UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

Juan Lopera, et al.	:	
his parent and next friend, Lilian Giraldo;	:	**C.A. No: 08- 123**
	:	
vs.	:	
	:	
TOWN OF COVENTRY, et al.	:	

PLAINTIFFS' OBJECTION TO MOTION FOR SUMMARY JUDGMENT

Now come the Plaintiffs, and hereby object to Defendants' Motion for Summary Judgment. In support of said Objection, Plaintiffs rely upon their Memorandum, their Statement of Undisputed Facts, and their Statement of Disputed Facts attached hereto and made a part hereof.

Plaintiffs,
By their attorney,

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CERTIFICATION

I hereby certify that the within document has been electronically filed with the Court on April 27, 2009, that it is available for viewing and downloading from the ECF system, and that the counsel of record listed below will receive notice via the ECF system:

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/s/ Vicki J. Bejma

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MEMORANDUM IN SUPPORT OF
PLAINTIFFS' OBJECTION TO MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before this Honorable Court on Defendants' Motion for Summary Judgment on all counts contained in Plaintiffs' Amended Complaint. The Plaintiffs' Amended Complaint arose out of an incident taking place on or about September 28, 2006. On that date, the Plaintiffs, who are Hispanic, were members of the Central Falls High School Soccer Team. The team had travelled by bus to an "away" game in Coventry, a predominately white community. They were accompanied by their coach, Robert Marchand, who was also a teacher at Central Falls High School. (Ex. D, 4:22-5:2)

As the Central Falls team was boarding their bus to leave, several members of the Coventry High School football team claimed that their cell phones, iPods, and various other articles had been stolen from their locker room, and immediately concluded that the Central Falls team had been responsible. An angry mob consisting of Coventry students and parents rapidly blocked in the team bus, shouting accusations and racist insults, and demanding a search of the Central Falls players. Several Coventry Police cruisers rushed to the scene, with their lights flashing and sirens blaring, and parked so as to further block in the bus. Once they arrived, the Coventry Police were told that Coach Marchand himself had already conducted a search of the

team and had not located the missing items. These officers were also aware that many students other than the Central Falls players had had access to the locker room. Nevertheless, the Coventry Police officers singled out the members of the Central Falls team for a search of their possessions and persons. This search lasted for about hour, and was conducted a mere six to ten feet of the mob. At no point was any Coventry student even requested to undergo such a search, despite the fact that any one of the Coventry students could just as easily have taken the items.

Plaintiffs then brought an action before this Court. Counts I, II, and III are actions brought under 42 U.S.C. § 1983, alleging deprivation of the Plaintiffs' rights to due process, equal protection, and freedom from unreasonable search and seizure. The Plaintiffs also brought state law claims. Count IV alleged an invasion of privacy pursuant to R.I.G.L. § 9-1-28.1. Count V alleged a violation of Rhode Island's relatively new Racial Profiling Prevention Act of 2004, R.I.G.L. § 31-21.2 *et seq*. Finally, Count VI alleged a violation of R.I.G.L. § 9-1-35, Racial/National Origin Intimidation.

Defendants now seek summary judgment on all counts of Plaintiffs' complaint. The Defendants' attack is twofold. In support of their argument for disposing of the counts stemming from the search, they would have this Court believe that Coach Marchand gave a "consent" to the search that legally absolves them of all accountability for their actions. This position is wholly unsupported by the law. Coach Marchand could not have given a valid "consent" to this search as a matter of law because he lacked the authority to do so on behalf of his team members. Even if he had had the authority to give such a "consent," that "consent" was coerced. As for the counts relating to racial and national origin discrimination, the Defendants argue that these should be disposed of because, in their view, the Central Falls students were actually treated no differently than any other person similarly situated. A full treatment of the facts of this matter

clearly demonstrates that argument flies in the face of all logic and reason. Accordingly, the Defendants' Motion for Summary Judgment must fail.

II. FACTUAL AND PROCEDURAL BACKGROUND

Contrary to the apparent beliefs of the Defendants, there is disagreement about the material facts. Plaintiffs can produce evidence demonstrating that the events of September 28, 2006 unfolded quite differently from the account given by the Defendants.

On the afternoon of September 28, 2006, the Central Falls Soccer Team arrived at Coventry High School for a game. Among the players were Plaintiffs Juan Lopera, a senior, (Ex. A, 6:1.), as well as juniors, Milton Ricuarte, Jr., and Bryan Ocampo. (Ex. B, 74:19-22; Ex. C, 4:9.), and Steve Giraldo. (Ex. D, 5:17-19.) As the current Police Chief acknowledged, Coventry is a predominately white community. (Ex. N, 22:1-7.) Its High School accordingly reflects that racial composition. (Ex. E, October 2006 Enrollment, Coventry High School.[1]) By contrast, the Central Falls School District is far more racially integrated, with Hispanics comprising the majority group. (Ex. F, October 2006 Enrollment, Central Falls School District.) One member of the Central Falls High School Soccer Team at the time was Portuguese, and the rest were Hispanic. (Ex. A, p. 9:2-5.)

It was not the standard practice for the visiting team to use Coventry High School's locker room facilities to change into their game uniforms. (Ex. G, 21:15-20.) However, on arrival at Coventry, about five or six of the Central Falls team members asked to go into the locker room in order to use the bathroom. (Ex. A, 9:1; Ex. B, 9:12-10:5; Ex. D, 9:10-16.) There were four doors to the boys' locker room, and at minimum, the exterior door of the locker room was left open during games and practices as standard procedure. (Ex. G, 20:22-21:11.) Coach Marchand accompanied these players to the locker room because they did not know where the bathroom was located. He did

[1] Exhibits E and F on the Rhode Island Department of Education website, http://www.eride.ri.gov/reports.asp.

not go into the locker room itself, but instead asked a security guard to go in with the players. (Ex. B, 10:6-11:20.) Steven Giraldo, who was one of the players who used the locker room, recalls seeing what he believed to be a security guard walking back and forth while they were using the locker room, keeping an eye on them. (Ex. D, 7:19-8:21)

Once the game itself began, the Central Falls players encountered a fair amount of racial hostility from Coventry. During the game, Ocampo and his teammates were told to "go back to where you were." (Ex. C, 36:2-14.) Ricuarte and Lopera recall numerous instances in which they spoke to their teammates in Spanish, their native language, whether on the bench or on the playing field. The Coventry players ordered them to "speak English." (Ex. A, 28:1-10; Ex. B, 6:13-7:21.) Steven Giraldo was referred to as a "spic" by one of the Coventry spectators who was apparently displeased with Giraldo's play. (Ex. D, 5:21-7:9.) The Central Falls players remained stoic, and concentrated on their game. (Ex. D, 7:5-18.) This sort of behavior simply was not out of their experience. (Ex. C, 35:20-23.)

At the conclusion of the game, the Central Falls team followed their standard practice of lining up by twos and walking straight to the bus, without talking to anybody. (Ex. H, 17:22-18:1.) Unbeknowst to them, the racial hostility that had smoldered through that late afternoon had not dissipated, but had reached a flashpoint. Coach Marchand was walking in the back of the line at some distance from the team. He was accosted by a group of about twenty youths wearing jeans and t-shirts. All seemed to have wet hair, as if they had been showering. (Ex. H, 18:4-19-1.) Coach Marchand later found out that this was the Coventry football team. (Ex. H, 19:6-7.) The Coventry football team demanded to know if Coach Marchand were the "F'n coach of Central Falls." When Coach Marchand replied he was, they said, "Well, your punks stole all of our F'n shit and they got our ipods." (Ex. H, 18:5-10.)

