QUARTERLY REPORT

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The Quarterly Report provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at <kmcdowel@doe.state.in.us>.

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SEXUAL ORIENTATION, THE EQUAL ACCESS ACT, AND THE EQUAL PROTECTION CLAUSE

The American Civil Liberties Union (ACLU) filed two lawsuits in January, 2003, one in the U.S. Eastern District Court of Kentucky and the other in the U.S. Southern District Court of Texas.[1] The Kentucky case involves attempts to create a Gay-Straight Alliance club at Boyd County High School in Ashland, Kentucky. This resulted in a student boycott and anti-gay rally. The school board then stopped all clubs from meeting in any of the district's schools. The students who sought to create the club reportedly did so because they needed to support each other due to taunts, threats and harassment that they asserted occur on a regular basis. The Texas dispute involves the alleged use of procedural guidelines as a pretext for denying the formation of a Gay-Straight Alliance club. The students allege they completed necessary club applications but then the procedures for doing so were altered so that their application was never in concert with current guidelines.

Both suits are being brought, in major part, under the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, which makes it "unlawful for any public secondary school which receives federal financial assistance and which [maintains] a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content or the speech at such meetings." 20 U.S.C. § 4071(a). A school maintains a "limited public forum" if it provides an "opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time." § 4071(b). "Non-instructional time" is defined at § 4072(4) as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."[2]

The defining of terms has been a fertile ground for litigation. The U.S. Supreme Court resolved many of the disputes when it decided Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 110 S. Ct. 2356 (1990). The court noted that when Congress created the term "limited open forum," it meant to create a concept different from "limited public forum," which is better understood within a First Amendment context. This standard, the court said, requires that all clubs or potential clubs be treated the same. Discrimination in a "limited open forum" against the speech of any one club purely on the basis of its content is prohibited. Mergens, 496 U.S. at 241-42. A student group would be considered "curricular" if its activities are "*directly* related to the body of courses offered by the school." 496 U.S. at 239. A student group directly relates to a school's curriculum only if:

- The subject matter of the group is actually taught in a regularly offered course;
- The subject matter of the group concerns the body of courses as a whole;
- Participation in the group is required by a regularly offered course; or
- Participation in the group results in academic credit.

496 U.S. at 239-40. By statute, the criteria for "fair opportunity" means that a school uniformly provides that:

- The meeting is voluntary and student-initiated;
- There is no sponsorship of the meeting by the school, the government, or its agents or employees;

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[1] *Education Daily*, January 27, 2003, p. 3.

[2] See also "Religious Clubs, Equal Access, and Public Schools," **Quarterly Report** July-September 1996 and April-June 1997.

- Employees or agents of the school or government are present at religious meetings only in a non-participatory capacity;
- The meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- Non-school persons may not direct, conduct, control, or regularly attend activities of student groups.[3]

20 U.S.C. § 4071(c).

On August 30, 2002, the U.S. Federal District Court for the Southern District of Indiana addressed the Equal Access Act and its application to a public school district where students sought to form a "Gay/Straight Alliance" club. Franklin Central Gay/Straight Alliance v. Franklin Township Community School Corporation relates to all of the above, with some additional twists.[4] Students sought to obtain club status at Franklin Central High School for a "Gay/Straight Alliance" (GSA) club. School administration wished the club to change its name to the "Diversity Club" so as to expand its appeal to all students who believe themselves to be marginalized (specific examples included overweight students, African-American students, and foreign-born students). The school argued that insistence on the name change would not entail a substantial change in the students' speech but would be directed only to time, place, and manner of the speech.[5] However, the majority of the opinion is concerned with the procedures of the school for determining club status.

The high school has a "club period" that occurs every Thursday between the second and third class periods. The school maintains the "club period" is "instructional time" and does not create a limited public or open forum.[6] Student clubs meet in "cycles," with the remainder of students remaining in their second period classrooms under the supervision of teachers. All clubs at the school are to have a faculty sponsor. The school had argued teachers could provide instruction during this time, but there was no requirement they do so. Indications were that no instruction did occur.

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[3]Although the Equal Access Act was enacted primarily to ensure a degree of equal access for religious-oriented clubs, the thrust of this article involves clubs devoted to issues affecting homosexual, lesbian, or bi-sexual orientation. This latter category–the involvement of non-school personnel–is discussed at some length in Colin *ex rel.* Colin v. Orange Unified School Dist., *infra*.

[4]The federal district court also issued an order on December 26, 2002, denying the school district's motion to reconsider. The two decisions are unpublished.

[5]This is a hybrid argument, applying elements of "limited public forum" under First Amendment analysis to "limited open forum" analysis under the Equal Access Act.

[6]Although the Equal Access Act defines "non-instructional time" as that time set aside before classroom instruction begins or after it ends, courts have given this concept a broad interpretation. "Non-instructional time" is not limited to a "before school-after school" analysis but would include times during a typical instructional day where no instruction is occurring. See Ceniceros v. Bd. of Trustees of the San Diego Unified School Dist., 106 F.3d 878 (9th Cir. 1997), where non-instructional time set aside during lunch period for non-curricular student clubs to meet was considered "non-instructional time" even though it occurred during the school day. No actual classroom instruction was occurring during this time.

The student who wished to form the GSA obtained the application for club status and secured a faculty member willing to be the sponsor. The student, not the faculty sponsor, completed the application. It was this procedural anomaly that became the focal point of the federal district court's discussion.

According to the school, the application had to be completed by the faculty sponsor and not by the student. When the application was completed and submitted, a vice principal brought the application to the faculty sponsor and said something to the effect that "This won't fly." This statement was subject to differing interpretations. Did he mean the reference to gay students would not "fly," or did he mean an application not completed by the faculty sponsor would not "fly"? The vice principal never testified in the matter. The court relied upon the deposition testimony of the faculty sponsor, who interpreted the remarks as indicating the statement was an objection to the name of the club.

The court was not persuaded that the school had a detailed policy regarding the completion of the application form.

> The Court wishes to emphasize that it is not saying that a school cannot have a very strict, or even unreasonable policy with regard to the formation of student clubs. However, the problem in this case is that there is no record evidence even remotely suggesting that such a strict policy ever existed, much less that the faculty had notice of the policy and that it was applied even-handedly to all clubs.

Slip Opinion, at 24. Had there been a policy that required the application to be completed by the faculty sponsor, school administration should have advised the faculty sponsor of this when it returned the application.
The federal district court did not accept the argument that all the existing school clubs were "curricular" in the sense that they supplemented current curricular objectives and instruction. The court noted this was too expansive and was an argument similar to the one rejected by the U.S. Supreme Court in Mergens. Under the Mergens' standard for determining whether a club is curricular (see the four points, *supra*), it was evident to the federal district court that a number of the high school's clubs were non-curricular (some examples include chess club, game and fish club, Youth Alive, and the Sunshine Society). A school cannot evade the Mergens holding by focusing upon the word "non-instructional" in the definition of "limited open forum" rather than the word "non-curricular." Id., at 28. The court was unpersuaded the "club period" that occurred every Thursday between second and third periods constituted "instructional time." It was non-instructional time, analogous to the situation described by the 9th Circuit in Ceniceros.

The school also argued that its attempt to regulate the name and purpose of the GSA was not an attempt to discriminate against the GSA on the basis of the content of its speech or its political and philosophical viewpoint; rather, the school's activities in this regard constituted reasonable regulation of time, place, and manner of that speech. The two primary reasons for suggesting the name be changed to the "Diversity Club" were to broaden the appeal of the club and to avoid making potential GSA club members the targets for harassment.[7]

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[7]Harassment is a very real concern. It is often stated as one of the reasons for starting a GSA club. Schools are also concerned that liability can attach where a student is the subject of harassment based on sexual orientation. See, *e.g.*, Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

The court disagreed, noting that "time, place, and manner restrictions" refer to logistics and not content or viewpoint.

> For example, it might be reasonable for the State to require a homosexual-rights group to stage an intended downtown demonstration at mid-day rather than during rush hour; whereas, it might be unreasonable for the State to require that the demonstration be held at midnight. But it would not even fall within the scope of time, place, and manner restrictions for the State to order the group to reinvent itself as a human rights group, so that its message would be less provocative.

Id., at 35. The court also found that the attempt to change the name of the club to a more generic one, such as the Diversity Club or the Tolerance Club, constituted content discrimination. "...[The school's] attempt to force GSA to dilute its message by accommodating others, such as overweight students, is not content-neutral. The speaker has the right to tailor his or her own message." Id., at 37.

In the final analysis, the court granted summary judgment to the plaintiffs, finding the school had violated the Equal Access Act and enjoining it from further transgressions of the Act. For this reason, the court did not address the First Amendment issues.

Thereafter, the school filed a Motion to Reconsider based on mootness. The student who wished to start the GSA had graduated and, according to the school, the GSA did not exist independent of this student. This raises an interesting argument: If the student had graduated by the time the court issued its order (and she had), and if the GSA did not actually exist, did it have standing to prosecute its claims? The GSA was not a pre-existing legal entity and, apparently, is not an existing entity at present.

