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

JOAN GRUENKE, individually and as a parent and natural guardian of LEAH GRUENKE, a minor	:	
Plaintiffs,	:	**Civil No. 97-5454**
v.	:	
MICHAEL SEIP	:	
Defendant.	:	

OPINION AND ORDER

Van Antwerpen, J. October 21, 1998

I. INTRODUCTION

On August 26, 1997, Plaintiffs, Joan and Leah Gruenke, filed this action against Defendant, Michael Seip, under 42 U.S.C. § 1983 ("§ 1983") and state tort law, 42 Pa. C.S.A. § 8550 et. seq. Plaintiffs essentially claim that their rights were violated when Leah Gruenke was forced to take a pregnancy test at the behest of the Defendant, a swim team coach. In their Amended Complaint filed on November 4, 1997,[1] the Plaintiffs alleged the following claims: (1) an illegal search in violation of Leah Gruenke's fourth amendment right, see ¶¶ 6-28; (2) a violation of Joan and

[1]Hereinafter referred to as "Am. Compl. at ¶__."

Leah Gruenke's right to familial privacy, ¶¶ 36-49; (3) a violation of Leah Gruenke's right to privacy, ¶¶ 29-35; (4) a violation of Leah Gruenke's right of free speech and association, ¶¶ 50-56; and (5) violations of Joan and Leah Gruenke's rights under state tort law, ¶¶ 57-76.

Presently before the court is the Motion for Summary Judgment filed by the Defendant on September 4, 1998, and the Plaintiffs' Opposition to this Motion, filed on September 16, 1998. For the reasons set forth below, we will grant Defendant's Motion with regard to all § 1983 claims and dismiss all Plaintiffs' state law claims without prejudice.

II. STANDARD OF REVIEW

The court shall render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("Anderson I"). A factual dispute is "material" only if it might affect the outcome of the suit under governing law. Id. at 248. All inferences must be drawn and all doubts resolved in favor of

the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. 1985).

On motion for summary judgment, the moving party bears the initial burden of identifying those portions of the record that it believes demonstrate the absence of material fact. Celotex Corp. v.. Catrett, 477 U.S. 317, 323 (1986). To defeat summary judgment, the non-moving party must respond with facts of record that contradict the facts identified by the movant and may not rest on mere denials. Id. at 321 n.3 (quoting Fed.R.Civ.P. 56(e)); see also First Nat'l Bank of Pennsylvania v. Lincoln Nat'l Life Ins. Co., 824 F.2d 277, 282 (3d Cir. 1987). The non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. See Anderson I, 477 U.S. at 249.

III. FACTUAL BACKGROUND

Discovery in this matter is complete, and the facts are essentially as follows.[2] In January of 1997, Leah Gruenke, daughter of Joan Gruenke, was seventeen years old and in the eleventh grade. L. Gruenke Dep. 2/20/98 at 5, 8. She was also a member of the Emmaus High School varsity swim team, coached by

[2]On April 21, 1998, this court ordered that discovery be completed by July 13, 1998. We have resolved any conflicts in the testimony in favor of the non-moving party. See discussion and footnotes.

Defendant, Michael Seip. Seip Dep. 2/20/98 at 17. In January of 1997, Defendant began to have suspicions that Leah was pregnant because she was "nauseated at practice on several occasions during Christmas, New Year's practice [sic] repeated trips to urinate to the bathroom during the two-hour span. She was complaining profusely about her energy levels being down. Her body was changing rapidly." Id. at 40-41.

At some point in February, Defendant talked to assistant coach Kim Kryzan about Leah Gruenke. Id. at 64-65. Ms. Kryzan had also noticed similar changes to Leah Gruenke's physical condition and approached Leah Gruenke to talk about her changed performance. Id. at 65; Kryzan Dep. 3/18/98 at 21. There is some conflict in testimony as to what was actually discussed, but Leah Gruenke did not volunteer any information. L. Gruenke Dep. 2/20/98 at 20.

Soon after Leah Gruenke failed to give information to Ms. Kryzan, Defendant approached Leah Gruenke and attempted to broach an informative discussion on sex and pregnancy. L. Gruenke Dep. 2/20/98 at 21; Seip Dep. 2/20/98 at 69. Defendant claims that Leah Gruenke emphatically denied the possibility of pregnancy. Seip Dep. 2/20/98 at 64, 69.

Meanwhile, parents and other members of the swim team began to suspect that Leah Gruenke might be pregnant. See, e.g., Seip Dep. 2/20/98 at 60-63, 72-74; Hochella Dep. 3/16/98 at 12-13;

Ritter Dep. 3/16/98 at 58-59. It is unclear whether anyone approached Leah Gruenke, although she did tell some of her fellow swimmers that she could not be pregnant because she had never had sexual intercourse. L. Gruenke Dep. 2/20/98 at 19. Leah Gruenke stated that she denied any possibility of pregnancy because she did not think that it was any of their business. Id.

Leah Gruenke also testified that she was called into both the offices of the nurse and the guidance counselor at school. L. Gruenke 2/20/98 at 27. It is clear from the record that the Defendant had asked the guidance counselor to talk to Leah Gruenke after his discussion with her produced nothing. Seip Dep. 2/20/98 at 79. Leah Gruenke testified that she found out that a mother of one of the swim team members had asked the nurse to talk to her. L. Gruenke Dep. 2/20/98 at 25. In both interviews Leah Gruenke did not volunteer any information, but was upset at the time: "I was sick of people like talking to me about pregnancy tests; and if I was pregnant, it's none of their business." Id. at 25.

