IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO.: 16-2821

KENNETH MANN and ROSE MANN, as parents and co-plenary guardians of the estate of SHELDON MANN, an incapacitated person, and in their own right,

PLAINTIFFS/APPELLANTS

v.

PALMERTON AREA SCHOOL DISTRICT; CHRISTOPHER WALKOWIAK, individually and in his official capacity as a football coach,

DEFENDANTS/APPELLEES

Appeal from the June 2, 2016 Order of the United States District Court for the Middle District of Pennsylvania (Caputo, J.) that granted the motion for summary judgment filed by Defendants/Appellees, Palmerton Area School District and Christopher Walkowiak, and entered judgment in their favor on all claims.

BRIEF FOR DEFENDANTS/APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Defendants/Appellees, Palmerton Area School District and Christopher Walkowiak,

1) For non-governmental corporate parties please list all parent corporations:

N/A

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

N/A

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

Name: */s/Thomas A. Specht* Dated: 01/03/2017
(Signature of Counsel or Party)

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COUNTER-STATEMENT OF THE ISSUES INVOLVED

A. Must this Court affirm the District Court's June 2, 2016 Order/Judgment that granted Defendants'/Appellees' Motion for Summary Judgment on Plaintiffs'/Appellants' claim pursuant to 42 Pa.C.S. § 1983 for violation of due process under the Fourteenth Amendment (state-created danger theory), when the record demonstrates that no reasonable juror could conclude that Defendant/Appellee Christopher Walkowiak: 1.) engaged in conduct that "shocks the conscience"; or, 2.) affirmatively used his authority in a way that created a danger to Sheldon Mann or rendered him more vulnerable to danger than had he not "acted" at all?

Suggested Answer: *Yes.*

B. In the alternative, must this Court affirm the June 2, 2016 Order because Walkowiak was entitled to qualified immunity?

Suggested Answer: *Yes.*

C. In the alternative, must this Court affirm the June 2, 2016 Order that granted the portion of Defendants'/Appellees' Motion for Summary Judgment that sought judgment in favor of Defendant/Appellee, Palmerton Area School District, as the record demonstrates that there was no substantive constitutional violation, no unconstitutional policy, custom or practice and/or failure to train, and no

support that any violation of rights was caused by a policy, custom, or practice of the PASD, or any failure to train?

Suggested Answer: *Yes.*

COUNTER-STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's order granting summary judgment under a plenary standard of review. *Curley v. Klem*, 298 F.3d 271, 276 (3d Cir. 2002). Where the decision of the district court is correct, this Court must affirm, even if the district court relied on a wrong ground or gave a wrong reason. *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Erie Telecomms v. Erie*, 853 F.2d 1084, 1089 n. 10 (3d Cir. 1988); *Myers v. American Dental Assoc.*, 695 F.2d 716, 725 (3d Cir. 1982). This Court may affirm on any basis that finds support in the record. *Helvering*, 302 U.S. at 245.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *F.R.C.P. 56(a)*. A disputed issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). *See also, F.R.C.P. 56(c)(1)*. For a fact to be considered "material," it "must have the potential to alter the outcome of the case." *Favata v. Seidel*, 511 F.Appx. 155, 158 (3d Cir. 2013). The adverse party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. *Williams v.*

Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

COUNTER-STATEMENT OF THE CASE/STATEMENT OF THE FACTS

Procedural History

Plaintiffs, Kenneth Mann and Rose Mann, as parents and co-plenary guardians of the estate of Sheldon Mann, an incapacitated person, and in their own right, ("Plaintiffs"), asserted due process claims against Defendants/Appellees, Palmerton Area School District ("PASD") and Christopher Walkowiak, ("Walkowiak"), contending they violated the constitutional rights of Sheldon Mann and caused him to suffer traumatic brain injuries. *See gen., ECF Document No.: 27* ("Amended Complaint"). Plaintiffs claim that Sheldon's rights were violated as a result of Walkowiak's exercise of authority in telling Sheldon to continue participating in football practice after sustaining a hit and exhibiting signs of a concussion. *Id.* Plaintiffs also claim that Sheldon's rights were violated as a result of the School District's practice of failing to medically clear student athletes, failing to enforce and enact proper concussion policies, and failing to train the coaches on a safety protocol for head injuries. *Id.*.

Defendants moved for summary judgment, (JA106a-119a). The Court granted the motion on June 2, 2016, finding there was sufficient evidence to support a prima facie case on Plaintiffs' state-created danger claim, (JA 0016a), but that Walkowiak was entitled to qualified immunity, and that there was insufficient evidence to support the municipal liability claim against PASD. (JA 0016a-0026a).

The court also concluded that Plaintiffs failed to support that any alleged constitutional injury to Sheldon Mann was caused by a policy, custom or practice of PASD, or any failure to train. (JA 0026a-0027a). This appeal followed.

Statement of Facts

PASD adopted a series of policies and procedures in its 2011-2012 Athletic Handbook. *See gen.*, (JA 150a-176a). The Handbook was utilized "to inform head coaches, assistant coaches, and others [including parents] with the policies, rules and regulations, procedures, and general guidelines which are necessary to provide athletic participants with programs that are consistent within the framework of the education program of the Palmerton Area School District, as well as the By-Laws of the Pennsylvania Interscholastic Athletic Association (P.I.A.A.) . . . ." (JA 151a).

The Handbook identified the responsibilities of the Board of School Directors – to "set policy with regard to conducting of the athletic programs within the Palmerton Area School District and . . . make all decisions as are required by law. (JA 154a). It also set forth the responsibilities of the Principal, which included, ". . . to exclude any contestant, who has suffered illness or injury until that contestant is pronounced physically fit by the school physician or, if none is employed, by another licensed physician." *Id.* Consistent therewith, the Handbook

noted that the PASD "has the right to restrict students from attending or participating in any athletic activities." (JA 155a).

The Handbook further provided that the Athletic Director was responsible for overseeing the operation, organization, personnel and finances of the athletic department. (JA 155a-156a). The duties of the Athletic Director included the supervision of the health and safety of all athletes. (JA 156a).

Contained within the Handbook was a section relating to the Head Athletic Coach. (JA 157a-160a). It was indicated that the Head Athletic Coach was responsible for implementing approved policies of the athletic program, directing the overall activities of the team, recommending budget requests for supplies and equipment, providing for the welfare of the athletes, maintaining and enhancing the school's standing in the community through the conduct and performance of the players, and fulfilling such other duties associated with the teams and athletes as the Athletic Director might assign. (JA 157a). The authority and responsibility of the coach extended to all athletes involved in the particular sport and providing for their health and safety. *Id.* It included the responsibility to inform all athletes of School District athletic policies, and to properly supervise "athletes at all times on the playing area . . . including before and after practice . . . ." (JA 158a). It also included the responsibility to "complete or having the Athletic Trainer complete the accident report forms and submit them to the school nurse." (JA 159a).

Finally, it encompassed the responsibility to inform the Athletic Trainer of any injuries which might occur during practices or games, and comply with the recommendation of the Athletic Trainer in all matters relating to the athlete's participation in practices and games. *Id.*

The responsibilities of Assistant Athletic Coaches were also defined. *See gen.*, (160a-161a). They included, under the direction of the Head Athletic Coach, the supervision of all training, practices, and instructional sessions, performance and conduct of athletes, and fulfillment of such other duties with the team and athletes as the head coach might assign. (JA 160a). They were required to identify and inform the head coach of current or potential problem situations. *Id.*

The Athletic Trainer of PASD was a staff member of the athletic program under the direction of the Athletic Director, whose job was to assist and cooperate with Head Athletic Coaches in providing for the prevention and care of athletic injuries and the health, safety and welfare of athletes. (JA 161a). The Athletic Trainer would assist athletic coaches in providing emergency first aid care to an injured athlete in the absence of an on-site physician, and supervise competition and practices to provide appropriate care for athletic injuries. (JA 161a-162a). The Athletic Trainer would also perform the duties and be accountable for the responsibilities of a certified athletic trainer as defined by the National Athletic

Trainer's Association and Rules and Regulations governing athletic trainers within the Commonwealth of Pennsylvania. (JA 162a).

The Handbook also had a section dedicated to the proper handling of injured players in the absence of an Athletic Trainer. (JA 170a). The direction provided was extensive and detailed. *See*, (JA 0021a, 170a-171a).

Carol Boyce is the former Superintendent of the PASD, who was hired in 2008 and served the entirety of her five-year contract with the PASD. (JA 183a, 186a). According to Ms. Boyce, Walkowiak became the head football coach at Palmerton for the 2011 football season. (JA 191a).

On or about December 8, 2011, Ms. Boyce received an email from Plaintiff/Appellant, Kenneth Mann, (JA 779a-781a), that alleged that his son, Sheldon, had sustained two concussions at football practice on November 1, 2011. (JA 193a-194a). Ms. Boyce indicated to Mr. Mann that she would investigate the allegations concerning the injuries Sheldon was alleged to have suffered. (JA 194a-195a, 782a).[1]

Through her investigation, Ms. Boyce attempted to determine what had happened to Sheldon at practice on November 1, 2011. (JA 195a-196a). She intended to discern: 1.) whether there was a "first hit" that caused an injury; 2.)

[1] Prior to the 2011-2012 season, the Mann's had certified that understood the risk of concussion and head injury from participating in interscholastic athletics, including the risks of continuing to compete after a concussion or head injury. (JA 546a).

what the coaching staff did, if anything, to evaluate that alleged injury; 3.) what, if anything, the coaching staff did in either removing Sheldon from practice or allowing him to continue practicing after any "first hit"; 4.) whether there was a "second hit" that caused injury; 5.) what, if anything, was done by the coaching staff to evaluate Sheldon after the putative "second hit"; and, 6.) what, if anything the coaching staff did after any evaluation of the "second hit." *Id.*

She further testified that she had received an email from Walkowiak on December 8th that stated that Sheldon never went back into practice after he was hit, as there was only five to ten minutes of practice left at the time. (JA 196a). Walkowiak wrote that Sheldon Mann was held out of the remainder of practice and he personally walked Sheldon to the trainer's room, quizzing him on if he was having any symptoms as they walked. (JA 196a).

