

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION**

**THE ESTATE OF MONTANA LANCE, §  
BY AND THROUGH JASON AND §  
DEBORAH LANCE, INDIVIDUALLY §  
AND UPON BEHALF OF HIS HEIRS §  
Plaintiffs, §**

v. §

§ **CIVIL ACTION NO.: 4:11-cv-00032**

**CAROL KYER, PRESIDENT OF THE §  
SCHOOL BOARD OF THE §  
LEWISVILLE INDEPENDENT SCHOOL §  
DISTRICT, INDIVIDUALLY AND IN §  
HER OFFICIAL CAPACITY; DR. STEVE §  
WADDELL, SUPERINTENDENT OF THE §  
LEWISVILLE INDEPENDENT §  
SCHOOL DISTRICT, IN HIS §  
OFFICIAL CAPACITY; LEA LAND, §  
PRINCIPAL, IN HER INDIVIDUAL §  
CAPACITY AND TERRY LOWRY, R.N., §  
IN HER INDIVIDUAL CAPACITY. §  
Defendant**

**FIRST ORIGINAL COMPLAINT**

NOW COMES Jason and Deborah Lance, Individually and in their representative capacities in “The Estate Of Montana Lance, Deceased, collectively termed Plaintiffs herein, by and through their attorneys, Martin J. Cirkiel from the law firm of Cirkiel & Associates, P.C., and Mike Zimmerman from the Zimmerman Law Firm, brings this their *First Original Complaint* alleging that Carol Kyer, President Of The School Board Of The Lewisville Independent School District, Individually and in her In Her Official capacity (hereinafter collectively referred to as “the School Board”); Dr. Sreve Waddell, in his Official Capacity as Superintendent of the Lewisville Independent School District (hereinafter referred to as the “Lewisville ISD”); Lea Land, Principal

in her Individual Capacity and Terry Lowry, R.N. in her Individual Capacity, all collectively termed as the “School District Defendants,” jointly and severally violated the various rights of Montana Lance, as more specifically pled herein. Plaintiffs reserve the right to replead if new claims and issues arise upon further development of the facts, and as permitted by law. In support thereof, Plaintiffs would respectfully show the following:

**I. INTRODUCTION AND BRIEF REVIEW OF THE CASE**

1. Montana Lance was only nine years old when he committed suicide in the bathroom at the office of the school nurse. When the nurse attempted to open the bathroom door, she found that Montana had locked himself in the bathroom and that she did not have a key. Montana died while she and other school personnel tried to find someone with a key.
2. This incident was not Montana’s first suicidal gesture, and in fact, just a few days before, he told a school counselor that he wanted to kill himself. In addition, about a week before he made the threat, his mother sent a letter to the school principal complaining about the fact Montana had been, and continued to be, a victim of incessant bullying by other children. She also complained before the school board. Even with this overt and verbalized threat, and with the reports to the school board and his principal about the bullying, and reports to his counselor about his imminent and overt suicidality, not one person intervened in any way to prevent this catastrophe.
3. Plaintiffs claim that because of the acts and omissions of the Lewisville Independent School District Defendants, jointly and severally, and by and through the policies, procedures, practices and customs, failed to keep Montana Lance safe in the manner and particulars noted herein and caused his suicide and in addition, failed to prevent his suicide.

4. As such, Plaintiffs seek damages and compensation as the heirs of the Estate of Montana Lance for the injuries more fully discussed below. Plaintiffs bring this action pursuant to 42 U.S.C. §1983 of the Civil Rights Acts for violations of the 14th Amendment to the United States Constitution; and for violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794a (“Rehabilitation Act”) and the Americans with Disabilities Act (“ADA”). They also bring forth state claims pursuant to Tex. Civ. Prac. & Rem. Code, 71.001 et. seq, for a “Wrongful Death” proceeding and at Tex. Civ. Prac. & Rem. Code, 71.021 001 et. seq for a survival claim.

## **II. JURISDICTION**

5. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C.A. §§ 1331 and 1343 because the matters in controversy arise under the laws and rules of the United States as noted above.
6. Finally, this Court has jurisdiction pursuant to Section 504 of the Rehabilitation Act of 1973 and 42 U.S.C §2000d et seq., to award attorneys fees and costs to the Plaintiffs.

## **III. VENUE**

7. Under 28 U.S.C. § 1391, venue is proper before this Court because the events and omissions giving rise to the Plaintiffs claims occurred in the Eastern District of Texas and in the Sherman Division. .

## **IV. PARTIES**

8. Montana Lance, when alive, was a citizen of the State of Texas, and was, at all pertinent times, a pupil in the Lewisville Independent School District. It is uncontroverted that he is considered a “student with a disability,” as defined by Section 504 of the Rehabilitation Act of 1973 and the Americans With Disabilities Act.

