Estate of Esquivel v. Brownsville Indep. Sch. Dist.

United States District Court for the Southern District of Texas, Brownsville Division

September 11, 2018, Decided; September 11, 2018, Filed, Entered

Civil Action No. 1:16-cv-0040

Reporter
2018 U.S. Dist. LEXIS 231738 *; 2018 WL 10150656

THE ESTATE OF ISIS LUCERO ESQUIVEL, et al., Plaintiffs, v. BROWNSVILLE INDEPENDENT SCHOOL DISTRICT, Defendant.

Prior History: *Estate of Esquivel v. Brownsville Indep. Sch. Dist., 2018 U.S. Dist. LEXIS 231742 (S.D. Tex., June 27, 2018)*

Core Terms

accommodations, video, deliberate indifference, Aquatics, training, employees, disability, summary judgment, infer, clip, nose, spoliation, pool, issue of material fact, public entity, deliberately, failure of defendant, reasonable jury, school district, Recommendation, underwater, violations, sanctions, Adaptive, benefits

Counsel: **[*1]** For The Estate of Isis Lucero Esquivel, Deceased, Gregoria Alvarado, Individually and on Behalf of the Heirs of Isis Lucero Esquivel, Plaintiff: Raymond L Thomas, Jr, LEAD ATTORNEY, Ray Thomas PC, McAllen, TX; Martin Jay Cirkiel, Cirkiel Assoc, Round Rock, TX; Olegario Garcia, Kittleman Thomas PLLC, McAllen, TX; Weldon G Nixon, Jr, Walsh McGurk Cordova Nixon, PLLC, McAllen, TX.

For Brownsville Independent School District, Defendant: Charles S Frigerio, LEAD ATTORNEY, Attorney at Law, San Antonio, TX; Marjory Colvin Batsell, Attorney at Law, Brownsville, TX.

Judges: Rolando Olvera, United States District Judge.

Opinion by: Rolando Olvera

Opinion

ORDER

Before the Court is the "Magistrate Judge's Report and Recommendation" (Docket No. 52) (hereafter "R&R"), which recommends the Court grant Defendant's motion for summary judgment, deny Plaintiffs' partial motion for summary judgment and deny Plaintiffs' request for spoliation sanctions. *See* Docket No. 52, at 1. After a *de novo* review of the record, the Court rules as follows: (i) **ADOPTS** the R&R in part and **GRANTS** "Defendant Brownsville Independent School District's Motion for Summary Judgement" (Docket No. 38) (hereafter "Defendant's MSJ") limited in scope exclusively **[*2]** to Plaintiffs' *§ 1983* claim; (ii) **DECLINES TO ADOPT** the R&R in part and **DENIES** Defendant's MSJ with respect to Plaintiffs' claims under the *Americans with Disabilities Act (hereafter "ADA")* and the Rehabilitation Act (hereafter "RA"); and (iii) **DECLINES TO ADOPT** the R&R as to spoliation sanctions and **REMANDS** the case for a hearing with respect to Plaintiffs' request for spoliation sanctions.

I. FACTUAL BACKGROUND[1]

The instant matter is a wrongful death case brought by the parents of Ms. Isis Lucero Esquivel (hereafter "Ms. Esquivel") due to an incident that occurred at the Margaret Clark Aquatic/Adaptive Center (hereafter "Aquatic Center"), a facility owned and operated by Brownsville Independent School District (hereafter "BISD" or "Defendant"). Prior to her death, Ms. Esquivel was 20 years old and suffered from cerebral palsy, intellectual disabilities, development delays, and hypertonicity in her limbs which caused her to suffer decreased mobility, muscle rigidity, and uncontrollable muscle spasms. She weighed less than 100 pounds, could not walk, and was non-verbal. Ms. Esquivel could, however, crawl short distances, roll her wheelchair, and communicate through non-verbal cues.

Defendant **[*3]** operated an aquatics program designed specifically for children and young adults with special needs

[1] The facts herein were gathered from the R&R unless otherwise noted.

called the Adaptive Physical Education Program (hereafter "Aquatics Program") at the Aquatic Center. Defendant required each participant, through their physician, to complete a "Physician's Form, Adaptive Aquatics Swimming Program" (hereafter "Physician's Form") prior to participating in the Aquatics Program. The Physician's Form was drafted by Defendant, and required a physician to identify accommodations set forth in the form, necessary for a respective individual to safely participate in the program. Ms. Esquivel's physician required the following for Ms. Esquivel: (i) needs to wear a nose clip, (ii) should not put head underwater, (iii) should not hold breath, (iv) receive entire body support, and (v) water tolerance at 91-93 degrees. In addition, Ms. Esquivel's physician inserted a handwritten note on said form that stated: "1:1 supervision required."

