United States Court of Appeals

for the

First Circuit

09-2386

JUAN LOPERA; MARLON GIRALDO; MAURICIO ESPINAL; HECTOR CARDONA; RANDY GIRALDO; STEVEN GIRALDO; WILLIAM RUIZ; PEDRO HERNANDEZ; L.E.A.-L., by and through his parents and next friends, Luis Ardila and Hziel Ardila; B.O., by and through his parent and next friend, Alba Jaramillo; S.P., by and through his parent and next friend, Lilian Giraldo; J.S., by and through his parents and next friends, Youlder Salazar and Martha Duran; M.R., by and through his parents and next friends, Milton Ricuarte, Sr. and Elizabeth Rivera,

Plaintiffs-Appellants,

v.

TOWN OF COVENTRY, by and through its Treasurer, Warren West; KEVIN P. HARRIS, in his individual capacity and in his capacity as a police officer for the Town of Coventry; KEVIN KENNEDY, in his individual capacity and in his capacity as a police officer for the Town of Coventry; DAVID NELSON, in his individual capacity and in his capacity as a police officer for the Town of Coventry; STEPHEN A. MICHAILIDES, in his individual capacity and in his capacity as a police officer for the Town of Coventry; BRIAN O'ROURKE, individually and in his capacity as the former Chief of Police for the Town of Coventry; RONALD E. DASILVA, individually and in his capacity as Chief of Police for the Town of Coventry,

Defendants-Appellees.

On Appeal from the United States District Court of Rhode Island, Providence

BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Other Authorities

I. INTRODUCTION

This matter comes before this Honorable Court on appeal of a District Court ruling granting Appellees' Motion for Summary Judgment on all counts contained in Appellants' Amended Complaint. The instant matter arose out of an incident taking place on or about September 28, 2006. The Appellants, who are Hispanic, were members of the Central Falls High School Men's Soccer Team. The team had travelled by bus to an "away" game in Coventry, a predominately white community. Their Coach, Robert Marchand, accompanied them to the game. After the game, as the team was boarding the bus, the Coventry players accused the Central Falls players of having stolen iPods and cellular telephones from the Coventry locker room. An angry mob surrounded the Central Falls team bus, shouting racial epithets and demanding a search of the players.

The Coventry Police swarmed onto the scene in four cruisers, lights flashing and sirens blaring. The Coventry Police quickly learned that there was no cause to suspect the Central Falls players. Nevertheless, the Coventry Police singled out the Central Falls players for the very search that the mob demanded. The students were ordered off the bus, and forced to line up against the bus and face the mob. This search lasted for an hour, and was conducted a mere six to ten feet of a mob that continued to shout racial slurs.

The Central Falls players brought an action against the Town of Coventry and its police officers before the District Court for the District of Rhode Island. Counts I, II, and III were 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. § 31-21.2-1 *et seq*. Finally, Count VI alleged a violation of R.I.G.L. § 9-1-35, Racial/National Origin Intimidation.

The District Court granted summary judgment to the Coventry defendants on all counts. The District Court found that the officers were entitled to qualified immunity with respect to the claims for the violations of the Central Falls' players rights under the Fourth Amendment, and also under R.I.G.L. § 9-1-28.1. As its basis, the District Court ruled that Coach Marchand had given an uncoerced consent to the search. The District Court also ruled that the case law was not sufficiently clear as to whether Coach Marchand, a school official, lacked *in loco parentis* authority over the players so as to authorize him to consent to the search. Therefore, the District Court ruled that the Coventry Police could reasonably have relied upon Coach Marchand's "consent" to the search. The District Court also found that there was insufficient evidence on the record to support an inference of racial discrimination on behalf of the officers, and thus dismissed the claims for violation of the Equal Protection Clause, as well as R.I.G.L. § 31-21.2-1 and R.I.G.L. § 9-1-35. The District Court made a similar ruling on the claims for municipal and supervisory liability.

The Appellants take the position that except for the rulings on municipal and supervisory liability, the District Court's grant of summary judgment was in error. The case law is exquisitely clear: Coach Marchand's *in loco parentis* authority never extended to consent to police searches at any point. In particular, Coach Marchand's *in loco parentis* authority, at least with respect to random searches aimed at uncovering suspected wrongdoing, was clearly abrogated by *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). Accordingly, the Coventry officers should not have been granted qualified immunity. In addition, the District Court overlooked substantial evidence demonstrating that the Coach Marchand's "consent" was produced by duress. Additionally, the District Court overlooked substantial evidence demonstrating that the Coventry officers' actions were based at least in part on racial animus. For these reasons, summary judgment should not have been granted, and the Appellants should have been permitted to proceed to trial and finally vindicate their Constitutional rights.

II. STATEMENT OF JURISDICTION

The jurisdiction of the District Court over the complaint was conferred by 28 U. S. C. § 1331, its federal question jurisdiction. The court was also empowered to hear the civil rights claims enumerated herein pursuant to 28 U. S. C. § 1343. Additionally, the court was empowered to hear the state law claims presented pursuant to 28 U. S. C. § 1367.

The jurisdiction of the Court of Appeals over the final judgment of the District Court is invoked pursuant to the provisions of 28 U.S.C. § 1291. On September 11, 2009, the Decision and Order which is the subject of this appeal was entered against the Appellant, with the final judgment entered the same day. On October 5, 2009, Appellants timely filed their notice of appeal with the District Court.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the District Court erroneously found that the Coventry officers were entitled to qualified immunity with respect to the alleged violations of Appellants' Fourth Amendment rights, Due Process Rights, and Rhode Island General Laws § 9-1-28.1 (invasion of privacy), in that the case law at the time of the September 28, 2006 search of the Central Falls High School Soccer Team clearly demonstrated that Coach Marchand lacked authority to "consent" to a police search for the members of the team?

B. Whether the District Court erroneously granted summary judgment to the Coventry defendants, in that there was material evidence demonstrating that Coach Marchand's alleged "consent" to the search of the Central Falls High School Soccer Team was produced by coercion?

C. Did the District Court erroneously grant summary judgment on claims for violations of Equal Protection and Rhode Island General Laws § 31-21.2-1 (prohibition against racial profiling) and § 9-1-35 (racial/national origin harassment and intimdation), in that there was material evidence supporting a reasonable inference that the actions of the Coventry Police officers were racially motivated?

IV. STATEMENT OF THE CASE

This is an appeal from a judgment entered in favor of Appellees following an order granting summary judgment on all counts of the Appellants' Amended Complaint. Appellants had brought action against the Town of Coventry and various of its police officers pursuant to 42 U.S.C. § 1983, alleging violations of their rights to unreasonable search and seizure pursuant to the Fourth Amendment of the United States Constitution, as well as their rights to due process and equal protection pursuant to the Fourteenth Amendment. Appellants had also alleged a violation of their rights to privacy pursuant to R.I.G.L. § 9-1-28.1, as well as their rights to be free from racial harassment and intimidation pursuant to R.I.G.L. § 9-

1-35, and also their rights to be free from racial profiling from law enforcement officials pursuant to R.I.G.L. § 31-21.2-1.

After discovery, the Appellees filed a motion for summary judgment on all counts, which was granted in full on September 11, 2009. The District Court also filed a final judgment on the same day. Appellants take the position that the District Court's ruling was in error, except as to the claims of municipal and supervisory liability.

V. STATEMENT OF FACTS

On the afternoon of September 28, 2006, the Central Falls Soccer Team arrived at Coventry High School for a game. Among the players were Appellant Juan Lopera, a senior, (App. 20, 6:1[1].), as well as juniors, Appellants M.R. and B.O. (App. 36, 74:19-22; App. 38, 4:9.)

As the visiting team, the Central Falls players as a matter of course did not use the Coventry High School's locker room facilities, but arrived to Coventry already in uniform. (App. 65, 21:15-20.) However, five or six of the Central Falls players needed to use the bathroom before the game began. (App. 20, 8:20-9:1; App. 27, 9:12-10:5.) The exterior door of the locker room was open. Leaving the locker room

[1] In the Appendix, the relevant pages of deposition transcripts were reproduced as four deposition pages per Appendix page. The set of numbers immediately after "App." thus refers to the Appendix page upon which the deposition pages can be found. The second series of numbers refers to the deposition page and line numbers on which the cited material can be found.

door open during practices and games was a well-known standard practice at Coventry High School. (App. 65, p. 20:22-21:11.)

Coach Marchand brought the five or six players to the locker room because they did not know where the bathroom was located. Coach Marchand did not actually enter the locker room, but instead asked a security guard to go in with the players. (App. 27, 10:6-11:20.) Appellant Steven Giraldo, who was one of the players who used the locker room, similarly 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. (App. 44-45, p. 8:2-9:19.)

The game began. There was a distinct racial divide between the teams. The Town of Coventry is predominately white community, and its school population reflected that. (App. 15, 22:1-5; App. 16.) The City of Central Falls is far more racially diverse. In October, 2006, white students were actually a minority; Hispanic students were the majority. (App. 17.) The Central Falls High School Soccer Team that went to Coventry that day was entirely composed of Spanish-speaking Hispanics, with the exception of one Portuguese player. (App. 20, 9:2-7.)

That racial difference came into play on the field. One player recalled that during the game, he and his teammates were told to "go back to where you were." (App. 41, 36:2:14.) At various times during the game, the Central Falls players spoke to their teammates in Spanish, whether on the bench or on the playing field. The

Coventry players took umbrage and ordered the Central Falls players to "speak English." (App. 23, p. 28:1-10; App. 26, 6:13-7:21.) At one point, a Coventry spectator became displeased a maneuver made by Steven Giraldo, and called him a "spic." (App. 44, p. 5:21-7:9.) The Central Falls players dealt with these actions by simply ignoring them and playing the game. (App. 26, 8:17-9:5)

With respect to the actual soccer game, at least, the Central Falls players were able to earn a draw. (App. 57, 17:11-17).) The contest with respect to their race, on the other hand, went into overtime. While the Central Falls players were walking back to the bus, Coach Marchand was approached by a group of about twenty youths. As Coach Marchand would later find out, these youths were members of the Coventry football team. (App. 57, 18:4-19:6-7.) These representatives of the Coventry football team accosted Coach Marchand and demanded to know if he were the "F'n coach of Central Falls." When Coach Marchand replied he was, these Coventry students informed him: "Well, your punks stole all of our F'n shit and they got our ipods." (App. 57, 18:5-10.)

By this time, the Central Falls players had boarded their bus. Coach Marchand boarded and told his Assistant Coach, Carl Africo, of the accusations. (App. 57, 20:12-15.) Marchand explained to the boys that the crowd believed that the Central Falls players who went into the locker room had taken the missing items. Marchand told his team that he knew that they had not taken these items. (App. 29, 29:10-23.)

The boys who had used the locker room told Marchand that the security guard had followed them around for the entire period that they were in the locker room. (App. 27-28, 12:7-20:2-13.) Nevertheless, Coach Marchand and Coach Africo searched the boys, as well as the medicine kits and ball bags. (App. 58, 21:8-22:22.) At the end of that search, which lasted about 20-25 minutes, Coach Marchand was "completely satisfied" that the boys had done nothing. (App. 58, 23:4-8.)

When Coach Marchand was done, he found the Coventry Athletic Director outside the bus. He told the Athletic Director that the Central Falls boys did not have the items. (App. 58, 23:20-24:4.) By this time, a crowd of about 50-60 people had gathered outside the bus. (App. 58, 24:6-10.) Members of the crowd declared that they knew the Central Falls players had taken the items. The crowd also declared that the Central Falls players were "from the ghetto" and knew how to hide things and "lie good," and could not be trusted. The crowd was even demanding a search of Coach Marchand. (App. 58-59, 24:15-25:25) Some of those making these remarks were adults. (App. 59, 25:1-8.) Steven Giraldo, who was sitting on the bus, heard members of the crowd making racial slurs, including one woman who called the team "spics." (App. 46, 27:13-28:5.) Some in the crowd said that the Central Falls team was not leaving ". . . til we find the stuff . . ." (App. 59, 25:5-8.) At some point, one Coventry student even tried to board the bus to conduct his own search. (App. 46-47, 27:11-30:5.) (App. 34, 53:5-12.)

