No. 15-2154

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

QUENTIN SCOTT,	)	**On Appeal from the United States**
	)	**District Court for the District of**
Plaintiff-Appellant,	)	**New Mexico**
	)	
v.	)	**United States District Judge**
	)	**Scott W. Skavdahl**
	)	
CITY OF ALBUQUERQUE,	)	**Appeal from District Court Case**
et al.	)	**No. 1:14-cv-0665-SWS-WPL**
	)	
Defendants-Appellees.	)	

APPELLEES CITY OF ALBUQUERQUE, RAY SCHULTZ AND DAMON HENSLEY'S ANSWER BRIEF

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ORAL ARGUMENT IS NOT REQUESTED

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STATEMENT OF THE ISSUES

1. Whether Defendant-Appellee School Resource Officer Damon Hensley ("Officer Hensley") had probable cause to arrest Plaintiff-Appellant Quentin Scott ("Mr. Scott) for a violation of NMSA 1978, § 30-20-13(D).

2. Whether the district court erred in concluding that Officer Hensley was entitled to qualified immunity.

3. Whether the district court erred in granting summary judgment to Defendants-Appellees City of Albuquerque and Ray Schultz ("Chief Schultz").

4. Whether the district court erred in entering summary judgment on Mr. Scott's Americans with Disabilities Act claims.

STATEMENT OF THE CASE

On January 16, 2009, Officer Hensley, a law enforcement officer with over twenty (20) years of experience, was assigned as a School Resource Officer ("SRO") for Grant Middle School. As he was sitting in his office, Officer Hensley overheard Lupe Griego ("Ms. Griego"), the front desk secretary, call out Mr. Scott's name and ask him what he was doing and where he was supposed to be. Officer Hensley followed up on this by asking Ms. Griego what was going on. She informed Officer Hensley that she had run into Mr. Scott and was trying to question him about why he was not in class. Mr. Scott told her that he was helping the custodians. Officer Hensley, knowing that Mr. Scott was out of class and

apparently not where he was supposed to be, needed to find out why.

Several days prior, Officer Hensley had become aware that Mr. Scott run away from home, which Officer Hensley considered "risky behavior." Concerned about Mr. Scott's well-being, Officer Hensley had left Grant Middle School to look for him and located him at the Los Altos Skate Park in Albuquerque, New Mexico. At that time, Officer Hensley brought Mr. Scott back to the school.

When Officer Hensley went to look for Mr. Scott on January 16, 2009, he saw him halfway in the door of the custodian's office. Thinking that Mr. Scott was supposed to be in class, he went to speak with Mr. Scott's teacher, Nancy Wiggins ("Ms. Wiggins). Ms. Wiggins told Officer Hensley that Mr. Scott was supposed to be in health class and was probably ditching class. When Officer Hensley confronted Mr. Scott, Mr. Scott told Officer Hensley that either Ms. Wiggins or someone else told him that he could help with the custodians. Ms. Wiggins denied ever saying that. Believing that Mr. Scott was going to leave the school and/or run, and having found him interfering with the education process, Officer Hensley arrested Mr. Scott for a violation of NMSA 1978, § 30-20-13(D) and transported him to the Juvenile Detention Center.

At the time of Mr. Scott's arrest, Officer Hensley was not aware of any "special protocols" with regard to Mr. Scott's education, although he did understand that Mr. Scott was in a specially supervised classroom. As a result of

being handcuffed, Mr. Scott claims that he experienced "redness, soreness and indentation from the handcuffs" although he never received any medical treatment.

STATEMENT OF THE FACTS

The district court found the following relevant and material facts as undisputed [Aplt. App. at 306-343]:

1. Officer Hensley knew Mr. Scott was not in class based on his conversation with Lupe Griego, the school secretary, who had just seen Mr. Scott in the hallway. [*Id.* at 313]

2. Ms. Griego reported to Officer Hensley that Mr. Scott told her was "helping the custodians." [*Id.*]

3. Officer Hensley looked down the hallway toward the custodian's office and saw Mr. Scott in the doorway. [*Id.*]

4. Officer Hensley testified that Mr. Scott "can't see me, but I think he was hiding there or something." [*Id.*]

5. Either Officer Hensley or Ms. Griego got Nancy Wiggins, Mr. Scott's teacher and took her out of class. [*Id.*]

6. Ms. Wiggins reported to Officer Hensley that Mr. Scott was supposed to be in health class and was probably ditching class. [*Id.*] Mr. Scott admitted that he was supposed to be in health class when he was with the custodians. [*Id.*]

7. Officer Hensley then went to speak with Mr. Scott in the custodians'

office. [*Id.*]

8. Mr. Scott said that he was permitted to leave class at any time to help the custodians. [*Id.*]

9. Ms. Wiggins told Officer Hensley that Mr. Scott did not have permission to leave class early and help the custodians. [*Id.* at 314]

10. Officer Hensley then handcuffed and arrested Mr. Scott for interference with the educational process. [*Id.*]

SUMMARY OF THE ARGUMENT

The district court did not err in granting Defendants-Appellees' Motion for Summary Judgment. Officer Hensley had probable cause to arrest Mr. Scott for interfering with the educational process, a violation of NMSA 1978, § 30-20-10. On appeal, Mr. Scott has not argued that there are factual issues that would preclude summary judgment for Officer Hensley on his unreasonable arrest claim, rather, Mr. Scott appears to argue that the district court misapprehended the law as it applies to NMSA 1978, § 30-20-10. Even if Officer Hensley was mistaken in his belief that probable cause existed, if it was objectively reasonable, he is entitled to qualified immunity. *See Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir.), *cert. denied*, 135 S. Ct. 881 (2014). Even if the facts are viewed in the light most favorable to Mr. Scott, Officer Hensley had probable cause to arrest him for a violation of Section 30-20-10 because of his acts of ditching class, wandering

around school property and getting several people involved in addressing his actions.