On May 13, 2015, Ms. Esquivel participated in the Aquatics Program after submitting her completed Physician's Form to Defendant. Laura Avitia (hereafter "Ms. Avitia"), an employee of Defendant, was in charge of Ms. Esquivel on the day **[*4]** of the incident. Ms. Avitia left Ms. Esquivel in the pool area and notified someone of Ms. Esquivel's presence, while Ms. Avitia went to change her clothes. Upon Ms. Avitia's return, Ms. Esquivel was already in the pool; however, no employee of Defendant recalls assisting Ms. Esquivel into the pool. After Ms. Esquivel was transferred into the care of Ms. Avitia, Ms. Esquivel began to vomit. Ms. Esquivel subsequently had seizure-like symptoms, turned blue around her mouth, and had problems breathing. Ms. Esquivel was taken out of the pool where the on-duty lifeguard assisted Ms. Esquivel. The Brownsville Emergency Medical Service was dispatched and transported Ms. Esquivel to the Valley Baptist Medical Center where the primary impression of Ms. Esquivel's condition was listed as "Aspiration Pneumonitis". It is undisputed that Defendant failed to provide Ms. Esquivel *any* of the physician-required accommodations set forth in Ms. Esquivel's Physician's Form on the day of the incident.

Ms. Esquivel remained hospitalized and was transferred out of intensive care May 22, 2015. On May 29, 2015, Ms. Esquivel underwent a procedure which involved the insertion of a flexible tube into her stomach **[*5]** to facilitate direct digestion of food, liquids and medications. During said procedure, Ms. Esquivel's vital signs became unstable and she went into respiratory and/or cardiopulmonary arrest. Tragically, attempts to resuscitate Ms. Esquivel failed and she died May 30, 2015.

A few days after the incident occurred, Monica Rosales (hereafter "Ms. Rosales"), an employee of Defendant in charge of the Aquatics Program, specifically requested that Defendant's Police and Security Department save the video of the incident. Heriberto Castillo (hereafter "Mr. Castillo"), an employee of Defendant, downloaded the video and saved it without reviewing the file. Subsequently, Mr. Castillo discovered that the video had been corrupted and attempted to repair the video without success. As a result, Defendant provided Plaintiffs with a corrupted video file that contained a few minutes of video from the day of the incident, but did not include video of the incident itself.

II. PROCEDURAL HISTORY

The instant action, brought by the estate of Ms. Esquivel by and through her parents, was initiated February 19, 2016, with the filing of "Plaintiffs' Original Complaint and Jury Demand" (Docket No. 1) (hereafter **[*6]** "Complaint"). Defendant subsequently filed Defendant's MSJ, asserting that each of Plaintiffs' claims were subject to dismissal. Plaintiffs filed a competing summary judgment motion, entitled "Plaintiff's [sic] Partial Motion for Summary Judgment" (Docket No. 39), asserting that Plaintiffs were entitled to summary judgment under the ADA. Both parties filed responses and replies to each motion. On June 27, 2018, the Magistrate Court issued the R&R, recommending the Court deny Plaintiffs' partial motion for summary judgment and grant Defendant's motion for summary judgment. *See* Docket No. 52, at 1. The spoliation issue was first asserted by Plaintiffs in their Complaint; however, a hearing on the spoliation issue was never conducted by the Magistrate Court. [2]

III. DISCUSSION

Summary judgment is appropriate when the movant has established that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Crawford v. Formosa Plastics Corp., Louisiana, 234 F. 3d 899, 902 (5th Cir. 2000)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. In determining whether a fact issue exists, "[t]he evidence of the non-movant is to be believed, **[*7]** and all justifiable inferences are to be drawn in [their] favor." *Coastal Agric. Supply, Inc. v. JP Morgan Chase Bank, N.A., 759 F.3d 498, 505 (5th Cir. 2014)*.

