

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

THERESA RHOADES and MICHAEL)
RHOADES as parents and next friends of)
C.R., a minor,)
)
Plaintiffs,)

v.)

Cause No. 3:05-CV-00586-JTM-CAN

PENN HARRIS MADISON SCHOOL)
CORPORATION, DAVID R. TYDGAT,)
DAVE RISNER, STEVEN HOPE, VICKIE)
MARSHALL, MARNI CRONK,)
MADISON CENTER, INC.,)
)
Defendants.)

**SCHOOL DEFENDANTS’ BRIEF IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT**

I. Introduction.

This case involves a challenge to the decision of the Penn-Harris-Madison School Corporation (“School”) to administer a voluntary suicide-prevention screening test developed by Columbia University, known as “TeenScreen.” The Plaintiffs assert that administration of the test violated a variety of state and federal laws relating to their rights to raise their daughter and her own rights to privacy. However, the Plaintiffs’ claims fail as a matter of law since the testing was voluntary, part of a school-wide curriculum relating to suicide prevention, confidential, and two Courts of Appeals have recently rejected such claims under similar circumstances, the 3rd Circuit in C.N. v. Ridgewood Board of Education, 430 F.3d 159 (3rd Cir. 2005) and the 9th Circuit in Fields v. Palmdale School District, 427 F.3d 1197 (9th Cir. 2005).

II. Statement of Material Facts.

A. The Parties.

The named Plaintiffs in this case are Teresa and Michael Allen Rhoades, individually and

as next friends of C.R. (Am. Compl., ¶2.1) At the time of the incident giving rise to this litigation C.R. was a fifteen (15) year old. student at Penn High School. (*Id.*, ¶2.2-2.3) The Principal at Penn High School at the time of these events was David Tydgat, the Assistant Principals were Dave Risner and Steven Hope, and Vickie Marshall and Marni Cronk were guidance counselors. (*Id.*, ¶2.4-2.7) The Co-Defendant, Madison Center Inc. is a community mental health center serving St. Joseph County, which operates under the name Madison Center and Madison Center for Children. (Am.Compl., ¶2.8)

B. The Sherbun Suicide and Suicide Prevention.

On January 15, 2003, Nick Sherbun, a popular Penn High School student committed suicide. The suicide was a great shock to the community and Nick's parents became activists for the "Yellow Ribbon Suicide Prevention Program." The Yellow Ribbon Program promotes teen depression and suicide awareness with an Annual Yellow Ribbon Suicide Awareness & Prevention Week in September or October of each year. (Tydgat Aff'd., ¶ 2)

As a consequence of Nick Sherbun's suicide the Human Services Council of CONNECT, Inc. identified a need for the detection and prevention of adolescent suicide. CONNECT, Inc. was created by the business community to provide communication, coordination and collaboration between education, business and human services providers for the benefit of the residents of St. Joseph County. A task force was created by the Human Services Council to research programs and services for the detection and prevention of adolescent suicide. Members of this task force included former Superintendent Vickie Markovitch and Linda Pyfer, Director of the Madison Center, Inc. (Tydgat Aff'd., ¶ 3)

Because the program was community based, the Madison Center accepted a lead role in the development of a community based suicide detection and prevention program. As part of its research into programs and services for the detection and prevention of adolescent suicide, the

Task Force began accumulating information relating to adolescent suicide in Indiana and St. Joseph County in particular. (Tydgat Aff'd., ¶ 4, Exhibit "A") The Indiana State Department of Health's "Suicide in Indiana 1999-2001," noted that "[f]or Hoosiers age 10-24, suicide ranked as the 3rd leading cause of death and accounted for 13% of all injury deaths in this age group." *Id.* The St. Joseph County suicide rates between 1999 and 2003 also demonstrated an alarming increase, going from 20 a year to more than 30 a year. *Id.*

Following the identification of the problem, the Task Force examined a variety of programs and services to address it, including the link between mental illness and teenage suicide. (Tydgat Aff'd., ¶ 5, Exhibit "B") These programs included the "Guidelines for School Based Suicide Prevention Programs" developed by the Prevention Division of the American Association of Suicidology which contained a detailed suicide prevention educational curriculum. *Id.* The Task Force also considered crisis services, education/awareness programs and screening programs. *Id.*, Exhibit "C." A key focus in many of the community based programs was on the use of school-based screening tools conducted in connection with a curriculum on suicide prevention. As it developed the community-based identification and education program, the Task Force identified the Columbia University "TeenScreen" Program as one option for the screening portion of the program. *Id.*