While Coach Marchand was speaking to the Coventry Athletic Director, about three or four Coventry Police cruisers arrived with their lights and sirens activated. (App. 56, 15:14-16; App. 68, 38:7-39:2.) These officers were Kevin Harris, David Nelson, and Kevin Kennedy, and their supervisor, Sergeant Stephen Michaelides.[2] The Coventry officers parked their cars in front of and in back of the bus, which foreclosed the possibility of the bus moving. (App. 61, 43:15-24.) In any case, by this time the crowd already had formed a semicircle that would have prevented the bus from moving. (App. 47, 31:16-32:6.)

Coach Marchand and the Coventry Athletic Director spoke to the police. The Coventry police officers admitted at deposition that Coach Marchand explained to them that he had already searched his players. (App. 59, 26:22-27:4; App. 71, 76:22-25; App. 76, 46:3-5; App. 82, 43:25-44:2.) Coach Marchand, by this time very fearful of the crowd around the bus, appealed to the Coventry Police for their help: ". . . what am I going to do, what are they going to do to us." (App. 59, 27:23:24.) At that point, the Coventry Police asked if they could search the boys. (App. 59, 28:8-28:13.) 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." (App. 71, 77:1-4.) Michaelides testified that he

[2] In February of 2008, Michaelides was promoted to Lieutenant. (App. 80, 18:6-16.)

had told Coach Marchand that a police search of the Central Falls team would ". . . expedite the process and eliminate them all as suspects." (App. 82, 44:1-6.)

By this time, it was not even fully clear whether a theft had even taken place, much less what exactly was believed to have been stolen. The Coventry officers never asked the Coventry students to make sure that they had not simply mislaid the items. (App. 75, 40:14-17; App. 89, 28:23-29:1.) No serious effort was ever made before the search to determine exactly what items were missing. All of the Coventry Police officers also admitted at deposition that 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. (App. 69, 66:13-67:4; App. 75, p. 39:14-22; App. 78, 62:5-14; App. 82, 45:16-19; App. 89, 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." (App. 69, 67:5-9; App. 75, 39:14-22; App. 77-78, 61:19-62:4; App. 82, 45:20-23; App. 89, 27:1-18.) As matters progressed, students alleged that items other than iPods or cell phones were alleged to be missing, such as books or cash, but the Coventry officers never even obtained a final accounting of all missing items. (App. 70, 71:4-12; App. 75, 40:7-13; App. 82, 45:10-14.)

The Coventry Police officers justified their belief in the Central Falls players' potential guilt on the basis that the Central Falls students had allegedly been in the locker room from where the items had disappeared. (App 69, 69:7-24; App. 75, p.

40:1-6.) However, the Coventry officers admitted that they knew perfectly well that the locker room had been left open, and anybody could have accessed it -- Coventry as well as Central Falls students. (App. 69-70, 69:25-70:7; App., 76, 47:4-6; App. 83, 46:2-5.)

The Coventry officers' view of the Coventry High School students, by contrast, was far more charitable. At deposition, the Coventry officers opined that all of the Coventry High School students on the scene were considered to be potential "victims," even though not all of them had items missing. (App. 70-71, 73:7-74:5.) No Coventry student was searched at any time. (App. 70, 73:4-23; App. 76, 46:13-24; App. 83, 46:2-10.) In fact, no Coventry student was even requested to submit to a search. (App. 71, 74:4-7.)

Coach Marchand correctly believed that the Coventry Police did not have the right to search the boys. (App. 61, 44:16-17.) He felt that the police simply wanted to: ". . . appease the masses over there that were crying for our heads." (App. 59, 28:2-5.) Even with police presence, the crowd outside the bus remained hostile and threatening, repeatedly calling out remarks indicating that the Central Falls players were "good at hiding things, they're sneaky you know it, search the coach." (App. 56, 15:14-16:3.) The police took no action to stop the crowd. Coach Marchand, a veteran 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." (App. 56, 16:3-7; App. 59, 27:5-9; App. 62, 45:8-13.) Coach Marchand's bus was by now blocked in by both the police and the crowd. Coach Marchand fully appreciated the potential for violence that could result with the large crowd. (App. 56, 13:16-22.) As Coach Marchand testified, he felt that he had no other choice but to permit the police search. (App. 61, 16:24.)

Marchand returned to the bus and told the Central Falls team that the crowd was not going to let them go until the police searched them. (App. 48, 36:1-8.) The Coventry Police ordered the students to leave the bus with all of their belongings, to line up, put their bags in between their legs and wait for further instructions. (App. 30, 40:17-22, App. 59, 28:15-23.) As ordered, the boys lined up with their backs to the bus. The crowd was about six to ten feet away. (App. 21, 21:9-24; App. 50, 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 then announced that they would be doing a search. (App. 39, 27:21-28:6.)

The police proceeded down the line to make their searches, with the crowd still looking on. In some cases, students were searched twice, by different officers. (App. 34-35, 56:8-57:14.) Marchand recalled witnessing students' bags placed on the hoods of the officers' cars, and the police searching them. (App. 60, 29:8-23.) When a cell phone or iPod was found in possession of any Central Falls student, that student was required to prove that that item belonged to him. In some cases, this was accomplished by the students' naming items that were stored on these devices, and allowing the police to search the pictures, numbers, and data stored thereon to check for that item. (App. 33, 49:13-50:9; App. 51, 48:2-17; App. 52, 50:23-51:5.) On other occasions, the Coventry officers would display the student's electronic device to the crowd and ask if it were the one missing. (App. 23, 26:3-24, App. 39, 29:13-24; App. 60, 29:8-23.)

The searches were not limited to the students' belongings of their persons. Appellant Lopera, for example, 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. (App. 22, 24:9-11.) Lopera was told to take off his sweater, and to stretch his shirt and pants to remove that nothing was in them. (App. 22, 24:19-25:24.) The Coventry police asked another student to empty his pockets. (App. 40, 32:2:4.) Giraldo was required to lift his shirt to prove that he had nothing in his waistband. (App. 52, 49:20-50:5.) Giraldo also witnessed another player next to him, Pedro Hernandez, get patted down. (App. 52, 50:12-15.) A Coventry officer told Appellant M.R. to spread his legs and raise his hands straight out. Beginning at M.R.'s ankles, he dragged his hands up his legs, ribs and arms. (App. 32, 47:17-48:16.) The Coventry officer also ordered M.R. to lift his shirt. (App. 33, 49:2-3.)

While the search was ongoing, the players continued to be harassed by the mob. M.R. heard the crowd saying that because the Central Falls players were Hispanic, that team should not be in Coventry or playing with Coventry. (App. 29, 31:9-17.) M.R., like his Coach, was fearful of being attacked by the crowd. (App. 31, 41:22-23.) The crowd repeatedly photographed the students during the search. (App. 23, 27:1-3; App. 29, 29:1-8, 30:5-11; App. 49, 39:13-17; App. 62, 47:17-19.) The crowd continued to refer to the team as "Spics" and make other comments regarding the players' race. (App. 33-34, 50:11-53:2; App. 50, 41:13-42:5.) During the search, one Coventry officer told M.R. 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 for the entire period. (App. 35, 57:18-58:14.) Another officer heard this remark and laughed. (App. 35, 58:20-23.)

This search lasted for about 45 minutes to an hour. (App. 53, 53:8-23; App. 60, 30:14-15.) Even if a boy had been searched, he was required to wait outside the bus for the police to finish with all of the boys. (App. 53, 53:13-16.) Finally, the Central Falls team was allowed to go home, with a Coventry police cruiser following them out of town. (App. 60, 31:17-22.)

VI. SUMMARY OF ARGUMENT

The District Court erred when granting summary judgment on the claims for violations of the Fourth Amendment, the Due Process Clause, and Rhode Island's invasion of privacy statute, R.I.G.L. § 9-1-28. The District Court's ruling was based upon a qualified immunity defense. The District Court ruled that there was at least some basis in the existing case law for a police officer to reasonably believe that Coach Marchand, as school official, possessed *in loco parentis* authority over the team members, and that therefore a police officer could reasonably rely upon Coach Marchand's "consent" to the search.

This ruling was erroneous on two bases. First, the District Court overlooked or disregarded material issues of fact supporting an inference that Coach Marchand's consent was the product of coercion. Second, the law could not be more crystalline on the lack of Coach Marchand's *in loco parentis* authority in cases of searches of students for investigation of wrongdoing. As school official, Coach Marchand did possess a limited *in loco parentis* authority. That authority only permitted him to make decisions involving the students' education and discipline. At no point did that authority ever run to the extent of permitting school officials to make legal decisions of this nature on behalf of their students, that is, the decision to waive one's right to withhold consent to a law enforcement search. Furthermore, there is ample authority, beginning with *New Jersey v.*

T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), that removed Coach Marchand's *in loco parentis* authority with respect to Fourth Amendment issues, and reduced him to the level of state actor who could only demand searches of students to investigate wrongdoing where there was reasonable cause to suspect that student. To state that Coach Marchand could give consent to a suspicionless law enforcement search is wholly inconsistent with *T.L.O.* and its progeny.

The District Court similarly erred when granting summary judgment on the claims brought against the Coventry officers for violations of the right to Equal Protection under the Fourteenth Amendment, R.I.G.L. § 31-21.2-1 and R.I.G.L. § 9-1-35. All of these claims were based on the proposition that Appellants had been singled out for search on the basis of their race (Hispanic). The District Court failed to apply the appropriate legal standards. The District Court insisted that the officers themselves had to possess racial animus before an Equal Protection violation could be supported. This is a clear error of law. It is well-established that when a public official caters to the racial animus of his constituents rather than his own, there is still a violation of equal protection.

Furthermore, the District Court overlooked material evidence supporting a reasonable inference that the Coventry Police officers had acted to satisfy a racial animus, whether their own or their constituents. This evidence includes the disparate treatment between the Central Falls players and the Coventry students, the lack of a rational basis for that disparate treatment, and the manner in which the search was conducted. Instead, the District Court appears to have attempted an impermissible factual finding that the difference in treatment was not based on race.

VII. ARGUMENT

STANDARD OF REVIEW

Rulings on motions for summary judgment are reviewed on appeal *de novo*. *The Stop & Shop Supermarket Company v. Blue Cross & Blue Shield of Rhode Island*, 373 F.3d 57 (1st Cir. 2004). As in the lower court, this court determines whether the record, including the discovery materials, creates a triable issue, that is, whether a reasonable jury could return a verdict for the non-moving party, or whether the moving party is entitled to judgment as a matter of law. *Thomas v. Metropolitan Life Ins. Co*., 40 F.3d 505, 508 (1st Cir. 1994). 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.

The standard is no different when analyzing a defense of qualified immunity granted under summary judgment. The Court accepts the version of the facts and most favorable to the plaintiff, and applies the qualified immunity standards to that version. *Morelli v. Webster*, 552 F.3d 12, 15 (1st Cir. 2009). Similarly, this Court draws inferences from those facts in the light most favorable to the plaintiff. *Morelli*, at 25.

A. **<u>THE DISTRICT COURT ERRONEOUSLY RULED THAT THE APPELLEES WERE ENTITLED TO QUALIFIED IMMUNITY ON THE CLAIMS OF VIOLATION OF THE FOURTH AMENDMENT, THE DUE PROCESS CLAUSE, AND R.I.G.L. § 9-1-28.1.</u>**

As the District Court noted, the Appellees readily conceded that the search of the Coventry players had been conducted in total absence of probable cause. Instead, Appellees' bid for summary judgment was granted based upon a qualified immunity defense. The District Court found that Coach Marchand had given an uncoerced consent to the search. The District Court then concluded that there was sufficient ambiguity in the case law as to whether Coach Marchand possessed *in loco parentis* authority over the players so as to give him authority to consent to the search. The District Court then ruled that this ambiguity was so great that a reasonable police officer would have believed that the reliance on Coach Marchand's "consent" passed Constitutional muster, and applied the qualified immunity defense to both the Fourth Amendment and Due Process claims, as well as those brought under Rhode Island's invasion of privacy statute, R.I.G.L. § 9-1-28.1.