---

[2] In the Fifth Circuit, there is no duty to file a separate motion to compel in order to put a court on notice regarding a spoliation issue. *Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 572 (5th Cir. 1996)*.

A. Plaintiffs' ADA/RA Claims

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *42 U.S.C. § 12132*. *Section 504 of the RA* provides that, "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]" *29 U.S.C. § 794*. Individuals may enforce *Title II of the ADA* and *§ 504 of the RA* through a private right of action. *Frame v. City of Arlington, 657 F.3d 215 (5th Cir. 2011)*. Jurisprudence interpreting the ADA is also generally applicable to the RA because "[t]he remedies, procedures and rights available under the RA are also accessible under the ADA." *Delano—Pyle v. Victoria County, 302 F.3d 567, 574 (5th Cir. 2002)* (internal citations omitted). To establish a cause of action under the ADA or RA, a plaintiff must demonstrate:

> (1) that [they are] a qualified individual within the meaning of the ADA; (2) that [they are] being excluded **[*8]** from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of [their] disability.

Melton v. Dallas Area Rapid Transit, 391 F.3d 669, 671-72 (5th Cir. 2004). Defendant does not contest the first two elements. The third element requires a plaintiff prove that the discrimination, or the denial of benefits, was "intentional". *Delano-Pyle, 302 F.3d at 574*. However, "[w]hat constitutes intentional discrimination is undecided in the Fifth Circuit." *Cadena v. El Paso Cty., 2018 U.S. Dist. LEXIS 22371, 2018 WL 835210, at *8 (W.D. Tex. Feb. 12, 2018)* (citing *Perez v. Doctors Hosp. at Renaissance, Ltd., 624 Fed. App'x 180, 184 (5th Cir. 2015)*). In *Perez*, the Fifth Circuit recently stated as follows:

> We did not define what we meant by intent [under the ADA/RA] in *Delano—Pyle*. Some circuits have held that deliberate indifference suffices. The parties have not briefed the issue in any depth, and we decline to make new law on the nature of intent at this time. We conclude that on the present record, there is enough to show a dispute of material fact on whether [defendant] intentionally, i.e. purposefully, discriminated. Intent is usually shown only by inferences. Inferences are for a fact-finder and we are not that. Still, we conclude that actual intent *could* be inferred **[*9]** from the evidence before us.

Perez, 624 F. App'x at 184-85 (internal citations omitted) (emphasis in original). In fact, "every circuit that has reached the question of what standard to apply for 'intentional discrimination' has concluded that 'deliberate indifference' is the proper standard." *McCollum v. Livingston, No. 4:14-cv-3253, 2017 U.S. Dist. LEXIS 76922, 2017 WL 2215627, at *2, n.3 (S.D. Tex. May 19, 2017)*.[3] The rationale for adopting the deliberate indifference standard is particularly compelling based on Supreme Court precedent: "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtfulness and indifference-of benign neglect." *Alexander v. Choate, 469 U.S. 287, 295, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985)*. "Thus, a standard of deliberate indifference, rather than one that targets animus, will give meaning to the RA's and the ADA's purpose to end systematic neglect." *S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 264 (3d Cir. 2013)* (citing *Choate, 469 U.S. at 295*). Courts applying the deliberate indifference standard require a plaintiff to demonstrate that a defendant: (1) knew that a federally protected right was substantially likely to be violated; and (2) failed to act despite that knowledge. *S.H. ex rel. Durrell, 729 F.3d at 264*.

To establish the first element of deliberate indifference, Plaintiffs must provide evidence to suggest that Defendant "knew that a federally **[*10]** protected right was substantially

---

[3] See *Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 275 (2d Cir. 2009)* ("The standard for intentional violations is "deliberate indifference to the strong likelihood [of] a violation"); *A.G. v. Lower Merion Sch. Dist., 542 Fed. Appx. 193, 198 (3d Cir. 2013)* ("We have held that the remedial goals of the *Rehabilitation Act* and the ADA, however, suggest that a standard of deliberate indifference, rather than discriminatory animus, may satisfy that showing"); *Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001)*, *as amended on denial of reh'g* (Oct. 11, 2001) ("We now determine that the deliberate indifference standard applies"); *Barber ex rel. Barber v. Colorado Dep't of Revenue, 562 F.3d 1222, 1228-29 (10th Cir. 2009)* ("Intentional discrimination does not require a showing of personal ill will or animosity toward the disabled person; rather, 'intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights'"); *Liese v. Indian River Cry. Hosp. Dist., 701 F.3d 334, 345 (11th Cir. 2012)* ("We agree with the parties and hold that a plaintiff may demonstrate discriminatory intent through a showing of deliberate indifference").

likely to be violated." *Id.* Courts have found that the first element is met when the plaintiff shows that they have alerted the public entity to their need for an accommodation. *Duvall v. City of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001)* (holding that "[w]hen the plaintiff has alerted the public entity to his need for accommodation . . . the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test.").

