hensley wrongfully arrested Scott

Wrongful arrest is established when the plaintiff can show the "police wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity." Gohier, 186 F.3d at 1220-21. In this case, Scott was acting pursuant to his IEP and verbal permission to leave class. Officer Hensley arrested Scott because he was engaged in an educational accommodation of his disabilities. If Scott had not been disabled, he would have had no need to leave class. Therefore, Officer Hensley handcuffed, arrested, transported and charged Scott because he was disabled, and thereby discriminated against him.

In this regard, S.A.S. v. Hibbing Public Schools, 2005 WL 2230415 (D. Minn. Sept. 13, 2005) (unpublished), is immaterial to this case. Aside from the fact

that the S.A.S. case is not binding on this court nor published, as argued above, Officer Hensley had no probable cause to arrest Scott for interfering with the educational process of Grant Middle School. As such, Scott is not arguing that he is exempt from following the law; to the contrary, he is arguing that he followed the law at all material times.

B. Officer Hensley failed to provide reasonable accommodations to Scott during his arrest.

The Department of Justice has weighed in on the use of handcuffing and arrests to address childhood misbehavior and its impact on children with disabilities. S.R. et al. v. Kenton County, et al., http://www.kyed.uscourts.gov/; 2:15-CV-00143-WOB/JGW; Doc. 32; filed October 2, 2015. (Statement of Interest of the United States). The Department of Justice asserts: "children – particularly children with disabilities – risk experiencing lasting and severe consequences if SROs unnecessarily criminalize school – related misbehavior by taking a disproportionate law enforcement response to minor disciplinary infractions."

The Justice Department noted that the criminalization of student mis-behavior had a disproportionate impact on children with disabilities. Id. at p. 4, n. 4, citing U.S. Dep't of Educ. Office for Civil Rights, Civil Rights Data Collection: Data Snapshot (School Discipline) 1 (March 21, 2014). (http://ocrdata.ed.gov/downloads/croc-school-discipline-snapshot.pdf).

Law enforcement agencies must make reasonable modifications to their policies, procedures and practices "when necessary to avoid disability based discrimination." Id. at p. 32; citing 28 C.F.R. 35.130 (b)(7). The existence of probable cause does not obviate the need to make reasonable modifications. Id.

Scott identified the accommodation as the availability of a telephone call for a risk assessment to determine whether he would be accepted for housing rather than slapping handcuffs on a thirteen-year-old, parading him through school and taking him to a detention center for being with janitors instead of a classroom. The ADA also prohibits the use of a neutral policy if it has a disparate impact on children. Id. at p. 36.

The City of Albuquerque, acting through Officer Hensley, failed to provide accommodations for Scott as required under the ADA. To establish a violation of Title II for failing to reasonably accommodate a suspect during his arrest, a plaintiff must show that the discriminatory action would have been prevented in the presence of better training or use of an appropriate accommodation. Gohier, 186 F.3d at 1222.

After the events in this case, Chief Ray Schultz issued a special order requiring officers to either leave non-violent children with the school administration, or to transport them to the Reception and Assessment Center. Prior to this Order, the City maintained a de facto policy of allowing its officers to arrest

non-violent children like Scott and transport them to the JDC. Furthermore, the City established no meaningful policies to accommodate disabled children; specifically requiring that all children to be transported by an officer be handcuffed, without reference to the child's age or health status.

A reasonable jury could find that the City's de facto policy violated Scott's rights under the ADA. A reasonable jury could find that the City, acting through Officer Hensley, did not accommodate Scott when he was paraded through the halls of Grant Middle School in handcuffs and transported to the JDC. A reasonable jury could find that an officer placed in a public school should be trained to know the impact of his actions on children, or be trained on the relevant juvenile and federal laws he is meant to enforce, or to establish policies and procedure which would allow an officer to gain the information he needs in order to comply with procedural safeguards mandated in statutes. A reasonable jury could also find that by not having the aforementioned training and not seeking any awareness of the school's special education program, the City and Officer Hensley deliberately and indifferently violated Scott's rights. And a reasonable jury could conclude that Officer Hensley failed to reasonably accommodate Scott by ignoring New Mexico's clearly stated and statutorily mandated alternatives to detention.

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON SCOTT'S MONELL AND SUPERVISORY LIABILITY CLAIMS.

Defendants City of Albuquerque and Schultz issued policies, or employed a de facto policy, effectively requiring the arrest and transportation of Scott to the JDC in handcuffs in this instance. Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690-691(1978), established that local governments are liable when their policies cause deprivation of civil rights. If the Court determines that Scott's rights were violated, it may analyze the City of Albuquerque's actions which arguably contributed to said violation. Among other things, "Monell is a case about responsibility," Pembaur v. City of Cincinnati, 475 U.S. 469, 478 (1986), meaning that recovery under it requires a Section 1983 Plaintiff to prove that the local government was responsible for an individual defendant's commission of a constitutional tort. Id. at 480 ("Monell reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered.").