C. The Columbia University TeenScreen Program as part of the 10th Grade Health Education Curriculum.

The Columbia University TeenScreen Program is a national mental health and suicide risk screening program for youth. (Am. Compl., ¶ 3.1) According to Columbia University's web site at <http://www.teenscreen.org>, the goal of the National TeenScreen Program is to make voluntary mental health check-ups available for all American teens. *Id.* TeenScreen works by assisting communities throughout the nation with developing locally operated and sustained screening programs for youth. Screening can take place in schools, doctors' offices, clinics,

youth groups, shelters, and other youth-serving organizations and settings. The core basis for the screening program is that “[a]pproximately 750,000 teens in the United States suffer from depression - some so seriously it leads to suicide, the third leading cause of teenage death.” Under the TeenScreen program students “can also refuse to answer any question they don't want to answer.” *Id.*

In addition to looking at a community based screening program, the Task Force also developed a school based curriculum. Based on input from the Task Force members, including the parents of Nick Sherbun, the Task Force recommended, and the School accepted, the Yellow Ribbon program and integrated it into Penn High School's health education curriculum which is taught in the 10th grade. (Tydgate Aff'd., ¶ 6; Exhibit “D.”)

As the suicide detection and prevention curriculum was being developed and integrated into the 10th grade health education curriculum, the Task Force asked the School if it would allow Madison Center to come to Penn High School and administer the Teen Screen test voluntarily to some students. (Tydgate Aff'd., ¶ 7) The School provided no funding for the testing, merely a conference room at Penn High School, permission for Madison Center personnel to come on site to administer the test, and coordination with parents and students who would be taking the test. *Id.* No student was required to take the test and testing was purely voluntary. *Id.*

This practice is consistent with the School's policies on student privacy and parental access to information which specifically state that “[n]o student shall be required” to submit to a survey. (Tydgate Aff'd., ¶ 7; Exhibits “E” & “F”)

The pilot testing was done in the fall of 2003 and was an “active consent” program. Under the active consent program Penn High School sent out a letter to the parents of 10th graders advising them of the opportunity to participate in the TeenScreen program. (Tydgate

Aff'd., ¶ 8; Exhibit "G.") Unfortunately the active consent process only resulted in nine (9) children returning forms consenting to taking the TeenScreen test. *Id.*

Disappointed with the results of the testing, for the 2004-2005 school year the Task Force proposed going from an "active consent" program to a "passive consent" program. (Tydgate Aff'd., ¶ 9) During a meeting on October 1, 2004, Steve Bright of the Madison Center presented the "passive consent" concept to Penn High School personnel. *Id.* ¶ 10; Exhibit "H." Penn High School agreed to assist so long as the passive parental consent continued to be coupled with an active student consent which left any student free to opt-out of the testing at any time. The Madison Center agreed and prior to testing all students were required to be given a student "Assent Form" that states "(d) I have been told that participation in this program is voluntary and that I am not required to do any of these things if I don't want to. I may also refuse to answer any and all questions." (Tydgate Aff'd., ¶ 11; Exhibit "I.") The "Assent Form" also made it clear that the responses were to be treated with the utmost confidentiality. *Id.*

Consistent with the desire to work the TeenScreen program into the 10th grade health education curriculum, it was decided that the notice and the testing would take place after the Yellow Ribbon Suicide Awareness & Prevention Week and student convocation, scheduled for October 15, 2004. (Tydgate Aff'd., ¶ 12; Exhibit "J.")

In the November, 2004 issue of the "Kingsman Notes: The Penn High School Newsletter" sent out in late October, the Yellow Ribbon curriculum and convocation were discussed, as was the upcoming TeenScreen testing:

In October, sophomores attend a class assembly featuring the Yellow Ribbon Campaign. The Yellow Ribbon Campaign is a suicide prevention program that encourages teens to talk to adults and teaches them about the signs of depression and suicide. Later in November, Madison Center will be offering a free screening to all sophomore students to identify those students who may be at risk for mental illness and/or suicide. The "TeenScreen" will help identify students who are not already receiving help and not known by school counselors to have problems. A

*form is enclosed for you to sign and return if you do **not** want your child to participate in this free mental health evaluation.*

(Tydgate Aff'd., ¶ 13; Exhibit "K;" emphasis in original)

The newsletter also contained an attached letter dated October 1, 2004, discussing the TeenScreen testing noting that it was both voluntary and confidential and that **"If you DO NOT want your child to participate in TeenScreen, please complete the form below and return it to the Penn High School Guidance Office by November 8, 2004."** (Tydgate Aff'd., ¶ 13, Exhibit "K;" *see also* Am. Compl., ¶ 3.4-3.5, Exhibit "A.") The Plaintiffs claim never to have received these letters. (*Id.*, ¶ 3.7) Interestingly, although the Plaintiffs claim that they did not receive the Newsletter, as a consequence of that same Newsletter, twenty-three (23) other parents and students opted out of the TeenScreen testing. (Tydgate Aff'd., ¶ 14; Exhibit "L.")