Defendant testified that mothers of swim team members were still approaching him about Leah Gruenke and suggested that a pregnancy test should be administered. Seip Dep. 2/20/98 at 91-92. There is conflicting testimony as to whether some mothers of swim team members had actually tried to talk to Leah Gruenke's mother about this issue. See J. Gruenke Dep. 5/29/98 at 58-61;

L. Gruenke Dep. 2/20/98 at 39. Lynn Williams, the mother of a swim team member, suggested to the Defendant that a pregnancy test be purchased. Williams Dep. 5/29/98 at 13. The test was eventually purchased by Lynn Williams and the Defendant reimbursed her for the test and kept it at school. Id. at 15-16; Seip Dep. 2/20/98 at 92, 101.

The progression of events that followed are unclear in the record because of conflicting testimony. On about March 5, 1997, Leah Gruenke was approached by female swim team members Abby Hochella and Kathy Ritter who asked her to take a pregnancy test which she refused. L. Gruenke Dep. 2/20/98 at 50-51. According to Leah Gruenke, on March 6, 1997, Ms. Hochella and Ms. Ritter again approached her and stated "we still have this pregnancy test that Seip gave us, and he wants us to get you to take it." Id. at 51. Ritter and Hochella testified, however, that the Defendant told them that "if she [Leah Gruenke] was willing to take one, there was one in the back room." Ritter Dep. 3/16/98 at 14; Hochella Dep. 3/16/98 at 20. Defendant claimed that he did not urge L. Gruenke to take the test, but did tell Ms. Hochella and Ms. Ritter that "[i]f it were a friend of mine, I would start with asking her to take a pregnancy test." Seip Dep. 2/20/98 at 102.

Leah Gruenke then wrote a letter to the Defendant, which he refused to accept, stating that Defendant had no right to make

her take a pregnancy test because she wasn't showing any symptoms of being pregnant and that she had never had sexual intercourse. L. Gruenke Dep. 2/20/98 at 53-54; Seip Dep. 2/20/98 at 123. She also told Ms. Ritter and Ms. Hochella that she did not have sexual intercourse "because I didn't want them to harass me anymore." L. Gruenke Dep. 2/20/98 at 54.

On the same day, Ms. Ritter approached Leah Gruenke once more and according to Leah Gruenke stated "you have to take the test because if you don't, Mr. Seip said he'll take you out of the relay." Id. at 55. Leah Gruenke finally conceded to take the test. Id. at 56. Ms. Hochella testified differently stating that she tried to convince Leah Gruenke because it would solve a lot of problems for her if she could prove that she wasn't pregnant. Hochella Dep. 3/16/98 at 20. Ms. Hochella and Ms. Ritter then testified that Leah Gruenke came back to them and voluntarily decided to be tested. Id.; Ritter Dep. 3/16/98 at 17.

Ms. Ritter, Ms. Hochella and an additional female swimmer, Sara Cierski, were present when Leah Gruenke took the test in the locker room bathroom stall. L. Gruenke Dep. 2/20/98 at 62-63. This test proved positive. Id. at 65. Sara Cierski suggested that Leah Gruenke take another test. Id. at 66. The girls went to the parking lot and got money from their parents. Id. Leah Gruenke drove with Abby Hochella and Kathy Ritter and bought two

more tests. Id. at 67. Leah Gruenke took both tests and they came out negative. Id. at 69, 72.

Later that evening, Leah Gruenke discussed with her mother what had happened that evening. Id. at 74. Joan Gruenke was clearly upset. Id. at 74-75. Abby Hochella called her in the evening to ask Leah Gruenke to take another pregnancy test and that her mother (Abby Hochella's mother) would be willing to take her to a doctor. Id. at 76-77. Leah Gruenke rose early the next day to take the fourth and final pregnancy test in the locker room with Ms. Hochella and Ms. Ritter. Id. at 79. This test was purchased by Ms. Hochella and her mother. Hochella Dep. 3/16/98 at 32. This test also came out negative. L. Gruenke Dep. 2/20/98 at 80.

The record is clear that Defendant did not, beyond consulting a guidance counselor and other assistant coaches, ever make an attempt to talk directly to Leah Gruenke's parents or to higher levels of the school administration. Seip Dep. 2/20/98 at 74. After receiving information about positive pregnancy test, Defendant did, however, ask volunteer assistant coach Dr. Meade whether it was okay for a pregnant swimmer to compete and made the decision that there was no basis on which to pull her from the subsequent competitions. Seip Dep. 2/20/98 at 134-137.

It is also clear from the record that Leah Gruenke, for whatever reasons, chose to deny to herself and others the

possibility of her being pregnant. See L. Gruenke Dep. 2/20/98 at 33, 36, 54. It was not until her appointment with Dr. Greybush, scheduled by her mother on March 10, 1997, that she was confronted with the fact that she was in fact five to six months pregnant. Id. at 84. Even then, Leah Gruenke did not tell her mother or anyone on the swim team that she was pregnant because she wanted to compete in the states tournament. Id. at 92, 95.

