UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
(WORCESTER DIVISION)

G, a 12-year-old minor suing by a fictitious name for privacy reasons, MOTHER, and FATHER, suing under fictitious names to protect the identity and privacy of G, their minor child, Plaintiffs, v. THE FAY SCHOOL (by and through its Board of Trustees) and ROBERT GUSTAVSON,[1] Defendants.	Case No. 15-cv-40116-TSH

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

The central and dispositive issue in this case is whether or not the low-level radio frequency ("RF") emissions associated with the wireless internet network ("Wi-Fi") at the Fay School (the "School") are the cause of an array of physical symptoms suffered by Plaintiff G ("G"), a former student at the School. They are not. Nonetheless, Plaintiffs allege that the School's Wi-Fi is causing G harm, and are asking this Court for an order to alter or disable the Wi-Fi system in such a way that would render it unusable by every student in G's presence. Plaintiffs assert that they are entitled to this modification as a reasonable accommodation pursuant to Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the "ADA"), and similar obligations they claim that Defendants owe them under common law. Plaintiffs' misguided claims, however, fail both as a matter of law and fact.

First, the Court lacks jurisdiction over this dispute because Plaintiffs' claims represent an

[1] The proper names of Defendants are The Fay School, Inc. and Robert J. Gustavson, Jr.

attack on the Federal Communications Commission's ("FCC") guidelines governing the use of Wi-Fi. There is no dispute that the School is in full compliance with the FCC safety limit regulating RF emissions. Plaintiffs' requested relief would require the School to comply with RF exposure levels well below the FCC safety limit and, therefore, impose upon the School an obligation inconsistent with the FCC's adopted regulatory scheme, which affords the FCC exclusive jurisdiction to determine such issues. For this reason alone, Plaintiffs' Complaint must be dismissed in its entirety.

Second, Plaintiffs cannot demonstrate that the School's Wi-Fi is either the general or specific cause of G's symptoms. There is no evidence that RF emissions, at the levels associated with the School's Wi-Fi, cause adverse health effects in humans. In fact, the overwhelming consensus of scientific evidence refutes Plaintiffs' speculative and untested theory. Moreover, there is no evidence demonstrating that the specific cause of G's individual symptoms is the School's Wi-Fi, as opposed to some other cause. Without establishing this causal link, Plaintiffs cannot demonstrate that G is entitled to the requested accommodation. In other words, if G is not being injured by the School's Wi-Fi, then he is not entitled to an accommodation that would disable the School's Wi-Fi. Because each and every one of Plaintiffs' claims derives from this central assertion, each claim must fail as a matter of law.

Third, despite the utter lack of any evidence that Wi-Fi is harmful to human health, or that the School's Wi-Fi caused G's symptoms, the School did, in fact, take significant steps to reduce G's exposure to RF emissions while he was enrolled at the School. Thus, even without a legal obligation to do so, the School entirely complied with the requirements of the ADA. While Plaintiffs seek additional accommodations in this case, such accommodations are unreasonable as they would fundamentally alter the educational activities at the School and there is no

evidence that they would assist G.

Fourth, Plaintiffs cannot demonstrate that the School retaliated against them in any way. As an initial matter, the record clearly demonstrates that Plaintiffs' continued requests for accommodations in this case were not made in good faith. When Plaintiffs' initial anti-technology efforts were rebuffed, they went doctor shopping for the preferred diagnosis so they could use G as a pawn in their crusade against Wi-Fi. This conduct constitutes bad faith and hence invalidates any retaliation claim. Further, the record establishes that Defendants' actions were undertaken for legitimate, non-discriminatory reasons.

Finally, not only do the common law claims fail for the above reasons, but they also fail for additional reasons. The breach of contract claim fails because it is based on aspirational provisions in the School's Handbook that are not contractual in nature, and which simply indicate the School will comply with the ADA, which it did. Plaintiffs' misrepresentation claim is deficient because it is based solely on the School's alleged contractual duties, which cannot form the basis of a misrepresentation claim. Plaintiffs' negligence claim fails because the School is in full compliance with the FCC safety limit, which entirely negates Plaintiffs' allegation that the School breached any duty of care owed to Plaintiffs. The individual common law claims against Defendant Robert J. Gustavson, Jr. ("Mr. Gustavson") fail as there is no evidence that justifies holding him individually liable.

For all these reasons, the Court should grant Defendants' Motion for Summary Judgment in its entirety.

I. FACTUAL BACKGROUND[2]

A. The School's Computer-Based Curriculum

The School is a non-profit, independent day and boarding school located in Southborough, Massachusetts for children from pre-kindergarten through the ninth grade. SOF at ¶ 1. Plaintiff G attended the School's day program starting in September of 2009. Id. at ¶ 20.

The School provides a challenging and supportive learning environment aimed at preparing its students for secondary school. Id. at ¶ 2. Starting in or around the fifth grade, the curriculum in many of the School's classes is highly computer and technology based, and requires the ability of all teachers and students to quickly and consistently connect to the internet. Id. at ¶¶ 2-5, 13-18. As a result, the School has a Wi-Fi system throughout the buildings for all teachers and students to use to meet the School's curriculum needs. Id. at ¶¶ 6-7.

B. The Parents' Advocacy Against Wi-Fi

Starting as early as October 2012, Plaintiffs Mother and Father (the "Parents") began to advocate that exposure to RF emissions from Wi-Fi could be dangerous to children. See id. at ¶ 21. In light of these concerns, the Parents removed all Wi-Fi, smart meters, and other electronics that operate on wireless technology from their home. See id. at ¶ 22. Mother also donated cases for iPads to the School, which she believed would reduce RF emissions from iPads, and then she engaged in a business venture to develop her own RF mitigation case for iPads with the hope of marketing and selling such cases. See id. at ¶¶ 21, 24.

By March 2014, Mother came to believe that the mitigation cases were not effective and the only way to protect school children from Wi-Fi was to completely remove Wi-Fi from school

[2] Defendants include in this Memorandum a summary of the material facts in the case. A full recitation of the material facts in this matter as to which there should be no genuine dispute is contained in Defendants' Statement of Undisputed Material Facts in support of Defendants' Motion For Summary Judgment ("SOF"). Thus, the citations in this Memorandum are to the full recitation of facts contained in the SOF (and the exhibits attached thereto).

classrooms. See id. at ¶ 25. She then embarked on a "PSA campaign" to advocate for the removal of Wi-Fi from schools. See id. at ¶¶ 25-31.

In April 2014, Mother reached out to the School to express her belief that Wi-Fi in schools created a potential danger to students and demanded a meeting with School administrators. See id. at ¶¶ 27-29. On May 12, 2014, the School, including its Head of School, Mr. Gustavson, met with the Parents. See id. at ¶ 30. Although the Parents expressed concerns about Wi-Fi in general, and requested that the School remove its Wi-Fi, the Parents never mentioned any medical concerns being suffered by G. See id. at ¶¶ 28, 30, 34.

After listening to the Parents' concerns, consulting with organizations that work with private schools, and doing their own research, School administrators determined that there was no legitimate scientific evidence that the School's Wi-Fi system (which is similar to Wi-Fi systems installed in schools and businesses across the country) was in any way harmful. See id. at ¶ 32. As a result, Mr. Gustavson notified the Parents that there was inadequate support for the removal of Wi-Fi from the School, but indicated the School would "adhere to guidelines from all relevant regulatory agencies." See id. To ensure that other School employees, who were not part of the initial discussions with the Parents, could focus on their educational duties, Mr. Gustavson requested that the Parents address any future concerns regarding Wi-Fi to only those School employees involved in the May 12, 2014 meeting. See id. at ¶ 33.

Rather than accepting the School's decision, Mother continued to email the School with additional information she claimed supported her demand for the removal of Wi-Fi from the School and demanded another meeting. See id. at ¶ 34. Mother also emailed third parties to help with her anti-Wi-Fi strategy, emailed other parents at the School, and contacted members of the Parents' Association to gain support for her campaign. See id. at ¶¶ 31, 36.

C. The Parents' Attempt To Obtain An EHS Diagnosis For G Without Having G Evaluated And Other Concerning Behavior By The Parents

Although she had yet to raise any health concerns to the School about her son, on May 20, 2014, Mother told G's pediatrician that she believed the School's Wi-Fi was causing "chest pressure and stomach pain" in her son, G. Id. at ¶ 37. G's pediatrician, however, told Mother that he could not support Wi-Fi as a cause of G's symptoms. Id. at ¶ 40. Mother then sought assistance from a Texas physician, Dr. William Rea ("Dr. Rea"), known to the anti-Wi-Fi community.[3] See id. at ¶ 41. Dr. Rea directed Mother to Dr. Jeanne Hubbuch ("Dr. Hubbuch"), a doctor in Watertown, Massachusetts. See id. In her first correspondence with Dr. Hubbuch, Mother told Dr. Hubbuch that she believed G suffered from Electromagnetic Hypersensitivity Syndrome ("EHS"), a disorder that allegedly caused him to experience physical symptoms (such as headaches, nose bleeds, dizziness, ear ringing, and chest pressure) when he was exposed to the School's Wi-Fi. See id. at ¶ 42. Mother asked Dr. Hubbuch what her protocol was for diagnosing EHS, and requested to meet with Dr. Hubbuch without G present. Id. at ¶¶ 42-46. Dr. Hubbuch agreed and met with *only* Mother on July 23, 2014. Id. at ¶ 47. Although she had yet to even meet G, Dr. Hubbuch then gave Mother a "preliminary diagnosis" of EHS for G and, at Mother's request, wrote a letter to the School stating that G was "being adversely affected by prolonged exposure to WIFI at school." See id. at ¶¶ 48-50. Dr. Hubbuch suggested in her letter that the School follow the "precautionary principle" with respect to its Wi-Fi going forward, by turning off or minimizing its use of Wi-Fi as an accommodation to G. See id. at ¶¶ 49, 51.