The district court's decision on Mr. Scott's excessive force claim may be affirmed. In order for Mr. Scott to establish a claim for excessive force, he must show that Officer Hensley used more force than was reasonably necessary and that there was some actual injury, not *de minimis*. *See Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009). The record in this case does not support an injury beyond an allegation of a *de minimis* injury and Mr. Scott has not provided any evidence of any "actual" injury. Therefore, Mr. Scott's claims cannot survive summary judgment.

Mr. Scott has not created a genuine issue of material fact in order to defeat summary judgment on his municipal liability or supervisory liability claims against the City of Albuquerque and Chief Schultz, respectively. Mr. Scott cannot establish each of the elements for his supervisory claim against Chief Schultz and has not established even a single element for his municipal liability claim against the City of Albuquerque. The district court, on this basis, properly dismissed these claims.

Mr. Scott's claims under the Americans with Disabilities Act were correctly dismissed on summary judgment by the district court. Mr. Scott cannot show that Officer Hensley arrested him for a manifestation of his alleged disability or for

failing to accommodate him in the arrest. *See J.H. ex rel. J.P. v. Bernalillo County*, 806 F.3d 1255, 1260-61 (10th Cir. 2015). With regard to his Fourteenth Amendment claims, Mr. Scott failed to provide this Court with any argument and he has, therefore, abandoned and/or waived those claims.

ARGUMENT AND AUTHORITIES

THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES

A. Standard of Appellate Review

This Court reviews *de novo* the district court's grant of summary judgment, using the same standard as the district court under FED. R. CIV. P. 56(a) and reviewing the evidence in the light most favorable to the nonmoving party. *See Certain Underwriters at Lloyd's London v. Garmin Int'l, Inc.*, 781 F.3d 1226, 1229-30 (10th Cir. 2015); *see Clark v. Edmunds*, 513 F.3d 1219, 1221-22 (10th Cir. 2008). This Court should affirm the district court's determination if "there is no genuine dispute as to any material fact and [defendants are] entitled to judgment as a matter of law." *Garmin Int'l*, at 1230 (quoting Rule 56(a)).

"However, because qualified immunity is designed to protect public officials from spending inordinate time and money defending erroneous suits at trial, we review summary judgment decisions involving a qualified immunity defense somewhat differently than other summary judgment rulings." *Id.* at 1222 (internal quotation marks omitted). When a defendant asserts a qualified immunity defense,

the burden shifts to the plaintiff to satisfy a strict two-part test: (1) the defendant-officer in question violated one of his constitutional rights, and (2) the infringed right at issue was clearly established at the time of the allegedly unlawful activity such that "every reasonable official would have understood that what he [was] doing" violated the law. *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 2080, 2083 (2011). Failure on either qualified immunity element is fatal to the plaintiff's cause. Courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

As to the constitutional inquiry, the question is whether the facts alleged, which are taken in the light most favorable to the non-moving party, show that the officer's conduct violated a constitutional right. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1312 (10th Cir. 2002). The clearly established inquiry is more specific than whether the officer's conduct violated a constitutional right; the question is whether it would be clear to a reasonable officer that his or her conduct was unlawful under the circumstances he or she confronted. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). "[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). Moreover, "in order for the law to be

clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as plaintiff maintains." *Medina v. City & County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). "A necessary concomitant to the determination of whether the constitutional right is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *see also Bella v. Chamberlain*, 24 F.3d 1251 (10th Cir. 1994).

For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right, *Anderson*, 483 U.S. at 640, because the salient question is whether the state of the law at the time gives officials fair warning that their conduct is unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Hence, the general rule of qualified immunity is intended to provide government officials with the ability to reasonably anticipate when their conduct may give rise to liability for damages. When conducting this clearly established inquiry, it is inappropriate for a court to define a clearly established law at a high level of generality. *See Brosseau v. Haugen*, 543 U.S. 194, 198-199 (2004) (per curiam); *Wilson*, 526 U.S. 603; *Anderson*, 483 U.S. at 639-640. Instead, the clearly established inquiry must be undertaken in light of the specific context of the case. *Saucier*, 533 U.S. at 201.

B. The District Court Correctly Concluded that Officer Hensley was Entitled to Qualified Immunity on Mr. Scott's Constitutional Claims

"Students whose presence poses a continuing danger to persons or property *or an ongoing threat of disrupting the academic process* may be immediately removed from school." *Goss v. Lopez*, 419 U.S. 565, 582 (1975) (emphasis added).

i. Mr. Scott's Fourth Amendment Claims (Unreasonable Arrest, Extraordinary Manner of Arrest,[1] Excessive Force) Were Properly Dismissed on Summary Judgment

a. Officer Hensley had probable cause to arrest Mr. Scott and therefore, his arrest was reasonable and lawful.

Under established federal law, a warrantless arrest is permissible when an officer "has probable cause to believe that a person committed a crime." *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995); *see Tennessee v. Garner*, 471 U.S. 1 (1985). "Probable cause to arrest exists only when the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *United States v.*

[1] In his Opening Brief, Mr. Scott did not argue that the district court erred in its dismissal of his "extraordinary manner of arrest" claim. [*See* Opening Brief, pgs. 14-24; *compare* Aplt. Appx. at 316-319] It appears as though Mr. Scott has abandoned this claim. *See Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004); *see also Reedy v. Weholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011) (holding that issues not argued in the opening brief are abandoned).

