UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 21-CV-81099-CANNON/REINHART

D.P. et al.,

Plaintiffs,

v.

SCHOOL BOARD OF PALM BEACH COUNTY, et al.,

Defendants.
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REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS (ECF No. 45)

Defendants School Board of Palm Beach County, Florida (School Board), Superintendent Dr. Donald E. Fennoy, II, Police Chief Daniel Alexander, Officer Jose Cuellar, Officer Howard Blochar, Officer Johnny Brown, Officer Jordan Lauginiger (collectively with the School Board, School Board Defendants), and Officer Joseph M. Margolis, Jr. move to dismiss the Plaintiffs' First Amended Complaint (FAC) for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons discussed below, it is RECOMMENDED that the Motion to Dismiss be GRANTED in part and DENIED in part.

Judge Cannon referred the Motion to Dismiss to me for appropriate disposition. ECF No. 46. I have reviewed the FAC (ECF No. 31), Defendants' Motion to Dismiss (ECF No. 45), Plaintiffs' Response (ECF No. 50), and Defendants' Reply (ECF No. 54). This matter is now ripe for decision.

BACKGROUND

The Plaintiffs in this case are five students under the age of eighteen enrolled in the School District of Palm Beach County (D.P., E.S., L.A., W.B., and M.S., collectively, Student Plaintiffs), their respective legal guardians (P.S., J.S., A.B., L.H., S.S., and R.S., collectively , Parent Plaintiffs), Disability Rights of Florida (DRF) and Florida State Conference of the National Association for the Advancement of Colored People (FL NAACP). The fa ctual background given below has been drawn from allegations in the FAC which, on a motion to dismiss, the court must credit as true. See Instituto de Prevision Militar v. Merill Lynch , 546 F.3d 1340, 1342 (11th Cir. 2008).

The Student Plaintiffs were ages eight to eleven years old at the time of the incidents that led to this lawsuit . Each has been diagnosed with varying disabilities including Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), Dyslexia, Emotional/Behavioral Disabi lity, and Post -Traumatic Stress Disorder (PTSD). ECF No. 31 ¶¶ 71 192. Each child was taken from school by a School Board police officer for involuntary psychiatric examination, pursuant to the Florida Mental Health Act, Fla. Stat §§ 394.451 .47892 (otherwise known as the Baker Act). ECF No. 31 ¶ 1. Plaintiffs seek damages for the harm caused to t he individual Plaintiffs and for injunctive relief to prevent future harm to all Plaintiffs and their members and constituents. Id . ¶ 8.

Plaintiff s allege that the Student Plaintiffs , and by association, the Parent Plaintiffs, were discriminated against in violation of (1) the Americans with

Disabilities Act (ADA), (2) Section 504 of the Rehabilitation Act, and (3) the Florida Educational Equity A ct (FEEA) (Counts I V). Some Plaintiffs also raise several 42 U.S.C. § 1983 Procedural Due Process Claims for (1) deprivation of parent al right to custody and control, (2) violation of right to have control over medical decision -making under the Fourteen th Amendment, (3) violation of Due Process Right to be free from unreasonable seizures under the Fourth and Fourteenth Amendments, and (4) excessive force under the Fourth and Fourteenth Amendments (Counts VI XVIII).

The School Board Defendants move to dismiss the FAC pursuant to Fed. R. Civ. P. 12(b)(6) on the following grounds [1]: (1) the FAC constitutes a shotgun pleading in violation of Fed. R. Civ. P. 8(a) and 10(b), (2) all claims against the School Board Defendants should be dismissed because Fla. Sta t. § 394.459 (10) provides a good faith defense and Plaintiffs have failed to allege that the School Board Defendants acted in bad faith [2]; (3) the FAC does not state a cause of action under the Rehabilitation Act, the ADA, or the FEEA because the FAC doe s not contain sufficient facts to establish

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[1] Officer Margoli s is employed by the City of Lantana and not the School Board, thus, he makes separate arguments as to why specific counts against him should be dismissed. The School Board Defendants raise their arguments on pages 1 27 of the Motion to Dismiss and Office r Margolis arguments can be found on pages 27 40.