In the instant case, it is undisputed that Defendant had knowledge of Ms. Esquivel's required accommodations via the submission and receipt of Ms. Esquivel's executed Physician's Form. *See Duvall, 260 F.3d at 1139*. Defendant, through the input and editorial assistance of their medically trained employees, *drafted* and promulgated the Physician's Form. Said form specifically listed numerous accommodations *offered* by Defendant and available as options to be provided by the Defendant for physician consideration.[4] A material issue of fact thus exists relevant to the safety and constitutional rights of disabled individuals when any specific accommodations accepted and required by a physician, are subsequently not provided by Defendant.[5] In addition, Defendant **[*11]** *required* receipt of said form as a prerequisite to permitting any individual to participate in the Aquatics Program.[6] Defendant does not contest the failure to provide Ms. Esquivel any of the accommodations set forth in her Physician's Form.[7] Thus, a reasonable jury could infer that Defendant knew that a disabled individual's constitutional rights were "substantially likely to be violated" if Defendant subsequently *ignored* the implementation of the required accommodations. *S.H. ex rel. Durrell, 729 F.3d at 264*.

In order for Plaintiffs to establish the second prong of deliberate indifference, Plaintiffs must provide evidence to suggest that Defendant "failed to act despite such knowledge." *S.H. ex rel. Durrell, 729 F.3d at 264*. Courts have held that a defendant's failure to provide the accommodation "must be a result of conduct that is more than negligent, and involves an element of deliberateness." *Duvall, 260 F.3d at 1139*.

Ms. Esquivel's physician required that Ms. Esquivel wear a nose clip in order for her to participate **[*12]** in the swimming program. Docket No. 39-7. Abraham Hernandez (hereafter "Mr. Hernandez"), an adaptive physical education instructor for Defendant, who was present at the time of the incident, testified he could not give a specific reason for why a nose clip was not provided to Ms. Esquivel in accordance with her physician's requirement. Mr. Hernandez also testified that using the nose clip is difficult because "we put it back in [and] it pops out."[8] As a result, a reasonable jury could infer that the failure to provide a nose clip was not done so negligently, but deliberately due to challenges in the administration of said accommodation. In addition, Ms. Rosales, the director of the Aquatics Program, testified she thought nose clips were "outdated" and believed that the physicians did not always "pay attention" or think the requirements through.[9] The evidence suggests a number of excuses as to why Ms. Esquivel was not provided a nose clip on the day of the incident, but does not suggest that the omission of said accommodation was done so negligently. Thus, a material issue of fact exists relevant to a deliberate decision by Defendant's employees to overrule or ignore the physician's accommodation **[*13]** requirement of a nose clip; a decision of this nature could conceivably be found to be more than mere negligence.

In addition, Ms. Esquivel's physician indicated that Ms. Esquivel's water tolerance was between 91-93 degrees. On the day of the incident, the pool's temperature was between 89.4 and 90.5 degrees.[10] Mr. Hernandez testified and acknowledged that his colleagues knew that Ms. Esquivel had

---

[4] Docket No. 40-3, at 99-100. The Physician's Form listed the following accommodations for each physician's consideration:

☐ Needs to wear nose clip;

☐ Requires ear molds;

☐ Requires water goggles;

☐ Should not put head underwater;

☐ Should not hold breath

☐ Requires entire body support;

☐ Requires head/neck support Water temperature tolerance:

☐ 88-90 degrees; ☐ 91-93 degrees. Docket No. 39-7.

[5] Moreover, a reasonable jury could also infer that each accommodation set forth in the Physician's Form was not immaterial or random.

[6] Docket No. 52, at 30 ("[Ms. Rosales] required the form to be complete before the student could enter the Aquatics Program.").