In actions brought under 42 U.S.C. § 1983, a defendant can indeed avoid liability under the qualified immunity defense unless he or she should have reasonably known his or her actions 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). Similarly, the Rhode Island Supreme Court, although never having the opportunity to definitively decide the question, has previously suggested that qualified immunity might apply to invasion of privacy claims against state actors. *Ensey v. Culhane*, 727 A.2d 687 (R.I. 1999); *Pontbriand v. Sundlun*, 699 A.2d 856 (R.I. 1997).

To defeat the qualified immunity defense, it must be shown that the state of the law, as it existed at the time of the search, would have put the public official on fair notice that his or her 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 instead 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).

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); *Bergeron v. Cabral*, 560 F.3d 1 (2009), 11-12 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 v. Rhode Island*, 338 F.3d 23, 28 (1st Cir. 2003), *citing Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

The touchstone of the doctrine of qualified immunity is reasonableness. As this Court recently reiterated, the qualified immunity defense does not work to protect the plainly incompetent. *Morelli*, 552 F.3d at 18, *citing Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). By extension, the qualified immunity defense would not shield officers based upon a patently absurd interpretation of the law.

The qualified immunity defense, if properly applied, should have failed on two grounds. First, the law at the time of the search clearly established that Coach Marchand lacked *in loco parentis* authority, at least as far as giving consent to law enforcement searches. Even as the *in loco parentis* doctrine was originally enunciated, that action would have been beyond his authority as educator. More recently, with *T.L.O.* , the Supreme Court specifically removed Coach Marchand's *in loco parentis* status with respect to searches aimed at investigating wrongdoing. Under *T.L.O.*, Coach Marchand, as school official, was a state actor, and could only search a student to investigate wrongdoing if there was a reasonable suspicion of that student. *Id.,* 469 U.S. at 342. That reasonable suspicion was absent here. It is wholly inconsistent with *T.L.O.* to declare that Coach Marchand could authorize the search of the students when he himself was forbidden to conduct that search. Finally, even if we accepted the proposition that the officers could reasonably have considered Coach Marchand to possess the authority to give a valid consent, there was material evidence supporting the inference that Coach Marchand's "consent" was coerced.

1. The *In Loco Parentis* Doctrine at No Time Allowed School Officials to Grant Consents to Law Enforcement Searches on Behalf of Their Students.

The District Court's decision relied upon a superficial interpretation of the *in loco parentis* doctrine with respect to school teachers. The District Court ruled that because the term in loco parentis has been "bandied about" in various decisions relating to school officials, the Coventry Police could reasonably have relied upon Coach Marchand's "consent" as a valid means to obtain a search. The Coventry Police, however, simply cannot be permitted to seize upon *in loco parentis* without a full analysis of how that concept applied to Coach Marchand.

Coach Marchand may have had some *in loco parentis* authority over the boys, but only that which was necessary to ensure their good discipline and order while engaged in a school activity. Giving consent to this police search extended far beyond that authority because there was not sufficient relationship between the search and the students' educational interests.

The term *in loco parentis*, of course, means "in place of the parents." *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn.App. 1997). In its fullest sense of the word, the term *in loco parentis* implies one who has assumed the entire parental role, but has not formally adopted the child. In other words, the individual acting *in loco parentis* has accepted all of the responsibilities normally undertaken by parents, such as care, custody, support, and discipline, and, as *de facto* parent, is granted all of the duties and interests normally given to the parents. *See, e.g., State v. Sherman*, 266 S.W.3d. 395, 406 (Tenn. 2008) *citing Volunteer State Life Ins. v. Pioneer Bank*, 46 Tenn. App. 244, 327 S.W.2d 59 (1959).

The District Court correctly noted that the term *in loco parentis* has also been used in connection with the relationship between student and teacher. However, with respect to school officials, the term *in loco parentis* has never been construed so expansively as to imply the full authority of the parents. Stephen R. Goldstein*, The Scope and Sources of School Board Authority to Regulate Student*

Conduct and Status: A Non-Constitutional Analysis, 177 U.Pa.L.Rev. 373, 378-79 (January 1966).

The limits on the *in loco parentis* authority of school officials have long roots, reaching as far back as Sir William Blackstone, who appears to have been the first legal authority to use the term with respect to schoolteachers. Richard Jenkins, *An Historical Approach to Search and Seizure in Public Education*, 30 W.St.U.L.Rev. 105, 114 (Spring 2003). Blackstone thus framed the doctrine:

> The father may also delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child; who is then in loco parentis and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, *as may be necessary to answer the purposes for which he is employed*.

1 W. Blackstone, Commentaries 453 (1770). (Emphasis added.) The *in loco parentis* doctrine, from its inception, accordingly granted school officials only the authority that was required for the school official to carry out his or her function as educator. *See also Axtell v. LaPenna*, 323 F.Supp. 1077, 1080 (D.C. Pa. 1971); *Edson v. Barre Supervisory Union No. 61*, 182 Vt. 157, 161, 933 A.2d 200, 204 (2007), citing *Eastman v. Williams*, 124 Vt. 445, 448, 207 A.2d 146, 148 (1965); *D.O.F. v. Lewisburg Area Sch. Dist. Bd. of Dir's*, 868 A.2d 28, 36 (Pa. Cmwlth. 2004); *Smith v. West Virginia State Bd. of Educ.*, 170 W.Va. 593, 598, 295 S.E.2d 680, 685 (1982); *People v. Jackson*, 319 N.Y.S.2d 731, 733-734 (1971); *O'Rourke*

v. Walker, 102 Conn. 130, 128 A. 25, 25 (1925); James A. Rapp, Education Law, § 8.01[2][b][ii] (2002).

The limited nature of the *in loco parentis* acts has long been understood to limit school official authority in a number of specific situations. For example, a school official lacks the inherent right to impose routine medical treatment or testing on a student, at least where there is no emergency. *See Gruenke v. Seip*, 225 F.3d 290, 301-02 (3rd Cir. 2000); *Guerrieri v. Tyson*, 147 Pa. Super. 239, 421, 24 A.2d 468, 469 (1942). Those decisions clearly go beyond the educational interests. For another example, it has long been understood that school officials have no authority to regulate student conduct outside the school, at least where that conduct has no impact on the school. *Hailey v. Brooks*, 191 S.W. 781, 783 (Tex.Civ. App.1916) (school official lacked authority to require students to participate in boycott of store outside of school hours).

Most strikingly, many years before it was determined that students possessed any Constitutional rights vis-a-vis their school teachers, the *in loco parentis* doctrine was applied so as to impose limits on school officials' authority to search their students. The case of *Phillips v. Johns*, 12 Tenn.App. 354, 1930 WL 1707 involved a student bringing action against school officials after they searched her to determine if she had stolen money from her teacher. The Phillips Court used this occasion to comment on the limits of the in loco parentis doctrine:

> The weight of authority is that a teacher stands in loco parentis, but to a limited, extent only.
>
> "The delegation by the parent of part of his parental authority to a schoolmaster places the latter in loco parentis, and gives him the power to exercise such restraint and correction as may be necessary to answer the purposes for which he is employed." 1 Bl. Com., 453.
>
> "As a general rule a school-teacher, to a limited extent at least, stands in loco parentis to pupils under his charge, and may exercise such powers of control, restraint, and correction over them as may be reasonably necessary to enable him to properly perform his duties as teacher and accomplish the purposes of education." 35 Cyc., 1134.
>
> The question whether this search was made for the benefit of Mrs. Felknor, to recover her money, or whether it was made for the ethical training of the child, was for the jury. A teacher cannot claim justification on the ground that he or she is acting in loco parentis, if they search a child for the benefit of a third person. The relationship of teacher and pupil does not exist if the act is done for a third person.
>
> A teacher is given the powers of a parent over the child to the extent that is necessary to educate him or her and to preserve order necessary to the carrying on of the same; but if the teacher undertakes to recover money for a third person, this is not within the scope of the teacher's authority and employment, and the general law will apply to the case.

Id. at *2-3. (Emphasis added.) The *Phillips* Court, finding that the search had been for the benefit of the teacher, held that *in loco parentis* did not serve as a defense. *Id.* at *3.

There is nothing in the record that even remotely suggests that Coach Marchand ever assumed anything more than the limited *in loco parentis* authority held by school officials, or that the boys' parents ever made such a delegation. Coach Marchand's *in loco parentis* authority can only stem from his capacity as school official. That authority did not extend to providing consent to student searches by law enforcement under this set of factual circumstances. As school official, Coach Marchand did have some initial interest in determining whether his players had stolen from their hosts, and imposing discipline if they had done so. Nobody would deny that the *in loco parentis* doctrine does involve ". . . . the power and indeed the duty to 'inculcate the habits and manners of civility.'" *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 2391, 132 L.Ed.2d 564 (1995). Rhode Island even codified that duty in 1896 with the passage of R.I.G.L. § 16-12-3.[3]

However, there is more than sufficient evidence on the record demonstrating that the educational or tutelary interests of Coach Marchand in any search had come to an end well before the Coventy Police arrived -- and that the Coventry Police were well aware of that fact. As the record reflects, Coach Marchand had expressly told the Coventry Police that he had searched the students (rightfully or otherwise) and had satisfied himself that they had taken nothing. (App. 59, 26:22-27:4; App. 71, 76:22-25; App. 76, 46:3-5; App. 82, 43:25-44:2.) Coach Marchand was also aware that the boys had been watched in the locker room, and could have taken nothing. (App. 27, 12:7; App. 28, 20:2-13.) The officers were similarly aware of this. (App. 35, 57:18-58:14.) Having assured himself that nothing had

[3] "Every teacher shall aim to implant and cultivate in the minds of all children committed to his or her care the principles of morality and virtue."

been taken, he had thus fulfilled his disciplinary responsibilities over the boys, and had no further interests in the search.

The Coventry Police, on the other hand, acknowledged that the search was not for any educational purpose, or to aid Coach Marchand in the fulfillment of his duties. Instead, the investigation was solely for law enforcement purposes, that is, to investigate whether or not any of the boys had committed a crime. The Coventry Police were even investigating Coach Marchand's behavior, to see whether Coach Marchand was covering up for his players. (App. 71, 77:2-4.) The purpose of the "consent" to search therefore was for the fulfilment of the Coventry Police's law enforcement interests rather than any tutelary or disciplinary interest in the student. As such, the "consent" was outside of Coach Marchand's limited *in loco parentis* authority. *Phillips*, at 2*-3.

The decision to consent to a police search in any case stretches far beyond schools and education. Decisions regarding whether to waive one's right to not to subject to a police search implicate far broader matters than education or school discipline. These decisions can put into motion life-altering events with consequences extending far beyond an anticipated graduation date. By consenting to a search, one does not only agree to relinquish one's interest in privacy in the thing or place being searched, but also accepts that the fruits of that search might be used as evidence against one, whether in a criminal or juvenile proceeding.

Whether a student should waive one's rights in a criminal law setting is therefore one that clearly goes far beyond an educator's responsibilities.

Indeed, asking Coach Marchand or any other school teacher to assume the authority to waive their students' legal rights is tantamount to placing school teachers in the role of legal counsel to their students. Few if any school teachers are qualified to accept that role. Furthermore, Coach Marchand would have had a conflict of interest preventing him from taking that role. Had the Coventry Police found a stolen item in a Central Falls student's possession that Coach Marchand had missed, Coach Marchand's posture with respect to that student would have immediately become adversarial. Coach Marchand, as school teacher, would have been duty-bound to refer the student to school administration for disciplinary action. That disciplinary action could have included suspension from school, that is, a deprivation of the student's right to receive an education.

Additionally, only a short period of time before this search, Rhode Island had had the opportunity to impose limits upon the *in loco parentis* authorities of school officials with respect to student encounters with police. About one year prior to the subject incident, the General Assembly passed legislation governing police interrogations of students while attending school. P.L. 2005, ch. 409, § 1, codified at R.I.G.L. § 16-21.5-3. This legislation requires that before producing a secondary student to the police for questioning, the school officials must take affirmative steps to ensure that the student may first 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 delegated to the school administrators in an *in loco parentis* capacity. Instead, the parents' control over these situations was to be preserved. Given this statute, it is hardly consistent to declare that Rhode Island school officials have an *in loco parentis* authority to consent to a bodily search of the student by police.

