IN THE SUPERIOR COURT OF HALL COUNTY
STATE OF GEORGIA

DONALD LEE KING and TINA MARIE KING,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION**
	§	**FILE NO.: 2006-CV-3323-A**
PIONEER REGIONAL EDUCATIONAL SERVICE AGENCY, ALPINE PSYCHOEDUCATIONAL PROGRAM, and DEPARTMENT OF EDUCATION OF THE STATE OF GEORGIA,	§	
Defendants.	§	

ORDER GRANTING DEFENDANTS PIONEER REGIONAL EDUCATIONAL SERVICE AGENCY'S and ALPINE PSYCHOEDUCATIONAL PROGRAM'S MOTION FOR SUMMARY JUDGMENT

The above-styled civil action is before the Court on Defendant Pioneer Regional Educational Service Agency's and Defendant Alpine Psychoeducational Program's Motion for Summary Judgment. Defendant Department of Education filed a Motion to Dismiss on June 5, 2007 which was granted on February 5, 2008.

This case arises from the death of Jonathan King, a thirteen-year-old student who suffered from emotional and behavioral disorders and who, at the time of his death, attended school at Defendant Alpine Psychoeducational Program's Gainesville facility ("Alpine"). Defendant Alpine is operated by Defendant Pioneer Regional Educational Service Agency ("Pioneer"). Defendant Alpine maintained a room known as the "time-out room" or "seclusion room." On November 15, 2004, one of the teachers at Defendant Alpine gave Jonathan a rope to use as a belt to hold his pants in place around his waist because Jonathan, as was his practice, arrived at Defendant Alpine's school without a belt

such that his pants were constantly subject to falling below his waist. That same day, Jonathan was locked in the seclusion room after his behavior became threatening toward other students. While in the seclusion room, Jonathan hanged himself using the rope given to him earlier in the day as a belt, resulting in his death.

On November 14, 2006, Plaintiffs, Jonathan's parents, filed this civil action against Defendant Pioneer Regional Educational Program and Defendant Alpine Psychoeducational Program asserting claims under 42 U.S.C. § 1983 for failing to adequately train employees and for failing to develop, implement, and maintain adequate policies and procedures concerning (1) the use and supervision of the seclusion room; (2) prevention of suicide by students; and (3) the supervision and handling of students with behavior disorders such as those displayed by Jonathan. Plaintiffs allege that such failures by Defendants "amounted to a conscious or deliberate indifference to, and deprivation of, the rights, privileges, and immunities secured to Jonathan under the Constitution and the laws of the United States, including but not limited to the Fourth and Fourteenth Amendments to the U.S. Constitution,"[1] and that such failures by the Defendants proximately caused Jonathan's death. Plaintiffs narrow this allegation to the substantive protections of the Due Process Clause of the Fourteenth Amendment in their Plaintiffs' Brief in Opposition to Defendants Pioneer's and Alpine's Motion for Summary Judgment. A hearing on Defendants' Motion for Summary Judgment was held on July 9, 2008.

[1] Complaint, page 11.

Discussion

In evaluating a Motion for Summary Judgment pursuant to O.C.G.A. § 9-11-56, the Court must consider all evidence in the light most favorable to the non-moving party, here Plaintiffs. Further, if the Court finds that Plaintiffs have pointed to evidence giving rise to at least one issue of material fact, summary judgment is improper, and the case must proceed to the jury. Lau's Corporation, Inc. v. Haskins, 261 Ga. 491 (1991). On the other hand, the moving party may discharge its burden "by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving party's case. If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue." Id. at 491.

Further, "a finding of fact which may be inferred but is not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists. When uncontradicted and unimpeached evidence is produced as to the real facts, the inference disappears, and does not create a conflict in the evidence so as to require its submission to a jury." Taylor & Mathis, Inc. v. Doyle, 219 Ga. App. 445, 446 (1995). "While there may be some 'shadowy semblance of an issue' (cit.), the case may nevertheless be decided as a matter of law where the evidence shows clearly and palpably that the jury could reasonably draw but one conclusion." Southern Business Machines of Savannah, Inc. v. Northwest Financial Leasing, Inc., 194 Ga. App. 253, 255 (1990), *citing* Southern Trust Ins. Co. v. Braner, 169 Ga. App. 567, 569 (1984).