Coach Marchand proceeded to the bus. His team by this time was sitting on the bus. They were told to keep their mouths shut and their heads down. (Ex. H, 20:9-12.) Coach Marchand called his Assistant Coach, Carl Africo, and told him of the accusations. (Ex. H, 20:12-15.) Marchand explained to the boys that the crowd believed that the five boys who went into the locker room had taken the missing items. Coach Marchand told the boys that he knew that they had not done that. (Ex. B, 29:10-18.) At some point during this conversation, the boys who had used the locker room at told Marchand that the security guard had followed them around the whole time they were in the locker room. (Ex. B, 12:7-18, 20:2-13.) Nevertheless, Coach Marchand and Coach Africo searched the boys, as well as the medicine kits and ball bags. (Ex. H, 21:8-22:22.) At the end of the search, which lasted about 20-25 minutes, Coach Marchand was "completely satisfied" that the boys had done nothing. (Ex. H, 15:9-12; 23:4-8.)

When Coach Marchand was done, he found the Coventry Athletic Director outside. He told the Athletic Director that the Central Falls boys did not have the items. (Ex. H, 23:20-24:4.) On the same day as the game, the Coventry football, cheerleading, and cross-country teams were practicing, and by this time their parents were coming to pick them up. (Ex. H, 19:19-20:2.) A crowd of about 50-60 people had gathered outside the bus. (Ex. H, 24:6-10.) Coach Marchand heard members of the crowd saying that they knew the Central Falls players had taken the items. People in that crowd also commented that the Central Falls players were from the ghetto and that "those people" knew how to hide things and "lie good," and could not be trusted. The crowd was even demanding a search of Coach Marchand. (Ex. H, 24:15-25:25) Some of those making these remarks were adults. (Ex. H, 25:1-8.) Other members of the crowd made specific racial slurs, including one woman who called the team "spics." (Ex. D, 27:13-28:5.) At some point, one Coventry student tried to get on the bus to conduct his own search. (Ex. B, 53:5-12; Ex. D, 27:11-30:5.) Others in the crowd

declared that the Central Falls team was not leaving ". . . til we find the stuff . . ." (Ex. H, 25:5-8.) In any case, the crowd already had formed a semicircle that prevented the bus from moving. (Ex. D, 31:16-32:6.)

At that point, three or four Coventry Police cars arrived with their lights and sirens on. (Ex. H, 15:14-16; Ex. I, 38:7-39:2.) Officers Kevin Harris, David Nelson, and Kevin Kennedy responded, along with their supervisor, Sergeant Stephen Michaelides.[2] Once the police had responded, the team bus could not have moved without the police cars moving, because one was in front of and the other was in back of the bus. (Ex. H, 43:15-24.) Coach Marchand and the Coventry Athletic Director spoke to the police. As the Coventry police officers admitted at deposition, Coach Marchand told them that he had already searched his players. (Ex. H, 26:22-27:4; Ex. I, 76:22-25; (Ex. J, 46:3-5; Ex. K, 43:25-44:2.) Coach Marchand asked: ". . . what am I going to do, what are they going to do to us." (Ex. H, 27:23-24.)

Coach Marchand did not at any time make the suggestion that the Coventry Police search his players' bags. (Ex. H, 27:18-20.) At this point, however, the Coventry Police responded to Coach Marchand's question about what would happen by deciding to search the boys themselves. (Ex. H, 28:8-29:13.) At deposition, Officer Harris testified that the second search by the police was necessary: "[t]o prove that, we don't know if Coach Marchand is telling us the truth. We are investigating the situation." (Ex. I, 77:1-4.) Michaelides testified that he had told Coach Marchand that a police search of the Central Falls team would ". . . expedite the process and eliminate them all as suspects." (Ex. K, 44:1-6.)

At the time that the Coventry Police asked for a second search of the boys, there had been a clear rush to judgment as to whether a theft had even taken place. The Coventry officers had not

[2] In February of 2008, Michaelides was promoted to Lieutenant. (Ex. K, 18:6-16.)

even asked the Coventry students to make sure that they had not simply mislaid the items. (Ex. I, 71:17-72:7; Ex. J, 40:14-17; Ex. M, 28:23-29:1.) Worse, no effort was made then or at any later point to determine precisely what items were allegedly missing and would be sought. As all of the Coventry Police officers also admitted at deposition, not a single one of them obtained any description of the exact type of iPod alleged to be missing, its color, or whether it was in a case. . (Ex. I, 66:13-67:4; Ex. J, 39:14-22, 62:5-14; Ex. K, 45:16-19; Ex. M, 27:1-18.) No Coventry Police officer received any description of the make or model of the cell phone alleged to be missing, other than perhaps its being a "flip phone." (Ex. I, 67:5-9; Ex. J, 39:14-22, 61:19-62:4; Ex. K, 45:20-23; Ex. M, 27:1-18.) As matters progressed, students alleged that other items than iPods or cell phones were alleged to be missing, such as books or cash, but the Coventry officers never bothered obtaining a final accounting of all missing items. They merely proceeded to press for a search. (Ex. I, 71:4-12; Ex. J, 40:7-13; Ex. K, 45:10-14.)

Furthermore, every single officer on the scene that day knew perfectly well that the locker room was open, and anybody could have accessed it -- including Coventry as well as Central Falls students. (Ex. I, 69:25-70:1, 70:4-7; Ex. J, 47:4-6; Ex. K, 46:2-5.) Nevertheless, the Coventry Police officers believed the Central Falls students to be suspects, justifying that belief on the basis that the Central Falls students had allegedly been in the locker room where the items had gone missing. (Ex. I, 69:7-24; Ex. J, 40:1-6.)

The Coventry officers' view of the Coventry High School students, by contrast, was far more charitable. Despite the fact that any Coventry student could have just as easily have been a potential perpetrator, the Coventry officers considered all of the Coventry High School students on the scene to be "victims" – including those who were *not* complaining of having lost anything. (Ex. I, 73:7-

74:5.) No Coventry student was searched at any time. (Ex. I, 73:4-23; Ex. J, 46:13-24; Ex. K, 46:2-5.) In fact, no Coventry student was even requested to submit to a search. (Ex. I, 74:4-7.)