Ms. Boyce indicated that her investigation encompassed the entire practice and that, if Sheldon had suffered a first hit before a second hit, then her investigation hopefully would have shown that. (JA 197a-198a). As her investigation progressed,[2] she determined that Walkowiak personally took Sheldon to the trainer, who evaluated Sheldon for a concussion (diagnosed him with the

[2] Superintendent Boyce also received written statements from assistant coaches Fink, Morgans, Falcone, and Kunkel concerning the hit received by Sheldon during the November 1, 2011 practice. (JA 552a-555a). All four, independent summaries indicate that Coach Walkowiak pulled Sheldon from the remainder of practice after the "second" hit. *Id.*.

symptoms of a concussion) and, later, instructed his parents regarding medical care. (JA 198a, 200a, 784a, 1116a, 1146a-1148a). Sheldon did not practice anymore that year or play in the Northern Lehigh game. *Id.* It was Ms. Boyce's ultimate determination that the football staff, including Walkowiak and Trainer Dave Smith, followed PASD protocol in handling Sheldon's injury. (JA 198a-199a).

When asked about whether there had been a "first hit" to Sheldon, her investigation ultimately determined that those in charge of the practice, all experienced coaches, felt that there was a first hit – a stinger – and not a concussion or head injury. (JA 199a). According to Ms. Boyce, a stinger is the jarring of a nerve or nervous connection, usually in an arm. (JA 207a). And, if a player were to receive an upper extremity stinger, the practice of the school district did not necessarily call for his or her removal from play/practice. (JA 207a).

Other than the allegations made by Mr. Mann, Ms. Boyce had no information that Sheldon allegedly suffered a "first concussion" after a "first hit" at the November 1, 2011 practice. (JA 200a, 209a). Ms. Boyce related that an email from Walkowiak described that the first hit to Sheldon Mann was not a jarring hit involving snapping of his head or neck. (JA 206a). At no point during her investigation did Ms. Boyce ever acquire any information that Sheldon sustained

concussive symptoms from a "first hit" on November 1, 2011, but was required to continue to play at that practice. (JA 209a-210a).

Athletic Director, Andrew Remsing, testified as corporate designee for PASD. (JA 244a). According to Remsing, Walkowiak was the Head Coach during the 2011 football season, and William Kunkel, Travis Fink, Pat Morgans and Mike Falcone were Assistant Coaches. (JA 243a).

He testified that official meetings were held with PASD coaches twice a year. (JA 268a-269a). A preseason meeting would be held to go over the coaches' (Palmerton Athletic) Handbook. (JA 268a-269a). The Handbook contained the rules and regulations that the PASD set forth for the coaches to follow for the season. (JA 269a). Walkowiak went over the Handbook with Mr. Remsing. (JA 271a).

Mr. Remsing believed that written protocols and policies for concussion management were given to trainers, coaches, players and parents before the start of the 2011 season. (JA 277a-278a). He believes this occurred because 2011 was the first year that the PASD implemented imPACT testing, and background material was sent out as part of that. (JA 277a-278a).[3]

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[3] "ImPACT® (Immediate Post-Concussion Assessment and Cognitive Testing) is a software program to assist in the management of head injuries. It tracks neuro-cognitive information such as memory, reaction time, brain processing speed and concentration. OAA conducts a post-concussive test at 24-72 hours from date of

Walkowiak has been the Head Football Coach for PASD since 2011. (JA 474a). He had been an Assistant Coach beginning in 2006 under Head Coach McArdle. *Id.*

Walkowiak had proactively sought out and received concussion safety training prior to the 2011 football season from DeSales University following a seminar course. (JA 474a, 556a). Based on this training, Walkowiak was aware of the symptoms of a concussion prior to the 2011 football season. (JA 475a).[4] And he had been trained to remove players from practices and games and keep them out, if in doubt as to whether a player was hurt. (JA 475a).[5]

Walkowiak and his staff were vigilant in observing practices and the hits occurring during practice, looking to see if a player was exhibiting concussion symptoms and sending the player out if it was suspected that the player had a concussion. (JA 476a). He did not coach his players to "play through pain" when it came to head injuries. (JA 479a). He and his staff erred on the side of caution. *Id.*

Before the 2011 season started, Walkowiak knew all of the information that was contained in the PASD concussion protocols that had been made available

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injury and continues to test the athlete until his/her scores return to normal. . . .." (JA 876a).

[4] Walkowiak had also attended an OAA concussion seminar and taken an online concussion test in 2012 and every year thereafter. (JA 474a).

[5] Walkowiak had training in examining players who were suspected of receiving a concussion which included asking basic questions and looking for visible signs of injury. (JA 485a-486a).

online for parents prior to the 2011 season on the PASD website. (JA 478a-479a). He felt that he was required to strictly adhere to the protocols. (JA 479a, 483a).[6] Walkowiak knew in 2011 about these concussion protocols and procedures prior to Sheldon's injury. (JA 483a).

Walkowiak, and all of the coaches in the football program (his other eyes and ears on the field), had the authority and responsibility to remove a player at any point if they suspected a concussion. (JA 480a-481a). The player is to be removed even if the player expresses that he or she is okay. *Id.* Walkowiak also testified that if a player complains of headaches, or expresses a sign of symptom of a headache, they are automatically removed from practice. (JA 480a-481a). Walkowiak knew, in 2011, that PASD policy was that, if a player had a suspected concussion, he was to be removed from practice and seen by the trainer (on site but not always at practices) before being allowed to return. (JA 481a-482a). A team physician was also available at games. (JA 482a). It was up to the trainer/physician to make a decision as to the status of the individual. *Id.*[7]

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[6] The protocols provided, in part, that "any student athlete who exhibits concussion signs and/or symptoms while participating with any school athletic team will be removed from the remainder of the event and not allowed to perform any activities that may increase the severity of the signs and/or symptoms." (JA 479a). Walkowiak indicated that all PASD coaches followed that mandate. (JA 479a-480a).

[7] The District adopted return to play guidelines by 2011. (JA 482a). Walkowiak followed these return to play guidelines in 2011, and the guidelines required that if a player went out of a game with a suspected concussion, or symptoms of a

Walkowiak was unaware of the allegation that Sheldon sustained two concussions on November 1, 2011 until Sheldon's father, Kenneth Mann, sent an e-mail to the whole District about that issue. (JA 504a-505a). Walkowiak testified that the "first hit" Sheldon Mann received at practice on November 1, 2011, was not a "big hit or substantial hit." (JA 505a).[8] Walkowiak saw a cluster of bodies during the play, and this "first hit" is where Sheldon potentially rolled his shoulder. (JA 505a). He speculated as to why Sheldon Mann was "rolling his shoulder" after the first hit, including the possibility of a "stinger." *Id.* He never said that Sheldon had suffered a "stinger" on the first hit during the practice, and, although admitting that a stinger could be representative of sustaining a concussion depending on where a player was hit, he merely mentioned "stinger" as part of a list of things that could cause you to roll your shoulder. (JA 505a, 514a-516a). After the first hit, according to Walkowiak, it did not appear that Sheldon needed to come out of

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concussion, he/she was not eligible to return to play until a physical examination was completed. *Id.*

[8] Walkowiak did not see any "first hit," but saw Sheldon Mann roll his shoulder after a play, which he did not merit as a concussion symptom. (JA 505a, 508a, 510a-511a). He indicated that any hit was not "big" or "substantial" based upon the sounds he heard (or didn't hear) during the play, and based upon the fact that no coach reported a substantial hit, or took Sheldon out after the play. (JA 505a-506a). Assistant Coaches Kunkel, Morgans, Falcone and Fink, observed the play/hit (there may not have even been a hit), in close proximity to the play. (JA 506a-507a). No player reported a helmet to helmet hit. (JA 508a). And Walkowiak stated that, after the play, he saw Sheldon standing up and walking to his position for the next play (which would have occurred 30 seconds later). (JA 508a). He asked Sheldon if he was alright with his shoulder and he said he was fine. (JA 509a-511a). Sheldon ran around the next 20-25 plays without incident. (JA 511a).

practice. (JA 520a). If he was disoriented, dazed, or confused, that would have been signs of a concussion, and the coaching staff would have removed him from practice. (JA 520a).

On January 7, 2011, William Cogdon, the former PASD Athletic Director, contacted Mark Brayford, indicating that the Palmerton Area School Board was interested in learning more about imPACT testing, as it had come to PASD's attention the seriousness of the concussion issue in athletics. (JA 536a). On March 22, 2011, Mr. Cogdon again contacted Mr. Brayford indicating that PASD wanted to have imPACT testing in place for the Fall 2011 sports season. (JA 537a). The PASD intended to have its athletes baseline tested in June 2011 for the 2010-2011 school year. (JA 539a).

At the April 5, 2011 meeting of the Board of School Directors for the PASD, the PASD discussed and reviewed policies and procedures from OAA concerning imPACT testing and concussions. (JA 857a-860a). At the April 19, 2011 meeting of the Board of School Directors for the PASD, the Board approved the imPACT program with OAA at no cost to the District. (JA 861a-869a). On June 6, 2011, Mr. Cogdon contacted the Fall sports coaches to schedule times for teams to be imPACT tested for a baseline reading in case they were to have a concussion during the season. (JA 538a). Mr. Cogdon also scheduled, via e-mail, on June 10, 2011, a conference call in the Superintendant's office regarding concussion testing

that was to be made available to athletes prior to the Fall 2011 sports season. (JA 539a). Mark Brayford of OAA was the person conducting the conference call concerning imPACT testing. (JA 539a, 542a-544a).

