

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK and ELLEN O'HARE, on behalf : CIVIL ACTION
of their minor child, MEGAN O'HARE :
 :
v. :
 :
COLONIAL SCHOOL DISTRICT, et al. : NO. 99-0399

MEMORANDUM AND ORDER

HUTTON, J.

September 28, 1999

Presently before this Court are Defendants' Motion to Dismiss Plaintiffs' Complaint (Docket No. 4), Plaintiffs' Reply Memorandum (Docket No. 5), Defendants' Supplemental Memorandum of Law (Docket No. 6), and Plaintiffs' Supplemental Reply Memorandum (Docket No. 8). For the reasons stated below, Defendants' Motion is **GRANTED in part and DENIED in part.**

I. BACKGROUND

This is a civil rights action brought under the Fourth and Fourteenth Amendments to the United States Constitution and Title 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), 1986, and 1988. Patrick O'Hare and Ellen O'Hare ("Parents") brought this action on behalf of their minor child, Megan O'Hare ("Child" or "Minor Plaintiff") (collectively, the "Plaintiffs"), against the following Defendants: Colonial School District, a public school district in Montgomery County ("School District"); Dr. Stanley Durtan, Superintendent of the Schools of Colonial School District ("Superintendent");

Patricia Campbell, principal of the Plymouth Whitemarsh High School of the Colonial School District ("Principal"); Candace Maggincalda, a school teacher at Plymouth Whitemarsh High School ("Teacher"); Stuart Kessler, Marc Orlow, Beverly Brown, Richard Connolly, Gary Johnson, Robert Carroll, Robert O'Neill, Jack Pinheiro and Thomas Unker, elected members of the Board of School Directors of Colonial School District ("Board Members") (collectively, the "Defendants"). At all times relevant to this matter, Minor Plaintiff was a student attending public school in Defendant School District.

Plaintiffs allege that Minor Plaintiff's constitutional and statutory rights were violated when a male student, a minor known as John Doe, allegedly repeatedly sexually assaulted Minor Plaintiff in the darkroom of Teacher's photography classroom at Plymouth Whitemarsh High School. Indeed, Plaintiffs contend that criminal juvenile charges against John Doe are pending currently. Plaintiffs further allege that Defendants failed to implement and enforce a policy which addressed the safety of Minor Plaintiff. Additionally, Plaintiffs allege that Defendants violated Child's constitutional and statutory rights by engaging either actively or by acquiescence in the conduct of its employees and/or agents in a de facto custom, policy and/or practice of failing to properly safeguard Minor Plaintiff in school and that such acts were committed under the color of state law.

II. DISCUSSION

A. Legal Standard

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),¹ this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50, 109 S. Ct, 2893, 2906 (1989). A court will only dismiss a complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50, 109 S. Ct. at 2906 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 104 S. Ct. 2229, 2232 (1984)). Nevertheless, a court need not credit a plaintiff's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997).

³. Rule 12(b)(6) provides that:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

Fed. R. Civ. P. 12(b)(6).

B. Plaintiff's Claims

1. Section 1981 Claim

Section 1981 provides in relevant part that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (1994). While § 1981 does not use expressly the term "race," the Supreme Court "construed the section to forbid all 'racial' discrimination" in the making of public and private contracts.\² Saint Francis College v. Al-Khazrajia, 481 U.S. 604, 609, 107 S. Ct. 2022, 2026 (1987); Runyon v. McCrary, 422 U.S. 160, 168-75, 96 S. Ct. 2586, 2593-96 (1976)."

Plaintiffs state that their § 1981 claim is based upon Minor Plaintiff's right to "'the full and equal benefit of all laws and proceedings for the security of persons and property' in her right to access to free public education and a non-hostile environment as provided by state law." (Pl.'s Rep. Mem. at 6.) Plaintiffs do not allege a deprivation of Minor Plaintiff's rights on the basis of

² It must be noted, however, that Congress amended § 1981 in 1991 to allow suits for workplace harassment. See 42 U.S.C. § 1981(b). "[Accordingly, claims of a hostile working environment that arise after 1991 are ... actionable under § 1981." Simpson v. Martin, Ryan, Andrada & Lifter, No. CIV.A. 96-4590, 1997 WL 542701, at * 3 (N.D. Ca. Aug. 26, 1997) (citations and footnote omitted). Retaliation claims are also actionable under § 1981. Patterson v. Augat Wiring Sys., Inc., 944 F. Supp. 1509, 1519-21 (M.D. Ak. 1996); see Freeman v. Atlantic Ref. & Mktg. Corp., No. CIV.A. 92-7029, 1994 WL 156723, at * 8 (E.D. Pa. Apr. 28, 1994) ("Section 1981's prohibitions against discrimination extend to the same broad range of employment actions and conditions as in Title VII.").

her race. Indeed, Plaintiffs do not allege that Minor Plaintiff's race played any role whatsoever in the alleged unlawful conduct promulgated and/or tolerated by Defendants. Nevertheless, the Court denies Defendants' Motion to Dismiss because Plaintiffs' Complaint, when read in light of the liberal notice pleading requirement of Federal Rule of Civil Procedure 8(a), provides facts sufficient to show that they may be entitled to relief pursuant to this theory of liability.