9. His parents, and natural heirs in this proceeding are Jason Lance, his father and Deborah Lance, his mother. They live at 4800 Garvin, The Colony, Texas 75056. They too are citizens of the State of Texas and residents of Denton County and bring forward this complaint individually, and as heirs of the Estate of Montana Lance.
10. Defendant Carol Kyer, is sued in her Individual and Official Capacities as President of the School Board at the Lewisville Independent School District, which is a school board organized under the laws of the State of Texas and at all times was responsible for the implementation of relevant federal and state law, the care, management and control of all public school business within its jurisdiction as to students like Montana, the training of teachers at the School as to safety, and supervision of students within the district, and for the course of study. She may be served at the Lewisville Independent School District at 1800 Timber Creek Drive, Flower Mound, Texas 75028.
11. Defendant Dr. Steve Waddel, is sued in his Official Capacity as the Superintendent of the Lewisville ISD, a school district organized under the laws of the State of Texas and at all times required to follow the policies and procedures as set forth by the School Board. District personnel are thus responsible for the care, management and control of all public school business within its jurisdiction as to Petitioner, the training of teachers at the School as to safety, and supervision of students within the district, and for the course of study. He may be served at the Lewisville Independent School District at 1800 Timber Creek Drive, Flower Mound, Texas 75028.
12. Defendant Lea Land is sued in her Individual Capacity as the School Principal for Montana Lance, and was employed by the Defendant Lewisville ISD during the relevant period in

question. Her job description, among other things, required her to assure that the school environment was kept safe and that school board policies regarding bullying, and bullying based upon disability, were followed. She also had the duty to assure that federal guidelines regarding the Individual With Disabilities Education Act (“IDEA”) were likewise followed. She may be served at the Lewisville Independent School District at 1800 Timber Creek Drive, Flower Mound, Texas 75028.

13. Terry Lowry, R.N. is licensed and certified nurse, pursuant to State of Texas licensing laws and standards. She is required to follow nursing standards of care. In addition she was the school nurse for Montana Lance and had the duty, among other things, to assure that the environment in which she provided her professional nursing services was safe and would be injurious to the health of her students. She may be served at the Lewisville Independent School District at 1800 Timber Creek Drive, Flower Mound, Texas 75028.

**V. HISTORICAL, CULTURAL AND FACTUAL BACKGROUND**

14. Plaintiffs incorporate by reference all the above-related paragraphs with the same force and effect as if herein set forth.

A. THE HISTORY OF BULLYING AND HARASSMENT

15. The infamous Columbine High School massacre occurred on Tuesday, April 20, 1999. Eric Harris and Dylan Klebold, both known to have serious emotional disturbances and also known by school officials to be victims of bullying and harassment themselves, embarked on a horrid massacre, killing twelve (12) students and one teacher. They also injured twenty-one (21) other students directly, and three people were injured while attempting to escape. Not surprisingly, the pair then committed suicide.

16. Importantly, the issue of bullying and harassment in schools was already a major concern even before *Columbine*. In fact, just a few months earlier, in January of 1999, the U.S. Department of Education (“DOE”) produced a document, *Protecting Students From Harassment And Hate Crime*, which essentially provided for schools a “Checklist of items, that if they followed, would help to develop a culture that make the schools safer for all students and help to prevent bullying and harassment. These items included but were not limited to the mandate that Board members, administrators and the superintendent should:
- a. recognize the urgency of the problem and identify people/agencies that can help develop effective prevention and response strategies,
  - b. compile a library of useful materials;
  - c. work on creating an effective anti-harassment program in consultation with parents, students, and community groups;
  - d. appoint a Compliance Coordinator to train School personnel;
  - e. assess the school climate to determine the prevalence of harassment that exists and the potential for hate-motivated violence;
  - f. adopt a written anti-harassment policy and assure the policy is clearly communicated to all members of the school community; and school personnel and students are held accountable for their actions;
  - g. develop a formal grievance procedure and takes steps to make sure it is working properly;
  - h. have instructional personnel use or supplement a district's curriculum and pedagogical strategies to foster respect and appreciation for diversity;

