

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

STEPHANIE SUSAVAGE and : CIVIL ACTION  
SCOTT SUSAVAGE, :  
Administrators of the Estate :  
of CYNTHIA SUSAVAGE :  
 :  
 :  
v. :  
 :  
BUCKS COUNTY SCHOOLS : NO. 00-6217  
INTERMEDIATE UNIT NO. 22, :  
et al. :  
 :

**MEMORANDUM**

Giles, C.J.

June 18, 2002

**I. INTRODUCTION**

Alleging violations of federal constitutional and statutory rights, plaintiffs filed a complaint in the above-captioned matter on December 8, 2000 as Administrators of the Estate of Cynthia Susavage, a minor, and in their own right, as parents, against the Bucks County Schools Intermediate Unit No. 22 (“BCIU”), the Quakertown Community School District (“School District”) and the LifePath Special Care Facility (“LifePath”). On February 12, 2001, the school district filed a third party action against the Levy Bus Co. (“Levy”), whose bus was transporting the minor child to school when she sustained injuries that led to her death.

Plaintiffs have claims remaining under 42 U.S.C. § 1983 for violation of their due process rights under the Fourteenth Amendment to the United States Constitution for termination of the parental relationship, as well as claims as Administrators of the Estate of Cynthia Susavage for 1) violation of the decedent’s rights under the Individuals with Disabilities Education Act (“IDEA”), 2 U.S.C. § 1400, et. seq. and the 42 U.S.C. § 1983 action predicated thereon;

2) violation of the decedent's rights under §504 of the Rehabilitation Act of 1973 ("§ 504"), 29 U.S.C. § 794 and the 42 U.S.C. § 1983 action predicated thereon; 3) violation of the decedent's rights under the Americans with Disabilities Act, 42 U.S.C. § 12101, et. seq. and the 42 U.S.C. § 1983 action predicated thereon; and, 4) violation of the decedent's due process rights under the Fourteenth Amendment to the United States Constitution (42 U.S.C. §1983 action).

Currently before the court is LifePath's Motion for Summary Judgment as to all of plaintiffs' § 1983 claims. For the reasons that follow, the motion is granted.

## **II. FACTUAL BACKGROUND**

The factual background of the underlying case is outlined in detail in Susavage v. Bucks County Schools Intermediate Unit No. 22, 2002 WL 109615 (E.D. Pa. January 22, 2002). The court only relates those facts necessary for an understanding of the instant motion. The claims in this case all arise out of the death of Cynthia Susavage on September 25, 1999, when the child was strangled by a harness on her way to LifePath riding on a Levy bus. LifePath is a private non-profit provider of early intervention services and in-home habilitation supports to handicapped and mentally retarded children. It provided such services to Cynthia Susavage pursuant to its contract with BCIU.

## **III. DISCUSSION**

### *A. Legal Standard*

A summary judgment motion should be granted where it is clear that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact is in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574,

585 n. 10 (1986). All evidence must be viewed in the light most favorable to the nonmoving party. Id. at 587. Once the moving party has carried its initial burden, the nonmoving party must come forward with “specific facts showing there is a genuine issue for trial,” FED. R. CIV. P. 56(e)). There must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

*B. The Instant Case*

LifePath’s motion for summary judgment is based primarily on the argument that a reasonable jury could not find that LifePath was a state actor. Pursuant to 42 U.S.C. § 1983, liability attaches where 1) an entity acts “under color of state law;” and, 2) thereby “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 federal statutory or constitutional law. 42 U.S.C. § 1983. The requirement of conduct “under color of state law” is treated the same as the requirement of “state action” under the Fourteenth Amendment." Mark v. Borough of Hatboro, 51 F.3d 1137 (3d Cir. 1995) (citing United States v. Price, 383 U.S. 787, 794 n.7 (1966)). The Supreme Court has articulated three distinct methods for establishing when the actions of a private entity may be treated as those of the state. They are the “exclusive government function” test, the “symbiotic relationship” test, and the “close nexus” test. Not all of the tests need to be satisfied for a finding of state action. See Brentwood Acad. v. Tennessee Secondary Sch., 531 U.S. 288, 302-03 (2001). The test to be used in a given case is “determined by the particular facts and circumstances of the case.” Thomas v. Larson, 2001 WL 185729, at \*14 (E.D. Pa. Feb. 27, 2001).

The exclusive government function test asks whether “the private entity has exercised

powers that are traditionally the exclusive prerogative of the state." Blum v. Yaretsky, 457 U.S. 991,1004-05 (1982) (internal citation omitted). The third circuit has observed that the Supreme Court has come "increasingly to emphasize the 'exclusivity' aspect of the test." Mark, 51 F.3d at 1142 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982); Black v. Indiana Area Sch. Dist., 985 F.2d 707, 710-11 (3d Cir.1993)). The symbiotic relationship test asks whether "the private party has acted with the help of or in concert with state officials." Mark, 51 F.3d at 1142 (quoting McKeesport Hospital v. Accreditation Council for Graduate Medical Ed., 24 F.3d 519, 524 (3d Cir.1994)). It examines the relationship between the state and the alleged wrongdoer to discern whether there is a great degree of interdependence between the two. Id. at 1142; see Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). Finally, while the symbiotic relationship test examines the entire relationship between the state and the private entity, the close nexus test focuses on "the connection between the state and the specific conduct that allegedly violated the plaintiff's civil rights." Thomas, 2001WL 185729, at \*15. This test asks whether "there is a sufficiently close nexus between the State and the challenged action" such that "the action of the latter may be fairly treated as that of the State itself." Mark, 51 F.3d at 1142 (quoting Blum, 457 U.S. at 1004) (internal citation omitted).