2. Section 1982 Claim

Section 1982 provides that:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982. Like a § 1981 claim, the scope of a § 1982 claim is limited to cases of race discrimination. Smith v. Borough of Pottstown, No. CIV.A. 96-1941, 1997 WL 381778, at *3 (E.D. Pa. June 30, 1997). The Defendants argue that Plaintiffs' claim under § 1982 should be dismissed because Plaintiffs "fail to allege that they were discriminated against on the basis of race in a transaction involving real or personal property." (Def.'s Mot. to Dismiss at 19.) In light of the liberal notice pleading requirement of Federal Rule of Civil Procedure 8(a), the Court concludes that there exists potentially a set of facts on which

relief may be granted. Therefore, Defendants' Motion to Dismiss Plaintiffs' § 1982 claim is denied.

3. Section 1983 Claim

Section 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983. While § 1983 is not itself a source of substantive rights, Baker v. McCollan, 443 U.S. 137 144 n.3, 99 S. Ct. 2689, 2694-95 n.3 (1979), the section provides a remedy for violations of constitutional rights where the alleged violation was committed by a person acting under the color of state law. Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995). As a general rule, however, the state has no affirmative obligation to protect its citizens from the violent acts of private individuals. Gonzalez v. Angelilli, 40 F. Supp. 2d 615, 618-19 (E.D. Pa. 1999). Moreover, there is nothing in the language of the Fourteenth Amendment's Due Process Clause that requires a state to protect the

life, liberty, and property of its citizens against harm by private actors. Hunter 829 F. Supp. 714, 717 (M.D. Pa. 1993). Nevertheless, courts recognize at least two exceptions to this general rule whereby § 1983 liability can attach for unlawful acts committed by a private citizen: (1) the state-created danger theory; and (2) the special relationship theory. Gonzalez, 40 F. Supp. 2d at 618-19.

Although Plaintiffs' Complaint is neither the archetype of clarity nor the paragon of specificity, the Court interprets Plaintiffs' Complaint and related documents to argue that Defendants are liable under three distinct theories of § 1983 liability: (1) the special relationship theory; (2) the state-created danger theory; and (3) practice, policy, and custom theory. To establish a prima facie § 1983 case under these theories, a plaintiff must show that the action occurred "under color of state law" and that the action deprived the plaintiff of a constitutional right or a federal statutory right. See Paratt v. Taylor, 451 U.S. 527, 535 (1981). The state-created danger and special relationship theories are viable mechanisms for establishing a constitutional claim under § 1983. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3d Cir. 1997).

Generally, the first issue in a § 1983 action is whether plaintiff sufficiently alleges a deprivation of any right secured by the Constitution. D.R., 109 F.3d at 1367. Accordingly, the

Court now considers the facts as alleged in the light most favorable to Plaintiffs to determine whether Plaintiffs sufficiently allege such a deprivation of any constitutional right under the special-relationship and state-created danger theories. The Court also considers whether Defendants deprived Minor Plaintiff of a constitutional right by actively or passively promulgating a de facto custom, policy, and/or practice of failing to properly safeguard its students.\³ (Pl.'s Compl. ¶34).

a. Special Relationship

The special relationship theory allows a plaintiff to recover damages under § 1983 where the state entered into a "special relationship" with a particular citizen and failed, under sufficiently culpable circumstances, to protect the health and safety of the citizen to whom it owed an affirmative duty. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3d Cir. 1997). There is a "special relationship" only in those circumstances where the plaintiff is essentially in the defendant's custody. Mark v. Borough of Hatboro, 51 F.3d 1137, 1150 (3d Cir. 1995).