Following the publication of the Newsletter, the High School developed a protocol whereby students who had not opted out of the TeenScreen would be tested at various times on "November 9, 11, 19, 23, December 1, 3, 7, 9, 13, 15, 17" depending on their individual schedules. Other than making Conference Room C available for Madison Center employees on these dates, setting up the schedule for students to leave the classroom and go down to testing, and arranging for the hall passes, Penn High School employees had no other involvement in the testing. (Tydgate Aff'd., ¶ 15; Exhibit "M.")

D. The December 7, 2004 TeenScreen Test of C. R.

According to the Complaint: "On December 7, 2004, Plaintiff [C.R.], who was a tenth grade student at Penn High School at the time, arrived at school and reported to her homeroom. Soon after she arrived, [C.R.] and the other students were told to go to another classroom unless they had an 'opt-out' slip. Only five students in the class had such slips." (Am. Compl., ¶ 3.10) "The remainder of the students, including [C.R.], were divided into groups of about ten, herded into another classroom, and placed in front of computers. The purpose of their being in this

other room was not told to them, other than they were going to take some kind of test.” *Id.*, ¶ 3.11.

Consistent with the testing protocol, according to the Complaint, C.R. was given the “Assent” form which advised her that the test was purely voluntary: “(d) I have been told that participation in this program is voluntary and that I am not required to do any of these things if I don’t want to. I may also refuse to answer any and all questions.” (Am. Compl., ¶ 3.12-3.13; Exhibit “B.”) According to the Amended Complaint, “[C.R.] filled out and signed the assent form.” *Id.*

Other than arranging for C.R. to be released from class on December 7, 2004 to take the TeenScreen test, School officials had no other involvement in the test or subsequent interactions between Madison Center employees and C.R. (Tydgate Aff’d., ¶ 17) Out of the total 10th Grade population of 740 students, 623 students actually took the TeenScreen test. The other 117 either opted out, declined to execute the Assent form, or were simply absent during the various test dates. (Tydgate Aff’d., ¶ 18)

III. Discussion.

A. Standard of Review.

In Sims v. Indiana Dept. of Correction, -- F.Supp.2d --, 2005 WL 3576844 (N.D.Ind. 2005) this Court recently set forth the familiar standard of review in summary judgment cases under Rule 56 of the Federal Rules of Civil Procedure and that discussion is incorporated by reference. Sims, * 1-2.

B. Count I: 14th Amendment, Interference with Parental Rights.

In Count I of the Complaint, the Rhoades contend that the School Defendants violated their substantive due process rights under the 14th Amendment to the United States Constitution

to “control the care, custody, and upbringing of their daughter ... by subjecting [C.R.] to psychological testing ... without the consent” of her parents. (Am. Compl., ¶ 4.2-4.3)

There is no doubt that among other fundamental liberty interests, the Supreme Court has held that the “Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” Troxel v. Granville, 530 U.S. 57, 65-66 (2000). However, this right must be balanced with the state obligation to educate children.

As noted in the introduction, two separate Courts of Appeals have recently rejected claims under nearly identical circumstances finding that the balance tips in favor of the school to make curricular decisions including the decision to permit surveys like the TeenScreen. *See C.N. v. Ridgewood Board of Education*, 430 F.3d 159 (3rd Cir. 2005) and Fields v. Palmdale School District, 427 F.3d 1197 (9th Cir. 2005).

In Fields, a student working towards a master’s degree in psychology who was volunteering at the district as a mental health counselor developed and administered a psychological assessment for first, third, and fifth graders. The parents were given a consent letter stating that the purpose of the survey was to “establish a community baseline measure of children’s exposure to early trauma (for example, violence).” *Id.*, 427 F.3d at 1200. The letter stated that the survey was “100% confidential,” no information would be used to identify a particular child, and after the study was completed, surveys would be locked in storage and destroyed after five years. The consent letter did not inform parents that some of the survey questions would be about sex. *Id.*, 427 F.3d at 1201.

Following the school’s approval of the survey, the volunteer counselor administered the survey during school hours to the children, ages 7 - 10. Fields, 427 F.3d at 1201. When several parents discovered that their children were questioned about sex, they filed suit alleging that

“had they known the true nature of the survey, they would not have consented to their children’s involvement.” *Id.*, 427 F.3d at 1202.

The parents first argued that by administering the survey, the school deprived them of their free-standing fundamental right “to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs.” *Id.*, 427 F.3d at 1203. The 9th Circuit, in affirming the dismissal of the claims against the school responded that while parents have the right to choose the type of “educational forum” that their children attend under Meyer v. Nebraska, 262 U.S. 290 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925), that “right does not extend beyond the threshold of the school door.” Fields, 427 F.3d at 1207. The 9th Circuit then went on to find that “[a]ccordingly, *Meyer-Pierce* provides no basis for finding a substantive due process right that could have been violated by the defendants’ authorization and administration of the survey.” *Id.*, 427 F.3d at 1207. *See also Skoros v. City of New York*, -- F.3d --, 206 WL 240709, * 34 (2nd Cir. 2006)(Affirming summary judgment for the school in a parental rights claim noting “this precedent affords parents no ‘fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children.’”)