Coach Marchand, however, was left in a quandary. Quite rightly, he believed that the Coventry Police did not have the right to search the boys. (Ex. H, 44:16-17.) He felt that the police simply wanted to: ". . . appease the masses over there that were crying for our heads." (Ex. H, 28:2-5.) Even now that the police had arrived, the crowd outside the bus remained hostile, repeatedly calling out remarks indicating that the Central Falls players were "good at hiding things, they're sneaky you know it, search the coach." (Ex. H, 15:14-16:3.) The police were telling the crowd to stop, but they stayed where they were and continued with their remarks. (Ex. H, 16:3-7, 27:5-9, 45:8-13.) Worse, Coach Marchand's bus was blocked in, and he also had reason to believe that the police were not making any serious effort at controlling the crowd. Coach Marchand, also a teacher, described the situation: "You know, it was one of those things where you tell the class okay you cut it out and you don't really do anything and then two seconds later they're talking again, you know." (Ex. H, 16:3-7, 27:5-9, 45:8-13.) Coach Marchand fully appreciated the potential for violence that could result with the large crowd. During his coaching career, he had experienced a situation in Burrillville where some disagreement erupted into a serious brawl and injuries to the players, and was fearful that a similar situation might arise. (Ex. H, 13:16-22.)

Marchand therefore felt that he had no under choice but to permit the police search. (Ex. H, 44:24.) Marchand told the boys that the crowd was not going to let them go until the police searched them. (Ex. D, 36:1-8.) Marchand never told the boys that he had given the police permission to search them. (Ex D, 37:15-17.) The Coventry Police ordered the Central Falls students that everybody was to leave the bus with all of their belongings. The managers were to

bring off the equipment. They were to line up, put the bags in between their legs and wait for further instructions. (Ex. B, 40:17-22; Ex. H, 28:15-23.)

As ordered, the boys lined up with their backs to the bus. The crowd was about six to ten feet away. (Ex. A, 21:9-24; Ex. D, 42:6-10.) After the boys lined up, a Coventry police officer announced that they were there because there were things missing from the locker room. The officer warned the boys that if they had the items, they were to step forward or they would be arrested "right now and not be able to go home tonight." The officer also announced that they would be doing a search. (Ex. C, 27:21-28:6.) The police told the boys to open their bags and remove everything. (Ex. A, 22:8-15.)

The police proceeded down the line to make their searches, with the crowd still looking on. It appears in at least some cases, some students were searched twice, by different officers. (Ex. B, 56:8-57:14.) Marchand witnessed students' bags were placed on the hoods of the officers' cars, and the police searching them. (Ex. H, 29:8-23.) At least in part because the Coventry Police had obtained no clear idea of what they were looking for in the first place, the Central Falls students had to prove that their own cell phones and iPods were their property by allowing the police to search the pictures, numbers, and data stored thereon. (Ex. B, 49:13-22, 49:23-50:9; Ex. D, 48:2-17, 50:23-51:5, 51:6-13.) On other occasions, the Coventry officers took students' electronics to the crowd and displayed it to the crowd to find out if it were among those said to be missing. (Ex. A, 26:3-24; Ex. C, 29:13-24; Ex. H, 29:8-23.)

Contrary to the officers' account, the searches were not limited to the students' belongings, but included searches of their persons. Lopera was asked if he had anything under his armpits. He said no. The police told him to pull up his shirt, and one officer touched him under the armpits. Ex. A, p. 24:9-11.) Lopera was told to take off his sweater, and to stretch his shirt and pants to prove

that nothing was in them. (Ex. A, 24:19-25:24.) The Coventry police asked Ocampo to empty his pockets. (Ex. C, 32:2-4.) Giraldo was required to lift his shirt to prove that he had nothing in his waistband. (Ex. D, 49:21-50:5.) Giraldo also witnessed another player next to him, Pedro Hernandez, get patted down. (Ex. D, 50:12-15.) A Coventry officer told Ricuarte to spread his legs and raise his hands straight out. Beginning at Ricuarte's ankles, he dragged his hands up his legs, ribs and arms. (Ex. B, 47:17-48:16.) The Coventry officer told Ricuarte to lift his shirt. (Ex. B, 49:2-3.)

This process lasted for about 45 minutes to an hour. (Ex. D, 53:8-23; Ex. H, 30:14-15.) While the search was ongoing, the players continued to be harassed by the mob. Ricuarte heard the crowd saying that his team should not be playing Coventry because of their race. (Ex. B, 31:9-17.) Ricuarte, like his Coach, was fearful of being attacked by the crowd. (Ex. B, 41:22-23.) The crowd repeatedly photographed the students during the search. (Ex. A, 27:1-3; Ex. B, 29:1-8, 30:5-11; Ex. D, 39:13-17; Ex. H, 47:17-19.) The crowd continued to refer to the team as "Spics" and make other comments regarding the players' race. (Ex. B, 50:11-53:2; Ex. D, 41:13-42-5.)

The Coventry police themselves appear to have felt that this humiliating public search served absolutely no legitimate law enforcement purpose. During the search, one Coventry officer told Ricuarte that he thought the search was stupid because the coach had already checked, and in any case the security guard had been with the five boys who had used the locker room the whole time. (Ex. B, 57:18-58:14.) Another officer heard this remark and laughed. (Ex. B, 58:20-23.) Later, however, when this incident attracted media attention, the matter was brought up at roll call, with Chief O'Rourke relaying to Coventry officers through Sergeant Michaelides that they had done nothing wrong. (Ex. K, 57:20-58:16.)

III. LEGAL ARGUMENT

Defendants face a formidable burden in obtaining summary judgment. Defendants must demonstrate that ". . . 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." Fed.R.Civ.P. 56(c). The reviewing court does not make factual determinations itself, or decide which edition of the facts to accept; it merely determines whether ". . . a fair-minded jury could return a verdict for the plaintiff on the case presented." *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 895 (1st Cir. 1988). The record is reviewed in the light most favorable to the non-moving party. *Rossy v. Roche Products, Inc.*, 880 F.2d 621, 623 (1st Cir. 1989). All factual inferences must be drawn in favor of the non-moving party. *See Rossy* at 623. Defendant's burden is particularly onerous in discrimination cases. The First Circuit has counseled caution and restraint when deciding a summary judgment motion in a discrimination action because motion and intent play such a prominent role. *See Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 109 (1st Cir. 1988). Such questions of motive and intent are considered the realm of the jury. *Rossy*, at 624.

When one examines the evidence in its totality – including that substantial amount of evidence that the Defendants omitted from their discussion – it is clear that Defendants cannot obtain summary judgment. Instead, there is more than sufficient evidence on the record that could support a jury verdict for the Plaintiffs on all counts.

A. NO PROBABLE CAUSE EXISTED FOR THE SEARCH OF THE STUDENTS AND THEIR POSSESSIONS.

It is beyond cavil that the Coventry Police had no right to search the Central Falls players without consent. A search or seizure conducted without a warrant based upon probable cause has historically been deemed presumptively unreasonable, unless it falls within certain well-

defined exceptions. *See Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Probable cause does not exist unless the facts available to the officer would allow a reasonable person to believe that the search will yield evidence of a crime or evidence of a crime. *See Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983), *citing Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949). "Probable cause" does not require certainty, but the officer's mere suspicion or personal belief is not enough. *United States v. Infante-Ruiz*, 13 F.3d 498, 502. Instead, there must be a "fair probability," based upon the totality of the circumstances, that the evidence or contraband will be found in the area to be searched. *See United States v. Bartelho*, 71 F.3d 436, 441 (1st Cir. 1995). Furthermore, probable cause must be supported by individualized suspicion. *See, e.g., Ybarra v. Illinois*, 444 U.S. 85, 110 S.Ct. 338, 62 L.Ed.2d 238 (1980).

