UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PAMELA THORPE, *Plaintiff,* v. WEST HEMPSTEAD UNION FREE SCHOOL DISTRICT et al, *Defendants.*	Docket 17-cv-04910-JFB-ARL United States Courthouse Central Islip, New York July 23, 2018 4:49:59 p.m. – 5:18:28 p.m.

TRANSCRIPT FOR CIVIL CAUSE
TELEPHONIC CONFERENCE RE MOTION TO DISMISS
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S :

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(Proceedings recorded by electronic sound recording)

COURTROOM DEPUTY: Calling case 17-cv-4910, *Thorpe v. West Hempstead Union Free School District*. Counsel, please state your appearances for the record.

MR. BREWINGTON: For the Plaintiff, the Law Offices of Frederick K. Brewington, by of Frederick K. Brewington. And along with me today, Your Honor, is Cathryn Harris-Marchesi.

THE COURT: Okay. Good afternoon.

MR. BREWINGTON: Good afternoon, Your Honor.

MS. HARRIS-MARCHESI: Good afternoon, Your Honor.

MS. GASSER: For the Defendant, West Hempstead School District and several individual Defendants, the Law Firm of Congdon, Flaherty, O'Callaghan, by Christine Gasser.

THE COURT: Okay. The Court scheduled this conference because I wanted to place a ruling on the record with respect to the pending motion to dismiss. It should take about 15 minutes or so to put it on the record. And then obviously, I'll address any issues either side wants to address once I've done that. You can order a copy of this ruling by ordering a transcript through the clerk's office if you wish.

So, for reasons I'll set forth in a moment, I'm granting in part, and denying in part the motion to dismiss. First, I just note procedurally the Plaintiff agreed to dismiss the false imprisonment claim. And although it didn't specifically reference the corresponding Fourth Amendment claim, to the extent that that was not also dismissed voluntarily, I

conclude that first of all, it was abandoned because there was no briefing on the Fourth Amendment claim; but in any event, there is no plausible fourth amendment claim based upon the facts as alleged in the complaint. So, therefore, the false imprisonment claim, and the corresponding fourth amendment claim are dismissed.

In addition, I'm granting the motion to dismiss the official capacity claims against the individuals because they are duplicative of a *Monell* claim. And I'm granting the motion to dismiss the claim by Pamela Thorpe under § 1983 as a parent. Because I don't believe that she has a claim under § 1983 as the parent. However, I'm denying the motion to dismiss in all other respects for reasons I'll explain in a moment.

So, with respect to the standard for a motion to dismiss, I adopt and incorporate by reference the standard I set forth in *Rodrigues v. Incorporated Village of Mineola*, 2017 WL 2616937 (E.D.N.Y. June 16, 2017). In sum, as I noted in that opinion, the Court accepts the facts in the complaint as true. Draws all reasonable inferences in the Plaintiff's favor, and then determines whether or not a plausible claim exists under the Iqbal-Twombly standard as set forth by the Supreme Court. And that's the standard I'm applying in this instance.

I just note in terms of what I'm considering as a procedural matter, I agree with Plaintiff that the Court should not consider the transcript of the 50-H Hearing. I don't

believe that when a complaint simply refers to the fact that the hearing took place that that is therefore allowing the Defendant to then cite to the transcript in order to prevail on a motion to dismiss. So, to the extent the Defendants have cited the actual transcript of the 50-H Hearing, I do not believe on this motion to dismiss that's properly considered by the Court. I'm not sure in any event, even if I considered it, I don't think would alter my conclusions about the plausibility of the claim. But in any event, I don't think it's proper to consider it on a motion to dismiss.

Now, going through each of the claims, the Defendant argues that the Plaintiff can't state a plausible substantive due process claim under § 1983 because the alleged failure to protect a student from the acts of a private act, or in this case another student, do not rise to the level of a constitutional violation. The Defendants in support of this argument cite the landmark Supreme Court case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

I'm denying the motion to dismiss the § 1983 substantive due process claim for the following reasons:

With respect to the elements of a substantive due process claim, I set then forth in *CT v. Valley Stream Union Free School District*, 2001 F.Supp.3d 307 (E.D.N.Y. August 16, 2016). As I noted, in order to establish a violation of a right

to substantive due process, a Plaintiff must demonstrate not only a government action, but also that the government action was so egregious, so outrageous, that it may fairly be set to shock the contemporary conscience. And I cite a Second Circuit case citing a Supreme Court precedent.

