

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

<b>K.S., Individually and as the Parent and Natural Guardian of S.M., a Minor, Plaintiff,</b>	:	
	:	
<b>v.</b>	:	<b>CIVIL ACTION</b>
	:	<b>NO. 05-4916</b>
<b>School District of Philadelphia, et al., Defendants.</b>	:	
	:	

**MEMORANDUM OPINION AND ORDER**

**RUFE, J.**

**March 28, 2007**

This is a § 1983 action in which Plaintiff K.S., individually and as the parent and natural guardian of S.M., brings suit against Defendants School District of Philadelphia (the “School District”), Principal Wayland Wilson, and teacher Virginia Daniel. Before the Court are Defendants’ Motion for Summary Judgment [Document No. 31], Plaintiff’s Response in Opposition to Defendants’ Motion for Summary Judgment [Document No. 34], Defendants’ Amended Reply to Plaintiff’s Response [Document No. 37], and Plaintiff’s Sur-Reply to Defendants’ Amended Reply [Document No. 39]. For the reasons that follow, Defendants’ Motion for Summary Judgment will be granted in part and denied in part.

**I. FACTS AND PROCEDURAL HISTORY**

K.S. alleges that on March 8, 2005, her daughter S.M., a five-year-old female kindergarten student, was sexually assaulted by a five-year-old male classmate, R.F., while they were left unsupervised at the William H. Harrison Elementary School (“Harrison Elementary”) in Philadelphia, Pennsylvania. On that date, K.S. arrived at the main office of Harrison Elementary to

pick up S.M. early due to bad weather. When K.S. arrived, S.M. was in gym class in the basement of the school. In accordance with a school policy that allows students “to roam” the halls without adult supervision,<sup>1</sup> Daniel, the gym teacher, ordered R.F. to accompany S.M. from the gym to the main office. On their way to the office, R.F. forced S.M. into the boy’s bathroom in the basement and sexually assaulted her.

K.S. subsequently filed this suit, which is before the Court after removal from the Court of Common Pleas of Philadelphia County, alleging federal and state claims for monetary damages and declaratory relief. The Court, in a February 6, 2006 Memorandum Opinion and Order [Document No. 28], dismissed Plaintiff’s claim against the Commonwealth of Pennsylvania Department of Education, allowing the matter to proceed against Defendants School District, Wilson, and Daniel.

Plaintiff’s remaining claims assert three primary grounds for liability under 42 U.S.C. § 1983: (1) that, under the state-created-danger theory, Wilson and Daniel are each liable for affirmatively creating a dangerous situation that resulted in a constitutional violation; (2) that Wilson and Daniel are liable for carrying out school customs or policies that resulted in a constitutional violation, and (3) that the School District is liable as a municipality for having such customs or policies. Defendants School District, Wilson, and Daniel now move for summary judgment on all of Plaintiff’s remaining claims—Counts I through VI—and Wilson and Daniel further assert a qualified immunity defense.

## **II. LEGAL STANDARD**

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is

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<sup>1</sup> Am. Compl. ¶ 224(h).

proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” A genuine issue of material fact exists when “a reasonable jury could return a verdict for the nonmoving party.”<sup>2</sup> “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”<sup>3</sup> All inferences must be drawn, and all doubts resolved, in favor of the nonmoving party.<sup>4</sup>

If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to “do more than simply show that there is some metaphysical doubt as to the material facts.”<sup>5</sup> The nonmoving party cannot “rely merely upon bare assertions, conclusory allegations or suspicions” to support its claim.<sup>6</sup> To the contrary, a mere scintilla of evidence in support of the nonmoving party’s position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant.<sup>7</sup> Accordingly, “Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”<sup>8</sup>

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<sup>2</sup> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

<sup>3</sup> Id.

<sup>4</sup> Id. at 255.

<sup>5</sup> Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

<sup>6</sup> Fireman’s Ins. Co. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

<sup>7</sup> Liberty Lobby, 477 U.S. at 252.

<sup>8</sup> Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

### III. DISCUSSION

To establish a prima facie case under § 1983, a plaintiff must show that a person acting under color of state law deprived them of a right, privilege, or immunity secured by the Constitution or federal law.<sup>9</sup> It is undisputed that the School District Defendants, as employees of the School District of Philadelphia, qualify as state actors for purposes of § 1983. Moreover, K.S. alleges violation of her daughter S.M.'s rights under the Fourteenth Amendment to the United States Constitution. This is sufficient to make a prima facie showing of § 1983 liability.