Valenzuela, 365 F.3d 892, 896 (10th Cir. 2004) (internal quotation marks omitted). Probable cause does not require a finding of guilt beyond a reasonable doubt, nor does it require proof of a prima facie case. *See St. John v. Justman*, 771 F.2d 445, 448 (10th Cir. 1985). Rather, probable cause requires a "substantial probability that a crime has been committed and that a specific individual committed a crime." *Id.*

"Probable cause must be evaluated as of the events in question." *Pierce v. Gilchrist*, 359 F.3d 1279, 1294 (10th Cir. 2004). Probable cause is measured against an objective standard and is evaluated "in relation to the circumstances as they would have appeared to prudent, cautious and trained police officers." *United States v. Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999). "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *United States v. Turner*, 553 F.3d 1337, 1345 (10th Cir. 2009) ("[T]he probable cause inquiry is not restricted to a particular offense, but rather requires merely that officers had reason to believe that a crime—any crime—occurred."); *see*, *e.g.*, *Hedgepeth ex rel. Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1150 (D.C. Cir. 2004) (holding that the Fourth Amendment was not violated by the arrest of a 12-year-old girl for eating a french fry in a subway station).

As acknowledged by the district court, in the qualified immunity context, all that is required is "arguable" probable cause. [Aplt. Appx. at 312 ("In the context of a qualified immunity defense on an unlawful search or arrest claim, we ascertain whether a defendant violated clearly established law by asking whether there was arguable probable cause for the challenged conduct." *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir.), *cert. denied*, 135 S.Ct. 881 (2014) (internal quotation marks and citation omitted)]. "Arguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists." *Stonecipher*, 759 F.3d at 1141 (citing *Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir. 2007)); *see Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (holding that even law enforcement officers who "reasonably but mistakenly conclude that probable cause is present" are entitled to qualified immunity). Qualified immunity analyses allow room for mistaken judgments. *Malloy v. Briggs*, 475 U.S. 335, 341 (1986).

Even when viewing the facts in the light most favorable to Mr. Scott, Officer Hensley had probable cause to arrest Mr. Scott for violating NMSA 1978, § 30-20-13(D). The information that Officer Hensley had at the time he arrested Mr. Scott was sufficient for him to believe that an offense had been and was being committed by Mr. Scott, even if a minor offense. *See Valenzuela*, 365 F.3d at 896; *see also Devenpeck v. Alford*, 543 U.S. 146, 152 (2003) (holding that the probable cause

inquiry in a qualified immunity case is governed by a purely objective standard and depends solely "upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest."); *see also Jones v. City and Cnty of Denver*, 854 F.2d 1206, 1210 (10th Cir. 1988) ("[I]f the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to believe that the arrestee has committed or is committing an offense[,]" then the standard for probable cause is met). At the time of Mr. Scott's arrest, he was ditching health class and, by doing so and involving multiple school personnel, disrupting the functions of the school, which is a violation of NMSA 1978, § 30-20-13(D).

NMSA 1978, § 30-20-13(D) provides as follows:

> 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 with or obstruct the lawful mission, processes, procedures or functions of a public or private school.

Officer Hensley, at the time of Mr. Scott's arrest, had probable cause to arrest him for the willful interference of the educational process. Mr. Scott was ditching class. [Aplt. Appx. at 97, ¶ 15; 128 (RFA No. 9); 286 ("[Mr. Scott] testified he 'wasn't necessarily allowed to specifically be with the janitors.'")] Mr. Scott's act of ditching class resulted in the involvement of an administrative employee, Ms. Griego [Aplt. Appx. at 97, ¶ 15], a teacher, Ms. Wiggins [*Id.*, at 97;

286] and Officer Hensley. [*Id.*, at 96-98] Additionally, Officer Hensley believed Mr. Scott was a "flight risk" because Mr. Scott was out of control and out of the school's control. [Aplt. Appx. at 286] Moreover, Mr. Scott's acts of willful interference were committed in Officer Hensley's presence. [*Id.*, at 96-98] Simply put, the facts and circumstances within Officer Hensley's knowledge and of which he had reasonably trustworthy information, were "sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." *See Jones*, 854 F.2d at 1210. Officer Hensley's arrest of Mr. Scott comported with the law and he was entitled to qualified immunity.

Mr. Scott argues that the district court erred by not specifically discussing *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903. [Aplt. Opening Brief, pgs. 9, 16-17 (stating that "The District Court's failure to analyze the Silva decision leaves the analysis of Scott's arrest half baked.")] However, the district court *did* address Mr. Scott's argument as to whether Mr. Scott's actions needed to be "intentional" in order for his actions to fall under statute prohibiting interference with the educational process. [Aplt. Appx. at 314] Although the district court did not specifically discuss *Silva* at length, it does not follow that the district court's order is flawed or should be reversed.

In *Silva*, university students from Eastern New Mexico University ("ENMU") appealed a *conviction* for a violation of NMSA 1978, § 40A-20-10.

Silva, 1974-NMCA-072, ¶ 1. Section 40A-20-10 read, in relevant part, as follows:

> Interference with member of staff, faculty or students of institutions of higher education—Trespass—Damage to Property—Misdemeanors—Penalties.— . . . C. No person shall willfully refuse or fail to leave the property of, or any building or other facility owned, operated or controlled by the governing board of any institution of higher education upon being requested to do so by the chief administrative officer or his designee charged with maintaining order on the campus and in its facilities or a dean of a college or university, if the person is committing, threatens to commit or incites others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of the institution.

As stated the court stated in *Silva*, "[c]riminality is based first on a refusal to leave . . . and second *on a determination* that the person '. . . is committing, threatens to commit or incites others to commit any act which would disrupt, impair interfere with or obstruct the lawful mission, processes, procedures or functions of the institution.'" *Silva*, 1974-NMCA-072, ¶ 7. As aptly stated by the court in *Silva*, "[t]he second determination is not made by the requesting officer but by the trier of fact." *Id.*

Implicit in this analysis is that the officer has the discretion to arrest if he has probable cause to believe that a person has committed a violation of the statute, but that the ultimate determination of whether the criminal act was committed is left to the trier of fact. In this case, Mr. Scott asks this Court to decide that since he did not violate the statute, his arrest was unreasonable. However, Mr. Scott has misapprehended the standard for probable cause, for which an arrest is permissible

when "the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Valenzuela*, 365 F.3d at 896. Probable cause, unlike Mr. Scott's suggestion to the contrary, does not require a finding of guilt beyond a reasonable doubt. *See St. John*, 771 F.2d at 448.