- i. institute, improve, or expand age appropriate student activities to prevent or reduce prejudice and conflict;
- j. institute specific measures to respond immediately and effectively when harassment occurs to stop the harassment and prevent recurrence;
- k. flexibly apply response mechanisms to both the victim and the perpetrator, taking into account the parties' ages and the context of the behavior;
- l. continually monitor the school climate and promptly address problems that could lead to harassment or violence or that indicate that harassment could be occurring;
- m. appoint appropriate school officials to become familiar with pertinent civil and criminal laws at the state, local, and federal levels, so that they are able to recognize possible civil rights violations, hate crimes and other criminal acts;
- n. develop guidelines and procedures for collaboration with law enforcement officials, make appropriate referrals to outside agencies and designate liaison personnel;
- o. assure Crisis Intervention Plans are in place to minimize the possibility of violence or disruption of the educational process;
- p. have District-level personnel and individual school sites form continuing partnerships with parents and the community to prevent hate crimes and harassing behaviors;
- q. provide Staff training and professional development programs to support the district's anti-harassment efforts;
- r. assure that all harassment incidents are carefully documented and incidents are reported to outside authorities as required; and
- s. regularly assesses the effectiveness of its anti-harassment efforts.

17. Statistical studies showed that children with disabilities were most likely to be the victims of bullying and harassment. For this reason, the U.S. DOE next produced, and on behalf of both their own *Office Of Civil Rights* and the *Office Of Special Education And Rehabilitative Services* another document called the “Memorandum Regarding Harassment Based Upon Disability.” In that writing the DOE noted that intimidating or abusive behavior towards a student with a disability, that creates a hostile educational environment for that student or denies the student’s ability to participate in certain benefits, services or opportunities at the school, to the same extent as non-disabled students, would be considered “disability discrimination,” pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (“Section 504”). Further, it was considered a denial of the student’s right to a *Free Appropriate Public Education* (“FAPE”) pursuant to that act.
18. This document, developed now almost a decade ago, also provided a section called “*How To Prevent and Respond* (emphasis added) *To Disability Harassment.*” It generally paralleled the list of items noted in the *checklist* noted above, but strengthened language directing a school district to create “a campus environment (emphasis added) that is aware of disability concerns and sensitive to disability harassment.” Again, school boards were directed, among other things, to be “weaving these issues (of bullying and harassment based upon disability) into the curriculum or programs outside the classroom.” School Boards were now required to have not only policies, but active programs and ongoing practices in place to address discrimination on the basis of disability, including and especially bullying and harassment based upon disability. This writing also produced, in effect, a checklist that requires Board members, administrators and the superintendent to:

- a. widely publicize anti-harassment statements and procedures for handling discrimination complaints, because this information makes students and employees aware of what constitutes harassment, that such conduct is prohibited, that the institution will not tolerate such behavior, and that effective action, including disciplinary action, where appropriate, will be taken;
  - b. provide appropriate, up-to-date, and timely training for staff and students to recognize and handle the potential for harassment;
  - c. provide counseling for the person who was harmed by harassment and the person(s) who have been responsible for the harassment of others;
  - d. implement monitoring programs to follow up on resolved issues of disability harassment; and
  - e. regularly assess and, as appropriate, modify existing disability harassment policies and procedures for addressing the issue, to ensure effectiveness.
19. As we know the problems with bullying and harassment continued, so the Department of Education later developed, and in concert with the Health Resources & Services Administration at the Health & Human Services Dept., a *Best Practices In Bullying Prevention and Intervention*." In addition, the U.S. Dept. Of Justice produced *Bullying In Schools*. All these resources were readily available for school boards so that these policies, programs and practices could be implemented into the student body climate.
20. Over the course of time the *Office Of Civil Rights* within the United States *Department Of Education* issued numerous opinions on the issues of bullying and harassment and discrimination based upon disability, further giving school boards direction as to how to deal

with this ongoing threat to not only the safety of children but to assure they were received an education that was not hostile. The OCR noted that a failure to do any of the following various items could create a hostile educational environment and be considered discrimination based upon disability:

- a. provide school assemblies and instruction on bullying;
- b. address bullying in classroom intervention settings;
- c. conduct a school bullying assessment;
- d. form a bullying prevention coordination team at school;
- e. include language specifically identifying bullying in the school rules;
- f. develop strategies to prevent bullying in hot spots;
- g. post signs in classrooms prohibiting bullying & listing its consequences; and
- h. encourage students to help classmates who are being bullied & to report bullying.

21. In regard to handling incident once reported, the OCR noted that the failure to do the following, could also rise to the level of discrimination based upon disability:

- a. train staff on how to investigate a claim of bullying and harassment based upon disability;
- b. fully investigate allegations of bullying and harassment;
- c. respond to each allegation promptly;
- d. interview the student and the perpetrator;
- e. keep a written record of the investigation;
- f. taken prompt action against the perpetrators;
- g. remove the perpetrator from the class;