#### A. State-Created Danger

Individuals have a constitutionally protected, substantive-due-process right to bodily integrity.<sup>10</sup> Although the Due Process Clause does not generally impose an affirmative duty upon the state to protect citizens from the acts of private individuals,<sup>11</sup> courts have explicitly imposed a duty to protect when a “state-created danger” is involved.<sup>12</sup> To prevail on a state-created-danger claim in the Third Circuit, a plaintiff must prove the following four elements:

- (1) the harm ultimately caused was foreseeable and fairly direct;
- (2) a state actor acted with a degree of culpability that shocks the conscience;
- (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's

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<sup>9</sup> 42 U.S.C. § 1983 (2000).

<sup>10</sup> See Albright v. Oliver, 510 U.S. 266, 272 (1994).

<sup>11</sup> See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 198-200 (1989).

<sup>12</sup> See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3d Cir. 1997).

actions, as opposed to a member of the public in general; and

- (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.<sup>13</sup>

The first and third prongs of the state-created-danger test hinge on foreseeability; the focus on whether the harm itself was foreseeable and, if so, whether the plaintiff was a foreseeable victim of the defendant's acts. A foreseeable plaintiff may mean a specific person or a specific class of persons.<sup>14</sup> Based upon the facts before the Court, there are genuine issues of material fact concerning foreseeability such that, when viewed in the light most favorable to K.S., a reasonable jury could return a verdict in her favor.

Prior to March 8, 2005, the School District had experienced a rise in sexual offenses including rape, sexual misconduct, indecent exposure, and indecent assault among some of its youngest students.<sup>15</sup> Harrison Elementary was not immune from such offenses. Specific harm to young students was reported to Harrison Elementary's Principal, Defendant Wilson, and to other teachers, those reports including sexually overt acts among kindergarten and first grade students.<sup>16</sup> Among the reported perpetrators was kindergartner R.F., the student alleged to be responsible for

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<sup>13</sup> See Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. 2006), cert. denied, 75 U.S.L.W. 3473 (U.S. Mar. 5, 2007) (No. 06-563).

<sup>14</sup> Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 913 (3d Cir. 1997).

<sup>15</sup> See First Am. Compl. ¶¶ 24-41 (the School District refers to these sexual offenses collectively as "moral offenses."); Defs.' Am. Reply to Pl.'s Resp. to Summ. J., Ex. B, Dep. of Harvey Rice, 34:11-18.

<sup>16</sup> See First Am. Compl. ¶ 41; Defs.' Am. Reply to Pl.'s Resp. to Summ. J., Ex. D, Dep. of K.S., 51:14-20, 56:19-23, 64:2-22.

the sexual assault of S.M. on March 8, 2005.<sup>17</sup> Specifically, K.S. observed R.F. on school grounds aggressively hugging and kissing girls in S.M.'s class, and attempting to do the same to S.M. before K.S. told him to stay away from her daughter.<sup>18</sup> As a result of K.S.'s observations of R.F., she explicitly demanded that Miss Milhouse, S.M.'s kindergarten teacher, keep R.F. away from her daughter.<sup>19</sup> What remains unclear, however, is whether Miss Millhouse conveyed K.S.'s concerns about R.F. to Wilson or any of S.M.'s other teachers. Also unclear is whether S.M.'s gym teacher, Defendant Daniel, was aware, or should have been aware, of any of the aforementioned facts concerning sexual offenses generally, or R.F. specifically, on the day she ordered R.F. to accompany S.M. through an unmonitored area of the school.

The Court, in viewing the facts in the light most favorable to K.S., construes the aforementioned factual discrepancies in K.S.'s favor and concludes that Miss Millhouse would logically have conveyed K.S.'s concerns regarding R.F.'s sexually aggressive behavior towards S.M. to both Principal Wilson and S.M.'s other teachers. In light of the rampant increase in sexual offenses among the young students generally, the specific sexual acts among the students reported to Harrison Elementary's Principal and teachers, and viewing the noted discrepancies concerning the acts of R.F., a reasonable jury could find that harm is foreseeable where a teacher selects an alleged sexually deviant five-year-old boy to escort his female classmate through an unmonitored area of school.

Concerning the second prong of the state-created-danger test, the Court notes that "in

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<sup>17</sup> See Pl.'s Resp. to Defs.' Mot. for Summ. J., Ex. B, Dep. of K.S., 69:9 to 72:23.

<sup>18</sup> Id.