Under one or another of these tests, LifePath could be deemed a state actor in proper circumstances. For example, this court previously explained that while Massachusetts' legislative policy choice to fund a private school for maladjusted students in Rendell-Baker did not make their education an exclusive public function, the case currently before this court is fundamentally different. Susavage v. Bucks County Schools Intermediate Unit No. 22, 2002 WL

109615, \*11 (E.D. Pa. Jan 22, 2002). The third circuit has noted that the precise federal regulations at issue in this case were put in place to “insure that a public agency that would otherwise be responsible for the education of a handicapped child [did] not abdicate that responsibility” merely by delegating it to a private contractor. Id. (citing Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1037 n.5 (3d Cir. 1993)). Thus, in the instant case, part of what made the provision of services to Cynthia Susavage an exclusive state function was not a state policy choice but a federal mandate. The federal statutory requirements, discussed at length in Susavage, 2002 WL 109615, at \*11, by specifically precluding delegation of the state’s duties to a private entity, effectively made them the exclusive prerogative of the state. To the extent that Pennsylvania chose to carry out its duties through LifePath, the latter’s acts or omissions could be deemed state action.

However, §1983 liability attaches only when state action “subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities” secured by federal statutory or constitutional law. 42 U.S.C. § 1983. While counsel have briefed, extensively, the nature of the relationship between LifePath and the state, the closeness of the nexus between the state and the challenged conduct, and the exclusivity or lack thereof of the function at issue, as to LifePath, plaintiffs cannot establish duty, breach or causation.

Plaintiffs assert that LifePath is mandated by Pennsylvania law to provide early intervention services to handicapped children in accordance with state and federal law, including federal civil rights statutes, and point out that LifePath’s contract with BCIU contains the following provision:

Consultant agrees not to discriminate against any person because of race color, religious creed, ancestry, national origin, age, sex, or handicap/ disability in its activities, programs, employment practices or in performing the *duties and/or services required by this agreement*, as required by Title VII, Title IX, ADA, and Section 504.

Plaintiff's Resp., Exhibit 5 (emphasis added). Plaintiffs argue that by virtue of this provision, Life Path was a joint participant with the co-defendants in providing early intervention services to Cynthia Susavage. They then assert that "BCIU paid LifePath to provide Cynthia with early intervention services, including, the required related services of transportation." Plaintiff's Resp. at 8. The court disagrees with the factual assertion and the legal conclusion of state action.

In the above provision, LifePath specifically agrees to comply with state and federal law in the provision of the services for which it is responsible under the contract. LifePath's form service agreement for Cynthia Susavage contains two important sections. The first section requests a listing of the "[s]ervices to be provided as part of the day care fee." Plaintiff's Resp., Exhibit 19. The form provides specific examples of the types of services that should be listed in this section if they are to be provided. The examples given are "transportation, care, meals, etc." Id. The only thing written in this section is "special instruction." Id. The second section of the agreement requests a listing of "[e]xtra services to be provided at an additional fee if applicable." Id. The only thing written under this section is the word "therapies." It is clear that transportation was not within the *duties and/or services required by th[e] agreement* between LifePath and BCIU with regard to Cynthia Susavage.

Plaintiffs also argue that LifePath was responsible, together with the other co-defendants, for developing an appropriate Individualized Educational Plan ("IEP") for Cynthia Susavage, including appropriate transportation. This argument lacks merit. The record demonstrates only

that LifePath was responsible for implementing the terms of Cynthia's IEP relating to her instruction and therapy at LifePath.

Finally, plaintiffs assert that LifePath actively coordinates Pennsylvania's mandatory "statewide system of coordinated, comprehensive, multi-disciplinary, interagency programs" for early intervention services in Bucks County as a designated Local Interagency Coordinating Council ("LICC") for Early Intervention. They cite Brentwood Academy and argue that by virtue of its LICC status, LifePath together with the state, is responsible for planning, coordinating and executing early intervention services for handicapped children, including transportation.

In Brentwood Academy, the Supreme Court held that a state-wide athletic association regulating interscholastic sports among Tennessee public and private high schools, exercised state authority when it penalized the Brentwood Academy for violating a recruiting rule. 531 U.S. at 298. Brentwood Academy does not affect the analysis in this matter for two reasons. There, the association created rules and exercised specific management and enforcement authority. Id. at 299. By contrast, LICCs are "advisory bod[ies]" whose function is to advise and assist state agencies "by making recommendations" regarding the implementation of a state-wide early intervention system. Plaintiffs' Resp. at 19 (citing Pennsylvania Department of Public Welfare Internet web site). Moreover, in Brentwood Academy, it was the association's direct action which caused the alleged harm. Although, in this case, the state's duty to provide various early intervention services was carried out through LifePath, the responsibility for the related service of transportation was carried out through Levy pursuant to its contract with the School District. Thus, again, while the kind of entwinement described by plaintiffs might be sufficient to ground a state action claim in proper circumstances, the causal link between LifePath and the harm

alleged in this case is completely lacking factually and legally.

#### **IV. CONCLUSION**

For the foregoing reasons, the motion for summary judgment is granted. An appropriate order follows.