In *Silva*, the criminal defendants were challenging the constitutionality of the statute itself. *Silva*, 1974-NMCA-072, ¶ 1. The court, in analyzing whether the statute was overbroad, held that the statute [Section 40A-20-10] "requires interference with the actual functioning of the University" in contrast to a statute in *Grayned v. City of Rockford*, 408 U.S. 104 (1972) that "punish[ed] only conduct which disrupts . . . normal school activities." *Silva*, 1974-NMCA-072, ¶¶ 19-20. Similarly to this case, where Mr. Scott's actions disrupted the function of the school itself, as opposed to normal school activities—such as peaceful picketing—the statute in *Silva* was upheld by the Court of Appeals as applied to the university students. *Id.* at 23. This Court, in applying the standard for probable cause, can reach the conclusion that Officer Hensley had probable cause to arrest Mr. Scott for a violation of Section 30-20-13(D). As the district court concluded below, this Court may also conclude: that Mr. Scott's actions "involved the time and attention of three school officials, including disrupting [Ms.] Wiggins' preparation for her

next class and the class itself." [Aplt. Appx. at 314]

Mr. Scott argues that his case is unlike the case in *Silva* because in *Silva*, the students "took the affirmative actions of protesting in the office of the university president and refusing to leave." [Opening Brief, pg. 18] However, it can be said that in this case, Mr. Scott's assertions that he was allowed to be in the custodians' office contrary to Ms. Wiggins' assertion otherwise, amounted to a refusal to leave the custodians' office. [Aplt. Appx. at 97, ¶ 16] Mr. Scott's actions disrupted an administrator's job, namely, the school's secretary. [*Id.*, at 96, ¶¶ 8-10, 12]

Mr. Scott cites to several cases, none of which are New Mexico or Tenth Circuit cases, to support his argument that this Court should interpret Section 30-20-13(D) such that his acts do not fall within its provisions. [Opening Brief, pgs. 18-23] However, Mr. Scott overlooks two important principals in this regard: (1) the right at issue must have been clearly established so that "every reasonable official" would have understood what he was doing was violating the law, *Ashcroft*, 563 U.S. 731, and (2) "in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as plaintiff maintains." *Medina*, 960 F.2d at 1498. Mr. Scott's citations to how the Colorado court, Florida court, and North Carolina court interpreted their state statutes does not assist in the analysis herein.

Interestingly, though, Mr. Scott's citation to *People ex rel. J.P.L.*, 49 P.3d 1209 (Colo. App. 2002) supports Defendants-Appellees' position. [*See* Opening Brief, pg. 18] In *People ex rel J.P.L.*, the testimony concerning whether a student violated the statute that Mr. Scott argues is "substantively comparable to NMSA 1978, § 30-20-13," amounted to several students who heard J.P.L. making a threatening statement, who were concerned or frightened by the statement and who missed class because of the statement in order to discuss the statements with the principal and police. *People ex rel. J.P.L.*, 49 P.3d at 1211. Based on this testimony, the Colorado Court of Appeals upheld J.P.L.'s conviction. *Id.* at 1212. In this case, Mr. Scott's acts caused two school employees and the police to get involved. *Supra*. Mr. Scott's actions resulted in a disruption to the school secretary, a disruption in the regular course of a teacher's day and Officer Hensley's involvement. Moreover, and as previously argued, the focus here is not on whether the statute is unconstitutional or whether a conviction should be upheld; it is whether Officer Hensley had probable cause to believe that Mr. Scott was violating the interference with education statute.

Mr. Scott appears to argue that this Court should analyze his "intent" as well, in making a determination as to whether Officer Hensley had probable cause to arrest him. [*See* Opening Brief, pgs. 19-20] Mr. Scott, however, applies the wrong standard to the present case. In the cases he cites with regard to the element of

intent, the courts were analyzing whether the student's actions were sufficient to *uphold a conviction*, not analyze whether an officer had probable cause to arrest. [*Id.* (citing *S.L. v. State*, 96 So.3d 1080 (Fl. Ct. App., 3rd Dist., 2012); *L.T. v. State*, 941 So.2d 551 (Fl. Ct. App., 2nd Dist. 2006); *A.M.P. v. State*, 927 So.2d 97 (Fl. Ct. App., 5th Dist., 2006), *et al*.)] Each of these cases are easily distinguishable on that basis alone. Similarly, Mr. Scott's citations to cases from the North Carolina courts are distinguishable—not only based on the facts but also because they involved the question of whether a conviction should be upheld; not whether probable cause existed for an arrest in the first instance. [Opening Brief, pgs. 20-21 (citing *In re S.M.*, 660 S.E.2d 653 (N.C. Ct. App. 2008); *In re Brown*, 562 S.E.2d 583 (N.C. Ct. App. 2002); *In re K.F.*, 606 S.E.2d 459 (N.C. Ct. App. 2005) (unpublished))]

Finally, Mr. Scott argues that his criminal acts should have been addressed by his teachers and school administration, other than by a SRO. [Opening Brief, pgs. 21-22] However, Mr. Scott has provided no legal authority that would suggest that the school's ability to discipline him should have taken priority in this circumstance, above a finding of probable cause by Officer Hensley. Moreover, the school's ability to discipline a student does not mitigate Officer Hensley's probable cause. While it is true that schools do have the *right* to discipline students, as referenced by Mr. Scott, [Opening Brief, pgs. 22-23] the school's

ability to discipline a student simply does not trump or quash probable cause and Mr. Scott has provided this Court with no authority to suggest otherwise.