In his conversations with Walkowiak, Mr. Remsing testified that Walkowiak never told him that Sheldon sustained two hard hits during practice. (JA 309a-310a). Walkowiak told Mr. Remsing that at the end of practice, Sheldon took a very hard hit. (JA 311a). There were claims of a second hit early on in practice, but it was never described as anything more than a football play. *Id.* Walkowiak told Mr. Remsing that Sheldon displayed signs of confusion about ten minutes after the "second" hit. (JA 312a). According to Mr. Remsing, Walkowiak pulled Sheldon from practice after that hit. (JA 312a). Mr. Remsing spoke to several of the players in the hallway about the incident, and they described a big hit at the end of practice where one of the players hit Sheldon. (JA 320a-321a). They did not talk about any other hits. (JA 321a).

Mr. Remsing disagreed that the PASD's protocol was not followed by the coaching staff, and Sheldon was not seen by a school trainer after the "first hit." (JA 365a). Walkowiak did not tell Mr. Remsing that Sheldon appeared dazed after the first hit, nor did he tell Mr. Remsing that Sheldon appeared confused after the first hit or that he was seeing stars or that he was wobbly. (JA 392a-393a). Based upon what Walkowiak told Mr. Remsing about what occurred that day concerning

Sheldon's injury, Mr. Remsing believes that Walkowiak acted appropriately. (JA 410a).

Dave Smith has been employed by the PASD as an Athletic Trainer for approximately 19 years. *ECF Document No.: 57, Exhibit "D,"* at p. 6. Mr. Smith received training concerning concussions while in college. *Id.*, at pp. 14-15. According to Mr. Smith, PASD started to implement concussion protocols and imPACT testing prior to the 2012 football season. *Id.*, at p. 17.[9] In 2012, the Pennsylvania General Assembly passed S.B. 200, "The Safety in Youth Sports Act," which established standards for managing concussions and traumatic brain injuries to student athletes. Yet, even as far back as November 24, 2010, Palmerton Area had been contacting OAA concerning implementing imPACT testing for the football program. (JA 451a); *ECF Document No.: 57, Exhibit "D,"* at p. 6).

Mr. Smith noted that signs and symptoms of a concussion include headache, light headedness, dizziness, blurred vision, double vision, ringing in the ears, nausea, and a person seeing stars or appearing dazed and confused. (JA 453a). If the player is displaying signs and symptoms, a coach must alert the Athletic Trainer and have that player seen by the trainer. *Id.*

[9] Walkowiak testified that, in 2011, the PASD made imPACT testing optional. (JA 485a). It was not mandatory until 2013. *Id.*

In his time at PASD, Mr. Smith is not aware of any instances where coaches would allow players to continue playing, having suspected that the player had suffered an injury. *ECF Document No.: 57, Exhibit "D,"* at p. 22. Regarding football players, Mr. Smith would make the ultimate call as to whether or not a player was healthy enough to play. (JA 455a).

Sheldon was sent to see Mr. Smith for signs of a concussion. (JA 456a). When asked to evaluate a player, Mr. Smith fills out a student accident report. (JA 458a). The information comes from Mr. Smith's evaluation and from the athletes themselves. (JA 458a). Sometimes, Mr. Smith will speak to coaches to obtain information about the incident. *Id.*

Mr. Smith specifically recalls encountering Sheldon Mann on November 1, 2011. *Id.* He evaluated Sheldon in his office. (JA 458a). He first encountered Sheldon as he was walking out of his office and onto the practice field, when Walkowiak was walking toward the office. *Id.* Plaintiff was described as staggering and light headed. *ECF Document No.: 57, Exhibit "D,"* at p. 62. Mr. Smith could tell that Sheldon was displaying signs of a concussion. *Id.*, at p. 63.

Walkowiak did not tell Mr. Smith that he believed Sheldon sustained a stinger earlier in that practice. (JA 459a). Furthermore, Walkowiak did not tell Mr. Smith that he believed that Sheldon suffered any injury at some point during that practice before the hit that led him to be brought to Mr. Smith's office. *Id.* Mr.

Smith's evaluated Sheldon in the athletic room, determined that he had signs and symptoms of a concussion and spoke to Sheldon's parents. *ECF Document No.: 57, Exhibit "D,"* at pp. 72-73. Mr. Smith did not remember any coaches telling him that Sheldon Mann had sustained another hard hit during practice, or that they suspected that Sheldon had had an injury earlier in the practice. (JA 460a).

Ryan McGrath was an assistant high school football coach for the Palmerton Area School District starting in 2006. (JA 562a). Every year, the coaches, including Mr. McGrath, would receive handbooks outlining policies and procedures for dealing with student injuries. (JA 563a). In 2011, Mr. McGrath also attended a concussion seminar. *ECF Document No.: 57, Exhibit "G,"* at pp. 21-22; (JA 579a-604a).

Mr. McGrath testified that he believes Walkowiak told him that Sheldon sustained two hits during the November 1, 2011 practice. *Id.*, at p. 49; (JA 567a). More specifically, Mr. McGrath stated that Walkowiak told him that, after the first hit, Sheldon got up with something like a stinger to his shoulder, where he got up, grabbed his arm and moved his shoulder. (JA 567a). He also related that Walkowiak spoke to Sheldon after that hit. *Id.* However, Mr. McGrath was not at the practice where Sheldon was injured, (JA 569a), and admitted that Walkowiak could "talk about this much better than I could on what happened." *Id.*

Will Kunkel started coaching at the PASD in August of 2011. (JA 620a). Mr. Kunkel received (OAA) training for football safety prior to the commencement of the 2011 season at DeSales, focusing on concussions and how to treat and diagnose them, but was aware of the same and its importance prior to the course. (JA 622a-623a). And he and the other football coaches understood the importance of performing an on-field evaluation of the player, asking questions of the player and taking the player to the trainer, who would then decide when the player was fit to practice or play again. (JA 623a-625a).

Mr. Kunkel recalls being at practice on November 1, 2011. (JA 626a). He recalls Sheldon getting hurt towards the end of the year, but does not remember specifically any events at practice. *Id.* He did not know whether a nerve injury type of stinger is a sign or symptom of concussion. (JA 634a).

Travis Fink was an assistant football coach from the 2011-2012 season until 2013. (JA 659a). Mr. Fink took a course/had training with respect to concussions prior to Sheldon's injury on November 1, 2011, and understood the seriousness of sustaining a concussion along with the associated risks. *Id.* He acknowledged that if a coach suspects that a player has suffered a concussion, the player needs to be seen by a trainer before being cleared to continue practicing or playing in a game. (JA 661a-662a).

Mr. Fink recalled Sheldon taking a hit on November 1, 2011, and being pulled out of practice after the hit. (JA 665a). That was the last play in which Sheldon participated during that practice. (JA 665a-666a). Coach Fink was in charge of the offensive receivers and was watching them during that time. (JA 666a). During the play where Sheldon was injured, one of the offensive linemen blocked Sheldon and knocked him to the ground. (JA 667a). Mr. Fink believes that Sheldon was possibly on the ground for one to two minutes. (JA 668a).

Mr. Fink approached Sheldon after he was taken to the sidelines, and he and Walkowiak took Sheldon to see Trainer Dave Smith. (JA 668a). Mr. Fink testified that Walkowiak never said there was another play earlier in practice where he believed Sheldon sustained a stinger. (JA 669a). Prior to the "second hit" that caused injury to Sheldon, Mr. Fink did not see Sheldon exhibit any signs or symptoms of a concussion on November 1, 2011 – no behavior consistent with being dazed and confused, or light-headed. (JA 674a).

Michael Falcone was an assistant football coach during the 2011 football season. (JA 696a). Mr. Falcone had received training on how to identify the symptoms and signs of a concussion. (JA 696a). Through his training, and experience, Mr. Falcone was able to identify the signs and symptoms of a concussion. (JA 697a).

Mr. Falcone only witnessed one injury-causing hit. (701a). Mr. Falcone also testified that he believed Walkowiak told him that Sheldon, at some point during the practice, either during individual work or group work, suffered a stinger. (JA 703a).

Mr. Falcone stated that, if he saw a player suffer a stinger, he would have the player step out for a play, and ask him if he needed a trainer. (JA 704a). Some players would see the trainer, while others would not. *Id.* He would keep the player out until the stinger symptoms subsided, and/or he was cleared by a coach or trainer. *Id.* Stingers were pretty standard. (JA 705a).

Mr. Falcone observed signs of a concussion after Sheldon suffered a "second hit." (JA 715a). Mr. Falcone did not speak with Sheldon after the hit. *Id.* He had the opportunity to see Sheldon practice before the "Tampa rocket screen" play that resulted in the second hit to Sheldon and did not notice any signs that he was injured prior to that play. (JA 718a). He felt confident that he would have been able to notice if Sheldon had had a concussion prior to the "second hit." *Id.* He emphatically stated: "There was nothing, zero, signs up here of any problem with Sheldon. . . . how do I know that? I'm watching every play. . . . Sheldon was involved in everything going on until play number whatever. . . . That was the difference right there." (JA 719a).

The OAA Concussion Policy and Procedures, adopted by the PASD, develops and articulates a thorough method for the recognition, evaluation and management of students who have sustained a concussion. (JA 870a-881a). The policy provides definitions of concussion, community goals, and management of concussive symptoms. *Id.* The policy also outlines return to play guidelines as well as a gradual return to play time frame. (JA 874a-875a). Several PASD football coaches, including Walkowiak, McGrath, Kunkel and Fink, testified they attended a concussion seminar at DeSales University sponsored by OAA prior to the Fall 2011 season, with presentations relating to on-field evaluation, E.R. evaluation, in-office evaluation, and return to play guidelines. (JA 475a, 564a, 622a-623a, 661a, 882a).