[7] Ms. Esquivel's physician required the following accommodations for Ms. Esquivel: (i) needs to wear a nose clip, (ii) should not put head underwater, (iii) should not hold breath, (iv) receive entire body support, and (v) only be subjected to water temperatures between 91-93 degrees. Docket No. 39-7. In addition, Ms. Esquivel's physician hand-wrote an additional requirement: "1:1 supervision required." *Id.*

[8] Docket No. 40-4, at 44.

[9] Docket No. 40-3, at 103-105.

[10] Docket No. 45-3, at 100.

a special need for warmer water.[11]Despite this knowledge, Ms. Rosales testified "the water always has to be 88 to 90 degrees. We always have to have it at that temperature. We always try to have it at that temperature."[12] Again, Plaintiffs present evidence that Defendant's failure to accommodate Ms. Esquivel was not done negligently, but done so consciously and without regard to the accommodations required by her physician or Ms. Esquivel's specific disabilities.

Ms. Esquivel's physician also required that she "should not put head underwater", "requires entire body support" and required one-on-one supervision. Docket No. 39-7. Nevertheless, Ms. Rosales testified that the life jacket provided to Ms. Esquivel was "cheap" and not designed for handicapped individuals.[13] Additional testimony by Defendant's **[*14]** employees suggested that the life jacket provided to Ms. Esquivel would *not* have prevented her head from going underwater nor did it provide proper head/neck support.[14] Plaintiffs' expert opined that an appropriate inflatable swim collar would have prevented Ms. Esquivel's head from going underwater, and could be purchased for less than $35.00.[15] Moreover, Ms. Avitia was responsible for one-on-one supervision with Ms. Esquivel in the pool. Ms. Avitia admitted she was unqualified to assist Ms. Esquivel in the pool one-on-one and was not made aware of her physician-required accommodations.[16] Again, material issues of fact exist relevant to the decision by Defendant to provide a "cheap" life jacket that did not prevent Ms. Esquivel's head from going underwater, and the decision by Defendant to not provide Ms. Esquivel with adequate one-on-one supervision at all times.

In summary, Plaintiffs have produced sufficient material issues of fact for a reasonable jury to infer that Defendant's failure to provide Ms. Esquivel with reasonable accommodations as prescribed by her physician was done so consciously and deliberately. In fact, the above evidence suggests several excuses offered **[*15]** by Defendant's employees as to why Defendant's employees believed the physician's required accommodations were not necessary or important. The foregoing is an example of the type of apathetic attitude Congress intended to protect handicapped individuals from—the hallmark of ADA and RA claims. *Choate, 469 U.S. at 295*; *S.H. ex rel. Durrell, 729 F.3d at 264*. As the Fifth Circuit has recently instructed in *Perez*, "[i]ntent is usually shown only by inferences. Inferences are for a fact-finder and we are not that. Still, we conclude that actual intent *could* be inferred from the evidence before us." *Perez, 624 F. App'x at 184-85* (emphasis in original). [17] Thus, even if the Court were to analyze Plaintiffs' ADA and RA claims without the application of the deliberate indifference standard, Plaintiffs have provided the Court sufficient evidence to suggest that "actual intent could be inferred" from Defendant's failure to provide the accommodations offered by Defendants and prescribed by Ms. Esquivel's physician. *Perez, 624 F. App'x at 184-85*.

B. Plaintiffs' *§ 1983* Claim

The Court hereby **ADOPTS** the conclusion and the rationale of the R&R with respect to Plaintiffs' *§ 1983* claim, except for the following. For a municipality to be held liable under *42 U.S.C. § 1983*, (1) a constitutional violation must have occurred, and (2) an "official policy" **[*16]** attributable to the school districts' policymakers be deemed the "moving force" behind the subject constitutional violation. *Littell v. Houston Independent School District, 894 F.3d 616, 623 (5th Cir. 2018)*.[18] The Supreme Court has established that a

[11] Docket No. 40-4, at 75.

[12] Docket No. 38-2, at 78.

[13] Docket No. 40-3, at 110-111. Additional testimony by Defendant's employees suggests that the budget was being squeezed and they were often understaffed. Docket No. 38-4, at 15-16.

[14] Docket No. 40-2, at 64; Docket No. 38-4, at 54-55. In addition, Virginia Miller, Special Services Administrator for Defendant, testified that "entire body support" would be *more support* than the box checked by the physician for "head/neck support." Docket No. 40-1, at 42.