<sup>19</sup> Id.

any state-created-danger case, the state actor’s behavior must always shock the conscience. But what is required to meet the conscience-shocking level will depend upon the circumstances of each case, particularly the extent to which deliberation is possible.”<sup>20</sup> “In a ‘hyperpressurized environment,’ an intent to cause harm is usually required. On the other hand, in cases where deliberation is possible and officials have the time to make ‘unhurried judgments,’ deliberate indifference is sufficient.”<sup>21</sup> “[In] circumstances involving something less urgent than a ‘split-second’ decision but more urgent than an ‘unhurried judgment’ . . . defendants [must] disregard a great risk of serious harm . . . .”<sup>22</sup> Negligent behavior can never rise to the level of conscience shocking.<sup>23</sup>

The parties do not disagree that on March 8, 2005, K.S. came to school to pick up S.M. while she was in gym class. Daniel was contacted and told to dismiss S.M. from gym class. Deliberation was possible in selecting a student to accompany K.S. and required no more than an “unhurried judgment.” Daniel selected R.F. to escort her to the Principal’s Office where K.S. was waiting. Daniel knew that R.F. supposedly needed to use the bathroom, but alleges that she told R.F. to use the bathroom only after dropping S.M. off at the Principal’s Office.<sup>24</sup> Daniel knew that the school policy required that students going to the bathroom should be escorted by a student of the same sex, but because R.F. was to use the bathroom only after dropping S.M. off, she did not balk

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<sup>20</sup> Sanford v. Stiles, 456 F.3d 298, 310 (3d Cir. 2006).

<sup>21</sup> Id. at 309.

<sup>22</sup> Id. at 310.

<sup>23</sup> See Kaucher v. County of Bucks, 455 F.3d 418, 426 (3d Cir. 2006) (citing County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998) (“[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.”)).

<sup>24</sup> See First Am. Compl. ¶¶ 24-41; Defs.’ Am. Reply to Pl.’s Resp. to Summ. J., Ex. G, Dep. of Virginia Daniel, 17:6-11.

at sending two students of opposite sex to the Office.<sup>25</sup> Under these circumstances, the Court concludes that K.S. need only establish that Daniel exhibited deliberate indifference in selecting R.F. to accompany S.M. under the second prong of the state-created-danger test.

These facts, viewed in a vacuum, would appear, at most, to rise to a level of negligence, which would not permit a reasonable jury to find that Daniel's acts shocked the conscience. The issue of foreseeability, however, must first be resolved. If K.S. can establish that the harm to S.M. was foreseeable, a reasonable jury could find that Daniel, with knowledge of the high rate of sexual offenses among young children in her class, and with knowledge of particular students' sexual tendencies, acted deliberately indifferent, and hence shocked the conscience, when selecting an alleged sexually deviant five-year-old boy to escort his female classmate through an unmonitored area of school.

The fourth and final prong of the state-created-danger test requires that a state actor affirmatively used his or her authority in a way that created a danger to S.M. or that rendered S.M. more vulnerable to danger than had the state not acted at all. The Court reviews both the acts of Wilson and Daniel to determine whether the acts of either state actor meet the threshold requirements for the fourth prong of the state-created-danger test. These requirements include establishing "a specific and deliberate exercise of state authority," and "a direct causal relationship between the affirmative act of the state and the plaintiff's harm."<sup>26</sup> In other words, a plaintiff must show that "the

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<sup>25</sup> *Id.* at 17:19 to 18:14. The Court notes that even if Daniel did instruct R.F. to use the bathroom only after dropping S.M. off at the main office, this instruction also violates school policy since R.F. would then be going to the bathroom by himself and without the required student escort.

<sup>26</sup> *Kaucher v. County of Bucks*, 455 F.3d 418, 432 (3d Cir. 2006).

state's action was the 'but for cause' of the danger faced by the plaintiff."<sup>27</sup>