There was a complete dearth of probable cause for this search. No individualized suspicion could be cast upon the Coventry players because there simply was no reason to suspect the Central Falls players to any greater degree than any other person on the campus at the time of the incident. At deposition, the Coventry officers attempted to justify their search on the basis that the Central Falls players had been in the locker room. (Ex. I, 69:7-24;Ex. J, 40:1-6.) However, the Coventry officers also admitted that the locker room was open and available to all, and virtually any person could have entered and taken the items -- including Coventry students. (Ex. I, 69:25-70:1; 70:4-7; Ex. J, 47:4-6; Ex. K, 46:2-5.) For that reason alone, there could have been no individualized suspicion of any of the Central Falls students. The simple fact that one was in an area in which a crime may have been committed has never been accepted as sufficient "probable cause" for a search of one's person or possessions. *See, e.g., Ybarra*, at 91, *citing Sibron v. New York*, 392 U.S. 40, 62-63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968).

In any case, all of the Central Falls students were searched, rather than the mere five or six students who had used the locker room. The mere fact that some of them had been in the locker room did not create probable cause as to all of the students. Simply being with associated with others who may have been involved in criminal activity is similarly not enough to establish "probable cause." *United States v. Khounsavanh*, 113 F.3d 279, 287 (1st 1997); *United States v. Sepulveda*, 102 F.3d 1313, 1315 (1st Cir. 1996). Accordingly, even if we accepted the proposition that there could be probable cause for the students who had used the locker room, there was still no probable cause for a search of the entire team.

The demand for a search is even more egregious when one considers that the police had never made any serious attempt to ascertain that a theft had taken place, much less of precisely what items were missing. The Coventry Police never made any effort to determine if the items had merely been misplaced. (Ex. I, 71:17-72:7; Ex. J, 40:14-17; Ex. M, 28:23-29:1.) The Coventry officers never even ascertained precisely what was missing so that they could identify the missing items. No description was even sought of the cell phones and iPods first said to be missing, whether by size, color, make, or model. (Ex. I, 66:13-67:4, 67:5-9; Ex. J, 39:14-22, 62:5-14 61:19-62:4; Ex. K, 45:16-19, 45:20-23; Ex. M, 27:1-18.) That lack of basic information rendered the search itself little more than a "fishing expedition."

Worse, the police had been given information clearly exculpating the Central Falls team. The officers freely admitted at deposition that they had been made aware that Coach Marchand had already searched his players, and had not found the missing items. (Ex. H, 26:22-27:4; Ex. I, 76:22-25; Ex. J, 46:3-5; Ex. K, 43:25-44:2.) At least one of the Coventry officers appears to have been fully aware of the fact that there was no reason to suspect the Central Falls team of any wrongdoing. That officer indicated to Plaintiff Milton Ricuarte, Jr. during the search that the

search was "stupid" not only because their coach had searched them, but also because the police knew that a security officer had been with the boys who had used the locker room the entire time. (Ex. B, 57:18-14.)

The search of the Central Falls team, then, was inherently unreasonable. The Coventry Police knew or should have known that there was simply no reason at the time to suspect the Central Falls students of theft. If anything, there was even less reason to suspect the Central Falls players than others. Nevertheless, the Coventry Police embarked on a thorough public rummaging through the Central Falls' players belongings and persons, without even so much as a clear idea of what they were looking for. This type of police behavior can never be considered reasonable under any concept of ordered liberty, but can only be construed as a Constitutionally obnoxious "dragnet" tactic.

B. THE CLEARLY ESTABLISHED LAW AT THE TIME OF THE SEARCH DID NOT GRANT COACH MARCHAND AUTHORITY TO CONSENT TO THE SEARCH OF THE STUDENTS.

In their supporting Memorandum, the Defendants did not attempt to argue that any exceptions to the probable cause and warrant requirements existed. Defendants instead take cover behind a claim that Coach Marchand had consented to the search in an *in loco parentis* capacity. As a fallback position, Defendants rely upon the qualified immunity defense.

Defendants' effort at Constitutionally sanitizing their actions is unavailing. "Qualified immunity" does not shield government officials from actions that they reasonably should have known were violative of another's Constitutional rights at the time. *See Cookish v. Powell*, 945 F.2d 441, 442 (1st Cir. 1991), *citing Newman v. Massachusetts*, 884 F.2d 19, 26 (1st Cir. 1989). Instead, it must be determined whether the state of the law, as it existed at the time of the search,

would have put the Defendants on fair notice that their acts or omissions were unconstitutional. *See Hope v. Pelzer*, 536 U.S. 730, 740, 122 S.Ct. 2508, 2516, 153 L.Ed.2d 666 (2002).

This test is entirely objective; the officer's good faith belief in the Constitutionality of his actions or omissions is irrelevant. *See Harlow v. Fitzgerald*, 457 U.S. 800, 816-20, 102 S.Ct. 2727, 2737-2739, 73 L.Ed.2d 396 (1982). The court must proceed on ". . . the juridical equivalent of an archelogical dig." *Savard v. Rhode Island*, 338 F.3d 23, 28 (1st Cir. 2003) The court must examine the controlling case law in its own jurisdiction at that time of the action or omission complained of. *Id.*at 28. If none exists, the court must attempt to determine whether there is consensus elsewhere. *Id.* In that quest, the court should look to all available case law. *Hatch v. Dept. for Children, Youth and their Families*, 274 F.3d 12, 22-23 (1st Cir. 2001).

Furthermore, it is not required that the plaintiff produce pre-existing case law expressly forbidding the precise conduct in question. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). As First Circuit Court Judge Selya recently suggested, to suggest otherwise would be to view a Constitutional violation in the same light as dog bite under common law, in that the first bite would always be free. *See Bergeron v. Cabral*, 2009 WL 580795 (1st Cir.) Therefore, if the authorities existing at the time are sufficiently particularized so that a reasonable official could extrapolate from them and conclude that his particular action or omission would violate the law, then the official cannot assert the qualified immunity defense. *Savard*, at 28, *citing Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

The law is more than sufficiently clear on the point of Coach Marchand's lack of authority to consent to a search. Under case law established at the time, Coach Marchand, in his capacity as school official, had far less than that unbridled *in loco parentis* authority over the

students that the Defendants would suggest; as a government official, his authority was Constitutionally cabined. Under the circumstances, Coach Marchand plainly could not have conducted a search of the team members, even under the relaxed standards for student searches established in the United States Supreme Court's decision, *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733 (1985). Because Coach Marchand himself could not have required a search of his students under these circumstances, it defies logic to declare that he could have authorized such a search on his student's behalf by a policeman. Even if we did accept the proposition that Coach Marchand had the authority to consent to a search, that consent was hardly voluntary in nature. Accordingly, any purported consent given by Coach Marchand was void as a matter of clearly established law, and qualified immunity cannot apply.

1. Under the Clearly Established Law at the Time of the Search, Coach Marchand Did Not Stand *In Loco Parentis* With Respect to the Students for the Purpose of Granting Consent to Search.

Defendants' assertion regarding the extent of Coach Marchand's authority over the Central Falls players is flawed for the simple reason that it is seriously outdated. It is true that at one point, courts did consider a school official's relationship with the student to be *in loco parents* by nature. *See* James Rapp, *Education Law*, § 8.01[2][b][ii] (2002). Where public school students are concerned, the *in loco parentis* doctrine has been separated from Fourth Amendment jurisprudence for at least thirty years.

