UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JUAN LOPERA, ET AL
PLAINTIFFS,

vs.

C.A. No. 08-123S

TOWN OF COVENTRY, ET AL,
DEFENDANTS.

DEFENDANTS'[1] SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On May 26, 2009, this Court held a hearing on Defendants' Motion for Summary Judgment. During that hearing, two (2) issues were raised that warrant further briefing by the parties. First, although the Complaint is not clear, plaintiffs' attorney represented during the hearing that plaintiffs intended to maintain a federal claim against the Town for failure to train and supervise. In addition, during the hearing, plaintiffs' attorney argued that a factual issue existed as to whether the coach felt coerced into consenting to the search by the crowd of spectators. Defendants hereby submit the instant Supplemental Memorandum addressing both these issues.

II. ARGUMENT

A. FAILURE TO TRAIN AND SUPERVISE

Although plaintiff does not specifically delineate a cause of action for failure to train and/or supervise, the Amended Complaint contains the general factual allegation that the Town and former Chief O'Rourke failed to adequately train or supervise the

[1] The Defendants are the four Coventry Police Department officers who responded to the incident (Kevin P. Harris, Kevin Kennedy, David Nelson, and Stephen A. Michailides), the Treasurer of the Town (Warren West), former Chief of Police for the Town of Coventry, Brian O'Rourke and current Chief of Police,Ronald E. DaSilva.

police officers "relative to proper manner in which to conduct searches and seizures." *Amended Complaint, paragraph 33 (Document #24).* During the May 26, 2009, hearing, plaintiffs' attorney represented that plaintiffs were seeking to maintain a *Monell* claim based on the alleged failure to train or supervise. Defendants thus hereby move for the entry of summary judgment on plaintiffs' federal claim for failure to train or supervise.

The Supreme Court has imposed a high burden on parties seeking to recover against a municipality or supervisory personal for an alleged failure to train under *§ 1983*. In fact, in *City of Canton v. Harris*, the United States Supreme Court held that there are only "limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." *489 U.S. 378, 387 (1989).*

Of course, in order to maintain a claim against the Town itself under *§ 1983,* the plaintiff must demonstrate in the first instance that it was an unlawful, unconstitutional policy, practice or custom that lead to the constitutional deprivation. *Monell v. City of New York Dept. of Soc. Services, 436 U.S. 658 (1978)*. In *City of Canton v. Harris 489 U.S. 378, 387 (1989),* the Supreme Court clarified the standard and held that the "policy" requirement limiting municipal liability in *§ 1983* cases under *Monell* can be satisfied in municipal "failure to train" cases only (1) where employees of a local government commit a constitutional violation (2) due to a lack of training by municipal policy makers (3) who are "deliberately indifferent" to the need for the training and 4) it was this lack of training that caused the constitutional violation.

This standard thus first requires a constitutional event, *i.e.*, an underlying constitutional violation that the failure to train causes. Bad facts or a single outrageous event is insufficient. Some kind of wrong of constitutional dimension must be present.

Monell, 436 U.S. at 690-91. In the instant case, as more fully addressed during the summary judgment hearing, defendants maintain that under *Pearson v. Callahan, 129 S. Ct. 808 (U.S. 2009)*, the Court need not reach the issue of whether a constitutional violation occurred in order to find that the officers are entitled to qualified immunity. If the Court were to nevertheless reach this issue and decide that the undisputed facts failed to support a finding of a constitutional violation, plaintiffs' § 1983 claim against the municipality and Chief will likewise fail. *City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point"); Evans v. Avery, 100 F.3d 1033, 1039-40 (1st Cir. 1996)(where individual officers did violate plaintiff's constitutional rights in the course of a high speed pursuit, the City likewise could not be held liable for the alleged failure to monitor police pursuits and through its failure to supervise police officers involved in such pursuits).*

