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

KATHLEEN SANFORD, Individually and as Administratrix of the ESTATE OF MICHAEL R. SANFORD,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
PAMELA STILES, DENNIS MURPHY, and EAST PENN SCHOOL DISTRICT,	:	
Defendants.	:	
	:	NO. 03-CV-5698

OPINION

Stengel, J. Date: November 10, 2004

Kathleen Sanford brought this action against the East Penn School District and Pamela Stiles, a school guidance counselor, in connection with her son Michael Sanford's suicide on December 4, 2002.[1] Plaintiff, in her own right and as administratrix of her son's estate, alleges that Defendants are liable for constitutional violations pursuant to 42 U.S.C. § 1983 under a state-created danger theory, and that Pamela Stiles is also individually liable on a state law negligence claim. Defendants moved to dismiss Plaintiff's complaint, and on March 8, 2004, that motion was denied by the Honorable Timothy J. Savage of the United States District Court of the Eastern District of Pennsylvania. Upon completion of discovery, Defendants filed a motion for summary judgment. The case was reassigned to me on August 3, 2004. For the reasons set forth below, I will grant Defendants' motion for summary judgment.

[1] Plaintiff has dismissed her claims against the school principal, Dennis Murphy, who was named in the initial complaint.

I. Factual Background

On November 26, 2002, Karen Martin, a high school student, received a handwritten note from Michael Sanford, a fellow student in the East Penn School District. Karen and Michael had met at the beach during the summer of 2002 and dated for a brief period of time. In the fall of 2002, Michael learned that Karen was dating someone else and wrote her a series of notes between September and November of that year. Many of those notes indicated that Michael was upset that Karen had a new boyfriend named Ryan. In the note Karen received on November 26, Michael wrote:

> I know I really haven't talked to you in awhile. Hopefully this note doesn't come out the wrong way. I've heard 3 different stories about you & Ryan. The one I heard almost made me want to kill myself. Mostly because if there was any chance in hell of you & me solving the what if's I fucked it up. Anyways I heard that instead of Danielle it was you online Friday. If I said anything stupid, I apologize. (This weekend sucked & I've tried to make myself forget it). So how have you been? How's driving going? Remember stop signs with white lines around them are optional & if you hit a pedestrian @ nite & he's wearing black its 100 pts. For some reason, I just thought this & have to ask you, is there any grudge or animosity btwn us? I g2g. Write back if you can, if not hopefully I ttyl. Luv ya.

On November 27, 2002, Karen presented the note to her assigned guidance counselor, Barbara Valladares, and indicated that although she did not think that Michael would actually commit suicide, she was worried about him. She also told Mrs. Valladares that Michael was "bugging" her. When Mrs. Valladares asked whether she could tell Michael that Karen had turned in the note, Karen responded, "Please don't." Mrs. Valladares gave a copy of the note to Michael's guidance counselor, Pamela Stiles.

That afternoon, Mrs. Stiles called Michael to her office to question him about the note he had written to Karen Martin. Mrs. Stiles told Michael that some of his friends were concerned about him and therefore, she was concerned about him. When she asked if he was upset about a situation with a girl, Michael responded "Mrs. Stiles, that was two months ago, not now." Mrs. Stiles asked if he understood why she would be concerned and he indicated that he did. She asked if he ever had a plan to hurt himself or if he would do so, and he said that he definitely would not. She then proceeded to ask "forward thinking" questions regarding his plans in the immediate future. Upon conclusion of this ten to fifteen minute meeting with Michael, Mrs. Stiles determined that he was not at risk of committing suicide. She did not contact the school psychologist, nor did she contact Michael's mother, Kathleen. Mrs. Stiles was acting in accordance with a procedure set forth in a document entitled "Suicide Referral Process," which was signed by the director of pupil services and approved by the high school principal.

On December 4, Michael visited the guidance office and asked Mrs. Stiles who had given her the note that they had discussed on November 27. She said that for confidentiality reasons, she could not reveal the source of the information. She invited him into her office, but he said, "Thanks, I thought that's what you would say. That's all I needed." That evening, on the way home from basketball practice, Michael and Mrs. Sanford had an argument in the car.[2] Michael jumped out of the car, and ultimately, walked home. Upon his return home, Mrs. Sanford asked Michael to clean the kitchen. Mrs. Sanford was on the second floor of the house. When she did not hear Michael cleaning the kitchen on the first floor, she went downstairs to look for him. She found him hanging from the door of the bathroom in the basement.

[2] The argument seems to have centered around Michael's disapproval of his mother's smoking.

Michael Sanford was sixteen years old and a senior in high school at the time of his death. In the weeks prior to the suicide no one, including Mrs. Sanford, Jason Pekarkik, Karen Martin, or Michael's uncle David Schlegel[3], believed he was suicidal or that he would harm himself.[4] He had been diagnosed with attention deficit disorder in the seventh grade and was taking Aderol for this condition. The dosage had been reduced from 30 milligrams to 20 milligrams in August 2002, but his mother did not witness a change in his behavior as a result of the dosage change.

On the day before Michael's death, Mrs. Sanford read an instant message exchange between Michael and his friend, Jason Pekarkik, which referenced suicidal behavior.[5] When she saw these messages on December 3, she was not concerned that Michael was suicidal. She now believes that Michael and Jason had made a suicide pact. Jason testified in his deposition that they were not seriously discussing injuring themselves. After Michael's death, Mrs. Sanford found a sketch of the tombstone on the back of Michael's notebook and "practice ropes" (three shoe laces with knots in them) among his belongings.

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[3] Michael spent significant amount of time at his uncle's home. Def.'s Mem. Supp. Summ. J., Ex. 9, at 8. David Schlegel is a licensed social worker and has worked as a general and family therapist in the past. Id., Ex. 8, at 7-11, 81. In his deposition, Mr. Schlegel testified that prior to Michael's death, he seemed "happy-go-lucky." According to Mr. Schlegel, he was not upset, depressed, sad, or angry. Id., Ex. 8, at 44-45.