The court rejected the representation that the GSA did not exist other than as an *alter ego* of the student plaintiff. The court added this was a factual question that should have been raised at the pleading stage. The second argument–that the GSA does not presently exist–is based upon the fact that no one sought to apply for club status for the GSA or participate in the school's club fair. The plaintiffs, however, provided a sufficient factual basis for the court to find that the matter is not moot. The court's decision did not come out until the end of August of 2002 and was not received by the student plaintiffs until September 6, 2002, preventing the GSA from submitting a timely application. The publicity surrounding the GSA and the lawsuit may have also made it difficult to obtain a faculty sponsor. The court did clarify that "it is not now saying that the GSA has an automatic right to meet during the club period just because it does still have legal standing..." Order on Motion to Reconsider, at 6. "...GSA is not entitled to form an officially approved club without first obtaining a faculty sponsor and then filling out the simple form that was required of all other clubs, listing the name and purpose of the club, the faculty sponsor, and the time when the club would meet." Id., at 7. "[T]he Court did not say that GSA was entitled to rights that other clubs would not have had." Id.

There are reportedly 600 GSA clubs in the United States. Courts in other federal districts are also involved in the legal maneuvers under the Equal Access Act and GSA clubs. At this writing, there are no published decisions from a Circuit Court of Appeals.

1. Colin *ex rel.* Colin v. Orange Unified School District, 83 F.Supp.2d 1135 (C.D. Cal. 2000) influenced the district court's decision in Franklin Central GSA *supra*. As in Franklin, students completed the

necessary paperwork to form a "Gay-Straight Alliance Club" at their high school.[8] They also obtained a faculty sponsor. The high school had a number of non-curriculum related clubs. The school principal suggested the club name be changed to the "Tolerance Club," the "Acceptance Club," or the "Alliance." The school board, after several public meetings, voted to deny the application, in part because the school board felt the nature of the club would be "sexually charged" and, as a result, inappropriate. The court provided a brief history of the Equal Access Act (EAA), noting the EAA "was intended to counteract perceived discrimination against religious speech in public schools and overturn two appellate court decisions that had held that allowing student religious groups to meet on campus before and after classes would violate the Establishment Clause." 83 F.Supp.2d at 1142. Congress's passage of the EAA "made a matter once left to the discretion of local school officials the subject of comprehensive regulation by federal law." Id., citing Mergens, 496 U.S. at 259, 110 S. Ct. 2356 (Kennedy, J., concurring). "As Justice Kennedy pointed out, 'one of the consequences of the statute, as we now interpret it, is that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind.'" Id.

"It's true," the federal district court wrote, "that when courts enforce the Act, they remove control from local school boards... Due to the First Amendment, Congress passed an 'Equal Access Act' when it wanted to permit religious speech on school campuses. It did not pass a 'Religious Speech Access Act' or an 'Access for All Students Except Gay Students Act' because to do so would be unconstitutional." Id. The local school board had a policy that, "in word and deed," proclaimed it had created a "limited open forum in accordance with the provisions of the federal Equal Access Act." 83 F.Supp.2d at 1143. It could not preclude the GSA from seeking access to the open forum.

One of the other arguments made by the school board was that the GSA was controlled by non-school persons, specifically the GLSEN. Because the club name "GSA" is recommended by GLSEN, the school argued that "this club is being directed and controlled to some extent by nonschool persons." 83 F.Supp.2d at 1146. The court was not persuaded. It noted other student groups were involved to some extent with national organizations, so the so-called "safe harbor" provisions under the "fair opportunity" section, 20 U.S.C. § 4071(c), were not uniformly applied if the GSA was to be singled out for this reason. Additionally, the GLSEN's involvement did not occur until the dispute between GSA and the school board became public through media reports. "[U]sing a name that is similar to names of other student groups, and which is the name suggested by the national GLSEN, would not approach the level of control necessary to exempt a student group from the Act's protections." Id.[9]

2. East High Gay/Straight Alliance *et al.* v. Board of Education of Salt Lake City School District, 81 F.Supp.2d 1166 (D. Utah 1999) involved a school policy the opposite from the one in Colin, *supra*. In

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[8]The similarity in the use of "GSA" for a club name is not by accident. This is a suggested club name promoted by the Gay Lesbian Straight Education Network (GLSEN). See Colin, 83 F.Supp.2d at 1139.

[9]In an article in *School Law News*, "California School Must Let Gay Rights Group Meet On Campus," (February 18, 2000, p. 3), school officials indicated they would appeal the decision to the 9th U.S. Circuit Court of Appeals. At this writing, the 9th Circuit has not ruled on the matter.

East High, the school board adopted a policy that school clubs would have to be "directly related to the curriculum to organize or meet on school property." The policy specifically stated that it is not creating a "limited open forum" under the EAA. Id., at 1168. The policy was then implemented through a process that required prior approval of every student club or group that sought to meet on the school premises during non-instructional time and to use school facilities to promote its activities. Although the GSA acknowledged it was a non-curricular group, it claimed other groups that were allowed to form and take advantage of in-school communication networks and be included in "Club Rush," "Spring Fest" and the school yearbook were not "directly related to the curriculum." The GSA sued under the EAA and the First Amendment when it was denied club status at the two high schools operated by the school district. The court noted that a public school could avoid the issue of free access under the EAA if it does not create a "limited open forum" by granting the opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time. Id., at 1173. "A school may establish a 'limited public forum' for First Amendment purposes without at the same time creating a 'limited open forum' under the Equal Access Act. However, it may do so only if the permissible and limited subject matter of the limited public forum does not go beyond 'curriculum related student groups.'" Id.

Five other clubs were designated for judicial analysis under the EAA: The Improvement Council of East (at East High School), or ICE; Future Homemakers of America (FHA); Future Business Leaders of America (FBLA); the National Honor Society (NHS); and the Odyssey of the Mind (OM), the latter club designed to enhance problem-solving skills. The court noted that Mergens "appears to be qualitative rather than quantitative: if at least part of a club's activities enhance, extend, or reinforce the specific subject matter of a class *in some meaningful way*, then the relationship between club and class is more than tangential or attenuated, and the club may be 'directly related' to the class in terms of its subject matter." Id., at 1177 citing an earlier skirmish, East High Gay/Straight Alliance v. Bd. of Ed. of Salt Lake City Sch. Dist., 30 F.Supp.2d 1356, 1360 (D. Utah 1998).[10] It does not matter should the student groups engage in activities that are also typical of non-curriculum groups. "It follows that curriculum-related student groups, like non-curricular student groups, need not serve merely as an extension of the classroom experience in order to avoid triggering the Act's protections. Members of a curriculum-related group may socialize, raise funds, and even assist others as part of their groups activities without altering the group's status under the Act." Id., at 1179. The relationship "between club and class is more logical than it is statistical in nature." Id. The court would not exalt "semantics over substance." Id. Accordingly, the court determined to look at the school's actual practice rather than its stated policy, and this would apply to the actual functions of the clubs at issue rather than their stated purposes. Id., at 1180. Following a detailed analysis of the five affected clubs, the court determined the school board had adopted and maintained a closed forum under the EAA beginning with its 1996 policy, and that a "limited open forum" does not now exist at either of the high schools. However, the court noted the ICE club, during the 1997-1998 school year, was non-curriculum but was allowed to meet. This instance violated the speech and access rights of the GSA. The court also found that the February 20, 1996 policy represented "a content-based restriction that is reasonable in light of the purpose served by the forum for students groups at East High School and West High School.

[10]There is at least another related decision, involving limitations on discovery. See East High Gay/Straight Alliance v. Bd. of Education, 81 F.Supp.2d 1199 (D. Utah 1999).

Establishing a forum for 'curriculum-related' student groups consistent with the Equal Access Act does not by itself violate the First and Fourteenth Amendments." Id., at 1197-98.[11]

3. The skirmishing is not over. In East High School PRISM Club *et al.* v. Seidel, 95 F.Supp.2d 1239 (D. Utah 2000), the former GSA re-formed itself as the "Prism Club" and sought club status as a "curriculum-related" club. Seidel is the school official charged with reviewing club applications to ensure compliance with the school board's February 20, 1996 policy. A club application is approved if (1) it appears that the subject matter of the group relates to the subject matter of a course; and (2) the group activities provide 'reinforcement, application, [extension,] and practice of curricular content." Id., at 1241. The application form is a two-page document that provides space for the club's statement of purpose, a listing of "approved course(s) that provide the curricular basis for the Student Club," "additional comments and rationale for approval," and a listing of the activities of the proposed club. Teacher disclosure statements describing the relevant course content are to be attached to the application form. Id., at 1242. Plaintiffs applied as the PRISM club ("People Recognizing Important Social Movements"). The club described its purpose as providing opportunities to discuss American history, government, law, and sociology, as well as democracy, civil rights, equality, discrimination, and diversity. Id. It specifically disavowed an advocation of homosexuality, promotion of a partisan platform, or discussion of sexual behavior. Proposed activities of the club would include "letter writing to public officials, keeping up and debating current events, tutoring, guest speakers, field trips, reviewing historical events, reports on influential GLBT [Gay, Lesbian, Bi-sexual, and Transgendered] persons and events, [and] group discussions." Id., at 1243. The club represented that its activities are related to the following courses: U.S. History, American Government and Law, and Sociology.

Seidel denied PRISM's application, noting that the scope of the club was narrowed to "the impact, experience, and contributions of gays and lesbians" in historical and current events, institutions, and culture. "This subject matter is not taught in the courses you cite." As a result, she denied the application. The PRISM club sought injunctive relief, asserting Seidel's actions violated their First Amendment rights.

The federal district court judge[12] noted that, within constitutionally permissible guidelines, a school board may legally limit access to its facilities. However, "[o]nce the school makes its facilities available for some after-school clubs and not others, ... it is imperative that the school 'respect the lawful boundaries it has itself set' by communicating coherent standards in some way to potential speakers and consistently and fairly applying its club approval standards." Id., at 1244, quoting Rosenberger v. University of Virginia;, 515 U.S. 819, 829, 115 S. Ct. 2510 (1995). The standards cannot be "post hoc rationalizations" or pretext for viewpoint discrimination. Id. For this reason, a school "is required to communicate a coherent standard and consistently apply that standard." Id.