Defendants Pioneer and Alpine assert that in order for Plaintiffs to prevail under 42 U.S.C. § 1983[2], Plaintiffs must prove that Jonathan's death was caused by the deprivation of a federal constitutional right to which Jonathan was entitled and that Defendants Pioneer and Alpine are responsible for the violation of Jonathan's federal constitutional right.[3] Plaintiffs must identify a policy, custom or practice of Defendants Pioneer and Alpine that caused a deprivation of Jonathan's federal constitutional rights. Defendants Pioneer and Alpine cite Board of the County Comm'rs v. Brown, 520 U.S. 397 (1997); Monell v. Department of Social Services of New York, 436 U.S. 658 (1978) and Collins v. City of Harker Heights, 503 U.S. 115, 120 (1992), holding that when a plaintiff asserts a § 1983 claim against a municipality, there is a two step analysis: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." Under this legal authority, this Court applies this legal principal to that case at issue.

Was Jonathan's harm caused by a constitutional violation and, if so, were Defendants Pioneer and Alpine responsible for that violation?

Plaintiffs contend that a special relationship existed between Jonathan and Defendants Pioneer and Alpine such that Defendants Pioneer and Alpine had an affirmative duty to prevent harm to Jonathan. However, Plaintiffs have not provided legal authority from any jurisdiction that imposes an affirmative duty on a public school system

[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..." 42 U.S.C. § 1983

[3] Defendants rightfully assert that Defendant Alpine Psychoeducational Program is not an entity that can be sued. Defendant Pioneer, a local government agency that provides educational services to local school systems, is the managing entity for the Alpine program and is a proper party.

to protect students from self-inflicted harm or harm inflicted by non-state actors even when a student is at school or on school property. Instead, Plaintiffs ask the Court to consider Jonathan's status analogous to that of a prison inmate or persons voluntarily committed to state mental institutions because at the time of his death Jonathan was confined to a seclusion room. Plaintiffs direct the Court to several cases in support of this assertion.

Howard v. City of Columbus, 239 Ga. App. 399 (1999) - This case involved a diabetic prison inmate who died as the result of deliberate indifference to his medical condition. Medical staff members and guards were aware of Howard's deteriorating condition and deliberately ignored pleas for help. Plaintiffs showed that "defendants engaged in deliberate indifference through a policy and pattern of practice in not treating diabetics" that resulted in the deaths of ten to thirteen inmates during a twelve year period. *Id* at 408.

Kennedy v. Schafer, 71 F.3d 292 (8th Cir. 1995) - the United States Court of Appeals for the 8th Circuit remanded the case to the United States District Court to determine whether the child, who was originally voluntarily admitted to a mental institution by her parents, became involuntarily confined as a result of state law because the institution had placed her on a suicide watch, and her parents no longer had an absolute right to demand she be released.

Wideman v. Shallowford Community Hospital Inc., 826 F.2d 1030 (11th Cir. 1995) - Plaintiffs brought suit for the wrongful death of their pre-term infant alleging a conspiracy existed between defendants whereby the County had a policy and practice of using its EMS vehicles to transport patients only to certain hospitals which guaranteed payment of the County's emergency medical bills. Plaintiffs' infant died following a substantial delay in treatment after emergency personnel refused to transport Mrs. Wideman to Piedmont Hospital where her physician was waiting. The United States Court of Appeals for the 11th Circuit, in discussing what constitutes a "special relationship"