[4] See Def's. Mem. Supp. Summ. J., Ex. 6, at 64; Ex. 8, at 52, 55; Ex. 10, at 60, 67. Karen Martin testified that she took the note from Michael Sanford to the guidance office, because "I was worried because it obviously said he was going to kill himself, *even though I didn't think he would*. But I just didn't want to have it in writing and not do anything about it." Id., Ex. 12, at 24 (emphasis added).

[5] In one such exchange, Jason Pekarkik wrote, "I get the knife," to which Michael responded, "Fine I got the rope." Def.'s Mem. Supp. Summ. J., Ex. 16.

II. Standard of Review

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment will be granted "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...." FED. RULE CIV. PROC. 56(b). The moving party bears the initial burden of showing that there is no genuine issue of material fact**.** Highlands Ins. Co. v. Hobbs Group LLC, 373 F.3d 347, 350-51 (3d Cir. 2004). Once the moving party has carried its burden, the nonmoving party must come forward with specific facts to show that there is a genuine issue for trial. Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989)**.** A fact is "material" if its resolution will affect the outcome under the applicable law, and an issue about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must draw all justifiable inferences in favor of the nonmoving party. Highland, 373 F.3d at 351.

III. Plaintiff's Substantive Due Process Claim on Behalf of Michael Sanford

Plaintiff alleges that Michael Sanford had a constitutional "right to be free from school officials' deliberate indifference to, or affirmative acts that increase the danger of his loss of life," and that Defendants violated this right by, among other things, affirmatively intervening and failing to properly evaluate Michael's psychological condition. Plaintiff filed suit on Michael Sanford's behalf pursuant to 42 U.S.C. § 1983.

Section 1983 provides a civil cause of action against any person who, acting under color of state law, deprives another of her constitutional rights. The constitutional right that Plaintiff invokes on behalf of Michael Sanford is grounded in the Fourteenth Amendment. Specifically,

Plaintiff alleges that by holding herself out as a resource to Michael Sanford and then improperly evaluating his psychological state, Pamela Stiles increased the danger of his loss of life in violation of the Fourteenth Amendment.

A. The State-Created Danger Exception

Defendants argue that Plaintiff's claims are based solely on an alleged failure to protect Michael Sanford from himself, that neither Pamela Stiles nor the East Penn School District had an affirmative duty to protect Michael Sanford or to prevent his suicide, and therefore, there can be no constitutional violation. Defendants rely heavily on the Supreme Court's decision DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), to support this proposition. In that case, Joshua DeShaney, a young boy who was severely abused by his father, brought suit against the county department of social services, alleging that the department violated his due process right by failing to protect him from his father's violent behavior. Id. Despite its knowledge that Joshua had suffered numerous "suspicious" injuries, the department took no action to remove him from his father's custody. Id. at 192-93. The Court found no constitutional violation, explaining that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." Id. at 195. Moreover, the Court acknowledged that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." Id. at 196 (citations omitted).

Plaintiff, by contrast, contends that her allegations do not stem from the school's failure to protect Michael, but rather from Pamela Stiles' affirmative actions, which created an increased

risk of danger to him. Despite the holding in DeShaney that there is no constitutional right to governmental aid, Plaintiff argues that the Defendants are liable under the "state-created danger exception."[6]

In DeShaney, the Court declined to recognize that the State had an affirmative duty to protect Joshua, but noted that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them." DeShaney, 489 U.S. at 201. Based on this language, several appellate courts, including the Third Circuit, have recognized the so-called "state-created danger" exception when a state creates or increases the danger to a person with whom it has a relationship. See Kneipp v. Tedder, 95 F.3d 1199, 1211 (3d Cir. 1996); see also Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983).

In Kneipp v. Tedder, 95 F.3d at 1208, the court set forth the elements required to support a state-created danger theory. These elements have since been modified. See Rivas v. City of Passaic, 365 F.3d 181, 202-03 (3d Cir. 2004) (Ambro, J. concurring). However, under the most modern rendition of the test, a plaintiff must establish that: (1) the harm ultimately caused was foreseeable and direct, (2) the conduct of the state official was "so ill-conceived or malicious that

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[6] The Third Circuit has recognized two exceptions to the general proposition that the state has no affirmative obligation to protect its citizens from violent individuals: the "special relationship" exception and the "state-created danger" theory. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3d Cir. 1997).

Under the "special relationship" exception, a state may be held liable for failing to protect a particular citizen to whom it owes an affirmative duty. See D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1369 (3d Cir. 1992). The exception applies, for example, to prisoners and involuntarily committed mental patients. See Estelle v. Gamble, 429 U.S. 97 (1976); Youngberg v. Romeo, 457 U.S. 307 (1982). In D.R. v. Middle Bucks Area Vocational Technical School, 972 F.3d at 1373, the Third Circuit held that no such special relationship exists with school children, and therefore, the exception does not apply in this case. Neither party has argued that it does.

it shocks the conscience" or at least rose to the level of deliberate indifference[7] (3) there existed some relationship between the state and the plaintiff, and (4) the state actor used her authority to create an opportunity that would not have otherwise existed for harm to come to plaintiff. I find, for summary judgment purposes, that there was indeed a relationship between the state and the plaintiff.[8] Further, I find there is at least a question of fact as to whether the harm ultimately caused was foreseeable and direct.[9] Plaintiff, however, has failed to come forward with specific facts to raise a material question for trial as to the second and fourth prongs of the state-created danger exception. Because I find that no reasonable jury could find that Pamela Stiles' actions created or increased the danger that Michael Sanford would commit suicide, nor could a reasonable jury find that she acted with deliberate indifference, summary judgment is appropriate on Plaintiff's constitutional claim.

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[7] See discussion infra at III.A.2.

[8]Unlike the special relationship exception, the state-created danger exception does not require a custodial relationship. Nevertheless, a relationship between the state and the plaintiff must exist. In order to meet this condition, the plaintiff must be "a member of a discrete class of persons subjected to the potential harm brought about by the state's actions." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 913 (3d Cir. 1997). Michael Sanford was one of 2600 students in the East Penn School District during the 2002-2003 school year. He was among the 300 students in Pamela Stiles' caseload, and belonged to the limited group of those students that presented a suicide risk. Thus, Plaintiff has provided sufficient evidence to suggest that there was indeed a relationship between the state and the plaintiff sufficient to preclude summary judgment with respect to this issue.