- h. take action to prevent future incidents;
  - i. offer to transfer the student or to a different class;
  - j. offer counseling for the student victim;
  - k. offer counseling to the perpetrator;
  - l. notify the parents of the bullied child their procedural safeguards pursuant to Section 504 of the Rehabilitation Act of 1973;
  - m. notify parents of their right to grievance procedures under Section 504;
  - n. offer the student a 1:1 aide or “shadow” for protection;
  - o. offer social skills training to the student;
  - p. offer social skills training to the perpetrator;
  - q. offer social skills training to the student’s class;
  - r. convene a meeting of the parents, and educators to discuss the issues of bullying and harassment;
  - s. use a program to monitor and oversee the resolution of incidents;
  - t. hire a temporary paraprofessional to monitor the perpetrator after the incident;
  - u. perform a psychological evaluation of the student victim after the incident; and among other things; and
  - v. most importantly use the incident as a “teaching moment” for the perpetrator and even the entire student body.
22. These guidelines were not only a mere federal mandate, but were integrated into, and became part of, Texas law as well. First, there were increased penalties in the Juvenile Justice system for students who bullied and harassed other students. In addition, the Texas Education

Agency (“TEA”) and their various local service centers working under TEA’s purview developed and disseminated a significant amount of support material for school boards as to how to best prevent bullying and harassment in general, and bullying and harassment based upon disability in particular. In addition, school board’s were provided information on how to best respond to bullying and harassment, when it occurred.

23. In Texas, many of these mandates were developed into policies and procedures by the Texas Association of School Boards and provided to school boards across Texas. The Lewisville Independent School District definitely adopted some policies regarding bullying and harassment, and discrimination based upon disability. They also generally provided some very general discussion of these issues in the student handbook. Unfortunately, while many school boards across the country and across our own great state heard this clarion call and made anti-bullying campaigns an integral part of that school district’s practices and customs, unfortunately, many others like the Lewisville Independent School District, only gave it “lip service,” and did not.

**B. THE SCHOOL DISTRICT’S RESPONSES TO BULLYING AND HARASSMENT**

24. A review of public and on-line documents and policies and procedures evidence that the Lewisville Independent School Board and School District have promulgated policies in regard to the general problem of bullying and harassment and the particular problem of bullying and harassment based upon disability.
25. Nevertheless, there is nothing in Montana’s of almost 1000 page educational record that indicates that anything was ever done in regard to his complaints that he was being bullied and harassed.

26. In addition, as the facts will more specifically address below, Mr. and Mrs. Lance made numerous complaints that Montana was being bullied and harassed to his teachers, the school Principal, and the School Board, none of which acted in concert with any of the directives of the Department of Justice and Office of Civil Rights, or even correctly responded, as required by law and to their own written policies.
27. In short, there is no evidence in the record provided or the facts discussed that the School District Defendants put into practice their own policies and procedures in regard to responding to and acting to prevent future occurrences of bullying and harassment in general, or in regard to children with disabilities like Montana, in particular.
28. Nor was there any evidence that the Lewisville Independent School Board trained personnel as to these various practices.
29. Nor was there any evidence that the Lewisville Independent School Board supervised personnel as to these various practices.
30. In short, rather than promote a school climate that was sensitive to the issue of bullying and harassment and discrimination based upon disability, the School District Defendants actually fostered a climate where bullying and harassment was rampant and when it occurred, did not know how to respond.
31. Though certainly any one of the failures noted above, taken in isolation, do not necessarily evidence the school violated the rights of Montana based upon his disability, the failures of the school district to develop programs and practices sensitive to bullying and harassment of students with disabilities absolutely affected the perception of school district officials and personnel in this case. When Montana and his parents brought forward complaints that he

was a victim of bullying and harassment, they heard but they did not listen.

32. It is with all this in background that Plaintiffs now provide their specific “Statement Of Facts” about Montana

C. STATEMENT OF FACTS ABOUT MONTANA LANCE.

33. Montana Lance was born March 2, 2000. At the time of his death he was in the 4<sup>th</sup> grade (2009-2010 school year) at the Stewart Creek Elementary School. He committed suicide on January 21, 2010. He was survived by Deborah, his mother; Jason, his father and his younger brother, Dooley John Lance.

34. Montana was diagnosed with an *Emotional Disturbance* (“ED”), a *Learning Disability* and with a *Speech Impairment* (a childlike lisp). Based upon these impairments and behaviors, he received special education services pursuant to the *Individuals With Disabilities Education Act* (“IDEA”), 20 U.S.C. §1401 et. seq.

35. In addition, his behaviors being so observable and his lisp so evident, he easily became a target for the bullying of some other children.

36. As early as in the 2<sup>nd</sup> grade, Montana was bullied by A.O., J.G. and J.R.B.<sup>1</sup> He was bullied at lunch, at the playground, and in class. Because of his speech impediment he was called “gay,” and other students were told not to sit with him and that if they did, they were ”sitting at the gay table.” Recess periods at school were the worst times for Montana. To avoid his tormentors, Montana asked his teacher if he could stay in the classroom and read rather than go to recess.