stated, "the rationale for imposing these special relationships 'lies in constraints the state imposes on private action.' *Id* at 1035, and further stated, "[g]iven this rationale, these special relationship cases may be viewed on a continuum. At one extreme is the person whom the state has completely deprived of his liberty by either incarceration or institutionalization, such as a prison inmate ... or an involuntarily committed mental patient... The rights of the individual and the corresponding duties of the state are clearest and strongest in those contexts. Still protected, but somewhat further in along the continuum, are pretrial detainees...and arrestees or suspects in police custody... At the opposite end of the continuum, however, are 'members of the general public, living in the free society, and having no special custodial or other relationship with the state'.... Clearly, no right-duty relationship exists between those individuals and the state... In most cases, to establish a special relationship which creates a duty on the part of the state, the plaintiff must show that his situation lies closer to the 'incarceration' or 'custody' end of this continuum than it does to the 'unrestricted' or 'free' end. *Id* at1035. (*internal citations omitted*).

Plaintiffs assert that applying the continuum from Wideman, Jonathan's status was closer to that of "an involuntarily restrained prisoner or mental patient than a normal student in a traditional school setting." [4]

Plaintiffs offer the following case in further support of their position that an affirmative duty can exist in a school setting:

> Waechter v. School Dist. No. 14-030 of Cassopolis, Mich., 773 F. Supp. 1005 (W.D. Mich. 1991) - Parents of a thirteen-year-old special education handicapped student brought suit against the school district and other defendants after a teacher forced their son to run 350 yards in less than two minutes as punishment for talking with a classmate *knowing* that the child had a congenital heart defect. While making the run, the boy suffered cardiac

[4] Plaintiffs' Brief in Opposition to Defendants Pioneer's and Alpine's Motion for Summary Judgment, page 19.

arrhythmia and died. Thereafter, defendants allegedly tried to conceal the facts surrounding the boy's death by telling the parents that their son had voluntarily participated in a football game. The District Court found that a reasonable jury could conclude that the teacher's demand, "was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id* at 1010.[5]

Defendants Pioneer and Alpine assert they are entitled to summary judgment due to Plaintiffs' failure to identify any Defendant Pioneer policy, practice, custom, or act that caused Jonathan to commit suicide pursuant to the principles of liability under Monell. In Monell, female employees of the Department of Social Services and the Board of Education of the City of New York brought suit challenging the official policy compelling pregnant employees to take unpaid leaves of absence before such absences were medically necessary. The Supreme Court held that (1) local governments can be sued under § 1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy"[6], (2) local governments "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official

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[5] Many circuits have declined to follow Waechter including the Third Circuit (see D.R. v. Middle Bucks Area Voc. Tech. Sch., 972 F. 2d 1364 (3rd Cir. 1992), the Fourth Circuit (see B.M.H. v. The School Board of the City of Chesapeake, Virginia, 833 F. Supp. 560 (4th Cir. 1993), the Seventh Circuit (see J.O. v. Alton Commun. Unit Sch. Dist.11, 909 F. 2d 267 (7th Cir. 1990), the Eighth Circuit (See Dorothy J. v. Little Rock Sch. Dist., 794 F. Supp. 1405 (E.D. Ark. 1992), the Tenth Circuit (see Maldanado v. Josey, 975 F. 2d 727 (10th Cir. 1992), and, perhaps most importantly for this Court, the Eleventh Circuit (See Russell v. Fannin Cty. Sch. Dist., 784 F. Supp. 1576 (N.D. Ga. 1992).

[6] *Id.* at 690.

decisionmaking channels"[7], and (3) "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents."[8]

Having considered the evidence and argument offered by all parties, and following a thorough review of applicable legal authority, this Court finds that Defendants Pioneer and Alpine did not owe an affirmative duty to protect Jonathan from self-inflicted harm and further finds that a "special relationship" did not exist between Jonathan and Defendants Pioneer and Alpine such as those that arise with prison inmates, involuntarily committed mental patients, or arrestees. The Court additionally finds that Plaintiffs have failed to identify an official "policy, practice, or custom" employed by Defendants Pioneer and Alpine that violated Jonathan's rights under § 1983, which resulted in or caused the suicide of Jonathan.