[9]In order to establish that the state-created danger exception applies, the harm ultimately caused must be foreseeable and direct. On one hand, the Plaintiff has offered evidence that Pamela Stiles received a note which included a suicidal statement, that Michael Sanford was a white adolescent male who came from a single parent home, that he suffered from attention deficit disorder, and that he was impulsive. On the other hand, the note Michael Sanford wrote to Karen Martin stated that a rumor he had heard "made [him] want to kill [himself]." This statement was in the past tense, and Karen indicated in her deposition that it was an oft used turn of phrase sometimes. Def.'s Mem. Supp. Summ. J., Ex. 12, at 68. She also stated that she did not think Michael intended to kill himself. Id. at 20, 33, 75. Michael's mother, and his uncle, a therapist, described Michael as happy in the weeks before his death. Id., Ex. 8, p. 44; Ex. 6, pp. 33-34. Nevertheless, the evidence provided by Plaintiff creates a genuine issue of material fact, and therefore, summary judgment is not appropriate on this issue.

1. No Reasonable Jury Could Find that Pamela Stiles Used Her Authority to Create an Opportunity that Would Not Have Otherwise Existed for Harm to Come to Michael Sanford

To pass summary-judgment muster under the state-created danger theory, a reasonable jury must be able to conclude that Pamela Stiles used her authority to create an opportunity that otherwise would not have existed for Michael Sanford to commit suicide. Plaintiff contends that Pamela Stiles created and increased the risk that Michael Sanford would kill himself by, among other things, affirmatively holding herself out as a source of aid and thereby cutting off other possible avenues of help, undertaking an assessment of Michael's suicide risk without proper training, improperly evaluating that risk, and intentionally deciding not to contact the school psychologist or Michael's parents.

The question under the fourth prong of the state-created danger exception is whether "but for defendants' actions, the plaintiff would have been in a less harmful position." Smith v. Marasco, 318 F.3d 497, 510 (3d Cir. 2003). The Third Circuit and other courts in the Eastern District of Pennsylvania have found causation under the state-created danger theory where there is direct evidence that the harm suffered by the plaintiff was traceable to the intervention of state actors. See, e.g., Kneipp, 95 F.3d at 1201-1203 (holding that police created a risk of harm by detaining an intoxicated woman who was being escorted home by her husband, and thereafter, allowing her to proceed home alone); Smith, 318 F.3d at 502-03, 510 (concluding that a reasonable jury could find that state police officers created the opportunity for the plaintiff's decedent to suffer a fatal heart attack because they used extreme methods to try and coerce him out of his home); Sciotto v. Marple Newtown Sch. Dist., 81 F. Supp. 2d 559, 565 (E.D. Pa. 1999) (finding that school increased the risk of harm to a student by encouraging and permitting older,

heavier college wrestlers to wrestle lighter, younger high school athletes).

However, in those cases where the link between the state official's actions and the ultimate harm was more attenuated, the courts have declined to uphold a § 1983 action based upon a state-created danger theory. See generally Henderson v. City of Philadelphia, 1999 U.S. Dist. LEXIS 10367 (E.D. Pa. 1999) (holding that plaintiff failed to show that police officers did not create or increase the risk of harm to a man who ultimately committed suicide where they did nothing to prevent his mother from coming to his aid); White v. City of Philadelphia, 118 F. Supp. 2d 564, 572 (E.D. Pa. 2000) (dismissing plaintiff's state-created danger claims because officers who responded to an emergency call did not interfere with decedent's sources of aid, but "simply let the events unfold as they stood idly by."); D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3d Cir. 1992) (stating that "schools do not have a constitutionally imposed duty to protect students from other students" and finding that the school's inaction did not create the abusive relationship between students). Plaintiff argues that in contrast to these cases, Pamela Stiles actively intervened and affirmatively cut off other potential sources of aid by holding herself out as a resource to help Michael Sanford and therefore, was responsible for increasing the risk that he would commit suicide. Plaintiff has failed to set forth sufficient facts to support this claim.

The causation element in a suicide case is difficult to establish. In fact, the only state-created danger case we have found against a school district involving a student suicide that has survived a motion to dismiss or motion for summary judgment is Armijo v. Wagon Mound Public Schools, 159 F.3d 1253 (10th Cir. 1998). The facts of that case are distinguishable from this one. In Armijo, the school district suspended Philadelphio, a sixteen-year-old special

education student, when he threatened to physically harm a teacher. Id. at 1256-57. School officials were aware that Philadelphio was emotionally disturbed, that he had threatened to commit suicide in the past, and that he had access to firearms at home. Id. at 1256. The school principal considered him to be at risk for committing violence and the school counselor noted that he appeared to be "very angry." Id. Despite this knowledge and in violation of the school's disciplinary policy,[10] a school official drove him home during the middle of day without notifying his parents. Id. at 1257. The district court granted summary judgment in favor of the school principal and guidance counselor, but the Tenth Circuit reversed, finding that there was sufficient evidence to support a state-created danger claim against them. In contrast to the state actors in Armijo, Pamela Stiles was actually acting in accordance with school policy when she met with Michael Sanford, not in violation of it. She did not discipline Michael Sanford, or send him off school grounds. Moreover, the note she received from Karen Martin contained only an equivocal statement regarding Michael's suicidal intentions. Although in hindsight her evaluation of his mental state may not have been correct, unlike the defendants in Armijo who sent a student home where they knew he had access to firearms, she did nothing to affirmatively create the danger that Michael Sanford would commit suicide.