Finally, there are several acts after this whole incident which Plaintiffs allege alienated Leah Gruenke from her peers. At a Franklin and Marshall swim meet sometime in the summer, Defendant saw Leah Gruenke for her first time after she had given birth. Seip Dep. 2/20/98 at 156-57. At that point in time, Leah Gruenke was swimming independently and Defendant was there in the capacity as coach of the Emmaus Aquatic Team (part of a private swimming club). Id. Leah Gruenke testified that the Defendant ordered students not to sit with her. Id. at 157; L. Gruenke Dep. 2/20/98 at 115-116. During the following school year, Leah Gruenke's last year of high school, she testified that the Defendant never talked to her and she felt she was being retaliated against because she was taken out of several swim meets. L. Gruenke Dep. 2/20/98 at 149-151.

IV. DISCUSSION

Section 1983 provides for the imposition of liability on any

person who, acting under color of state law, deprives another of rights, privileges, or immunities secured by the Constitution or the laws of the United States. To state a claim under § 1983, the plaintiffs must show both that: (1) the offending conduct was committed by a person acting under color of state law; and (2) that such conduct deprived the plaintiffs of rights secured by the Constitution of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986). In this case, no party disputes that Defendant was acting under color of state law.[3]

Generally, in a § 1983 action, the first issue to be determined is whether the plaintiff has sufficiently alleged a deprivation of a right secured by the Constitution. See Baker v. McCollan, 443 U.S. 137, 140 (1979). However, when a defendant asserts the affirmative defense of immunity, as in the present case, we must first determine whether he is entitled to such a defense before reaching the merits of the case. Harlow v. Fitzgerald, 457 U.S. 800, 819-19 (1982). This preliminary determination is necessary because unlike a mere defense to liability which involves the essence of the wrong, one who enjoys qualified immunity is immune from suit. Richardson v. McKnight,

[3]Plaintiffs have brought claims against the Defendant in only his individual capacity. Individual capacity suits seek to impose personal liability upon a government official's personal assets. Kentucky v. Graham, 473 U.S. 159, 166 (1985).

521 U.S. 399, 117 S. Ct. 2100, 2103 (1997). Moreover, the policy underlying the qualified immunity doctrine is "to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." Siegert v. Gilley, 500 U.S. 226, 232 (1991).

A. Qualified Immunity

Defendant asserts that qualified immunity should shield him from liability. Under the doctrine of qualified immunity, the inquiry is divided into two separate issues. First, this court must examine whether the conduct of the Defendant violated clearly established constitutional rights. See Harlow, 457 U.S. at 818. Next, we must assess whether an objectively reasonable person in the Defendant's position would have known that his conduct would have violated such constitutional rights. Id. The analysis generally turns on the "'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639 (1987) (quoting Harlow, 457 U.S. at 818-19) ("Anderson II"). Qualified immunity is applicable even where officials "of reasonable competence could disagree" that such acts were objectively reasonable, see Malley v. Briggs, 475 U.S. 335, 341 (1986), and "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Id.

The determination of qualified immunity upon a motion for summary judgment is entirely appropriate. See, e.g., Harlow, 457 U.S. at 818; Siegert, 500 U.S. at 231; Grant v. City of Pittsburgh, 98 F.3d 116, 122 (3d Cir. 1996). The first issue, whether a plaintiff asserts the violation of a clearly established constitutional right, is purely a question of law. Sharrar v. Felsing, 128 F.3d 810, 828 (3d Cir. 1997). The second issue, whether the officer reasonably believed in the lawfulness of his or her conduct, is also generally an issue of law to be decided by the court.[4] Id.

There is, however, a tension between the "insistence that the immunity defense be decided as a matter of law when the reality is that factual issues must frequently be resolved in order to determine whether the defendant violated clearly established federal law." Grant, 98 F.3d at 122 (quoting Schwartz, Section 1983 in the Second Circuit, 59 Brook. L.Rev. 285, 309 (1993)). Courts have resolved such tension by a careful examination of the record viewed in a light most favorable to the plaintiff upon a summary judgment motion. Id.; see, e.g., Moniz v. City of Fort Lauderdale, 145 F.2d 1278, 1281 (11th Cir. 1998); King v. Beavers, 148 F.3d 1031, 1032 (8th Cir. 1998). In the

[4]In Sharrar, the Third Circuit noted that there may be some instances where a court may choose to resolve disputed facts by resorting to a jury in deciding the qualified immunity question. 128 F.3d at 828.

present case before us, therefore, we will undergo the analysis by assuming the facts in a light most favorable to the Plaintiffs and proceed to consider whether the qualified immunity defense is established as a matter of law.[5]

The threshold question for this court is whether the constitutional rights asserted by Plaintiffs are clearly established at the time Defendant acted. Siegert, 500 U.S. at 232. Only if this question is answered affirmatively may this court move on to the analysis of whether the Defendant's conduct was objectively reasonable. See Johnson v. Horn, 150 F.3d 276, 286 n.7 (3d Cir. 1998).

The Supreme Court has explained what it means by clearly established law for the purposes of qualified immunity:

> The contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right. 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 . . . the unlawfulness must be apparent.