Even accepting, *arguendo*, the premise that the officers' actions amounted to a constitutional deprivation because the Coach could not consent on behalf of the plaintiffs and/or that the police lacked probable cause to search, in order to succeed on their failure to train claim, plaintiffs must demonstrate that the Town and Chief were deliberately indifferent in the failure to train the officers. In *City of Canton, 489 U.S. 378, 387 (1989),* the plaintiff had alleged that due to the inadequacy of police training, the City of Canton and its officials violated plaintiff's constitutional right to receive medical attention while in police custody. *Id. at 382*. After the jury ruled in the plaintiff's favor, the city made a motion for judgment notwithstanding the verdict, claiming that a

municipality can only be found liable under § 1983 where the policy in place is itself unconstitutional. In rejecting the city's narrow interpretation of § 1983, the *Canton* court established the following standard for evaluating valid policies alleged to have been unconstitutionally applied:

> The inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police came into contact. . . . Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983 . . . . Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983. *Id. at 388-89 (emphasis added).*

Thus, for liability to stem from a failure to train, the Plaintiff must show an actual policy of inadequate training, where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id. at 390*. Plaintiffs must also demonstrate that a municipality *deliberately* chose an inadequate training program. *Id. at 389*.

> The "deliberate indifference" standard has been broken down into three elements:
>
> (1) that a policymaker of the municipality knows to a moral certainty that its employees will confront a given situation;
>
> (2) that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation; and
>
> (3) that the wrong choice by the employee will frequently cause the deprivation of a citizen's constitutional rights.

Smith v. Town of E. Haven, 2005 U.S. Dist. LEXIS 4544 (D. Conn. 2005) citing Nicholson v. Scoppetta, 344 F.3d 154, 166 (2d Cir. 2003) (citations omitted).

"Absent any showing of previous harm arising from this training policy, or any evidence of deliberation on the [defendants'] part, plaintiff fails to demonstrate an issue of material fact as to whether the Defendants actually chose a policy with deliberate indifference toward" constitutional rights of individuals. *K v. City of S. Portland, 407 F. Supp. 2d 290, 297 (D. Me. 2006).*

> In this specific context, a showing of deliberate indifference generally requires "a showing 'of more than a single instance of the lack of training or supervision causing a violation of constitutional rights.'" "[A] plaintiff [must] demonstrate 'at least a pattern of similar violations'" arising from training or supervising "that is so clearly inadequate as to be 'obviously likely to result in a constitutional violation.'" A limited exception for single-incident liability exists only "where the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy or failure to train."

Brumfield v. Hollins, 551 F.3d 322, 329 (5th Cir. Miss. 2008) (citations omitted).

In this case, defendants submit that the undisputed facts fail to support a finding of deliberate indifference. In particular, there is no basis to support the conclusion in the first instance that any harm had resulted in the past from this alleged deficient training or "'at least a pattern of similar violations'" arising from training or supervising "that is so clearly inadequate as to be 'obviously likely to result in a constitutional violation.'" *Brumfield, 551 F.3d at 329.* Absent such alleged prior harm or even an allegation of such harm, plaintiff cannot meet its burden of showing that the defendants "actually chose a policy with deliberate indifference toward the constitutional rights of individuals." *K v. City of S. Portland, 407 F. Supp. 2d at 297.*

The Eleventh Circuit has addressed a similar claim regarding the need for additional training in the context of police officers interaction with students and concluded "that the need for training regarding the detention of students specifically is

not obvious in the abstract and that a lack of such training is a "possible imperfection," but not a "glaring omission" from a training regimen." *Gray v. Bostic, 458 F.3d 1295, 1309 (11th Cir. Ala. 2006).* In that case, the Special Resource officer at a middle school took a student who had threatened to hit a teacher into the hallway and placed handcuffs on her to demonstrate what it felt like to get arrested. In addressing the failure to train and supervise claim against the SRO's superior, the Court noted that the SRO had received training, at both the police academy and the Sheriff's Department, on the proper use of force and the principles of probable cause. The Court thus concluded that "[t]he failure to provide specific training regarding the detention of students, in addition to general training regarding use of force during detention and 22 {sic} arrest, was not "so likely" to result in the violation of students' Fourth Amendment rights that Sheriff Sexton reasonably can be said to have been deliberately indifferent to the need for this particularized training without any prior notice." *Id. citing inter alia City of Canton, 489 U.S. at 390-92 (finding no obvious need to train jail supervisors regarding when to provide medical treatment beyond first aid).*

Likewise, in the instant case, there is nothing to support the finding that failure to provide additional training beyond that received by the officers would so likely result in the violation of students' civil rights that the Town or former Chief can be found to have been deliberately indifferent to the need for the additional training. Moreover, as to the Town itself, plaintiffs cannot point to any evidence that supports a finding of an unconstitutional policy or practice relative to failure to properly train and supervise officers. *Monell, 436 U.S. 658.* Absent such evidence, the Town and former Chief are entitled to summary judgment.