While not clearly delineated in K.S.'s filings, K.S. argues that Wilson affirmatively created the constitutional harm at issue here by failing to report acts of sexual misconduct to the School District.<sup>28</sup> The facts before the Court, however, do not support this argument. Rather, in both the sexually inappropriate incident reported by K.S. to Wilson concerning the first-grade class and the incident involving S.M. now before the Court, Wilson took sufficient measures to address the incidents. Specifically, Wilson, in addressing the incident involving the first-grade students, brought the parents of the students into his office to discuss the issue the very next day.<sup>29</sup> In the instant case, Wilson reported the incident to the School District which resulted in further police investigation.<sup>30</sup> Regardless of how Wilson's response to these incidents is surmised, however, K.S. attempts to recharacterize Wilson's alleged failure to report acts of sexual misconduct as an affirmative act. What K.S. alleges, though, is solely the failure of Wilson to protect S.M. against the criminal behavior of a third party. Under Bright, this alleged failure to act is not an affirmative act under the state-created-danger test.<sup>31</sup> Moreover, K.S. has failed to establish that any of Wilson's actions or inactions were the "but-for cause" of S.M.'s alleged constitutional harm.<sup>32</sup> Accordingly, since none

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<sup>27</sup> Id.

<sup>28</sup> See Pl.'s Resp. to the Defs.' Mot. for Summ. J., at 17.

<sup>29</sup> See Defs.' Am. Reply to Pl.'s Resp. to Summ. J., at 17.

<sup>30</sup> Id.

<sup>31</sup> 443 F.3d at 282; see also, Sanford, 456 F.3d at 312.

<sup>32</sup> See, e.g., D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1376 (3d Cir. 1992) ("Plaintiff's harm came about solely through the acts of private persons without the level of intermingling of state conduct with private violence that supported liability [under the state-created danger theory]."); Mohammed v. Sch. Dist. of Philadelphia, 196 Fed. Appx. 79, 82 (3d. Cir. 2006) (not precedential) (plaintiff failed to establish claim for state-created danger where he was punched by another student in an unmonitored stairwell because the attack "was not a fairly direct result of Defendant's actions.").

of Wilson's acts could be found by a reasonable jury to rise to the requisite level of culpability under this fourth prong, the Court dismisses all claims against Wilson under the state-created-danger theory.

With respect to the acts of Daniel, K.S. alleges that Daniel's selection of R.F. to escort S.M. to the main office constitutes an affirmative act and that, but for the selection of R.F., S.M. would not have been sexually assaulted.<sup>33</sup> As set forth in Morse, "the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission."<sup>34</sup> Foreseeability is still at issue with respect to Daniel's acts. The Court concludes that when considering the facts in the light most favorable to K.S., a reasonable jury could find that harm is foreseeable where a teacher selects an alleged sexually deviant five-year-old boy to escort his female classmate through an unmonitored area of school. Accordingly, summary judgment is denied as it relates to the state-created-danger claim against Daniel.

With respect to K.S.'s state constitutional claims brought under the state-created-danger theory, the Pennsylvania Supreme Court has held that the requirements of Article I, Section 1 of the Pennsylvania Constitution are not distinguishable from those of the Fourteenth Amendment, and the same analysis may be applied to both claims.<sup>35</sup> Accordingly, for the same reasons detailed above, the Court denies Defendants' Motion for Summary Judgment as it relates to K.S.'s state-constitutional claim against Daniel, and grants Defendants' Motion as it relates to the state-

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<sup>33</sup> See Pl.'s Resp. to the Defs.' Mot. for Summ. J., at 16-17.

<sup>34</sup> Morse, 132 F.3d at 915.

<sup>35</sup> Pennsylvania Game Comm'n v. Marich, 666 A.2d 253, 255 n.6 (Pa. 1995) (internal citation omitted).

constitutional claims against Wilson under the state-created-danger theory.

### **B. Unconstitutional School Custom or Policy**

K.S.'s second claim of § 1983 liability is grounded in the theory that enforcement of a school custom or policy allowing two students to accompany one another through a hallway without adult supervision results in constitutional violations such as the one allegedly suffered here. K.S. asserts that both Wilson and Daniel are liable for the enforcement of this policy, and that the School District is liable as a municipality under Monell.<sup>36</sup> With respect to the School District's liability, a municipality cannot be responsible for damages under § 1983 on a vicarious-liability theory,<sup>37</sup> and "can be found liable under § 1983 only where the municipality itself causes the constitutional violation at issue."<sup>38</sup>

Under the law of this Circuit, a plaintiff must show that a policy, procedure, or custom of the state caused the injury, and that the state acted with deliberate indifference to the likelihood of a constitutional deprivation.<sup>39</sup> In addition, the wrongdoer must be a state actor.<sup>40</sup> This circuit held in Stoneking that a school district and its officials could be liable for a policy, procedure, or custom of condoning sexual abuse of students by teachers.