[2] Plaintiffs are correct that this argument is an affirmative defense, not a basis for dismissal at the motion to dismiss stage. An affirmative defense must be established by a defendant, not negated by a plaintiff. Garcia- Bengochea v. Carnival Corp. , 407 F. Supp. 3d 1281, 1286 (S.D. Fla. 2019 (J. King). Furthermore, an affirmative defense is not properly raised by a motion to dismiss but should be pled as part of an answer. Sunny Corral Mgmt., LLC v. Value Dining Inc. , No. 08-60072-CIV, 2008 WL 5191466, at *2 n. 2 (S.D. Fla. Dec.10, 2008) (J. Moreno). Thus, I need not reach the merits of the School Board Defendants argument at this stage .

that

STANDARD ON MOTION TO DISMISS

A pleading in a civil action must contain a short and plain st

Group, Inc. , 517 U.S. 544, 552 53 (1996) (citing Hunt v. Washington State Apple Adver. Comm'n , 432 U.S. 333, 343 (1977)).

An individual plaintiff has standing under the Constitution's case or controversy requirement where the plaintiff has: (1) suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife , 504 U.S. 555, 560 61 (1992). At least one member of the association must meet the individual standing requirements. Sierra Club v. Tenn. Valley Auth. , 430 F.3d 1337, 1344 (11th Cir. 2005).

As to the first Hunt factor, FL NAACP argues that Parent Plaintiff L.H. is a member of F L NAACP, which is all that is required for organizational standing (citing Warth , 422 U.S. at 511) . ECF No. 71 at 3. FL NAACP contends that any other parent member of the FL NAACP with children in the Palm Beach County public school system could bring su it because the risk of deprivation of the rights of FL NAACP members with children in the school district is both imminent and substantially likely to occur. Id . at 3 4.

FL NAACP argues that it satisfies the second Hunt factor because ending the illegal use of involuntary examination under the Baker Act by SDPBC, which disproportionately harms Black children, is germane to the organization s purpose of ending the disproportionate use of exclusionary discipline, which includes arrest, suspension, expul sion, and other forms of school discipline, on Black children in

Florida and spends a significant portion of its organizational resources on this priority. Id. at 6 (quoting Friends of the Earth v. Laidlaw Env't Serv., 528 U.S. 167, 181 (2000)).

Finally,

dismiss encompasses the complaint, attachments to the complaint, and matters of public record).

I also do not find that FL NA ACP has pled that any of its other members would otherwise have standing to sue in their own right because the FAC does not allege an injury in fact. FL NAACP argues that its members injury is one that will occur in the future. The threat of future injury must be real and immediate as opposed to merely conjectural or hypothetical. Wooden v. Bd. of Regents of Univ. Sys. of Geo., 247 F.3d 1262, 1284 (11th Cir. 2001). FL NAACP argues that the threat is real and immediate because [e]very member of the FL N AACP with children in SDPBC public schools may, on any school day, have their children taken away from school in handcuffs to a locked psychiatric facility without their consent. ECF No. 71 at 3. As evidence of the imminence of the threat, FL NAACP cites to the FAC s statistic that before remote instruction began, SDPBC was on track to initiate involuntary psychiatric examination of students more than 400 times by the end of the academic year. Id . at 4 (citing ECF No. 31 ¶ 197). [4]

I decline to find that FL NAACP has demonstrated a threat of injury that is real and immediate as opposed to merely conjectural or hypothetical. The FAC is silent as to the number of FL NAACP members who have children enrolled in the Palm Beach County public school system. Knowing that information is crucial to

[4] Per the School District of Palm Beach County s website, 167,378 students are enrolled in Palm Beach County -operated schools. https://www.palmbeachschools.org/about_us/district_information

Board and should be dismissed from this lawsuit. As discussed later, however, if the Court should grant leave to amend the FAC, I recommend that the FL NAACP be given one final opportunity to establish associational standing.