In addition, as with all constitutional claims, plaintiff can only succeed on its failure to train claim under *§ 1983* if that failure is the cause or the "moving force" behind the underlying constitutional deprivation. *See City of Canton, 489 U.S. at 388*. A governmental entity "is only liable when it can be fairly said that the city itself is the wrongdoer." *Collins v. City of Harker Heights, 503 U.S. 115, 122 (U.S. 1992).* The Supreme Court has employed an "actual causation" standard in claims against a municipality for the negligent training and supervision of government officials under *42 U.S.C. § 1983*. *City of Canton, 489 U.S. at 390*. That is, in order to maintain a *§ 1983* claim against a municipality, plaintiff must demonstrate that the claimed deficiency "actually causes injury." *Id.* The Supreme Court has described this burden as requiring a showing that "the identified deficiency in a city's training program . . . [is] closely related to the ultimate injury. . . Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *Id. at 391.*

The determination of whether there is a causal link has been characterized as a legal conclusion rather than a function of objective fact. *Britton v. Maloney, 901 F.Supp. 444 (D. Mass 1995).* The Supreme Court has further tutored that in order to determine if a plaintiff has met this "rigorous standard" of causation, the Court should refer to state tort principles. *Rodriguez-Cirilo v. Garcia, C.A. No. 96-1306 (1st Cir., June 2, 1997); Soto v. Carrasquillo, 878 F.Supp. 324, 331 (D. Puerto Rico 1995)*. Under Rhode Island's causation standard, plaintiffs must demonstrate that "but for" the alleged failure to act, the injury would not have occurred. *Geloso v. Kenny, 812 A.2d 814, 818 (R.I. 2002).* In this case, given the circumstances surrounding the consent and search, defendants submit

that it cannot be said that the lack of additional training (whatever that training may have been) was the driving force behind the alleged constitutional deprivation.

Accordingly, defendants submit that in the instant case, as a matter of law, plaintiffs are unable to prove that the alleged failure to train is the result of the Town's or Chief's "deliberate indifference" or, in any event, that such failure to train caused plaintiff to suffer a constitutional deprivation. Summary judgment should accordingly enter on behalf of defendants.

B. QUALIFIED IMMUNITY FROM FAILURE TO TRAIN AND SUPERVISE

It is also noteworthy, that the former Chief O'Rourke, in any event, is entitled to qualified immunity from the failure to train and supervise claim for all the same reasons that justify the granting of qualified immunity for the officers actually involved in the incident. More precisely, it was not clearly established that a coach in custody of students on a school sponsored athletic event lacked capacity to consent on behalf of the students to a police search. The event was not of such nature that the Chief should have known that failure to provide additional training would constitute deliberate indifference to the plaintiffs' rights. *See i.e.* Gray, *458 F.3d at 1309 ("the law was not "clearly established" for purposes of qualified immunity such that a reasonable official in Sheriff['s] . . . shoes would have known that the failure to provide such training constituted deliberate indifference"); Riley v. Newton, 94 F.3d 632, 637 (11th Cir. 1996) (concluding that sheriff was entitled to qualified immunity on failure-to-train claim where plaintiffs failed to cite case law or constitutional provision requiring sheriff to provide training on how to use Army personnel and rejecting plaintiffs' argument that City of Canton's general standard of liability in failure to train cases clearly established the*

right); Battiste v. Sheriff of Broward County, 261 Fed. Appx. 199, 203 (11th Cir. Fla. 2008). Consequently, defendants submit that former Chief O'Rourke is entitled to qualified immunity from plaintiffs' failure to train claim and summary judgment should thus enter in his favor.