After receiving Dr. Hubbuch's letter and the Parents' demands regarding the School's Wi-Fi, the School requested additional medical documentation concerning G's alleged condition

[3] As the use of Wi-Fi has increased in everyday life over the last fifteen years, advocacy groups against Wi-Fi have formed. In advocating against the use of Wi-Fi, these groups ignore the overwhelming scientific evidence, which has failed to show any adverse health effects from the use of Wi-Fi. See ECF Nos. 58, 59.

and request for an accommodation (the "Requested Medical Documentation"). Id. at ¶ 52. Rather than provide the Requested Medical Documentation, the Parents continued their anti-Wi-Fi advocacy efforts by reaching out to third parties, parents, and employees at the School. Id. at ¶¶ 54-59. In doing so, the Parents engaged in troubling and inappropriate behavior, including actions where they: (a) "persisted in criticizing and harassing the School and its community members;" (b) "ignored … [the School's] numerous requests to refrain from contacting other School employees and trustees [who had not been involved in the earlier meeting with the Parents] about … [their] concerns relating to the safety of Wi-Fi;" (c) "cultivated a campaign against the School;" (d) "misused access to family email addresses in … [the] School directory;" (e) "solicited Fay Parents in order to advance … [their] personal agenda;" (f) misled members of … [the School's] community by reporting inaccurate information about the School's opinions and efforts, including, but not limited to, fabrications that the School Nurse had seen an increase in Wi-Fi related illness;" and (g) "misrepresented … [themselves] as acting on behalf of Fay and … [the] Parents' Association in the communications with the Parents' Independent School Network, creating the false impression that Fay is sponsoring a discussion on Wi-Fi safety at the Southborough Library." Id. at ¶ 61. In light of this behavior, the School sent the Parents a letter on September 15, 2014, detailing the Parents' "disrespectful and deceitful behavior" towards the School, and indicating that such behavior violated the principles contained in the School's Parent/Student Handbook (the "Handbook"). Id. at ¶¶ 61-62.

As a result, the School requested that the Parents comply with the Handbook's parental comportment expectations going forward. Id. In response, the Parents apologized and notified the School that they would "comply immediately with the expectations set forth in your letter." Id. at ¶ 62.

D. Third-Party Compliance Survey Confirms The School's Full Compliance With The FCC's Safety Limit For Wi-Fi

Despite the Parents' troubling and inappropriate behavior and their failure to provide the Requested Medical Documentation to the School, the School hired David Maxson ("Mr. Maxson") from Isotrope, LLC to conduct an RF energy survey at the School (the "Compliance Survey"), to determine whether the School's Wi-Fi was in compliance with applicable federal guidelines relating to the use of, and human exposure to, RF energy from the Wi-Fi, including guidelines established by the FCC. Id. at ¶¶ 72-76. The RF exposure guidelines set by the FCC for use of Wi-Fi in the School are 10,000 mW/m^2 (the "Safety Limit"). Id. at ¶ 75.

In December 2014, Mr. Maxson's measurements during the Compliance Survey indicated that the RF levels from the School's Wi-Fi were more than 10,000 times below the Safety Limit. See id. at ¶ 75. Subsequent RF measurements taken by Plaintiffs and one of Defendants' experts confirmed that the RF levels from the School's Wi-Fi remain below or near 1 mW/m^2, and, therefore, are in full compliance with the FCC guidelines and several orders of magnitude below the safe-level threshold promulgated by the FCC. See id. at ¶¶ 78-80.

E. The Parents' Continued Attempts To Obtain A Diagnosis Of EHS For G And Their Failure To Provide The School With Requested Medical Documentation

Although the School's Wi-Fi was in full compliance with the FCC Safety Limit, the Parents continued to insist that the School make alterations or remove the School's Wi-Fi as an accommodation to G. Id. at ¶¶ 68, 71. In response, the School again asked for the Requested Medical Documentation regarding G's health. Id. at ¶¶ 69-70. In an attempt to obtain such documentation, the Parents had G evaluated by his new pediatrician in November 2014 and a pediatric neurologist at Boston Children's Hospital ("BCH") in December 2014. Id. at ¶¶ 81-90. After both of these medical professionals declined to diagnose G with EHS, Mother brought G to

be evaluated by Dr. Hubbuch in February 2015 in the hopes that she would affirm the "preliminary diagnosis" of EHS that she had made in July 2014 (despite her not having evaluated, or even met, G at that time). Id. at ¶¶ 87, 90, 93. At the Parents' request, Dr. Hubbuch wrote a second letter, which diagnosed G with EHS. Id. at ¶¶ 103-104. She failed, however, to provide the Requested Medical Documentation to the School. Id. at ¶¶ 70, 108.

F. Two Independent Medical Examinations Of G Do Not Support EHS Diagnosis

Despite their failure to provide the School with all of the Requested Medical Documentation, in the spring of 2015, the Parents demanded that they be allowed to conduct a walk-through of the School to examine the School's Wi-Fi and possible changes to the Wi-Fi. See id. at ¶¶ 70, 107-108. As a compromise, the Parties agreed that G would undergo a two-part independent medical evaluation ("IME") with medical experts from BCH who were unaffiliated with any of the Parties. See id. at ¶¶ 109-110. The Parties also agreed that if the IME suggested EHS, the School would allow the Parents to do a walk-through of the School to assess possible modifications. See id. at ¶ 110.

On June 29, 2015, G attended the first part of the IME by being evaluated by Alan Woolf, M.D. ("Dr. Woolf"), a pediatrician and medical toxicologist with the Pediatric Environmental Health Center at BCH. See id. at ¶ 111. Based on his evaluation of G, Dr. Woolf found G did not have EHS and listed other causes to consider. See id. Instead of completing the second part of the IME (as agreed), the Parents demanded an immediate walk-through of the School. See id. at ¶ 46. When the School requested that the Parents adhere to the Parties' agreement that G complete the two-part IME before any walk-through of the School, Plaintiffs, on August 12, 2015, filed their original Complaint in the instant action. See id. at ¶¶ 113-114.

Thereafter, the School compromised again and agreed to allow the Parents (and their

attorneys and experts) to walk through the School, as long as the Parents completed the second part of the IME process (as they had agreed to do months before). See id. at ¶ 115.

On September 10, 2015, the Parents completed the second part of the IME by allowing G to be evaluated at BCH's Multi-Disciplinary Headache Clinic by Alyssa Lebel, M.D. ("Dr. Lebel") and Rupa Gambhir, Psy.D. ("Dr. Gambhir"). See id. at ¶ 116. These doctors did not find that G had EHS. See id. at ¶¶ 116-119. Instead, Dr. Lebel concluded (and Dr. Gambhir agreed) that G had "tension-type predominant" headaches that should be managed through the use of a headache preventative medication, along with therapies such as massage, essential oils, acupuncture, Reiki, and "relaxation strategies." See id. at ¶¶ 117-118. Dr. Lebel also "strongly encouraged [G] to attend school regularly." See id. at 117. The Parents never followed through with Dr. Lebel's medical recommendations. See id. at ¶¶ 121-123.

G. The School's Reduction Of G's Exposure To RF From The School's Wi-Fi

Nonetheless, in the fall of 2015, the School undertook a series of efforts to reduce G's exposure to RF from the School's Wi-Fi. See id. at ¶¶ 128-145. These measures consisted of a number of adjustments to each of G's nine classrooms, including adding equipment in those classrooms to allow G to access the internet via an Ethernet cord (instead of the School's Wi-Fi), moving students around in those classrooms (to allow for more distance between G and computers using the School's Wi-Fi), and, in some cases, moving entire classrooms of students – all in an effort to reduce G's exposure to RF from the Wi-Fi. See id. While these adjustments reduced G's exposure to RF from the School's Wi-Fi, Plaintiffs claimed that G's symptoms continued (which, by 2015, consisted mainly of headaches). See id. at ¶¶ 145-146. At the Parents' request, the School even allowed G to take a leave of absence, despite Dr. Lebel's medical opinion that G should attend School regularly. See id. at ¶¶ 147, 149-151. Despite all

of the School's efforts to appease Plaintiffs, Plaintiffs still demanded that the School continue to make additional changes until G's headaches stopped. See id. at ¶ 155. As additional steps, Plaintiffs demanded that the School either remove the Wi-Fi from all of G's classrooms and instead provide wired connections to all students in those classrooms, or provide G with a Wi-Fi-free classroom and have all of his teachers and the students in his classes come to that Wi-Fi-free classroom. See id. As these requests would have greatly affected many of the teachers and other students at the School and would have fundamentally altered the nature of the School's educational services, activities, environment, and facilities, the School declined Plaintiffs' unreasonable requests. See id. at ¶¶ 156-157. As a result, the Parents withdrew G from the School in January 2016, and enrolled him at the Waldorf School of Lexington ("Waldorf"), which, unlike the School (which has a computer and technology based curriculum), does not use any computers in its classrooms and utilizes a computer-free curriculum. See id. at ¶¶ 160-163.

H. Plaintiffs' Claims To Obtain Accommodations That Would Require The School To Comply With RF Exposure Levels Below FCC Safety Limit

In their Complaint, Plaintiffs have alleged five (5) claims, all of which seek an injunction and/or damages as a result of the School's alleged failure to provide G with the additional accommodations requested by Plaintiffs – accommodations which, if granted, would require the School to comply with RF exposure levels that are far below the FCC Safety Limit. Most notably, in their ADA claim (Count I), Plaintiffs request that the School lower or eliminate G's exposure to RF by attempting various "alternatives" as accommodations to G, all of which would require the School to comply with RF levels below the FCC Safety Limit. See id. at ¶¶ 164-165.

Plaintiffs' retaliation claim (Count II) seeks damages for a number of the School's alleged actions, including the School's alleged failure to provide Plaintiffs with the

accommodations they have requested in their ADA claim.[4] See id. at ¶ 166. Likewise, Plaintiffs' breach of contract claim (Count III), although pled as a breach of the Handbook, relies upon Handbook provisions that relate to the School's alleged promises to provide reasonable accommodations to disabled students. See id. at ¶¶ 167-168. Similarly, Plaintiffs' misrepresentation claim (Count IV), relies upon the same Handbook statements that form the basis of Plaintiffs' breach of contract claim, which Plaintiffs assert "are false representation[s] because despite all those statements and promises, Fay has acted in complete disregard of them and indeed completely contrary to the way it represented that it would act." See id. at ¶ 169.