Multiple student-players were also deposed in this matter, and the majority of students do not recall "two hits" on Sheldon. For instance, Tanner Gutekunst recalled only one hit, and Sheldon going right to the trainer's room because the coach pulled him from practice and instructed him to go to the trainer's room. (JA 901a, 904a).

Monty Szukicz also did not recall two hits. (JA 921a). Gerald Pereira also only recalls one hit on Sheldon at that practice and Sheldon leaving the practice immediately after the play. *ECF Document No.: 58, Exhibit "T,"* at p. 9; (JA 935a). Gabriel Leon also provided testimony in this matter and indicated that he only

recalled one hit, and he did not recall anyone telling him that there were two hits that day. (JA 945a).

Travis Wolfe also testified that he only recalled one hit at that practice, and after the hit Sheldon was brought to Trainer Dave and the team finished practice. (JA 964a-965a). Dallas Miata, another football player during the 2011 football season who was at practice on November 1, 2011, did not remember any big hits from that particular practice. (JA 988a).

Steven Semmel who was at practice on the day Sheldon was injured, did not recall seeing two big hits on Sheldon that day. (JA 999a). Aaron Cook also only recalled one big hit that he remembered Sheldon taking, and that, after the hit, Sheldon stopped practicing. (JA 1010a).

Michael Sander who was at practice the day Sheldon was injured did not have any recollection of the practice, or any "big hits" placed on Sheldon during that practice. (JA 1021a). James Wooten did not remember the day that Sheldon was injured, but was aware that he suffered a concussion. (JA 1032a). No one told him how many "big hits" Sheldon suffered during that practice. *Id.*

Austin Cook recalled the practice from November 1, 2011 when Sheldon was injured but testified he did not know if there was a second hit, he just remembered the one hit and Sheldon indicating that he was okay. (JA 1052a).

Alec De Long testified that he did not know if he saw the hits. (JA 1087a). Alec De Long was also the student that walked Sheldon to the trainer's room and helped him pack his bag after being taken out of practice. *Id.* Although counsel attempted to lead the witness into testifying that "all of the team knew that Sheldon got hit twice", following an objection, Alec then testified that he remembered Sheldon getting hit the first time and saying that Sheldon was fine so the team kept playing. (JA 1088a). Alexander Miller testified that he did not recall there being two hits on Sheldon that day. (JA 1123a).

Six students, Alex Vignone, Darris Rodriguez, Cody Peters, Ryan Reitz, Jarred Sacks, and Cody Reitz testified, in some form or in response to leading questions from counsel, that there may have been two hits during that practice. Alex Vignone testified that he did not see Sheldon suffer two big hits during the practice. (JA 1156a). In fact, he did not learn about the first hit until after the play was over and the players were back in the huddle. (JA 1157a).

Darris Rodriguez testified, after counsel's question "Are you aware that there were two big hits that Sheldon took on the day of November 1, 2011," that he was aware of the hits, but did not see either of them. (JA 1171a). Cody Peters testified that he did recall two big hits on November 1, 2011. (JA 1193a). However, although he admitted that a player who was suspected to either have a small or big injury should be removed from practice, no matter the case small, serious,

whatever, when asked if this was the type of injury that should have taken Sheldon out of the practice, Mr. Peters responded "First time, no. I didn't – I don't know, because he was pretty responsive the first time. Obviously the second time he wasn't very responsive. The first time he was like, I am alright, kind of like shaking it off. He looked like he was going to be able to bounce back, but it didn't end up happening. (JA 1198a).

Ryan Reitz, a PASD football player, testified that Coach Walkowiak talked to the players about concussions every year. (JA 1286a). According to the deposition testimony of Cody Reitz, another football player, Coach Walkowiak talked to the players about concussions even before Sheldon's injury, and the importance of evaluating somebody who has had a blow to the head to see if they have a concussion. (JA 1337a).

Ryan Reitz also testified that he was aware of a first and second hit on Sheldon, but he did not see or hear the first hit. (JA 1287a). He then testified that he also did not see the second hit, but only heard it. (JA 1291a). Jarred Sacks testified that he recalled Sheldon suffering two big hits during the practice on November 1, 2011, but testified that he only saw the first hit. (JA 1319a).

Cody Reitz testified that there were two separate hits on November 1, 2011. (JA 1342a). With respect to the first hit, he recalls Sheldon being hit and saying that he was fine, and then, subsequently receiving a second hit. (JA 1343a-1344a).

However, shortly thereafter, Mr. Reitz testified that he actually did not see the first hit. (JA 1344a). After this "first hit" Coach Walkowiak immediately went to Sheldon to make sure he was okay, and practice stopped. *Id.* Mr. Reitz did see the second hit that Sheldon sustained. (JA 1346a).

RELATED CASES AND PROCEEDINGS

Defendants/Appellees are unaware of any cases and proceedings related to this case.

SUMMARY OF THE ARGUMENT

"[H]ard as our sympathies may pull us, our duty to maintain the integrity of substantive law pulls harder." *Turner v. Atl. Coast Line R.R. Co.*, 292 F.2d 586, 589 (5th Cir. 1961). This case, although tragic, is not the type of case for which the law provides a remedy.

There was no substantive due process violation here, as Walkowiak neither engaged in conscience-shocking behavior nor committed an affirmative act that created a danger to Sheldon Mann or rendered him more vulnerable than if he had not acted at all. Nevertheless, even if there was a constitutional violation, Walkowiak had qualified immunity based on very recent Third Circuit case law that shows that the constitutional right at issue herein was not so "clearly established" as to be "beyond debate." Plaintiffs' attempts to evade this law should not be permitted.

Finally, the record does not support *Monell* liability. No facts support that the PASD had an unconstitutional policy, custom or practice, or that it failed to train its employees. Additionally, any policy or custom or failure to train did not cause a constitutional violation, because, as noted by the District Court, Walkowiak made any alleged decision to allow Sheldon to return to practice, and there is no evidence Walkowiak believed Sheldon was suffering from concussion symptoms prior to his "second hit."

For all the above reasons, more specifically supported herein, the District Court's June 2, 2016 Order/Judgment must be affirmed.

ARGUMENT

A. This Court must affirm the District Court's June 2, 2016 Order/Judgment, when the record demonstrates that Walkowiak was entitled to judgment as a matter of law on Plaintiffs' state-created danger claim, in that no reasonable juror could conclude that: 1.) Walkowiak engaged in conduct that "shocks the conscience"; or that, 2.) Walkowiak affirmatively used his authority in a way that created a danger to Sheldon Mann or that rendered him more vulnerable to danger than had he not acted at all.

State-created danger theory requires a plaintiff to demonstrate: (1) the harm ultimately caused to the plaintiff was foreseeable and fairly direct; (2) the state-actor acted in willful disregard for the plaintiff's safety; (3) there was some relationship between the state and the plaintiff; and (4) the state-actor used his/her authority to create an opportunity for danger that would not have existed otherwise. *Bright v. Westmoreland Cnty*, 443 F.3d 276, 281 (3d Cir. 2006). The record fails to support Plaintiffs' "state-created danger" claim, as it shows that no reasonable juror could conclude that: 1.) Walkowiak engaged in conduct that "shocks the conscience"; or that, 2.) Walkowiak affirmatively used their authority in a way that created a danger to Sheldon Mann or that rendered him more vulnerable to danger than had Walkowiak not "acted" at all.[10]

[10] These arguments were before the District Court. *See*, (JA 1226a-1249a). An appellee may, without taking a cross-appeal, support a judgment as entered through

1. No reasonable juror could conclude that Walkowiak engaged in conduct that "shocks the conscience."

Although the District Court concluded otherwise, (JA 0016a), the record shows that Plaintiffs cannot meet the second element – that Walkowiak acted in willful disregard of Sheldon Mann's safety. This element requires that Walkowiak's alleged actions have been "shocking to the conscience." *Miller v. City of Phila.*, 174 F.3d 368, 375 (3d Cir. 2011). In other words, because Walkowiak had time to process his actions deliberately, Plaintiffs were required to demonstrate that Walkowiak displayed deliberate indifference towards a substantial risk of serious harm to Plaintiff. *See*, *Phillips v. County of Allegheny*, 515 F.3d 224, 241 (3d Cir. 2008)("three possible standards can be used to determine whether state action shocked the conscience: (1) deliberate indifference; (2) gross negligence or arbitrariness that indeed shocks the conscience; or (3) intent to cause harm")(citing *Sanford v. Stiles*, 456 F.3d 298, 306 (3d Cir. 2006)); *Hinterberger v. Iroquois Sch. Dist.*, 898 F.Supp.2d 772, 788 (W.D.Pa. 2012)(where state actor has time to deliberate about actions and not make hurried judgments, actor's conduct will be

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any matter appearing in the record, though his argument may attack the lower court's reasoning or bring forth a matter overlooked or ignored by the court. *France v. Abbott Labs.*, 707 F.3d 223, 232 n. 15 (3d Cir. 2013). *See also*, *Smith v. Johnson & Johnson*, 593 F.3d 280, 283 n.2 (3d Cir. 2010)(party may argue for affirmance on alternative grounds without filing cross-appeal, provided that same arguments were raised before District Court); *Rite Aid, Inc. v. Houstoun*, 171 F.3d 842, 853 (3d Cir. 1999)(same).

sufficiently "conscience shocking" if it displays deliberate indifference toward substantial risk of serious harm to Plaintiff).