The Court notes as it relates to my ruling here that there is an exception to the general rule of *DeShaney* as cited to by the Defendants. And that would be the state created danger exception. I adopt the summary of that exception that was set forth by Judge Spatt in an excellent and thorough opinion, *Reed v. Freeport Public School District*, 89 F.Supp.3d 450 (E.D.N.Y. March 2, 2015). I believe that it is an accurate summary of this particular exception.

And I'm now quoting from Judge Spatt's opinion. I'm reading out the citations from the various cases. He noted under this exception to *DeShaney*, a Plaintiff seeking to state such a claim or show more than the state or it's subdivision's general knowledge of a danger, he or she must show that the state assisted in creating or increasing the danger that the victim faced at the hands of a third party. The requirement of showing that the state has taken an active role in the deprivation of a right stems from the acknowledgment that due process is, as noted above, defined as a mutation on the acts of the state, and not as a guarantee of state action. Thus, while passive conduct does not therefore fall within the state created

danger exception, the Second Circuit has held that a claim stated where the defendant's facilitation of a private attack amounts to an affirmative conduct necessary to state a due process violation. He cites two cases that I will note. *Pena v. Deprisco*, 432 F.3d 98 (2d Cir. 2005) and *Okin v. Village of Cornwall on Hudson Police Department*, 577 F.3d 415 (2d Cir. 2009).

And now, quoting from *Okin*, Judge Spatt notes, "Repeated sustained inaction by government officials in the face of potential acts of violence might constitute prior assurances rising to the level of an affirmative condoning of private violence, even if there is no explicit approval or encouragement. He's quoting *Okin* directly there. He then notes, moreover, again, quoting *Okin*, and quoting *Pena*, when officials communicate to a private person that he will not be arrested, punished or otherwise interfered with while engaging in this conduct that is likely to endanger the life, liberty or property of others, those officials can be held liable under § 1983 for an injury caused by the misconduct even though none of the Defendants allege to have communicated the approval explicitly. In a nutshell, Judge Spatt says, again quoting from *Okin*, "The affirmative conduct of a government official may give rise to an actual due process violation if it communicates explicitly or implicitly official sanction of private violence."

And then the last thing I'll note is that Judge Spatt,

again, citing other cases, accurately notes that the state, however, the state created danger theory does not impose a duty on schools to protect students from assaults by other students, even if Defendants knew or should have known of the danger absence this affirmative act requirement, as I outlined under the Second Circuit cases.

And obviously, the Defendants cite a case *Dwares v. City of New York*, a Second Circuit case from 1993, highlighting what they call the high bar for proving a substantive due process violation in this type of context. I note that since *Dwares*, we have *Okin* and *Pena* from the Second Circuit that have made clear that it doesn't have to be an explicit approval for encouragement; that it could be this implied condoning that might be based upon prior acts or prior assurances, whether explicit or implicit.

So, *Dwares* has to be read in light of *Okin* and *Pena*. And I believe here, although it's still a high bar to meet even with *Okin* and *Pena*, I believe the allegations state a plausible claim when the allegations are construed most favorably to Plaintiff, and every reasonable inference is drawn in the Plaintiff's favor for the following reasons:

There are allegations in there of inaction and implicit encouragement based upon at least one prior incident involving a student. And I'm noting I believe it was paragraph 28 through 30. First, the Plaintiff alleges on December 7, 2015

that the infant Plaintiff was bullied physically and sexually assaulted by another student in the locker room. And then specifically, when this issue of whether there could have been implicit condoning to state a plausible claim, it's alleged in paragraph 44 that the principal, Defendant Escobar, told the Plaintiff, when there was a complaint made, that another student on the JV basketball team was attacked, but he "moved on from it". Thereby suggesting that the Plaintiff should also move on.