Finally, Plaintiffs' negligence claim (Count V) seeks damages as a result of the School's alleged failure to "exercise ordinary care for G's safety" by failing to make "any accommodation to G's EHS…." See id. at ¶ 170. Thus, the allegations in all five (5) of Plaintiffs' claims are based on the School's alleged failure to provide the accommodations listed in Plaintiffs' ADA claim – accommodations which would require the School to comply with RF exposure levels that are far below the FCC Safety Limit.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" when the evidence is such that a reasonable fact finder could resolve the point in favor of the non-moving party, and a fact is "material" when it might affect the outcome of the suit under applicable law. Morris v. Gov't Dev. Bank of P.R., 27 F.3d 746, 748 (1st Cir. 1994). The Court must construe the facts in the light most favorable to the non-moving party. Benoit v. Technical Mfg. Corp., 331 F.3d 166, 173 (1st Cir. 2003).

[4] Plaintiffs' retaliation claim is also based on additional allegations listed in the SOF at ¶ 161. As detailed in Section II(E) of this Memorandum, however, none of these allegations are sufficient to withstand summary judgment.

III. ARGUMENT

A. All Of Plaintiffs' Claims Fail For Lack Of Jurisdiction Because They Are Preempted By The Exclusive Jurisdiction Of The FCC

Although presented as disability and accommodation claims, Plaintiffs' claims are inextricably intertwined with the FCC's regulations because the relief Plaintiffs seek would force the School to adhere to standards well below those deemed safe by the FCC. See SOF at ¶¶ 164-170. Accordingly, Plaintiffs' claims constitute an attack against guidelines promulgated by the FCC to establish a cohesive national regulatory scheme governing wireless telecommunications, and, therefore, the Court lacks jurisdiction to adjudicate Plaintiffs' claims. In addition, even if the Court has jurisdiction, the Court should decline to exercise that jurisdiction because Congress granted exclusive authority to the FCC to determine safe RF emission levels.

1. Background Of The FCC Guidelines

a. The FCC has the exclusive authority to create safety limits for RF exposure.

Congress gave the FCC the responsibility for "fostering the development of an efficient wireless network…." Farina v. Nokia Inc., 625 F.3d 97, 105 (3d Cir. 2010) (citing 47 U.S.C. § 151), cert. denied, 132 S.Ct. 365 (2011). Specifically, in 1996, Congress passed the Telecommunications Act of 1996 ("TCA"), and directed the FCC to "complete action . . . to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." Telecomms. Act of 1996, Pub.L. No. 104–104, § 704(b), 110 Stat. 56 (1996). In doing so, Congress gave the FCC exclusive jurisdiction to place restrictions on wireless networks based on the environmental effects of RF radiation. See Cellular Phone Taskforce v. F.C.C., 205 F.3d 82, 96 (2d Cir. 2000); Farina, 625 F.3d at 106.

In enacting the TCA, Congress noted that a "high quality national wireless telecommunications network cannot exist if each of its component[s] must meet different RF

standards in each community." H.R. REP. NO. 104-204(I), at 95 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61-62. Congress contemplated that the FCC's RF standards would "contain **adequate, appropriate and necessary levels of protection** to the public." Id. (emphasis added). As a result, after consulting with various other government agencies, and gathering scientific and technical information from these agencies, the FCC established limits for the safe level of human exposure to RF signals.[5] See In the Matter of Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation, 11 F.C.C. Rcd. 15123, 15134-35, 15146-47 (1996) ("In re Guidelines"); In the Matter of Procedures for Reviewing Requests for Relief from State & Local Regulations Pursuant to Section 332(*C*)(7)(*B*)(*V*) of the Commc'ns Act of 1934, 12 F.C.C. Rcd. 13494, 13496-97 (1997) ("In re Procedures"). Specifically, the FCC adopted safety limits based on standards and recommendations from the American National Standards Institute ("ANSI"), the Institute of Electrical and Electronics Engineers ("IEEE"), and the National Council on Radiation Protection and Measurements ("NCRP"). See Farina, 625 F.3d at 107; 47 C.F.R. § 2.1093(d). In doing so, the FCC adopted a safety limit of 10,000 mW/m^2 for Wi-Fi at frequency bands of 2.45 GHz and 5.0 GHz. See 47 C.F.R. § 1.1310, at Table 1. It is significant that the School's Wi-Fi operates entirely within these bands.

In promulgating the guidelines, the FCC noted that research was ongoing, and that it would continue to monitor the state of the science to "ensure that our guidelines continue to be appropriate and scientifically valid." See Farina, 625 F.3d at 107 (quoting In re Guidelines, at 15125). Since then, the FCC has done exactly that, reaffirming its guidelines after it was petitioned to "reconsider the RF exposure limits originally adopted." In re Procedures, at 13497. While the petitioners in that matter claimed the FCC standards failed to offer sufficient

[5] FCC Bulletin 65, "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields," Washington DC 1997, available at https://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet65/oet65b.pdf.

protections, the FCC responded by reiterating that its guidelines "provide a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." Id. at 13496. The FCC "recognize[d] that ongoing research in a number of areas may ultimately result in changes in the fundamental understandings upon which [the ANSI/IEEE and NCRP standards] are based." Id. at 13506. The FCC further explained that it gives "great weight to the judgment of . . . expert organizations and federal agencies" who are responsible for health and safety, particularly with respect to issues such as the "non-thermal effects and whether certain individuals might be 'hypersensitive' or 'electrosensitive.'" Id. at 13505. It concluded: "We will, of course, consider amending our rules at any appropriate time if these groups conclude that such action is desirable." Id. at 13506. Since then, the FCC and these expert organizations have not found it appropriate to conclude that an amendment to the FCC's guidelines is warranted.

b. Courts have consistently denied challenges to the FCC's safety limits.

Despite this regulatory scheme – and similar to Plaintiffs' efforts in this case – the FCC safety limits have been challenged through judicial proceedings, which have consistently ruled that such challenges are improperly before the court and instead rest within the exclusive jurisdiction of the FCC. See Cellular Phone Task Force, 205 F.3d at 88-91 ("The argument that the FCC should create greater safety margins in its guidelines to account for uncertain data is a policy question, not a legal one."); EMR Network v. F.C.C., 391 F.3d 269, 269 (D.C. Cir. 2004), cert. denied, 545 U.S. 1116 (2005). For example, in Cellular Phone Task Force, a plaintiffs' group brought claims directly against the FCC, alleging that its guidelines failed to account for so called "non-thermal" effects of RF radiation. 205 F.3d at 90. Despite this claim, the court

upheld the guidelines on the grounds that the ANSI and NCRP (upon which the FCC had based its guidelines), *did* consider nonthermal effects of RF, and ANSI found that "no reliable scientific data exist indicating that Nonthermal . . . exposure may be meaningfully related to human health." Id.; see also In re Procedures, at 13505.[6] Similarly, the FCC's guidelines again withstood attack when a plaintiff alleged that the FCC violated the National Environmental Policy Act, which requires agencies to consider the environmental impact of their regulatory decisions. EMR Network, 391 F.3d at 269. In upholding the FCC guidelines, the court in EMR Network noted that the FCC's "determination to keep an eye on developments in other expert agencies suggests that . . . the Commission has an adequate mechanism in place for accommodating changes in scientific knowledge." Id. at 273 (quoting Cellular Phone Task Force, 205 F. 3d at 91).

2. Plaintiffs' Claims Are A Collateral Attack On The FCC Guidelines Over Which This Court Does Not Have Jurisdiction

Although Plaintiffs' claims do not directly challenge the FCC's safety standards (*i.e.*, asking the Court to order the FCC to lower its threshold for safe RF exposure), the crux of Plaintiffs' allegations is that the FCC guidelines themselves are at unsafe levels and, therefore, the School should be required to alter its Wi-Fi to comply with RF guidelines below those of the FCC. See SOF at ¶¶ 164-170. Courts have ruled that such claims are improper as they "are a collateral attack on the FCC regulations themselves." See Bennett v. T-Mobile USA, Inc., 597 F. Supp. 2d 1050, 1053 (C.D. Cal. 2008) (dismissing claims against manufacturers who were complying with FCC's RF guidelines because claims were "a collateral attack on the FCC regulations themselves."). Such challenges are essentially equivalent to an action to enjoin, annul, or set aside an order of the FCC, which must follow a statutory and regulatory process

[6] This holding in the Cellular Phone Task Force matter directly contradicts the argument of Plaintiffs and their experts, who claim the FCC failed to consider nonthermal effects in issuing the FCC guidelines.

with an appeal directly to the Courts of Appeal – and not be resolved via judicial intervention by a District Court. See U.S. v. Dunifer, 219 F.3d 1004, 1007 (9th Cir. 2000) (holding Courts of Appeal, and not district courts, have exclusive jurisdiction over challenges to agency orders); see also 28 U.S.C. § 2342; 47 U.S.C. § 402(a).

Recently, in a case analogous to the instant one, a federal court in Oregon granted summary judgment for a school when a parent claimed a violation of constitutional rights because the Wi-Fi at that school was allegedly causing the parent's son (along with other students and teachers) harm. See AHM v. Portland Public Schools, No. 11-cv-00739-MO, *Transcript of Proceedings* (D. Ore. July 20, 2012) (attached hereto as Exhibit A). Although the plaintiffs in AHM were not directly challenging the FCC guidelines, the Court noted that the plaintiffs' efforts to have the Wi-Fi removed from the school district was an "indirect[ ]" challenge to the FCC guidelines. See id. at 19-22. The Court explained how the cases resolving collateral attacks should be applied to claims challenging a school's use of Wi-Fi:

> There is a body of cases that concerns me that suggests that even if a litigant isn't directly challenging the rule but challenging one of the direct consequences of the rule -- so, here, for example, it would be that the schools utilize or rely on the FCC's rule-making about safe levels to decide what's safe at school. You're challenging the school's decision, but the school's decision is arguably a consequence of the FCC's decision; that is, for me to determine or a jury to determine, for example, that the school is providing an environment that's unsafe, the fact-finder would have to necessarily be deciding that the FCC's decision about what's safe or not is wrong.