"[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question," id. at 483, and where "there is a direct

causal link between a municipal policy or custom and the alleged constitutional deprivation." City of Canton, Ohio v. Harris, 489 U.S. 378, 385 (1989). However, a policy decision for which Monell subjects a municipality to liability can result from a failure to properly train employees under certain circumstances. Id. In Harris, for example, a county was held liable under Section 1983 because of a regulation which authorized officers to determine, in their sole discretion, whether a detainee required medical care and where the officers were alleged to be inadequately trained in the art of recognizing when medical treatment was necessary. Id. at 381-2.

In resolving this issue "the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." Id. The Supreme Court thereby held that inadequate training "may serve as the basis for 1983 liability only where the failure to train amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact," id. at 388, and is shown to be the "moving force behind the constitutional violation." Id. at 389.

The tasks that School Resource Officers must necessarily perform in schools which serve children with disabilities require that they be properly trained and supervised in their application of laws which concern children and, specific to this case, children with disabilities. Thus, the City made two policy decisions that

impute liability under Monell and its progeny in this case: (1) that Officers are not required to be specially trained *at all* before placement in a school which serves special education students; and, (2) that Officers are to be afforded unbridled discretion to arrest children with special needs and to transport them to the JDC for manifestations of the very reasons they are assigned to special education classrooms and kept apart from mainstream students in the first place. This decision was made within the ambit of a variety of options and commandments under state and federal law including the presence of alternatives to detention as required by New Mexico Law. The City's later issuance of its Special Order through Chief Schultz would support a reasonable jury's finding that the City could have appropriately trained Officer Hensley, but failed to do so.

These training deficiencies and the City's acquiescence in the violation of the rights of special needs children actually caused Scott's rights to be violated by Officer Hensley in this case when he arrested him for conforming to his IEP, and transported him, handcuffed in a police cruiser, to the JDC. The City was well aware of the duties officers would be required to meet when placed in schools that served special needs children, yet remained deliberately indifferent to the fact that a lack of training of its officers is causing violations of federal and state statutory law.

Scott's supervisory liability claim against then Chief Schultz is also viable, assuming that the Court finds a violation of Scott's rights. "The Tenth Circuit has held that supervisors may be liable under 42 U.S.C. § 1983 when a plaintiff can establish the 'defendant-supervisor's personal involvement by demonstrating [the supervisor's] 'personal participation, ... exercise of control or direction, ... failure to supervise,' or ... 'knowledge of the violation and acquiescence in its continuance.'" Herrera v. Santa Fe Pub. Sch., 956 F. Supp. 2d 1191, 1223 (D.N.M. 2013) (Browning, J.) (quoting Dodds v. Richardson, 614 F.3d 1185, 1194 (10th Cir. 2010)); see also Schneider v. City of Grand Junction Police Dept., 717 F.3d 760, 767 (10th Cir. 2013) (reaffirming that there are "three elements required to establish a successful § 1983 claim against a defendant based on his or her supervisory responsibilities: (1) personal involvement; (2) causation, and (3) state of mind."). While couched in terms of "deliberate indifference," the Tenth Circuit has clarified that "the scienter requirement of § 1983 requires at least a showing of 'a conscious acceptance of a known risk' or recklessness." Gates v. Unified School District No. 449 of Leavenworth County, Kansas, 996 F.2d at 1042, n. 1 (citing Woodward v. City of Worland, 977 F.2d 1392, 1399 n. 11 (10th Cir. 1992)). The evidence in this case supports Scott's supervisory liability claim.

At a minimum, a reasonable jury could conclude that Chief Schultz' issuance of his Special Order evinces his personal involvement. So too, a

reasonable jury could infer that the failure of the Albuquerque Police Department to employ such standards caused the violation of Scott's rights. Finally, the record supports a conclusion that the City had a custom and policy of charging children under Section 30-20-13(D) for childhood misbehavior in contravention of the Silva decision. A reasonable jury could conclude that the City, acting through Chief Schultz, was either deliberately indifferent to students in its arrest policies or reckless in its placement of untrained officers in schools.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the importance of the issues at stake and because counsel's knowledge of the record will aid the Court, Appellant requests oral argument.

CONCLUSION

For all the reasons stated herein, Scott requests that this Court reverse the grant of summary judgment on his claims under the Fourth Amendment and the ADA and award costs and fees.

Respectfully,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) insofar as this brief is proportionally spaced using Microsoft Word 2013 in 14 point Times New Roman and contains 10,226 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In coming to this word count, I relied on my word processor to obtain the count and it is Microsoft Word Version 2013.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonably inquiry.

Respectfully,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with ESET Endpoint Security™ version 5.0.2228.1, with the most recent update occurring on December 3, 2015; and, according to the program, is free of viruses. 10th Cir. R. 25.3. In addition, I certify all required privacy redactions have been made.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF** was furnished through (ECF) electronic service to the following on this 4th day of December 2015 to:

Respectfully,

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