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<sup>1</sup>. Plaintiffs will use initials for any children mentioned and will provide a list to Defendants, upon request.

37. Montana had numerous disciplinary reports in his educational records. These reports note, as does his educational record, that Montana had many physical and verbal interactions with other children. Importantly, many were related to Montana defending himself from the harassment and bullying of other students.
38. His mother complained to school officials numerous times during the third grade (2008-2009 school year) and at least four (4) times prior to Montana's death.
39. Not surprisingly, Montana began to feel more and more left out of normal social interactions. He became depressed and even suicidal. His mother asked that an Admission, Review & Discharge ("ARD") Committee meeting be held to discuss these problems. The school responded quickly and appropriately, convening a meeting December 17, 2007 to discuss how to address these issues. He was referred for a full psychological assessment.
40. In early February of 2008, the school psychologist was concerned that Montana had made verbal statements about hurting himself. The psychologist found him to be "at risk," and was "clinically significant." In his own self-reporting, Montana wrote that he felt like life was getting worse and worse, that other kids hate him, that his classmates make fun of him, that he heard voices in his head, and that he hates himself. In regard to the question of "I want to die," or "I wish I were dead," he answered "Almost Always." She noted he satisfied criteria as a child with an "Emotional Disturbance" and could receive services from the school in concert with this diagnostic designation. Nevertheless, this designation was not formally accepted by the school district personnel until November 1, 2009.
41. The psychologist also noted that Montana satisfied diagnostic criteria for Autism and Aspergers Syndrome. This designation and diagnosis were never reviewed or formally

assessed by any school personnel either.

42. Neither the psychologist, nor the school counselor, nor the principal, nor any other person at the school spoke with mother about these findings. Nor was she ever provided a copy of this report.
43. In any case, as required by IDEA, an *Admission, Review & Discharge* (“ARD”) Committee was convened on Montana’s behalf to deal with this report. Specifically and in regard to his emotional concerns and behaviors, the ARD Committee developed an *Individualized Education Plan* (“IEP”) that require, among other things, that he receive Counseling Services for four (4) sessions of twenty (20) minutes each, during a six (6) week period to deal with Montana’s social interactions at school.
44. There is nothing in this IEP that addresses Montana self-destructive thoughts and feelings, nor any training for his teacher to know when he was beginning to evidence signs of depression and suicidality. There is nothing in the plan regarding communications between the counselor and the parents to address issues at school and home. This plan is, based upon the psychological report, grossly inadequate.
45. Not surprisingly, Mrs. Lance was never contacted by his school counselor during the 2009-2010 school year to discuss Montana’s emotional and behavioral issues.
46. The ARD Committee also attempted to develop a *Behavioral Intervention Plan* (“BIP”) to deal with Montana’s emotional disturbances in the classroom setting. This BIP provides for a number of “Positive Intervention Strategies and Consequences.” There is no evidence in the educational record that any of these interventions were ever used with Montana, especially during the times he was disciplined, whether it be formally or informally.

47. On November 4, 2009 a student “verbally provoked” him, “pushed him down on the ground,” and Montana almost hit his head on a stack of chairs. Montana responded by pushing the other student into a stack of chairs. Like other occasions previously when Montana attempted to protect himself, he received a “Student Discipline Referral.” There is no evidence in the educational record that his Counselor dealt with Montana over this issue. There is no evidence in the school record that any of the various behavior interventions for Montana were used, as well. There is no evidence his parents were ever called.
48. A few weeks later, on the 18<sup>th</sup>, Montana had problems in class and blurted out that he had “pooped in his pants.” There is no evidence in the educational record that his Counselor dealt with Montana over this issue. There is no evidence in the school record that any of the various behavior interventions for Montana were used, as well. There is no evidence his parents were ever called.
49. On December 11<sup>th</sup>, Montana received another “Student Discipline Referral” after getting into an altercation with three other boys. When speaking to the teacher about the incident, he stated he wanted to be expelled. There is no evidence in the educational record that his Counselor dealt with Montana over this issue. There is no evidence in the school record that any of the various behavior interventions for Montana were used as well. There is no evidence his parents were ever called.
50. On December 18<sup>th</sup> Montana was once again threatened by a student and he told the student that “he was a bully and that he would be a nerd when he grew up.” One student said to another student, “beat him up again.” Montana was again surrounded by a group of kids. In response, he pulled out a small pen knife in the hope he would frighten the bullies away.

In any case, Montana he received another “Student Discipline Referral” a and was suspended from school.