In sum, then, contrary to the District Court's belief, the law could not have been clearer: Coach Marchand's *in loco parentis* authority did not extend beyond what was necessary to fulfil his job duties, including ensuring discipline. That understanding had been clear for many years. That understanding did not extend to waiving students' legal rights on their behalf. In Rhode Island, that understanding had been reinforced with the passage of P.L. 2005, ch. 409, § 1 only a year before the incident. The evidence can certainly support a finding that the search by the Coventry Police was for their own law enforcement purposes rather than any tutelary purposes of Coach Marchand. On that basis, the Coventry Police could not have reasonably relied upon any supposed *in loco parentis* authority possessed by Coach Marchand to perform their law enforcement search.

2. <u>Pursuant to Clearly Established Fourth Amendment Case Law at the Time of the Search, Coach Marchand Lacked *In Loco Parentis* Authority to With Respect to Student Searches.</u>

Even if our understanding of the limited nature of school officials' *in loco parentis* authority would not be enough to clearly establish Coach Marchand's inability to consent to search, the Coventry Police cannot surmount the clear line of decisional law stripping Coach Marchand of *in loco parentis* authority with respect to searches. When one recognizes that Coach Marchand's authority to search was specifically limited by the Supreme Court's decision in *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), it becomes immediately apparent that Coach Marchand could not have consented to this particular search. It is self-evident that one cannot give others greater authority than one possesses oneself. Because Coach Marchand was forbidden to search the boys under these circumstances, he could hardly have given the Coventry Police the authority to do so.

Even the District Court decision conceded that there was a "logical appeal" to our argument. Nevertheless, the District Court felt that because the term *in loco parentis* had been used in various cases, there was still some ambiguity about Coach Marchand's authority that would allow the Coventry officers the benefit of qualified immunity. The District Court's decision fails to give due weight to the fact that over twenty years prior to the search, the *T.L.O.* Court had unequivocally found that the *in loco parentis* doctrine simply could not be squared with the Fourth Amendment of the Constitution. The *T.L.O.* Court set out to resolve any confusion about the status of school officials, for purposes of Fourth Amendment. From thereon in, as far as the Fourth Amendment was concerned, school officials were to be considered state actors rather than substitute parents:

> 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., 469 U.S. at 336.

The *T.L.O.* Court proceeded to enunciate the standards under which school officials were permitted to search students suspected of violation of law or school rules. *Id.*, 469 U.S. at 341-42. Although the *T.L.O.* Court was loathe to impose a "probable cause" regime upon school officials, the 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.*, 469 U.S. 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.* The *T.L.O.* Court thus left no doubt on the question that school officials lacked their former *in loco parentis* authority with respect to searches aimed at uncovering student wrongdoing.

Instead of considering this case law, the District Court instead found a supposed uncertainty in the case law regarding the extent of Coach Marchand's *in loco parentis* authority. While it is true that the term *in loco parentis* appears in the case law, the District Court's view that that use created an uncertainty as to

Coach Marchand's authority is simply not supported. The cases cited by the District Court dealing with school searches – *Gruenke v. Seip*, 225 F.3d 290, (3rd Cir. 2000); *Webb v. McCullough*, 828 F.2d 1151 (6th Cir. 1987); and *Rhodes v. Guarricino*, 54 F.Supp.2d 186 (S.D.N.Y. 1999) -- did not remove any limitations on Coach Marchand's *in loco parentis* authority for purposes of Fourth Amendment analysis of a search aimed at uncovering student malfeasance. Far from retreating from the "reasonable suspicion" standard for school officials investigating student wrongdoing, these cases reinforced it. *Webb*, at 1154; *Rhodes*, at 192. They similarly did not leave open the possibility that police officers could get "permission" from a school official to perform an utterly suspicionless search.

Furthermore, neither the cases of *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) nor *Vernonia School District v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) muddied the Constitutional waters as much as the District Court apparently believes. Both decisions did use the term *in loco parentis* when holding that school officials could require suspicionless, random drug testing as a condition of participation in athletics and extracurricular activities. These cases, however, were firmly confined to the class of "special needs" searches. 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. In *Earls* and *Vernonia*, the evils that the testing was to avoid were dangers to student safety and disruption to general school discipline due to illegal drug use. *Earls*, 536 U.S. at 835; *Vernonia*, 515 U.S. at 662. Actions aimed at addressing those concerns were wholly within the educational mission. This was particularly true in *Vernonia*, where there was evidence that the drug culture at the school in question had spiraled to epidemic proportions and was demonstrably affecting school climate, as well as evidence student athletes were being endangered by playing under the influence of drugs. *Id*.

Moreover, neither *Vernonia* nor *Earls* applied to situations in which the search was aimed at investigating student wrongdoing for disciplinary or law enforcement purposes. When determining that the testing passed Fourth Amendment muster, both the *Vernonia* and *Earls* Courts counted it significant that the results were *not* used for law enforcement purposes, or even school disciplinary purposes. *Earls* at 833-34; *Vernonia*, at 658. The *in loco parentis* authority being exercised in *Vernonia* and *Earls*, then, remained firmly tied with legitimate, recognized educational purposes, those of maintaining student safety and general school order, rather than a law enforcement purpose

Accordingly, the holding of *T.L.O.* remained undisturbed in cases involving investigation of student misconduct. With respect to the Fourth Amendment, Coach Marchand's position was not *in loco parentis*. Coach Marchand instead possessed the status of a government actor, whose authority with respect to searches was wholly cabined by the "reasonable suspicion" standard.

3. **The Clear State of the Law Rendered It Unreasonable for the Coventry Police to Rely Upon Any Alleged "Consent" By Coach Marchand.**

We thus come to the major point upon which the qualified immunity defense ought to have failed under the Fourth Amendment standards. Because Coach Marchand plainly could not have conducted the search himself, it defies logic to declare that he could authorize the Coventry Police the permission to do the same. To declare otherwise potentially eviscerates the protections of the Fourth Amendment while students are at school.

Under *T.L.O.*, Coach Marchand himself could not have demanded a search of his students under this factual situation because there was an utter lack of even reasonable suspicion against the Central Falls players. The lack of reasonable suspicion appears to be virtually undisputable in this factual record. From the beginning of this incident, Coach Marchand himself never had any suspicions of his team at all, whether reasonable or not. Before the police arrived, he expressly told his team that he did not believe the accusations of theft. (App. 29, 29:2-23.)

Coach Marchand would later declare that by the time that the police had arrived, he was "completely satisfied" that the boys had done nothing wrong. (App. 58, 23:4-8.) Coach Marchand, lacking that reasonable suspicion, had no authority to search the players at any point.

The Coventry Police officers themselves were well aware of that lack of any reasonable basis to suspect the Central Falls players. At deposition, the Coventry officers 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. (App. 69-70, 69:25-70:7; App. 76, 47:4-6; App. 83, 46:2-5.) The Coventry Police were told that the students had already been searched by Coach Marchand. (App. 59, 26:22-27:4; App. 71, 77:22-25.) The Coventry police and Coach Marchand were also aware that the Central Falls players had been watched while they were in the locker room. (App. 35, 57:18-14.). One officer even declared the search "stupid" because Coach Marchand had done his search, and because the boys had been watched in the locker room. (App. 35, 57:18-14)

When one fully considers all of this evidence, it is clear that all of the participants were well aware that there was not even reasonable suspicion against the Central Falls players. The District Court ultimately declined to determine the question of whether Coventry officers could colorably rely upon Coach Marchand's "consent" to this suspicionless search in absence of a reasonable suspicion. However, such a construction of the law is absurd on its face. It goes without saying that one cannot give another permission to do that which one is forbidden to do oneself. If Coach Marchand could not have conducted the search without reasonable suspicion, he cannot be reasonably considered in a position to give another person permission to do so without reasonable suspicion. On that basis alone, the Coventry officers could not colorably rely upon Coach Marchand's "consent" when conducting their search, and qualified immunity should not have attached.

The District Court's ruling has frankly disturbing implications for the future of students' Fourth Amendment rights. By suggesting that the officers could have reasonably relied upon Coach Marchand's "consent," the District Court has contributed an "end run" around warrant requirements to every police officer's playbook. If a police officer knows that he cannot obtain a warrant to search a juvenile, all that he needs to do is knock at the schoolhouse door, and obtain the "consent" of a school official to perform the search. The District Court's ruling has suggested that the officer can reasonably rely upon that "consent," and therefore be shielded from liability. Similarly, if a school official chafes at the restraints of *T.L.O.*, all that teacher needs to do is to call a police officer and give "consent" for that officer to search that student.

The District Court's ruling is thus not only illogical, but strips students of any realistic expectation of Fourth Amendment rights while at school. This is particularly true given the recent expansion of police presence in the schools, in the *persona* of the "School Resource Officer." The School Resource Officers are rapidly becoming ubiquitous in public schools across the country, as much a part of the school staff as the teachers. Susan Black, *Security and the SRO*, American School Board Journal, June 2009, at 30. Under these conditions, it is not difficult to fathom that collusive relationships between the schools and the police could easily develop, with both parties relying upon the "consents" of the other to circumvent any Fourth Amendment limitations on student searches.

The District Court's decision also failed to acknowledge that even before *T.L.O.*, at least one federal court had firmly rejected the proposition that law enforcement officers, in investigating a crime, could rely upon the consent of school officials to search a student. *Picha v. Wielgos*, 410 F.Supp. 1214, 1218 (N.D. Ill. 1976) involved an incident in which police had been summoned to a school to investigate whether a student possessed drugs. The police officers directed other school officials to search the female students. The *Picha* officers certainly could have argued that the school officials had given consent to the search. They had, after all, even gone to the extent of physically carrying it out for the police. Nevertheless, the *Picha* Court held that such a police-directed search could not pass Constitutional muster based on the *in loco parentis* authority of school officials alone:

> The court now considers the standard, under the facts presented at trial, to which police must adhere to protect the rights of a student under the Fourth Amendment. . . . *As far as the police are concerned, such an investigation cannot come under the ambit of the state interest that dwells under the banner of 'in loco parentis.'* Although the school may have an interest in the safety of its charges, either with regard to one student possessing drugs, or with regard to the possibility that that student would transfer possession of drugs to another student, all it can do in furtherance of that interest is to locate and perhaps confiscate the drugs. In the course of such a procedure, evidence may be acquired, as was the case in *In re Boykin, supra*, or as could have been the case in *Potts v. Wright*, 357 F.Supp. 215 (E.D.Pa. 1973), which may ultimately be considered to have been reasonably obtained and therefore usable in a criminal prosecution or in an adjudication of delinquency. However, the evidence here could not support a jury finding that the police were called merely in furtherance of this interest. Consequently, the substantial state interest in the provision of education and the maintenance of school discipline cannot be here said to temper the application of the Constitution to a search caused by police for evidence of crime. *Moreover, 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. (Emphasis added.) Thus, the *Picha* Court clearly held that outside police officers were not permitted to take advantage of the student's presence at school and the school officials' *in loco parentis* authority in order to gain a relaxed standard for searches initiated by law enforcement to satisfy their own agenda.[4] This decision could easily be extrapolated to put Coventry officers on notice that reliance upon Coach Marchand's "consent" would not pass Constitutional muster.

Other jurisdictions have echoed the *Picha* position regarding police in schools. Outside police officers who initiate searches have always been held to the same Fourth Amendment standards as any other police officer, both before and after *T.L.O.*, *See State v. Tywane H.*, 123 N.M. 42, 46, 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); *In the Interest of Thomas B.D.*, 326 S.C. 614, 629, 486 S.E.2d 498, 505-06 (S.C. App. 1997); *F.P. v. State*, 528 So.2d 1253, 1254 (Fla. App. 1 Dist. 1988). This is so even when the school officials participate in the search. *M.J.* , at 998. Under these cases, the fact that school officials had *in loco parentis* authority over the boys was ultimately irrelevant to any assessment of the legality of the Coventry officers' search.

The District Court's holding as it stands thus permits a public official to hide behind qualified immunity even if the interpretation of case law being relied upon is, as here, wholly absurd and against the great weight of that case law. In this

[4] Admittedly, some courts do recognize a distinction with respect to those officers assigned to schools, commonly referred to as "school resource officers." The purpose of these school resource officers is educational, that is, to maintain order at school. Even these school resource officers, however, are held to a "reasonable suspicion" standard. *See Shade v. City of Farmington,* 309 F.3d 1054, 1060-61 (8th Cir. 2002).

case, permitting the officers to hide behind qualified immunity in this situation is actively dangerous to the Fourth Amendment rights of all students. For that reason, the District Court's decision must be overturned.