So, I think again, you have to draw reasonable inferences in the Plaintiff's favor that could suggest that there was a prior incident involving some type of sexual assault on a basketball team, and that essentially through the principal suggesting that the student involved in that should move on, and that suggesting that to the Plaintiff, that there was a condoning of it, and implicit encouragement of it.

In addition, Plaintiff cites the fact that Defendant Escobar met with the alleged attackers, harassers, that's paragraph 36, and that this then caused, in paragraph 37, further harassment and threats. And they note, in paragraph 42, that the Plaintiff showed Defendant Escobar and Mistretta a group chat where the witnesses agreed not to snitch. Again, it seems to have been an effort by the Plaintiff to show that the incident had in fact occurred, and they allege, notwithstanding, showing the group chat, that the school took no action, which led to additional harassment and threats.

I conclude, although I think this will be a difficult claim to prove because of the high bar for a substantive due process violation, especially in this area, even with *Okin* and *Pena*, I do believe it is a plausible claim for purposes of a motion to dismiss. And the Plaintiff should be allowed to try through discovery to show implicit encouragement of the conduct by the Defendants based upon some combination of condoning at least one prior assault with no action, notifying students of ST's allegations, and then taking no action even when shown the group chat about not snitching. I understand, obviously, the Defendants have a different version of this in terms of it not being condoning or encouraging, but investigating, but I think that's an issue for summary judgment. I don't think that that can be resolved in this case on a motion to dismiss.

Having determined that there's a plausible claim under this state created danger theory for purpose of a motion to dismiss, I don't consider whether or not it could be done under the special relationship standard. I'm somewhat skeptical of that based upon the nature of this case or as it relates to establishing a special relationship. But there's no reason for me to address that because I've concluded the § 1983 claim can proceed under the state created danger theory at a minimum.

The Defendants also argue that the allegations do not shock the conscience such they could be actionable under substantive due process violation. They argue that failing to

prevent an assault is not outrageous in and of itself. And that's certainly true in isolation. But again, as I noted before that my ruling is the same with respect to this issue, there is a plausible claim. There are a number of different aspects to it that state a plausible claim if the Plaintiff is able to show, for example, that there was a prior assault, and the student was told to get over it, no action was taken, and then no action was taken with respect to this. Team members were notified of the allegation, no action was taken. You could potentially have a plausible claim if everything worked out favorably to the Plaintiff in terms of the discovery. So, for those reasons, I don't believe it's appropriate to dismiss this on that ground on a motion to dismiss.

The District also argues that there could be no *Monell* claim. I incorporate the law as it relates to a *Monell* claim as set forth in detail prior to the opinion in *Crews v. County of Nassau*, 2007 WL 4591325 (E.D.N.Y. December 27, 2007). As I noted in that case, it is well established under both Second Circuit and Supreme Court law that there could be situations where you don't have to have a long pattern of similar conduct in order for a *Monell* claim to be proven. And here there are allegations as I noted in paragraph 44 through paragraph 45 that it happened previously. And I don't believe it's appropriate under the circumstances to dismiss a *Monell* claim given that an allegation in at least one other incident where the school took

no action from an alleged assault. And therefore, I think this is something again that is more appropriately addressed at summary judgment.

I also note, although this is sometimes difficult again to prove, but there are cases out there that suggest that a principal, depending upon the circumstances, could be a policymaker for purposes of *Monell*. That's discussed in detail in a case called *Eldridge v. Rochester City School District*, 968 F.Supp.2d 546 (W.D.N.Y. September 13, 2013). So, that potentially could be an alternative theory of *Monell*. But again, I don't think this is something as a matter of law the Court can determine based upon the allegations in the complaint.