51. He was also placed in an *Disciplinary Alternative Education Environment* (“DAEP”) at the Lewisville Learning Center for his behaviors. To the knowledge of Plaintiffs no one from the school district investigated this complaint of bullying. There is no evidence in the educational record that his Counselor dealt with Montana over this issue. There is no evidence in the school record that any of the various behavior interventions for Montana were used as well.
52. Importantly, when a child with a disability, like Montana, is referred to a DAEP, there is a procedure pursuant to federal special education law that required Montana to have a special hearing to determine if his behaviors were a manifestation of his disability, called a “Manifestation Determination Hearing.” If the committee reviewing the incident determines that the child with a disability had the incident because of their disability, then the child would not go to the DAEP. Montana never received this procedural protection.
53. On January 4, 2010 Montana’s mother sent a letter to Lea Land, the School Principal, in an effort to appeal his placement to the DAEP. She specifically wrote that Montana had been a victim of bullying and that he had been defending himself against the bullies, in the most recent incident.
54. Land denied the appeal. There is nothing in the educational record to reflect the Principal or any designee investigated the concerns that Montana’s recent acts were a result of defending himself against bullies or that the bullying was due to Montana’s disability. Nor did Land convene the “manifestation meeting,” as required by federal law. 34 C.F.R.

§300.530(e).

55. Montana went to the Lewisville Learning Center. There is no evidence in the educational record that his regular school counselor dealt with Montana over this issue or his placement. There is no evidence in the school record that any of the various behavioral or counseling interventions for Montana were used, as well, during his period at the DAEP.
56. On January 6<sup>th</sup> Mrs. Lance sent a letter to Rocky Brookmole, appealing Land decision. She did note that Montana had no disciplinary problems at the placement, as he had been free from “hazing and bullying.”
57. Again, there is nothing in the educational record to reflect that Brookmole or any designee of his investigated the concerns that Montana’s recent acts were a result of defending himself against bullies or that the bullying was due to Montana’s disability.
58. On January 11<sup>th</sup>, Mrs. Lance appealed Montana’s placement to the DAEP to the School Board. At that time she told the board that Montana had been a victim of bullying and that had been defending himself against the bullies.
59. There is nothing in the educational record to reflect that the School Board or designee investigated the concerns that Montana’s recent acts were a result of defending himself against bullies or that the bullying was due to Montana’s disability.
60. In fact, there is nothing in the educational record to reflect that any school district staff ever investigated any of mother’s complaints, or Montana’s complaints, that Montana’s recent acts were a result of defending himself against bullies or that the bullying was due to Montana’s disability.
61. While Montana was at the DAEP, he admitted to a High School Counselor, Mike Riek, that

he was suicidal. The record is again bereft of any documentation as to what this school counselor specifically heard from Montana. There is no evidence of any assessment taken, or to what interventions, if any, the Counselor specifically used or what specific recommendations were made (if any). Nor is there any documentation that was shared with his regular school counselor.

62. Nor does the record reflect that Montana benefitted from another important procedural safeguard; an ARD Committee meeting, pursuant to 34 C.F.R. §300.324(b) that was required when he was discharged from the DAEP and sent back to the regular education environment. Such a meeting would have been especially relevant in light of the incident that paced Montana at the DAEP in the first instance, and his suicidal threats, just days before he did actually commit suicide.
63. Last, and on January 21, 2010 Montana was back in the regular education classroom. Evidently there was an incident or group of incidents where Montana was bullied and harassed by the very same students who had caused him to be removed from the classroom in the first instance. Not surprisingly, he had a behavioral outburst and was again disciplined and removed from the classroom.
64. There is no documentation in the file that any portion of the Behavioral Intervention Plan was used that day. In addition, there is no evidence that in regard to his Individualized Education Plan, including and especially the counseling component, that these interventions were even considered, let alone used on that fateful day.
65. In addition, there is no documentation that the school counselor was called to speak with Montana that day.

66. In any case, Montana was sent to an office to be apart from his class and alone, ostensibly operating as an *In-School Suspension* (“ISS”). It would seem the clear intent of this placement was to keep Montana more closely supervised. Nevertheless, when he needed to use a bathroom, he was sent by himself to the Nurse’s Office.
67. While there, Montana took his belt and hung himself from an apparatus used for the toileting children with special needs. The school nurse, Ms. Terry Lowry became concerned that Montana was in the bathroom for a long period of time. She called out to him and getting no response, attempted to open the bathroom door but found it locked. When she looked for a key to open the door, she could not find one. Finally, a janitor was called who had a key and opened the door. Montana was taken down. CPR was unsuccessful. He was pronounced dead shortly thereafter.
68. It was not the first time that Montana had locked himself in that bathroom. The school district personnel never told Mr. and Mrs. Lance that their son had ever been locked in the bathroom where he died.