Anderson II, 483 U.S. at 640 (citation omitted). In determining whether a defendant's conduct impinged upon clearly established constitutional rights, the courts are required to conduct more than a generalized inquiry into whether an abstract

---

[5]In other words, when there is a conflict of evidence presented in the record, we will assume that Plaintiffs' version is true. At this stage of the proceedings, however, this court will not accept all of Plaintiffs' allegations as true because we have often found Plaintiffs' characterization of the facts to be widely divergent from the deposition testimony.

constitutional right is implicated. Id. at 639-40. Moreover, the Third Circuit has similarly held that when there is a lack of substantially similar authority on point, the law cannot be said to be clearly established. See, e.g., Sharrar, 128 F.3d at 810, 828-29; Johnson, 150 F.3d at 286; Pro v. Donatucci, 81 F.3d 1283, 1292 (3d Cir. 1996).

Moreover, a necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is clearly established is whether the plaintiff has asserted a violation of a constitutional right at all. Siegert v. Gilley, 500 U.S. at 233; County of Sacramento v. Lewis, -- U.S. --, 118 S. Ct. 1708, 1714 n.5 (1998). If the actions of the government official, as alleged by the plaintiff, do not even rise to a level of a constitutional violation, then that official is clearly entitled to qualified immunity. City of Philadelphia Litigation v. City of Philadelphia, No. 96-2127, 1998 WL 569362, at *7-8 (3d Cir. Sept. 9, 1998).[6]

[6]There seems to be some confusion as to whether the failure to assert an alleged deprivation of a constitutional right by a plaintiff means that the immunity question need not be reached, see Sameric Corp. of Delaware, Inc. V. City of Philadelphia, 142 F.3d 582, 590 n.6 (3d Cir. 1998), or merely that the official is entitled to qualified immunity. City of Philadelphia Litigation, 1998 WL 569362, at *7-8. We choose to follow the latter analysis as it is supported by a more recent Third Circuit opinion and by other sister circuits. See, e.g., Jones v. Collins, 132 F.3d 1048, 1052 (5th Cir. 1998); Roe v. Sherry, 91 F.3d 1270, 1273-74 (9th Cir. 1996).

1. Fourth Amendment Claim

Plaintiffs allege that Leah Gruenke was forced by the Defendant to take a pregnancy test in violation of her fourth amendment rights. Pls.' Br. 19-23.[7] We will assume for the purposes of this motion that the Defendant did have the intention of giving Leah Gruenke the test and that Leah Gruenke was pressured to take the pregnancy test. Id. at 22. The question before us, then, is whether Defendant's actions violated clearly established constitutional law.

The administration of a pregnancy test by a school official appears to be a matter of first impression in the federal courts. There are no cases that we can find that address pregnancy testing in the public school context under the fourth amendment. Plaintiffs' argue that Leah Gruenke's constitutional rights were violated because the Supreme Court has "deemed to prohibit the pregnancy testing of student athletes" under the fourth amendment. Id. at 20. For the reasons set forth below, we find Plaintiffs' statement to be a misinterpretation of current law.

The fourth amendment guarantees the privacy of persons against certain arbitrary and invasive acts by officers of the government. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (1989). By virtue of the fourteenth amendment, the

[7]Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment is hereinafter referred to as "Pls.' Br. at __."

fourth amendment embodies the right to be free from unreasonable searches by state officers. Elkins v. United States, 364 U.S. 206, 213 (1960). State officers include public school officials for the purposes of the fourth amendment. New Jersey v. T.L.O., 469 U.S. 325, 336 (1985); Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 115 S. Ct. 2386, 2390 (1995).

The administration of a pregnancy test by a school official clearly constitutes a search within the meaning of the fourth amendment because such tests invade reasonable expectations of privacy. Vernonia, 115 S. Ct. at 2390; Skinner, 489 U.S. at 617. The pregnancy test given in this case, therefore, must meet the reasonableness requirement. Although a search or seizure is usually not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause, there is a well-defined exception when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Griffin v. Wisconsin, 483 U.S. 868, 873 (1987). The Supreme Court has chosen to apply the "special needs" analysis in numerous occasions relating to a school setting because of the non-criminal investigatory nature of the searches. See, e.g., T.L.O., 469 U.S. at 341-42; Vernonia, 115 S. Ct. at 2390-91. In determining the reasonableness of the pregnancy test at issue, we will follow the "special needs" balancing test set

forth by the Supreme Court.[8]

The "special needs" analysis under the fourth amendment requires a court to balance the nature of the privacy interest at stake versus its promotion of legitimate governmental interests. Vernonia, 115 S. Ct. at 2390. In Vernonia, the governmental interest in having student athletes tested was sufficient to invade their privacy. 115 S. Ct. at 2396. Unlike Plaintiffs' characterization, the Vernonia Court did not conclude that an unreasonable search or seizure would automatically occur if a school official conducted a pregnancy test. Pls' Br. at 20. Rather, the Court merely recognized that pregnancy information carried with it a heightened standard of privacy compared to information on drug use. Vernonia, 115 S. Ct. at 2393 (citing

---

[8]We diverge, therefore, from Ascolese v. Southeastern Pennsylvania Transp. Auth. in which the court analyzed a pregnancy test requirement by an employer under the probable cause and the warrant requirement. 902 F. Supp. 533, 550 (E.D. Pa. 1995), on reconsideration, 925 F. Supp. 351 (E.D. Pa. 1996). The court in Ascolese reasoned that the unified "special needs" analysis eradicating the probable cause and warrant requirements was applied in public school contexts because of the need for "swift and informal disciplinary procedures" not relevant in pregnancy testing by an employer. Id. at 550 n.25 (quoting Vernonia, 115 S. Ct. at 2391).