K.S. sets forth that in light of rampant school violence and sexual offenses, Harvey Rice, an administrator in the Office of Safe Schools Advocate, suggested that the School District

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<sup>36</sup> See Monell v. Dept. of Soc. Sec. Servs., New York City, 436 U.S. 658 (1978).

<sup>37</sup> Id. at 694-95.

<sup>38</sup> City of Canton v. Harris, 489 U.S. 378, 385 (1989).

<sup>39</sup> Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 730 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990).

<sup>40</sup> D.R., 972 F.2d at 1376.

review its procedures involving student supervision and recommended that there should be an adult supervisor accompanying young students when they are sent to the bathroom.<sup>41</sup> Rice explicitly stated during his deposition that, “I wouldn’t think you would send a six-year-old [student] out to the hall by *themselves* not being monitored.”<sup>42</sup> Rice, however, was addressing the practice of allowing young students to go to the bathroom without any supervision—not teacher, classmate, or otherwise. He was not speaking to policies such as the one in place at Harrison Elementary that promoted two or more students accompanying one another to the bathroom or through unmonitored hallways. Nonetheless, it is K.S.’s position that the School District’s policy of failing to provide adult supervision in all areas of the school resulted in the constitutional harm suffered by S.M.

There exists no issue of material fact as to whether Harrison Elementary’s policy of requiring at least two students to accompany one another through the hallways violates the Fourteenth Amendment. The Court, making a judgment as a matter of law under Federal Rule of Civil Procedure 56(c), concludes that such a policy promotes rather than hinders safety and that enforcement of this policy does not cause constitutional harms. While a school would ideally provide adult supervision throughout every inch of the school grounds, such a level of protection is neither required<sup>43</sup> nor economically feasible. Moreover, although not binding precedent, the Court agrees with the reasoning set forth by the New York Appellate Division in Garcia v. City of New York,<sup>44</sup> where a kindergarten student was sexually molested in a bathroom and the school was held

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<sup>41</sup> See Pl.’s Resp. to Defs.’ Mot. for Summ. J., Ex. B, Dep. of Harvey Rice, 44:5-15, 49:7-21.

<sup>42</sup> Id. at 49:19-21 (emphasis added).

<sup>43</sup> See D.R., 972 F.2d at 1368-69 (“We commence our analysis by reiterating the well-established principle that the Due Process Clause does not impose an affirmative duty upon the state to protect its citizens.”).

<sup>44</sup> 646 N.Y.S.2d 508 (N.Y. App. Div. 1996).

liable for sending the student to the bathroom alone:

[W]e have a five-year old child . . . who was sent by his teacher to a public bathroom unescorted. The potential danger to the child under the circumstances of this case can be reasonably foreseen and could have been prevented by adequate supervision by the school. Thus, while it would be reasonable to allow high school students to go to a public bathroom unaccompanied, the same practice surely does not apply to a five-year-old child, who is unable to resist, is defenseless against attack, and poses an easy target for sexual molestation or other assaults. Stated another way, even the most prudent parent will not guard his or her teen at every moment in the absence of some foreseeable danger of which he or she has notice; *but a five-year-old child in a public bathroom should be supervised or, at the very least, be accompanied by another child.*<sup>45</sup>

Here, Harrison Elementary’s policy at least met the minimum requirement of safety discussed in Garcia—S.M. was accompanied by another student in the unmonitored hallways of the school.

Because the Court finds that the school policy requiring students to escort one another through the school hallways and to the bathroom is not unconstitutional and does not directly cause harms such as those suffered here by S.M., no further analysis is required. “[W]here the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the ‘policy’ and the constitutional deprivation.”<sup>46</sup> The facts presented to the Court are devoid of this requisite level of additional proof. The Court therefore grants Defendants’ Motion for Summary Judgment as it relates to all claims that this policy, and enforcement of this policy, causes constitutional harms. Moreover, the Court grants Defendants’ Motion for Summary Judgment as it relates to Plaintiff’s state-constitutional claims brought under the same

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<sup>45</sup> Id. at 510-11 (emphasis added). See also Phillips v. City of New York, 453 F. Supp. 2d 690, 732-33 (S.D.N.Y. 2006) (citing to both Garcia, 646 N.Y.S.2d at 510-11, and Murray v. Research Found., 707 N.Y.S.2d 816, 821 (N.Y. Super. Ct. 2000), for the proposition that in some instances, a potential danger can reasonably be foreseen and prevented by a school even absent notice of prior similar conduct.).