[15] Docket No. 39-5, at 17.

[16] Docket No. 40-2, at 36. Plaintiffs' expert, Dr. Osinski, opines that Ms. Avitia was unqualified to assist Ms. Esquivel in the pool and explains why such assistance was insufficient to satisfy the one-on-one supervision accommodation. Docket No. 39-5, at 14-15.

[17] In *Perez*, the Fifth Circuit held that a material fact existed with respect to whether defendant intentionally discriminated under *§ 504 of the RA* where plaintiffs had hearing impairments and the defendant hospital did not provide plaintiffs with a sign language interpreter, or other suitable accommodation, when they visited the hospital.

[18] The R&R suggests a "special relationship" is required to exist between a student and a school district for municipal liability to attach; however, said requirement is not applicable because there is no third-party, non-state actor, tortfeasor. BISD is the state actor and the only alleged tortfeasor in this case; therefore, BISD may be sued if its policies or customs cause a constitutional tort. *See Monell v. Dept of Social Services, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*. Thus, *Monell* liability attaches in the instant matter without requiring Plaintiff to prove a "special relationship" exists because there is no third-party independent tortfeasor. *Compare Doe*

municipality's "failure to train" can constitute an "official policy" to which *§ 1983* liability may attach if such failure amounts to "deliberate indifference". *City of Canton v. Harris, 489 U.S. 378, 386-92, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)*.

Plaintiffs' alleged Defendant's failure to adequately train their employees was an "official policy" attributable to BISD and was the "moving force" behind Ms. Esquivel's death.[19] However, Plaintiffs' *§ 1983* claim fails because the decision by Defendant's employees to ignore Ms. Esquivel's physician's recommendations, relevant to Plaintiffs' ADA and RA claims, is not attributable to Defendant under *§ 1983* because BISD "cannot be held liable under *§ 1983* on a *respondeat superior* theory. Rather, the school district *itself* must have caused the violation." *Littell, 894 F.3d at 622* (internal citations omitted) (emphasis in original). Deliberate indifference may be attributable directly to a school district when a pattern of constitutional violations exists, and said pattern imputes knowledge of the training inadequacy to the school district,[20] but absent a pattern of violations, deliberate **[*17]** indifference may only be inferred if the factfinder determines "the risk of constitutional violations was or should have been an 'obvious' or 'highly predictable consequence' of the alleged training inadequacy." *Littell, 894 F.3d at 624*. The Court's controlling precedent identifies only two situations where *§ 1983* liability was imposed on a municipality absent a pattern of violations. *See Canton, 489 U.S. at 390 n.10 (1989)* ("[C]ity policymakers know to moral certainty that their police officers will be required to arrest fleeing felons . . . Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights."); *Littell, 894 F.3d at 625-28* (holding *§ 1983* municipal liability exists where the school district offers *no* training to staff on the constitutional limitations of student searches).

The instant case is distinct from *Canton* and *Littell* simply because Defendant's employees were not devoid of all relevant training. Defendant's employees at the Aquatic Center on the day of the incident were all either specifically trained in adaptive aquatics, trained life guards, or paraprofessionals who worked with Ms. Esquivel **[*18]** for many years. *See* Docket No. 52, at 26-28. In addition, Plaintiffs have presented no evidence to suggest that Defendant's employees were deliberately ignoring the Physician's Forms with respect to other participants, thus, no pattern of violations existed. Although additional training or instruction may have been advantageous, the Court holds that Ms. Esquivel's death was not an "obvious" or "highly predictable consequence" given the training that Defendant did provide and the familiarity that Defendant's employees had with Ms. Esquivel and her disabilities. Thus, Plaintiffs' *§ 1983* claim is without merit and requires dismissal.