Because the evidence that was adduced in this case is sufficient to support Officer Hensley's determination of probable cause, the district court's decision should be upheld. Although Mr. Scott claims that he "was permitted to leave class and spend time with the janitors to calm himself," [Opening Brief, pg. 23] he has not provided any evidence that his (or others) belief that he was allowed to do so was in Officer Hensley's knowledge or affected Officer Hensley's probable cause.

b. Mr. Scott suffered no more than a *de minimis* injury and therefore, his excessive force claim was properly dismissed.

"[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Conner*, 490 U.S. 386, 396 (1989); *see Neague v. Cynkar*, 258 F.3d 504, 508 (6th Cir. 2001) (applying the rule that "the handcuffing of a person in the course of an otherwise lawful arrest fails, as a matter of law, to state a claim of excessive force" to the handcuffing of the seventh-grade student). In order "to recover on an excessive force claim [for handcuffing], a plaintiff must show: (1) that the officers used greater force than would have been reasonably necessary to effect a lawful seizure, and (2) some actual injury caused by the unreasonable seizure that is not *de minimis*, be it physical or emotional." *Fisher v. City of Las*

Cruces, 584 F.3d 888, 894 (10th Cir. 2009) (emphasis added); *see Cortez v. McCauley*, 478 F.3d 1108, 1129 (10th Cir. 2007) (requiring that a plaintiff show that the officers used greater force than would have been reasonably necessary to effect a lawful seizure and some actual injury).

The district court did not err in concluding that the record did not support a finding above a *de mininis* injury and, therefore, Defendants-Appellees were entitled to summary judgment on this claim. The district court first assumed that Officer Hensley applied greater force than was reasonably necessary to effect Mr. Scott's arrest. [Aplt. Appx. at 321, fn 6 ("[T]he Court will assume arguendo that handcuffing Mr. Scott constituted greater force than reasonably necessary to effect his arrest, but the evidence far from establishes such.")] The district court then found that Mr. Scott's alleged injuries did not amount to a sufficient injury in order to state a claim. [*Id.* at 322] The district court also analyzed whether Mr. Scott's alleged emotional injury rose to a level that could be considered more than a *de minimis* injury and concluded that it did not. [*Id.* at 322] There was simply no facts to establish any injury above a *de minimis* level and therefore, the district court's decision may be affirmed.

In his Opening Brief, Mr. Scott conclusorily states that Officer Hensley used excessive force and does not point to anything *in the record* to support this allegation. [Opening Brief, pgs. 25-26] *Contra* Fed. R. App. P. 28(a)(8) (requiring

"appellant's contentions and the reasons for them *with citations* to the authorities and *parts of the record* on which the appellant relies" to be part of the appellant's argument (emphasis added)). Specifically, and without citation to the record, Mr. Scott claims that "parading [Mr. Scott] through the school's halls in handcuffs and transporting him to the JDC" was excessive. [Opening Brief, pg. 25] Mr. Scott then claims, without citation to the record, that "Officer Hensley handcuffed him in a manner that left him with severe bruising that did not dissipate for a week." [*Id.*] Finally, Mr. Scott claims, without citation to the record, that he was emotionally distressed as a result of "Officer Hensley's act of parading him though [sic] the school halls in front of his peers, and berating him while he was crying and handcuffed in Officer Hensley's office." [*Id.*, pgs. 25-26]

As this Court recently held in *J.H. ex rel. J.P.. v. Bernalillo County*, 806 F.3d 1255, 1258 (10th Cir. 2015), once a school resource officer, such as Officer Hensley, makes an arrest, he is authorized to place the student in handcuffs "for his own protection." Although the holding in *J.H. ex rel. J.P.* specifically referred to the trip to the detention center, this Court cited to, with approval, the holding in *Fisher*, which authorized a law enforcement officer's decision to handcuff an individual suspected of a petty misdemeanor as "an appropriate response to officer-safety concerns even during investigative detentions." *Id.* Additionally, although Mr. Scott argues to the contrary herein, this Court held that "'an arrestee's age . . .

does not necessarily undermine an officer's concern for safety and need to control the situation.'" *Id.* (brackets omitted) (quoting *Hawker v. Sandy City Corp.*, 591 F. App'x 669, 675 (10th Cir. 2014)). [*Contra* Opening Brief, pgs. 27-31]

Mr. Scott's arguments, in the district court and on appeal, do not overcome a finding of a *de minimis* injury. Even if this Court accepts Mr. Scott's unsupported factual allegations as true, his claimed injuries do not amount to anything more than *de minimis* injury. [*See* Opening Brief, pgs. 25-26] The district court's citation to *Cortez v. McCauley* is on point. [Aplt. Appx. at 321] In *Cortez*, this Court held that even evidence that handcuffs left red marks that were visible for days afterwards was insufficient to defeat summary judgment. *Id.* at 1129 ("[T]he summary judgment record presents too little evidence of any actual injury. . . . The only evidence in the record is his affidavit that the handcuffs left red marks that were visible for days afterward." (internal citation and footnote omitted). The district court also relied on an unpublished opinion from this Court, wherein summary judgment was affirmed on a claim of injury that was found to be no more than *de minimis* where the plaintiff complained that he suffered chaffing and soreness of his wrists along with extreme emotional trauma due to being publicly displayed in handcuffs. [Aplt. Appx. at 322 (relying on *Silvan W. v. Briggs*, 309 F. App'x 216, 224 (10th Cir. 2009) (unpublished)]

The district court also noted that Mr. Scott did not receive any medical

treatment for his wrists. There is not even a scintilla of evidence in the record that Mr. Scott received any treatment for his claimed emotional injury and he provided none in his Response to Defendants-Appellants' Motion for Summary Judgment. [Aplt. Appx. at 163-169] Moreover, in his Opening Brief, Mr. Scott relies on the incorrect standard for these claims: he argues that he "pled more than a *de minimis* injury" and sufficiently "state[d] a claim for excessive force." [Opening Brief, pg. 25-26] However, the standard on summary judgment is whether there is a genuine issue of material fact; not whether he adequately pled the claim. *Supra*.