Other circuit courts have not only distinguished Armijo, but have questioned its holding. The Seventh Circuit affirmed the district court's grant of summary judgment in Martin v. Shawano-Gresham School District, 295 F.3d 701 (7th Cir. 2002), where a student committed suicide at home after being suspended for having a cigarette on school property. In that case,

[10] The school handbook provided: "If a student is placed on out-of-school suspension, but his/her parents will not be home, that student will be placed instead on in-school suspension without credit for work done." Id. at 1257.

there had been several recent suicides at the school and there was at least some evidence that the student was at risk for suicide because she possessed a book entitled "After Suicide." Nevertheless, the court held that because "the defendants did not create or increase the risk that [the student] would commit suicide...they did not have an affirmative obligation to protect [her] after school hours."[11] Id. at 710. Although the Martin court discussed the holding in Armijo, it noted, "*Even if* we were to accept the Armijo standard that the school created a danger and thus could be liable under DeShaney, the Martins' argument would not succeed." Id. at 295 F.3d at 711 (emphasis added). Likewise, in Hasenfus v. LaJeunesse, 175 F.3d 68 (1st Cir. 1999), the First Circuit upheld the lower court's dismissal of the plaintiff's state-created danger claim. Although school officials knew that the student had been raped and that there had been a rash of suicides within the school, the court held that the school did not create or increase the risk that the student would attempt to commit suicide when a teacher reprimanded her in front of her classmates and sent her back to an unsupervised locker room alone. Id. at 73-74. The First Circuit, too, indicated that the Armijo decision was questionable, and in any case, its holding was at the "outer limit." Id. at 74.

The facts in Michael Sanford's case are significantly less compelling from a causation standpoint than Armijo, Martin, or Hasenfus. In those cases, school officials affirmatively imposed disciplinary action on students who they knew to be emotionally fragile, and potentially

[11] In deciding Martin, the Seventh Circuit relied on Collignon v. Milwaukee County, 163 F.3d 982 (7th Cir. 1998). In Collignon, a 28-year-old man committed suicide after leaving police custody. His estate sued the police officers, claiming that the defendants violated the decedent's constitutional rights by releasing him from custody, despite his parents pleas to keep him in detention and obtain medical treatment. The court determined that although temporarily detaining the decedent may have been stressful for him, it did not "expose him to an 'incremental risk' that must then be ameliorated."

suicidal. Pamela Stiles may have failed to protect Michael from himself by improperly evaluating his psychological state, but she did nothing to cause him to take his own life.

The most factually similar case to the one at bar is Wyke v. Polk County School Board, 129 F.3d 560 (11th Cir. 1997). In Wyke, the mother of a junior high student sued the school district under section 1983 after her son committed suicide at home. He had attempted to kill himself on two separate occasions at school. Id. at 564-65. When another student's mother called and informed a school official about the student's suicide attempts, the official assured her that he would "take care of it." Id. at 564. The school official responded to the situation by calling the student into his office and reading him Bible verses. Id. The plaintiff argued that a school official had affirmatively intervened and effectively prevented her from saving her son's life. The court rejected this argument, explaining:

> An affirmative duty to protect according to the [DeShaney] Court, arises from limitations the state places upon an individual's ability to act on his own behalf, "not from the state's knowledge of the individual's predicament or from its expressions of intent to help him..." Trying to reconcile these statements with the Court's language about rendering an individual "more vulnerable to harm," we can only infer that, to venture into the realm of possible state liability, the state must do something more than say, "We'll take care of it."
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> Wyke submits that school officials "affirmatively prevented" her from saving Shawn's life. Unfortunately, the only things Wyke can point to in support of that assertion are Bryan's statement to Morton that he would "take care" of Shawn's situation, and Morton's testimony that, absent Bryan's assurances, she would have called Wyke directly. It was not Bryan, however, that prevented Morton from calling Wyke. Morton herself chose not to call Wyke. Bryan did not either by verbal or physical act restrain Morton from picking up her telephone. Morton simply assumed after speaking with Bryan, she did not need to. Wyke cannot recharacterize that decision, which was made by a private person

> under no obligation to act, as the school's decision to prevent Wyke or anyone else from helping Shawn.

Id. at 570. Plaintiff attempts to distinguish Wyke by pointing to the fact that Karen Martin, a sixteen-year-old student, rather than an adult, was the person who raised the concerns about Michael Sanford's suicidal ideation. This argument is not persuasive. Martin, like the mother who informed the school in Wyke was a private person. Although students are encouraged to inform a guidance counselor about fellow students' suicidal expressions, Martin had no duty to do so. Karen Martin was free to tell her parents or to contact Michael's mother. Thus, as in Wyke, the plaintiff cannot convert Karen Martin's decision to inform the school about Michael's note into an affirmative obligation on the part of the school.

In this case, the link between the Defendants' conduct and Michael Sanford's untimely death is far too attenuated to justify imposition of liability. Michael saw Pamela Stiles on two occasions–once on November 27 when she called him into her office, and again on December 4 when he asked her who had given her the note. Between those visits, it is undisputed that Michael had an altercation with his uncle and an argument with his mother. He was upset about the state of his relationship with Karen Martin. He was taking medication for Attention Deficit Disorder. Plaintiff has alleged that Michael was suicidal when he spoke to Pamela Stiles on November 27–and he was clearly suicidal on the day that he took his own life. Although Pamela Stiles may have been able to prevent his death by conducting a proper evaluation and referring him to a qualified psychologist, she did not create the danger that he would hang himself on that December night.

2. The State Official's Conduct Must "Shock The Conscience" or At Least Rise to the Level of Deliberate Indifference

To establish a state-created danger claim, the plaintiff must also prove that the state official's conduct "shocks the conscience." County of Sacramento v. Lewis, 523 U.S. 833 (1997). This standard clearly applies if the official acted with urgency. If the conduct did not occur in the context of a high pressure situation, however, the plaintiff must show that the official's conduct rose at least to the level of deliberate indifference. Brown v. Commonwealth of Pa. Dep't of Health Emergency Medical Serv., 318 F.3d 473, 480 (3d Cir. 2003). The Kneipp court, which was the first in the Third Circuit to recognize the state-created danger exception, required a showing that the defendant acted in willful disregard of the plaintiff's safety. However, in County of Sacramento v. Lewis, 523 U.S. 833 (1997), the Supreme Court held that in order to constitute a constitutional violation, the state actor's conduct must be so egregious that it "shocks the conscience." The Third Circuit has at least suggested that its reading of Lewis is limited to those situations in which a state official acted with urgency. Brown, 318 F.3d at 480. The Brown court's rationale was based on language from Lewis, in which the Supreme Court stated that "in such circumstances," namely, high pressure situations, a state official's conduct must be conscience-shocking in order to result in constitutional liability. See id. at 480 (quoting Lewis, 523 U.S. 853). Even in those cases where the state official did not have to act with urgency, however, the Third Circuit has required the plaintiff to show that the official was "deliberately indifferent" to the risk of harm. Id. at 479.