The *in loco parentis* doctrine, in its most classical sense, places the schools "in the place of the parent," with all of a parent's rights and responsibilities. In other words, when a child was placed in a care of a teacher, the parent delegated to that teacher all of his rights and responsibilities. *See id.* However, especially during the last century, it has become apparent that that delegation is not complete. Nobody would seriously argue that a teacher has the right to

make a number of the various types of decisions entrusted to parents – for example, decisions as to the student's health care. A teacher's *in loco parentis* with relationship to the student instead begins and ends with respect to matters directly related with that student's education. *See People v. Jackson*, 319 N.Y.S.2d 731, 733-734 (1971).

During the last half of the last century, the United States Supreme Court similarly came to realize that the *in loco parentis* doctrine really represented no more than a relic of a day when most schools were privately operated, and simply did not mesh with a state-operated system of compulsory education. In 1985, with the Court's decision in *T.L.O.*, it was firmly established that a student's right to be free of unreasonable search and seizure under Fourth Amendment, in common with a student's First Amendment rights and rights to due process, could not be smothered under the *in loco parentis* doctrine:

> Notwithstanding the general applicability of the Fourth Amendment to the activities of civil authorities, a few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren. *See, e.g., R.C.M. v. State*, 660 S.W.2d 552 (Tex. App. 1983). Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment. *Ibid.*
>
> Such reasoning is in tension with contemporary reality and the teachers of this Court. We have held school officials subject to the commands of the First Amendment, see *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), and the Due Process Clause of the Fourteenth Amendment, see *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." *Ingraham v. Wright*, 430 U.S. 651, 662, 97 S.Ct. 1402, 1407, 51 L.Ed.2d 711 (1977). Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. *See, e.g.,* the opinion in *State ex*

> *rel. T.L.O.*, 94 N.J., at 343, 463 A.2d, at 934, 940, describing the New Jersey statutes regulating school disciplinary policies and establishing the authority of school officials over their students. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

Id. at 336. The *T.L.O.* Court proceeded to establish a "reasonable suspicion" standard on school officials' ability to search students suspected of violation of law or school rules. *Id.* at 341-42.

Since *T.L.O.*, the Court has only had two occasions upon which to revisit the issue of school officials' relationships with their students in regards to searches. These cases were limited to the specific issue of schools' ability to make random drug testing a condition of participation in athletics and extracurricular activities *See Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S.Ct. 2559 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 115 S.Ct. 2386 (1995). The Court found in favor of the schools under a "special needs" exception, that is, the school officials' unique need to ensure a drug-free school environment that went beyond ordinary law enforcement. *Earls*, at 836; *Vernonia*, at 653-54. However, neither case reinstated any notion of an "*in loco parentis*" relationship between school and student where searches were concerned. Public school officials instead had the status of governmental actors.

Even prior to *T.L.O.*, courts had considered and rejected the proposition that a police officer could rely upon the "consent" of school officials to obtain permission to search. The case of *Picha v. Wielgos*, 410 F.Supp. 1214, 1218 (N.D. Ill. 1976) involved a search of female students directed by outside police officers for purposes finding illegal drugs on the students' possessions.[3] The *Picha* Court held that such a police-directed search could not pass

[3] The actual search of these students was done by female school personnel, apparently in light of the students' gender.

Constitutional muster based on the *in loco parentis* authority of school officials alone: ". . . whatever may be the consent to the discretion of the school officials deemed constructively made by the parent or student, it cannot vitiate the constitutional expectation of privacy which decrease the need for levels of suspicion and/or exigency in the conduct of a criminal investigation." *Id.* at 1221. The *Picha* Court, then, freely recognized the dangers of allowing the *in loco parentis* doctrine to be applied where the police knock on the school door. Permitting the application of that doctrine when that child is in the custody of school officials simply makes it all too easy to allow those officers to circumvent limitations on search and seizures that would apply to that student outside of school.

Closer to home, Rhode Island law also undermines the conclusion that Coach Marchand, as a school official, possessed *in loco parentis* authority with respect to searches by police. Just one year prior to this incident, the General Assembly passed legislation governing police interrogations of students while attending school. Those statutes provide, in pertinent part:

> (a) Before making a high school pupil under eighteen (18) years of age available to a law enforcement officer for the purpose of questioning, the principal of the school, or his or her designee, shall inform the pupil that the pupil has the right to request that his or her parent or guardian or an adult family member, or person on the list of emergency contacts for the pupil be present during the questioning.
>
> (b) If the person selected by the pupil cannot be made available within a reasonable period of time, not exceeding one hour, or declines to be present at the questioning, the principal or his or her designee shall inform the pupil that the pupil may select as an alternate, a school administrator, school counselor, or school teacher who is reasonably available to be present during the questioning.
>
> (c) If the person selected by the pupil declines to be present during the questioning, the principal, or his or her designee, shall so inform the pupil and advise the pupil that the principal, or his or designee, will be present during the questioning if the pupil so requests.
>
> (d) If the pupil exercises his or her right, pursuant to this subsection, to have one of the persons designated in paragraph (a), (b) or (c) present during the questioning, the pupil may not be made available to the law enforcement officer

for questioning until that person is present.

P.L. 2005, ch. 409, § 1, codified at R.I.G.L. § 16-21.5-3. This statute, on its face, requires that when minor high school students – such as the Plaintiffs – are sought for police questioning while at school, the school officials must take affirmative steps to ensure that the student may consult with his or her parents. This statute made it clear that the task of making legal decisions for the student in this situation – such as whether to be interviewed or not -- was not to be automatically delegated to the school administrators in an *in loco parentis* capacity. Instead, the parents' control over these situations was to be preserved. It is hardly consonant with this statute to declare that school officials have an *in loco parentis* authority to consent to a bodily search of the student by police.[4]

Given this legal background, the *in loco parentis* doctrine is a wilted, dead reed to grasp in an attempt to haul the Defendants' actions out of Constitutional deep water. In the first instance, Coach Marchand's *in loco parentis* authority clearly extended only to those matters related to the team members' educations. The decision as to whether to consent to a police search implicates far broader matters. A consent to a search involves a waiver of important legal rights – and, possibly, affects the student's future far after graduation. By consenting to a search, one does not only agree to relinquish one's interest in privacy in the thing or place being searched. One also accepts the possibility that the fruits of that search might be used as evidence against one. Whether a student should waive one's rights in a criminal law setting is one that clearly goes far beyond an educator's responsibilities.

[4] It is also worth noting that the Coventry Police itself recognized the primacy of the parents when approaching minors. Written policy of the Coventry Police Department specifically called for parents to be contacted when minors were being interviewed by police. (Ex. L.) (Ex. J, 33:23-25; Ex. K, p. 27:7:16.)

Even more significantly, the Supreme Court had made clear almost thirty years ago that for Fourth Amendment purposes, a public school teacher is not and is never to be confounded with a student's parent. Instead, that teacher, like the police officer, is a government actor, whose authority to search is constrained. As we shall explore more deeply in the next section, the limits of the teacher's authority to search necessarily limits the teacher's authority to give another permission to search.