We choose to follow other cases which apply the "special needs" analysis under the rationale that a search in this type of case is outside the scope of law enforcement activities. See, e.g., O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (special needs applies for legitimate work-related, non-investigatory intrusions); Yin v. State of California, 95 F.3d 864, 869 (9th Cir. 1996) (medical examinations not conducted as part of a criminal investigation are generally subject to "special needs" analysis); Skinner, 489 U.S. at 620 (urinalysis of railroad employees to ensure safety presents a "special needs" question).

Skinner, 489 U.S. at 617).

We could not, however, find any clearly established law on the issue of how to balance the privacy interest of pregnancy information with the interest of a school official in obtaining such information. While we found some guidance from school cases involving a search for drugs, the special needs inquiry in such cases were primarily concerned with searches directed at promoting discipline or the safety interests of a broader student population, rather than the health and safety of the tested individual. See, e.g., T.L.O., 469 U.S. at 339-40; Vernonia, 115 S. Ct. at 2396; Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988). Moreover, we believe that the present case is also distinguished from cases involving fourth amendment claims and mandatory pregnancy tests given by employers. The interest of an employer in such pregnancy information must be compelling, Ascolese, 902 F. Supp. at 550; Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1269-70 (9th Cir. 1998), while schools have a broader "custodial and tutelary responsibility for children" that might change the outcome of such fourth amendment balancing.[9] Vernonia, 115 S. Ct. at 2392;

[9]We do find that the "custodial and tutelary responsibility for children" would apply to this situation absent qualified immunity. Plaintiffs have alleged that Defendant did not have Leah Gruenke's best interests in mind when ordering the pregnancy test. They claim that Defendant ordered the test for his own personal satisfaction and because he was concerned about the competitive performance of the swim team. Pls.' Br. at 23, 31.

T.L.O., 469 U.S. at 349 (Powell, J., concurring). Moreover, Vernonia stated "[l]egitimate privacy expectations are even less with regard to student athletes . . .[t]hey require 'suiting up' before each practice or event, and showering and changing afterwards." 115 S. Ct. at 2392.

We decline to decide today whether a fourth amendment violation may be established by the facts in this case. We merely wish to indicate that as in Anderson II, we cannot say that the right allegedly violated has been clearly established by prior law. 483 U.S. at 639-40. Taking the Plaintiffs' assertions as true for the purposes of this motion, we certainly do believe the Defendant's conduct was questionable and wonder why he failed to discreetly refer any concerns about Leah Gruenke directly to her parents or to higher levels of the school administration. Indeed, without the qualified immunity issue, we might well find that material issues of fact exist as to whether the Defendant violated Plaintiffs' fourth amendment rights. However, as a matter of law, we cannot say that the law on this issue has been

---

While this court is examining the facts in a light most favorable to the Plaintiffs, we do not find any facts in the depositions that support such a claim. Plaintiffs support their allegation only by claiming that Defendant's conduct in not seeking medical attention and allowing Leah Gruenke to compete is evidence that he was not concerned about her health. Id. Such evidence contradicts their assertion that he was only concerned about performance of the swim team as Leah Gruenke's competitive times were slowing due to her pregnancy. L. Gruenke Dep. 2/20/98 at 95.

clearly established, and therefore must hold that the Defendant is entitled to qualified immunity on this fourth amendment claim.

2. Substantive Due Process Claims

Plaintiffs allege two different claims under substantive due process: (1) Plaintiffs claim that Defendant's conduct violated their constitutional right to be free from state interference with family relations; and (2) Plaintiffs argue that Leah Gruenke's own constitutional right to privacy was violated not only by disclosure of personal medical information, but also by the alleged publication of such information which interfered with Leah Gruenke's right to make independent decisions. Pls.' Br. at 24-27.

The substantive component of the due process clause bars "certain government actions regardless of the fairness of the procedures used to implement them ... [and thereby] serves to prevent governmental power from being 'used for purposes of oppression.'" Daniels v. Williams, 474 U.S. 327, 331-32 (1986) (internal citations omitted). When determining whether an action violates a right protected by this element of the due process clause, the court must balance "the liberty of the individual" and "the demands of an organized society." Youngberg v. Romeo, 457 U.S. 307, 320 (1982) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

a. Familial Right to Privacy

The substantive due process right to which Plaintiffs refer is the right to familial integrity. In particular, Plaintiff Joan Gruenke claims that she was denied the opportunity to have been "the sole influence" and to "have guided" her daughter, Leah Gruenke, through the issues surrounding her pregnancy. Pls.' Br. at 29. Plaintiffs also allege that Defendant's conduct interfered with Leah Gruenke's familial right to privacy as a daughter and future mother. Id.

We agree that the Supreme Court has clearly recognized a fundamental liberty interest in familial integrity and privacy. Many of the cases recognizing this fundamental liberty interest do so in the context of the creation or sustenance of a family. Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984); see, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 117 S. Ct. 555 (1996) (a statute prohibiting an appeal in forma pauperis from a decision to sever the parent-child bond violated due process); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (local ordinance that restricted certain family living arrangements was unconstitutional). We believe that the intrusion upon familial rights complained of in the present case does not amount to state termination or restriction of familial rights.

The courts have also recognized a right of familial integrity in the upbringing of children in specific instances.

