

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

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| CATHERINE R. GIOVINCO and | : | |
| CATHERINE A. GIOVINCO, | : | |
| | : | |
| Plaintiffs, | : | |
| | : | CIVIL ACTION NO. 3:CV-03-1569 |
| v. | : | |
| | : | |
| DANIELLE N. FOSTER, | : | |
| PATRICIA M. FOSTER, | : | |
| STROUDSBURG AREA SCHOOL | : | (JUDGE CAPUTO) |
| DISTRICT, and JEFFREY SODL, | : | |
| | : | |
| Defendants. | : | |

MEMORANDUM

Presently before the Court is a Motion to Dismiss (Doc. 4) for failure to state a claim upon which relief could be granted filed by Defendant Jeffrey Sodl and Defendant Stroudsburg Area School District (hereinafter School District). Because the Plaintiffs have failed to allege that the School District or Sodl created a danger which caused the injuries to Catherine R. Giovinco, I will grant Defendants' motion. Since granting the motion to dismiss will dispose of all the federal claims, I will remand the remaining claims to state court. The Court has jurisdiction pursuant to 28 U.S.C. § 1331 for the claims against Sodl and the School District and 28 U.S.C. § 1367 for the state law claims against Defendants Danielle Foster and Patricia Foster.

BACKGROUND

All of the following facts are alleged by the plaintiffs. Catherine R. Giovinco (hereinafter Catherine R.), was a student at Stroudsburg High School (hereinafter high school), which is part of the School District. Sodl was the Assistant Principal for the high school. On February 20, 2002, in the high school, Danielle Foster attacked Catherine R.

by pulling her hair and knocking her to the ground. Catherine R. suffered a broken fibula and a fractured posterior malleolus. Plaintiffs also allege that she suffered aches, pains, mental anguish, shock, and disability, as well as impairments which she may suffer in the future.

Prior to the incident, Sodl had knowledge that Foster was a threat to Catherine R. Foster had been suspended from the high school for making terroristic threats towards Catherine R., as well as committing an act of violence against a student not a party to this action. Sodl had also notified Catherine R.'s mother, Catherine A. Giovinco (hereinafter Catherine A.), that Foster could harm Catherine R., and he cautioned Catherine A. to take measures to protect Catherine R. from Foster when she was not at school. In the same conversation, Sodl told Catherine A. that Catherine R. would be safe at school.

Plaintiffs Catherine R. and Catherine A. filed suit in the Pennsylvania Court of Common Pleas, Monroe County. Plaintiffs brought claims against Foster for seven common law torts, ranging from negligence to assault and battery. Plaintiffs brought claims against Foster's mother, Patricia Foster, for negligence. Plaintiffs brought claims against Sodl and the School District via 42 U.S.C. § 1983 (hereinafter section 1983) for violations of Catherine A.'s Fourteenth Amendment liberty interests in bodily integrity. Defendants Sodl and the School District removed the action to the United States District Court for the Middle District of Pennsylvania. (Doc. 1.) The same defendants filed a Motion to Dismiss (Doc. 4) for failure to state a claim upon which relief can be granted.

LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be

granted. Dismissal is appropriate only if, accepting all factual allegations in the complaint as true and “drawing all reasonable inferences in the plaintiff’s favor, no relief could be granted under any set of facts consistent with the allegations in the complaint.” *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (3d Cir. 1998).

In deciding a motion to dismiss, a court should consider the allegations in the complaint, exhibits attached to the complaint and matters of public record. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). The court may also consider “undisputedly authentic” documents where the plaintiff’s claims are based on the documents and the defendant has attached a copy of the document to the motion to dismiss. *Id.* The court need not assume that the plaintiff can prove facts that were not alleged in the complaint, *see City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 263 (3d Cir. 1998), nor credit a complaint’s “bald assertions” or “legal conclusions.” *Morse v. Lower Marion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997).