The applicable standard is highly dependent on the factual circumstances. See Miller v. City of Philadelphia, 174 F.3d 368, 375-76 (3d Cir. 1999). In Miller, the court recognized that

although a social worker acting to separate a parent and child was not acting in a highly pressurized environment, it nonetheless found that because the social worker did not have "the luxury of proceeding in a deliberate fashion," the shocks-the-conscience test was the appropriate standard. Id. at 375;see also Ziccardi v. City of Philadelphia , 288 F.3d 57 (3d Cir. 2002).

In this case, Defendants argue that Pamela Stiles' decision to immediately call Michael Sanford to her office proves that she was acting with some urgency, and therefore, the Plaintiff must set forth facts such that a reasonable jury could find that Stiles' conduct was so egregious as to "shock the conscience." In any case, Defendants argue that Pamela Stiles' conduct did not even rise to the level of deliberate indifference, and thus, Plaintiff's case must fail.

Plaintiff, by contrast, contends that "a reasonable jury could easily find the facts of this case to be 'conscience-shocking.'" Plaintiff's basic argument is that Pamela Stiles knew that her decision whether to refer a student to the school psychologist involved matters of life and death and that an incorrect evaluation of a student's suicide risk could result in a student taking his own life. Thus, according to Plaintiff, Pamela Stiles' active intervention, subsequent improper assessment, and failure to call Michael's mother constitutes "conscience-shocking" conduct.

Pamela Stiles did respond almost immediately to the note that Karen Martin gave to Barbara Valladares. Nevertheless, she had an entire week–and another visit from Michael Sanford–to reconsider her evaluation. Although a close call, I find that Pamela Stiles did have "the luxury of proceeding in a deliberate fashion," and that deliberate indifference is the applicable standard.

"Deliberate indifference" is a "[s]tringent standard of fault requiring that the municipal actor disregarded a known or obvious consequence of his action." Bd of County Comm'r v.

Brown, 520 U.S. 397 (1997). The Supreme Court has equated deliberate indifference with criminal recklessness, which requires proof that "a state actor has disregarded a risk of which he is aware." Farmer v. Brennan, 511 U.S. 825, 836 (1999). Neither obviousness nor constructive notice is sufficient to render a state actor liable under the deliberate indifference standard. Id.

Although Plaintiff has produced sufficient evidence such that a reasonable jury could conclude that Pamela Stiles acted negligently, there is no evidence which suggests that she consciously disregarded a known or obvious risk. Plaintiff has made repeated allegations about the things Pamela Stiles failed to do–she failed to properly evaluate Michael's mental state, she failed to refer him to a school psychologist, and she failed to notify her of the note written by her son. Def.'s Mem. Supp. Summ. J., Ex. 6, at 124-25, 133-34, 136; Id., Ex. 7, at 15, 64, 66-67, 71-73. Despite her efforts to recharacterize each of these failures as affirmative actions leading to Michael's death, the case against Pamela Stiles sounds in negligence, not deliberate indifference. Similarly, Plaintiff's experts have opined that Stiles' actions fell grossly below the standard of care. A careful reading of their reports, however, suggests only that Pamela Stiles may have been negligent in handling Michael Sanford's case. Dr. Trusty, for example, stated that Stiles "underestimated the seriousness" of the suicidal ideation and "responded insufficiently" to Michael Sanford's note. See id., Ex. 19, at 4.

Negligence is insufficient to support the finding of a due process violation. As the First Circuit noted in Hasenfus:

> Attempted suicide by school-age children is no slight matter; but it has no single cause and no infallible solution...Different schools will react differently, depending upon resources, available information, and the judgment of school and public health authorities, who may fear making a bad situation worse. Absent a

> showing that the school affirmatively caused a suicide, the primary responsibility for safeguarding children from danger, as from most others, is that of their parents; and even they, with direct control and intimate knowledge are often helpless. Possibly there was school negligence here–one would need more information to make a judgment, but negligence is not a due process violation.

Hasenfus, 175 F.3d at 72 (citations omitted)(emphasis added). Summary judgment is therefore appropriate.

B. Pamela Stiles is Entitled to Qualified Immunity

Even if Plaintiff were able to establish that Pamela Stiles' actions created or increased the danger that Michael Sanford would take his own life, Stiles would nevertheless be entitled to qualified immunity. Government officials are entitled to such immunity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would not have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, in order to impose liability, the court must ask three questions: (1) Did the plaintiff assert a violation of a constitutional right?, (2) Was the right clearly established at the time of the alleged violation?, and (3) Was the unconstitutional nature of the action apparent to an objectively reasonable observer? See Rouse v. Plantier, 182 F.3d 192, 196-97 (3d Cir. 1999). Because the right that Plaintiff has asserted was not clearly established, Pamela Stiles is entitled to qualified immunity.