The second recent case to discuss the issue of parental rights is the 3rd Circuit’s decision in C.N.. In that case the school administered a survey to 7th through 12th grade students about their drug and alcohol use, sexual activity, and other controversial topics. The survey was the result of a multi-year study of local needs by a community task force known as the Community Vision Team which hoped to “understand [students’] needs, attitudes and behavior patterns in order to use the town’s programs and resources more effectively.” *Id.*, 430 F.3d at 162.

To that end the Vision Team selected a survey designed by a Minneapolis based company which was then purchased and administered by the school.¹ The administration sent parents two letters informing them that the survey would take place and would cover at-risk behaviors such as substance abuse, sexuality, stress, and depression. One of the letters informed parents that the survey was to be voluntary and anonymous. As in Fields, parents claimed that the survey violated their right to privacy and to control the upbringing of their children. C.N., 430 F.3d at 163-167.

Before addressing the constitutional claims, the Third Circuit first addressed whether the survey was voluntary and anonymous. The 3rd Circuit reviewed several factors in determining whether the survey was voluntary: (1) at least one teacher allegedly told students they had to take the survey, a loud speaker announcement at one school said if students did not take the survey, they would receive a cut; (2) instructions read at the high school did not say the survey was voluntary; (3) there was 100% participation in the survey; (4) absent students had to make up the survey; (5) parents received no consent form or instructions about how to exempt their children from participating in the survey; (6) the letters to parents about the survey did not contain the exact date of the survey; and (7) the survey seemed like a test—it was intended to take an entire class period, and no one could leave the classroom while it was being administered.² C.N., 430 F.3d at 163-167.

Based on the foregoing factors the 3rd Circuit noted that “we conclude that the summary judgment record would also support a finding that the survey as intended by the Board and

¹ This is in contrast to the present case where the School Defendants had no connection with the purchase and administration of the TeenScreen survey. (Tydgat Aff’d., ¶ 17) The Minneapolis survey with 156 questions on a wide variety of controversial topics was also far more comprehensive and intrusive than the TeenScreen survey which was limited to fifteen or so questions about depression. C.N., 430 F.3d at 168-169.

² Again this is in sharp contrast with the present case where it was emphasized that the test was voluntary, the students all signed Assent Forms, there were 117 students out of 740 who did not take the test, absent students were not required to make up the test, parents received opt-out consent forms which they used, the survey was very short, and did not take a full class period. All factors demonstrating voluntariness.

certain School Defendants acting on behalf of the Board was involuntary.” C.N., 430 F.3d at 177. However, the Court also found that the “record shows that anonymity and confidentiality--as opposed to voluntariness--were consistently stressed to parents, principals and survey administrators.” *Id.*

Therefore for purposes of the C.N. case, the survey was involuntary but anonymous. Having made that determination, the court then turned to the “fundamental right of parents to make decisions concerning the care, custody, and control of their children.” C.N., 430 F.3d at 182.

Plaintiff Parents complain that the School Defendants, by not requiring parental consent prior to the administration of the survey and failing to provide sufficient information to allow an objecting parent to avoid having their child participate, deprived them of their right to make the important decision whether to allow their child to participate in the survey. Additionally, we understand Plaintiff Parents to complain that the School Defendants' actions intruded upon their parental authority to decide when and how to introduce their children to sensitive topics such as appeared on the survey.

Id., 430 F.3d at 184-185.

In resolving these claims the 3rd Circuit acknowledged that parents do have certain constitutionally guaranteed rights with respect the upbringing of their children, but:

It does not necessarily follow, however, that the survey violated the Constitution. While the Supreme Court has extended constitutional protection to parental decisions regarding certain matters (*see Troxel*, 530 U.S. 57, 120 S.Ct. 2054 (visitation); *Pierce*, 268 U.S. 510, 45 S.Ct. 571 (decision to enroll child in private, religious school rather than public school)), our review of these cases prompts us to conclude that the decision whether to permit a middle or high school student to participate in a survey of this type is not a matter of comparable gravity.

* * *

School Defendants in no way indoctrinated the students in any particular outlook on these sensitive topics; at most, they may have introduced a few topics unknown to certain individuals. We thus conclude that the survey's interference with parental decision-making authority did not amount to a constitutional violation.