When considering a Rule 12(b)(6) motion, the court’s role is limited to determining whether the plaintiff is entitled to offer evidence in support of the claims. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The court does not consider whether the plaintiff will ultimately prevail. *See id.* In order to survive a motion to dismiss, the plaintiff must set forth information from which each element of a claim may be inferred. *See Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). The defendant bears the burden of establishing that the plaintiff’s complaint fails to state a claim upon which relief can be granted. *See Gould Elecs. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000).

DISCUSSION

Section 1983 does not create any new rights, it merely permits a cause of action for violations of the federal Constitution or federal law. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). For a plaintiff to succeed in a section 1983 action, she must prove that the defendants acted under the color of state law and deprived her of a right under the Constitution. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

In the present case, Plaintiffs allege that the Defendants deprived Catherine R. of her constitutional right to bodily integrity when they failed to protect her from Foster. Generally, the state has no duty to protect citizens from each other. *DeShaney v. Winnebago Co. Dep't of Soc. Serv.*, 489 U.S. 189, 196 (1989). The Court of Appeals for the Third Circuit has recognized two exceptions to this rule, special relationship and state-created danger. *See, e.g., Morse v. Lower Marion Sch. Dist.*, 132 F.3d 902, 915 (3d Cir. 1997). Plaintiffs allege that Defendant Sodl and Defendant School District are liable under the second exception, state-created danger. Plaintiffs also allege that Defendants are liable because they had a policy, practice, or custom which lead to Catherine R.'s injuries.

A) State-Created Danger

A state actor can be liable under section 1983 for a state-created danger. *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996). Under the state-created danger theory of liability, the plaintiff must prove:

- (1) the harm caused was foreseeable and fairly directly related to defendant's actions;
- (2) the state actor acted in wilful disregard for the safety of the plaintiff;

- (3) some relationship existed between the plaintiff and the state; and
- (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Id. at 1208. Because I find that Plaintiff makes no allegations that satisfy the final prong of the test, I need not decide the other three prongs.

In *Morse v. Lower Marion School District*, the Court of Appeals for the Third Circuit clarified that the fourth prong of the *Kniepp* analysis does not require an affirmative act on the part of the state actor, but it does require that the state “in some way placed the plaintiff in a dangerous position that was foreseeable.” 132 F.3d at 915. In its analysis, the court explained that a school would be liable only when it “placed the plaintiffs in danger, increased their risk of harm, or made them more vulnerable to danger.” *Id.* (citing *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1375 (3d Cir. 1992)).

Plaintiffs make no allegations that would suggest any act by the moving defendants created a harm, increased a harm, or made Catherine R. more vulnerable. Plaintiffs allege that Sodl and the School District did nothing to prevent an attack, but Plaintiffs make no suggestion that the defendants in any way caused the attack, encouraged the attack, or placed Catherine R. in a position where she was more susceptible to an attack. Plaintiffs seem to suggest that school's liability stems from its failure to exercise its authority over Foster. This is really nothing more than an allegation that the school failed to protect Catherine R.

Plaintiffs cite *Sciotto v. Marple Newtown School District* for the proposition that the

school had a duty to guard against Catherine R.'s injuries. 81 F. Supp. 2d 559 (E.D. Pa. 1999). However, *Sciotto* is factually distinguishable from the present case. In *Sciotto*, the defendant school district *encouraged* a college wrestler to practice with the high school wrestling team. *Id.* at 561. Further, the injuries sustained by the plaintiff in *Sciotto* were the result of a school-organized activity, not a student-initiated encounter as the Plaintiffs allege in the present case. Schools do not have a constitutionally imposed duty to protect students from other students. See, e.g., *D.R.*, 972 F.2d at 1376; see also *Page v. Sch. Dist. of Philadelphia*, 45 F. Supp. 2d 457, 465-66 (E.D. Pa. 1999); see also *M.M. v. East Stroudsburg Area Sch. Dist.*, No. 3:03-cv-0834, (M.D. Pa. filed October 24, 2003).