II. SHOTGUN PLEADNG

Defendants argue that the FAC should be dismissed as a shotgun pleading because it asserts multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against. ECF No. 45 at 5, 29. Because there are multiple plaintiffs and multiple defendants, some of whom never interacted, Defendants argue that it is not clear whether each Plaintiff asserts a claim against each Defendant, or if only certain Plaintiffs are asserting claims against certain Defendants.

Plaintiffs Response argues that this is a complex case and in order to avoid excessive counts, they combined claims by multiple Plaintiffs against multiple Defendants into single counts where the facts and legal issues were common, as is allowed by Fed. R. Civ. P. 8(a) and 10(b). They also point to the Appendix attached to the FAC for clarification of who is being sued for what. ECF No. 50 at 10. Plaintiffs also explain in a footnote that each Plaintiff is stating a claim against the School Board, superintendent, police chief, and the individual Plaintiffs are stating claims against the individual officers involved in their examinations. Id. at 10 n. 8.

Finally, FL NAACP clarifies in it (s 0 Td 12.64rTj /TT3 1 TT3 1 j 1.32 0 Td (t)-4(e)5 (x)2 (a (

With respect to the FAC, I find that Counts VI, VII, VIII, and XIII do not provide the Defendants with adequate notice of the claims brought against them.

states that Count XIII is brought by D.P., E.S., L.A., W.B., M.S., DRF, and FL NAACP against All Defendants. Id . at 79. Taking that at face value leads the Court to believe

federal right . Whiting v. Traylor , 85 F.3d 581, 583 (11th Cir.1996) (citing Albright v. Oliver , 510 U.S. 266, 271 (1994) (emphasis added).

A. Section

practice is the mov ing force behind the constitutional violation. Doe , 403 F. Supp. 3d at 1264 (citing Grech , 335 F.3d at 1330).

A custom is a practice that is so settled and permanent that it takes on the force of the law. McDowell v. Brown , 392 F.3d 1283, 1290 (11th Cir. 2004) (quoting Wayne v. Jarvis, 197 F.3d 1098, 1105 (11th Cir. 1999)). A custom must be so pervasive as to be the functional equivalent of a policy adopted by the final policymaker. Church v. City of Huntsville , 30 F.3d 1332, 1343 (11th Cir. 1994) . Actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. Id . at 1345 (quoting Depew v. City of St. Marys, 787 F.2d 1496, 1499 (11th Cir. 1986)).

A [m]unicipal policy or custom may [also] include a fa ilure to provide adequate training if the deficiency evidences a deliberate indifference to the rights of its inhabitants. Lewis v. City of W. Palm Beach , 561 F.3d 1288, 1293 (11th Cir. 2009) (quoting City of Canton v. Harris, 489 U.S. 378, 385 (1989)). [D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Bd. of Comm'rs v. Brown , 520 U.S. 397, 410 (1997).

> In order to establish deliberate indifference, the plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action. Lewis, 561 F.3d at 1293 (internal quotation omitted). A municipality may be put on notice if either (1) the municipality is aware that a pattern of constitutional violations exists, and nevertheless fails to provide adequate training, or (2) the likelihood for a constitutional violation is so high that the ne ed for training would be obvious. Id .

Hoti v. Barkley Master Assoc., Inc. , No. 18-cv-80484, 2019 WL 11660558, at *4 (S.D. Fla. Mar. 26, 2019) (J. Middlebrooks).

The first determination is whether the FAC sufficiently alleges that the School Board s actions deprived the plaintiffs of a federal right. West , 487 U.S. at 48. See also Tomberlin v. Clark

alleges that each of the Student Plaintiffs were escorted by one of the Officer Defendants from their classroom or school principal s office to a mental health facility for an involuntary examination under the Baker Act. ECF No. 31 ¶¶ 79, 91, 96, 107, 112, 115, 135, 142, 148, 162, 171, 182, 185 and 187. Although some of the Parent Plaintiffs were called and told that their child was being taken for an involuntary examination, not a single Parent Plaintiffs was given an opportunity to decline the involu ntary examination in favor of taking their child home or otherwise remov ing them from the care of the school or police officers. For example, in one instance, a Parent Plaintiff (A.B.) was called by school staff when her eight -year-old (L.A.) was being Baker Acted. Id . at ¶ 144. A.B. did not have a car so she walked to the school and asked to see her child and take her home, but the school refused. Id . The FAC alleges that A.B. told the school staff that she would come and take care of L.A., and that L.A. did not ne ed to be hospitalized. Id . ¶ 145. Still A.B. was not allowed to take L.A. home or even see or speak to her. Instead, Officer Blocher deemed A.B. uncooperative and told her she would be allowed to see L.A. at the hospital. Id .