Mr. Scott asserts that Defendants-Appellees' argument concerning *de minimis* injury is "contrary to law." [Opening Brief, pg. 26] However, Mr. Scott fails to point to a single case that has called into question or overruled the holdings in *Cortez* or *Fisher*; the holdings in these cases related to *de minimis* injuries remain good law. Mr. Scott relies on an unpublished opinion to support his position that the application of the *de minimis* standard is contrary to law. [Opening Brief, pg. 34 (citing to *Grass v. Johnson*, 322 F. App'x 586, 589 (10th Cir. 2009) (unpublished)] However, in *Grass*, this Court discussed the *de minimis* standard in light of an allegation that a police officer punched the plaintiff in the face after he was handcuffed and seated in the police car. *See Grass*, 322 F. App'x at 587. This Court, in *Grass*, specifically discussed the *de minimis* standard contained in *Cortez* and delineated the holding as applying to a case in which there

is a claim of too-tight handcuffing resulting in red marks on the plaintiff's wrists that "were visible for days" "if the use of handcuffs was *otherwise justified*." *Id.* at 589 (emphasis in original; internal brackets and citation omitted).

This Court went on to explain that the holding in *Cortez* was "of limited value in the present case because *Cortez* did not involve allegations of unjustified and actively abusive behavior by the arresting officer." *Grass*, 322 F. App'x at 589. In this case, Mr. Scott did not made claims that were supported by the evidence at the summary judgment stage that Officer Hensley's conduct amounted to an unwarranted and patently unreasonable conduct, as required by *Cortez* in order to defeat Defendants-Appellants' Motion for Summary Judgment and in his Opening Brief, Mr. Scott does not claim that he did. Rather, Mr. Scott claims that he "adequately pled such an [actual] injury," which is the incorrect standard at the summary judgment stage. [Opening Brief, pg. 27]

Mr. Scott argues that "[n]othing in the case law requires an injured person to seek medical care to prove excessive force." [Opening brief, pg. 27] However, Mr. Scott does not provide this Court with any case law that states the opposite either; namely, that Mr. Scott can defeat summary judgment by simply stating that he suffered an injury or by "adequately pleading" such an injury. Indeed, in *Cortez*, it is implicit that *some* indication of an "actual injury" is necessary in order to maintain a claim of excessive force. *Cortez*, 478 F.3d at 1129 [*See* Opening

Brief, pg. 27 (acknowledging that an "actual injury" is required)]. In the district court, over 2,400 pages of medical records were disclosed with regard to Mr. Scott. [Aplt. Appx. at 293] Mr. Scott has not pointed to a single page discussing any physical or emotional trauma related to the handcuffing in this incident. [*Id.*] The district court correctly concluded that Mr. Scott could not maintain his claim for excessive force because even viewing the facts in the light most favorable to Mr. Scott, Mr. Scott has not met his burden of showing that there is a material issue of disputed fact as to whether Officer Hensley used excessive force.

Mr. Scott compares this case to a case from the Ninth Circuit, *C.B. v. City of Sonora*, 769 F.3d 1005 (9th Cir. 2014) in order to support his position that Officer Hensley should not have handcuffed or transported Mr. Scott. [Opening Brief, pgs. 28-30] However, the facts in *C.B.* are distinct from the facts here. In *C.B.*, the arresting officers did not actually see "a single act of disobedience" such that they could take custody of the student *in accordance with California law*. *Id.* at 1027-28. The California law discussed in *C.B.* has no counterpart or similarity to any law in New Mexico with regard to when it is appropriate to take a minor into custody and Mr. Scott has not argued that it does.

In *C.B.*, the officers were relying on a specific statute that they argued gave them probable cause to believe it was appropriate to take the minor into custody. *Id.* at 1027. The Ninth Circuit held that the officers in *C.B.* did not have probable

cause to take the minor into custody, *see id.* at 1028, making the handcuffing and detention patently unreasonable. In this case, Officer Hensley had probable cause to believe that Mr. Scott had violated New Mexico law, which provided him with the authority necessary to handcuff and detain him. Moreover, it was undisputed that Officer Hensley believed that Mr. Scott was going to run, a fact ignored by Mr. Scott in his Opening Brief as it was admitted in his Response to Defendants-Appellants' Motion for Summary Judgment. [Aplt. Appx. 97, ¶ 17; 163, ¶ 17] *See*, *e.g.*, *Chavez v. City of Albuquerque*, 402 F.3d 1039, 1045 (10th Cir. 2005).

Mr. Scott argues that "Officer Hensley's seizure, handcuffing, and transportation of Scott to the JDC, in handcuffs, was unreasonable and excessively intrusive." [Opening Brief, pg. 30] He argues, without citation to the record, that "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." [*Id.*] Mr. Scott suggests that because he was compliant, no force, including handcuffs, should have been used. Mr. Scott's unsupported contention, however, is contrary to his own deposition testimony. [Aplt. Appx. at 321, fn 6 (noting that Mr. Scott admitted to physically resisting and defying Officer Hensley's attempts to walk him to the office)] Nonetheless, the district court assumed, for purposes of arriving at its decision, that handcuffing Mr. Scott constituted greater force than

was reasonably necessary. [*Id.*] In making his argument that the force was unreasonable, Mr. Scott fails to address the fact that the injury was *de minimis*. *Supra*. Mr. Scott has not met his burden of showing a violation of his Fourth Amendment right to be free from excessive force and therefore, the district court's decision should be affirmed.

ii. Mr. Scott's Fourteenth Amendment Claims (Procedural and Substantive Due Process Claims) Have Been Waived