See id. at 14-15. The Court concluded that because the "very core" of any trial of the dispute would be about "whether the FCC is right about the decision it's made regarding safe levels," jurisdiction lies "first to the FCC and then exclusively, after that, to the Court of Appeals." Id. at 19-22. As a result, the court granted summary judgment for the school. Id.

The same reasoning applies in the instant case. Here, there is no dispute that the School's

Wi-Fi is FCC compliant. See SOF at ¶¶ 75-80. By their claims, however, Plaintiffs seek to "indirectly" attack the FCC guidelines by seeking an order forcing the School to alter or remove its Wi-Fi in such a manner that would require the School to comply with RF standards well below those of the FCC. See SOF at ¶¶ 164-170. Judicial review is not the appropriate avenue to seek such relief. See Firstenberg v. Monribot, 2015-NMCA-062, 350 P.3d 1205, 1216, cert. denied, 2015-NMCERT-006, 367 P.3d 850 (dismissing claims based on alleged injury caused by RF emissions from cell phones as claims preempted because claims would require jury to find "that FCC's regulations are inadequate to ensure the safe use of cell phones"); Farina, 625 F.3d at 133-134 (dismissing plaintiff's cell phone product liability claim where underlying product complied with FCC's regulation of RF emissions); Murray v. Motorola, Inc., 982 A.2d 764, 778-79 (D.C. 2009) (holding state law claims based on non-thermal emissions were preempted by federal law because FCC has authority to regulate such emissions); Dunifer, 219 F.3d at 1007 (finding district court lacked jurisdiction to adjudicate defendant's affirmative defenses which in essence challenged FCC rules); Stanley v. Amalithone Realty, Inc., 940 N.Y.S.2d 65, 70 (N.Y. App. Div. 2012) (holding plaintiffs' claims preempted even though plaintiffs claimed they were not asking court to regulate RF emissions because "all of plaintiffs' claims are premised on the notion that the RF emissions emanating from … [defendant's property] are unsafe or dangerous."). Instead, as clearly articulated by several courts, Plaintiffs' proper remedy in this case is to petition the FCC directly for a change in its guidelines, which is specifically authorized pursuant to 47 C.F.R. § 1.1. ("The Commission may on . . . petition of any interested party hold such proceedings as it may deem necessary . . . for the purpose of obtaining information necessary or helpful in . . . the formulation or amendment of its rules and regulations."). Indeed, the FCC has specifically stated that if a petitioner were "to demonstrate reliable pertinent

information developed by an. . . expert source, [the FCC] would have a basis for opening a rulemaking or fact-finding proceeding." In the Matter of EMR Network Petition for Inquiry to Consider Amendment of Parts 1 and 2 Regarding Envtl. Effects of Radiofrequency Radiation, 18 F.C.C Rcd. 16822, 16826 (2003).

3. Plaintiffs' ADA Claim Is Specifically Preempted By The TCA

"Congress is presumed to enact legislation with knowledge of the law and a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts." Farina, 625 F.3d at 112 (quoting Prime Care of Ne. Kan., LLC v. Humana Ins. Co., 447 F.3d 1284, 1287 (10th Cir. 2006)). The TCA was passed six years after Congress enacted the ADA in 1990. It is presumed, therefore, that Congress was aware of, and took into account, this prior legislation when mandating that the FCC promulgate safety standards governing RF emissions. See Firstenberg v. City of Santa Fe, N.M., 782 F. Supp. 2d 1262, 1271-3 (D.N.M. 2011), ("[T]he broad language of the ADA prohibiting discrimination against the disabled cannot override the specific terms of the TCA with regard to regulating RFEs."), rev'd on other grounds 696 F.3d 1018 (10th Cir. 2012). In fact, under the TCA, Congress specifically accounted for disability claims arising under the ADA, and granted jurisdiction over such claims exclusively to the FCC. See 47 U.S.C. § 255(f) ("Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The [FCC] shall have exclusive jurisdiction with respect to any complaint under this section.").

In the instant matter, there is no dispute that the School's Wi-Fi equipment is in full compliance with the applicable FCC Safety Limit. See SOF at ¶¶ 75-80. Plaintiffs' ADA and common law claims arise solely by virtue of their contention that the existing FCC Safety Limit is inadequate to protect G. See id. at ¶¶ 164-170. Although the School is not the "provider" of

telecommunication services, the gravamen of their Complaint is that G's use of, and access to, the School's Wi-Fi is impaired by his alleged disability. Congress clearly contemplated such a scenario when it gave exclusive jurisdiction to the FCC to resolve such complaints. See 47 U.S.C. § 255(f); see also Coal. of Institutionalized Aged and Disabled v. Verizon Commc'ns, Inc., No. 06-cv1706, 2009 WL 928101, at *5 (S.D.N.Y. March 31, 2009) (dismissing disability claims under federal Rehabilitation Act and New York City Human Rights Law because they implicate FCC's exclusive jurisdiction under § 255(f) of TCA).

B. All Of Plaintiffs' Claims Fail Under The Doctrine Of Primary Jurisdiction

The doctrine of primary jurisdiction "informed by principles of deference to agency decision making, gives effect to the eminently sensible notion that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." Comm. of Mass. v. Blackstone Valley Electric. Co., 67 F.3d 981, 991-93 (1st Cir. 1995) (quoting U.S. v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956)). The three factors that guide the decision of whether to defer to an agency are whether: (1) the agency's determination lies at the heart of the task assigned to the agency by Congress; (2) the agency's expertise is required to unravel intricate, technical facts; and (3) the agency's determination would materially aid the court. Blackstone Valley, 67 F.3d at 992. The instant matter satisfies all three of the required factors: this Court must defer to the FCC.

First, Plaintiffs' entitlement to any relief clearly turns on whether the FCC's guidelines are sufficient to protect G, especially given that the remedy which Plaintiffs seek is for the School to alter its Wi-Fi system in a way that will require the School to comply with RF standards far below the FCC Safety Limit. See SOF at ¶¶ 164-170. Such a determination is specifically (and exclusively) within the scope of the FCC's delegated authority. Cellular Phone

Taskforce, 205 F.3d at 96. Second, the FCC's expertise in this area is required to "sift through and properly weigh all of the arguments for and against" the safety levels established by the FCC. Blackstone Valley, 67 F.3d at 992. The FCC is best equipped to collect and assess the current and developing research in this area, gather input from other expert agencies, and set generally applicable standards to advance a comprehensive and uniform national telecommunications scheme. Indeed, it is their congressional mandate. See TCA, Pub. L. No. 104-104, § 704(b), 110 Stat. 56, 152 (1996). Third, the FCC's determination of this issue would indisputably aid the Court in assessing the School's liability in this issue. If the FCC continues to maintain (as it has repeatedly done up to this point) that RF emissions from devices operating within the current FCC Safety Limit do not pose a health risk to individuals, then Plaintiffs cannot demonstrate a causal nexus in support of their claims. For these reasons, the Court should recognize the primary jurisdiction of the FCC and dismiss this case. See AHM v. Portland Public Schools, *Transcript of Proceedings* at 20-21 (attached as Exhibit A) (granting summary judgment for school on claims regarding dangers of RF from Wi-Fi on both exclusive and primary jurisdiction grounds as "the core purpose of FCC rule-making is to give the chance to pass on the validity of its own decisions to ensure review by the agency charged with it and an agency that has certainly far more expertise than this Court does on this question.")

C. All Of Plaintiffs' Claims Fail Because Plaintiffs Cannot Prove The School's Wi-Fi Is The Cause Of G's Alleged Disability

Plaintiffs have failed to demonstrate any credible causal link between G's alleged disability and the School's Wi-Fi. Each of Plaintiffs' claims is premised on the same underlying "failure to accommodate" allegation – that the School should be liable because it failed to provide G with a reasonable accommodation, namely the altering or removal of the School's Wi-Fi system. See SOF at ¶¶ 164-170. But Plaintiffs' allegations put the cart before the horse.

Granting Plaintiffs the requested accommodation (*i.e.*, removal or disabling the School's Wi-Fi), and damages for failure to provide that accommodation, may only be contemplated if there is a nexus between the requested accommodation and the disability. In other words, before the School has a legal obligation to remove the Wi-Fi in order to alleviate G's symptoms, Plaintiffs must demonstrate that the Wi-Fi is the *cause* of G's symptoms. To establish this nexus, Plaintiffs must establish both (a) general causation – that it is possible for low-level RF (such as that associated with the School's Wi-Fi) to cause physical symptoms (such as headaches, tinnitus, chest congestion, nausea, etc.); and (b) specific causation – that it is the School's Wi-Fi causing G harm. See Firstenberg, 350 P.3d at 1212 (stating "where the plaintiff seeks to establish injury as a result of exposure to a harmful substance, including radiation, the plaintiff is required to prove both general and specific causation.").

In the instant case, Plaintiffs cannot prove causation as there is absolutely no scientific evidence to support a finding that exposure to low-level RF emissions, such as those from the School's Wi-Fi, can cause physical symptoms in humans, or that the School's Wi-Fi (as opposed to something else) is the cause of G's symptoms. As more fully briefed in Defendants' Motion to Exclude Plaintiffs' Expert Witnesses (see ECF Nos. 58, 59), Plaintiffs have failed to prove causation through accepted scientific principles or opinions. Instead, all of Plaintiffs' experts offer fringe views that are directly at odds with the accepted scientific consensus, are based on inaccurate and unreliable facts and data, unreliable methodologies, and/or are well outside of the experts' field of expertise. See id. Even more alarming, none of Plaintiffs' experts will offer reliable proof that G's exposure to low-level RF from the School's Wi-Fi has caused G to suffer from any physical symptoms or that the School failed to provide a reasonable accommodation to G. See id. As such, Plaintiffs cannot demonstrate a causal link between G's physical symptoms

and the School's Wi-Fi. See id. Absent this essential causation evidence, Plaintiffs' request that the School further modify or disable its Wi-Fi as an accommodation to G is patently unreasonable, and Plaintiffs' claims must be dismissed. See Firstenberg, 350 P.3d at 1212-15 (affirming summary judgment given the lack of evidence that RF causes EHS); Wroncy v. Or. Dep't of Transp., 94 F. App'x 559, 560 (9th Cir. 2004) (affirming entry of summary judgment for defendant on ADA claim based on alleged disability of chemical sensitivities given the plaintiff's inability to prove defendant's herbicides along highway caused plaintiff's disability); Litowsky v. Asco Power Techs., L.P., 4 F. Supp. 3d 328, 329 (D. Mass. 2014) (finding negligence claim failed given that plaintiff "has no reasonable expectation of proving that [his injury] was a foreseeable result of the defendant's negligent conduct") (quoting Hebert v. Enos, 60 Mass. App. Ct. 817, 820-821 (2004)).