Id., 430 F.3d at 185.³

Thus under Fields, the parents lost their challenge to the survey because the rights of parents presented “do[] not extend beyond the threshold of the school door.” *Id.*, 427 F.3d at 1207. Under C.N., which weighed the facts, even an involuntary survey with no parental consent at all, does not violate parental rights because “the parental decisions alleged to have been usurped by the School Defendants are not of comparable gravity to those protected under existing Supreme Court precedent.” *Id.*, 430 F.3d at 185 n. 26.

Under either of these two approaches, the claims presented in this case fail. Either because the Rhoades have no parental decisional rights “beyond the threshold of the school door” or because “the parental decisions alleged to have been usurped by the School Defendants are not of comparable gravity to those protected under existing Supreme Court precedent.” Either way the School Defendants are entitled to judgment as a matter of law with respect to the interference with parental rights claims contained in Count I of the Amended Complaint.

C. Count II: 14th Amendment, Invasion of Privacy.

In Count II of the Amended Complaint, the Rhoades contend that the School violated their rights to privacy under the 14th Amendment “by subjecting [C.R.] to the ‘TeenScreen’ examination without the valid consent of any of the Plaintiffs” (Am.Compl., ¶ 5.4)

As with the parental rights argument, the invasion of privacy claims were also presented to and rejected by the 3rd and 9th Circuits in Fields and C.N. In Fields, as in the present case, the parents argued that the right to control information contained in the survey was encompassed within the constitutional “right to privacy with respect to intimate decisions.” *Id.*, 427 F.3d at

³ However, the 3rd Circuit also took pains to distance itself from the 9th Circuit’s pronouncement in Fields that the right of parents “does not extend beyond the threshold of the school door.” Instead, the 3rd Circuit adopted a case by case approach and concluded that “we have determined only that, on the facts presented, the parental decisions alleged to have been usurped by the School Defendants are not of comparable gravity to those protected under existing Supreme Court precedent.” C.N., 430 F.3d at 185 n. 26.

1207. While both Courts stated that some cases see this right as being the same as the “right to control the education and upbringing of one’s child,” and thus subject to dismissal under the substantive due process argument in Count I, they also elected to analyze the two rights separately as well.

In C.N. the Court discussed the right to privacy in this context as being composed of two separate strands:

The Supreme Court has, however, found certain “zones of privacy” in the amendments to the Constitution, and from these zones has specified that the constitutional right to privacy “protects two types of privacy interests: ‘One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.’” The “important decisions” referred to in the latter strand of the privacy protection “have encompassed ‘matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.’”

Id., 430 F.3d at 178 (citations omitted).

In the present case the Rhoades’ claims only implicate the first of these strands, “the individual interest in avoiding disclosure of personal matters.” In the Complaint they claim that “[t]he Defendants deprived the Plaintiffs of their right to privacy by subjecting [C.R.] to the ‘TeenScreen’ examination without the valid consent of any of the Plaintiffs, by extracting highly personal and private matters from [C.R.]” (Am. Compl., ¶ 5.40)

In analyzing claims of this sort the 3rd Circuit noted that a threshold inquiry is whether there was a “disclosure that was involuntary in nature.” C.N., 430 F.3d at 180. This threshold factor is based upon the fact that “[i]n determining whether information is entitled to privacy protection, [this Court] ha[s] looked at whether it is within an individual's reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.” *Id.*(parenthetical supplied) Of course if the individual has voluntarily provided the information, then there is no “reasonable expectation of confidentiality” and the information is not protected.

In the present case, as noted earlier, it is undisputed that C.R. signed an “Assent Form” that states “(d) I have been told that participation in this program is voluntary and that I am not required to do any of these things if I don’t want to. I may also refuse to answer any and all questions.” (Tydgate Aff’d., ¶ 11; Exhibit “T”) As the Complaint notes, “[C.R.] filled out and signed the assent form.” (Am. Compl., ¶ 3.13; Exhibit “B”) Thus from C.R.’s standpoint the TeenScreen testing was purely voluntary.

Moreover, the TeenScreen test was given in an environment which made it clear that participation was voluntary. As the amended Complaint also notes, other students in C.R.’s class opted out, “five students in the class had such slips.” *Id.*, ¶ 3.10. Moreover, out of the total 10th Grade population of 740 students, only 623 students actually took the TeenScreen test, demonstrating that it was not “required.” (Tydgate Aff’d., ¶ 18) Under these circumstances the invasion of privacy claim fails at the first hurdle since there was no expectation of privacy based on consent nor was there any compelled disclosure of personal information.