<sup>46</sup> City of Oklahoma City v. Tuttle, 471 U.S. 808, 824 (1985).

unconstitutional-school-policy theory. Accordingly, no claims on this theory may proceed against the School District, Wilson, or Daniel.

### **C. Monetary Damages Under Pennsylvania Constitution**

Plaintiff concedes that because money damages are available under § 1983, the Pennsylvania Constitution does not provide a separate remedy for monetary damages. Indeed, the Commonwealth Court of Pennsylvania has so held in the context of Article I, Section 8 violations.<sup>47</sup> While the Third Circuit has not yet addressed the issues raised in Jones v. City of Philadelphia,<sup>48</sup> decisions in the Eastern District of Pennsylvania have adopted its reasoning.<sup>49</sup> This Court similarly adopts the Jones decision and predicts that the Pennsylvania Supreme Court would agree that Jones equally applies to Article I, Section 1 violations. Accordingly, the Court grants Defendants' Motion for Summary Judgment with respect to Plaintiff's claim for monetary damages under the Pennsylvania Constitution.

### **D. Qualified Immunity**

Finally, the Court notes that Daniel cannot establish a defense for qualified immunity at this time. The formula for analyzing a qualified-immunity claim is a multi-step process. First, the court must decide whether a constitutional violation has occurred, and then it must ““proceed to determine whether the right was clearly established at the time of the alleged violation.””<sup>50</sup> Once these requirements are found to have been satisfied, the inquiry proceeds to another, closely related

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<sup>47</sup> Jones v. City of Philadelphia, 890 A.2d 1188, 1215-16 (Pa. Commw. Ct. 2006).

<sup>48</sup> Id.

<sup>49</sup> See, e.g., Small v. City of Philadelphia, Civ. No. 05-5291, 2007 WL 674629, at \*12 (E.D. Pa. Feb. 26, 2007).

<sup>50</sup> Wilson v. Layne, 526 U.S. 603, 609 (1999) (quoting Conn v. Gabbert, 526 U.S. 286, 290 (1999)).

issue, that is, whether the state actor made a reasonable mistake as to what the law requires.<sup>51</sup> Here, because foreseeability is still at issue, it cannot be determined whether Daniel's actions on March 8, 2005, were reasonable. Accordingly, the Court denies Defendants' Motion for Summary Judgment as it relates to Daniel's defense of qualified immunity. The Court need not address Wilson's claim for qualified immunity because all claims against Wilson are summarily dismissed.

#### **IV. CONCLUSION**

Ultimately, the Court grants in part and denies in part Defendants' Motion for Summary Judgment. Counts III and VI, Plaintiff's claims against Daniel concerning the state-created-danger theory of liability, survive summary judgment, and Defendant's Motion is granted with respect to all other claims against School District and Wilson. An appropriate Order follows.

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<sup>51</sup> See Carswell v. Borough of Homestead, 381 F.3d 235, 242 (3d Cir. 2004).

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

<b>K.S., Individually and as the Parent</b>	:	
<b>and Natural Guardian of S.M., a Minor,</b>	:	
<b>Plaintiff,</b>	:	
	:	
v.	:	<b>CIVIL ACTION</b>
	:	<b>NO. 05-4916</b>
<b>School District of Philadelphia, et al.,</b>	:	
<b>Defendants.</b>	:	
	:	

**ORDER**

**AND NOW**, this 28th day of March 2007, upon consideration of Defendants’ Motion for Summary Judgment [Document No. 31], Plaintiff’s Response in Opposition to Defendants’ Motion for Summary Judgment [Document No. 34], Defendants’ Amended Reply to Plaintiff’s Response [Document No. 37], and Plaintiff’s Sur-Reply to Defendants’ Amended Reply [Document No. 39], it is hereby **ORDERED** that Defendants’ Motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Defendants’ Motion for Summary Judgment is **DENIED** as it relates to Plaintiff’s 42 U.S.C. § 1983 (state-created danger) and related Pennsylvania state constitutional claim against Defendant Virginia Daniel (Counts III and VI);
2. Defendants’ Motion for Summary Judgment is **GRANTED** as it relates to Defendants School District of Philadelphia and Wayland Wilson, and Counts I, II, IV, and V are **DISMISSED**; and
3. Defendants’ Motion for Summary Judgment is **GRANTED** with respect to

the monetary-damage claim in Count VI.

It is so **ORDERED**.

**BY THE COURT:**

**/s/ Cynthia M. Rufe**  
**CYNTHIA M. RUFÉ, J.**