In D.R., the Third Circuit Court of Appeals refused to apply the special relationship theory in a factually similar situation to the instant matter. In D.R., public school students who allegedly

³ With regard to the Court's consideration of Plaintiff's arguments for imposing § 1983 liability, the Court will assume that the unlawful acts alleged were committed under the color of state law.

suffered sexual abuse at the hands of other students brought, inter alia, a § 1983 action against, inter alia, their school, their school district, and individually named teachers and officials. The circuit court rejected plaintiffs' special relationship theory of liability, reasoning that unlike the circumstance where the state holds a person in custody against his or her will, the named plaintiffs did not allege that they had a "special relationship" with the defendants based upon a restraint of liberty. D.R., 972 F.2d at 1373. The court also considered the following factors when denying plaintiffs' special relationship argument: (1) parents decide whether their children will be educated in public schools; (2) parents remain the primary caretakers of their children even when their children are at school; (3) the plaintiffs still resided in their respective homes and therefore had access to sources of assistance other than the state; and (4) the plaintiffs did not depend on the school or the state for the satisfaction of their basic human needs. Id. at 1372.

Accordingly, this Court must determine whether Defendants had a special relationship with Plaintiffs such that Defendants owed Plaintiffs a constitutional duty to protect them from harm. Plaintiffs' pleadings with regard to this theory of recovery are neither artful nor articulate. Pursuant to the D.R. court's reasoning, Plaintiffs cannot allege facts sufficient to establish that Minor Plaintiff's liberty was restrained in such a manner that

a "special relationship" arose. The Court holds that Plaintiffs cannot prove their special relationship theory of § 1983 liability, and said claim is therefore dismissed.

b. State-Created Danger

The Third Circuit Court of Appeals recognizes the state-created danger theory of § 1983 liability. Kneipp v. Tedder, 95 F.3d 1199, 1211 (3d Cir. 1996). Liability under this theory is grounded upon the state's affirmative acts which "work to plaintiffs' detriment in terms of exposure to danger." D.R., 972 F.2d at 1368. The Kneipp court adopted a four-part test whereby liability may be imposed on a state actor where the following elements are satisfied:

(1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; 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.

Kneipp, 95 F.3d at 1208. Section 1983 liability under the state-created danger theory is predicated on a state's affirmative culpable acts which deprive plaintiff of a right protected by substantive due process. D.R., 972 F.2d at 1368. Courts therefore consider whether the involved state actors affirmatively acted to create plaintiff's danger or to make her more vulnerable to such danger. Id. at 1373.

While it unclear whether Plaintiffs' state-created danger

argument relates to the harm allegedly suffered by Minor Plaintiff prior to John Doe's suspension or the prospective harm Minor Plaintiff might suffer subsequent to John Doe's readmittance to school, Plaintiffs do not allege facts sufficient to sustain a finding of § 1983 liability. Plaintiffs simply assert that they should recover against Defendants but offer no factual support whatsoever to satisfy even a single prong of the Kneipp test. Indeed, Plaintiffs' allegations amount to nothing more than a conclusory recounting of the Kneipp test's elements, (Pl.'s Reply Mem. at 10-11.), and an impotent claim that the holding in Davis v. Monroe County Bd. of Ed., ___ U.S. ___, 119 S. Ct. 1661 (1999), is applicable to the instant matter. This Court disagrees with Plaintiffs' conclusory statements regarding their satisfaction of the Kneipp test and Plaintiffs' claim regarding the applicability of the Davis holding. The Davis holding concerns student-on-student sexual harassment under Title IX whereas the instant matter concerns sexual assault and claims brought pursuant to Title VII. Additionally, the Davis court's express holding is applicable only where the recipient of federal education funds is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, persuasive and objectively offensive that it can be said to deprive the plaintiff of the education opportunities and benefits provided by the school. Davis ___ U.S. ___, 119 S. Ct. at 1665 (1999)(emphasis added).

Plaintiffs fail to allege any facts sufficient to make the Davis holding analogous or relevant to the instant matter. The facts as provided and taken in the light most favorable to Plaintiffs do not rise to the level of a constitutional violation. Accordingly, Plaintiff's state-created danger theory of § 1983 liability is dismissed.

c. Policy, Practice or Custom

The Court interprets Plaintiffs' Complaint to also allege that Defendants, acting under the color of state law and in furtherance of Defendants' established custom, practice, and policy, deprived Plaintiffs of a right secured by the Constitution in violation of § 1983. (Pl. Compl. ¶ 34). To sustain such a claim, the policy, custom, or practice must be the "moving force" behind the constitutional tort. Monell v. Department of Social Serv., 436 U.S. 658, 691, 694, 98 S. Ct. 2018, 2038 (1978). The policy must also exhibit deliberate indifference to the constitutional rights of those that the policy, custom, or practice affects. Beck v. Pittsburgh, 89 F.3d 966, 972 (3d Cir. 1996).