The state may, under certa in civil statutes, constitutionally remove a child from their parents custody without consent or a court order only in true emergencies where there is probable cause to believe the child is threatened with imminent harm. Doe v. Kearney, 329 F.3d 1286, 1294 95 (11th Cir. 2003). Based on the facts alleged in the FAC, I do not find that a true emergency existed that would justify an involuntary Baker Act without parental consent . The FAC describes children with disabilities becoming very upset, verbally aggressive, and sometimes even physically

violent. However, in each of the four scenarios at issue in these counts, it also alleges alternative actions the School Board not only could have taken to de- escalate the situation but knew it could have taken. [8]

handcuffed him. He then took E.S. for involuntary examination despite the fact that (a) the tantrum beha vior had ceased and was under control, (b) the BCBA did not think the involuntary examination was appropriate, and (c) the school was aware that E.S. s mother could successfully de -escalate E.S. when he became upset. Id . ¶¶ 106, 113, 126. Again, I find that there was not a true emergency justifying the Baker Act when E.S. had already calmed down and even if he had not, the school was aware of other previously successful strategies for de -escalation.

The FAC alleges that L.A ., an eight -year old, became upset over a misconstrued drawing and ran out of the classroom but was intercepted by the principal and taken to the principal s office. Id . ¶¶ 133 34. L.A. made several troubling statements including that she did not want to g o home, was suffering from abuse, wanted her mom to take her to church, and calling the principal a devil who had eyes like Momo. Id . ¶ 136. The officer also reported that L.A. tried to leave the principal s office, was ripping up pieces of paper and p utting them into her mouth, although L.A. claims she was doing so to wet the paper and u se it as a blending tool for her drawings and her comments were also similarly misconstrued . Id . ¶ 137 38. L.A. did not make any statements threating to harm herself.

The mobile response team responded to the principal s office to evalua te L.A., but notably recommended that she be sent for counseling, not Baker Acted. Id . ¶ 141. The FAC raises alternative methods that would have ameliorated any risk of imminent threat o f harm to L.A. and others: A.B. could have been allowed to meet with the assistant principal who had successfully calmed her down previously, A.B.

could have been allowed to speak with her mother, or A.B. could have been allowed to sit in a room (without a ccess to any dangerous weapons) and draw while being supervised until her mother could arrive. None of these options involve Baker Acting L.A. without her mother s consent.

Finally, the FAC alleges that W.B. , a ten-year old, became upset with another stud ent and began throwing chairs and at some point inadvertently came in physical contact with a staff member. Id . ¶ 162. W.B. s mother, L.H., was contacted and was told that W.B. would be taken for involuntary examination, but when she arrived, he was still at the school handcuffed and sitting in a chair. Id . ¶ 164. The FAC alleges that W.B. was still upset but remained sea ted and did not attempt to get up or flee. Id . The officer reported that W.B. threatened suicide by jumping off of a building, that he threatened to kill people with a gun, and that L.H. admitted that W.B. had looked up ways to kill people on the internet. Id . ¶ 167. W.B. alleges in the FAC that he did not say he wanted to commit suicide by jumping off of a building, but that he wanted to jump over a gate. Id . ¶ 168. L.H. denies ever saying that W.B. was researching ways to kill people and in fact states th at she searched all devices at the home and did not find any record of those searches. Id .

Viewing the FAC in the light most favorable to L.H. and W.B., the situation surely was tense and perhaps alarming, but by the time L.H. arrived at the school, W.B. was sitting in a chair handcuffed, not posing an imminent threat of danger to himself or others. There was no true emergency to justify Baker Acting him over his mother s protests. Furthermore, even if W.B. had not been calm and restrained, th e

school was aware of other tactics it could have used before involuntary examination such as calling W.B. s counselor in for assistance or waiting for the mobile response team to respond and assess W.B. s needs. Id . ¶¶ 158, 165, 169.