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[11]The plaintiffs indicated they would appeal the decision to the 10th U.S. Circuit Court of Appeals. No decision has been rendered. See "Court to Eye Utah District's 'Ban' On Gay Youth Group," *School Law News*, Vol. 28, No. 4 (February 18, 2000).

[12]This was not the same federal judge who presided over the East High GSA matter.

The court reviewed the course objectives and determined the PRISM club's application sufficiently stated a relationship to some of the course objectives for sociology, U.S. History, and Advanced Placement Government and Politics. Id., at 1245-46.[13] The court rejected the school's argument that the narrowness of the subject matter to which the club would be devoted is an implied standard. "In fact," the court wrote at 1246, "the standard Defendant actually applied in reviewing PRISM's application is not obvious." The school board's policy does not contain a "no narrowing of the subject matter" concept. It is not clear whether such a standard is directed to the subject matter, the viewpoint, or both. Id. As a consequence, the "court concludes that the District has never explicitly articulated a 'no narrowing' rule, and the court can find no reason to infer such a rule from current policy guidelines. Even if such a rule could be inferred, it has not been consistently applied." The court determined that the plaintiffs' First Amendment rights were likely violated such that they would eventually succeed on the merits of their complaint. Accordingly, the court granted the plaintiffs' the injunctive relief they sought. Id., at 1251.

TIME-OUT ROOMS REVISITED

The use of time-out rooms continues to draw attention.[14]

The National Association of State Boards of Education (NASBE) publishes every Friday afternoon its Headline Review, providing one-paragraph summaries of education-related matters, especially those affecting state policy makers. In the Headline Review for January 3, 2002, under the lead-in "Minnesota Reverses Rule on Locked Timeout Rooms," it was reported that the Minnesota Department of Children, Families and Learning "has decided to once again allow schools to use locked timeout rooms for misbehaving students." The Department is engaged in public hearings over its new special education rules, which, in part, will require schools to register their locked timeout rooms with the state. A ban on timeout rooms, critics had warned, could result in more residential placements for students. An assistant commissioner was quoted as stating, "We heard a lot from special education administrators about why they needed these tools," referring to locked timeout rooms.

These could be very expensive "tools." In Peters v. Rome City School District, 747 N.Y.S.2d 867 (N.Y. A.D. 4 Dept. 2002), the student was awarded by a jury $75,000 in damages plus attorney fees, finding that the school's use of a timeout room (not locked but often held shut by school personnel) constituted false imprisonment, negligent infliction of emotional distress, and an unlawful seizure under the Fourth Amendment. The supreme court denied the school's motion to set aside the jury verdict, and the appellate division affirmed the supreme court.[15]

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[13]The court noted the PRISM club did not relate to all or even most of the objectives for the referenced courses. However, it "is best visualized as a 'subject matter' subset within a larger 'total curriculum subject matter' circle." 95 F.Supp.2d at 1247.

[14]See "Time-Out Rooms," **Quarterly Report** October-December 1996.

[15]For non-attorneys unfamiliar with New York's judicial system, "supreme court" is not the highest court of appellate review. The New York Court of Appeals is the highest court of appellate review, analogous to the Supreme Court in most other states. The Appellate Division is analogous to the

The dispute began when the student was in the second grade. According to the decision, the evidence at trial indicated the student had a learning disability (LD), but this seems peculiar in light of the behavior plan developed and implemented through the student's Individualized Education Program (IEP), calling for the use of a time-out room as a last resort to correct inappropriate behavior the student had exhibited in the past. During a six-month period, the student was placed in the time-out room 75 times. The room was described as "small" without further elaboration. It was padded and unfurnished. The student was not permitted to leave the time-out room until he remained seated in an upright position without moving for three consecutive minutes. On one occasion, the student fell asleep in the time-out room, and there were occasions where he remained in the time-out room for periods in excess of one hour. The parent had consented to the use of a time-out room but had never observed it. The court was unwilling to construe the parent's consent for implementing the IEP as consenting to what the jury perceived as inappropriate use of the time-out room.

> With respect to the cause of action for false imprisonment, we conclude that there was evidence from which the jury could rationally find that defendant intended to confine [the student]; that [the student] was conscious of the confinement; that in consenting to the IEP, plaintiff did not thereby consent to [the student's] confinement in the time-out room inasmuch as plaintiff was unaware of the conditions of the room or [the student's] reaction to placement in the room; and that the confinement was not otherwise privileged. [Citations omitted.]

747 N.Y.S.2d at 869. The appellate court also noted that there was sufficient evidence "from which the jury could rationally find that the frequency, duration and manner of confinement were so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." At 870 (internal punctuation omitted, citation omitted). There was some evidence that the student was placed face-down on the floor and physically restrained in the time-out room.

States wrestle with the use of time-out rooms, especially locked ones. A number of states have adopted the Uniform Fire Code of 1997, which forbids the use of locks on time-out rooms even with adult supervision. Under the Uniform Fire Code of 1997 (adopted in Indiana through the State Fire Marshall), all "exit doors" must be "openable" from the inside without the use of a key or some special knowledge or effort. Intermediate Care Facilities for the Mentally Retarded (ICF/MRs) have for years had regulations regarding time-out rooms and their use. The ICF/MR regulations do permit the door to be held shut by staff or by use of a mechanism that requires constant physical pressure from a staff member to keep the mechanism engaged but do not otherwise permit the time-out rooms to be locked.

There have been several reported cases involving the use of time-out rooms.

Covington v. Knox County School System *et al.*, 205 F.3d 912 (6th Cir. 2000) involved a student with multiple disabilities who was reportedly locked in a time-out room for disciplinary reasons, sometimes for several hours. The 6th Circuit was addressing the issue as to whether the Individuals with Disabilities Education Act (IDEA) administrative remedies had to be exhausted and not whether there had been any constitutional deprivations. Based on the complaint, the time-out room was approximately 4x6 feet, dark and "vault-like,"

Court of Appeals in other states.

with a concrete floor, no furniture, no heat, no ventilation, and only one small reinforced window located at least five feet above the floor. The student was reportedly locked in the room without adult supervision. The parent filed a complaint under 34 CFR §§ 300.660-300.662 with the Tennessee Department of Education, which referred the complaint to the local school district for resolution. The local school district responded to the complaint, denying some of the allegations and explaining others. No remedial actions were deemed warranted. The parent then sought an IDEA due process hearing, which was delayed repeatedly, often by the parent, such that no hearing had been held for three years. Although the hearing had not yet taken place, the parent initiated an action under 42 U.S.C. § 1983 in federal district court, alleging violations of the student's Fourth, Fifth, and Fourteenth Amendment rights, as well as state-law claims of intentional infliction of emotional distress and false imprisonment. The federal complaint did not mention the IDEA at all. The federal district court, following Hayes v. Unified School Dist. No. 377, see *infra*, determined the parent had to exhaust administrative remedies because the issues involved the school's disciplinary practices incorporated into the student's IEP. The district court granted the school's Motion for Summary Judgment and dismissed the case without prejudice. On appeal, the parent abandoned the Fourth Amendment claim and the procedural due process claim under the Fourteenth Amendment, but raised a Seventh Amendment issue, claiming that requiring the exhaustion of IDEA administrative remedies would violate the student's right to a trial by jury. During these various maneuvers, the student graduated from school with a differentiated diploma. The 6th Circuit, noting the student's graduation, reversed the district court, finding the student's graduation rendered any injuries that had occurred to be wholly in the past with the only remedy presently available to him would be monetary damages. IDEA's exhaustion of administrative remedies are not excused merely because the action was initiated under § 1983 and sought money damages, but exhaustion is excused where, as here, to do so at this date would be futile and inadequate. There being available no equitable relief that could make the student whole through the administrative scheme, assuming the alleged deprivations occurred, it would be futile to require the student to exhaust the due process hearing procedures when there is no adequate remedy.

In Padilla v. Denver School District No. 1, 35 F.Supp.2d 1260 (D. Colo. 1999), the district court found that IDEA administrative remedies would be futile where a student initiated an action under the Americans with Disabilities Act of 1990 and §1983 against the school district for injuries sustained when she was placed in a time-out room. A teacher and an aide placed the 11-year-old student with multiple disabilities in a stroller, strapped her in with a seat belt, and then placed the stroller in a closet as a means of restraint and "time out" when the student became agitated and refused to eat. The student was not supervised. The student became more agitated at being placed in the closet. The stroller toppled backwards, resulting in a skull fracture to the student. The use of the time-out room was not in accordance with the student's IEP. The school moved to have the complaint dismissed for failure to exhaust IDEA administrative remedies. The parent had requested a due process hearing through which money damages were requested. The hearing was dismissed at the school's request because money damages are not available through the administrative procedures. The hearing officer also noted that there appeared to be little or no relief that could be granted the student because she no longer lived in the district or received any services from the Denver school district. The federal court found that exhaustion was not required in this instance because the student had now moved and lived outside the district. Further administrative appeal would have been futile. The student had sought a due process hearing, but the hearing was denied. There was no relief available to her. 35 F.Supp.2d at 1265. Adequate relief is not available. In addition, money damages are not available through IDEA's administrative due process procedures, making this avenue futile.