In making such determinations, the Court relies on Skop v. City of Atlanta, GA, 485 F.3d 1130 (2007) citing the United States Supreme Court case of Monell "...it is now axiomatic that in order to be held liable for a § 1983 violation, a municipality must be found to have itself caused the constitutional violation at issue; it cannot be found liable on a vicarious liability theory. Thus, Skop can only succeed on her § 1983 claim against the City of Atlanta by showing that her injury was the result of the city's unlawful 'policy or custom.'"[9]

The evidence in this case shows that Jonathan was placed in a time-out or seclusion room following an in classroom outburst in which Jonathan displayed violent behavior toward another student. Kenneth Trotter, a substitute teacher at Alpine, was unable to gain

[7] *Id.* at 690, 691.
[8] *Id.* at 694.
[9] *Id.* at 1145.

control of Jonathan using verbal communication and was having difficulty restraining Jonathan physically.[10] With the assistance of another teacher, Douglas Jackson, Trotter led Jonathan to a time-out room located approximately fifteen feet from Jonathan's classroom.[11] Once in the time-out room, Jackson asked Jonathan if the make-shift belt needed to be taken from him or did Jonathan intend to behave. Based on Jonathan's assurance that he intended to behave, the belt remained in the room with Jonathan. At some point prior to closing the door of the time-out room, Jonathan was instructed to remove his shoes whereupon Jonathan removed his shoes, and the shoes were placed on the floor in the hallway outside the time-out room.[12] During the first fifteen minutes that Jonathan was confined alone in the time-out room, Trotter was seated outside where Trotter and Jonathan communicated with each other through the closed door even though Trotter did not continuously visually observe Jonathan in the time-out room. While in the time-out room, Jonathan was hitting the door, swearing, and requesting that he be let out to use the restroom. Trotter told Jonathan that Trotter needed to see good behavior for fifteen minutes before Trotter would allow Jonathan out of the time-out room.[13] Trotter looked through the observation window after the first fifteen-minute interval had passed and was able to partially see Jonathan. During this time Trotter and Jonathan continued to converse through the door. Trotter made an entry in the log book noting the time and Jonathan's behavior. During the second fifteen-minute interval Jonathan quieted and after twelve minutes had passed Trotter noted the time in the log book and observed Jonathan through

[10] December 12, 2007 Deposition of Kenneth Trotter, pages 72-75.
[11] December 12, 2007 Deposition of Kenneth Trotter, pages 80-82. May 15, 2007 Deposition of Douglas Jackson, pages 13.
[12] December 12, 2007 Deposition of Kenneth Trotter, pages 83-85. May 15, 2007 Deposition of Douglas Jackson, pages 14-17.
[13] December 12, 2007 Deposition of Kenneth Trotter, pages 89, 91.

the window in the door. Jonathan appeared to be sitting on the floor with his back against the door. Trotter pushed open the door, intending to let Jonathan out, and discovered Jonathan's body blocking the doorway.[14]

The above illustrates the standard practices and procedures implemented by Defendant Pioneer and followed by the staff at the school relating to the use of the time-out room. It was within Trotter's discretion to communicate with Jonathan through the door, and Trotter deviated from the norm slightly by opening the door a few minutes prior to the lapse of the second fifteen-minute interval.

Counsel for the Plaintiffs argues strenuously that Jonathan, at the time of his death, was a suicide risk and that Defendants Pioneer and Alpine had knowledge of the same. However, the Court finds that the Plaintiffs set forward no evidence in the record that Jonathan was a suicide risk at the time of his death. In fact, the evidence shows that Jonathan was admitted to Peachford Behavioral Health System of Atlanta and evaluated by physicians approximately one month prior to his death. Upon his discharge on October 10, 2004, Jonathan was found to be "stable, safe, and appropriate for discharge..."[15]

The evidence does show that on occasion Jonathan would use the threat of suicide to manipulate those preventing him from achieving a desired result. Jonathan's mother, Tina King, acknowledged several times throughout her deposition testimony that she was not concerned that Jonathan was suicidal[16] even though Jonathan often discussed and/or threatened suicide. Mrs. King recalled an instance while driving in the family's vehicle when Jonathan wanted to stop at Burger King. When it became apparent that Mrs. King