Plaintiffs also argue that Defendants created a danger by their failure to follow through on assurances that the school would protect Catherine R. while she was on school property. However, a state does not create a danger through a promise to protect a person. *Page*, 45 F. Supp. 2d. at 465. To create a danger, the school must place the plaintiff in "a dangerous environment stripped of means to defend [herself] and cut off from sources of aid." *Morse*, 132 F.3d at 912. Plaintiffs make no allegations which suggest that, as a result of the promise to protect her, Catherine R. was prevented from defending herself or getting assistance from others. As such, Defendants' motion will be granted as it pertains to the state created danger theory.

B) Policy, Practice, or Custom

"[A] school board can be held responsible for a constitutional violation . . . only if the violation occurred as a result of the policy, custom, or practice established by the board." *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 202 (3d Cir. 2000). A plaintiff can

maintain a cause of action under section 1983 if she alleges “that defendants, with deliberate indifference to the consequences, established and maintained a policy, practice, or custom which directly caused her constitutional harm.” *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989). In *Stoneking*, the plaintiff sued the school district for its policies which lead to her suffering repeated sexual assaults from a teacher. The Court of Appeals for the Third Circuit held that the school board could be liable for its direct actions if a policy lead to a constitutional violation.

In the present case, Plaintiffs argue that the defendants had a policy, practice, or custom of permitting a student to remain on school property even though she was a known danger to other students. However, this argument misses the mark. Plaintiffs are attempting to repeat the state-created danger argument. The policy, practice, or custom argument requires that the policy leads to a constitutional violation. See *Stoneking*, 882 F.2d at 725. The school district in *Stoneking* was subject to liability because an official of the school assaulted the student. “The distinction between harm inflicted by a state agent and injury caused by a private individual is critical.” *McComb v. Wambaugh*, 934 F.2d 474, 478 (3d Cir. 1991) (discussing *Stoneking*). A policy, practice, or custom is only unconstitutional because it allows *another* unconstitutional violation. See *Sciotto v. Marple Newtown Sch. Dist.*, 81 F. Supp. 2d 559, 576 (E.D. Pa. 1999).

A state has no constitutional duty to protect its citizens from each other. *DeShaney v. Winnebago Co. Dep’t of Soc. Serv.*, 489 U.S. 189, 196 (1989). A constitutional violation only occurs when the state has a special relationship with the citizen or when the state created the danger. See, e.g., *Morse v. Lower Marion Sch.*

Dist., 132 F.3d 902, 915 (3d Cir. 1997). Because I have already held that Plaintiffs make no allegations which establish that the state created a danger to Catherine R. and Plaintiffs do not allege any other constitutional violation, there can be no liability for any policy, practice, or custom Defendant Sodl or Defendant School District maintained. As such, Defendants' motion will be granted as it pertains to the policy, practice, or custom theory of liability.

C) Remaining State Law Claims

A federal court has supplemental jurisdiction over any state law claims which arise out of the same case or controversy as those claims over which the court has original jurisdiction. 28 U.S.C. § 1367(a). A district court may decline to exercise supplemental jurisdiction if it has dismissed all the claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). When a case comes before a district court via removal from state court and, at any time before final judgment, it appears that the court lacks subject matter jurisdiction, then the court must remand the case. 28 U.S.C. § 1447(c); *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988).

In the present case, I have just ruled that the federal question claims will be dismissed. The only remaining claims are state law claims which came before the Court through supplemental jurisdiction. Given that the case has not progressed beyond the filing of a single motion to dismiss, I see no reason that I should retain jurisdiction of the state law claims. Matters of state law are best left to the state courts. Therefore, I decline to continue to exercise supplemental jurisdiction over the remaining claims in the case. Those claims will be remanded to state court.

CONCLUSION

Defendants' Motion to Dismiss will be granted because Plaintiffs make no allegations that either Sodl or the School District created the danger to Catherine R. Plaintiffs also fail to allege anything which supports the contention that either Defendant had a policy, practice, or custom which lead to a constitutional violation. Therefore, neither defendant can be liable under section 1983 for the actions of a third party who injured Catherine R. The remaining state law claims against Defendants Danielle Foster and Patricia Foster will be remanded to state court.

An appropriate order follows.

December 15, 2003
Date

A. Richard Caputo
United States District Judge