Sabin v. Greenville Public Schools, 31 IDELR ¶ 161 (W.D. Mich. 1999), involves a different conclusion. The court reasoned the IDEA administrative remedies were adequate and were not excused because monetary damages were sought. Much of the relief sought could be obtained through the due process system. (This case has a number of particularly troubling aspects to it. The student had an emotional impairment, was prone to oppositional/defiant behavior, and had frequent episodes in the classroom. He often posed a danger to himself and others. He had destroyed one time-out "box" that had been employed in the classroom. When the student's father came to pick him up from school, he found the student in the time-out "box," which was held shut by an aide. He was naked and covered in his bodily waste. He had removed his own clothes and had urinated on the time-out "box." The aide removed his clothes from the box when he started to use his shoe strings to strangle himself.)

Washougal (WA) School District, 4 ECLPR ¶ 131 (OCR 1999), an investigation by the Office for Civil Rights (OCR), involved allegations the school denied a second-grade student a free appropriate public education (FAPE) by allegedly placing him in a cold, unsupervised time-out area for approximately one hour and, on one occasion, withholding his lunch. The Office for Civil Rights (OCR) determined the school district did not violate either Sec. 504 or Title II of the A.D.A. The student's IEP called for the use of a quiet time-out area for the student. The student was placed in the time-out area only once, and this placement was supervised and lasted about 15 minutes. The student was never unsupervised. OCR's on-site investigation indicated the temperature of the time-out area was 70 degrees. The school district did not use denial of food as a form of discipline or behavior management. The student's lunch was delayed once for about thirty (30) minutes due to the student's lack of behavior control. Once control was established, his lunch was provided to him.

In Rasmus v. State of Arizona, 939 F.Supp. 709 (D. Ariz. 1996), an eighth-grade student with an emotional handicap alleged that his Fourth and Fourteenth Amendment rights were violated by a school's use of a locked, windowless time-out room. The room was really more of a closet in the school's alternative classroom. It was approximately 6' x 4' x 8' 10" with plywood walls and a carpeted floor. There was no furniture, but there was an overhead light, fire sprinkler, air vent and viewing peephole. The door was equipped with two exterior steel bolt locks. The student had become involved in an altercation with another student. A classroom aide separated the students, directing the plaintiff to remove his jacket and shoes and empty his pockets before entering the time-out room. The student spent approximately ten minutes in the locked room. The student exhibited no trauma when he exited the closet. In fact, he was not involved in any other incidents the remainder of the school year. The student's parents were notified the same day he was confined to the time-out room. The parents asked the Fire Department to investigate. A deputy fire marshal found that the locks violated the fire code. The locks were removed. The parents also initiated a complaint with the Arizona Department of Education (ADOE) under 34 CFR §§300.660-300.662 of the Individuals with Disabilities Education Act (IDEA). Although the ADOE has developed and disseminated guidelines for the use of non-aversive behavior management practices, including time-out rooms, ADOE's complaint investigator found no IDEA violations. The court noted, however, the school violated many of the principles in the ADOE guidelines for time-out rooms, including the following:

* The student's individualized education program (IEP) contained no provision for seclusionary time-out.

* The written permission of the parents was never obtained.

* Seclusion occurred without regard to any specific behavior management program.

* The school had not developed any policies or procedures for the use of the time-out room, deferring instead to the discretion of the adult present.

* The time-out room violated the fire code.

* The time-out room did not permit staff to see the student at all times nor the student to see anyone outside.

The school argued the guidelines should not have legal effect because they were merely guidelines that had not been incorporated into law. The court noted that the ADOE referred to the guidelines and incorporated references to these principles when it conducted its IDEA complaint investigation. Although the court found the ten-minute, time-out seclusion period to be a *de minimus* violation of the student's Fourteenth Amendment rights such that the school was entitled to summary judgment on this issue, the court found there was sufficient merit to the Fourth Amendment issue that trial would be warranted. The court noted that time-out rooms do not necessarily offend the Fourth Amendment, but in this case the seemingly unfettered discretion permitted employees to place students in the time-out room for indeterminate periods without regard to a student's age or emotional disability may be excessively intrusive and thus may violate the relaxed Fourth Amendment standard for school officials.

For other cases involving time-out rooms, see the following:

1. Hayes v. Unified School Dist. No. 377, 877 F.2d 809 (10th Cir. 1989). Recent court decisions rely heavily upon Hayes, even when distinguishing facts (as in the Rasmus dispute, *supra*). The two students in Hayes had behavioral problems. The students' parent was advised of her IDEA procedural safeguards prior to giving written permission for the students' placement in a behavioral management program (Personal/Social Adjustment, or PSA, program). At times during the school year, the students were required to stay in a 3' x 5' time-out room. The parent never challenged this through IDEA due process nor sought a change of placement. Failure to exhaust IDEA remedies precluded the civil rights action in court. Notwithstanding this, the 10th circuit court made the following observations or adopted them from the district court:

    * Short-term removals for disciplinary reasons are not "changes of placement."

    * However, the use of time-out rooms can be challenged through IDEA procedures.

    * The school's use of time-out rooms was related to the provision of appropriate educational services to these students because:

(a) The use of the time-out room was rationally related to the school's educational function to teach students rather than suspend them out of school;

(b) The students could be directly supervised at all times;

(c) The location of the time-out room allowed the students placed there to continue with their classroom instruction; and

(d) The school had a policy which strictly regulated the placement of students in the time-out room.

2. Dickens v. Johnson County Bd. of Ed., 661 F.Supp. 155 (E.D. Tenn. 1987). The court found no constitutional infirmity with the school's use of a time-out room, which consisted of a three-sided cardboard partition that was not attached to a wall and could easily be removed. The area contained a desk and enabled a student placed there to see and hear the teacher as well as observe the chalkboard.

PEER SEXUAL HARASSMENT: KINDERGARTEN STUDENTS

In Davis v. Monroe Co. Board of Education, 526 U.S. 629, 119 S.Ct. 1661 (1999), the U.S. Supreme Court, relying on its earlier decision in Gebser v. Lago Vista Independent School District, 524 U.S. 274, 118 S. Ct. 1989 (1998), determined that a school recipient of federal funds is liable in damages where:

1. The school is deliberately indifferent to peer sexual harassment
2. Of which it has actual knowledge
3. And where the harassment is so severe, pervasive, and objectively offensive
4. That it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school.

526 U.S. at 650.[16] The majority (this was a 5-4 decision) noted that it was not mandating any particular response or disciplinary action that a school must take when it has "actual knowledge" of such incidents, but the school's response to known peer harassment must be in a manner that is not "clearly unreasonable."

Davis involved fifth grade students. Gabrielle M. v. Park Forest-Chicago Heights School District 163, 315 F.3d 817 (7th Cir. 2003), decided January 14, 2003, by the 7th Circuit Court of Appeals (which includes Indiana), has a troubling and problematical set of facts, both legally and personally: The students are all in kindergarten.

Gabrielle M. was five years old and had just started kindergarten. Another student in her class exhibited acting-out behavior that was sexual in nature, including incidents of touching and kissing, unzipping his pants, and placing his hands inside the clothes of other students. The school engaged in a number of progressive disciplinary measures with the student, including suspension from recess, time out, isolated seating in the lunchroom, detention, counseling, and reassignment to another kindergarten class. The school agreed to transfer Garbrielle M. to another school. She had begun to exhibit symptoms of stress disorder, including separation anxiety and enuresis. Her family sought counseling for her, and she was reportedly asymptomatic by the end of the kindergarten year.

She sued her principal under state law for intentional infliction of emotional distress and the school district under Title IX alleging that the student's conduct amounted to sexual harassment. The federal district court granted summary judgment to the school district on the Title IX claim and declined to exercise supplemental jurisdiction over the state-law tort claim. The 7th Circuit affirmed, although the three-member panel indicated the difficulty in analyzing this matter due to the ages of the students.

> There is a threshold question, altogether reasonable and rational, of whether a five- or six-year-old kindergartner can ever engage in conduct constituting "sexual harassment" or "gender discrimination" under Title IX. Common sense, at least, would reject any such extension of Title IX. Nevertheless, we need not answer whether six-year-old Jason should carry the label of "sexual harasser," as we will assume *arguendo* that Jason's conduct was "sexual harassment."

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[16]See "Peer Sexual Harassment" and "Peer Sexual Harassment Revisited" in **Quarterly Reports** for October-December: 1997, July-September: 1998, and April-June: 1999 (articles by Dana L. Long, Legal Counsel).

315 F.3d at 821-22. Whether the harassment is "so severe, pervasive, and objectively offensively that it effectively bars the victim's access to educational opportunity or benefit" is a "fact-specific inquiry." Because children engage in a "dizzying array of immature...behavior," actionable harassment must be distinguished from "simple acts of teasing and name-calling among children." Id., at 822, citing Davis, 526 U.S. at 633, 651-52.

Although Gabrielle M. provided some specificity as to certain instances where the other student acted inappropriately towards her, most of her allegations were vague and conclusory, or were provided to the court through hearsay (the student "bothered" her by doing "nasty stuff").

> In the context of peer harassment between five- and six-year-olds, such allegations are as indicative of nonactionable teasing and name-calling as they are of potentially actionable harassment, and thus they provide no support for Gabrielle's claim. Nor can she avoid summary judgment by her equally unspecific testimony that Jason wanted to play with her "funny ways" at recess.

Id. The father's testimony as to what his daughter told him was both hearsay and insufficient–even if admissible–because the information does not detail when, where, or how often the alleged conduct occurred and whether the conduct was reported.

Because Davis requires evaluation to determine the severity and pervasiveness of the alleged conduct, there must be more than a single incident of offensive conduct in order to entertain a claim of official indifference and actual knowledge, citing Manfredi v. Mount Vernon Bd. of Education, 94 F.Supp.2d 447, 454-55 (S.D. N.Y. 2000), a case involving a single incident of offensive conduct between first-grade students. Id.