2. Under the Clearly Established Law at the Time of the Search, Coach Marchand as a School Official Lacked the Authority to Perform the Search of the Students Himself Under the Factual Circumstances and Therefore Could Not Authorize the Same.

It plainly defies logic to declare that one can authorize another to perform an act that one is expressly forbidden to undertake oneself. Defendants' argument in favor of Coach Marchand's authority to consent to search is hopelessly infected by that very type of logical flaw. Under clear law in place at the time of the search, Coach Marchand, as a public school official, could not simply search his charges whenever he wished, but was held to a "reasonable suspicion" standard. Because Coach Marchand did not have that "reasonable suspicion," he himself was forbidden to conduct a search and therefore could not have given the Coventry Police the permission to do the same.

The *T.L.O.* Court was loathe to impose a "probable cause" regime upon school officials. Nevertheless, the *T.L.O.* Court recognized a need for restrictions on school officials' ability to search students accused of wrongdoing. Under *T.L.O.*, one must consider whether the search was justified at its inception, and whether the search was reasonably related in scope to the purposes of the search. *Id.* at 341-42. A search by a school official is only justified at its inception if the school official has a reasonable belief that the search will uncover evidence of wrongdoing by the student. *Id.*

We anticipate that the Defendants may point to later cases involving random drug searches as overturning *T.L.O*. Subsequent to *T.L.O*., the Court did find that school officials could require suspicionless, random drug testing as a condition of participation in athletics and extracurricular activities. *Earls*, at 836*; Vernonia*, at 653-54. We also believe that the Defendants may point to this Court's own decision in *Brousseau v. Town of Westerly*, 11 F.Supp.2d 177 (D.R.I. 1998). The *Brousseau* case involved a "pat-down" of a group of elementary schoolchildren to locate a missing pizza knife with a nine-inch serrated blade. *Id*. at 179.

None of these cases should be construed as a wholesale defenestration of the requirement of reasonable suspicion, as applied to searches of public school students suspected of actual wrongdoing. Instead, these cases are more properly understood to belong to the class of "special needs" cases. *See especially Shade v. City of Farmington,* 309 F.3d 1054, 1060 (8th Cir. 2002); *Desroches v. Caprio*, 974 F.Supp. 542, 548-49 (E.D. Va. 1997), *overturned on other grounds*, 156 F.3d 571 (4th Cir. 1998). Before such a "special need" is found, one must carefully consider the nature of the intrusion, and balance that against the governmental interest involved. *Vernonia*, at 654-661. When one applies this calculus to the instant situation, it is apparent that *Vernonia*, *Earls*, and *Brousseau* are wholly inapposite to this situation.

First, the evils that the searches were to avoid were far more pressing in *Vernonia, Earls,* and *Brousseau* than in the present instance. The searches were aimed solely at student safety. In *Brousseau*, the danger was immediate: there was a strong possibility that a child had in his or her possession a knife capable of inflicting serious or even fatal injury, and there was no other efficacious way of ensuring otherwise. *Id*. at 182. In *Vernonia* and *Earls*, the danger was illegal, and potentially lethal substances. *Earls* at 835; *Vernonia* at 662.

Second, the nature of the intrusions in *Vernonia, Earls,* and *Brousseau* was far more limited. In *Brousseau*, the search was limited to a mere "pat down." *Id*. at 179. In *Vernonia* and *Earls*, the intrusion was minimized by the fact that the students were informed in advance that the drug tests would be required, and could be avoided by simply not going out for activities or the team. *Earls* at 832; *Vernonia*, at 657. Additionally, the search was limited solely to evidence of illegal drug use, and results of the search were kept confidential. *Earls* at 833; *Vernonia*, at 658. The drug tests were conducted in a truly random fashion, thus avoiding the possibility that unpopular groups were being targeted. *Earls*, at 837. Most significantly, the results were *not* used for either law enforcement or even school disciplinary purposes. *Earls* at 833-34; *Vernonia*, at 658.

Here, the level of need for the search was far lesser. There was no pressing safety concern here. All that had happened here was that a student may or may not have been deprived of his cell phone or iPod. Although many adolescents have certainly argued to their parents that death or other immediate and irreparable harm would result from deprivation of a cell phone or iPod, none have been able to produce reliable evidence to support such a claim. There was therefore no "safety" need resulting from the disappearance of these devices justifying a suspicionless search.

It is true that Coach Marchand did give the purported "consent" out of concern for student safety under the near-melee conditions. However, even these concerns do not bring the search within the orbit of *Vernonia, Earls,* and *Brousseau*. No court has ever accepted the proposition that you may be compelled to give up your Constitutional rights simply because you have been ganged up on and ordered that you surrender that right to ensure your safety. That is precisely what took place here where the bus was blocked in and the crowd declared that the

Central Falls team was not leaving until the items were found. (Ex. H, 25:5-8.) More importantly, the search in no way contributed to student safety. If anything, the manner in which the searches were conducted increased the danger to the students rather than allayed it. The students were at least relatively secure on the bus. The Coventry Police's search removed them from that refuge. Exposing a student to greater danger was hardly what the *Vernonia* or *Earls* Court had in mind.

Not only did the search lack any legitimate safety concern, but the searches were also far more intrusive than those in *Vernonia, Earls,* or *Brousseau*. Unlike in *Vernonia* or *Earls,* there was no way the students could have anticipated that this type of search would be demanded of them. The student's bags were thoroughly searched, and the students were forced to lift clothing to the bare skin. The searches were not conducted in a confidential manner. Instead, the students were forced to spend an hour before a hostile crowd that was filming the event. This was far more intrusive than a brief "pat down" or a quickly administered urine test.

Accordingly, the suspicionless searches here were wholly unlike the "special needs" searches authorized by *Vernonia*, *Earls*, or *Brousseau*. For that reason, none of these cases applied to this situation. Instead, the *T.L.O*. standard prevailed for these students, and reasonable suspicion was needed before Coach Marchand could authorize a search.

By the time the Coventry Police arrived, Coach Marchand had no reasonable suspicion that his students had engaged in any wrongdoing.[5] As we discussed in Subsection A above, there was no reason to suspect any Central Falls student any more than anybody else. Coach Marchand himself never even suspected his team at all. He specifically told them before the police arrived that he did not believe that they had stolen anything. (Ex. B, 29:10-18.) By the

[5] We also observe that Coach Marchand's initial search was highly suspect under *T.L.O*.

time that he searched the students, he was "completely satisfied" that they had done nothing wrong. (Ex. H, 15:9-12; 23:4-8.) At the inception of the search allegedly "authorized" by the police, then, Coach Marchand had no "reasonable suspicion," and therefore could not have required a search of the students.

In summary, there is no way that the existing case could be stretched to find authority for Coach Marchand to search the students under these factual circumstances. His authority to demand a search of the boys never existed because he never had any type of suspicion of them at all. Therefore, he could not simply authorize the Coventry police to do it. To state otherwise risks actual violence to students' Fourth Amendment rights. If all an overreaching teacher needs to do is to call a police officer and give "permission" for that officer to search that student, then there is little or no point to granting students a right to freedom from unreasonable search and seizure from their teachers in the first place. That kind of evasion is clearly not what the *T.L.O* Court had in mind, and should not be countenanced here.