With respect to the claim on behalf of Michael Sanford, Plaintiff has asserted that Pamela Stiles violated Michael's "right to be free from school officials' deliberate indifference to, or affirmative acts that increase the danger of his loss of life." As noted above, the source of this right is the substantive due process clause of the Fourteenth Amendment, and more specifically, the state-created danger exception set forth in Kneipp. In evaluating a qualified immunity claim,

the constitutional right asserted should not be defined at too high a level of abstraction, but rather must be defined "in a more particularized and hence more relevant sense." Sciotto, 81 F. Supp. 2d at 568 (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987)). Because "the second prong of the qualified immunity inquiry (whether a right is clearly established) 'depends substantially upon the level of generality at which the relevant 'legal rule' is...identified,'" id. at 568 (citation omitted), the alleged constitutional right in this case should be identified more specifically to include the source of the danger. The right, therefore, should be defined not as Michael's "right to be free from school officials' deliberate indifference to, or affirmative acts that increase the danger of his loss of life," but rather as his "right to be free from school officials' deliberate indifference to, or affirmative acts that increase the danger that he would commit suicide."[12]

This right was not clearly established at the time of the alleged constitutional violation, and therefore, Pamela Stiles is entitled to qualified immunity. Although, as one judge quipped**,** "[t]he meaning of clearly established is not yet clearly established," id. at 569, the Third Circuit has expressly stated that there is no requirement that there be "strict factual identity" to identify a clearly established right, rather there need only be "some factual correspondence." Id. at 571 (citing Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 726 (3d Cir. 1989)). Moreover, in assessing whether a right is clearly established a court may consider opinions from sister circuits. Id.

[12] Cf. Sciotto, 81 F. Supp. 2d at 568 (concluding that the relevant constitutional right in that case was "a student's right to be free from school officials' deliberate indifference to, or affirmative acts that increase the danger of, serious injury from unjustified invasions of bodily integrity perpetrated by third parties in the school setting," and that this was "consistent with the identifications of constitutional rights by this and other circuits in qualified immunity cases.") (emphasis added).

Plaintiff cites Hasenfus, Martin, and Armijo to support her contention that the right she invokes on behalf of her son is clearly established. Specifically, Plaintiff argues that "[i]n each of these cases, the courts held that, under the right factual circumstances, they would hold school officials liable for a student's suicide." As discussed above, however, neither the court in Hasenfus nor in Martin found a constitutional violation on the part of the school officials. In fact, as noted above, the Seventh Circuit clearly suggested that it was not endorsing the holding in Armijo, stating: "*Even if* we were to accept the Armijo standard that the school created a danger and thus could be liable under DeShaney, the Martins' argument would not succeed." Martin, 295 F.3d at 711 (emphasis added). Likewise, in its analysis of Armijo, the First Circuit similarly expressed its skepticism of the decision, explaining that "*[i]f sound*, the Tenth Circuit decision is at the outer limit...." Hasenfus, 175 F.3d at 74 (emphasis added). Thus, Plaintiff is left with one circuit decision to support her claim that the right she claims was violated is clearly established. This is an insufficient basis, and therefore, Pamela Stiles is entitled to qualified immunity.

IV. Plaintiff's Substantive Due Process Claim on Her Own Behalf

In addition to her claim on behalf of Michael Sanford, Plaintiff contends that the Defendants also violated her constitutional "right to be free from school officials' deliberate indifference to, or affirmative acts that interfere with her fundamental right to maintain her relationship with her child and her right to companionship, care, management, and society of her child." As with her claim on behalf of her son, Mrs. Sanford's claim is rooted in the Due Process Clause of the Fourteenth Amendment, which protects a parent's right to make decisions concerning the care, custody, and control of their children without government interference. See,

e.g., Troxel v. Granville, 530 U.S. 57, 66 (2000).

To the extent that Mrs. Sanford's claim is based upon Pamela Stiles' failure to contact her, I find that Stiles' actions do not constitute "interference" with Plaintiff's relationship with her son. Case law regarding an official's liability for failing to notify a parent of their child's problems at school is scant. In Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000), the Third Circuit affirmed the district court's grant of summary judgment with respect to a parental right when a high school swimming coach failed to notify a student's parents that he believed their daughter, Leah, was pregnant, required Leah to take a pregnancy test over her objection, and discussed Leah's situation with her teammates and their parents. Leah's mother alleged that the coach's "continued intrusion into what was a private family matter [and] his failure to notify her while instead aiding and abetting the members of the team and their mothers in making Leah's pregnancy a subject of gossip in the school community violated her constitutional right to manage the upbringing of her child." Id. at 306. The court found that Leah's parents sufficiently alleged a constitutional violation, but that the coach nevertheless was entitled to qualified immunity.[13] Id. at 307. Although the coach notified the school counselors of Leah's

[13]Judge Roth concurred in the opinion, arguing that the Gruenkes failed to allege a violation of a constitutional right. Id. at 308-10. As she explained:

> The Commonwealth of Pennsylvania has not attempted by statute or by court proceedings to determine the outcome of Leah's pregnancy or to dictate whether she should keep the child or give it up for adoption. Nor did [the coach] physically prevent Leah or her parents from taking any action as a consequence of her pregnancy. The claim here is that [the coach's] discussion of Leah's pregnancy with others and his failure to inform the Gruenkes of the pregnancy merely complicated the Gruenkes' ability to make decisions concerning the pregnancy. This alleged breach of privacy and failure by the school to impart information to the family is not an action by the state to control the education of a child against the parents' wishes or to determine custody or visitation without proper input by the parents. In fact, the Gruenkes were free at all times to make whatever decision they pleased as to the outcome of Leah's pregnancy, even

pregnancy, the court did not consider whether the counselors could be liable for withholding the information from Leah's parents. Id. at 307.

Gruenke is distinguishable from this case. Unlike Pamela Stiles, the coach in Gruenke not only failed to notify Leah's parents that he suspected she was pregnant, but by purchasing a pregnancy test and pressuring Leah to use it, he took affirmative (and very public) steps to determine whether she in fact was. He notified other students and their parents about Leah's condition and thereby, prevented Leah and her parents from making decisions outside of the public view. In this case, Pamela Stiles merely failed to notify Kathleen Sanford of information–the same information to which she already had access in the form of instant messages.