The 7th Circuit found that the plaintiff was not denied an equal access to an education. Although the plaintiff did suffer from a stress disorder, the typical "negative impact" indices were not present (dropping grades, confined to home or hospital because of the harassment, or physical violence). Her grades remained steady and her absenteeism from school did not increase. The record did not show that she had been denied any educational opportunities occasioned by the other student's actions. Id., at 823.

In addition, the school's response to the student's actions were not "clearly unreasonable" as to amount to deliberate indifference. The 7th Circuit declined to adopt a "constructive notice" measure for "actual knowledge," finding that Davis requires "actual notice" as a part of the liability analysis for peer harassment. "Actual notice" is typically determined where there are reports or observations in the record of inappropriate behavior. Once a school has "actual notice," a duty is imposed to respond in a manner that is not "clearly unreasonable." "Clearly unreasonable" is not defined by a "mere reasonableness standard" nor does it require that the measures employed by the school actually remedy the peer harassment. In this case, the school responded to each reported or observed incident of inappropriate conduct. Although some of the disciplinary steps proved ineffective in preventing the student from having contact with the plaintiff during lunch and recess, the measures employed by the school do not have to remedy the peer harassment. A cause of action is not supported by the ineffective remedial effect of the school's responses. The Supreme Court in Davis did not advocate that each student accused of such harassment be suspended or expelled from school. Id., at 825.

The concurring opinion is helpful in that it addresses a critical presumption made by the 7th Circuit (the students were not sufficiently aware that the behavior was sexual in nature) and challenges the limited impact analysis. Judge Ilana Diamond Rovner noted that the legal analysis does not require the court to determine whether a kindergarten student can engage in peer sexual harassment because the liability analysis is dependent upon the school's actions when it is deemed to have "actual notice" of such conduct. The state of mind of the students involved should not be figured into the equation.

> Although my colleagues stop short of saying that sexual awareness is a prerequisite to a sexual harassment claim, they suggest that the absence of such awareness at the least renders the harassment less severe and less offensive that it otherwise might be.
>
> ...Harassing conduct need not be motivated by sexual desire, nor must it be overtly sexual in nature, in order to support of claim of sex discrimination. [Citations omitted.] The pertinent question, for purposes of Title IX, is whether the harasser engaged in conduct "on the basis of sex" that had the effect of denying the plaintiff access to educational opportunities. 20 U.S.C. § 1681(a) [.] . . .
>
> Moreover, whatever the children's comprehension may have been, the adults charged with their care and education had the ability to appreciate the inappropriate and potentially harmful nature of the conduct. In fact, school officials, once alerted to Jason's behavior, immediately recognized its problematic character. It is that recognition, rather than Jason's knowledge, that exposes the school district to liability. ...
>
> The knowledge and intent of the school district are therefore central to the liability determination; the knowledge and intent of the student perpetrating the harassment are really irrelevant.... Our focus, in sum, properly rests on what the school district knew and intended, not on what Jason was capable of realizing at age six.

Id., at 826-27 (Judge Rovner, concurring). The concurring justice also asserted that the impact analysis was too narrowly defined (lack of failing grades, sufficient school attendance).

> Construing the record favorably to Gabrielle, one may readily infer that the alleged harassment traumatized her psychologically: she lost her excitement for school, she resisted going to school, she was emotionally distraught, she had nightmares and difficulty sleeping, she lost her appetite, and she began wetting her bed. It is easy to imagine how such trauma might have interfered with her access to educational opportunities. [Citations omitted.]
>
> The fact that Gabrielle's grades did not suffer is by no means dispositive. Certainly at the kindergarten level, where learning social skills is at least as important as academic instruction, grades do not tell the complete story of how well a student is doing. ... [C]ourts ought to be more flexible in assessing the harms that a child experiences as a result of harassment, given that children (especially young children) are far less able to articulate the fact and extent of their injuries and may manifest an array of different reactions to the harassment. Gabrielle may have managed to keep her grades up, yet she nonetheless may have confronted a hostile environment that made it much more difficult for her to develop and achieve as a student.

Id., at 828. (concurring). A school-based hostile environment can be established without the victim suffering from a serious blow to the victim's psychological well-being. Dramatic consequences–such as hospitalization or homebound instruction–should not be conditions precedent to imposition of liability.

THE *PARENT TRAP*: VARIATIONS ON A THEME

In the **Quarterly Report** October-December 2001, an article addressed increasing school security issues emanating from difficulties in determining who is the "parent" for a child, especially where there is divorce decree and the non-custodial parent is attempting to assert parental rights.[17] One of the cases discussed was Navin v. Park Ridge School District No. 64, 270 F.3d 1147 (7th Cir. 2001), which involved the relative rights of non-custodial parents under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, 34 C.F.R. Part 300. In Navin, the parents were divorced with the mother retaining the right to make educational decisions regarding the parents' child, who was eligible for services under IDEA. The father, displeased with the assistance provided his child, initiated a due process hearing under IDEA to challenge the appropriateness of the services being provided. Both the Impartial Hearing Officer (IHO) and the federal district court judge determined the father lacked standing as a "parent" under IDEA to initiate such a hearing and, accordingly, dismissed the action. The 7th Circuit, however, noted the mother had been silent throughout the process and the divorce decree did not terminate all of the father's rights and interests in the education of his child. The 7th Circuit remanded the case for a determination whether the father's actions were incompatible with the mother's rights under the divorce decree (and not whether his actions were incompatible with the divorce decree itself). Should the mother disagree with the father's actions, the father will have no standing to prosecute his claims.

The 2nd Circuit Court of Appeals has now addressed the same issue but with a more expansive treatment.

In Taylor v. Vermont Department of Education , 313 F.3d 768 (2nd Cir. 2002), a decision released on December 20, 2002, the court was asked to address a dispute involving an increasingly familiar core issue: Who is the "Parent" for a child with a disability?[18]

The natural parents divorced, with the mother moving to the U.S. Virgin Islands. For awhile, the parents maintained a joint custody arrangement, but this proved difficult. A state family court eventually vested custody solely with the father, including the right to make educational decisions for the child, with the mother having "a right to reasonable information regarding the child's progress in school and her health and safety."[19]

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[17]See "The 'Parent' Trap: School Security and Student Safety Issues," **Quarterly Report** October-December 2001.

[18] The 2nd Circuit refers to and relies upon the 7th Circuit's analysis in Navin, especially with regard to the relative rights of a non-custodial parent under IDEA. The Taylor case, however, is more ripe for judicial determination than Navin was, as will be seen.

[19]The court should have known better than to use the ambiguous term "reasonable" as a qualifying descriptor. This can only lead to future disagreement, which it did.

The father remarried, and it appears the stepmother was very much involved in the child's education, much to the consternation of the natural mother, who objected to references to the stepmother as "mother" or "parent" in several documents. The mother's subsequent requests to amend the records were directed primarily at these references.

The child was referred for evaluation for a suspected disability. Although originally determined not eligible for IDEA services, she was later found to have emotional and behavioral difficulties that did qualify her for services. The natural mother sought access to records maintained by the first school district the child attended, but apparently received only part of the records. The second school district the child attended was more receptive and provided records. It was the second school district that provided the natural mother with documents indicating the child's referral for an educational evaluation and the subsequent determinations of eligibility along with the development and implementation of an IEP. The natural mother had been interviewed by a psychologist retained by one of the school districts, and the psychologist provided the mother with a copy of her report. The mother sought to have an Independent Educational Evaluation (IEE) performed, but the father opposed this, as did the school. The mother sought a due process hearing under IDEA but this was dismissed by the Impartial Hearing Officer (IHO) because the mother did not have standing as a "parent" under IDEA to initiate such a proceeding due to the state custody decree.

During the time the mother was attempting to obtain records from the first school district, she wrote letters to the district, complaining of its apparent reticence in attending to her access and amendment requests. She provided courtesy copies of her correspondence to the U.S. Department of Education as well as the Vermont Department of Education.

The mother filed a *pro se* action against numerous state and local officials, alleging, *inter alia*, violations of IDEA and The Family Educational Rights and Privacy Act (FERPA) as well as her civil rights under 42 U.S.C. § 1983. She sought compensatory and punitive damages. She also claimed the Vermont DOE failed to act upon her complaint as required by 34 CFR §§300.660-300.662. The federal magistrate granted the defendants' Motion to Dismiss, but five days later, advised the parties that his daughter had been hired recently as a teacher by one of the defendant local school districts.

The 2nd Circuit addressed the core issue succinctly, declining the mother's argument that state law cannot abrogate federal rights secured to parents under IDEA and FERPA. The Circuit Court said it would not "federalize the law of domestic relations," noting that IDEA and FERPA do not interfere with a state's authority to determine who may make educational decisions on behalf of a child "so long as a state does so in a manner consistent with the federal statutes." 313 F.3d at 772. The court, in something of an understatement, notes at 776 that "neither the IDEA nor its federal regulatory scheme are models of clarity."[20] Nevertheless, there is sufficient guidance in the brief statutory reference to "parent" at 20 U.S.C. § 1401(19)

[20]This revelation is followed by a later observation: "We acknowledge that the federal regulations are inartfully drafted." Id., at 779.

and the more expanded treatment at 34 C.F.R. § 300.20, along with policy guidance from OSEP,[21] to indicate that "parent" for IDEA purposes must refer to state law. Id., at 779.