4. The District Court Erred When Finding that Coach Marchand's Purported "Consent" to the Search Was Not Coerced.

The District Court also erred by making a factual finding that Coach Marchand's "consent" had been voluntary, rather than the product of coercion. In the summary judgment setting, the District Court is not to make factual determinations, but is to determine whether or not there is any evidence upon which a reasonable jury could rely to support the legal claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Contrary to the District Court's opinion, the evidence on record here more than supports an inference that Coach Marchand gave his "consent" under coercive circumstances that were in a large part created or allowed to continue by the Coventry Police.

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 (1st Cir. 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 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). Furthermore, 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 District Court based its decision on the lack of coercion on two discrete pieces of evidence in the record. That evidence was Coach Marchand's deposition testimony, indicating that when he had considered whether to accede to the Coventry officer's demand for a search, he considered the safety of his team, and the fact that he knew that the team was innocent, but decide to take the "high road." The District Court takes this isolated piece of testimony out of context and ignores other evidence on the record supports a conclusion that the Coventry Police had indeed coerced the consent of Coach Marchand.

First, the consent was obtained in a constructively custodial environment. 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 detention. (App. 47, p. 31:15-32:6; App. 61, 43:15-24.) That detention, of course, was wholly unwarranted, since there was no probable cause, or even reasonable suspicion. Worse, once they got out of their cruisers, the Coventry Police at no point took any effective action to dissipate the crowd. (App. 56, 16:3-7; App. 59, 27:5-9; App. 62, 45:8-13.)

The Coventry Police were fully aware that the mob's actions and the detention were causing Coach Marchand to become fearful for his players' safety. At the time of the consent, Coach Marchand had appealed to the Coventry Police 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*." (App. 59, 27:23-24.) (Emphases added.) Instead of controlling the crowd and allowing the players to exit in an orderly fashion, the Coventry Police determined that the search would be the manner in which this situation would be resolved.

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. (App. 59, 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. (App. 71, 77:1-4.)

Under these circumstances, a jury could find that the "consent" was the product of duress. There are few situations more coercive than being held prisoner by an angry mob, while the police tacitly permit that imprisonment to continue – and even contribute to it. Coach Marchand and his players had the same right to police protection from wrongful imprisonment as anybody else on the campus. That protection was withheld. Instead, it was implied that protection could only be had if there was a consent to a search. A reasonable jury could accordingly find that any "consent" given by Coach Marchand was hopelessly tainted by coercion. For this reason, too, the District Court's grant of summary judgment should be overturned.

B. THE DISTRICT COURT ERRED WHEN GRANTING SUMMARY SUMMARY JUDGMENT ON COUNT II (EQUAL PROTECTION).

The District Court also erred in granting Appellees summary judgment on Count II of the Amended Complaint. Count II had made a § 1983 claim for violation of Appellant's right to equal protection. The District Court found that summary judgment was in order because the hearing judge believed that the Appellants had ". . . failed to produce evidence sufficient to permit a reasonable jury to find that the officers' conduct was racially motivated." The District Court overlooked key evidence demonstrating that the Coventry officer's conduct was animated by racial hatred. Furthermore, the District Court also appears to have again engaged in impermissible fact-finding.

The District Court at least correctly recited some of the elements of an Equal Protection Claim. The Appellants were required to show that the Coventry police officers acted in an intentionally discriminatory manner. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000). An individual acts in with discriminatory intent where he or she acted at least in part due to the adverse effect on the disfavored group. *Hayden v. Grayson*, 134 F.3d 449, 453 (1st Cir. 1998).

Where the District Court apparently failed was in applying the correct legal standards for evaluating evidence produced in support of an Equal Protection claim. The District Court once again at least correctly recited some of the law regarding the nature of the evidence that may be used to support a claim of racial animus. As the District Court acknowledged, in this day and age, an individual with racial animus will seldom be as obtuse as to directly express that animus. Therefore, intent to discriminate may be shown by circumstantial evidence. *Judge v. City of Lowell*, 160 F.3d 67, 77 (1st Cir. 1998). As our Supreme Court stated in *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2049, 48 L.Ed.2d 597 (1976):

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact – in the jury

> cases, for example, the total of seriously disproportionate exclusion of Negroes from jury venires – may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on non-racial grounds.

As the Supreme Court further illuminated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), there may be instances in which the nature of the disparity is so glaring, and the reasons supplied for the decision represents such a radical departure from normal standards, that racial discrimination can be inferred. *Id*. at 266. Similarly, where the reason supplied for the disparity is patently false or otherwise wholly undeserving of credence, racial discrimination can be inferred. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886); *Dailey v. City of Lawton*, 425 F.2d 1037, 1039-40 (10th Cir. 1970). *See also Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 274-45, 99 S.Ct. 2282, 2294, 60 L.Ed.2d 870 (1979) ("If the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral.")

With these standards in mind, we turn to the evidentiary record. A gross disparity in treatment between the white Coventry students and the Hispanic Central Falls students can certainly serve as evidence of discriminatory intent by the Coventry officers themselves. *Washington*, at 242. The differences were indeed glaring. The Coventry police singled out the Hispanic Central Falls players for a search. Their peers from predominately-white Coventry were not even asked to agree to a search. (App. 70-71, 73:4-74: 7.) At least one of the officers even insisted on characterizing all of the Coventry players as "victims," whether they had claimed to be missing any item or not. (App. 70-71; 73:22-74:3.) The District Court's opinion does not seem to appreciate the full extent of the differences in treatment and officer attitude towards the two groups of students.

Furthermore, the District Court seems to have failed to appreciate that there was strong evidence supporting the position that the differential treatment was utterly lacking in any rational, believable basis. Normally, when deciding to do a search, an officer would consider whether there was any particular reason to suspect an individual. A departure from normal standards can be counted as evidence of discriminatory intent by the Coventry officers themselves. *Arlington*, at 267. The District Court seems to have been very dismissive of the evidence that there was no rational basis to suspect the Central Falls players any more than the Coventry students.

That evidence is indeed overwhelming. The Coventry Police, when confronted at deposition, admitted 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. (App. 69-70, 69:25-70:7; App. 76, 47:4-6; App. 83, 46:2-5.) The District Court actually appears to have overlooked evidence on the record showing that the Coventry Police were fully aware that there was even less reason to suspect the Central Falls players than the others. The District Court analysis does not even reference the fact that Coach Marchand had told the Coventry police that he had already searched the Central Falls boys. (App. 59, 26:22-27:4; App. 71, 77:22-25.) Even more tellingly, the analysis does not even include the evidence that during the search, one of the Coventry Police told a Central Falls player that the search was "stupid," because the Central Falls players who had been in the locker room had been watched by a security guard. (App. 35, 57:18-14.) In other words, the police knew perfectly well there was no legitimate reason to single out the Hispanic Central Falls players.

The District Court's opinion also ignored the fact the Coventry officers' own explanation for that differential treatment is patently unbelievable. As noted above, the Coventry officers explained the differential in treatment by declaring that all of the Coventry students were "victims." (App. 70, 73:7-74:5.) This claim is absurd because not every Coventry student was claiming to be missing items. The Coventry officers would later admit that the Coventry students were just as much in a position to have taken the items as the Central Falls students. A reasonable jury could find that these stated "reasons" for treating the Central Falls students differently are wholly unworthy of credence, and, on that basis, find that the real reason was indeed their race.

The District Court, in addition to overlooking this material evidence supporting racial animus on the part of the police themselves, also appears to have been led astray on the question of whether the individual officers themselves must have harbored racial animus in their own hearts before an Equal Protection violation could be found. As the District Court ruled: "While the evidence may reflect the officers' poor judgment in giving into an unruly mob and humiliating the boys, it does not even approach discrimination." The District Court appears to have overlooked the fact that the Equal Protection Clause is violated not only when the governmental actor acts upon his own discriminatory intent, but works so as to effectuate the known discriminatory intention of others. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1226 (2nd Cir. 1987).

Even if the Coventry police harbored no racial hatred towards Hispanics in their own hearts, 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 District Court acknowledges that the Coventry officers' actions could be construed as a pandering to this crowd. Furthermore, the manner in which the search was secured and executed could support a conclusion that the Coventry police had acted for the perverse benefit of a racist mob. The search was conducted in the most publicly humiliating and dangerous fashion possible.

It would have been entirely simple and reasonable for the Coventry police to order the crowd to clear off, or at least find a more secluded area to conduct the search. Instead, the boys were marched off their bus, and arrayed before the crowd, with their backs up to the bus. (App. 21, 21:9-24; App. 50, 42:6-10.) The mob was permitted to stay only about six to ten feet away. (App. 21, 21:9-24; App. 50, 42:6-10.) The mob continued to shout racist slurs and engage in racial harassment of the boys, with impunity. (App. 33-34, 50:11-53:2; App. 50, 41:13-42-5.) The Coventry police forced the Central Falls players were forced to endure about forty-five minutes to an hour in this vulnerable position. (App. 53, 53:8-23; App. 60, 30:14-15.) When an electronic device was found in a Central Falls player's possession, that item was flashed about to that crowd, and the player was required to defend his right to possession of that item in front of that crowd. (App. 23, 26:3-24; App. 39, 29:13-24; App. 60, 29:8-23.) Under these circumstances, a reasonable jury could infer that the search was a piece of vicious street theatre produced by the Coventry Police for the purpose of fulfilling the fondest racist fantasies of their constituency.

Instead of considering this evidence in the balance, the District Court, appears to have focused above all else on Coach Marchand's "consent" to the search and his offhand remarks about his players' having become the "prime suspects." To the District Court, the "prime suspect" remark and the "consent" were enough to justify any differential treatment meted out to the Central Falls players. This focus on these two pieces of evidence, above all others, represents the very type of weighing of evidence that is forbidden in the summary judgment setting.

In any case, a reasonable jury could find that reliance on the "prime suspect" remark as grounds for the search was unjustifiable. There is certainly enough evidence to show that it was taken wholly out of context. Rather than Coach Marchand's own assessment of his team's potential culpability, it was better read as a reference to the crowd opinion. In any case, Coach Marchand's remark should not have been taken in isolation, as it was accompanied by other information clearly exculpating his players.

The District Court's also erred in its focus on the alleged "consent" of Coach Marchand as a factor weighing against the racial animus of the officers. Even if we conceded that the Coach had the ability to give a valid consent, that consent is ultimately irrelevant to the question of whether or not the Coventry officers possessed racial animus. Even a consensual search, wholly permissible under the Fourth Amendment, may be the subject of an Equal Protection claim, if it were initiated by the officer based solely upon the individual's race. *United States v. Travis*, 62 F.3d 170, 173-74 (6th Cir. 1995); *also Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

The totality of the evidence, then, would be sufficient for a reasonable jury to find that the Coventry officers had acted upon racial bias. For that reason, summary judgment should not have been granted.

C. THE APPELLANTS WERE NOT ENTITLED TO SUMMARY JUDGMENT ON COUNTS V AND VI (RACIAL PROFILING AND RACIAL/NATIONAL ORIGIN INTIMIDATION).

When granting summary disposition on Counts V and VI of Appellant's claims, the District Court relied upon the same line of reasoning as when disposing of the Equal Protection claims, that is, the purported lack of evidence of racial animus. This line of reasoning was similarly erroneous with respect to the claims of racial intimidation and racial profiling.

Under R.I.G.L. § 9-1-51, an individual may be found liable for racial/national origin intimidation under the following standard:

> (a) Any person, who is maliciously subjected to an act or acts which would reasonably be construed as intended to harass or intimidate the person because of his or her race, religion, or national origin, may bring an action in the superior court against the perpetrator of the act or acts for compensatory damages including damages for emotional distress. The court, in its discretion, may also restrain and enjoin such future acts by the defendant.

Similarly, Rhode Island's Racial Profiling Prevention Act forbids the police to use race as a basis for their police acitivities:

> No state or municipal law enforcement officer or law enforcement agency shall engage in racial profiling. For purposes of this chapter, "racial profiling" means the detention, interdiction or other disparate

> treatment of an individual on the basis, in whole or in part, of the racial or ethnic status of such individual, except when such status is used in combination with other identifying factors seeking to apprehend a specific suspect whose racial or ethnic status is part of the description of the suspect, which description is timely and reliable

R.I.G.L. § 31-21.2-3.