The District Court concluded that the record sufficiently supported Plaintiffs' allegations that Walkowiak observed Sheldon getting hit on the field and subsequently exhibiting symptoms of a head injury, that Walkowiak instructed him to continue to practice and that Walkowiak was or should have been aware of the risk of continuing to play football with a head injury. (JA 0012a-0013a). The Court's conclusion was erroneous.[11]

First, the Court stated that the record supported that "Coach Walkowiak observed Sheldon get hit on the field and exhibit symptoms of a head injury through deposition testimony from both Ryan McGrath and Coach Walkowiak as well as an email from Coach Walkowiak to Carol Boyce." (JA 0013a). In reaching this conclusion, the Court relied on testimony from Mr. McGrath that the first hit

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[11] It should be noted that the court appeared to apply an objective standard, closer to negligence, when it reached its decision on the deliberate indifference prong, because, even assuming the evidence was as stated by Plaintiffs, there is no evidence, and the court pointed to no evidence, that Walkowiak "subjectively appreciated" the risk of allowing Sheldon to continue to practice after the "first hit." (JA 0027a). This Court has "not yet definitively answered the question of whether the appropriate standard in a non-Eighth Amendment substantive due process case is subjective or objective." *Kaucher*, *supra*, 455 F.3d at 428. *See also*, *Nicini v. Morra*, 212 F.3d 798, 812 (3d Cir. 2000)(en banc); *Patrick v. Great Valley*, 296 F. Appx. 258, 262 n.3 (3d Cir. Oct. 9, 2008); *Benedict v. SW. Pennsylvania Human Servs., Inc.*, 98 F. Supp. 3d 809, 826 (W.D.Pa. 2015). But it has "expressed approval of a subjective standard." *Kaucher*, 455 F.3d at 427. If the subjective standard is appropriate, the evidence below was insufficient to send the state-created danger claim to the jury.

to Sheldon at the November 1, 2011 practice was "hard." (JA 1577a). But it disregarded testimony from Mr. McGrath that he could not say whether the hit involved the head, (JA 1578a), that he was not at the practice where Sheldon was injured, (JA 569a), and that he admitted that Walkowiak could "talk about this much better than I could on what happened." *Id.*

The court also relied on testimony from Walkowiak that a stinger could be a symptom of a concussion depending on where you were hit, (JA 515a), and that he had seen Sheldon rolling his shoulder after the "first hit" play. *Id.* However, it disregarded that Walkowiak did not think or know that Sheldon suffered a stinger (merely mentioning a "stinger" as part of a list of things that could cause you to roll your shoulder). (JA 505a, 514a-516a). Further, even if Walkowiak felt that Sheldon had suffered a stinger, Sheldon said he was fine after that play, (JA 509a-511a, 515a), and ran around the next 20-25 plays without incident or any signs or symptoms of a concussion. (JA 209a-210a, 511a, 520a, 674a, 718a-719a, 1052a, 1088a, 1198a). And a stinger did not necessarily warrant removal from practice or play where, as here, the player expressed that he or she was okay, (JA 207a, 505a, 514a-516a, 704a-705a), and practice was stopped. (JA 1344a). As a result, there is insufficient evidence that any PASD coach, including Walkowiak, (JA 0027a), knew or even suspected that Plaintiff was suffering from symptoms of a

concussion and continued to allow him to practice in the face thereof.[12] The evidence in support of any "knowledge" or "notice" on the part of Walkowiak that Sheldon was suffering concussive symptoms after a "first hit" was, at best, speculative and conjectural (not a reasonable inference) and could not support a state-created danger claim. *See*, *Rockland County Sheriff's Deputies v. Grant*, 670 F. Supp. 566, 568 (S.D.N.Y. 1987)(citing *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986)("Issues based on speculation or conjecture will not defeat a summary judgment motion.")).

Even if Coach Walkowiak should have known that Sheldon was suffering concussive symptoms after a "first hit," and removed him from practice until he could have been examined by a trainer, Plaintiffs claim was still insufficient as evidencing mere negligence and not willful disregard. This Court has frequently stated that behavior which is merely negligent does not "shock the conscience." *See*, *Fagan v. City of Vineland*, 22 F.3d 1296, 1305 (3d Cir. 1994)(finding that "[t]he Supreme Court has thus far held that mere negligence is insufficient to trigger constitutional liability."). *See also*, *Miller*, *supra*, 174 F.3d at 375.

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[12] Therefore, even if Sheldon Mann was affirmatively told to continue practicing, there is no evidence that Walkowiak was aware that there was a risk, let alone a "substantial risk of serious harm" in allowing Sheldon to continue to practice. (JA 0027a). The email cited by the District Court, (JA 0013a, 1580a-1581a), does not establish any issue as to subjective appreciation on the part of Walkowiak. According to that email, the "first hit" was not a "red flag," Sheldon merely appeared to have something like a stinger as he was experiencing some shoulder discomfort, and Sheldon said he was "fine to go" after the play. (JA 1580a-1581a).

Under similar factual circumstances where a female basketball player was pressured, goaded and coerced into playing a basketball game by her coaches when they knew she had suffered a concussion the previous day and was still suffering from concussion symptoms , the court in *Yatsko v. Berezwick*, dismissed a complaint that set forth a state-created danger claim. It determined that, even if the defendants' improperly encouraged plaintiff to play, such encouragement was in the run of normal coaching methods that would not shock the conscience. 2008 U.S.Dist.LEXIS 47280, at *11-*20 (M.D.Pa. June 13, 2008). And that failure to follow PIAA regulations would at best constitute negligence per se – insufficient to shock the conscience. *Id.*, at *18-19.

Likewise, in *Lavella v. Stockhausen*, 2013 U.S.Dist.LEXIS 62428 (W.D.Pa. May 1, 2013), the court also dismissed a state-created danger action. The court dismissed the action after a previously concussed cheerleader was struck in the head by another cheerleader during practice and there were allegations that the coach knew of the plaintiff cheerleader's continuing headaches, the seriousness of concussions, as well as additional risks from repeat concussions, and yet, asked the plaintiff to participate in stunting. *Id.*, 2013 U.S.Dist.LEXIS 6242, at *9-*12.

Refusing to find that the alleged conduct of Walkowiak conscience-shocking would also have been consistent with *M.U. v. Downingtown*, 103 F.Supp.2d 612 (E.D.Pa. 2015), where the court also refused to find that the second prong of the

state-created danger theory had been met. There, in dismissing the plaintiff's complaint, the court noted that it was particularly relevant that there were no allegations of subjective complaints from the plaintiff or objective signs that she had suffered a concussion, i.e., "that she was clearly disoriented or displaying erratic behavior." *M.U.*, 103 F.Supp. 3d at 624. Also noteworthy was that there were no allegations of physical manifestations of a concussion like dry heaving, or that she complained of symptoms of a concussion to a coach or anyone else, or that she asked to come out of the game. *Id.* She was merely crying because she knew that she had been hit in the head. *Id.*

The court concluded that, even if the coach had observed M.U. crying, this was not a ***definitive indicator*** that she had suffered a concussion. *Id.* Also, despite the fact that the opposing coach stated to M.U.'s coach that she should be taken out of the game and that one of M.U.'s teammates had said to her coach that M.U. had been hit in the head and needed to come out to be evaluated, the fact that M.U. was not suffering from objective symptoms of a concussion excused the coach's failure to heed the warnings and indicated that he was not deliberately indifferent. *Id.*

These persuasive holdings illustrate that the District Court tacked too close to a negligence standard and abused its discretion when it determined that the record sufficiently supported that the alleged affirmative conduct of Walkowiak "shocked the conscience." The court's Order entering summary judgment in favor

of Defendants/Appellees should be affirmed on this alternative basis. Failure to do so could subject numerous school districts to Section 1983 suits and attendant remedies/damages on the basis of mere negligence, possibly leading many to abandon football as a sport in the face of such broad potential liability.

This case is not like *Alt v. Shirey*, 2012 U.S.Dist.LEXIS 26882 (W.D.Pa. Feb. 7, 2012). Unlike that case, where Defendant coaches clearly knew of the plaintiff's concussive symptoms, and his "obvious incoherent and vulnerable state," *Alt*, 2012 U.S.Dist.LEXIS 26882, at *22, here there is no such knowledge and intentional or willful disregard thereof. In *Alt*, it was alleged that: 1.) Plaintiff was involved in a helmet-to-helmet collision with a member of the opposing team; 2.) he was "clearly disoriented" and jogged off of the playing field in a laborious fashion, "aimlessly walk[ing] the length of his team's sideline," immediately after leaving the playing field, instead of reporting to an assigned coach as was customary for Plaintiff and his teammates; 3.) Plaintiff's teammates reported to him that his "behavior was erratic upon reaching the sideline and they immediately recognized that something was awry with the Plaintiff," and, 4.) "[d]espite Plaintiff's erratic and confused behavior, Defendant Albert and Defendant Rizzo failed to evaluate the Plaintiff to ensure that he was in a sufficient condition to reenter the game." 2012 U.S.Dist.LEXIS 26882, at *4. It was additionally alleged that, almost immediately after this first helmet-to-helmet collision, a defendant

coach approached Plaintiff and "instructed him to deliver a substantial hit to the opposition's middle linebacker," and to "blow him up." *Id.*, at *5. When instructing Plaintiff to deliver the "substantial hit," the defendant coach ***personally observed the disorientated and confused disposition of the Plaintiff, yet placed Plaintiff back onto the field of play***. *Id.* The allegations also indicated that game film reflected that the plaintiff had engaged in a violent helmet-to-helmet collision that left him visibly injured, with the plaintiff returning to "team's huddle with his head lowered into his chest." *Id.* It was averred that the defendant coaches knew of the plaintiff's disoriented and confused state, and that, after witnessing two helmet-to-helmet collisions, they allowed Plaintiff to remain in the game. *Id.*, at *5-*6. Allegations indicated that fellow players later informed the plaintiff that his condition worsened throughout the game and he was told that he was acting in a "drunken state." *Id.*, at *6. Finally, at least two of the plaintiff's teammates approached one defendant coach to advise him of Plaintiff's incoherent condition but the coach did nothing. *Id.*

The foregoing allegations are a far cry from what the record supports here. The allegations in *Alt* are more akin to the egregious behavior that has traditionally been found to rise to the level of a substantive due process violation. *See*, *Yatsko*, *supra*, 2008 U.S.Dist.LEXIS 47280, at *15-*16 (citing cases). The District Court

should not have concluded that, here, "a reasonable juror could conclude that this 'shock the conscience' element has been satisfied." (JA 0014a).[13]

2. No reasonable juror could conclude that Walkowiak affirmatively used his authority in a way that created a danger to Sheldon Mann or that rendered him more vulnerable to danger than had he not "acted" at all.