Mr. Scott has appeared to have abandoned his claim that his Fourteenth Amendment rights were violated. *See Tran*, 355 F.3d at 1266; *see also Reedy*, 660 F.3d at 1274 (holding that issues not argued in the opening brief are abandoned). Other than briefly mentioning the Fourteenth Amendment on pg. 14 of his Opening Brief, Mr. Scott has not made any substantive argument concerning this claim. Because he failed to address his Fourteenth Amendment claims and, more importantly, failed to provide this Court with citations to authorities and parts of the record upon which he relies to support any argument, Mr. Scott's has waived this argument on appeal. *See* Fed. R. App. P. 28(a)(8); *see also United States v. Kunzman*, 54 F.3d 1522, 1534 (10th Cir. 1995) ("It is insufficient merely to state in one's brief that one is appealing an adverse ruling below without advancing reasoned argument as to the grounds for appeal." (internal quotation marks omitted)).

iii. Mr. Scott's Supervisory and Municipal Liability Claims Were Properly Dismissed

In his Opening Brief, Mr. Scott argues that "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." [Opening Brief, pg. 37] Mr. Scott, however, does not support this conclusory statement with citations to the record. Even if Mr. Scott's conclusory statement were to be accepted as true, it would not establish liability on Chief Schultz or the City of Albuquerque. *See Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) (holding that in order to establish a claim against a supervisor under § 1983, a plaintiff must demonstrate "(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the constitutional deprivation."); *see Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013) (establishing the following elements for a municipal liability claims: "(1) official policy or custom, (2) causation, and (3) state of mind."). More importantly, Mr. Scott has not argued that the district court erred in concluding (1) that Mr. Scott could not prove each of the elements necessary to establish supervisory liability against Chief Schultz, and (2) that Mr. Scott could not establish *any* of the elements to establish a municipal liability claim. [Aplt. Appx. at 330, 332, respectively]

Essentially, Mr. Scott's claim here mirrors the claim made in *J.H. ex rel. J.P.*; namely, that the government should have provided better training to the officer. *Id.*, 806 F.3d at 1262. If this Court reaches the same holding with regard to the arrest and detention of the plaintiff in *J.H. ex rel. J.P.* in this case - that it was lawful - then this Court may reach the same result with regard to the municipal claims as well – they cannot survive in the absence of a constitutional or statutory violation. *Id.* Additionally, the same result could be reached with regard to the supervisory claim as it cannot survive in the absence of an underlying constitutional or statutory violation. *See Schneider*, 717 F.3d at 769; *see Myers v. Oklahoma County Bd. of County Commissioners*, 151 F.3d 1313, 1316 (10th Cir. 1998) ("[A] municipality cannot be held liable under section 1983 for the acts of an employee if a jury finds that the municipal employee committed no constitutional violation."). However, even if this Court holds that the district court erred in concluding that Mr. Scott did not meet his burden in defeating summary judgment, Mr. Scott's municipal and supervisory claims still fail as a matter of law.

Individual liability under 42 U.S.C. § 1983 must be based on personal involvement in an alleged constitutional violation. *See Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997); *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996). "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*" and a

government official "is only liable for his or her own conduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009). In order to establish a supervisory claim under § 1983, Mr. Scott must demonstrate the following: "(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the constitutional deprivation." *Dodds*, 614 F.3d at 1199. Mr. Scott has not met his burden of establishing any of these elements.

In his Opening Brief, Mr. Scott argues that "a reasonable juror could conclude the Chief Schultz' issuance of his Special Order [over two years after Mr. Scott's arrest] evinces his personal involvement." [Opening Brief, pg. 40] Mr. Scott's argument is illogical. How could Chief Schultz's issuance of a special order over two years after Mr. Scott's arrest "evince" his personal involvement in allegedly unconstitutional conduct two years earlier? Such a theory is too tenuous and falls far short of Mr. Scott's burden of showing that there is a genuine issue of material fact that would defeat summary judgment. Mr. Scott has not raised a genuine issue of material fact that Chief Schultz had the requisite state of mind in order for him to establish a supervisory liability claim against Chief Schultz and therefore, the district court's decision should be affirmed.

A municipality may not be held liable under Section 1983 solely because it is an employer. *See Monell v. Dep't of Social Services*, 436 U.S. 658, 691-92

(1978). "A plaintiff suing a municipality under Section 1983 for the acts of one of its employees must prove: (1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation." *Myers*, 151 F.3d at 1316. Mr. Scott, without citation to the record, argues that the City of Albuquerque "made two policy decisions" which result in the imputation of liability. [Opening Brief, pgs. 38-39]

Both the of "policy decisions" that Mr. Scott claims the City of Albuquerque made concern the training (or a claim of a lack thereof) of "Officers." [*Id.* at 39] However, nowhere in his Opening Brief does Mr. Scott argue that this alleged lack of training amounted to deliberate indifference to anyone's constitutional rights or that the alleged lack of training was a deliberate decision made amounting to a policy or custom that ultimately became the moving force behind the alleged constitutional deprivation. *Contra Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986); *contra City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). Mr. Scott has neither argued, nor can he, establish these elements of a municipal liability claim and therefore, it fails as a matter of law.

C. The District Court Correctly Granted Summary Judgment to Defendants-Appellees on Mr. Scott's ADA Claims

The district court correctly concluded that "Mr. Scott's ADA claims cannot survive summary judgment" because "[n]o reasonable jury could conclude, based

on the evidence in the record, that Mr. Scott can satisfy his wrongful-arrest claim, his failure-to-accommodate-during-arrest claim, or his failure-to-properly-train claim." [Aplt. Appx. at 340] Mr. Scott argues in his Opening Brief that "Officer Hensley violated the ADA by arresting [Mr.] Scott for a manifestation of his disability and failing to accommodate him in his arrest." [Opening Brief, pg. 31] In this regard, Mr. Scott's claims are nearly identical to those made by a student-plaintiff in *J.H. ex rel. J.P.*, 806 F.3d at 1260-62 (10th Cir. 2015)[2]. Just as it did in *J.H. ex rel. J.P.. v. Bernalillo County*, this Court can hold that "[t]hese claims are invalid as a matter of law" because in this case Officer Hensley had probable cause to arrest Mr. Scott. *See J.H. ex rel. J.P.*, 806 F.3d at 1260.