Plaintiffs offer neither facts to support this theory of liability nor allege that their constitutional rights were violated by a state actor acting pursuant to such a custom, policy, or practice. Moreover, this Court is at a loss to infer any facts to support this claim. Accordingly Plaintiff's custom, policy, or practice theory of liability is denied.

4. Section 1985 Claim

Section 1985 of Title VII was enacted to combat conspiracies motivated by animus against the classes of people Congress intended to protect under Title VII, particularly African-Americans. The Supreme Court stated that the reach of § 1985(3) is limited to private conspiracies predicated on "racial or, perhaps otherwise class biases, invidiously discriminatory animus." Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 1798 (1971). Section 1985(3) provides as follows:

If two or more persons in any State or Territory conspire for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ...the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators.

42 U.S.C. § 1985(3). To state a claim under § 1985(3), "a plaintiff must allege: (1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to the equal protection of the laws; and an injury to person or property or the deprivation of any right or privilege of a citizen." Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997) (citing United Brotherhood of Carpenters & Joiners of Am., Local 610 v. Scott, 463 U.S. 825, 828-29, 103 S. Ct. 3352, 3356 (1983)).

Plaintiff's entire argument supporting its § 1985(3) theory of liability is that "Minor Plaintiff, as being a female, is a

protected class for § 1985(3) purposes, as recently decided in the Eleventh Circuit in the case of Lyes v. City of Riviera Beach, 166 F.3d 1332 (11th Cir. 1999), decided February 11, 1999 A sex-based conspiracy against women is actionable under § 1985(3)." (Pl.s' Reply Mem. at 11).

In order to prevail, Plaintiffs must show a conspiracy on the part of the Defendants to deprive Minor Plaintiff of equal protection or equal privileges and immunities motivated by class-based, invidiously discriminatory customs and practices of failing to protect female students from the deprivation of a constitutional right. See D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3d Cir. 1991). Plaintiffs do not and cannot meet their burden for they neither allege facts sufficient to sustain this cause of action nor do they assert any facts from which this Court can infer that a conspiratorial agreement existed. Additionally, Plaintiffs' pleadings fail to establish that the alleged harm suffered by Minor Plaintiff was due to her membership in a protected class. Accordingly, because Plaintiffs provide nothing more than conclusory statements that Defendants caused a deprivation of constitutional rights, Plaintiffs' § 1985 claim is dismissed.

5. Section 1986 Claim

A § 1986 claim is dependent on the existence of a cognizable § 1985(3) claim. Clark v. Clabaugh 20 F.3d 1290, 1295 n.5 (3d Cir.

1994). Because this Court dismissed Plaintiffs' 1985(3) claim, Plaintiffs' § 1986 claim also must be dismissed.

6. State Law Claims

Plaintiffs assert claims based upon Pennsylvania law. This Court has supplemental jurisdiction over Plaintiffs' Pennsylvania law claims pursuant to 28 U.S.C. § 1367 which provides in pertinent part as follows: "[D]istrict courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy" 28 U.S.C. § 1367(a) (1999). Section 1367 therefore enables this Court to hear State law claims over which it otherwise has no independent basis for jurisdiction.

Pursuant to § 1367(a), the Court elects to maintain supplemental jurisdiction over Plaintiffs' state law claims. Accordingly, Defendants' Motion to Dismiss said claims is denied.

An appropriate Order follows.

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of their minor child, MEGAN O'HARE :
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v. :
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COLONIAL SCHOOL DISTRICT, et al. : NO. 99-0399

O R D E R

AND NOW, this 28th day of September, 1999, upon consideration of Defendants' Motion to Dismiss Plaintiffs' Complaint (Docket No. 4), Plaintiffs' Reply Memorandum (Docket No. 5), Defendants' Supplemental Memorandum of Law (Docket No. 6), and Plaintiffs' Supplemental Reply Memorandum (Docket No. 8), IT IS HEREBY ORDERED:

(1) Defendants' Motion to Dismiss Plaintiffs' § 1981 claim is **DENIED;**

(2) Defendants' Motion to Dismiss Plaintiffs' § 1982 claim is **DENIED;**

(3) Defendants' Motion to Dismiss Plaintiffs' § 1983 claim is **GRANTED;**

(4) Defendants' Motion to Dismiss Plaintiffs' § 1985 claim is **GRANTED;**

(5) Defendants' Motion to Dismiss Plaintiffs' § 1986 claim is

GRANTED; and

(6) Defendants' Motion to Dismiss Plaintiffs' state law claim
is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.