See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944) (parents have fundamental interest in the religious upbringing of children); Meyer v. Nebraska, 262 U.S. 390 (1923) (parents and teachers have a fundamental interest in the education of their children in foreign languages); Wisconsin v. Yoder, 406 U.S. 205 (1972) (state may not impinge upon the interest of parents with respect to the religious upbringing of their children).

Plaintiffs argue that Defendant's conduct was not unlike that of the school officials in Arnold v. Board of Education of Escambia County, where a student was coerced into obtaining an abortion. 880 F.2d 305, 313 (11th Cir. 1989). While the court in Arnold found that the parents had established a cause of action for the invasion in the familial right to privacy, the court stated:

> We find that a parent's constitutional right to direct the upbringing of a minor is violated when the minor is coerced to refrain from discussing with the parent an intimate decision such as whether to obtain an abortion; a decision which touches fundamental values and religious beliefs parents wish to instill in their children.

Id. at 312. Here, the Defendant's alleged efforts to get Leah Gruenke to take a pregnancy test and a disclosure of the results do not amount to actual interference with Joan Gruenke's right as a parent to make decisions for her child regarding a fundamental right. Nor do the alleged efforts of the Defendant in any way concern Joan Gruenke's right to control her child's religious upbringing as in Prince or Yoder.

Upon closer inspection of the Arnold facts, this court finds that the present case is easily distinguishable because the school officials in Arnold coerced a minor to refrain from consulting her parents about an abortion decision. Id. at 314. Assuming that many of the Plaintiffs assertions are true for the purposes of this motion, it is without question very unfortunate that Leah Gruenke's parents were not the first to know of her possible pregnancy, but we are at a loss in discovering how the Defendant's conduct seriously intruded on the relationship between Joan Gruenke and her daughter. After finding out about the positive results of the pregnancy test, Defendant did not coerce or compel Plaintiffs to make any kind of decisions regarding the pregnancy and the so-called "outside influences of the public," cannot be attributed to the Defendant. See Pls.' Br. at 28. At best, any burden on Plaintiffs' right to family integrity is very indirect and thus will not give rise to a violation of substantive due process. Compare Philadelphia Police Force & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia, 874 F.2d 156, 168 (3d Cir. 1989). Defendant, therefore, is entitled to qualified immunity because Plaintiffs have failed to assert a violation of the constitutional right to familial privacy. Siegert, 500 U.S. at 233.

Even assuming that Defendant's conduct did sufficiently interfere with familial integrity to trigger substantive due

process analysis, the right to familial privacy has never been absolute or unqualified, see Lehr v. Robertson, 463 U.S. 248, 256 (1983) (relationship between parent and child merits constitutional protection in "appropriate cases"), and has been balanced against the compelling government interest in the health, education, and welfare of children as future citizens. See, e.g., Santosky II v. Kramer, 455 U.S. 743, 766 (1982)(state has parens patriae interest in welfare of child); Stanley v. Illinois, 405 U.S. 645 (1972) (state has the right and duty to protect minor children); Quilloin v. Walcott, 434 U.S. 246 (1978) (upheld state law that denied an unwed father authority to prevent adoption of his illegitimate child). A school's interest in the health, education and welfare of its students has traditionally been strong. As no other case has previously balanced the state's interest in such pregnancy information with the interference it may cause to familial integrity, a legitimate question remains as to the outcome of such a balancing test. Therefore if we got to this point, the Defendant would be alternatively entitled to qualified immunity because the law is not clearly established on this point. Anderson II, 483 U.S. at 640.

No relevant cases exist, furthermore, to support Plaintiffs claim that Leah Gruenke's own parental right of decisionmaking concerning her unborn child was violated by the Defendant. Pls.'

Br. at 31. While a privacy right between a woman and her unborn child relating to the abortion decision is clearly established, see Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), upon searching the relevant law, we could not find any cases that held the relationship itself to be a fundamental right. In fact, we found a Third Circuit case that left precisely the issue of whether woman's "relationship with her unborn child during pregnancy is a fundamental interest" undetermined. Alexander v. Whitman, 114 F.3d 1392, 1403-4 (3d Cir. 1997). Even assuming that such a right did exist, we fail to see how Defendant's conduct interfered with Leah Gruenke's relationship with her unborn child as he did not coerce her to have an abortion, nor mandate any particular conduct on her part because she was pregnant. Plaintiffs claim that Defendant's conduct violated Leah Gruenke's right to familial privacy with her unborn child, does not rise to the level of a constitutional violation. Defendant, therefore, is also entitled to qualified immunity for this claim on the grounds that his conduct does not even amount to a constitutional violation, see City of Philadelphia Litigation, 1998 WL 569362, at *7-8, and that the constitutional right he assertedly violated was not clearly established. Pro, 81 F.3d at 1292.

b. Right to Privacy Concerning Personal Matters

Plaintiffs also allege that Leah Gruenke's substantive due

process right to privacy was violated. Pls.' Br. at 24. They claim that Defendant both violated her right to independently make certain decisions and avoid disclosure of highly personal matters.[10] Id.

Within the "zone of privacy" carved out by the Supreme Court, there are two lines of cases that have discussed the constitutional right of privacy. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977). Plaintiffs argue that both of these interests were violated by the Defendant.