D. All Of Plaintiffs' Claims Fail Because The School Provided Reasonable Accommodations To G And Plaintiffs' Additional Demands Are Unreasonable

Each of Plaintiffs' claims is predicated on the same grievance, that is, that the School failed to provide G with a reasonable accommodation. Plaintiffs' requested accommodation (that the School completely remove or disable its Wi-Fi), however, is not reasonable. First, the School actually provided many accommodations to G that greatly reduced his RF exposure. Second, the ultimate accommodation that Plaintiffs requested would severely and fundamentally alter the manner in which classes are taught at the School. The School implements a technology-forward curriculum and heavily relies on students' ability to have access to the internet during class. Restricting this access would require curriculum changes that would alter the nature of the educational programs and environment at the School, which is patently unreasonable. Third, there is no evidence that Plaintiffs' requested accommodations would actually alleviate G's symptoms. Accordingly, summary judgment must enter in favor of Defendants.

1. The School Provided G With Reasonable Accommodations

Plaintiffs' claims fail because G was, in fact, provided with reasonable accommodations that significantly reduced his RF exposure. The ADA only requires that a *reasonable* accommodation be provided, not necessarily the specific accommodation sought by the plaintiff. See Quintiliani v. Mass. Bay Transp. Auth., No. 98-11085-RGS, 2000 WL 1801841, at *6 (D. Mass. Nov. 29, 2000) (finding defendants are not required "to choose the best accommodation available or the accommodation that the [plaintiff] prefers . . . ") (citing 29 C.F.R. § 1630.9 (1991)); see also Bryant v. Caritas Norwood Hosp., 345 F. Supp. 2d 155, 169 (D. Mass. 2004) (holding ADA requires only that defendants offer reasonable accommodations, not necessarily accommodation sought).

In this matter, there is no dispute that the School made significant modifications to its classrooms to accommodate Plaintiffs' requests. In the fall of 2015, the School allowed Plaintiffs and their representatives to conduct at least four walk-throughs of the School and take RF measurements in the classrooms, all while the School was making various adjustments to nine of G's classrooms, including adding equipment in those classrooms that would allow G to access the internet through a hardwired connection. See SOF at ¶¶ 132-145. The School moved students away from G in order to reduce his exposure to RF emissions from devices being used by other students, such as laptops and tablets. See id. Through these modifications, the School was successful in reducing G's exposure to RF emissions. See id. at ¶ 145. In addition, when these modifications were ultimately rejected by Plaintiffs (despite their reasonableness), the School allowed G to take a leave of absence from the School. See id. at ¶ 149. The Parents then met with administrators from the Southborough Public School, who offered the Parents the same adjustments to their school's Wi-Fi as the School did – allowing G to connect to the internet using a hard wire and placing a reasonable distance between him and wireless devices in each

classroom. See id. at ¶ 154. Given all these factors, it is evident that the School provided G with numerous reasonable accommodations and was not required to placate Plaintiffs' requests for more modifications when the accommodations offered were sufficient and reasonable. See Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 88 (D. Mass. 1997) (denying students' additional requests for accommodations after having been granted a reasonable accommodation); DMP v. Fay Sch. ex rel. Bd. of Trs., 933 F. Supp. 2d 214, 222 (D. Mass. 2013) (granting summary judgment for school on ADA claim where additional accommodation sought was not reasonable as it would have required the school "to compromise the integrity of the school's policies, values and/or academic requirements in order to 'accommodate' a student's disability"); Axelrod v. Phillips Acad., Andover, 46 F. Supp. 22, 72, 84-85 (D. Mass. 1999) (denying plaintiff's accommodation request because it was not reasonable).

2. Plaintiffs' Additional Requested Accommodations Are Not Reasonable Because They Would Fundamentally Alter The School's Educational Environment

In order to obtain a requested accommodation, a plaintiff must first establish that the accommodation is reasonable. See Guckenberger v. Boston Univ., 974 F. Supp. 106, 146 (D. Mass. 1997) (holding plaintiff bears burden of first demonstrating that accommodation was requested and reasonable). An accommodation is not reasonable if it requires a "fundamental alteration in the nature of the program." See Darian, 980 F. Supp. at 88 (denying students' request for accommodation because such accommodation would fundamentally alter the nature of the academic program); 42 U.S.C. § 12182(b)(2)(A)(ii); see also DMP, 933 F. Supp. 2d at 222; Axelrod, 46 F. Supp. at 22, 84.

In the instant matter, Plaintiffs' requests to alter and/or remove the School's Wi-Fi in G's classes would fundamentally (and detrimentally) alter how teachers at the School provide

instruction to their students, how students interact with technology in the educational setting, and the manner in which the School curriculum is delivered to all students at the School. The curriculum in many of the classes at G's grade level is highly computer- and technology-based. See SOF at ¶¶ 2-18. For example, academic teachers in grades five through nine utilize an online program known as Google Docs, which allows students to create and edit documents online while collaborating with teachers and other students in real time. See id. at ¶ 3. This program, along with most of the applications on many student laptops and the Chromebooks that the School provides as laptops for student use, are cloud-based programs, which require internet access. See id. at ¶¶ 3-4. The School provides this essential internet access through the use of its Wi-Fi. See id. at ¶¶ 6-12. While Plaintiffs' requested accommodations do not seek the removal of the internet, they do seek discontinuation of the School's Wi-Fi in G's classrooms and installation of wired internet connections instead. See id. at ¶¶ 164-165. Such alterations would eliminate the mobility and flexibility within the classrooms and throughout the School's campus that is provided by the Wi-Fi by eliminating the following benefits of the School's Wi-Fi (benefits that are not provided by wired connections):

- The Wi-Fi allows the School's teachers to easily move the students' desks in their classrooms to allow students to work in groups on various projects or to accommodate the needs of a particular day's lesson plan;
- The Wi-Fi allows students and teachers to move wherever needed within a classroom, or even outside of the classroom (like into the School's hallways or other parts of the School) depending on the particular lesson planned for the students;
- The Wi-Fi allows students to effortlessly organize themselves into groups for collaborative class projects, and reorganize themselves to collaborate with other students within the same class and with students while outside of the classroom;
- The portability offered by the School's Wi-Fi enhances collaboration between students and communication between students and teachers; and

- The School's Wi-Fi allows instructional aids, such as projectors, video displays, Apple TV, tablets, and laptops to seamlessly interact with one another.

See id. at ¶¶ 13-18.

In addition, Plaintiffs' modifications would cause the following negative impacts on the School's teachers and students, all of which Plaintiffs never addressed in demanding removal of the Wi-Fi:

- Many students' laptops do not come standard with data jacks and would require an adapter to make the connection to the wired network;
- The logistical difficulties involved in teachers ensuring that all 15-18 students in each of G's classes connect to the internet using wires, as opposed to the School's wireless Wi-Fi, and each teacher would have to spend significant time at the beginning of every class (or multiple times in one class depending on the lesson plan) ensuring that all 15-18 students in each class (1) turn the Wi-Fi adapters off on their laptops (and keep them off), (2) activate the wired adapters for each laptop, (3) connect properly to the wired connections, and (4) ensure the cables remain positioned in such a way as to avoid tripping or computer-pulling hazards;
- The invasiveness of Plaintiffs' proposed tele-poles in the School's classrooms, as those poles would decrease the size of the usable space in the classrooms, restrict the desks to fixed positions, and obstruct the line of sight for students and instructors; and
- The injury hazard posed by the presence of the proposed multiple (up to 18) internet cables in G's classrooms to provide internet to 15-18 students in each class.

See id. at ¶ 157.

Moreover, even if G's classes were wired, the School cannot "shut off" its Wi-Fi in any particular classroom without affecting the internet access in six to eight other classrooms as well. See id. at ¶ 12. Thus, there is no way for the School to eliminate G's exposure to RF from the Wi-Fi without removing the Wi-Fi in the School entirely. Such removal would fundamentally alter the way in which the teachers instruct their classes and use the School's technology. Plaintiffs' requests are not reasonable, and their claims should be dismissed. See Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 152-53 (1st Cir. 1998) (finding requested accommodation was

not reasonable where it would alter fundamental requirement of school's academic program); Zukle v. Regents of Univ. of Cal., 166 F.3d 1041, 1050 (9th Cir. 1999) (affirming summary judgment on ADA claim for defendant university as student's requests for accommodation were not reasonable because they would require substantial modification of school's program).

3. Plaintiffs' Additional Requested Accommodations Are Not Reasonable Because Plaintiffs Cannot Establish They Would Be Effective

In determining whether an accommodation is reasonable, courts look to the "effectiveness" of the proposed accommodation. See Ass'n for Disabled Ams., Inc. v. Concorde Gaming Corp., 158 F. Supp. 2d 1353, 1362 (S.D. Fla. 2001) (stating determination of whether "modification is 'reasonable' involves a fact specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question…." (quoting Staron v. McDonald's Corp., 51 F.3d 353, 356 (2d Cir.1995)).