The Americans with Disabilities Act forbids discrimination by reason of an individual's disability. *See* Americans with Disabilities Act § 202, 42 U.S.C. § 12132 (2012). It also "forbids . . . failure to make reasonable accommodations for a disability." *J.H. ex rel. J.P.*, 806 F.3d at 1261 (citing the Americans with Disabilities Act, § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (2012)). Much like the holding in *J.H. ex rel. J.P.*, this Court can hold that Mr. Scott did not provide admissible evidence that Mr. Scott had requested an accommodation or that Officer Hensley knew about a claimed need for accommodation. *Id.* at 1261.

[2] In fact, counsel for the plaintiff in *J.H. ex rel. J.P. v. Bernalillo County*, 806 F.3d 1255, 1256 (10th Cir. 2015) is the same as counsel for Mr. Scott in this matter (Joseph P. Kennedy for Plaintiff-Appellant on the case).

"If a police officer incurs a duty to reasonably accommodate a person's disability during an arrest, this duty would have arisen only if [the police officer] had known that [the person] needed an accommodation." *Id*. (citing *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1196 (10th Cir. 2007)). Officer Hensley neither knew nor had reason to know that Mr. Scott had a disability as it is defined by the ADA. [Aplt. Appx. at 284] As evidenced by the record in this case, Officer Hensley testified that he thought that Ms. Wiggins was "probably" a special education teacher and he did not know that Mr. Scott was in special education. [*Id.*] Moreover, Mr. Scott did not ask Officer Hensley to make an accommodation and he does not claim he did.

Mr. Scott does not point to any evidence in the record that Officer Hensley knew about a claimed disability or a need for accommodation. Instead, Mr. Scott conclusorily states that "[t]he facts relating to [Mr.] Scott's ADA claims are disputed, especially in regard to Officer Hensley's knowledge of [Mr.] Scott's disability." [Opening Brief, pg. 31] Mr. Scott also states that "there is a genuine issue of fact as to whether or not Officer Hensley was aware that [Mr.] Scott had a disability" and "[a] reasonable jury could find that Officer Hensley's knowledge sufficiently put him on notice that Scott was disabled[.]" [Opening Brief, pg. 33] However, Mr. Scott never says *what* facts create a dispute as to whether Officer Hensley knew of Mr. Scott's disability or *what* knowledge Officer Hensley had of

Mr. Scott's disability. More importantly, Mr. Scott fails to point to even once point to the record to support these bold contentions. [*See* Opening Brief, pgs. 31-36]

Mr. Scott argues that "[t]he Department of Justice has weighed in on the use of handcuffing and arrests to address childhood misbehavior and its impact on children with disabilities." [Opening Brief, pg. 34] However, this is not an argument that was advanced by Mr. Scott in the district court and is being presented here for the first time and therefore should not be considered. *See Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722 (10th Cir. 1993). Even if this Court were to consider this argument, Mr. Scott fails to articulate how it applies to his arguments that Officer Hensley violated the ADA by arresting him or by failing to accommodate him in the arrest. Moreover, the "Statement of Interest" and "Data Snapshot" referred to by Mr. Scott, *supra*, were issued in 2015 and 2014, respectively, more than five (5) years after Mr. Scott's arrest. It is unclear how the Department of Justice's statements in this regard can be applied to the present case.

Finally, Mr. Scott argues, without citation to the record,[3] that "[a]fter 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

[3] Mr. Scott presumably relies on his "Statement of the Case" for his conclusory statements. This is improper. Fed. R. App. P. 28(a)(8)(A) requires that Mr. Scott's "Argument" section contain his "contentions and the reasons for them, *with citations to the authorities and parts of the record on which the appellant relies*[.]" (emphasis added).

them to the Reception and Assessment Center." [Opening Brief, pg. 35] Mr. Scott further argues, without any citation to the record, that "[p]rior to this Order, the City maintained a de facto policy of allowing its officers to arrest non-violent children like [Mr.] Scott and transport them to the JDC." [*Id.*, pgs. 35-36] The district court rejected these arguments, concluding that Mr. Scott's reliance on the special order was misplaced and inapplicable, as it was issued two (2) years after Mr. Scott's arrest. [Aplt. Appx. 337-338] Furthermore, the district court rejected Mr. Scott's arguments that the City failed to establish meaningful policies to accommodate disabled children because Mr. Scott, quite simply, failed to support such allegations with any evidence in the record. [*Id.* at 338] Based on Mr. Scott's failure to meet his burden of showing that there is a genuine issue of material fact with regard to each of the elements of his ADA claim, the district court's decision may be upheld.

Moreover, the district court's decision may be affirmed because even if this Court determines that the district court's decision on Mr. Scott's ADA claim was in error, if this Court finds that Officer Hensley is entitled to qualified immunity, that qualified immunity should extend to Mr. Scott's ADA claims. *See David v. Scherer*, 468 U.S. 183, 194 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provisions.").

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Undersigned counsel does not think that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1.

CONCLUSION

The district court did not err in granting summary judgment to Defendants-Appellees. Officer Hensley's actions were reasonable, lawful, done in good faith and, therefore, constitutional. Officer Hensley had probable cause to arrest Mr. Scott and therefore, Mr. Scott's constitutional claims must fail.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Section 1. Word Count

As required by FED. R. APP. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 10,320 words.

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/s/ *Kristin J. Dalton*
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I hereby certify that a copy of the foregoing **APPELLEES' ANSWER 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 the VirusTotal Version 2.0 and, according to the program, is free of viruses. In addition, I certify that all required privacy redactions have been made.

/s/ *Kristin J. Dalton*
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLEE'S ANSWER BRIEF** was furnished through ECF electronic service to the following on this 11th day of January, 2016:

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