C. ALLEGED PRESSURE FROM CROWD DOES EFFECT VALIDITY OF CONSENT TO SEARCH

Another issue raised during the summary judgment hearing was whether the coach's consent was invalid because he allegedly felt coerced by the presence of the crowd. Plaintiffs claim that a factual issue exists as to whether the coach felt compelled to consent to the search because of the crowd that had gathered near the bus. Defendants respond that, as a matter of law, the alleged outside influence by the third parties does not invalidate the coach's consent and thus is irrelevant to plaintiffs' constitutional claims. Rather, under well-settled precedent in order to invalidate consent, there must be coercive action by the officers themselves. In this case, plaintiffs do not allege that the officers coerced Coach Marchand to consent to the search. Any alleged pressure felt by Coach Marchand because of the crowd is thus irrelevant to the determination of whether the officers are entitled to qualified immunity.

As noted in Defendants' Memorandum of Law in support of their Motion for Summary Judgment, "one of the specifically established exceptions to the [Fourth Amendment] requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); U.S. v. Vilches-Navarrete, 523 F.3d 1, 15 (1st Cir. 2008).* Of course, in order for a consent to search to be valid, it must be voluntarily given. *Id. at 235*. This requires looking at the totality of the circumstances. *U.S. v. Jennings, 491 F.Supp. 2d 1072, 1079*

(MD Ala 2007). However, in evaluating the totality of the circumstances in the context of undue influence or coercion, Courts have applied the holding of *Colorado v. Connelly, 479 U.S. 157, 170 (U.S. 1986)* and required that a consenting party who alleges coercion demonstrate that the coercion emanated from the police officers themselves rather than any subjective or outside influence. In *Connelly* the defendant claimed that his confession to the police was involuntary due to his mental condition. In rejecting the position that the statements should be suppressed under the Fourth Amendment due to the defendant's mental state, as opposed to police misconduct compelling the confession, the Court surveyed the cases over the past fifty years and summarized:

> Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."

Id. at 164 (citation omitted). The Supreme Court thus rejected the defendant's claim that the Court must "find an attempted waiver invalid whenever the defendant feels compelled to waive his rights by reason of any compulsion, even if the compulsion does not flow from the police." *Id. at 170.* The Court held that there must be an "essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Id. at 165 (emphasis added)*. The Court underscored the "state actor" requirement by stating:

> The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.

Id. at 166. This rationale is based on the recognition that the Due Process clause and other civil rights specifically protect citizens from being deprived of their rights by "state actors." "Whether a waiver of the Fifth Amendment privilege is voluntary depends on "the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Id. at 157. See i.e. U.S. v. Rosario-Diaz, 202 F.3d 54, 69 (1st Cir. P.R. 2000) ("Although Melendez-Garcia herself testified that she felt very scared and physically ill, there was no evidence whatsoever of physical coercion or intimidation, nor was there any indication of conduct by the law enforcement agents that would amount to psychological coercion or intimidation").*

As noted, *Connelly* has been applied to cases challenging the voluntariness of consent to search under the Fourteenth Amendment. *Jennings, 491 F.Supp.2d at 1078.* Although the voluntariness standard under the Fifth and Fourteenth amendments is slightly different, *id.*[2], a party challenging the validity of a consent to search based on undue coercion must likewise demonstrate coercive action by the governmental agent rather than subjective perception of coercion. For example, in *Jennings*, the defendant had claimed that because of his mental limitations he had not freely and voluntarily consented to the search of his personal bag by U.S. Postal inspectors. After concluding that *Connelly* applied to a determination of whether a consent to search was coerced, the Court held that "there is no basis for finding Jennings' consent to search involuntary 'absent any evidence of psychological or physical coercion on the part of the agents.'" *Id. at 1080.*

[2] The distinction is based on the fact that while a consent to search must be voluntarily given, it need not be knowing and intelligent as required under the waiver of *Miranda* rights. *Jennings, 491 F.Supp.2d at 1079.*

The *Jennings* Court relied upon *U.S. v. Barbour, 70 F.3d 580, 585 (11th Cir. Fla. 1995)*, where the Eleventh Circuit rejected the defendant's claim that his statements to Secret Service agents and his consent to search, both executed while he was undergoing psychiatric treatment for severe depression, was involuntary. Plaintiff claimed that given his severe mental depression and medicated state, the Secret Service Agent's promise to provide him help in obtaining mental health treatment was coercive. The Eleventh Circuit, however, noted the absence of "any evidence of psychological or physical coercion on the part of the agents." *Id.* Therefore, in applying *Connelly,* the Court held that there was no basis for finding that the defendant's statements and consent to search were involuntary. *Id.*