The 2nd Circuit noted that published administrative decisions applying Vermont law under IDEA do not allow a natural parent to challenge IEP determinations where the natural parent's legal authority to make educational decisions on behalf of a child has been terminated by state domestic law. Id., at 781-82. Because Taylor's parental rights have been restricted with respect to educational decision-making, the 2nd Circuit agreed she did not have standing to initiate a due process hearing.[22]

A non-custodial parent does have the right to initiate a complaint investigation under 34 C.F.R. §§ 300.660-300.662. In fact, any legal person can do so, whether in the state or out of state. §§ 300.660(a)(1), 300.662(a). Although Taylor provided courtesy copies to the Vermont DOE of her correspondence with the local school district, these letters were not directed to the DOE nor was the DOE on notice that Taylor intended these letters as requests for complaint investigations. Accordingly, the 2nd Circuit dismissed the claims against the Vermont DOE. Id., at 792-93.

The court also noted that Taylor's claim under FERPA was initiated prior to the U.S. Supreme Court's decision in Gonzaga University v. Doe, 122 S.Ct. 2268 (2002). The 2nd Circuit had previously determined that § 1983 may be available to enforce certain private rights under FERPA. Gonzaga, the 2nd Circuit concluded, effectively applies to all FERPA issues and not just the ones addressed by the Supreme Court, thus overruling 2nd Circuit FERPA decisions to the contrary: There is no private right of action under FERPA for violation of any of its provisions.[23]

If there is some potential misunderstanding in this decision, it will arise from the 2nd Circuit's decision that Taylor may not pursue a records-access claim under FERPA but can do so under IDEA. See 313 F.3d at 786, 788. While FERPA is incorporated by reference into IDEA, see 20 U.S.C. § 1417(c), these rights are expanded under IDEA. However, a non-custodial parent would have access to records under FERPA unless the school district "has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights." 34 C.F.R. § 99.4. It would appear from the recitation of facts in this case that Taylor would have access to the records under FERPA and IDEA. Although not explicitly stated, there was some indication that one of the school districts was treating "special education" records differently from "education records" generally. The 2nd Circuit seems to be doing the same thing. This has been something of a recurring problem. OSEP recently addressed this issue in Letter to Harkness, 35 IDELR 94 (OSEP 2001), criticizing the legal standards employed by a complaint investigator, who apparently differentiated between "special education" records and

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[21]The court quotes directly from the Office of Special Education Programs (OSEP) policy letter at 780 but does not identify the source. The quoted section is from Letter to Dunlap, EHLR p. 211:462 (OSEP 1987).

[22]The plaintiff also did not have standing under FERPA or IDEA to initiate a hearing to challenge the content of the child's education record. Id., at 792.

[23]It is noteworthy that the panel circulated its decision in this regard among all the Circuit judges for their concurrence. See Id., at 786, n.13

"education records" generally. OSEP stated that "educational records are records that are directly related to a student and are maintained by an educational agency or institution or by a party acting for the agency or institution," adding that there is "[n]o exception for disciplinary records or medical logs listed[,] and there is no distinction between 'special education' records and general education records."

Other than this uncomfortable discussion within the opinion, the court goes to great pains to discuss that certain documents may not be a part of a student's education record and, hence, are not susceptible to the access requirements of FERPA or IDEA. This has to do in part with what is meant by "reasonable" in the custodial order (see footnote 19, *supra*) as well as to documentation created from other notes or documentation that does not exist.[24] Id., at 787. Notwithstanding, "Although it is unclear what information is contained in these records, it is conceivable that denying plaintiff access to various medical records, counseling records, and test results during a period in which [the child] was being actively evaluated for an emotional disability cumulatively infringed upon plaintiff's right to reasonable information regarding her child's health and progress." Id., at 788.

The federal magistrate's daughter was hired as a teacher by one of the defendant school districts during the pendency of the action. The magistrate made this known to the parties but not until he had issued his decision. The 2nd Circuit declined the parties' assertion that his disinclination to recuse himself should be reviewed under a "plain error" analysis; rather, the court noted, the standard should be "fundamental error." Even so, the magistrate did not err and was not required to recuse himself. The daughter did not have an "interest that could be substantially affected by the outcome of the proceeding" that would have required the magistrate to recuse himself under 28 U.S.C. § 455. "The fact that a judge's offspring is employed by a party does not require recusal *per se*," the court observed. The magistrate did not commit error, much less a "flagrant" error under the "fundamental error" standard. Id., at 795.

Of far less legal importance but considerably more public interest is the legal challenge to the standing of Michael A. Newdow, a California physician who also has a law degree, to launch his challenge to the "under God" phrase in the Pledge of Allegiance. Newdow claims that the recitation of the Pledge in its current form violated the constitutional rights of his daughter, a second grade student, even though she was not required to recite the Pledge. See ***The Pledge of Allegiance,*** *infra*. After the 9th Circuit's three-member panel decision in Newdow v. U.S. Congress *et al.*, 292 F. 3d 597 (9th Cir. 2002) was issued on June 26, 2002, Sandra Banning, the mother of Newdow's daughter, sought to intervene, primarily to challenge his standing to maintain this action. Newdow v. U.S. Congress *et al.* 313 F.3d 500 (9th Cir. 2002). She attached to her Motion as an exhibit a February 6, 2002, custody order from a California state court that awarded Banning "sole legal custody" of the daughter.

The same three-judge panel that decided Newdow also reviewed the challenge to Newdow's standing. In its decision of December 4, 2002, the panel noted that when the dispute first reached the 9th Circuit, the custody order had not been issued. There existed no formal custody arrangement until February 6, 2002. Newdow sought modification of the court order, seeking joint legal custody. The state court issued an order

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[24]The court stated at 787: "'Reasonable' information does not mean every last cover letter, transmittal sheet or scrap of paper that happens to be contained in [the student's] files. Possibly it might not even cover more substantive original documents or notes if the information contained therein was substantially incorporated in reports or if the plaintiff had been otherwise informed of their content."

on September 25, 2002, enjoining Newdow from continuing to plead his daughter as a party to his suit. However, the state court reserved the question of Newdow's standing under federal law to continue to prosecute the matter on his own behalf.

Although the majority opinion in Newdow criticized the 7th Circuit's reasoning in its "Pledge" case, this time it relied upon the 7h Circuit's Navin decision to address Newdow's standing as a parent to continue his challenge to the Pledge of Allegiance. Following Navin's guidance, the 9th Circuit panel stated: "We hold that a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights. This holding assumes, of course, that the non-custodial parent can establish an injury in fact that is fairly traceable to the challenged action, and it is likely that the injury will be dressed by a favorable decision." 313 F.3d at 503-04.

The state court order did not strip Newdow of all parental rights. He retained rights with respect to his daughter's education and general welfare. "He has the right to consult with Banning regarding substantial non-emergency decisions (with Banning having ultimate decision-making power), as well as the right to inspect his daughter's school and medical records regardless of Banning's position." 313F.3d at 504. The panel determined that Newdow can prosecute his claim on his own behalf. However, the panel then diverged. The two justices who constituted the majority in the "Pledge" decision currently under review by the full 9h Circuit, attempted to defend its original decision while addressing Newdow's standing. The dissenting judge in the "Pledge" case noted this, concurring (as he did before) that Newdow has standing in his own right to maintain this action, but declining to entertain anything beyond the narrow issue to be decided. 313 F.3d at 506.

COURT JESTERS: THE CASE OF THE *SHAM ROCK*

Marriages are made in heaven, the adage tells us. But so were the devils.

Such is the lamentable lesson of the marriage of Louis J. Porreco and Susan J. Porreco, made all the more so due to a much public dispute among the members of the Pennsylvania Supreme Court, who, in a series of dissenting and concurring opinions, have gone from bad to verse.

Porreco v. Porreco, 811 A.2d 566 (Pa. 2002) reads like the script for a Fox television special. Louis was 45 years old, divorced, and a millionaire when he met and started dating Susan, then a 17-year-old high school student working part-time in a ski shop and living with her parents. Two years later, they were married. He presented her with a diamond ring; however, the "diamond" was really a cubic zirconium. She signed a prenuptial agreement. Prior to the execution of the prenuptial agreement, Louis prepared a personal financial statement that listed Susan's tangible assets (the ones he gave her). On this list was the fake engagement ring, valued by Louis at $21,000.00. The value is of the **ring**, as the majority opinion noted, and not of the **diamond**, which, of course, doesn't exist. Louis' net assets at the time were over $3.3 million.

It was only after the couple separated that Susan learned from a jeweler in South Carolina that the engagement ring did not contain a diamond. Susan then sought to have the prenuptial agreement set aside because of alleged fraud, failure to provide a full and fair disclosure, and breach of a confidential relationship.

The trial court agreed with Susan that a confidential relationship existed between Louis and Susan, especially "due to the difference in the parties' age, sophistication, wealth and status..." Louis breached this relationship by drafting a prenuptial agreement that was "lopsided in his favor." He also misrepresented the value of the engagement ring. The Pennsylvania Superior Court affirmed (2-1), but the Supreme Court reversed, finding that Susan's alleged reliance on Louis' misrepresentation of the value of the ring was not justifiable. She had possession of the ring and could have sought an appraisal at any time. The majority did remand the matter to the Superior Court to consider whether a confidential relationship existed between Louis and Susan.

There are three concurring opinions, a dissenting opinion joined by another justice, and a lone dissenting opinion by Justice Mike Eakin that, in the words of British poet Thomas Gray, employed "words that breathe, and words that burn."