In Arnold v. Board Education, 880 F.2d 305, 314 (11th Cir. 1989), the Eleventh Circuit held that school officials who coerced a student into having an abortion and pressured her to avoid discussing the situation with her parents interfered with familial relations. Nevertheless, the court stated:

> [W]e are not...constitutionally mandating that counselors notify the parents of a minor who receives counseling regarding pregnancy. We hold merely that the counselors must not coerce minors to refrain from communicating with their parents. The decision whether to seek parental guidance, absent law to the contrary, should rest within the discretion of the minor. As a matter of common sense, not constitutional duty, school counselors should encourage communication with parents regarding difficult decisions such as the one involved here.

> after [the coach] discussed her condition with other parents or swim team members.

Id. at 309-10.

Id. Stiles did nothing to prevent Mrs. Sanford from making decisions about the care or custody of her son, she did not prevent Michael from talking to his mother about his problems, nor did she compel Mrs. Sanford to take any action she would not have taken otherwise. Stiles simply failed to provide information regarding her conversations with Michael on November 27 and December 4. Therefore, to the extent that Mrs. Sanford's constitutional claim rests on Pamela Stiles' failure to notify her of the note, that claim cannot withstand Defendant's Motion for Summary Judgment.

Moreover, to the extent that Mrs. Sanford's constitutional claim is based upon the death of her son, it too must fail. The success of Plaintiff's personal claim is contingent upon her son's state-created danger claim–which as discussed above, is subject to dismissal on summary judgment. Therefore, Mrs. Sanford's claim on her own behalf must also be dismissed.

V. Municipal Liability

Mrs. Sanford advances a claim of municipal liability against the East Penn School District on a state-created danger theory. She contends the district maintained a policy or custom of allowing untrained guidance counselors to act as gatekeepers for suicidal students. In order to establish section 1983 liability against a municipality, the plaintiff must prove that the enforcement of a policy, custom, or practice was the "moving force" behind the constitutional violation. Polk v. County of Dodson, 454 U.S. 312, 326 (1981). A municipality cannot incur liability under a theory of respondeat superior for the acts of its employees or agents, Monell v. City of New York Dep't of Soc. Servs., 436 U.S. 658, 691 (1978), and therefore, a finding of liability against Pamela Stiles cannot be imputed to East Penn School District. It is clear from the case law that municipal liability will not attach simply because the plaintiff proves that a state

actor violated a citizen's constitutional rights under a state-created danger theory. See Kneipp, 95 F.3d at 1215 ("The precedent in our circuit requires the district court to review the plaintiff's municipal liability claims independently of the section 1983 claims against the individual police officers, as the City's liability for a substantive due process violation does not depend on the liability of any police officer."); see also M.B. v. City of Philadelphia, 2003 U.S. Dist. LEXIS 2999, at *18 (E.D. Pa. 2003) ("It is clear from [Kneipp] that the Third Circuit contemplates that proving a constitutional violation of state actors under the state-created danger theory by itself is not enough to implicate municipal liablity.").

Whether a municipality can be liable under Monell when the plaintiff has failed to establish a constitutional violation against an individual state actor under the state-created danger theory, however, is not so clear. Stated another way, the question remains whether East Penn School District could be liable for Michael Sanford's suicide even if Pamela Stiles could not. Some courts in the Eastern District of Pennsylvania have found that a municipal liability determination is a "separate and distinct analysis from the state-created danger theory," see Sciotto, 81 F. Supp. 2d at 574; Combs v. Sch. Dist., 2000 U.S. 15682 (E.D. Pa. 2000), whereas others have interpreted Third Circuit precedent to mean that the court must conduct "a layered analysis; determining first whether an individual state actor violated a plaintiff's substantive due process rights under a state-created danger theory and then determining a municipality's liability under the 'policy, custom, or practice' theory derived from Monell and its progeny." M.B., 2003 U.S. Dist. LEXIS at *17 (citing Tazioly v. City of Philadelphia, 1998 U.S. Dist. LEXIS 14603, at*35 (E.D. Pa. 1998)). If the "separate-and-distinct-analysis" approach is adopted, a court could find liability on the part of the municipal body without finding that the individual state actor is

liable under the state-created danger theory; under a "layered" approach, individual liability would serve as a condition precedent to a finding of municipal liability.

As previously noted, municipal liability under section 1983 requires that a municipal policy, custom, or practice be the "moving force," or cause, of a constitutional violation. The obvious implication, of course, is that the plaintiff must first present evidence of an underlying constitutional violation. Here the constitutional violation alleged is a Fourteenth Amendment substantive due process claim, and because there is no affirmative right to governmental aid or protection, Plaintiff's claim is based upon the state-created danger exception. Thus, in order to establish a constitutional violation, plaintiff must present evidence that (1) the harm ultimately caused was foreseeable and direct, (2) the conduct of the state official was "so ill-conceived or malicious that it shocks the conscience" or at least rose to the level of deliberate indifference (3) there existed some relationship between the state and the plaintiff, and (4) the state actor used her authority to create an opportunity that would not have otherwise existed for harm to come to plaintiff. It stands to reason that if the plaintiff is unable to establish a single element of the state-created danger test, there is no constitutional violation, and there can be no municipal liability. However, in Fagan v. City of Vineland, 22 F.3d 1283 (3d Cir. 1994), the Third Circuit held that a municipal body can be held independently liable even if no individual state actor is found to have violated the plaintiff's rights. More recent Third Circuit cases have somewhat tempered the holding in Fagan. See Mark v. Hatboro, 51 F.3d 1137, 1153 n.13 (3d Cir. 1995) ("It appears that, by focusing almost exclusively on the 'deliberate indifference' prong ... the panel opinion did not apply the first prong–establishing an underlying constitutional violation."); Brown, 318 F.3d at 482 (describing the holding in Fagan, but emphasizing that "there must still be a violation of

plaintiff's constitutional rights."). In Grazier v. City of Philadelphia, the court explained:

> We were concerned in Fagan that, where the standard for liability is whether state action "shocks the conscience," a city could escape liability for deliberately malicious conduct by carrying out its misdeeds through officers who do not recognize that their orders are unconstitutional and whose actions therefore do not shock the conscience....[O]nce the jury found that [the state actors] did not cause any constitutional harm, it no longer makes sense to ask whether the City caused them to do it.