In this matter, Plaintiffs have not shown, and cannot show, that their proposed accommodations are effective to resolve G's symptoms. First, while the modifications that the School made in the fall of 2015 did reduce G's exposure to RF emissions from the Wi-Fi, Plaintiffs claim G's symptoms continued. See SOF at ¶¶ 145-146. There is no indication that further changes would have any different effect on G. Second, Plaintiffs list six (6) different "alternatives" in their Complaint as suggested modifications which Plaintiffs assert that the School should try to see if any are effective for G. See id. at ¶ 165. Thus, based on their own allegations, it is clear that Plaintiffs do not even know which, if any, of their "alternatives" might be effective. As a result, Plaintiffs' claims fail as Plaintiffs are unable to demonstrate that their requested modifications would actually benefit G. See Ass'n for Disabled Ams., Inc., 158 F. Supp. 2d at 1364 (finding plaintiffs' proposal for modifying gangway on cruise ship would not afford sought after relief because plaintiffs cannot control for the slope due to fluctuating tidal

conditions); see also Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 90-91 (1st Cir. 2012) (finding defendant was not required to grant additional accommodations absent any evidence that requested accommodation was likely to succeed); Evans v. Fed. Express Corp., 133 F.3d 137, 140 (1st Cir. 1998) (holding defendant's denial of leave of absence for substance abuse rehabilitation was not unlawful, because plaintiff had already been given one leave for same reason, and one factor in considering the reasonableness of accommodation is "likelihood of success"); Halpern v. Wake Forest Univ. Health Scis., 669 F.3d 454, 465-66 (4th Cir. 2012) (holding indefinite duration and uncertain likelihood of success of plaintiff's proposed accommodation rendered it unreasonable); Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 205 (6th Cir. 2010) (Cole, J., concurring) (affirming summary judgment because "the proposed accommodations' likelihood of success is too attenuated").

E. Plaintiffs' Retaliation Claim (Count II) Fails Because Plaintiffs' Conduct Was Not In Good Faith, Defendants' Actions Were Taken For Legitimate, Non-Discriminatory Reasons, And There Is No Evidence Of Pretext

Retaliation claims under Title III of the ADA are evaluated under the familiar burden-shifting analysis of McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Mershon v. St. Louis Univ., 442 F.3d 1069, 1074 (8th Cir. 2006). To establish a *prima facie* claim of retaliation, Plaintiffs must demonstrate that: (1) they engaged in a statutorily-protected activity; (2) an adverse action was taken against them; and (3) there is a causal connection between the adverse action and the protected activity. Id. If Plaintiffs establish their *prima facie* claim (which, in the instant matter, they cannot), the burden shifts to Defendants to demonstrate a legitimate, non-discriminatory reason for their actions. Id. If Defendants establish a legitimate, non-discriminatory reason, the burden shifts back to Plaintiffs to demonstrate that the stated reason was a pretext for discrimination. Id. Plaintiffs cannot meet their burden in this shifting

analysis.

In the instant matter, Plaintiffs allege that the School took several actions (in addition to allegedly failing to provide the requested accommodation, which is addressed above) which, they assert, were retaliatory:

- Asking the Parents to refrain from speaking to certain School personnel concerning G's purported condition;
- Insisting that G be seen by two independent medical doctors (as part of the two-part IME) to establish an EHS diagnosis before allowing Plaintiffs to walk through the School to assess modifications to the School's Wi-Fi network;
- Requesting G not bring a dosimeter to School;
- Requiring G to maintain his academic progress while out on leave, through the use of a tutor; and
- Denying G's request to "listen in" to classes in real time or tape record classes while out on leave.

See SOF at ¶ 166.

There is no factual foundation to support a finding of retaliation. First, Plaintiffs did not have a good faith basis for seeking the requested accommodations. Prior to receiving the diagnosis from Dr. Hubbuch, Plaintiffs had visited two other doctors who questioned whether the School's Wi-Fi was the cause of G's symptoms. See id. at ¶¶ 40, 87. Thereafter, four more doctors who examined G declined to make a diagnosis of EHS. See id. at ¶¶ 90, 111, 116-119. Forum shopping for a medical opinion is not good faith. Second, the School had legitimate, non-discriminatory reasons for taking the actions that it did. The School was well within its rights to seek appropriate medical information demonstrating G's need for an accommodation, particularly in light of the fact that Dr. Hubbuch (the only doctor who provided an EHS diagnosis prior to this litigation) conceded that her diagnosis was "preliminary" in nature, and she required further examination to confirm. See id. at ¶¶ 48, 50. Finally, there is absolutely no

evidence of pretext. To the contrary, despite Plaintiffs' continued failure to provide appropriate medical information, Defendants took many steps to modify the School's classrooms to allow G to attend in an environment with greatly reduced RF exposure. See id. at ¶¶ 128-145. Accordingly, Plaintiffs' retaliation claim fails.

1. Plaintiffs' Continued Modification Requests Are Not Statutorily Protected Activity Because They Were Not Made in Good Faith

In order to sustain a retaliation claim under the ADA, Plaintiffs must show that they had a reasonable, good faith belief that they were entitled to request the accommodation they did. See Rumanek v. Indep. School Mgmt., Inc., 50 F. Supp. 3d 571, 584-85 (D. Del. 2014). In the instant matter, Plaintiffs cannot maintain the illusion that they had a good faith basis for seeking an accommodation for G. The undisputed facts clearly demonstrate that Plaintiffs are using this case as part of a general crusade to ban Wi-Fi from schools. See SOF at ¶¶ 25, 36, 54-61. There is no dispute that Plaintiffs raised the specter of Wi-Fi danger *months* before they ever informed the School that G was suffering from alleged Wi-Fi related physical symptoms. See id. at ¶¶ 21, 24-36. Further, Mother engaged in a "PSA Campaign" to raise awareness of this issue well before G ever experienced symptoms. See id. at ¶¶ 25, 36.

The facts also establish that the Parents went "doctor shopping" to find a medical professional who would support their requested diagnosis of EHS. After G's primary care physician declined to provide a diagnosis of EHS, Plaintiffs found a doctor (Dr. Hubbuch) who was willing to make a preliminary diagnosis and suggest the School make an accommodation for G without ever meeting or evaluating G. See id. at ¶¶ 37-50. Thereafter, the Parents continued to tout Dr. Hubbuch's opinion despite the fact that six other medical professionals would not provide an EHS diagnosis for G. See id. at ¶¶ 40, 87, 90, 111, 116-119. Mother's refusal to allow any medical professionals to thoroughly examine G, coupled with her request to G's

doctor to amend his medical charts to remove any skepticism about EHS, was in bad faith. See id. at ¶¶ 39, 46-47, 50, 86, 91-92, 95, 100, 110. Significantly, many of these actions were taken *before* Plaintiffs ever sought any accommodation from the School. See id. at ¶¶ 39, 46-47, 50. Given this bad faith, Plaintiffs' attempts to force the School to acquiesce to their demands are not statutorily protected activities and cannot support a claim for retaliation. See Rumanek, 50 F. Supp. 3d at 585 (dismissing retaliation claim because plaintiff lacked good faith basis for requesting accommodation).

2. The School Had Legitimate, Non-Discriminatory Reasons For Its Actions

The undisputed facts clearly illustrate that the School had legitimate, non-discriminatory reasons for its actions. First, the Parents were never restricted from speaking with appropriate School officials who were informed and knowledgeable about G's circumstances. See SOF at ¶ 33. The Parents' overreaching and misrepresentation of the situation was disruptive to the School environment, and the School took reasonable and appropriate steps to request that Plaintiffs restrict their conversations and inquiries to appropriate School officials; that is, those who had the most knowledge about the topic as they had attended the first meeting with the Parents. See id. at ¶ 33, 61. After Plaintiffs engaged legal counsel (in November 2014) and with the threat of an impending lawsuit, it was absolutely appropriate for the School to further restrict its communications with the family to the School's and Plaintiffs' chosen representatives. See id. at ¶ 68.

Second, the School was well within its rights to seek additional medical documentation regarding G's purported disability, including requesting that G submit to additional medical evaluations. "The ADA permits a [school] to require a student requesting a reasonable accommodation to provide current documentation from a qualified professional concerning his [ ] disability." Guckenberger v. Boston Univ., 974 F. Supp. 106, 135 (D. Mass. 1997) (citing

Halasz v. Univ. of New England, 816 F. Supp. 37, 46 (D. Me. 1993)). Indeed, directly contrary to Plaintiffs' own allegations, Dr. Hubbuch conceded that the diagnosis she provided to the School in August 2014 was a "preliminary diagnosis," and that she needed to do additional, follow-up medical testing in order to provide a final diagnosis. SOF at ¶ 48. Dr. Hubbuch did not provide a "final diagnosis" until she submitted an expert report in this matter on March 25, 2016. See id. As a result, even Dr. Hubbuch admitted that it was reasonable for the School to request additional medical documentation from Plaintiffs after receiving Dr. Hubbuch's "preliminary diagnosis." See id. It belies credulity for Plaintiffs to assert that the School's request for an additional medical evaluation was anything less than legitimate. If Plaintiffs' own doctor needed to perform additional testing, it is eminently reasonable for the School to request the same. Given the "preliminary" nature of Dr. Hubbuch's August 2014 letter to the School, which failed to offer sufficient information to allow the School to evaluate G's requested modifications, the School was well within its rights to seek additional medical information. See Goldstein v. Harvard Univ., 77 F. App'x 534, 537, n. 3 (1st Cir. 2003) (finding letter from student to University advisor referring to injury did not constitute a request for an accommodation because letter failed to indicate that injury would interfere with her academics); see also Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 675–76 (1st Cir. 1995) (allowing employer to ask for medical certification from treating psychiatrist); Farley v. Gibson Container, Inc., 891 F. Supp. 322, 326 (N.D. Miss. 1995) (finding "[e]mployers should not be expected to recognize a physical impairment solely on an employee's 'say-so'"); Kalekiristos v. CTF Hotel Mgmt. Corp., 958 F. Supp. 641, 657 (D.D.C. 1997) (holding individuals "alleging a disability protected by the ADA [have] a burden of establishing with medical evidence the existence of the alleged disability…").

Third, restricting a 12-year-old student from bringing an unknown electronic device (the dosimeter) to the School is perfectly appropriate. The School has a legitimate interest in maintaining an orderly classroom, and therefore, pursuant to the School's Handbook, students are not allowed to have or use electronic devices during classes. See SOF at ¶¶ 125-127. While the Parents were informed of this policy in at least three correspondences from the School, and were allowed by the School to perform a "walk-through" for the purpose of taking dosimeter readings themselves (that is, the Parents, instead of 12-year-old G), the Parents still repeatedly sent G to School with a hidden dosimeter in his pocket, without the School's permission. See id. Plaintiffs' actions violated School policy. The School taking steps to ensure G's compliance with School policy was reasonable. See Rodriguez-Fonseca v. Baxter Healthcare Corp. of P.R., 899 F. Supp. 2d 141, 154-55 (D.P.R. 2012) (finding defendant's disciplinary actions taken as a result of plaintiff's failure to comply with defendant's policies was legitimate, non-retaliatory reason for adverse action); Rivot-Sanchez v. Warner Chilcott Co., Inc., 707 F. Supp. 2d 234, 273-74 (D.P.R. 2010) (same).