The Defendants also argue that the individual Defendants should be dismissed. First, it's argued because there's no underlying violation of a constitutional right that it should be denied. Obviously, I've already determined there's a plausible claim, so that's not a ground for dismissal of the individuals. And then there is a separate argument that the individual Defendants are entitled to qualified immunity. For purposes of qualifying immunity, the standard is set forth in great detail in an opinion I incorporate by reference that I issued a number of years ago, *Mangino v. Incorporated Village of Patchogue*, 814 F.Supp.2d 242, 249 (E.D.N.Y. September 30, 2011). The Court determines in the two-part inquiry whether the facts shown make out a violation of a constitutional right, and then

whether the right at issue was clearly established at the time of the Defendant's alleged misconduct. With respect to that second part in determining whether a right is clearly established to determine whether it would be clear to a reasonable officer or official that his or conduct wasn't lawful in the situation he confronted. In other words (quoting *Mangino*), "a right is clearly established when the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right …. The unlawfulness must be apparent."

Here, as it relates to whether or not it was a clearly established right, the Defendants cite Chambers of Judge Karas, 815 F.Supp. 753 (S.D.N.Y. September 27, 2011) in order to support their position that it was not clearly established in this case before me that school officials could be subject to a substantive due process violation by failing to protect students by condoning a private action by another student in the form of a sexual assault or harassment. However, in Chambers, Judge Karas dealt with a situation that was different than here. The alleged acts in chambers occurred much earlier than the acts here. And Judge Karas ruled that it was not until *Pena* that the Second Circuit first extended the state created danger doctrine to circumstances where state actors by repeated inaction over a long period of time without an explicit statement of approval might effectively constitute an implicit prior assurance that

rises to the level of an affirmative act. And he's quoting from *Pena*. However, that is not a concern here because *Pena* was decided in December of 2005, and obviously, this is long after *Pena* was decided that the circumstances in this case are alleged to have occurred.

So, it's my view that it was certainly clear by the time of *Pena* that this is a clearly established right. The fact that it dealt with police officers in that case, and here we're dealing with school officials, I don't think is something that would fail to place all state actors, when they're in the context of the police or the school that they could be liable for repeated inaction that could rise to the level of an implicit prior assurance, which becomes an affirmative act under *Pena*.

So, I do believe that this is a clearly established right at this point or at the point that this is alleged to have occurred in this case. And this is consistent with other cases, including a case called *Gothberg v. Town of Plainville*, 148 F.Supp.3d 168, which is a District of Connecticut case from September 13 of 2015. In that case the court similarly concludes that this is a clearly established right based upon *Pena*. And in fact, cites a Second Circuit summary order in a case called *Labella*, where the Second Circuit essentially said as much. This is now quoting from the *Labella* opinion of the Second Circuit, where it was again alleged that through multiple

times of inaction that arose to the level of an affirmative action and the Second Circuit in affirming the District Court's denial of the 12(b)(6) on its qualified immunity grounds stated, at least at the pleading stage these allegations suffice to defeat *Labelle's* claim of qualified immunity. They sufficiently state a claim under the state created danger doctrine because these facts, if true, would permit a jury to conclude that *Labelle* communicated to a private person, in that case Joseph Longo, that he or she will not be arrested, punished or otherwise interfered with while engaging in misconduct that is likely to endanger the life, liberty or property of others.

And again, I reached the same conclusion here based upon the allegations that are set forth in the complaint. I emphasize that this is not a ruling by the Court. That qualified immunity would not be something the Court would need to consider at summary judgment. Again, once the facts have all been gathered in discovery, the Defendants will once have the right to have me consider the qualified immunity issue in light of the record that has been developed. But I don't believe that this can be decided in this case based upon the complaint on a motion to dismiss.

I do dismiss the official capacity claims against the individuals because they are duplicative over the Monell claim that's set forth in numerous opinions, including *Kentucky v. Graham*, 473 U.S. 159 (1985). And finally, the mother's claim

for emotional distress under § 1983 is also dismissed. There is well-settled case law that's set forth in a number of opinions, including *Marino v. Chester Unified Free School District*, 859 F.Supp.2d 566, 568 (S.D.N.Y. 2012), that a parent lacks standing to bring an individual claim under § 1983 based upon the deprivation of his or her child's constitutional rights. And that is what Pamela Thorpe is trying to do in her § 1983 claim.

However, I emphasize that this ruling does not apply to Pamela Thorpe's state law claims, which she can bring for intentional infliction of emotional distress and for negligent infliction of emotional distress. And those claims under state law as relates to her can proceed.