As cited above, there is ample evidence to support the inference that the Coventry Police singled out the Central Falls players for a search based upon their racial background. That conduct alone would be sufficient to violate R.I.G.L. § 31-21.2-3. Additionally, under the circumstances of this case as described above, that action could certainly have been construed as harassing and intimidating. Accordingly, summary judgment should not have been granted on claims brought under these statutes.

VIII. CONCLUSION

For the above-referenced reasons, the District Court's grant of Appellees' Motion for Summary Judgment should be OVERTURNED in its entirety, except as to the Appellants' claims for municipal and supervisory liability.

/s/ Vicki J. Bejma
Vicki J. Bejma

/s/ Stephen M. Robinson
Stephen M. Robinson
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirement, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(a)(B) because this brief contains 13,363, words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman 14 point font.

/s/ Vicki J. Bejma
Vicki J. Bejma

Attorney for Plaintiffs-Appellants

Dated: January 19, 2010

ADDENDUM

TABLE OF CONTENTS TO ADDENDUM

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

Juan Lopera, Marlon Giraldo, Mauricio Espinal, Hector Cardona Steven Giraldo, William Ruiz, Pedro Hernandez, Luis E. Ardila-Lazaro by and through his parents and next friends, Luis Ardila and Hziel Ardila, Brian Ocampo by and through his parent and next friend, Alba Jaramillo, Stephen Patino by and through his parent and next friend, Lilian Giraldo, Joulder Salazar by and through his parents and next friends Youlder Salazar and Martha Duran, Milton Ricuarte, Jr. by and through his parents and next friends, Milton Ricuarte, Sr. and Elizabeth Rivera,

Plaintiffs,

v. C.A. No. 08-123 S

Town of Coventry by and through its Treasurer, Warren West, Kevin P. Harris in his individual capacity and in his capacity as a police officer for the Town of Coventry, Kevin Kennedy in his individual capacity and in his capacity as a police officer for the Town of Coventry, David Nelson in his individual capacity and in his capacity as a police officer for the Town of Coventry, Stephen A. Michailides in his individual capacity and in his capacity as a police officer for the Town of Coventry, Ronald E. DaSilva individually and in his capacity as Chief of Police for the Town of Coventry, and Brian J. O'Rourke individually and in his official capacity as the former Chief of Police for the Town of Coventry,

Defendants.

JUDGMENT

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Pursuant to the Decision and Order entered by this Court on September 11, 2009 judgment hereby enters for the Defendants Town of Coventry by and through its Treasurer, Warren West, Kevin P. Harris in his individual capacity and in his capacity as a police officer for the Town of Coventry, Kevin Kennedy in his individual capacity and in his capacity as a police officer for the Town of Coventry, David Nelson in his individual capacity and in his capacity as a police officer for the Town of Coventry, Stephen A. Michailides in his individual capacity and in his capacity as a police officer for the Town of Coventry, Ronald E. DaSilva individually and in his capacity as Chief of Police for the Town of Coventry, and Brian J. O'Rourke individually and in his official capacity as the former Chief of Police for the Town of Coventry and against the Plaintiffs Juan Lopera, Marlon Giraldo, Mauricio Espinal, Hector Cardona Steven Giraldo, William Ruiz, Pedro Hernandez, Luis E. Ardila-Lazaro by and through his parents and next friends, Luis Ardila and Hziel Ardila, Brian Ocampo by and through his parent and next friend, Alba Jaramillo, Stephen Patino by and through his parent and next friend, Lilian Giraldo, Joulder Salazar by and through his parents and next friends Youlder Salazar and Martha Duran, Milton Ricuarte, Jr. by and through his parents and next friends, Milton Ricuarte, Sr. and Elizabeth Rivera.

Enter:

/s/ Ryan H. Jackson

Deputy Clerk

Dated: September 11, 2009

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

Juan Lopera, Marlon Giraldo, Mauricio Espinal, Hector Cardona Steven Giraldo, William Ruiz, Pedro Hernandez, Luis E. Ardila-Lazaro by and through his parents and next friends, Luis Ardila and Hziel Ardila, Brian Ocampo by and through his parent and next friend, Alba Jaramillo, Stephen Patino by and through his parent and next friend, Lilian Giraldo, Joulder Salazar by and through his parents and next friends Youlder Salazar and Martha Duran, Milton Ricuarte, Jr. by and through his parents and next friends, Milton Ricuarte, Sr. and Elizabeth Rivera,

Plaintiffs,

v. C.A. No. 08-123 S

Town of Coventry by and through its Treasurer, Warren West, Kevin P. Harris in his individual capacity and in his capacity as a police officer for the Town of Coventry, Kevin Kennedy in his individual capacity and in his capacity as a police officer for the Town of Coventry, David Nelson in his individual capacity and in his capacity as a police officer for the Town of Coventry, Stephen A. Michailides in his individual capacity and in his capacity as a police officer for the Town of Coventry, Ronald E. DaSilva individually and in his capacity as Chief of Police for the Town of Coventry, and Brian J. O'Rourke individually and in his official capacity as the former Chief of Police for the Town of Coventry,

Defendants.

DECISION AND ORDER

WILLIAM E. SMITH, United States District Judge.

In this action, Plaintiffs, now former members of the Central Falls High School boys soccer team, claim their civil rights were violated when they were subjected to a humiliating search in front of a crowd of unruly spectators by the Defendant police officers.

While dismayed and disappointed by the officers' lack of profesional judgment and the appalling conduct of the crowd, the Court is compelled to conclude that the police officers' conduct is covered by the doctrine of qualified immunity. Moreover, Plaintiffs have failed to satisfy their burden with respect to their claims of discrimination and municipal and supervisory liability. So, for the reasons explained in detail below, the Defendants' Motion for Summary Judgment is granted.

I. Factual Background[1]

On September 28, 2006, the Central Falls High School boys soccer team played an away game against Coventry High School. The Central Falls team arrived by bus. Before the game began, five or six Central Falls players used the bathrooms located inside the Coventry boys locker room. While inside, one of the Central Falls players noticed a security guard keeping an eye on them.

[1] The facts described are taken from the record evidence including depositions of the relevant players in the controversy. While reviewed from the standpoint most favorable to the Plaintiffs, as required at the summary judgment stage, the basic facts are essentially undisputed.

The game was played and resulted in a tie. After the game, Coach Marchand (the Central Falls coach) sent his team to the bus and followed behind them. Before Coach Marchand reached the bus, approximately twenty players from the Coventry football team stopped him, and in profanity-laced terms accused the Central Falls players of stealing electronic devices (iPods and cell phones) from the Coventry locker room.

Coach Marchand told the football players that he would get to the bottom of the allegation and had them follow him to the team bus. The Central Falls players already were on the bus waiting to leave. Coach Marchand entered the bus and told his players: "everybody needs to put their game bag, varsity bag and their book bags . . . on their laps." The coach and his assistant coach then searched each bag for the alleged stolen items. If one of his players had an iPod or cell phone, Coach Marchand asked for proof of ownership. In his deposition, he characterized the search as a good one -- "I think we did a Columbo search, you know, CSI." The entire search took twenty to twenty-five minutes and none of the missing items were found.

When Coach Marchand exited the bus, the original group of twenty football players had grown to about fifty or sixty students and adults. The Coventry Athletic Director was also waiting. According to Coach Marchand, at this point the crowd was extremely vocal, shouting derogatory and racist remarks at his team and threatening not to disperse until the missing items were found.

As Coach Marchand began to discuss the situation with the Coventry Athletic Director, the four Defendant police officers arrived on scene. The officers entered the parking lot with sirens wailing and "boxed-in" the bus with their police cruisers. Coach Marchand and the Athletic Director then brought the officers up to speed on the situation. Coach Marchand informed the officers that the crowd suspected his team of stealing (or in the coach's own words: that his players were the "prime suspects.") A discussion ensued and at some point, after a "pregnant pause" in the conversation, the topic of whether the officers could do their own search came up. The parties agree it was at this point Coach Marchand consented to another search of his players. (In his deposition, however, Coach Marchand explained that he only consented because he felt compelled to do so under the circumstances.)

After obtaining Coach Marchand's consent, the officers ordered the Central Falls players to exit the bus with their belongings and stand with their backs against the bus. Up to this point, the police officers made little to no effort to quell or disperse the crowd, even as the crowd verbally assailed the players shouting racist epithets and accusations of theft.[2]

The search of the players began with the officers ordering each player to step forward one at a time with his bag. The officers then sorted through the contents of each bag on the hood of a police cruiser. If one of the officers discovered an iPod or cell phone, he held it up for the crowd to see -- purportedly to allow the "victims" a chance to identify the stolen property. Some of the boys were asked to stretch their waist band and lift their shirt so the officers could make sure they were not hiding anything, and a few of the boys were subjected to pat down searches. The entire search by the police, all of which took place in front of the angry mob, lasted approximately one hour and none of the missing items were found.

Undeterred, the mob persisted in its boorish behavior, even after the search ended. Concerned that the mob would take matters into its own hands, the officers in classic too little, too late fashion decided for safety reasons to escort the bus out of town.

II. Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to

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[2] For example, one player heard a woman in the crowd call the boys "spics." Coach Marchand testified that people in the crowd used phrases like: "those people," "they're good at hiding things," "they're sneaky, you know it," and made reference to the boys being from "the ghetto."

judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue exists if a "reasonable jury could return a verdict for the nonmoving party," and a fact is material if it has the "potential to affect the outcome of the suit." Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc., 473 F.3d 11, 15 (1st Cir. 2007). The Court views all facts and draws all reasonable inferences in favor of the nonmoving party. Torrech-Hernandez v. Gen. Elec. Co., 519 F.3d 41, 46 (1st Cir. 2008).

When the defense of qualified immunity is raised on summary judgment, as it is in this case, the Court begins by "identifying the version of events that best comports with the summary judgment standard and then [asks] whether, given that set of facts, a reasonable officer should have known that his actions were unlawful." Morelli v. Webster, 552 F.3d 12, 19 (1st Cir. 2009).

III. Discussion

Plaintiffs' Complaint alleges six causes of action brought pursuant to 42 U.S.C. § 1983 and state law. Counts I-III allege that the officers violated the boys' Due Process,[3] Equal Protection, and Fourth Amendment rights.[4] The remaining causes of

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[3] At oral argument, Plaintiffs' counsel conceded that the Due Process claim (Count I) overlaps their claim under the Fourth Amendment (Count III) and was not intended to allege a violation of Plaintiffs' substantive due process rights.

[4] Plaintiffs' § 1983 claims against the police officers are asserted in both the officers' individual and official capacities. Because claims brought against a municipal employee in his or her official capacity are essentially claims against the municipality

action allege violations of R.I. Gen. Laws § 9-1-28.1, Invasion of Privacy (Count IV); § 31-21.2-3 Racial Profiling (Count V); and § 9-1-35 Ethnic Intimidation (Count VI). Although not alleged in separate counts, Plaintiffs' Complaint also presents claims against the Town and the Defendant police chiefs for a failure to train and supervise the officers.[5] See Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

A. Qualified Immunity

Plaintiffs allege the officers violated their Fourth Amendment right against unreasonable searches. On this claim, the officers have asserted the defense of qualified immunity, which "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. --, --, 129 S. Ct. 808, 815 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity shields officials who perform their duties

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itself, they are duplicative of Plaintiffs' direct action against the Town. See Hafer v. Melo, 502 U.S. 21, 25-27 (1991). Thus the Court need not consider each official capacity claim separately.

[5] During oral argument, Plaintiffs' counsel clarified that the Complaint indeed contained claims for failure to train and supervise. However, in the Court's view that is debatable. Notwithstanding the inartfully drawn Complaint, the Plaintiffs received the benefit of the doubt, but because the Defendants' motion only addressed the causes of action specifically delineated in the Complaint, the Court allowed them to supplement their motion and address the merits of the two additional claims.

reasonably from liability and "applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Id. at 815 (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)).