328 F.3d 120, 124 n.5 (3d Cir. 2003) (emphasis added). The Grazier decision therefore suggests that municipal liability may attach in absence of a constitutional violation by an individual state actor where the "shocks the conscience" prong of the state-created danger test is the only element that has not been established.

In this case, Plaintiff has failed to present evidence such that a reasonable jury could find either (1) that Pamela Stiles was deliberately indifferent or that her conduct "shocked the conscience" under the second prong of the state-created danger test or (2) that she used her authority to create an opportunity that would not have otherwise existed for harm to come to Michael Sanford under the fourth prong.[14] Therefore, because Plaintiff has failed to show that Pamela Stiles caused a constitutional violation, East Penn School District similarly cannot be liable.

A municipality's failure to train its employees properly may also be a source of municipal liability. Berg v. County of Allegheny, 219 F.3d 261, 276 (3d Cir. 2000). In this case, Plaintiff has not specifically alleged a failure to train in her Amended Complaint. Even if she had, her claim falls short of proving a failure to train. In Berg, the court held that a plaintiff can establish

[14] See discussion supra at III.A.1 and III.A.2.

liability based on a municipality's failure to adequately train or supervise municipal employees if she is able to prove that the municipality acted with deliberate indifference to the rights of the persons that come into contact with these municipal employees. A failure to adequately train or supervise employees "can ordinarily be considered deliberate indifference only where the failure has caused a pattern of violations." Plaintiff has not produced evidence of any pattern of student suicides in the East Penn School District as a result of the District's failure to properly train guidance counselors to evaluate students' suicidal tendencies, and therefore, this is not a viable theory for purposes of establishing municipal liability.

VI. State Law Negligence Claim

In addition to the her claims under section 1983, Plaintiff has also asserted a cause of action against Pamela Stiles individually for negligence. Defendants argue that this claim must fail because: (1) Stiles did not breach any duty owed to Michael, (2) Stiles' actions did not cause Michael Sanford to commit suicide, (3) Stiles is entitled to immunity under the Pennsylvania Tort Claims Act, and (4) Stiles is entitled to qualified immunity under the common law.

A showing of negligence requires proof of a legal duty, a breach of that duty, causation, and damages. See, e.g., City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 422 n.9 (3d Cir. 2002). "Whether a defendant owes a duty of care to a plaintiff is a question of law." Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1366 (3d Cir. 1993). In this case, Plaintiff argues that Pamela Stiles owed three duties to Michael Sanford. Namely, she had an obligation to refer him to the school psychologist, to notify Kathleen Sanford of her son's suicide threat, and to correctly evaluate Michael Sanford's psychological condition. Considering the evidence in the light most favorable to the Plaintiff, the Suicide Referral Process flow-chart may have created a

duty on school guidance counselors to evaluate and properly refer a student who had expressed suicidal tendencies. In that case, based on the expert reports submitted by the plaintiff, a reasonable jury could conclude that Pamela Stiles breached this duty to Michael Sanford. Causation, however, cannot be established in this case. To prove negligence, a plaintiff must establish that the defendant's conduct was the proximate cause of the injury by showing that the "defendant's act or failure to act was a substantial factor in bringing about the plaintiff's harm." Hamil v. Bashline, 481 Pa. 256, 264-65, 392 A.2d 1280, 1284 (Pa. 1978). As discussed above, Plaintiff has not presented evidence that Pamela Stiles caused Michael Sanford to kill himself.

Pamela Stiles is also entitled to immunity under both the Pennsylvania Tort Claims Act and as established under the common law. The Tort Claims Act, 42 Pa. Cons. Stat. § 8541 (2004), provides that, with limited exceptions, "no local agency shall be liable for any damages on account of any injury to a person or property caused by an act of the local agency or an employee thereof or any other person." Id. § 8541. An employee of an agency is liable for acts that are "within the scope of his office or duties only to the same extent as his employing agency..." Id. § 8545. Assuming that Plaintiff can prove that Stiles was negligent, that her negligent acts were performed within the scope of her official duties, and that those acts caused Michael Sanford's suicide, she must then also prove that these acts fall within an exception to the Tort Claims Act.

Plaintiff argues that the Tort Claims Act does not apply because Pamela Stiles engaged in "willful misconduct," and that such misconduct precludes her from invoking her right to immunity under the Act. However, the Pennsylvania Supreme Court has defined "willful misconduct" as "conduct whereby the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desire can be implied. In

other words, the term 'willful misconduct' is synonymous with the term 'intentional tort.'" Renck v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994). Although Stiles' conduct may have breached a duty, Plaintiff has not produced any evidence that she intended for Michael Sanford to commit suicide or was aware that he was substantially likely to do so. Likewise, under common law immunity, public officials are shielded from liability for actions within the scope of their duties, provided that their conduct is not "intentionally malicious, wanton or reckless." DuBree v. Commonwealth, 303 A.2d 530 (Pa. Cmwlth. 1973). Plaintiff has not alleged that Stiles was acting outside the scope of her duties, nor has she proven that Stiles' actions were intentionally malicious, wanton or reckless. Therefore, Plaintiff's negligence claim again must fail.

VII. Conclusion

I find that there is no genuine issue of material fact regarding Plaintiff's claims against the Defendants, and that Defendants are entitled to judgment as a matter of law. Defendants' Motion for Summary Judgment is hereby granted.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KATHLEEN SANFORD, Individually	:	
and as Administratrix of the	:	
ESTATE OF MICHAEL R. SANFORD,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
PAMELA STILES, DENNIS MURPHY,	:	
and EAST PENN SCHOOL DISTRICT,	:	
	:	
Defendants.	:	
	:	NO. 03-CV-5698

ORDER

AND NOW, this day of November, 2004, upon consideration of Defendants' Motion for Summary Judgement and Plaintiff's Response thereto, it is hereby ORDERED that

Defendants' Motion is GRANTED. All of Plaintiff's claims against Pamela Stiles and East Penn School District are dismissed with prejudice. This case is closed for statistical purposes.

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LAWRENCE F. STENGEL, J.