> A groom must expect matrimonial pandemonium
> when his spouse finds he's given her a cubic zirconium
> instead of a diamond in her engagement band,
> the one he said was worth twenty-one grand.
>
> Our deceiver would claim that when his bride relied
> on his claim of value, she was not justified
> for she should have appraised it; and surely she could have,
> but the question is whether the bride-to-be- *would* have.
>
> The realities of the parties control the equation,
> and here they're not comparable in sophistication;
> the reasonableness of her reliance we just cannot gauge
> with a yardstick of equal experience and age.
>
> This must be remembered when applying the test
> by which the "reasonable fiancée" is assessed.
> She was 19, he was nearly 30 years older;
> was it unreasonable for her to believe what he told her?
>
> Given their history and Pygmalion relation,
> I find her reliance was with justification.
> Given his accomplishment and given her youth,
> was it unjustifiable for her to think he told the truth?
>
> Or for every prenuptial, is it now a must
> that you treat your betrothed with presumptive mistrust?
> Do we mean reliance on your beloved's representation
> is not justifiable, absent third party verification?
>
> Love, not suspicion, is the underlying foundation
> of parties entering the marital relation;
> mistrust is not required, and should not be made a priority.

> Accordingly, I must depart from the reasoning of the majority.[25]

The Chief Justice, Steve Zappala, was not amused by Justice Eakin's opus. In his concurring opinion, he wrote, "I write separately to address my grave concern that the filing of an opinion that expresses itself in rhyme reflects poorly on the Supreme Court of Pennsylvania.... The gravity of differing judicial views is diminished when the focus is taken away from their substance because of the form in which they are presented. I believe the integrity of this institution depends in great part upon the understanding that we engage in careful, deliberate and serious analysis of the legal issues that we undertake to examine.... The dignity of the Supreme Court of Pennsylvania, and the deserved respect that has been hard-earned, should not be diminished...." 811 A.2d at 572.

Justice Ralph Cappy, at 811 A.2d at 573, joined the Chief Justice in attempting to revoke Justice Eakin's Poetic License.

> It is axiomatic and I firmly believe that every jurist has the right to express him or herself in a manner that the jurist deems appropriate. My concern, however, and the point on which I concur completely with the Chief Justice, lies with the perception that litigants and the public at large might form when an opinion of this Court is reduced to rhyme. I, too, feel strongly that no case with which this court deals is any more or less important than any other; I will endeavor to prevent a contrary impression whenever possible.[26]

Perhaps Justice Eakin should have expressed himself in a more literary–as distinguished from poetic–manner as a means of exposing the foibles in logic of the majority opinion, whose legal fiction places a 19-year-old former part-time employee of a ski shop on the same bargaining plane as a divorced, multi-millionaire nearly thirty years older. Such presumptions have been attacked before. In Charles Dickens' *Oliver Twist*, Mr. Bumble–the cruel, self-important, exceedingly henpecked minor official at the workhouse where Oliver Twist was born and raised–complained that he was being punished because of the multiple misdeeds of his wife. He was advised that he was more at fault than she because "the law supposes that your wife acts under your direction."

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[25]811 A.2d at 575-76.

[26]The Fourth Estate has been sympathetic to Justice Eakin. In a column appearing in the December 15, 2002, issue of the Harrisburg Sunday Patriot-News, columnist Peter L. DeCoursey, referring to the spat as "PoemGate," chastised "Zappy and Cappy" for their criticisms of Eakin, a former district attorney who has a reputation for talking tough, riding motorcycles, and, of course, writing poetry, sometimes "in the verse way possible." See, for example, Busch v. Busch, 732 A.2d 1274 (Pa. Superior Ct., 1999), where then-Judge Eakin upheld a prenuptial agreement the husband sought to avoid but did so in verse.

> "If the law supposes that," said Mr. Bumble, squeezing his hat emphatically in both hands, "the law is a ass–a idiot. If that's the eye of the law, the law's a bachelor; and the worst I wish the law is, that his eye may be opened by experience–by experience!"[27]

Or maybe the observation of Irish poet William Butler Yeats is closer to the reality: "Out of the quarrel with others we make rhetoric; out of the quarrel with ourselves we make poetry."

QUOTABLE . . .

> Parties, whether in office or not, are often irresponsible in their use and abuse of freedoms of speech. They all make scapegoats of unpopular persons or classes and make promises of dubious sincerity or feasibility in order to win votes. All parties, when in opposition, strive to discredit and embarrass the Government of the day by spreading exaggerations and

[27]Chapter 51. Mr. Bumble did use "a" as noted in the quoted section. He was a beadle, not a grammarian. This is a well known quote among lawyers.

> untruths and by inciting prejudice or unreasoning discontent, not even hesitating to injure the Nation's prestige among the family of nations.
>
> U.S. Supreme Court Associate Justice Robert H. Jackson, concurring in part and dissenting in part, American Communications Association, CIO v. Douds, 339 U.S.382, 423 (1950). Justice Jackson (1892-1954) served on the Supreme Court from 1941-54) is also well known as the chief war crimes prosecutor for the U.S. at Nuremburg. Trials (1945-1949).

UPDATES

THE PLEDGE OF ALLEGIANCE

A fairly comprehensive history of The Pledge of Allegiance, both legislative and judicial, was provided in the **Quarterly Report** July-September 2001. The legislative history is of particular interest because the phrase "under God" was not inserted into the Pledge until 1954. The U.S Supreme Court has not addressed directly whether the insertion of "under God" violates the First Amendment, although *dicta* seems to indicate that a majority of the members do not believe the phrase offends the constitution. The issue may be on its way to the highest court.

On June 6, 2002, a three-member panel of the 9th Circuit Court of Appeals issued its decision (2-1) finding that the phrase "under God" does, in fact, violate the First Amendment. The case, Newdow v. U.S. Congress *et al.*, 292 F.3d 597 (9th Cir. 2002), resulted in an immediate controversy, so much so that Circuit Judge Alfred T. Goodwin, the author of the majority opinion, issued a stay the next day until the full 9th Circuit can hear the case.

The wording of the Pledge was entirely secular when first written in 1892. The phrase "under God" was added during the Cold War when President Dwight Eisenhower, on June 14, 1954, signed into law a bill that inserted the phrase. One of the primary reasons proffered at the time was to distinguish the United States from the Soviet Union, the latter an officially atheistic state. The central question to be answered is whether the enactment of the amended statute serves "any clearly secular purpose." 292 F.3d at 604, citing Sante Fe Independent School District v. Doe, 530 U.S. 290, 120 S. Ct. 2266 (2000) and Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479 (1985).

Michael Newdow brought the action *pro se*. He is an atheist, and he opposes the phrase "under God" in the Pledge. Although his daughter was not required to recite the Pledge, Newdow complained that she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'" 292 F.3d at 601. The majority agreed with Newdow.

> In the context of the Pledge, the statement that the United States is a nation "under God" is an endorsement of religion. It is a profession of a religious belief, namely, a belief in

> monotheism. The recitation that ours is a nation "under God" is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase "one nation under God" in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and–since 1954–monotheism. The text of the official Pledge, codified in federal law[28], impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion. "[T]he government must pursue a course of complete neutrality toward religion." *Wallace*, 472 U.S. at 60. Furthermore, the school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, and thus amounts to state endorsement of these ideals. Although students cannot be forced to participate in recitation of the Pledge, the school district is nonetheless conveying a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation of, the current form of the Pledge.

292 F.3d at 607-08. The majority found the current form of the Pledge and the teacher-led recitation in the public school to be a form of "coercion" that is unconstitutional. The majority also criticized the decision of the 7th Circuit Court of Appeals in Sherman v. Community Consolidated School District 21, 980 F.2d 437 (7th Cir. 1992), the only other U.S. Court of Appeals to consider the question. In Sherman, the 7th Circuit found the Pledge in its current form and its recitation in public schools not to violate the First Amendment. 292 F.3d at 611-12, *n* 12.

Circuit Judge Ferdinand F. Fernandez dissented as to the First Amendment issue.

> We can run through the litany of tests and concepts which have floated to the surface from time to time. Were we to do so, the one that appeals most to me, the one I think to be correct, is the concept that what the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions. [Citations omitted.] But, legal world abstractions and ruminations aside, when all is said and done, the danger that "under God" in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be *de minimis*. The danger that phrase presents to our First Amendment freedoms is picayune at most.

292 F.3d at 613. Judge Fernandez, unlike the majority, was persuaded by the 7th Circuit's reliance upon Supreme Court *dicta* in determining the Pledge was constitutional as written. He also said that accepting Newdow's theory of the constitution would mean that all American currency would offend the constitution and that many patriotic songs would no longer be able to be performed.

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[28]The Pledge is currently found at 4 U.S.C. § 4,

There is no specific time table by which the full 9th Circuit will review the decision and render its decision. According to legal experts, the dispute is likely to be appealed to the U.S. Supreme Court, where the Pledge would likely be found to be constitutional.[29]

SUICIDE AND SCHOOL LIABILITY

Suicide of school-aged children in public schools continues to be a matter of some litigation.[30] Ordinarily, a State's failure to intervene to prevent harm to an individual by a private actor is not a constitutional violation. See DeShaney v. Winnebago County, 489 U.S. 189, 109 S.Ct. 998 (1989). Under common law, inaction rarely gives rise to liability unless some "special duty of care" exists. *Restatement (Second) of Torts,* §314 and comment (1965). The main exceptions to this proposition are prisoners and involuntarily committed mental patients. Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976); Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452 (1982). Although children are required to attend school, this compulsory attendance does not make such children "captives" of school authorities. As the Supreme Court noted in Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655, 115 S.Ct. 2386 (1995): "[W]e do not, of course, suggest that public schools as a general matter, have such a degree of control over children as to give rise to a constitutional 'duty to protect.'" This is not, of course, an absolute statement of law. In some cases, a school's inaction, indifference, or deliberate action may result in tort actions or constitutional violations, with resulting liability, especially under two prevailing theories: Special Duty and Danger Creation.