Determining whether a public official is entitled to qualified immunity is a two-step inquiry. Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009). Under this test, "[a] court must decide: (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation." Id. (citing Pearson, 129 S. Ct. at 815-16). The clearly established prong has two aspects: (1) the clarity of the law at the time of the alleged civil rights violation and (2) whether given the facts of the particular case a reasonable defendant would have understood that his conduct violated the plaintiffs' constitutional rights. Id. A negative answer to either question results in a finding of qualified immunity for the official asserting the defense. Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 141 (1st Cir. 2001).

The order in which the questions are answered rests within the discretion of the Court. See Pearson, 129 S. Ct. at 813 (holding that the inquiry need not be conducted in a strict sequential order). A judge may skip ahead and decide whether the right at issue was clearly established without deciding whether that right was violated. Id. at 820-21. In some cases, including this one, the two-step analysis blends together, where the question of whether a constitutional violation occurred depends on whether the law regarding the officers' right to rely on a consent to search was clearly established, and, if not, whether the officers' actions were objectively reasonable. See Anderson v. Creighton, 483 U.S. 635, 648 (1987) (Stevens, J., dissenting) (noting the "double standard of reasonableness" that apparently applies in Fourth Amendment cases where qualified immunity is invoked).

1. Constitutional Violation

Here, it is a close call as to whether a constitutional violation occurred. There is no question that the Fourth Amendment applied to the search of the players and their belongings. See New Jersy v. T.L.O., 469 U.S. 325, 337-338 (1985) ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtably a severe violation of subjective expectations of privacy."). And, it is undisputed that the police did not have a search warrant and the search of the boys was not supported by probable cause. See Arizona v. Gant, -- U.S. --, 129 S. Ct. 1710, 1716 (2009) (stating that warrantless searches are per se unreasonable under the Fourth Amendment and justified only under specifically established and well-delineated exceptions). A search of a public school student will survive constitutional scrutiny if supported by a reasonable and individualized suspicion "that the search [would] turn up evidence that the student has violated or is violating either the law or the rules of the school." T.L.O., 469 U.S. at 342. A reasonable suspicion, as opposed to probable cause, is required because Fourth Amendment rights "are different in public schools than elsewhere," and strict adherence to a traditional Fourth Amendment analysis would undercut the "special needs" that exist in the public school context. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995).

Defendants concede, at least for purposes of this argument, that it is unlikely a reasonable suspicion existed to justify the search of the Central Falls players. Instead, the Defendants contend no constitutional violation occurred because Coach Marchand consented to the search *in loco parentis*. Generally, a search conducted pursuant to a valid consent is constitutional. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Furthermore, the ability to give valid consent is not limited to a person with actual authority to consent. Illinois v. Rodriguez, 497 U.S. 177, 185-86 (1990). Consent may be given by a person with apparent authority; that is, an individual whom the officer reasonably believes has authority to consent. United States v. Carrasco, 540 F.3d 43, 49 (1st Cir. 2008) ("[S]o long as law enforcement officers reasonably believe that the person who gives consent has the authority to do so, they may rely on that consent."); United States v. Meada, 408 F.3d 14, 21 (1st Cir. 2005). Coach Marchand's authority to consent on behalf of his players, however, is far from clear, and even though the existence of apparent authority would, in essence, dictate a finding of no constitutional violation, the question of the officers' reasonableness, in the context of a qualified immunity analysis, are more properly explored under the clearly established prong.

Therefore, the prudent approach in this case is to resolve the qualified immunity analysis by examining the clearly established prong, leaving the question of whether an actual constitutional violation occurred to the side.

2. Clearly Established Right

A right is clearly established when "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Wilson v. Layne, 526 U.S. 603, 615 (1999) (quoting Anderson, 483 U.S. at 640). The inquiry requires the Court to consider the state of the law at the time of the challenged act, or in other words "conduct the judicial equivalent of an archeological dig." Savard v. Rhode Island, 338 F.3d 23, 28 (1st Cir. 2003) (en banc). If "controlling authority" on the issue does not exist, a plaintiff may point to a "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."

Bergeron v. Cabral, 560 F.3d 1, 11 (1st Cir. 2009); see Wilson, 526 U.S. at 617. Careful attention also must be paid to the factual nuances of the case, so as to properly define the right at issue. Wilson, 526 U.S. at 615 (citing Anderson, 483 U.S. at 641); see also Bergeron, 560 F.3d at 11. And, when guidance concerning the right is lacking or unclear, qualified immunity attaches because the law does not penalize officers for "picking the losing side of the controversy." Wilson, 526 U.S. at 618; Joyce v. Town of Tewksbury, 112 F.3d 19, 22 (1st Cir. 1997) (en banc). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. at 640 (citations omitted). At bottom, "the salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional." Maldonado, 568 F.3d at 269.

Defendants contend that in the eyes of the officers at the scene, Coach Marchand had the requisite apparent authority to consent to a search, and it was reasonable for them to perceive him as acting *in loco parentis* over the players. Plaintiffs respond that it is well settled that the *in loco parentis* doctrine in the student search context cannot justify the search of a student. Plaintiffs do acknowledge that at one time the law considered a school official to act broadly *in loco parentis*, but they argue that over the last thirty years, that notion has become seriously outdated.

In T.L.O., the Supreme Court appeared to soundly reject the doctrine of *in loco parentis* as a rationale to justify a search of a student: "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." T.L.O., 469 U.S. at 336-37. Later, however, the Supreme Court added confusion when it referred to the powers school officials have over students as "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." Vernonia, 515 U.S. at 655. Vernonia acknowledged "that for many purposes school authorities act *in loco parentis* with the power and indeed the duty to inculcate the habits and manners of civility." Id. (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (internal quotations omitted)).

Recently, the Supreme Court passed up an opportunity to clarify whether the *in loco parentis* doctrine has any significance in school search cases. See Safford Unified Sch. Dist. No. 1 v. Redding, -- U.S. --, 129 S. Ct. 2633, 2637 (2009). In Redding, the Supreme Court reviewed the conduct of a school official who subjected a thirteen-year-old student to a search of her bra and underpants on the suspicion that she was secreting prescription and over-the-counter drugs. The court held that the search violated the student's constitutional rights, but because the relevant law that surrounded the right was not clearly established, the school official who ordered the search was entitled to qualified immunity. Id. at 2644.[6]

In light of the Supreme Court's silence on the issue and the rather clear language of T.L.O., a persuasive argument could be made that the *in loco parentis* doctrine serves no purpose in cases involving the Fourth Amendment rights of public school students. However, based on the full record of commentary on the issue, this Court cannot conclude that this was a clearly established principle of constitutional law in 2006. See Morse v. Frederick, 551 U.S. 393, 416 n.6 (2007) (J. Thomas, concurring) (stating that at least nominally the Supreme Court continues to recognize the applicability of the *in loco parentis* doctrine to public schools). Indeed, such a conclusion is not possible without ignoring the Supreme Court's statements in Vernonia and Frasier.

[6] Justice Thomas's partial dissent urged the Court to adopt an *in loco parentis* standard to govern all school search cases, a point the majority declined to address. See Safford Unified Sch. Dist. No. 1 v. Redding, -- U.S. --, 129 S. Ct. 2633, 2646, 2655 (2009) (Thomas, J., concurring in part, dissenting in part) (advocating for a "return to the common-law doctrine of *in loco parentis*" and a "complete restoration" of the doctrine) (emphasis added).

A review of circuit courts' decisional law also contributes to the lack of clarity on the issue. The courts that have referred to the *in loco parentis* doctrine have done so in a way that makes it appear that the doctrine is a viable source of authority to justify a school official's actions. See e.g. Hampton v. Oktibbeha County Sheriff Dep't, 480 F.3d 358, 362 (5th Cir. 2007) (stating that school officials act *in loco parentis* in dealing with students); Ramos v. Town of Vernon, 353 F.3d 171, 183 n.5 (2d Cir. 2003) (implying that in a public school the *in loco parentis* doctrine allows for a greater degree of control over children); Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000) ("Public schools must not forget that '*in loco parentis*' does not mean 'displace parents.'"); Wojcik v. Town of N. Smithfield, 76 F.3d 1, 3 (1st Cir. 1996) (indicating that school officials acted *in loco parentis* in connection with a Fourth Amendment seizure of a child); Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1080 n.15 (5th Cir. 1995) (citing Webb v. McCullough, 828 F.2d 1151 (6th Cir. 1987) (stating that school field trips often present greater, not lesser, challenges to school officials and justify *in loco parentis* authority as well as official authority)); Rhodes v. Guarricino, 54 F. Supp. 2d 186, 192 (S.D.N.Y. 1999) ("Much more than when on their home campus, defendants were acting in loco parentis to plaintiffs."); see also Seal v. Morgan, 229 F.3d 567, 582 (6th Cir. 2000) (Suhrheinrich, J., dissenting in part) ("In addition to their duty to educate, schools act *in loco parentis*."); Schleifer by Schleifer v. City of Charlottesville, 159 F.3d 843, 861 (4th Cir. 1998) (Michael, J., dissenting) ("the teachers and administrators of a public school will act 'in loco parentis' while children are in their physical custody because parents 'delegate part of [their] authority' to the school by placing their children under its instruction"); see generally Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361, 375 (6th Cir. 1998) (upholding a program of conducting suspicionless drug testing of teachers and administrators in part because of the *in loco parentis* obligations imposed upon them by state statute). But see Tenenbaum v. Williams, 193 F.3d 581, 594 n.9 (2d Cir. 1999) ("the Supreme Court has rejected the notion that public schools generally act *in loco parentis* in their dealings with students").[7] Courts have bandied about the phrase to such an extent that it is far from clear exactly what role the *in loco parentis* doctrine plays in a Fourth Amendment analysis, particularly in the specific factual context presented here.

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[7] So there is no confusion, the Court is not suggesting that these authorities stand for the proposition that Coach Marchand had the authority to consent by virtue of any *in loco parentis* status he may have had. All the Court is saying is that the case law on the limits of a school official's *in loco parentis* authority in the specific factual context of this case is not sufficiently clear so that a reasonable police officer would be on notice that searching players based on the consent of their coach is unconstitutional.

Based on all this, it cannot be said that the law in 2006 was clearly established concerning whether a high school coach chaperoning his players during an away game could or could not consent to a search of his players by police *in loco parentis*. What is clear, however, is that Fourth Amendment rights "are different in public schools than elsewhere; [and] the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." Vernonia, 515 U.S. at 656. Therefore, because the law was not clearly established concerning Coach Marchand's authority to consent to the search, the Defendant officers were entitled to rely on the consent.

Plaintiffs' argument -- that if a public school official cannot consent to his own infringements of students' Fourth Amendment rights, see T.L.O., 469 U.S. at 336-37, then he cannot authorize another to accomplish the forbidden act -- is logically persuasive, but ultimately unavailing to block qualified immunity. In addition to the muddy state of the case law described above, the argument also overlooks the question of the reasonableness of the officers' (mis)judgment. Bergeron, 560 F.3d at 12-13. If the officers could reasonably have believed that they were able to rely on Coach Marchand's consent (even if that belief was wrong), they would be entitled to qualified immunity. Id. at 13; Jennings v. Jones, 499 F.3d 2, 18 (1st Cir. 2007) ("[E]ven if an officer's conduct violated clearly established Fourth Amendment law, he may still be eligible for qualified immunity if he was reasonably mistaken as to the degree of force he should have used."). Given the state of the law at the time, and Coach Marchand's apparent authority over his players, it was reasonable for the officers to have believed they could rely on Coach Marchand's consent and qualified immunity must apply.

Attempting to avoid this result, Plaintiffs point to a written Coventry Police Department policy and R.I. Gen. Laws § 16-21.5-3, both of which deal with interrogating minors, and argue that in light of these authorities it was clearly established that Coach Marchand could not consent *in loco parentis*.[8] This argument fails for two reasons. First, the Coventry policy and § 16-21.5-3 only apply to questioning and not to searches; and, second, these authorities do nothing to clarify the state of federal constitutional law.

"Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates <u>some</u>

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[8] In pertinent part, the statute requires that:

> 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.

R.I. Gen. Laws § 16-21.5-3(a).

statutory or administrative provision." Davis v. Scherer, 468 U.S. 183, 194 (1984) (emphasis added). Put another way, "a state official's violation of a state statute or regulation, not itself the basis of the federal suit, should not deprive the official of qualified immunity from damages for violation of other statutory or constitutional provisions." Goyco de Maldonado v. Rivera, 849 F.2d 683, 687 (1st Cir. 1988) (citing Davis, 468 U.S. at 193-96). Simply put, neither police department policy nor Rhode Island statutes can determine whether federal law was clearly established.