There is also a second problem with the invasion of privacy claims. Even assuming that the School compelled the disclosure, that does not mean that the student’s privacy rights were invaded, for example if the disclosure was made anonymously or in the aggregate. The 3rd Circuit noted that in past cases in which it had found a disclosure-based privacy violation, an actual disclosure of personal information linked to a particular person was made—which did not occur in that case because the survey was anonymous. *Id.*, 430 F.3d at 180-181. The Court concluded that “while the privacy expectation is great, the privacy side of the balance is nonetheless lessened because disclosure of personal information occurred only in the aggregate and personal information was adequately safeguarded.” *Id.* The 3rd Circuit also considered the fact that the disclosure involves “public health or like concerns:”

At the same time, the record reflects that the survey was administered at Ridgewood in an attempt to obtain information directly related to the

understanding and prevention of the social problems confronting today's youth—a laudable goal, apparently pursued with the youths' best interests in mind. In this unique context, we will deem the balance to tip in the government's favor, and accordingly find no constitutional violation of the privacy right against disclosure.

Id., 430 F.3d at 181-182.

The present case presents an even more compelling argument. The TeenScreen program was one component of a comprehensive health education curriculum for 10th graders designed in response to the high profile suicide of a student at Penn High School. The test was both voluntary and confidential as noted in the Assent form which C.R. signed. Under these circumstances the School Defendants are entitled to judgment as a matter of law with respect to the invasion of privacy claims contained in Count II of the Amended Complaint.

D. Count III: State Law: Violation of I.C. § 20-10.1-4-15.

In Count III of the Amended Complaint, the Rhoades contend that the School violated their rights under I.C. § 20-10.1-4-15(b) by conducting the TeenScreen testing without their consent. (Am. Compl., ¶ 6.3)

I.C. § 20-10.1-4-15 was entitled “Access to materials relating to personal analysis, evaluation, or survey of students; consent for participation” and was intended to be a state law analog to the Protection of Pupil Rights Amendment (“PPRA”)(20 U.S.C. § 1232h).⁴ There are several problems with the reliance on this statute. First, the statute has since been repealed and does not appear to have ever been intended to create a private cause of action. Second, the School did not violate the statute because the TeenScreen testing was voluntary as evidenced by the “Assent” form that C.R. signed.

⁴ The PPRA is an amendment to the Family Educational Rights and Privacy Act (“FERPA”)(20 U.S.C. §1232g). Interestingly, although the Plaintiffs in this case mention the PPRA in the Amended Complaint (*See e.g.* Paragraph 3.8) and allege the School violated that provision, they do not present any legal claims under the PPRA. Presumably this is as a consequence of the Supreme Court’s decision in Gonzaga University v. Doe, 536 U.S. 273 (2002) which held that no private cause of action exists under FERPA. Because no private cause of action exists under FERPA, so too, no private cause of action could exist under the PPRA which is simply an amendment to FERPA.

I.C. § 20-10.1-4-15 was repealed and not replaced effective July 1, 2005 based upon the fact that it was effectively preempted by the PPRA. Prior to being repealed, the statute provided, in pertinent part, as follows:

(b) A student shall not be required to participate in a personal analysis, an evaluation, or a survey that is not directly related to academic instruction and that reveals or attempts to affect the student's attitudes, habits, traits, opinions, beliefs, or feelings concerning:

* * *

(3) mental or psychological conditions that may embarrass the student or the student's family; without the prior consent of the student (if the student is an adult or emancipated minor) or the prior written consent of the student's parent or guardian (if the student is an unemancipated minor)

The problem with presenting claims under I.C. § 20-10.1-4-15(b) is that it simply does not apply to this case. There is no dispute that the TeenScreen test is an evaluation concerning "mental or psychological conditions" however, the student was not "required to participate," either in part or in full. The "Assent Form" states "(d) I have been told that participation in this program is voluntary and that I am not required to do any of these things if I don't want to. I may also refuse to answer any and all questions." (Tydgat Aff'd., ¶ 11; Exhibit "I.") As the Amended Complaint notes, "[C.R.] filled out and signed the assent form." (Am. Compl., ¶ 3.13; Exhibit "B.") Indeed, as the Amended Complaint also notes other students opted out, "five students in the class had such slips." *Id.*, ¶ 3.10. Moreover, out of the total 10th Grade population of 740 students, only 623 students actually took the TeenScreen test, demonstrating that it was not "required," the other 117 either opted out, declined to execute the Assent form, or were simply absent during the various testing dates. (Tydgat Aff'd., ¶ 18)

As a consequence of the foregoing, the state law claims presented in Count III of the Amended Complaint for a violation of I.C. § 20-10.1-4-15(b) lack any merit and should be dismissed.