The District Court also misapprehended that the fourth, "affirmative act" prong of the state-created danger test, *See*, *Bright*, *supra*, 443 F.3d at 281, had been sufficiently supported. The court cited testimony from Taylor Gutekunst, a player on the football team in 2011, who only stated that Walkowiak had the authority to remove a player from practice, not that he did so with Sheldon Mann. (JA 0015a, 905a). It had earlier cited testimony from another player, Alex Miller, that indicated that Coach Walkowiak told Sheldon to continue practicing after the "first hit," (JA 1128a), but later indicated he did not know which coach checked on him after the play, that he was not exhibiting outward signs of a concussion and that he only started practicing again in subsequent plays, but not necessarily immediately

[13] Even if there were two hits, and after the first hit Sheldon Mann exhibited some signs of a concussion, as alleged by Plaintiffs, (JA 1478a-1485a), there is no evidence that Walkowiak observed those signs, was informed of those signs by coaches or players or recklessly or intentionally disregarded those signs. (JA 0027a). Or that the plays involving Sheldon on November 1, 2011, were anything other than clean football plays. (JA 311a). Without said evidentiary support, pursuant to the above-cases, it cannot be said that the alleged affirmative acts of Walkowiak shocked the conscience.

thereafter. (JA 1131a). He also offered no testimony regarding what Sheldon may have told Walkowiak about how he was feeling after the play.

These above, alleged facts and others cited by Plaintiff, do not square with relevant cases involving forcing, compelling or requiring a player to re-enter practice or a game, that have been found sufficient to satisfy the fourth element of the state-created danger test. *See e.g.*, *Moeck v. Pleasant Valley*, 983 F.Supp.2d 516, 527-528 (M.D.Pa. 2013); *Alt*, *supra*, 2012 U.S. Dist. LEXIS 26882, at *34-35; *Sciotto v. Marple Newton*, 1999 U.S. Dist. LEXIS 1311, at *11-*12 (E.D.Pa. Feb. 9, 1999). This case is similar to those cases where the state actor was a mere passive bystander who failed to take a student out of harm's way or failed to assess his injuries properly, which have been found insufficient to support a substantive due process claim. *See e.g.*, *M.U.*, *supra*, 103 F.Supp.3d at 635 (concluding that soccer coach's actions were of "omission in that he failed to take her out of the game, failed to evaluate her for a concussion, and failed to send her for a medical evaluation"); *Yatsko*, *supra*, 2008 U.S. Dist. LEXIS 47280, at *13-*16 ("The coaches also ***did not prevent*** plaintiff from acting on her desire to play in a subsequent game, despite their knowledge of her continued physical maladies."); , *Leonard v. Owen J. Roberts*, 2009 U.S. Dist. LEXIS 51468, at *18-*20 (E.D.Pa. Mar. 6, 2009)(dismissing state-created danger claim based upon "***failure*** of the School District Defendants to take appropriate steps to address and monitor

potentially unsafe athletic activities . . . ."), and *Lavella*, *supra*, 2013 U.S. Dist. LEXIS 62428, at *11-*12 ("At most, there is an allegation that Defendant knew of Plaintiff's continuing headaches, the seriousness of concussions and additional risks from repeat concussions, and she ***asked*** Plaintiff to participate in stunting.")(quotations omitted). Consequently, this Court may affirm judgment in favor of Walkowiak on this alternative basis.

B. In the alternative, this Court must affirm the District Court's June 2, 2016 Order because Walkowiak was entitled to qualified immunity.

Even if the District Court was right that Plaintiffs could possibly establish their state-created danger claim,[14] the record demonstrates that Walkowiak was entitled to qualified immunity. The court correctly determined that Sheldon Mann's allegedly violated right, *See*, (JA 1412a), was not clearly established. This case is within the wide breadth and deep reach of qualified immunity's coverage. *See*, *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015)(*per curiam*)(quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)("Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'")).

"[Q]ualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of

[14] Defendants/Appellees, as set forth *supra*, of course, contend that the record does not sufficiently support that a constitutional violation has occurred, rendering the rest of the qualified immunity analysis unnecessary. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

which a reasonable person would have known." *Mullenix*, 136 S. Ct. at 308 (quoting *Pearson*, *supra*, 555 U.S. at 231). A right is clearly established if it is "sufficiently clear that ***every reasonable official*** would have understood that what he is doing violates that right." *Id.* (emphasis added). And while there need not be "a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Most recently, the Supreme Court has suggested that, for a right to be clearly established, there must be ***applicable precedent from that Court***, or, possibly, ***a robust consensus of cases of persuasive authority in the Court of Appeals***. *Taylor v. Barkes*, 135 S.Ct. 2042, 2044 (2015)(*per curiam*)(quoting *City & Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1778 (2015)).

Importantly, in considering the "clearly established law" prong, the right may not be defined "at a high level of generality." *al-Kidd*, 563 U.S. at 742. Therefore, the Court's inquiry into the constitutional right that Plaintiffs say was infringed upon "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 136 S. Ct. at 308 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)(*per curiam*)). *See also*, *Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 638 (3d Cir. 2015). Plaintiffs' statement of the right at issue below, Sheldon's alleged "right to freedom from school officials' deliberate indifference to, or affirmative acts that increase the danger of, serious injury from

unjustified invasions of bodily integrity perpetrated by third parties in the school setting," (JA 1412a),[15] improperly appears to be very general. *See*, *Estep v. Mackey*, 639 F.Appx. 870, 873 (3d Cir. 2016)(" . . . the District Court defined the right at issue as the Fourth Amendment right to be free from the excessive use of force. This formulation lacks the required level of specificity . . . because it does not describe the specific situation that the officers confronted.").

A more adequate description might be "a student-athlete's constitutional right to be free from being ordered to resume practice or play after sustaining a major hit and displaying concussion-related symptoms of dizziness, wobbling, and disorientation," as described earlier in Plaintiffs' *Brief for Appellant*, at page 18.

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[15] This was the right that was also referenced in *Sciotto v. Marple Newton*, 81 F.Supp.2d 559, 568 (E.D.Pa. 1999). But, given this Court's holding in *Spady*, *supra*, that supported that that right was not yet clearly established as of 2015, 800 F.3d at 640 n. 7 ("Indeed, when faced with factual scenarios analogous to *Sciotto* – i.e., injuries sustained during school activities – several district courts in this circuit have reached decidedly different conclusions and declined to find a constitutional violation. . . . there is no vigorous consensus of authority to support *Sciotto*'s broad holding."), *see also*, *Dorley v. South Fayette Twp.*, 2016 U.S.Dist.LEXIS 71180, at *11 n. 5 (W.D.Pa. June 1, 2016)("[t]his Court is not sold that *Sciotto*'s definition of the constitutionally-protected right would now make the grade . . . ."), the Plaintiffs have now pivoted and, contrary to precedent, seek to define Sheldon's right even more generally as "an individual's right not to be removed from a safe environment and placed into one in which it is clear that harm is likely to occur, particularly when the individual may, due to youth or other factors, be especially vulnerable to the risk of harm." *Brief for Appellant*, at pp. 21-22. Unfortunately, this new claim was not raised below and has been waived. *See*, *Srein v. Frankford Trust Co.*, 323 F.3d 214, 224 n.8 (3d Cir. 2003)("we will not consider issues that are raised for the first time on appeal absent compelling reasons." (quotation omitted)).

Nevertheless, even if as defined in the lower court, the right was not clearly established on November 1, 2011.