Plaintiffs also argue that even if the law on Coach Marchand's authority to consent was not clearly established, the officers still acted unreasonably because the consent was the product of coercion and therefore invalid. The voluntariness question -- that is, whether consent to a search was the product of duress or coercion (express or implied) -- is determined from the totality of the circumstances. United States v. Dunbar, 553 F.3d 48, 57 (1st Cir. 2009); United States v. Luciano , 329 F.3d 1, 7 (1st Cir. 2003). Each case must be viewed on its own facts and in its own context. United States v. Berkowitz, 429 F.2d 921, 925 (1st Cir. 1970). "There is no talismanic definition of 'voluntariness' readily applicable to the myriad situations in which the police find it efficient to ask permission to conduct a consensual search." United States v. Hall, 969 F.2d 1102, 1106 (D.C. Cir.

1992). Relevant factors include "the consenting party's age, education, experience, intelligence, and knowledge of the right to withhold consent" and whether the consenting party was advised of his rights and whether consent was obtained under "inherently coercive circumstances." Dunbar, 553 F.3d at 57 (quoting United States v. Forbes, 181 F.3d 1, 5 (1st Cir. 1999)).

In this case, concerns that Coach Marchand's consent was coerced are put to rest by his deposition testimony. Coach Marchand testified that in response to the officers' request for consent he thought about the safety of his team, and the fact he knew his team was innocent; and, he said, that he decided to take the "high road." (Def.s' Mot. for Summ. J. Ex. A 28 (Doc. 25).)[9] From this it is obvious Coach Marchand understood the situation and rendered consent after careful and deliberate thought.[10] Coach

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[9] Coach Marchand further testified:

> I'm a First Amendment [sic] guy, you're getting to know [sic], you know, and I dread to say, screw you get a search warrant and I debated that. Okay. Then I said no, that's not my role, at that point my role as coach, I'm suppose (sic) to be the father, I'm suppose (sic) to take them home safe.

(Defs' Mot. for Summ. J. Ex. A 29 (Doc. 25).)

[10] At one point in his deposition, Coach Marchand said he consented because he was under duress. However, considering his use of the term "duress" in context, it is evident that Coach Marchand was attempting to poetically explain the stressfulness of the situation and the difficulty of his decision -- albeit perhaps inartfully for Fourth Amendment purposes. (Def.s' Mot. for Summ. J. Ex. A 30-31 (Doc. 25).) It does not automatically follow that his consent was involuntary simply because he stated that he was

Marchand's consent was voluntary and the officers' qualified immunity cannot be defeated on this basis. Accordingly, summary judgment will enter in favor of the Defendants on Counts I and III.

B. Invasion of Privacy Claim

Little need be said about Plaintiffs' claim for invasion of privacy under R.I. Gen. Laws § 9-1-28.1 because the qualified immunity defense is "well grounded in the law of Rhode Island." Hatch v. Town of Middletown, 311 F.3d 83, 90 (1st Cir. 2002) (discussing "recognition of a qualified immunity defense under state law analogous to the federal doctrine"); J.R. v. Gloria, 599 F. Supp. 2d 182, 205 (D.R.I. 2009). Plaintiffs' cause of action for invasion of privacy arises from the conduct for which the officers are immune from suit. Summary judgment is therefore appropriate on Count IV as well.

C. Equal Protection

"To succeed on a § 1983 equal protection claim, the plaintiffs must prove that the defendants acted in a discriminatory manner and that the discrimination was intentional." Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000); see Hayden v. Grayson, 134 F.3d 449, 453 (1st Cir. 1998). "That is, the

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under duress. The Court also rejects Plaintiffs' argument that the circumstances under which Coach Marchand gave consent were inherently coercive. See United States v. Jones, 523 F.3d 31, 38 (1st Cir. 2008) (affirming a finding of voluntary consent when given by a defendant surrounded by officers and holding that custody alone was not enough to show coercion).

plaintiff must establish that the defendant intentionally treated the plaintiff differently from others who were similarly situated." In re Subpoena to Witzel, 531 F.3d 113, 118-19 (1st Cir. 2008). "A discriminatory intent or purpose means that the defendants 'selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.'" Id. at 119 (quoting Wayte v. United States, 470 U.S. 598, 610 (1985)).

Here, Plaintiffs have failed to produce evidence sufficient to permit a reasonable jury to find that the officers' conduct was racially motivated. Plaintiffs argue that the overwhelming circumstantial evidence proves that they were singled out based upon race. They point to evidence that Central Falls is an ethically diverse community; the team was comprised of a number of Hispanics; the officers acknowledged members of the crowd could have just as likely perpetrated the theft but no one else was searched; and that the officers took no effective action to silence the mob from spewing racist insults.

It is the rare case in which a plaintiff can point to specific racist statements made by government officials, and circumstantial evidence may certainly demonstrate an intent to discriminate. Judge v. City of Lowell, 160 F.3d 67, 77 (1st Cir. 1998) (overruled on other grounds). But the facts Plaintiffs have marshaled to support an inference of discriminatory animus are woefully inadequate. Circumstantial evidence consists of proof of a series of facts or circumstances from which the existence or nonexistence of another fact may be reasonably inferred. Absolutely nothing can be inferred from Plaintiffs' evidence and to conclude otherwise is to engage in rank speculation. See Calvi v. Knox County, 470 F.3d 422, 426 (1st Cir. 2006) (stating that at the summary judgment stage a conglomeration of conclusory allegations, improbable inferences, and unsupported speculation is insufficient to discharge the nonmovant's burden).

While the evidence may reflect the officers' poor judgment in giving into an unruly mob and humiliating the boys, it does not even approach discrimination. It is undisputed that Coach Marchand informed the officers that his team was under suspicion for the alleged theft -- or in Coach Marchand's words "the prime suspects." Furthermore, the officers only conducted their search after Coach Marchand consented. The officers' conduct in this case resulted from the information and consent that Coach Marchand provided and not from any racial or ethnic bias. Summary judgment on Count II will therefore enter in Defendants' favor.

D. R.I. Racial Profiling Prevention Act and Ethnic Intimidation Statute

For the reasons stated above with respect to Plaintiffs' Equal Protection claim, summary judgment must also enter on Counts V and VI, brought under Rhode Island's Racial Profiling Prevention Act, R.I. Gen. Laws § 31-21.2-3, and Ethnic Intimidation Statute, R.I.

Gen. Laws § 9-1-35. Both statutes require discriminatory animus. The Racial Profiling Prevention Act requires that an individual be subject to disparate treatment by a law enforcement officer or agency, in whole or in part, on the basis of race or ethnicity. R.I. Gen. Laws § 31-21.2-3. Similarly, the Ethnic Intimidation Statute allows for a cause of action when a person has been "maliciously subjected to an act or acts which would reasonably be construed as intended to harass or intimidate the person because of his or her race, religion, or national origin." Id. at § 9-1-35. Plaintiffs have presented no evidence from which a reasonable trier of fact could conclude the Defendants' actions were motivated by the Plaintiffs' race or ethnicity. Again, it is critical to distinguish between the racist behavior and words of the mob and those of the officers. There is no evidence to support saddling the officers with the idiocies of the adults and students in the mob. Therefore, Defendants' Motion for Summary Judgment on Counts V and VI must be granted.

E. Supervisory Liability

Plaintiffs are also seeking to hold Chief DaSilva and Chief O'Rourke liable in their capacities as supervisory officials. Supervisory liability cannot be predicated on a *respondeat superior* theory, and instead must stem from the supervisor's own acts or omissions. Seekamp v. Michaud, 109 F.3d 802, 808 (1st Cir. 1997). A supervisor can be held liable if (1) the behavior of his subordinates results in a constitutional violation, and (2) the supervisor's action or inaction was affirmatively linked to that behavior in that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference. Id. (quoting Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 902 (1st Cir. 1988) (internal quotations omitted)).

Hyperbole and speculation are behind Plaintiffs' claims for supervisory liability. Plaintiffs have not alleged either police chief was at the scene or had prior knowledge (actual or constructive) of the situation such that it could be argued they were deliberately indifferent in failing to prevent the search. Rather, Plaintiffs rest their claims for supervisory liability on a theory of inadequate training. Despite submitting evidence that the Coventry Police Department sent at least one of its officers to a basic and advanced school resource officer training program hosted by the National Association of School Resource Officers, Plaintiffs argue that the chiefs' failure to train its officers amounted to deliberate indifference given the inevitable likelihood officers in the Town would confront situations involving searches of public school students. This argument asks too much. Plaintiffs have presented no evidence of "a known history of widespread abuse sufficient to alert a supervisor to ongoing violations." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 582 (1st Cir. 1994). Plaintiffs did submit evidence that Coventry officers have in the past responded to the high school and conducted searches, but a smattering of such incidents does not place this case within the "narrow range of circumstances," where the constitutional violation alleged occurs as "a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." Young v. City of Providence, 404 F.3d 4, 28 (1st Cir. 2005). Even if the Court assumes the officers' actions amounted to a constitutional violation, the evidence submitted is inadequate to conclude Chief DaSilva or Chief O'Rourke was deliberately indifferent or wilfully blind. See Maldonado-Denis, 23 F.3d at 582 ("[I]solated instances of unconstitutional activity ordinarily are insufficient to establish a supervisor's policy or custom, or otherwise to show deliberate indifference."). Simply put, without a shred of evidence that the action or inaction of either chief "led inexorably to the constitutional violation," Plaintiffs' supervisory liability claims fail as a matter of law. Maldonado, 568 F.3d at 275 (quoting Pineda v. Toomey, 533 F.3d 50, 54 (1st Cir. 2008)).

F. Municipal Liability

Having disposed of all claims brought against the Defendants in their individual capacities, the Court addresses whether a basis exists to hold the Town of Coventry liable. The cloak of qualified immunity that protects the officers does not shield the Town from liability. See Estate of Bennett v. Wainwright, 548 F.3d 155, 177 (1st Cir. 2008) ("[I]t is not impossible for a municipality to be held liable for the actions of lower-level officers who are themselves entitled to qualified immunity."). To prevail, however, Plaintiffs need evidence that the officers' actions constitute a constitutional violation and were caused by a "policy or custom" of the Town. Id. (citing Martínez-Vélez v. Rey-Hernández, 506 F.3d 32, 41 (1st Cir. 2007)); see also Monell, 436 U.S. at 694. In other words, the policy or custom must be the "moving force behind the deprivation of constitutional rights." Bisbal-Ramos v. City of Mayaguez, 467 F.3d 16, 24 (1st Cir. 2006). To be actionable a custom or practice must be "so well-settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice." Id. at 23-24 (quoting Silva v. Worden, 130 F.3d 26, 31 (1st Cir. 1997) (internal quotations omitted)). Where a claim of inadequate training is alleged to have caused the constitutional injury, the municipality's failure to train must be the product of deliberate indifference such that the Town disregarded a known or obvious risk of serious harm from its failure to develop an adequate training program. Estate of Bennett, 548 F.3d at 177; Young, 404 F.3d at 28.

Plaintiffs' claim for municipal liability is based on a failure to train and fails for the same reasons their claims for supervisory liability fail. Even if a constitutional violation occurred, Plaintiffs offer no evidence of a policy, custom, practice or of any deliberate indifference on the part of the Town. Moreover, nothing Plaintiffs point to bears the requisite causal relationship to the alleged constitutional deprivation to establish liability. Accordingly, summary judgment will enter for the Town on Plaintiffs' claims of municipality liability.

IV. Conclusion

For all of the foregoing reasons, Defendants' Motion for Summary Judgment is hereby GRANTED, and judgment shall enter for the Defendants.

IT IS SO ORDERED.

WESmith

William E. Smith
U. S. District Judge
Date: 9/9/09

CERTIFICATE OF FILING AND SERVICE

I, Robyn Cocho, hereby certify pursuant to Fed. R. App. P. 25(d) that, on January 19, 2010, the foregoing Brief for Plaintiffs-Appellants was filed through the CM/ECF system and served electronically on the individual listed below:

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