C. Spoliation Issue

Pursuant to Federal Rule of Civil Procedure (hereafter "FRCP") *Rule 37(e)*, the R&R correctly determined the following: Defendant should have preserved the relevant video in anticipation of litigation; Defendant failed to take reasonable steps to preserve the video; and the video cannot be restored or replaced through additional discovery. Docket No. 52, at 54-55. Thus, the predicate elements of *Rule 37(e)* have been met. The parties agree that there is no evidence of "bad faith" on the part of Defendant; rather, Plaintiffs claim that Defendant was "grossly negligent" **[*19]** in the preservation of the video. *See* Docket No. 45, at 13-14.[21] Clearly, Plaintiffs have been prejudiced by the loss of the video; thus, the remaining issue is to determine measures "no greater than necessary" to cure said prejudice. *FED. R. Civ. P.*

---

ex rel. v. Covington, 675 F.3d 849 (5th Cir. 2012) (denying *§ 1983* claim because school district had no special relationship with plaintiff to protect her from a third-party tortfeasor—an unauthorized adult who picked plaintiff up from school and sexually assaulted her) *and Estate of Brown v. Cypress, 863 F. Supp. 2d 632 (S.D. Tex. 2012)* (denying *§ 1983* because school had no special relationship where third-party tortfeasor was a bully in the school) *with J.D. v. Georgetown Indep. Sch. Dist., 2011 U.S. Dist. LEXIS 79335, 2011 WL 2971284 (W.D. Tex. July 21, 2011)* (requiring no "special relationship" analysis for *§ 1983* municipal claim where handicapped student was on a field trip supervised by school employees and fell into a river and drowned).

[19] Plaintiffs asserted a *Fourteenth Amendment* constitutional violation existed based on the following:: (1) failure to properly train staff in adaptive aquatics, failure to maintain written policies specifically to ensure water was not ingested by participants and participants were safely transferred into the water and into wheelchairs, and (2) failure to have a supervisory process to ensure that each individual's physician-required accommodations were implemented. *See* Docket No. 45, at 15-16.

[20] *See Georgetown Indep. School Dist., 2011 U.S. Dist. LEXIS 79335, 2011 WL 2971284, at *6* ("[T]he reason that courts impose liability on a municipality or school district under this doctrine is that previous incidents have occurred, and those incidents have put the school district on notice of the problem, and the need for a policy or training to address the problem.").

[21] The curative measures listed under *Fed. R. Civ. P. 37(e)(2)* are not appropriate for this case as Plaintiff has failed to produce evidence of bad faith or intent.

37(e)(1).

Plaintiffs have produced sufficient evidence to permit a reasonable jury to infer that Ms. Esquivel's aspiration of water and seizure-like symptoms on the date of the incident was *not* the result of Defendant's negligence, but rather the result of Defendant's deliberate disregard for the accommodations required by her physician. The lost video would have unequivocally aided the jury in said causal determination.[22] Thus, the Court REMANDS the issue back to the Magistrate Court for a hearing to determine the appropriate sanctions under *Fed. R. Civ. P. 37(e)(1)* as a result of the lost video.

IV. CONCLUSION

The Court hereby **ADOPTS** the "Magistrate Judge's Report and Recommendation" (Docket No. 52) in part and **GRANTS** Defendant's MSJ limited in scope to Plaintiffs' *§ 1983* claim; the Court respectfully **DECLINES TO ADOPT** the R&R in part and **DENIES** Defendant's MSJ with respect to Plaintiffs' ADA and RA claims; and the Court **REMANDS** the R&R in part **[*20]** with respect to the appropriate spoliation sanctions.

Signed on this 11th day of September, 2018.

/s/ Rolando Olvera

Rolando Olvera

United States District Judge

---

[22] The Court notes that *each* of the physician-required accommodations were premised on the necessity of keeping Ms. Esquivel's head out of the water and/or preventing water intake in her nose or throat. It is undisputed that none of Ms. Esquivel's physicians' requirements were implemented and the video could have shown that Ms. Esquivel indeed aspirated water or was submerged in water. As a result of the lost video, Defendant's argument suggesting that Ms. Esquivel's incident was the result of a different source—such as a ham and cheese sandwich—may be excluded to avoid further prejudice to Plaintiffs. *See* *Fed. R. Civ. P. 37(e)(1)*, advisory committee's note to 2015 amendment ("[I]t may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence."); *see also* *Villalon, et al. v. Cameron Cty., Civ. No. 1:15-cv-161, Docket No. 55, 2017 U.S. Dist. LEXIS 222483 (S.D. Tex. Jun. 22, 2017)* (Olvera, J.) (granting spoliation sanctions under *Rule 37(e)(1)* despite lack of proof that defendants acted in bad faith). In addition, and as the R&R notes, the source of Ms. Esquivel's initial asphyxiation is not the only contested factual issue in this case. *See* Docket No. 52, at 57

End of Document