Finally, the Defendants argue that I should (inaudible) supplemental jurisdiction because the federal claims should be dismissed. But obviously, the federal claim, as relates to the infant Plaintiff, survives, and therefore the Court will continue to exercise supplemental jurisdiction at this juncture over the related state law claims by the infant Plaintiff and by Pamela Thorpe.

All right. So that's the ruling of the Court. Do you want to propose a date of the answer?

MS. GASSER: Yeah, I mean I can get the answer done within a few weeks. That's not a problem to get the answer done. If the Court has a preference as to the when of it, we'll certainly comply and get an answer done.

THE COURT: I was going to say 30 days. I think given it's July, I don't think Mr. Brewington would have any objection to 30 days. Right, Mr. Brewington?

MR. BREWINGTON: That is correct, Your Honor.

THE COURT: Okay.

MS. GASSER: That's fine.

THE COURT: So, we'll say August 23.

MS. GASSER: Okay.

MR. BREWINGTON: Judge, just so that it's not pushed too much with regard to that. Since I do anticipate that I'm out in August, I have no problem pushing it to the end of August.

THE COURT: All right. So, August 31. Again, obviously, the magistrate judge will supervise the discovery. And as is aid, all these issues can be raised again at the summary judgment stage. I would also suggest, I think at the oral argument, if my memory is correct, that there was some suggestion that Plaintiff was interested in pursuing mediation in this case. That her primary concern was to try to make sure that there were procedures in place at the school to try and prevent something like this from happening again.

So, I would suggest if both sides are interested in pursuing that, before you start spending a lot time and money on depositions or other discovery, and then a summary judgment motion, that you try to resolve the case. I think based upon

the 50-H hearing, both sides probably have a fair assessment of the case. So, I'll leave that to your wisdom, but I think, my view is, although it obviously it survived the motion to dismiss, it's going to be an uphill battle at least for a constitutional claim. And I would suggest if really what the Plaintiff is looking for here is to prevent this from happening again, there should be a way that the school district could try to resolve it that way. Okay?

MS. GASSER: Yeah. Could I just ask. You mentioned the clerk's office can get a copy of the order. Is that something that would be available relatively quickly?

THE COURT: I think it's how much you want to pay for it.

MS. GASSER: Oh, okay.

THE COURT: They send it to an outside agency, and I think if you ask for it to be expedited, the clerk's office will know.

MS. GASSER: Okay.

THE COURT: All right?

MS. GASSER: Is there anyone particular I should ask for? And it's the clerk's office in Central Islip?

THE COURT: Yes.

MS. GASSER: Okay.

THE COURT: If you call the clerk's office in Central Islip and just say, I'm calling to try to order a transcript

from the electronic recording. What they're going to need is, and this will be posted in an entry, the FTR number. You know, there'll just be a set of numbers, and that's essentially what they need for purposes of producing the transcript. Okay?

MS. GASSER: Okay. All right. Well, I guess they'll help me with that. Thank you.

THE COURT: If you have any problems, you can always call my law clerk, and they'll explain it to you.

MS. GASSER: Sure. Sure. If I could just ask, because I'm going to be away the first two weeks in September. Our answer will certainly be done in more than enough time. I'm just concerned that nothing will happen in those first two weeks of September. There's no anticipation that we're going to be having conferences on this?

THE COURT: No. We'll call the magistrate judge to just make sure that they don't schedule it for the first two weeks in September. They usually don't set the conference date until the answer, and I doubt it would be that quick.

MS. GASSER: Okay.

THE COURT: But we'll call them just to make sure they schedule it no sooner than late September. Okay?

MS. GASSER: Thank you very much, Your Honor, --

THE COURT: All right.

MS. GASSER: -- for that consideration.

THE COURT: All right. Thank you. have a good day.

MS. GASSER: All right. Thank you.

MR. BREWINGTON: Thank you, Your Honor.

MS. GASSER: Thank you. You too.

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CERTIFICATION

I, Rochelle V. Grant, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: September 1, 2018

Rochelle V. Grant