Fourth, it is a foundational concept of disability law that students must be otherwise qualified to continue in the academic program within which they seek an accommodation. See DMP, 933 F. Supp. 2d. at 222. Requiring that G maintain his academic eligibility and keep up with the School's curriculum is a basic obligation for G. Plaintiffs' claim that the School somehow interfered with G's ability to maintain his academic progress is contradicted by the undisputed facts in the record. The School arranged to have G's advisor, Paul Abeln ("Mr. Abeln"), work with G's tutor in order to provide G with the required coursework. See SOF at ¶¶ 150-151. Mr. Abeln also made himself available to G's tutor and met with the tutor on December 7, 2015 to provide him with G's classwork. See id. at ¶¶ 151-152. After this single

meeting, G's tutor never again contacted Mr. Abeln. See id. at ¶ 152. Rather, G reached out directly to his teachers, who all responded. See id. at ¶ 153. It was not the School's responsibility to monitor G's tutor, and Plaintiffs cannot refute that the School took reasonable efforts to help G keep up with his studies.

Finally, Plaintiffs' request to allow G to tape record or Skype his classes was unreasonable. Such an accommodation would be tantamount to reducing G's education to a correspondence course with the School, which would fundamentally alter the manner in which the School provides instruction and is contrary to the School's practice of requiring in person attendance for all students. Plaintiffs did not submit any medical documentation indicating that tape-recorded classes or Skyping were necessary, and in fact, this request was contrary to the medical information that was provided to the School (from Dr. Lebel), which stated that G should "attend school regularly." See SOF at ¶ 117. The steps the School took to provide G with access to his coursework, Mr. Abeln's availability to G's tutor, and G's ability to correspond with his teachers, were more than adequate to allow G to keep up with his studies. Thus, Plaintiffs' denial of G's request to attend School remotely was legitimate and non-retaliatory. See E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 762-63 (6th Cir. 2015) (requiring in-person attendance is reasonable under ADA).

Accordingly, Defendants have established that they had legitimate, non-discriminatory reasons for every action they took, such that Plaintiffs' retaliation claim should be dismissed. See Mershon v. St. Louis Univ., 442 F.3d 1069, 1074-76 (8th Cir. 2006) (affirming summary judgment on ADA retaliation claim for defendant university which offered legitimate nondiscriminatory explanation for adverse action against student); Derrick F. v. Red Lion Area Sch. Dist., 586 F. Supp. 2d 282, 301-02 (M.D. Pa. 2008) (dismissing ADA retaliation claim

because school's actions with respect to providing assistance to deaf student were taken for legitimate, non-discriminatory reasons).

3. There Is No Evidence That The School's Actions Were A Pretext For Discrimination

There is no evidence that the School's actions were, in any way, a pretext for discrimination. In the context of an ADA retaliation claim, pretext "means something worse than business error. It means deceit – a lie – to cover one's tracks." Echevarria v. AstraZeneca, L.P., 133 F. Supp. 3d 372, 403 (D.P.R. 2015) (citing Ronda-Perez v. Banco Bilbao Argenteria-Puerto Rico, 404 F.3d 42, 45 (1st Cir. 2005)). Despite the utter lack of any evidence that G's symptoms were actually caused by the School's Wi-Fi, the School took numerous steps to work with Plaintiffs toward a solution. When Plaintiffs first approached the School with concerns about the Wi-Fi (before any mention of G's symptoms), the School considered Plaintiffs' concerns and concluded that the removal of the Wi-Fi from the School was not appropriate. See SOF at ¶¶ 29-30, 32. When Plaintiffs continued to pursue their mission, the School appropriately required Plaintiffs to obtain sufficient medical documentation for G's diagnosis to support an assessment of appropriate modifications. See id. at ¶¶ 52, 69-70. After two independent medical evaluations failed to find G was actually suffering from EHS, and at least one of those medical evaluators (Dr. Lebel) suggested that G would benefit from *remaining* in School, the School, despite no obligation to do so, took steps to devise and implement a multifaceted solution that would significantly reduce G's RF exposure, including installing Ethernet cords for G, rearranging classrooms, and moving classes to different classrooms. See id. at ¶¶ 128-145. Despite these extensive accommodations, Plaintiffs still complained. When a solution appeared untenable, the School, despite Dr. Lebel's letter that G should attend school regularly, granted Plaintiffs' request that G take a leave, and then afforded G the exact same

leave, under the exact same conditions, that it provides to other students. See id. at ¶¶ 146-154. At no time did the School treat G any differently than it treated any other student, and there is no evidence that the School's actions were, in any way, discriminatory or motivated by a discriminatory animus. Accordingly, summary judgment must enter in favor of Defendants on Count II of the Complaint. See Collazo-Rosado v. Univ. of P.R., 765 F.3d 86, 93-95 (1st Cir. 2014) (dismissing ADA retaliation claim because claimant failed to demonstrate that defendant's stated reasons were a pretext for discrimination).

F. Plaintiffs' Common Law Claims Fail For Additional Reasons

1. Plaintiffs' Claim For Breach Of Contract (Count III) Fails

a. Plaintiffs have failed to demonstrate a legal claim for breach of contract.

The provisions cited by Plaintiffs from the School's Handbook are not contractual in nature and cannot form the basis for a breach of contract claim. See Pacella v. Tufts Univ. Sch. Of Dental Med., 66 F. Supp. 2d 234, 241 (D. Mass. 1999). While, in certain circumstances, provisions of a school handbook can form the basis of a contract between a school and student, such provisions must be sufficiently "definite and certain," such that the parties' obligations are clearly understood. See Rinsky v. Trustees of Boston Univ., No. 10-cv-10779, 2010 WL 5437289, *11 (D. Mass. Dec. 27, 2010) (stating enforceable handbook promise must be "definite and certain so that the promisor should reasonably foresee that it will induce reliance") (quoting Guckenberger, 974 F. Supp. at 150). Significantly, general representations and aspirational language contained in a student handbook cannot form the basis of a breach of contract claim. See Shin v. Mass. Inst. Of Tech., No. 020403, 2005 WL 1869101, at *7 (Mass. Super. June 27, 2005) (finding "generalized representations" of MIT medical department about services available on campus were not sufficiently definite or certain to form an enforceable contract).

In the instant case, the Handbook provisions cited by Plaintiffs are nothing more than

aspirational provisions and are certainly not contractual in nature. The Handbook provisions cited by Plaintiffs are:

- The School keeps "as a 'core value . . . the wellness of mind, body and spirit of each student;'"
- The School "will provide each student with 'a safe and supportive environment that recognizes, respects and celebrates the full range of human diversity;'"
- The School "will help when students 'are in physical need;'"
- The School "will 'recognize and celebrate . . . disabilities;'"
- The School "affirms the necessity of respect for individual differences;"
- The School maintains an environment where "all community members feel supported;" and
- The School affords its students "all rights, privileges, programs and activities generally accorded or made available to students at Fay School. The School does not discriminate on the basis of such factors in the administration of its educational policies, employment policies . . . or other school administered policies."

See SOF at ¶ 168. Each of these provisions is nothing more than general, aspirational language, none of which is definite enough to form the basis of a breach of contract claim. See Morris v. Brandeis Univ., 60 Mass. App. Ct. 1119 *3, n. 6 (2004) (finding general, aspirational language in school handbooks, brochures or other promotional materials is not enforceable as a contract because it is not a definite or certain promise). In Morris - exactly like the Handbook provisions cited here - the Court held that the "generalized representations" to treat its students with "fairness and beneficence" were "too vague and indefinite to form an enforceable contract." Id.[7]

[7] In a prior case, this Court found Handbook provisions (different than those at issue in this case) were contractual in nature and therefore enforceable. See DMP, 933 F. Supp. 2d at 224. In DMP, however, the Handbook provisions at issue dealt with a very specific process for the discipline and ultimate expulsion of a student. Id. Those provisions set forth a process by which a student was subject to a progressive discipline procedure, and required certain conditions precedent to be met before subsequent action could be taken. Id. The Court found those provisions created clear obligations on the part of the School, so the Court concluded that the alleged failure of the School to follow those procedures could form the basis for a breach of contract claim. Id. The basis for Plaintiffs' claims in

Accordingly, none of the provisions relied upon is contractual in nature, and Plaintiffs' breach of contract claim must be dismissed.[8]

b. Plaintiffs' contract claim also fails because Plaintiffs breached the contract.

Assuming, *arguendo*, that the cited Handbook provisions, in fact, create a contractual relationship between Plaintiffs and the School, Plaintiffs' claims for breach of that contract fail because Plaintiffs breached any contract, thereby relieving the School of its contractual obligations. See Hastings Assocs., Inc. v. Local 369 Bldg. Fund, Inc., 42 Mass. App. Ct. 162, 171 (1997) (stating material breach of contract by one party excuses other party from performance). In June 2015, Plaintiffs signed the Enrollment Agreement agreeing to the payment terms of the School's tuition. SOF at ¶¶ 66-67. In one such provision, the Parents agreed "that the obligation to pay the tuition and other required fees of the School for the full academic year is unconditional, that no refund or cancellation will be made of any portion of the annual tuition and fees…," unless the Parents withdrew G before June 30, 2015. Id. at ¶ 67. While the Parents did not withdraw G until January 2016, seven months after the deadline in the Enrollment Agreement, the Parents failed to pay all of G's tuition for the 2015-2016 school year. See id. at ¶ 160-161. As a result, Plaintiffs are barred from trying to enforce an agreement which they themselves breached.

c. Plaintiffs' breach of contract claim fails because the School did not breach the contract.

Defendants are not in breach of contract. There can be no breach "where neither the Handbook nor related documents created obligations that are in conflict with the [educational

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the instant case is clearly distinguishable because the contractual provisions that Plaintiffs rely upon are not definite and certain, but rather, generalized statements.