The more recent Indiana case addressing "special duty" and the application of the Indiana Tort Claims Act (ITCA) is Sauders v. Steuben Co., 693 N.E.2d 16 (Ind. 1998). In that case, the Indiana Supreme Court reversed judgment in favor of the county and remanded the matter to the trial court, finding the absence of an audio-visual monitoring equipment in the jail relevant to a determination whether the county breached a duty to protect the inmate. The inmate was actually a pre-trial detainee, arrested for driving while intoxicated. He was arrested after running into the back of a police car. He was processed and left alone in a two-person cell. He was found between 30-42 minutes later with a noose of blanket strips around his neck. Despite attempts to revive him, he never regained consciousness. The Supreme Court acknowledged that "a custodian, under some circumstances, has a legal duty to take steps to protect persons in custody from harm." This custodian "has the duty to exercise reasonable care to preserve the life, health, and safety of the person in custody. The appropriate precautions will vary according to the facts and circumstances presented in each case." At 18. However, "the custodian does not have a duty to prevent a particular act (e.g. suicide). Rather, the duty is to take reasonable steps under the circumstances for the life, health, and safety of the detainee." Id. This duty is "a duty to take reasonable steps" and does not impose upon the custodian the responsibility to become "an insurer against harm." Id. This duty is one "to protect against unreasonable risk of harm, including specifically self-inflicted harm." At 19, citing to *Restatement (Second) of Torts,* §314A, comment *d* (1965). "If the suicidal tendencies of the inmate are known, the standard of care required of the custodian is elevated." At 19-20. Indiana has by regulation established certain county jail standards. Under 210 IAC 3-1-7(f), county jails are required to have audio-video monitoring of intoxicated pre-trial detainees. The Steuben County jail did not have such monitoring devices. Although there is not a duty to provide the equipment for any particular inmate, including the decedent, and the absence of such equipment is not evidence of negligence, the jury should have been afforded the opportunity to consider the absence of such

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[29]*Education Week*, July 10, 2002, at p. 6.

[30]See "Suicide and School Liability," **Quarterly Report** July-September 1996 and "Suicide Threats and Crisis Intervention Plans," **Quarterly Report** October-December 1999.

monitoring equipment in evaluating whether the county exercised "reasonable care under the circumstances." At 21. A new trial by jury was ordered. At 22. The Chief Justice dissented, warning that the majority's decision "will ineluctably shift liability away from those who suffer harm from their own intentional acts and impose it on those who are only negligent." At 22. Although the dissent did not address schools, it did warn that the "bottom line" of the majority opinion is "that custodians have a specific duty to prevent self-harm and that their charges have no duty at all to care for themselves." At 22-23.

The most recent case in this area is Martin v. Shawano-Gresham School District, 295 F.3d 701 (7th Cir. 2002), *cert. den.* 123 S. Ct. 601 (2002). Martin involved a 7th grade student named Timijane. Other students at the middle school told the assistant principal that Tabitha, a friend of Timijane, had cigarettes. The assistant principal searched Tabitha's locker where he found a pack of cigarettes. He called Tabitha to the office, where he informed her she would be suspended for three days. He also called Tabitha's mother at work and left a message regarding Tabitha's suspension. At that time, Tabitha informed the assistant principal that Timijane also had cigarettes. The assistant principal called Timijane out of class and asked her if she had cigarettes. She denied having any. An eventual search of her locker revealed a cigarette hidden in a sock. Also in the locker but not seen by the assistant principal at that time was a book entitled *After A Suicide*. After he found the cigarette, Timijane began to cry. She continued to cry as he escorted her back to her class to gather her belongings. He informed her of her three-day suspension. While the assistant principal was discussing the matter with Tabitha and Timijane in his office, Tabitha's mother returned his phone call. She said she would pick up Tabitha from school. While this conversation was occurring, the school bell sounded, indicating the end of the school day. The assistant principal asked Timijane if she needed to ride the bus home from school. She indicated that she needed to do so. She was still crying when she left the office. After Timijane left his office, the assistant principal left a message on Timijane's home phone, advising her parents of the suspension. Once Timijane got home, she went to the basement and hanged herself.

Timijane's parents sued the school and the assistant principal, alleging denial of procedural and substantive due process rights as well as a denial of equal protection, all Fourteenth Amendment constitutional rights. The federal district court granted summary judgment to the defendants. The 7th Circuit Court of Appeals affirmed.

Procedural Due Process Claim

Relying upon Goss v. Lopez, 419 U.S. 565 (1975), the 7th Circuit rejected the parents' argument that procedural due process required parental notice and a hearing prior to the three-day suspension. Under Goss, minimal due process procedures require that a student faced with a suspension of ten (10) or fewer days is entitled to be given oral or written notice of the charges against him; and, should he deny the charges, he should be provided an explanation of the evidence the school authorities have and be provided an opportunity to present his side of the story. Goss, 419 at 581. Martin, 295 F.3d at 705-06. The school satisfied the minimum requirements under Goss. Although the school may not have complied with state law by failing to provide prompt notice of the suspension and the reason for the suspension, this did not alter the 7th Circuit's analyis "because the failure to conform with the procedural requirements guaranteed by state law does not by itself constitute a violation of federal due process." Id., at 706, citing Pro-Eco, Inc. v. Board of Comm'rs of Jay Count, Ind., 57 F.3d 505, 514 (7th Cir. 1995). The court also rejected an attempt to raise a procedural due process claim by relying upon representations in the student handbook. 295 F.3d at 707. "The Constitution does not require pre-suspension parental notification or a pre-suspension hearing. Moreover,

even if state law required more than the Constitution, that cannot form the basis of a federal due process claim." Id.

Substantive Due Process Claim

The 7th Circuit also rejected the parents' claim that the school violated Timijane's substantive due process rights by suspending her from school, which caused her severe emotional distress, and then failing to affirmatively protect her from that distress, resulting in Timijane's suicide. Relying upon DeShaney, *supra*, the 7th Circuit noted that the Due Process Clause's "purpose was to protect the people from the State, not to ensure that the State protected them from each other." Id., quoting DeShaney, 489 U.S. at 195-96. The Due Process Clause is "a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." Id., quoting DeShaney, 489 U.S. at 195. The 7th Circuit acknowledged that DeShaney "does not generally require the state to act affirmatively to protect people from harm from private actors," the U.S. Supreme Court does recognize that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." 295 F.3d at 708, quoting DeShaney, 489 U.S. at 198. Two such circumstances are the "special relationship" or "special duty" circumstance where there is a custodial relationship, such as prisoners or institutionalized persons (see Sauders v. Steuben Co., *supra*). The other circumstance is the "state-created danger exception." The 7th Circuit, in an earlier decision, rejected the argument that public schools have a "special custodial relationship" with a student by virtue of compulsory school attendance for the purposes of applying DeShaney.[31] As far as the "state-created danger" exception, plaintiffs "may state claims for civil rights violations if they allege state action that created, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to danger [than] they otherwise would have been." Id., quoting Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993). In this case, although Timijane had a book regarding suicide in her locker and had apparently discussed committing suicide in three letters and several telephone calls to her friend Tabitha, the school was not aware of any of this until after Timijane committed suicide. "[T]he defendants did not create or increase the risk that Timijane would commit suicide, and therefore they did not have an affirmative obligation to protect Timijane after school hours." Id., at 710.[32]

Equal Protection

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[31]See J.O. v. Alton Comm. Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir. 1990). Three other Circuit Courts of Appeal have reached the same conclusion. See D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3rd Cir. 1992); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993); and Wyke v. Polk Co. Sch. B.d, 129 F.3d 560 (11th Cir. 1997).

[32]The 7th Circuit distinguished Martin from the primary student-suicide case where the "state-created danger" exception has been applied, Armijo v. Wagon Mound Public Schools, 159 F.3d 1253 (10th Cir. 1998). Armijo has more troubling aspects to it: The school was aware of his suicidal propensities; it was also aware of that he was disabled; it took him home in the middle of the day, without notifying his parents and knowing that there were weapons in the house. The school created a risk that did not otherwise exist. In Martin, the school released Timijane at the end of the school day, as it would any day whether or not she had been suspended. The school also had no knowledge that Timijane had threatened suicide in the past.

The parents argued the school treated Tabitha differently from Timijane even though they were similarly situated. The claim is based primarily on the fact that Tabitha's mother had been contacted while Timijane's parents had not. "[A]n equal protection claim focuses on the denial of a fundamental right or disparate treatment of persons depending on the claimant's suspect classification." Id., at 712. The 7th Circuit noted that Timijane does not constitute "a suspect class" nor is "the right to education...considered a fundamental right." Id., citing San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). In this case, the analysis rests upon whether the assistant principal had a rational basis for treating Tabitha differently from Timijane. The court found that the chronology supports the different treatment. The assistant principal was informed initially of Tabitha's possession of cigarettes. He did not know about Timijane's possible involvement until after he questioned Tabitha and searched her locker. It was later, when he informed Tabitha of her suspension, that Tabitha informed him of Timijane's involvement. By the time he had finished his questioning of Timijane, searched her locker, and then discussed the matter with both Tabitha and Timijane in his office, the dismissal bell rang. "Under these circumstances, and in light of the different timing involved, [the assistant principal's] treatment of Tabitha and Timijane was rational." Id., at 713.

The parents sought review by the U.S. Supreme Court, but it denied certiorari on December 2, 2002.

Date: _____ _____

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