Connelly was also applied in *U.S. v. Amery, 2002 U.S. Dist. LEXIS 16974 (S.D.N.Y. Sept. 9, 2002)* to defeat a defendant's claim that he was unduly coerced in signing a consent to search. In that case, the defendant was originally from Afghanistan. He claimed that he signed the consent form because of his experience in Afghanistan and his belief that if he failed to cooperate he would be held in custody and subjected to abuse by the FBI agents. The Court held, however, that his subjective beliefs were irrelevant "unless there is an allegation that agents of the United States engaged in some type of coercion." *Id. citing U.S. v. Salameh, 152 F.3d 88, 117 (2d Cir. 1998)*. "The defendant has failed to allege any coercive action or unreasonable behavior by the governmental agents to induce him to waive his Miranda rights and make certain statements, or to consent to the various searches. The defendant's limited education, coupled with experiences in Afghanistan and his post-September 11th fears and apprehensions, are wholly unrelated to the agents' conduct." *Id.*

This was also the conclusion of the Second Circuit the case of *Smith v. Tenn., Dep't of Safety, 850 F.2d 692 (6th Cir. Tenn. 1988) (unpublished opinion).* The plaintiff in that case, an undercover agent for Tennessee Bureau of Investigation, brought § 1983 claim against defendants for alleged violation of his due process rights. The investigating officers had searched plaintiff's property for stolen property after receiving his consent. The plaintiff, however, maintained that the consent was coerced by the circumstances surrounding the investigating officers' request for consent and his granting the same. However, the Court held that "[t]he only alleged coercive policy activity was the "atmosphere" of the search ([that is, the investigating officers] gained entrance to the house without disclosing the official nature of their visit) and the relationship of the parties (co-workers)." *Id.* Plaintiff nevertheless maintained that he felt he had no choice but to agree because of his employment at the Bureau of Investigation and his belief that he could lose his job if he refused. However, in recognizing that the plaintiff likewise admitted that he knew he could refuse, the Court held that his "subjective concern over jeopardizing his job does not rise to the level of coercion, compulsion, or force resulting in a constitutional violation." *Id.*

As these cases make clear, and as articulated by the Fourth Circuit, "a court's evaluation of the totality of the circumstances is based, not on the perceptions of the individual searched, but on the coerciveness of the officer's conduct in obtaining the consent. In other words, the relevant question is not whether the person whose consent is sought perceived coercion but, rather, whether there actually was coercion." *U.S. v. Quezada, 1991 U.S. App. LEXIS 22712 (4th Cir. 1991)(unpublished per curiam opinion) citing Connelly, 479 U.S. at 163-67.*

In this case, it is undisputed that the officers took no coercive action to convince the Coach to agree to a search of the students. As previously noted in support of Defendants' Motion for Summary Judgment, Coach Marchand testified that one of officers asked if the Coach would allow the officers to also conduct a search and the Coach readily agreed believing that it was best to have his players names cleared.[3] *Marchand Tr., at 27-28.* In fact, according to Coach Marchand, the police officers were courteous and professional "at all times" and repeatedly told the bystanders to quiet down. *Marchand Tr., at 26, 27 and 32.* As the above cases make clear, absent any evidence of coercive conduct by the officers themselves, plaintiffs' reliance on the alleged pressure imposed by the "crowd" is irrelevant to the determination of whether the consent was constitutional firm in that it was voluntarily given. Thus, for all the reasons outlined in Defendants' previously filed Motion for Summary Judgment and oral arguments made at hearing, defendants respectfully request that summary judgment enter in favor of defendants.

Defendants,
By their attorney,

/s/ Marc DeSisto

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[3] Although not material for purposes of the instant motion, the officers testified that they did not ask for consent to search. Rather, it was Coach Marchand who offered to allow the officers to search the students. *Michailides Tr., at 44.*

CERTIFICATION OF SERVICE

I hereby certify that the within document has been electronically filed with the Court on this 9th day of June, 2009 and is available for viewing and downloading from the ECF system. Service on the counsel of record, as listed below, will be effectuated by electronic means.

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/s/ Marc DeSisto