Clearly the kind of privacy "in making certain kinds of important decisions" implicates the right to make decisions regarding certain fundamental rights. These fundamental rights have been carefully delineated by the Supreme Court, including the rights: to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, Meyer, 262 U.S. at 390; to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, Eisenstadt v. Baird, 405

[10]In count four of the Complaint, Plaintiffs raised a right to privacy claim on behalf of Joan Gruenke, individually. See Am. Compl. at ¶¶ 44-49. This right to privacy claim is the right to familial privacy claim discussed under subsection (2)(a). See Pls.' Br. at 27-32.

U.S. 438 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165 (1952), and to abortion, Casey, 505 U.S. at 833. See Washington v. Glucksberg, -- U.S. --, 117 S. Ct. 2258, 2267 (1997). Clearly Plaintiffs' claim does not fall under any of these cases because Leah Gruenke was not impaired of any decision making relating to a fundamental right.[11]

Plaintiffs claim does, however, fall under the right to be free from disclosure of personal matters. Whalen, 429 U.S. at 599-600. The Third Circuit has clearly recognized that private medical information is "well within the ambit of materials entitled to privacy protection." United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 (1980). Such a right, however, is not absolute and "public health or other public concerns may support access to facts an individual might otherwise choose to withhold." Id. at 578. The Third Circuit employs an "intermediate" standard of review and balances the government interest in disclosure against the individual's privacy interest. Id.; Doe v. Southeastern Pennsylvania Transportation Authority, 72 F.3d 1133, 1139 (3d Cir. 1995); Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987).

---

[11]The claims by Plaintiffs that their opportunities of adoption or moving Leah Gruenke to Florida were foreclosed because of "the eyes of the public" do not rise to the level of policies or state statutes that have prohibited personal choices in fundamental rights cases. Pls.' Br. at 26.

While the Third Circuit has clearly addressed the compelled disclosure of medical records in possession of an employer in the specific instances of Fraternal Order, Doe and Westinghouse, it has not yet addressed the compelled disclosure by a school official of a student's health records. As we have noted in the fourth amendment context, the concerns of schools differ from those of employers. As a result, the contours of a constitutional right to privacy of pregnancy information in the school context are less than clear, although there are undoubtedly limits in this context. To add to the uncertainty of the law in this area, different kinds of medical information — including the quality and quantity of information — have been given varying importance by courts analyzing the privacy right that attaches to such information. See Westinghouse, 638 F.2d at 577 n.5. As a matter of first impression, the balancing of interests requirement leaves a legitimate question for qualified immunity analysis as to whether the alleged disclosure of the results of the pregnancy test in this case violated any constitutional privacy rights. Accord Doe v. Attorney General, 941 F.2d 780, 796-97 (9th Cir. 1991). Without any cases where some factual correspondence exists with the present case, therefore, this court must conclude that there is no relevant clearly established law and that the Defendant is entitled to qualified immunity. Pro, 81 F.3d at 1292.

Even considering the facts in a light most favorable to the Plaintiffs, it is also highly uncertain that Leah Gruenke's test information was in fact confidential or that its disclosure was compelled by the Defendant. Leah Gruenke allowed other female swim team members to be present during the testing in a public school lavatory which might be more equated with inadvertent rather than compelled disclosure.[12] L. Gruenke Dep. 2/20/98 at 62-63. The test results were conflicting and did not clearly point to pregnancy. Id. at 65, 69, 72, 80. Moreover, competition swimwear leaves little to the imagination and Leah Gruenke was at that point five to six months pregnant. Id. at 84. A question exists as to whether the confidentiality of pregnancy information fades when the information involved already appears to be apparent to the public. Cf. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494 (1975). With more scrutiny, Plaintiffs' claim may not even rise to the level of a constitutional violation. We need not decide this issue today, however, because the Defendant is entitled to qualified immunity.

[12]Plaintiffs allege that the swim team members involved (Abby Hochella, Kathy Ritter and Sara Cierski) were present as "agents" of the Defendant. Pls.' Br. At 25. We find, however, that this assertion is both unsupported in law and facts as Plaintiffs have presented no evidence that there is a conspiracy to which these swim team members were willful participants. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970).

3. First Amendment Claim

Plaintiffs next allege that Defendant violated the first amendment by using his authority to forbid students form associating with Leah Gruenke.[13] Pls.' Br. at 32-33. Leah Gruenke testified that the Defendant refused to talk to her throughout the year and at one swim competition (where Leah Gruenke was not part of the team) said "I don't want any of you talking to people that aren't on my team." L. Gruenke Dep. 2/20/98 at 115-116, 149-151. Plaintiffs argue that attempts to characterize Leah Gruenke's right to freely associate with other swim team members as social is wrong because it more closely approximates the right to education characterized in Brown v. Board of Education, 347 U.S. 483 (1954). Pls.' Br. at 32. Even assuming that all factual assertions by Plaintiffs are true, the claim by Plaintiffs falls far short of establishing any kind of constitutional violation.

While the first amendment does not in terms protect a "right of association," cases have recognized "a right to associate for the purpose of engaging in those activities protected by the

[13]In one paragraph of their Complaint, Plaintiffs assert that this free speech issue is a violation of state constitutional law. Am. Compl. ¶ 53. We do not know if this reference was an error or intentional, however, Plaintiffs subsequent discussions of this issue have only involved federal first amendment law. See Pls.' Br. at 32-33. Even if Plaintiffs did intend to plead under state constitutional law, this court will dismiss any such state constitutional claims with other state law claims below in subsection (c).