**VI. CLAIMS FOR RELIEF PURSUANT TO THE REHABILITATION ACT OF 1973**

69. Plaintiffs incorporate by reference all the above-related paragraphs with the same force and effect as if herein set forth.
70. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and its implementing regulations require that each state that receives disbursements, including the state’s political subdivisions such as local school districts, must ensure all students with disabilities are given appropriate and necessary accommodations, pursuant to federal law and rules. To the degree that a policy or practice hinders honest consideration of a disabled child’s unique needs, and

fails to accommodate that child's disability and keep the student safe, it violates Section 504.

71. Plaintiffs assert that because the Defendant school district has failed to keep Montana safe from harm, and failed to provide him an environment that was not hostile, such failures as noted above, have, together and separately, contributed to violating his rights under Section 504, federal rules and regulations promulgated pursuant thereto.
72. In addition and in the alternative, the failure of the school district to develop an *Individualized Educational Plan*, commensurate with his unique and individualized needs, rises to the level of a gross mismanagement of his educational plan and is also a violation of Section 504 thereby.

#### **VII. STATE ACTION**

73. Plaintiffs incorporate by reference all the above-related paragraphs with the same force and effect as if herein set forth.
74. The Defendant school district was at all times and in all matters acting under color of state law when they permitted Plaintiff to be subjected to the wrongs and injuries set forth herein.

#### **VIII. CLAIMS PURSUANT TO 42 U.S.C. §1983 AND THE 14th AMENDMENT TO THE U.S. CONSTITUTION**

75. Plaintiffs incorporate by reference all the above related paragraphs with the same force and effect as if herein set forth.
76. The School District Defendant, acting under color of law and acting pursuant to customs and policies of the district, deprived Montana of rights and privileges secured to him by the Fourteenth Amendment to the United States Constitution and by other laws of the United States.
77. The acts and omissions of the school district deprived Montana of his rights to life, liberty

and bodily integrity guaranteed under the United States Constitution, for which the School District Defendant is liable to Montana. pursuant to 42 U.S.C. §1983 for compensatory monetary damages.

**IX. UNCONSTITUTIONAL POLICIES, PROCEDURES , PRACTICES & CUSTOMS**

78. Plaintiffs incorporate by reference all the above related paragraphs above with the same force and effect as if herein set forth.
79. Plaintiffs contend that these failures of the School District Defendant to have policies, procedures and practices to protect Montana from a known and inherent dangerous situation, bullying and harassment based upon disability, violates the Fourteenth Amendment of the Constitution of the United States for which Plaintiffs seek recovery pursuant to 42 U.S.C. §1983.
80. Plaintiffs contend that these failures of the School District Defendant to have policies, procedures, practices and customs in place to assure staff was correctly trained and supervised, so as to protect Montana Lance from another known and inherent dangerous situation, a door that cannot be unlocked, violates the Fourteenth Amendment of the Constitution of the United States for which Plaintiffs seek recovery pursuant to 42 U.S.C. §1983.
81. Plaintiffs contend that these failures of the School District Defendant to have policies, procedures, practices and customs in place to assure staff was correctly trained and supervised, so as to protect Montana Lance from another known inherent and imminent dangerous situation, his own suicidality, violated the Fourteenth Amendment of the Constitution of the United States for which Plaintiffs seek recovery pursuant to 42 U.S.C.

§1983.

82. Based upon the operative facts, such acts and omissions rise to the level of deliberate indifference and conscious indifference constituting a violation of the Fourteenth Amendment of the Constitution of the United States, and for which Plaintiffs seek recovery pursuant to 42 U.S.C. §1983.

**X. STATE-CREATED DANGERS AND DUTIES**

83. Plaintiffs incorporate by reference all the above related paragraphs above with the same force and effect as if herein set forth.
84. The school district personnel brought Montana, a child with a history of suicidal ideation, to the a bathroom that did not have a key to open the door, once locked.
85. The acts and omissions of the school district personnel, including and especially the nurse, created the danger which caused the injuries to Montana

**XI. SPECIAL RELATIONSHIP**

86. Plaintiffs incorporate by reference all the above related paragraphs with the same force and effect as if herein set forth.
87. A special custodial relationship existed at all pertinent times between the Defendants and Montana, as he was a student with a disability and was put into a situation where he could not freely move. Accordingly, the Defendant Independent School District had a corresponding duty to provide him a safe environment.

**XII. VIOLATIONS OF THE TEXAS HUMAN RESOURCES CODE**

88. Plaintiffs incorporate by reference all the above related paragraphs with the same force and effect as if herein set forth.