Each one of these four incidents, although surely stressful and alarming, do not rise to the level of a true emergency where there is probable cause to believe the child is threatened with imminent harm because there were ample alternatives to Baker Acting these children before seeking approval from their parents. Thus, I find that the School Board s actions cannot be justified by a true emergency and P.S., J.S., A.B., and L.H. have pled a plausible claim that their fundamental right to care, custody, and control of their children was v iolated.

School Board Defendants argue that Parent Plaintiffs P.S., J.S., A.B., and L.H. cannot state a claim for a procedural due process violation where an adequate post -deprivation remedy is available. ECF No. 45 at 6 (citing Hudson v. Palmer, 468 U.S. 517 (1984) holding that where a post -deprivation remedy was available, deprivation of property interest did not violate due process). School Board Defendants point to Florida Statute 394.459(10) as the adequate post -deprivation remedy. It states ,

> Any person who violates or abuses any rights or privileges of patients provided by this part is liable for damages as determined by law. Any

Fla. Stat. § 394.459(10). Put differently, Plaintiffs have a post -deprivation remedy in

In conclusion, I find that the FAC plainly describes multiple scenarios of legal guardians being denied the opportunity for consultation before their child was taken to a facility for involuntary examination without a true emergency justification and without an adequate post-deprivation remedy. These plausible deprivations of Parent Plaintiffs P.S., J.S., A.B., and L.H.'s right to the care, custody, and control of their child are sufficient to overcome a motion to dismiss. Troxel, 530 U.S. at 65.

Regarding the parental right to make medical decisions for one's child, I note that parents can only be deprived of their rights to make medical decisions for their children if there is a true or reasonably perceived emergency. Bendiburg, 909 F.2d at 468 ("The validity of the [state consent to Baker Acting a child without a parent's consent] . . . for constitutional . . . purposes, turns on whether such an emergency existed, or was thought to exist by the state employees, so as to make constitutional what would be unconstitutional in the absence of a medical emergency . . . .").

For the same reasons discussed above, the FAC sufficiently alleges that there was no true emergency that would justify the deprivation. Thus, I find that the FAC is sufficient to establish that the Parent Plaintiffs P.S., J.S., A.B., and L.H. were deprived of their fundamental liberty interests in making medical decisions for their children without due process of law.

ii. Official Policy, Custom, or Failure to Train that Caused the Deprivation

Plaintiffs argue that "[t]his is the rare case in which a municipality ha[s] an officially-adopted policy of permitting a particular constitutional violation." ECF No[s].

50 at 23 (citing Grech, 335 F.3d at 1330); 31 ¶ 296. As evidence of the official policy, Plaintiffs point to the School Board's Baker Act Decision Tree Protocol, a bulletin written for the district principals by Deputy Superintendent Keith Oswald and administered on August 10, 2018. ECF No. 31 ¶ 206. The FAC alleges that this Baker Act Bulletin states that the [c]riteria for an involuntary exam are that the individual: presents a danger to self or others; and/or appears to have a mental illness as determined by a licensed mental health professional. Id. The Baker Act Bulletin does not clarify that in the context of the Baker Act, a developmental disability does not constitute a mental illness. Id. ¶ 209.

With regard to parental contact, the FAC alleges that the Baker Act Bulletin states that school officials should make every effort to include the parents/guardians in all phases of the process, and contacting parents is recommended. Id. ¶¶ 208, 211, 296.

> First, after learning of a potential Baker Act situation, the tree indicates that a principal should contact the parents but does not suggest that they be involved further nor that their involvement might change the course of the situation. Second, the Decision Tree provides that after a school police officer or licensed staff has initiated an exam under the Act, a School Designee contacts and informs parent(s)/legal guardian(s) and informs them that the decision has been made to BA and is being transported.

Id. at ¶ 211. Defendants do not address this argument in their Motion to Dismiss or Reply.