[8] Indeed, the cover page of the Handbook explicitly states that "[t]his Handbook is for informational purposes only. It is not intended to create, nor does it create, a contract or part of a contract in any way, including but not limited to, between Fay and any parent, guardian or student affiliated with or attending the School." SOF at ¶ 167.

institution's] actions or where the [institution] did comply with the reasonable expectations generated by the Handbook and related documents." Bleiler v. Coll. of Holy Cross, No. 11-11541-DJC, 2013 WL 4714340, at *15 (D. Mass. Aug. 26, 2013).

First, Plaintiffs' breach of contract claim fails because the only alleged "breach" is Plaintiffs' erroneous belief that the School failed to accommodate G. In other words, Plaintiffs' breach of contract claim is nothing more than a re-hash of their ADA claim. Therefore, because Plaintiffs' ADA claim fails, their breach of contract claim also fails.

Separately, Plaintiffs have not provided any evidence that the School did, in fact, breach any of the cited provisions. To the contrary, the School worked diligently and in good faith, and provided numerous accommodations to reduce G's Wi-Fi exposure. See SOF at ¶¶ 128-145. There is nothing in the Handbook that requires the School to remove its Wi-Fi, and nothing that requires the School to comply with Plaintiffs' draconian requests. Rather, the cited Handbook provisions require only that the School make reasonable efforts to provide a safe environment for its students. See id. at ¶ 168. It is patently unreasonable for Plaintiffs to expect the School to modify or alter its educational environment, or to remove its Wi-Fi network that is in full compliance with every applicable federal regulatory standard. Accordingly, Defendants are not in breach of contract, and summary judgment should enter in favor of Defendants on Count III of the Complaint. See Driscoll v. Bd. of Trs. of Milton Acad., 70 Mass. App. Ct. 285, 294 (2007) (holding school did not violate the "reasonable expectations" created by the handbook provisions cited by student).

2. Plaintiffs' Claim For Misrepresentation (Count IV) Fails

Plaintiffs have failed to demonstrate any facts that would support a claim for misrepresentation. To establish a claim for misrepresentation, plaintiffs must prove (a) that the defendant made a false representation of a material fact; (b) with knowledge of its falsity; (c) for

the purpose of inducing the plaintiff to act thereupon; (d) that the plaintiff reasonably relied upon the representation; and (e) acted upon it to his damage. Robert Reiser & Co. v. Scriven, 130 F. Supp. 3d 488, 493-94 (D. Mass. 2015).

In the instant matter, the School never misrepresented any fact, and there are no allegations or evidence that would support such a finding. To the contrary, Plaintiffs base their misrepresentation claim exclusively on the School's purported breach of contract by alleging that the statements from the Handbook (that form the basis for the contract claim) "are false representation[s] because despite all those statements and promises, [and] Fay has acted in complete disregard of them and indeed completely contrary to the way it represented that it would act." SOF at ¶ 169. It is well established, however, that failure to perform a contractual duty cannot give rise to a claim for negligent misrepresentation. See Samia Companies LLC v. MRI Software LLC, 898 F. Supp. 2d 326, 343-44 (D. Mass. 2012) (dismissing misrepresentation claim where plaintiff failed to allege any promise other than those stated in the parties' written agreement) (quoting Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc., 455 Mass. 458, 474 (2009) ("Plaintiffs who are unable to prevail on their contract claims may not repackage the same claims under tort law."); see also AECOM Technical Servs. Inc. v. Mallinckrodt LLC, 117 F. Supp. 3d 98, 110 (D. Mass. 2015) (dismissing negligent misrepresentation claim based on failure to perform under contract, and noting that plaintiff's "relief lies in contract, not in tort"); Amorim Holding Financeria, S.G.P.S., S.A. v. C.P. Baker & Co., Ltd., 53 F. Supp. 3d 279, 307 n. 20 (D. Mass. 2014) (same); Grant v. Target Corp., 126 F. Supp. 3d 183, 191 (D. Mass. 2015) (holding statements promissory in nature and statements of conditions to exist in future are not actionable). Thus, summary judgment must enter in favor of Defendants on Count IV.

3. Plaintiffs' Claim For Negligence (Count V) Fails

Plaintiffs' negligence claim is nothing more than an attempt to extract monetary damages

for their ADA claims, which are statutorily barred. The only alleged breach is the School's purported "failure to have made any accommodation to G's EHS while G is in the custody of Fay and under its control." SOF at ¶ 170. Plaintiffs do not allege that the School took any affirmative actions that caused G's injury; only that the School's alleged failure to accommodate G's purported disability was sufficient to demonstrate a failure by the School "to exercise ordinary care for G's safety." Id.

Plaintiffs' negligence claim fails for several reasons. First, as stated above, Defendants did not violate the ADA. Therefore, to the extent that Plaintiffs' negligence claim is based on an ADA violation, it fails. Second, numerous courts have ruled that a failure to accommodate under the ADA does not constitute negligence. See Christian v. St. Anthony Medical Ctr., Inc., 117 F.3d 1051, 1053 (7th Cir. 1997) ("The Act is not a general protection of medically afflicted persons."); Galloway v. Superior Court of the District of Columbia, 816 F. Supp. 12, 20 (D.D.C. 1993) (stating ADA was not enacted to promote public safety, but to "prevent old-fashioned and unfounded prejudices against disabled persons."); see also James v. Peter Pan Transit Mgmt., Inc., No. 97-CV-747-BO-1, 1999 WL 735173, at *9 (E.D.N.C. Jan. 20, 1999) ("The ADA was enacted to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. Therefore, it is unlikely that the . . . courts would find that the ADA is a safety statute or that violation of the ADA constitutes negligence *per se*.") (internal citations omitted).

Third, although presented under the guise of an ADA accommodation, Plaintiffs have asserted during the course of discovery that the School's Wi-Fi is causing an injury to G. This assertion is unsupported by the facts and is legally deficient. As an initial matter, it is undisputed that the School's Wi-Fi network is in full compliance with applicable FCC standards for safe RF

emissions. See SOF at ¶¶ 75-80. Courts have held that the installation and use of devices that comply with FCC standards cannot form the basis of an injury claim, and such claims are pre-empted by federal law. See infra Section IV(A)(1)(b); see also Farina, 625 F.3d at 133-34 (dismissing plaintiffs' cell phone products liability claim where underlying device complied with FCC's regulation of RF emissions). Further, Plaintiffs have failed to demonstrate that the RF emissions associated with the School's Wi-Fi are the proximate cause of G's injury. See infra (IV)(C). Accordingly, Plaintiffs' negligence claim must be dismissed.

G. Individual Claims Against Mr. Gustavson Fail

Plaintiffs have not alleged, and cannot offer, any evidence that would justify holding Mr. Gustavson individually liable for breach of contract. In Massachusetts, officers of a corporation are generally not liable for a corporation's breach of contract. See Mass. Gen. Laws ch. 156, § 38 ("[N]o suit shall be maintained against a stockholder or officer for the debts or contracts of the corporation."). "In the absence of malice, one who knowingly and voluntarily contracts with a corporation must look to the corporation, not to its officers, for redress, even for 'obvious' failures to perform contractual promises." Union Mut. Life Ins. Co. v. Chrysler Corp., 793 F.2d 1, 11-12 (1st Cir. 1986). Any contract with Plaintiffs was solely between them and the School, as Mr. Gustavson was not a party to either the Handbook or the Enrollment Agreement. See SOF at ¶¶ 66, 167. Thus, there is absolutely no basis for holding Mr. Gustavson individually liable for such a claim. See Guckenberger, 957 F. Supp. at 324-25 (holding university president could not be liable for university's breach); Callahan v. Harvest Bd. Int'l., Inc., 138 F. Supp. 2d 147, 163 (D. Mass. 2001) (dismissing breach of contract claim against corporate officer who was not a party to the contract); Bisong v. Univ. of Houston, No. H-06-1815, 2006 WL 2414410, at *3 (S.D.Tex. Aug. 18, 2006) (dismissing individual defendants from breach of contract claim based upon student handbook); Selski, Inc. v. Bassett, No. 03-0381A, 2004 WL 2424300 at *2-3

(Mass. Super. Oct. 18, 2004) (rejecting argument that "high-level officers of private educational institutions may be held implicitly liable for their institution's breach of contract").

Likewise, there is no basis for holding Mr. Gustavson individually liable for the tort claims alleged by Plaintiffs. In Massachusetts, the bad acts of a corporation do not automatically extend to its officers. See Jones v. Experian Info. Solutions, Inc., 141 F. Supp. 3d 159, 162 (D. Mass. 2015); see also Lyon v. Morphew, 424 Mass. 828, 831 (1997) ("Officers and employees of a corporation do not incur personal liability for torts committed by their employer merely by virtue of the position they hold in the corporation."). In order to sustain a negligence claim against a corporate officer for the corporation's acts, there must be some showing that he or she "has personally participated in, and benefitted from, an illegal act." Jones, 141 F. Supp. 3d at 162. Here, there is absolutely no basis for finding that Mr. Gustavson benefitted in any way from the actions of the School. Accordingly, summary judgment should enter on Counts III through V in favor of Mr. Gustavson.

IV. CONCLUSION

Summary Judgment must enter for Defendants on all counts. Defendants have clearly established that this Court lacks jurisdiction to hear this case because Plaintiffs' claims represent an attack on the FCC guidelines governing the use of Wi-Fi; and, for that reason alone, summary judgment should enter in favor of Defendants on all counts. Even if the Court has jurisdiction, the undisputed facts in this case demonstrate that Defendants took reasonable and appropriate steps to accommodate a purported condition that Plaintiffs have failed to prove even exists. There is no evidence that Wi-Fi can cause headaches or other adverse health effects, generally, and there is no evidence that the School's Wi-Fi is the specific cause of G's physical symptoms. Despite the dearth of causality, Defendants have far exceeded their legal obligations to accommodate G.

Plaintiffs' continued requests for more (at the expense of the other students at the School) constitutes of bad faith. Accordingly, for these reasons and the reasons stated above, Defendants respectfully request that this Court grant their Motion for Summary Judgment and dismiss Plaintiffs' claims in their entirety.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I, Jaimie A. McKean, hereby certify that on the 1st day of September, 2016, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

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