Plaintiffs' alleged clearly-established right runs aground of this Court's precedential opinion in *Spady v. Bethlehem Area Sch. Dist.*, *supra*. In that Section 1983 case arising out of a student's death by "dry drowning" after a mandatory swim class run by his physical education teacher, *Spady*, *supra*, 800 F.3d at 635, this Court granted qualified immunity to the physical education teacher. *Id.*, at 641. It defined the constitutional right narrowly, stating that there was no clearly established right to dry-drowning intervention protocols while participating in physical education class. *Id.* This Court noted that "when faced with factual scenarios analogous to *Sciotto* [a case upon which the *Spady* plaintiff principally relied (as the Plaintiffs here)] – i.e., injuries sustained during school athletic activities – several district courts in this circuit have reached decidedly different conclusions and declined to find a constitutional violation." *Id.*, at 640 n. 7. Those diverse decisions "demonstrate no vigorous consensus of authority to support *Sciotto*'s broad holding." *Id.* In 2009, therefore, there was no "vigorous consensus" on what sorts of circumstances surrounding school-related athletic injuries gave rise to a constitutional violation. *See*, *Id.*

This Court in *Hinterberger v. Iroquois Sch. Dist.*, 548 F.Appx. 50 (3d Cir. Dec. 5, 2013)[16] had made a similar observation – writing that the district court opinions (including *Sciotto*) relied upon by the lower court did "not establish the law of the circuit, and are not even binding on other district courts within the district." 548 F.Appx. at 53. It concluded that the cases did not place the coach on notice that her actions amounted to a constitutional violation, *Id.*, at 53-54, while also emphasizing that cases from other courts of appeals also did not support the plaintiff's claim that her alleged constitutional right was clearly established, and also cited various cases that disagreed as to the applicability of the state-created danger doctrine in the context of schools. *Id.*, at 54 (citing cases). This Court concluded that It was not "beyond debate," as of March 2004 (post-*Sciotto*), that the coach's decision to introduce a new cheerleading stunt following a delay of several months, through the instruction of an experienced cheerleader, with the use of multiple spotters, but without any matting, violated Hinterberger's substantive due process rights. *Id.* It also found that no published decision of the Third Circuit had found by that time, ***in 2013***, that a state-created danger arises when coaches fail to take certain precautions in athletic practice or in any analogous situation. *Id.*, at 53. At the time of the November 1, 2011 practice, there was, therefore, no

[16] Therein, a cheerleader suffered a severe closed head injury after attempting a "twist down cradle," a new stunt introduced by her coach at practice in a room without adequate matting. *Hinterberger*, *supra*, 548 F.Appx. at 53.

precedential Third Circuit case that would have guided Walkowiak and informed him that his alleged failure to remove Sheldon Mann from practice, after he had allegedly suffered a "first hit," that allegedly caused concussion symptoms, violated his substantive due process rights. This fact alone should cause this Court to affirm qualified immunity in his favor. No "robust consensus" of persuasive authority in this Court, *Taylor*, *supra*; *City & Cnty. of S.F.*, *supra*, informed him that what he was allegedly doing violated Sheldon Mann's alleged right either.[17]

As if the foregoing were not enough, it is uncontradicted that the Commonwealth of Pennsylvania did not pass the "Safety in Youth Sports Act," *24 P.S. §§ 5321*, *et seq.*, which required training for coaches in preventing concussions to student athletes, education for parents and athletes, return to play restrictions and medical clearance for athletes, until November 9, 2011. *See gen.*, *24 P.S. § 5323*. The Act did not become effective until July 1, 2012. *Id.* Thus, Walkowiak's alleged conduct was not even regulated or penalized by the state, *24 P.S. § 5323(f)*, until 2012. Yet, Plaintiffs want this Court to hold that "every reasonable official" would have understood in November of 2011 that Walkowiak's alleged conduct in failing to remove Sheldon from practice violated his alleged right (general or not), (JA 1412a).

[17] District Court cases may be insufficient in light of *Taylor*, *supra*.

As the *Spady* Court observed, colorable constitutional violations had previously been found in cases in which an adult educator directly engaged in conduct that was both egregious *and* intentionally and purposefully focused on causing physical harm to a student. *See Spady*, 800 F.3d at 641 (citing cases). The *Spady* Court then contrasted those situations, each involving what was in reality direct physical battery, with the array of *Sciotto*-like cases, each of which (no matter the outcome) involved (as pled) grossly negligent or reckless conduct which created a real and appreciable risk of serious harm, but lacked an intent-to-injure component, and concluded that, at least as of September 1, 2015 (the date *Spady* came down), the constitutional right at issue in *Sciotto* was not so "clearly established" as to be "beyond debate." *Id.*, 800 F.3d at 640 n. 7, 641-642. It is that rule of law that this Court is bound to apply here to Plaintiffs' equivalent formulation of Sheldon Mann's right (JA 1412a). The June 2, 2016 Order must be affirmed.

Over the course of 10 pages of its brief on appeal, Plaintiffs attempt to address how Sheldon Mann's alleged right, as newly defined on appeal, *Brief for Appellant*, at pp. 21-22, was clearly established in 2011. Plaintiffs rely on this Court's recent decision in *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235 (3d Cir. 2016). However, *L.R.* does not salvage Plaintiffs' case against Walkowiak.

Initially, *L.R.* involved vastly different factual circumstances. In that case, a kindergartener was placed in the "obvious," common-sense danger of being permitted to leave school premises with an unidentified stranger. 836 F.3d at 240-241. This is not a case where Sheldon was removed from a "safe" environment and placed into one where his danger was exceedingly obvious. He was already playing the inherently dangerous sport of football. *See e.g.*, *Benitez v. NYC B.O.E.*, 541 N.E.2d 29, 34 (N.Y. 1989)(dismissing claims of paralyzed football player because "[f]atigue and, unfortunately, injury are inherent in team competitive sports, especially football"). And he was able to protect himself from danger. *See e.g.*, *Hammond v. B.O.E.*, 639 A.2d 223, 226 (Md.App. 1994)("[M]inors are held to 'sufficiently appreciate[] the dangers inherent in the game of football,' to know that 'football is a rough and hazardous game and that anyone playing or practicing such a game may be injured.'")(citations omitted)). Despite having been advised of the dangers of concussions and the dangers of practicing while suffering concussion symptoms, (JA 1286a, 1337a), he told his coach after an allegedly hard "first hit" at practice that he was fine, (JA 506a-511a, 520a, 718a-719a, 1088a, 1343a-1344a), and was, therefore, allowed to continue practicing. There is no evidence Walkowiak was aware of any concussion symptoms after the "first hit." *Id.*; *see also*, (JA 0027a).

Additionally, even if the inquiry is whether the facts fall within the elements of the state-created danger theory and whether it would be clear to ***a*** reasonable official that his behavior was unlawful under the circumstances, *L.R.*, *supra*, 836 F.3d at 248, as per *Spady*, *supra*, and *Hinterberger*, *supra*, the law was not settled – even as late as 2015. Given the facts, which do not support that Walkowiak directly engaged in conduct that was egregious and intentionally and purposefully focused on causing physical harm to a student, *Spady*, 800 F.3d at 641 (collecting cases), it was not clearly established that his alleged conduct fell within the elements of the state-created danger theory.

Finally, the potentially analogous situations here, were not as described in *L.R.*, 836 F.3d at 249-250, where vulnerable individuals had been knowingly abandoned in obviously dangerous situations (and where it might be said that the defendants engaged in egregious and intentional conduct), but like those described in *Spady*, *supra*, 800 F.3d at 641. Those cases, which involved grossly negligent conduct which created a real and appreciable risk of serious harm, but lacked an intent to injure component, were not so clearly established as of September 1, 2015, as to be beyond debate. *Id.*, 800 F.3d at 640. As such, *L.R.* is inapposite in key respects. Based on *Spady* and *Hinterberger*, the June 2, 2016 Order that granted qualified immunity to Walkowiak must be affirmed.

C. In the alternative, must this Court affirm the District Court's June 2, 2016 Order because Plaintiffs/Appellants failed to establish that any

violation of Sheldon Mann's rights was caused by a policy, custom, or practice of PASD, or a failure to train.

Plaintiffs have alleged a policy or custom based upon an alleged: 1.) policy or custom of failing to medically clear student athletes; 2.) policy or custom of failing to enforce and/or enact adequate policies for head injuries; and, 3.) failure to train the coaches on proper procedures and a safety protocol relating to head injuries. (JA 0019a-0020a). The court appropriately concluded that the record did not support any of the foregoing allegations.[18]

The Third Circuit has held that a municipality may be "independently liable for a substantive due process violation even when none of its individual employees is liable." *Sanford*, *supra*, 456 F.3d at 314.[19] However, it is well established that a School District, like a municipality, "cannot be liable solely as an employer because there is no *respondeat superior* theory of municipal liability in § 1983 actions." *Brown v. Dep't. of Health*, 318 F.3d 473, 482 (3d Cir. 2003). Instead, claims of this nature may only survive dismissal "when the 'execution of a

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[18] Plaintiffs repeatedly cite their expert in support of their municipal liability claim, but neglect to realize that if the factual record itself does not sufficiently support municipal liability or causation, any legal conclusions or opinions rendered by the expert cannot rescue the claim. *Pa. Dental Ass'n. v. Med. Serv. Ass'n.*, 745 F.2d 248, 262 (3d Cir. 1984).

[19] Deprivation of a substantive constitutional right is still required. *Sanford*, *supra*; *see also*, *Kaucher*, 455 F.3d at 423 n. 2 (initial inquiry under municipal liability doctrine asks whether Plaintiff asserted violation of cognizable constitutional right). Absent sufficient supported for Plaintiffs' state-created danger claim, their municipal claim also fails.

government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.'" *Watson v. Abington Twp.*, 478 F.3d 144, 155 (3d Cir. 2007)(quoting *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 694 (1978).

Simply put, these claims may be alleged based on formal action (a policy) or informal action (a custom) on behalf of the municipality. Establishing a municipal *policy* requires a decision-maker with final authority under state law to issue "an official proclamation, policy, or edict." *Id.*, at 155 (quoting *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir.1990)). A *custom* requires such a decision-maker's "knowledge of, and acquiescence to, a practice," or a course of conduct that is "so well-settled and permanent as virtually to constitute law." *Id.*, at 155-56 (internal quotation marks and citations omitted). *Monell* liability does not attach under either theory unless a policy-making official with "'unreviewable discretion,'" *Id.*, at 156 (quoting *Andrews v. Phila.*, 895 F.2d 1469, 1481(3d Cir. 1990)), "is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom," *Id.*, at 156-157 (quoting *Bielevicz*, 915 F.2d at 850). Moreover, plaintiffs must prove that the alleged policy or custom proximately caused their injuries, meaning they must show "the specific violation was made reasonably probable by permitted continuation of the custom." *Id.*, at 156 (internal quotation marks and citation omitted). Plaintiffs must also establish that the PASD

was the "moving force behind the injury alleged." *Chambers ex rel. Chambers v. Sch. Dist. Of Philadelphia Bd Of Educ.*, 587 F.3d 176, 193 (3d Cir. 2009)(internal quotation marks and citation omitted).