89. Chapter 121 of the Texas Human Resources Code provides that a person may seek a civil remedy in a court of competent jurisdiction (*see* Tex. Hum Res. Code §121.003) if he has been denied access to a facility or a program in this state supported, in whole or in part, by public funds and if an entity has failed to make reasonable accommodations in its policies, practices, and procedures as to the complainant. *See* Tex. Hum Res. Code § 121.004.
90. When the Lewisville ISD effectively and constructively denied Montana's right to access the school in the same manner as non-disabled persons, his rights pursuant to the Human Resource Code were violated thereby.

### **XIII. WRONGFUL DEATH CLAIMS**

91. Plaintiffs incorporate by reference all the above related paragraphs, as if fully set forth.
92. This claim for damages resulting from the wrongful death of Montana is brought by his surviving parents, pursuant to Tex. Civ. Prac. & Rem. Code, 71.001 et. seq. This claim is based upon the facts and legal theories more fully set out herein.
93. At the time of death, the decedent was otherwise in reasonably good health with a normal life expectancy.
94. The decedent was a loving and dutiful child and provided reasonable services to his parents and sibling.
95. As a result of the wrongful death of Montana his parents and brother did suffer damages, including termination of the parent-child and familial relationship and severe mental anguish, and will, in reasonable probability, continue to suffer damages in the future as a direct result of the wrongful death of Montana, in an amount within the jurisdictional limits of the court.

### **XIV. SURVIVAL CLAIMS**

96. Plaintiffs incorporate by reference all the above related paragraphs, as if fully set forth.
97. This claim for damages resulting from the death of Montana is brought by his surviving parents as personal representative of his estate. This claim is based upon the facts and legal theories more fully set out herein.
98. Any person required to be a named Plaintiff in this lawsuit to collect damages under Section 71.021., Tex. Civ. Prac. & Rem. Code, is a named Plaintiff, or will be added accordingly. Plaintiffs brings this survival action pursuant to Tex Civ. Prac. & Rem. Code, Section 71.021, because of personal injuries suffered by the decedent, which resulted in Montana's death, based upon the facts and legal theories more fully set out above.
99. Plaintiffs seek damages for the conscious pain and suffering and mental anguish that the decedent suffered prior to death and for the reasonable and necessary medical, funeral and burial expenses which were reasonably incurred because of such wrongful death. Plaintiffs seek damages within the jurisdictional limits of the court.

#### **XV. RATIFICATION**

100. Plaintiffs incorporate by reference all the above-related paragraphs with the same force and effect as if herein set forth.
101. The School District Defendants ratified the acts, omissions and customs of school district personnel and staff.
102. As a result the School District Defendants are responsible for the acts and omissions of staff persons who were otherwise responsible for the safety of Montana

#### **XVI. PROXIMATE CAUSE**

103. Plaintiffs incorporate by reference all the above related paragraphs with the same force and

effect as if herein set forth.

104. Each and every, all and singular of the foregoing acts and omissions, on the part of Defendants, taken separately and/or collectively, jointly and severally, constitute a direct and proximate cause of the injuries and damages set forth herein.

**XVII. PUNITIVE DAMAGES**

105. Plaintiffs incorporate by reference all the above-related paragraphs with the same force and effect as if herein set forth.
106. The acts and omissions of the Defendant school district over the course of many years, and after receiving repeated notice of such acts and omissions not only shock the conscience, but satisfy criteria for punitive damages, as contemplated by Section 1983.

**XVIII. ATTORNEY FEES**

107. Plaintiffs incorporate by reference all the above related paragraphs, as if fully set forth herein
108. It was necessary for Plaintiffs to retain the undersigned attorneys to file this lawsuit. Upon judgment, Plaintiffs are entitled to an award of attorney fees and costs pursuant to under 42 U.S.C. §1988(b), 42 U.S.C. §794a, 42 U.S.C. §12131, pursuant to 42 U.S.C. § 2000d et seq.

**XIX. DEMAND FOR JURY TRIAL**

109. Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a jury trial for all issues in this matter.

**PRAYER**

110. **WHEREFORE, PREMISES CONSIDERED**, Plaintiffs pray for judgment against Defendants, jointly and severally, in the manner and particulars noted above, and in an amount sufficient to fully compensate them for the elements of damages enumerated above,

judgment for damages, recovery of attorney's fees and costs for the preparation and trial of this cause of action, and for its appeal if required, pursuant to 42 U.S.C. §1988; together with pre- and post-judgment interest, and court costs expended herein, and for such other relief as this Court in equity, deems just and proper and for such other relief as the Court may deem just and proper in law or in equity.

Respectfully submitted,

Cirkiel & Associates, P.C.

/s/ Martin J. Cirkiel

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**ATTORNEYS FOR PLAINTIFFS**