One way to establish a policy, is via a statement of the policy by the municipal corporation, and its exercise. City of Oklahoma City v. Tuttle, 471 U.S. 808, 823

(1985). Another way, however, to determine whether the policy is that of the municipality , is to ascertain whether it is created and executed by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy . . . . Monell , 436 U.S. at 694.

examination. Fla. Stat. § 394.463(2)(a)(2). Vague notions about what a person might do for example, a belief about some likelihood that without treatment a person might cause some type of harm at some point does not meet this standard. Khoury , 4 F.4th at 1126 (emphasis in original).

Assessing the totality of the circumstances as alleged in the FAC regarding the detention of Student Plaintiffs D.P., E.S., L.A., and W.B., I find that , for several reasons, probable cause did not exist to justify detention of these four Student Plaintiffs.

Initially , I find Plaintiffs arguments regarding the mental illness component to be persuasive. When viewing the facts in ,ctsrnngC5gF4 (e)(e F)i1dswfavorable to D.P., E.S., L.A., and W.B., the record does not support awfinding that these officers wuld have reason to believe that any of theee e children had a mental illneee ee. Section 394.455(29) of the Florida Mental Hnalth Act specifically defines mental illness as

> an impairment of the mental or emotional processes that exercise conscious control of one s actions or of the abili(n).9 rfeng)60(the)-1 (o p)4 (er)4 (c)-6 person s ability to meet the ordina ry demands of living. For the purposes of this part, the term does not include a developmental disability as defined in chapter 39 3, intoxication, or conditionsnn4 (a)1.1 (n)6 (if)8 (e)5 (s)8 (t)4 (e)5 (d)9 abuse.

The FAC alleges, and Defendante do not contest, tha(n).9 ( )]TJ 0.002 Tc 0 Tw [(D.P)-1 (.)

for Exceptional Student Education and have been placed in specialized claseroome.

ECF No. 31 ¶ 12 18, 73, 104, 157. Developmental disability ie not eynonymous with

had a mental illness, I do not find there was probable cause for the officers to reasonably believe that there was a substantial likelihood that without treatment, these four students would have caused serious bodily harm to themselves or others in the near future. Fla. Stat. § 394.463(1)(b)(2).

In conclusion, I find that the FAC alleges sufficient facts to establish that the officers did not have probable cause to detain D.P., E.S., L.A., and W.B. under the Baker Act. Thus, for purposes of this Section 1983 claim, I find the FAC has pled a plausible deprivation of D.P., E.S., L.A., and W.B. s fundamental right to be free from unreasonable seizure under the Fourth and Fourteenth Amendments.

ii. Official Policy, Custom, or F ailure to Train that Caused the Deprivation

Plaintiffs argue that [illegible]

Act requires both elements —imminent danger and mental illness —collectively, not alternatively. This is notable because, as stated above, the school officials and officers had these students involuntarily committed despite the fact that they did not have a mental illness. When viewed in the light most favorable to Plaintiffs, it is plausible that the school administrators and teachers, when faced with the decision of whether to Baker Act a student, based their decision on what they read in the Baker Act Bulletin, which told them they only needed one of the two Baker Act elements, when in reality, the law required both.

Furthermore, the Baker Act Bulletin does not sufficiently describe the "danger" element. It states simply that the child must "present a danger to self or others" when the statute actually requires there be a "substantial likelihood" that the child will cause "serious bodily harm . . . to herself or others in the near future." Fla. Stat. § 394.463(1)(b)(2) (emphasis added). The Baker Act Bulletin completely obviates the requirements that the "danger" be (1) of serious bodily harm, (2) substantially likely to occur, and (3) in the near future. Instead, it leads teachers, administrators, and officers to incorrectly believe that any danger at all that could happen at some point, is sufficient to involuntarily commit a student. I find that the misstatement of the law in the Baker Act Bulletin that was administered to school staff is sufficient to establish, for purposes of surviving a motion to dismiss, that an official policy of the

violent. However, in each of the four scenarios at issue in these counts, it also alleges alternative actions the School Board not only could have taken to de- escalate the situation but knew it could have taken. [8]