[14] December 12, 2007 Deposition of Kenneth Trotter, pages 92-94, 106, 108.
[15] Richard Stephen LaPlante, M.D., Peachford Behavioral Health System of Atlanta.
[16] January 9, 2008 Deposition of Tina Marie King, pages 96, 177, 183-184, 186

was not going to stop, Jonathan wrapped his seat belt around his neck.[17] Mrs. King also acknowledged that she consented to the use of the time-out room as one of several possible consequences for Jonathan due to noncompliance with behavioral expectations.[18]

There were similar instances reported by staff members at Defendant Alpine, however, in each instance such events were reported both to Jonathan's parents and to the school psychologist, Diana Henning. Dr. Henning testified during her June 8, 2007 deposition that she evaluated Jonathan on numerous occasions over a five to six year period when Jonathan threatened or seemed to suggest the possibility of killing himself. On every occasion Dr. Henning found Jonathan's threats to be without merit.[19]

As to Plaintiffs' contention that Jonathan's status was similar to that of a prison inmate such that a "special relationship" existed between Jonathan and Defendant Pioneer, the Court finds persuasive the analysis and holding in B.M.H. v. The School Board of the City of Chesapeake, Virginia, 833 F. Supp. 560 (E.D. Vir. 1993). In that case, a thirteen-year old student and her parents brought suit against defendants under § 1983 for failing to affirmatively protect her from being sexually assaulted by a fellow student after she reported to her teachers the preceding verbal threats made toward her by the perpetrator. Plaintiffs asserted that an affirmative duty to protect B.M.H. arose from the "special relationship" that existed between B.M.H. and the school system. In examining the long line of cases on this subject, the District Court concluded that "the relationship between the state and the individual be one that so restrains the individual that he becomes almost wholly dependent upon the state for basic needs and unable to act on his own behalf." *Id.* at 569.

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[17] January 9, 2008 Deposition of Tina Marie King, page 161.
[18] January 9, 2008 Deposition of Tina Marie King, pages 107-108.
[19] June 8, 2007 Deposition of Dr. Diana Henning, pages 65-69, 72-73, 76-78, 86-87, 97, 99.

The court went on to examine whether B.M.H.'s presence in a public school under mandate of state law qualified as the type of restraint upon students that implicates the Due Process Clause of the United States Constitution. The court found that B.M.H. was not so restrained that she was prevented from acting on her own behalf. Citing from a case from the Third Circuit, D.R. v. Middle Bucks Area Voc. Tech. Sch., 972 F.2d 1364 (1992), the District Court wrote, "[i]t relied upon the fact that the 'parents remain the primary caretakers, despite [the student's] presence in school'" and "[a]s continuing residents of their parents' home, 'school children...may turn to persons unrelated to the state for help on a daily basis.. [and] leave the school building every day. The state did nothing to restrict her liberty after school hours and thus did not deny her meaningful access to sources of help." *Id.* at 570. The District Court thus concluded that the state-imposed restriction on B.M.H.'s freedom did not create the type of physical custody necessary to bring it within the boundaries of a "special relationship."

Based on the foregoing, the Court concludes that Jonathan's death was not the result of a constitutional violation and that no special relationship existed, and thus no affirmative duty was owed to Jonathan by Defendants Pioneer and Alpine. While the decision by Trotter and Jackson to allow Jonathan to keep the makeshift belt may have amounted to negligence, Plaintiffs have not pointed to any policy, procedure or custom of Defendant Pioneer that violated a right or privilege afforded to Jonathan under 42 U.S.C. § 1983.

IT IS THEREFORE ORDERED that Defendants Pioneer Regional Educational Service Agency's and Alpine Psychoeducational Program's Motion for Summary Judgment is granted.

SO ORDERED, this 21st day of January, 2009.

C. Andrew Fuller, Chief Judge
Hall County Superior Court
Northeastern Judicial Circuit