3. Notwithstanding the Presence of Coach Marchand, the Clearly Established Case Law at the Time of the Search Continued to Hold the Coventry Officers to the Same Standard for Searches and Seizures of the Central Falls Players as Would Be Applied to Any Other Citizen.

An even more recent line of cases further illuminates Coach Marchand's lack of authority to provide consent to search of the students. In recent years, many schools use "school resource officers," or "liaison officers," officers who are actually employed by the school districts or who are regularly assigned to the schools as their "beat." Coventry, as with many other districts in Rhode Island, has similarly adopted the practice of using "school resource officers. In Coventry, the School Resource Officer (SRO) is the law enforcement officer assigned to the school or school district. The SRO also serves as a ". . . point of contact for the student and faculty for intervention,

mediation, peer mediation, referral to outside agencies . . ." The SRO also serves as ". . . a visible role model and familiar face to the student and faculty." (Ex. G, 13:12-23.)

A number of jurisdictions have chosen to treat "school resource officers" or "liaison officers" as school officials, and thus applied the "reasonable suspicion" standard granted to school officials under *T.L.O.*, whether that "school resource officer" is acting in his own capacity in maintaining a safe school environment, or is acting at the behest of another school official. *See Shade v. City of Farmington,* 309 F.3d 1054, 1060-61 (8th Cir. 2002); *Cason v. Cook*, 810 F.3d 188, 192-93 (8th Cir. 1987); *In re Alexander B.*, 220 Cal.App.3d 1572, 1577, 270 Cal.Rptr. 342 (Cal.App. 1990); *State v. D.S.*, 685 So.2d 41, 43 (Fla. App. 1997); *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996); *T.S. v. State*, 863 N.E.2d 362, 371 (Ind.App. 2007); *In the Matter of Ana E.*, 2002 WL 264325, *4 (N.Y. Fam. Ct.); *In the Matter of D.D.*, 554 S.E.2d 346, 353 (N.C.App. 2001); *In re Murray*, 525 S.W.3d 496, 498 (N.C.App. 2000); *In the Matter of Josue T.*, 989 P.2d 431,437 (N.M. 1999); *Commonwealth v. J.B.*, 719 A.2d 1058, 1065-66 (Pa. Super. 1998); *Russell v. State*, 74 S.W.3d 887, 891-92 (Tex.App. 2002); *State v. Angelina D.B.*, 564 N.W.2d 682, 690-91 (Wis. 1997). The rationale for allowing such a relaxed standard for SROs is that the SRO essentially functions as a school official, and acts in aid of the school officials' function of maintaining campus discipline and order. *Angelina D.B.*. at 688.

Notwithstanding the line of cases, the standard for searches and seizures remains unchanged for outside police officers not acting at the behest of school officials. The *T.L.O.* Court specifically warned that its ruling regarding "reasonable suspicion" should not be construed as applying to searches ". . . conducted by school officials in conjunction with or at the behest of law enforcement agencies." *Id.* at 342, n.7. Both before and after *T.L.O.,* outside police officers who performed student searches *sua sponte* have always been held to the same

Fourth Amendment standards as any other police officer. *See R.D.S. v. State*, 245 S.W.3d 356, 369 (Tenn. 2008); *M.D. v. Smith*, 504 F.Supp.2d 1238, 1245 (M.D. Ala. 2007); *State v. Tywane H.*, 933 P.2d 251, 255 (N.M. App. 1997); *M.J. v. State*, 399 So.2d 996, 998 (Fla.App. 1981); *Waters v. United States*, 311 A.2d 835, 837-38 (D.C. App. 1973). Courts have steadfastly refused to budge from these standards even where the outside officer acted when the child was in the custody of school officials or was at school at the time the officer chose to do the search. *See In the Interest of Thomas B.D.*, 486 S.E.2d 498, 500 (S.C. App. 1997); *F.P. v. State*, 528 So.2d 1253, 1254 (Fla. App. 1 Dist. 1988) (probable cause standard applied in search of student being questioned regarding auto theft outside of school). The rationale for maintaining the probable cause standard outside police officers not acting at the behest of school officials is obvious. If we are to accept the proposition that a student's mere presence at school lowers the standard for police searches, then the students' rights to be free of unreasonable searches from the police would be eviscerated.

A similar evisceration would be worked if we permitted school officials to grant outside officers "consent" to search students for matters unrelated to school discipline. All that the police officer would need to do to circumvent the probable cause requirement is to wait until the student goes to school and persuade a school official to give "permission" to perform the search. In a day and age in which the police are already present on numerous school campuses, in the persona of the SRO, it is all too easy to envision the development of such a collusive relationship. Allowing the application of *in loco parentis* doctrine to give outside officers access to students is wholly incongruous with a line of cases that has insisted that outside officers must be held to the same Fourth Amendment standards that would apply to students outside of school. *Picha*, at 1221.

Here, there is no question that the Coventry Police were in any way acting in aid of Coach Marchand in his disciplinary function. None were School Resource Officers.[6] (Ex. I, 24:25-25:2; Ex. J, 29:6-7; Ex. K, 53:9-10.) More importantly, even before the police arrived, Coach Marchand had already completed his own investigation and satisfied himself that the boys had done nothing wrong. Therefore, he had no desire or need for assistance in his disciplinary function. The relationship between the Coventry Police officers and Coach Marchand was hardly a cooperative one, but had been an adversarial, law-enforcement type of search from the beginning. As one of the officers testified, the reason they wanted to do their own search was to see if Coach Marchand was telling the truth about the boys. (Ex. I, 77:1-4.) Therefore, the Coventry Police cannot be said to have been aiding Coach Marchand in his disciplinary role over the students, and cannot be permitted to take advantage of any relaxed Fourth Amendment standard. Further, they were not permitted to take advantage of any *in loco parentis* authority so as to circumvent the Fourth Amendment.

4. <u>Coach Marchand's Purported "Consent" to the Search Was Not Knowing and Voluntary.</u>

Even if we accepted the proposition that Coach Marchand could have given a valid "consent" to the search of his students, the consent in this case was invalidated by the coercive circumstances under which it was obtained. In order for a consent to a search to be valid, the government must show that that consent was freely and voluntarily given, rather than the product of coercion. *United States v. Jones*, 523 F.3d 31, 37 (2008). The question of whether the consent was freely and voluntarily given is one of fact, and requires ". . . an examination of the totality of the circumstances surrounding the relevant transaction between law-enforcement authorities and the consenting parties." *Id.*, *citing United States v. Pérez-Montañez*, 202 F.3d

[6] Kennedy had only graduated from Police Academy in March of 2006. (Ex. M, 14:21-15:3.)