E. Count IV: State Law: Negligent Breach of Duty.

In Count IV of the Amended Complaint, the Rhoades contend that the School and/or Madison Center “owed the Plaintiffs a duty not to relate to Plaintiff [C.R.] any diagnosis or analysis ... without the express consent of her parents” (Am. Compl., ¶ 7.3)

There are two significant problems with this claim. First, there is no legal basis for the existence of such a duty and such a duty simply does not exist. Second, and more importantly, the School never disclosed any information to C.R.. Indeed the Amended Complaint is devoid of a single allegation that any Penn High School employee was involved in the administration of the test or the alleged misinterpretation of the test results. *See e.g.* Am. Compl., ¶ 3.18 - 3.21 noting “[C.R.] was approached by an employee or agent of Defendant Madison Center, Inc.” In reality the undisputed facts are that the School had no involvement with the administration of the test or the discussion of the test answers at all. (Tydgate Aff’d., ¶ 17)

Because the undisputed facts demonstrate that neither the School nor its employees were involved in the administration of the test or the alleged misinterpretation of the test results, even if a duty existed, the School did not breach this duty.

F. Count V: State Law: Invasion of Privacy.

In Count V of the Amended Complaint, the Rhoades contend that the School “invaded the Plaintiffs’ state law right to privacy by subjecting Plaintiff [C.R.] to the ‘TeenScreen’ examination.” (Am. Compl., ¶ 8.2)

The Restatement Second recognizes four strands to the tort for invasion of privacy: (1) public disclosure of private facts; (2) unreasonable intrusion upon the seclusion of another; (3) appropriation of another's name or likeness; and (4) publicity that unreasonably places another in a false light before the public. Branham v. Celadon Trucking Servs., Inc., 744 N.E.2d 514, 524 (Ind.App. 2001). In the present case the Rhoades seem to seek to bring themselves within strand

two as they assert that the actions “constituted an intrusion into the Plaintiffs’ personal and family solitude.” (Am. Compl., ¶ 8.3)

The Indiana Court of Appeals discussed this tort in Creel v. I.C.E. & Associates, Inc., 771 N.E.2d 1276 (Ind.App. 2002):

To establish a claim for invasion of privacy by intrusion, a plaintiff must demonstrate that there was an “intrusion upon the plaintiff’s physical solitude or seclusion as by invading his home or conducting an illegal search.” *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind.1991) (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 117, at 854 (5th ed.1984)); see *Ledbetter v. Ross*, 725 N.E.2d 120, 123 (Ind.Ct.App.2000) (observing that intrusion upon the plaintiff’s physical solitude or seclusion includes invading his home or other quarters). To rise to the level of tortious conduct, “the intrusion must be something which would be offensive or objectionable to a reasonable person.” *Ledbetter*, 725 N.E.2d at 123.

Indiana courts have narrowly construed the tort of invasion of privacy by intrusion. In *Cullison*, our supreme court stated that the tort of invasion of privacy by intrusion requires intrusion into the plaintiff’s private “physical” space. 570 N.E.2d at 31. There have been no cases in Indiana in which a claim of intrusion was proven without physical contact or invasion of the plaintiff’s physical space such as the plaintiff’s home. See, e.g., *Ledbetter*, 725 N.E.2d at 123 (holding that a single telephone call, involving no threats or abusive language, cannot as a matter of law be the basis for the tort of invasion of privacy by intrusion); *Terrell v. Rowsey*, 647 N.E.2d 662, 667 (Ind.Ct.App.1995) (determining that there was no actionable intrusion where a defendant opened the plaintiff’s car door while the plaintiff sat in the car, reached behind the driver’s seat and grabbed an empty beer bottle, without making physical contact with the plaintiff) trans. denied; *Cullison*, 570 N.E.2d 27, 31 (Ind.1991) (concluding that, while invasion of the plaintiff’s home could constitute a claim for invasion of privacy, harassment of the plaintiff in a restaurant or on the public street outside his home could not).

Creel, 771 N.E.2d at 1280-1281.

Based upon the foregoing analysis, the Rhoades simply cannot state a claim for invasion of privacy by intrusion since there was no “intrusion into the plaintiff’s private ‘physical’ space” through either “physical contact or ... invasion ... of the plaintiff’s home.” Without such an intrusion, the Rhoades’ state law invasion of privacy claim must fail as a matter of law.

Moreover, in the present case, as discussed in detail in various other parts of this brief, C.R. actually consented to the survey and took part in it voluntarily. As a consequence of the foregoing factors, the School Defendants are entitled to judgment as a matter of law with respect to the invasion of privacy claims contained in Count V of the Amended Complaint.