First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." Roberts, 468 U.S. at 618. Even assuming that Defendant's conduct reached more than Leah Gruenke's social rights with other students, this action does not rise to the level of a constitutional violation. Otherwise, it would be "possible to find some kernel of expression in almost every activity a person undertakes -- for example, walking down the street or meeting one's friends at a shopping mall -- but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." Dallas v. Stanglin, 490 U.S. 19, 25 (1989). We think the activity of talking to swim team members during a swimming competition is not an individual liberty protected by the first amendment.

We fail to understand why the Plaintiffs cite to Brown as a situation similar to their own. There is no equal protection claim in the present case and the "right to interact with fellow students" elucidated in Brown concerned racially segregated schools.[14] It borders on the outrageous for Plaintiffs to even

[14]Freedom of association, furthermore, has often been used in the equal protection context as a justification against mandatory integration. See, e.g., Romer v. Evans, 517 U.S. 620, 635 (1996).

try to compare very serious issues of state mandated racial segregation to the facts of the instant case.[15]

As stated in City of Philadelphia Litigation, "if the actions of the government official, as alleged by the plaintiff do not even rise to a level of a constitutional violation, then that official is clearly entitled to qualified immunity." 1998 WL 569362, at *7-8. Defendant, therefore, is entitled to qualified immunity on this first amendment claim because the Plaintiffs have fallen short of asserting the violation of their first amendment right.

4. Objective Reasonableness

We need not reach the question of whether the Defendant's actions were objectively reasonable under the qualified immunity analysis because, as elucidated above, because Defendant's conduct neither amounts to a constitutional violation nor violates clearly established law. See, e.g., Johnson, 150 F.3d at 286 n.7; Sharrar, 128 F.3d at 828-29. Thus, it is irrelevant whether an objectively reasonable school official in Defendant's position would have believed that his conduct violated

[15]Perhaps Plaintiffs' confusion is related to the freedom of association cases under to the substantive due process clause. Under these cases, the formation and preservation of certain kinds of highly personal relationships are protected from a substantial measure of unjustified interference by the state. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer, 262 U.S. at 390. It is clear, however, that such a constitutional claim does not apply to the freedom of association of Leah Gruenke with other members of the swim team.

Plaintiffs' constitutional rights because this court has determined the threshold issue that entitles Defendant to qualified immunity.

B. Pendent State Law Claims

We now turn to address the disposition of the claims raised by Plaintiffs arising under state law. Plaintiffs' state law claims are before us under supplemental jurisdiction brought in connection with claims "arising under [the] Constitution, [and] the Laws of the United States." U.S. Const., art. III, § 2.

Plaintiffs allege that Defendant's actions amount to the intentional tort of battery under 42 Pa. C.S.A. § 8550. Pls.' Br. at 34-35. More specifically, Plaintiffs argue that Defendant's alleged administration of the pregnancy test violated their right to be free from unconsented medical treatment. Id.

Prior to Congress' codification of supplemental jurisdiction in 28 U.S.C. § 1367, it had "consistently been recognized that pendent jurisdiction [was] a doctrine of discretion, not of plaintiff's right." United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966) (citing Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (1st Cir. 1950)); Moynahan v. Pari-Mutuel Employees Guild, 317 F.2d 209, 211-212 (9th Cir. 1963). This discretionary aspect of pendant jurisdiction has always allowed federal courts to decline to decide cases that are primarily state law claims. Gibbs, 383

U.S. at 727. Finally, "if the federal claims are dismissed . . . the state claims should be dismissed as well." Id. at 726.

In the absence of any federal question or constitutional issue, this court has the discretion to dismiss Plaintiffs' state law claims on jurisdictional grounds. Plaintiffs, however, are not without remedy. On the contrary, the statue of limitations on Plaintiffs' state law claims is tolled for a minimum of 30 days from the date of dismissal. With the codification of supplemental jurisdiction, Congress has allowed for the dismissal of state claims, arising under article III jurisdiction and brought under § 1367(a), to benefit from a tolling of the statute of limitations. 28 U.S.C. § 1367(d). Thus, Plaintiffs' state law claims are dismissed without prejudice and may be filed in state court.

V. CONCLUSION

As a matter of law, however, this court must grant summary judgment in favor of the Defendant on the basis of qualified immunity. Moreover, we dismiss the state claims without prejudice. We have also found that much of the conduct complained of did not rise to a constitutional violation, although we believe this entire matter could have been much better handled by those involved. An appropriate order follows.

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

JOAN GRUENKE, individually and as a parent and natural guardian of LEAH GRUENKE, a minor	:	
Plaintiffs,	:	**Civil No. 97-5454**
v.	:	
MICHAEL SEIP	:	
Defendant.	:	

ORDER

AND NOW, this 21st day of October, 1998, upon, consideration of Defendant's Motion and Memorandum of Law in Support of its Motion for Summary Judgment, filed September 4, 1998, and Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment, filed September 16, 1998, it is hereby ORDERED that Defendant's Motion is GRANTED with respect to the § 1983 claims which are all DISMISSED. Plaintiffs' state law claims are DISMISSED without prejudice. This case is closed.

BY THE COURT:

_____

Franklin S. Van Antwerpen U.S.D.J.