434, 438 (1st Cir. 2000). Coercion may be express or implied. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973) Consent may not be the product of an illegal detention. *United States v. Jenson*, 462 F.3d 399, 407 (5th Cir. 2006). Similarly, the threat of violence or deception may invalidate consent to a search. *See United States v. Rosario-Diaz*, 202 F.3d 54, 69 (1st Cir. 2000); *United States v. Kampbell*, 574 F.2d 962, 963 (8th Cir. 1978)

The evidence on the record can support the conclusion that the Coventry Police not only failed to defuse an already inherently coercive situation, but actively contributed to and exploited it. At the time the Coventry Police arrived, the Central Falls bus was already blocked in by the mob and could not leave. The Coventry Police blocked in the bus with their vehicles, thus contributing to a completely unwarranted detention, since there was no probable cause, or even reasonable suspicion. (Ex. D, 31:15-32:6; Ex. H, 43:15-24.) Worse, the Coventry Police at no point took any effective action to dissipate the crowd or otherwise stop the harassment. (Ex. H, 16:3-7, 27:5-9, 45:8-13.) Coach Marchand expressed fear of the crowd to the Coventry officers, and appealed to them for assistance in extricating him and his players from this dangerous situation, asking them: ". . . what am I going to do, what are they going to do to us." (Ex. H, 27:23-24.) *No* real help was offered except for the search that the crowd was demanding.

Furthermore, there was an element of deception in the Coventry Police's actions. The Coventry Police portrayed their actions as helpful to Coach Marchand in his predicament, in at least appeasing the crowd and defusing a hostile situation. (Ex. H, 28:2-5.) However, as the officers later admitted, that was not their true intention. They had instead decided to determine if Coach Marchand was telling the truth about the players – and seek evidence against the boys to be used against them. (Ex. I, 77:1-4.)

Under these circumstances, no "consent" to search can or should be considered valid. There are few situations more coercive than being held prisoner by an angry mob while the police tacitly permit that imprisonment to continue. Coach Marchand and his players had the same right to police protection from wrongful imprisonment as anybody else on the campus. Nevertheless, that protection was withheld. Instead, it was implied that protection could only be had if there was a consent to a search. For that reason, even if Coach Marchand were legally in the position to give valid consent for a search of the boys as their coach, the consent that he did give was hopelessly tainted by coercion.

C. THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT IV (INVASION OF PRIVACY).

The Defendants seek summary judgment on Plaintiffs' state law invasion of privacy claim on virtually the same grounds as they seek summary judgment on Plaintiffs' § 1983 claims. They assert that that there can be no invasion of privacy claim for a constitutionally permissible search. Furthermore, they assert that a qualified immunity similarly exists for government officials in invasion of privacy complaint, citing *Hatch v. Town of Middletown*, 311 F.3d 83 (1st Cir. 2002), which in turn cited *Pontbriand v. Sundlun*, 699 A.2d 856 (R.I. 1997) and *Ensey v. Culhane*, 727 A.2d 687 (R.I. 1999).

Defendants overstate the effects of *Hatch*, *Pontbriand*, and *Ensey*. As *Hatch* itself acknowledged, neither *Pontbriand* nor *Ensey* ever actually made any ruling on whether "qualified immunity" would be applied to claims brought against state officials under R.I.G.L. § 9-1-28.1. *Hatch* at 90. Since *Hatch,* the Rhode Island Supreme Court has not yet had the opportunity to reach this issue of state law on its own. In any case, as we have outlined above, the Defendants were not entitled to qualified immunity in this situation. Therefore, their attempt to obtain summary judgment on this count must fail.

D. THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT II (EQUAL PROTECTION).

The Defendants also attempt to obtain summary judgment on Count II of Plaintiffs' complaint, a § 1983 claim for violation of their right to equal protection. The Defendants claim that they are entitled to summary judgment because there was no evidence that the Plaintiffs were treated differently than others similarly situated based upon their race. There is more than sufficient evidence to support a jury finding to the contrary.

The Defendants misstate the calculus applied in Equal Protection claims. They rely heavily on the lack of direct evidence of discriminatory animus. However, the courts readily recognize that there is seldom any direct evidence of discriminatory animus in an Equal Protection case. Therefore, intent to discriminate may be shown by circumstantial evidence. *Judge v. City of Lowell*, 160 F.3d 67, 77 (1st Cir. 1998).

The circumstantial evidence on the record supports an inference that the Plaintiffs were indeed singled out for different treatment than others similarly situated based upon their race. The Town of Coventry is predominately white, as was its school population at that time. (Ex. E.) The Central Falls team, coming from an ethnically diverse community, with a team composition including a number of Hispanics, was alone singled out for a search. (Ex. F.) In fact, nobody but the Central Falls team was even asked to agree to a search. (Ex. I, 74:4-7.) This was true despite the fact that the Coventry Police were fully aware that although the crowd may have decided that the Central Falls team were "prime suspects," there was no rational basis for that belief. The Coventry Police admitted at deposition that virtually anybody in that crowd, including the Coventry students themselves, could have had access to the locker room and could have stolen the items. (Ex. I, 69:25-70:1; 70:4-7; Ex. J, 47:4-6; Ex. K, 46:2-5.) In fact, the

evidence suggests that the Coventry Police were fully aware that the Central Falls players were innocent, because the ones who had been in the locker room had been accompanied by a security guard the entire time. (Ex. B, 57:18-58:14.) Under these circumstances, it is virtually impossible for the Coventry Police to state that they did not treat the Central Falls team differently than the Coventry students.

Furthermore, their explanation for that differential treatment is patently irrational. At deposition, the Coventry officers explained the differential in treatment by declaring that all of the Coventry students were "victims." (Ex. I, 73:7-74:5.) In light of the fact that the Coventry officers also admitted that the Coventry students were just as much in a position to have taken the items, these "reasons" for treating the Central Falls students differently are wholly unworthy of credence.

The Defendants also attempt to escape liability by claiming that the racial bias really stemmed from the crowd, rather than themselves. This argument is a red herring. While there is no direct evidence of racial bias on the part of the Coventry officers themselves, there is certainly evidence that they put their police powers at the disposal of a crowd that had a great deal of animus towards the Plaintiffs based upon their race. The crowd vociferously ascribed to the Central Falls players the traits of dishonesty based upon their race, spat racial epithets, and repeatedly demanded a search. (Ex. D, 27:13-28:5; Ex. H, 24:15-25:25.) As discussed in the Subsections above, the Coventry officers took no effective action to stop this harassment. Instead, they worked to secure the very search that the crowd was demanding. A government official who acquiesces to another's demand that a racial minority receive less favorable treatment must be deemed as guilty of an Equal Protection violation as an official who acts upon

a personally espoused racial hatred. In such cases, whether the official personally shared the bias or not, the result is the same: the disfavored minority was denied the equal protection of the law.

There is, then, more than sufficient circumstantial evidence on the record to support an inference that the Defendants treated Plaintiffs less favorably based upon race. For that reason, Defendants cannot receive summary judgment.

E. THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON COUNTS V AND VI (RACIAL PROFILING AND RACIAL/NATIONAL ORIGIN INTIMIDATION).

In their quest to gain summary judgment on Counts V and VI, Defendants rely upon the same arguments as made for the dismissal of the equal protection claims. These arguments should be equally unsuccessful on Counts V and VI.

IV. CONCLUSION

For the above-referenced reasons, Defendants' Motion for Summary Judgment should be DENIED.

Plaintiffs,
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CERTIFICATION

I hereby certify that the within document has been electronically filed with the Court on April 27, 2009, that it is available for viewing and downloading from the ECF system, and that the counsel of record listed below will receive notice via the ECF system:

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