Here, there is no record evidence to support any formal ***policy*** pursuant to which the School District may be held liable. Specifically, there is no evidence that "any final policy-making official issued any type of official proclamation, policy, or edict whereby the School District formally endorsed" a refusal to medically clear student athletes or to deliberately ignore head injuries. *Dorley v. South Fayette Twp. Sch. Dist.*, 129 F. Supp. 3d 220, 240-41 (W.D. Pa. 2015). Nor do Plaintiffs identify who made the policy that they claim caused the violation of Sheldon's rights or submit any evidence to support an allegation that the School District's final policy-makers acquiesced in Walkowiak's actions. *Id.*

Rather, the record evidence shows that at the time of Sheldon's incident, PASD had a comprehensive policy for evaluating and medically clearing student athletes following an injury. Their 2011-12 Athletic Handbook and the District-adopted OAA Concussion Policies, (JA 870a-875a), both of which were made known to the coaches at the time of Sheldon's incident. (JA 475a, 478a, 564a, 622a-623a, 661a, 882a). The Athletic Handbook provided that it was Defendants' policy to "exclude any contestant who . . . has suffered illness or injury until that contestant is pronounced physically fit by the school physician." (JA 154a-155a). It also

provided that it was Defendants' policy for the head athletic coach to complete or have the athletic trainer complete accident report forms, submit them to the school nurse, and to inform the athletic trainer of any injuries which occurred during practices or games. (JA 158a-159a). The coaches "***must*** follow the recommendation of the Athletic Trainer in all matters regarding the athlete's participation in practices and games." *Id.* (emphasis added).

The Handbook also contained a policy dedicated to the proper handling of injured players, which includes procedures (1) requiring that an injured athlete never be moved until the extent of the of the injury is known and (2) prohibiting student-athletes from returning to practice or competition without being cleared by the athletic trainer first. *See*, (JA 170a-171a). Testing (imPACT) had also been utilized prior to the 2011 season. (JA 277a-278a, 485a, 537a-539a, 861a-869a).

The foregoing policy of medically clearing athletes is comprehensive enough to apply to student athletes who suffered concussions or head injuries. It applied to concussions in practice. (JA 480a-482a). *See also*, (JA 196a, 198a, 200a, 784a, 1116a, 1146a-1148a). Nevertheless, even if the policy was inadequate, it does not demonstrate deliberate indifference or that PASD was operating according to any official policy designed to ignore concussions and force injured players to continue playing. *See*, *Chambers*, *supra*, 587 F.3d at 194 n. 23 ("the fact that the School District's attempts [to provide educational services] ultimately proved inadequate on

several fronts does not demonstrate that the School District was operating according to any official policy designed to derail the implementation of that plan or otherwise deny [the plaintiff] educational benefits to which she was statutorily entitled.").

Plaintiffs have submitted no evidence of other injuries or any players repeatedly getting injured "in open view of coaches and trainers," yet being ordered "back onto the field after sustaining blows to the head." There is no evidence of a pattern whereby Defendants repeatedly ignored head injuries. Plaintiffs cannot point to any evidence of any "practices . . . so permanent and well settled as to virtually constitute law." *Berg v. County of Allegheny* , 219 F.3d 261, 275 (3d Cir. 2000)(citation and internal quotation marks omitted); *see also*, *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 252 (3d Cir. 1999)(rejecting 1983 claim against municipality where plaintiff provided no evidence that school district's policy was to ignore the responsibilities imposed by IDEA – only that it failed to fulfill responsibilities). Crediting Plaintiffs' allegations, this case is more like *Chambers*, where this Court explained that "[w]hile it is certainly true that the School District in this case too frequently failed to fulfill commitments it had made with respect to [the plaintiff's] education, the record does not support a finding that the School District's policy is to ***ignore*** the responsibilities imposed by the IDEA." 587 F.3d at 194 (emphasis added). Similarly, here, even if it is true that PASD failed to fulfill its commitment to appropriately attend to Sheldon after he was injured during practice,

"the record does not support a finding that the School District's policy is to ***ignore***" its responsibilities regarding injured student athletes. *Chambers*, 587 F.3d at 194. To the contrary, the evidence shows that shortly after Sheldon's alleged injuries in November 2011, PASD began discussing how to address concussions and what protocols should be put in place. *See e.g.*, (JA 1759a, 1761a). And that imPACT testing was mandated in 2013. (JA 485a).

Plaintiffs' reliance on a failure to train theory to establish municipal liability is equally unavailing. Specifically, Plaintiffs argue that the PASD should be held liable based on their failure to train coaches on safety protocol and indicators of a concussion or other head injury.

In the context of a failure to train theory, the Third Circuit has consistently held that "a ***pattern of similar constitutional violations*** by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Hinterberger*, *supra*, 898 F. Supp. 2d at 808 (emphasis added); *Berg*, 219 F.3d at 276; *see also*, *Connick v. Thompson*, 563 U.S. 51, 62 (2011)("Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights."). Here, a review of the record yields no evidence of a pattern of similar constitutional violations suffered by members of the football team, or any other student-athletes getting injured other than Sheldon that would put PASD on

notice of any purported failure to train. *See*, *Hinterberger*, *supra*, 898 F. Supp. 2d at 808 (finding no municipal liability for this same reason). Plaintiffs point to no evidence in the record to show that there was a history of the School District ***ignoring*** the risk of concussions or a pattern of sending injured players back into practice. There is no evidence of any complaints prior to the date of Sheldon's injury concerning unsafe practices regarding head injuries or instructing injured players to continue playing. *See, e.g.*, *Id.*, 898 F.Supp.2d at 806 (holding that the school district's liability could not be established based on an allegedly deliberately indifferent custom or policy by the School Board because the President of the School Board denied any knowledge of complaints, prior to the date of the plaintiff's injury, concerning unsafe practices by the high school cheerleading squad or the coach in particular).

Nor does the record support "single-incident" liability. In *Connick*, *supra*, the Supreme Court explained that its' decision in *City of Canton v. Harris*, 489 U.S. 378 (1989) "left open the possibility that, in a narrow range of circumstances, a pattern of similar violations might not be necessary to show deliberate indifference." *Connick*, 563 U.S. at 63. The *Canton* court theorized that a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the "highly predictable consequence," namely, violations of constitutional rights. *Id.*

Here, however, the facts, even when construed most favorably to Plaintiffs, do not place this case within the narrow range of situations where "single-incident liability" could reasonably be found. In *Hinterberger*, *supra*, the court held that because the foreseeability of constitutional harm to the cheerleading squad members was not so patently obvious as that described in *Canton*, the court found "no basis upon which the record could support a finding of 'single-incident' liability." 898 F.Supp.2d at 809. Similarly, here, the foreseeability of constitutional harm to football team members was not so patently obvious, particularly given the absence of the need to make split-second decisions like in the hypothetical posed in *Canton*, and given the policies and procedures already in place and outlined in the Athletic Handbook that required that injured players be cleared by a medical professional before returning to play. Accordingly, it was proper for the District Court to hold that Plaintiffs failed to adduce sufficient evidence for their municipal liability claim.

However, even assuming Plaintiffs established a policy or custom, they were required to also demonstrate that PASD, through its deliberate conduct, was the "moving force" behind any injury. *Berg*, 219 F.3d at 276. Where the policy does not facially violate the Constitution, this causation element can only be established by demonstrating that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences. *Id.* "A showing of simple

or even heightened negligence will not suffice." *Id.* Here, Plaintiffs have failed to establish this required causal link.

In *Hinterberger*, *supra*, in raising a claim against the School District, the plaintiff challenged the High School Athletic Director's policy decision to refuse to allocate funds for better matting in a room where a cheerleader had been injured in a fall, or alternatively, to provide greater access to the high school gym. 898 F. Supp. 2d at 805. In rejecting the municipal claim, the court explained that the alleged policy decision could not be said to be the "moving force" behind the plaintiff's injury. *Id.* Rather, the cause of the plaintiff's injury was the coach's affirmative conduct in introducing the squad to the new stunt in an unsuitable environment. *Id.*

Similarly, here, any PASD failure to implement a policy that specifically addressed concussions and head injuries, or purported failure to train employees in addressing concussions and head injuries, cannot be said to be the "moving force" behind Sheldon's injury. Even if there was an inadequate policy that "ultimately contributed" to Sheldon's injury, the record does not support that it was the "moving force" behind Plaintiff's injury because, ultimately, it was Walkowiak who allegedly made the determination to send Sheldon back into practice after his "first hit." *Id.* Plaintiffs have also failed to establish causation because any policy likely would not have had any effect on the situation, as there is no evidence that Walkowiak actually believed that Sheldon was suffering from concussive symptoms. (JA 0027, 209-210a,

674a, 719a, 1052a, 1088a, 1198a). Accordingly, Plaintiffs have failed to adduce sufficient evidence for their municipal liability claim. Judgment in favor of the PASD must be affirmed.

CONCLUSION

For all of the foregoing reasons, the June 2, 2016 Order/Judgment in favor of Defendants/Appellees must be affirmed.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

The undersigned hereby certifies that, pursuant to 3rd Circuit Local Appellate Rules 28.3(d), Thomas A. Specht, is a member of the Bar of the United States Court of Appeals for the Third Circuit.

CERTIFICATE OF COMPLIANCE WITH ELECTRONIC FILING AND VIRUS CHECK REQUIREMENTS

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[20] The Brief for Appellant was filed before December 1, 2016. As such the 14,000 word limit applies to this brief.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief for Defendants/Appellees, Palmerton Area School District and Christopher Walkowiak, was submitted to the Court electronically and that the court will provide a copy to the parties listed below electronically:

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