G. Count VI: State Law: Intentional Infliction of Emotional Distress.

In Count VI of the Amended Complaint, the Rhoades contend that the “conduct of relating to Plaintiff [C.R.] a diagnosis that she suffered from obsessive compulsive disorder and social anxiety disorder was extreme and outrageous conduct and utterly intolerable in a civilized community.” (Am. Compl., ¶ 9.2)

In Indiana, the elements of a claim for intentional infliction of emotional distress are met where a person: (1) engages in ‘extreme and outrageous’ conduct that, (2) intentionally or recklessly, (3) causes, (4) severe emotional distress to another. Bradley v. Hall, 720 N.E.2d 747, 752 (Ind.App. 1999). With respect to the School and its employees the Complaint fails to make it over the first hurdle. The School was not the one that told the student of the diagnosis. Indeed, according to the Amended Complaint the individual who engaged in this conduct was “believed to be an agent and employee of Defendant Madison Center, Inc.” (Am. Compl., ¶ 3.18 - 3.20) Moreover, there was no “extreme or outrageous” conduct. As the Restatement (Second) of Torts § 46 states:

Liability has been found only where the conduct has been 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. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the act, and lead him to exclaim, ‘Outrageous!’

Bradley, 720 N.E.2d at 753 citing Restatement (Second) of Torts § 46. In the appropriate case, this question can be decided as a matter of law.

What constitutes “extreme and outrageous” conduct depends on the prevailing cultural norms and values. Bradley, 720 N.E.2d at 753. Under the undisputed facts the School Defendants (as opposed to the Madison Center) are not even alleged to have engaged in any conduct that could be characterized as either intentional or “extreme and outrageous.” As a consequence the School Defendants are entitled to judgment as a matter of law with respect to the intentional infliction of emotional distress claims contained in Count VI of the Amended Complaint.

H. Count VII: State Law: Art. 1, §1 Invasion of Privacy.

In Count VII of the Amended Complaint, the Rhoades contend that they have a “inalienable right to privacy protected by the guarantee to life, liberty, and the pursuit of happiness set forth in Indiana Constitution Article I. § 1.” (Am. Compl., ¶ 10.2) They allege that the School “violated the Plaintiffs’ right to privacy guaranteed by the Indiana Constitution by subjecting [C.R.] to the ‘TeenScreen’ examination without the valid consent of any of the Plaintiffs, by extracting highly personal and private matters from [C.R.]” *Id.*, ¶ 10.4.

Article I. § 1 of the Indiana Constitution provides, in pertinent part, that: “WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness”

In Clinic For Women, Inc. v. Brizzi, 814 N.E.2d 1042 (Ind.App. 2004) the Indiana Court of Appeals in an “informed consent” abortion case recently noted that “[w]e find that article I, § 1 of the Indiana Constitution protects and is animated by privacy as a core constitutional value and that this state constitutional right of privacy extends to all Indiana citizens” *Id.*, 814 N.E.2d at 1044. In that case an abortion clinic challenged Indiana’s informed consent law arguing that it “violates the state constitutional right of privacy of women seeking to obtain abortions.” *Id.* In overturning the informed consent law the Indiana Court of Appeals conducted

a detailed examination of the right to privacy as a core element of Article I, § 1 and determined that there was such a value, and therefore, in order for the statute to be valid, the State was required to show that its statute or actions did not “materially burden” the core value. “As explained in Price[v. State], 622 N.E.2d 954 (Ind.1993)], a restriction amounts to a ‘material burden’ upon a core value if the right, as impaired, would no longer serve the purpose for which it was designed. Price, 622 N.E.2d at 960 n. 7.” Clinic for Women, 814 N.E.2d at 1051.

The analysis under this constitutional right differs from that of the federal right which looks only to a “rational relationship” between a legitimate governmental interest and the action being taken. Under Indiana law, the “material burden” analysis, unlike a rationality inquiry, looks only to the magnitude of the impairment: “If the right, as impaired, would no longer serve the purpose for which it was designed, it has been materially impaired.” Price, 622 N.E.2d at 969 n. 7.

In the present case, the magnitude of the impairment is minimal. The right in this case is the student’s right to retain as confidential certain facts about her life. However, the information sought is not particularly intimate, and more importantly, C.R. consented to the release of this information. Under these circumstances the material burden that the TeenScreen test imposed on C.R.’s right to privacy is minimal at best. Certainly the test does not materially burden any right to confidentiality when the test itself permits opt-out by students or parents, is not required, any student may refrain from answering any question, and there were no breaches of confidentiality. Giving the TeenScreen test under these circumstances, when combined with the opt-out provisions to the parents, fairly protects the privacy right and does not “materially burden” C.R.’s privacy interests since she could, at any time, simply decline to take the test. As a consequence the School Defendants are entitled to judgment as a matter of law with respect to

the state constitutional invasion of privacy claims contained in Count VII of the Amended Complaint.

I. Liability of Individual School Defendants.

In addition to suing the School, as noted earlier, the Plaintiffs have also sued Principal Tydgate, Associate Principal Risner, Assistant Principal Hope, Counselor Cronk, and Counselor Marshall, “individually and in his [or her] capacity.” (Am. Compl., p. 1) These claims lack merit and should be dismissed irregardless of the Court’s findings on the preceding portions of the School Defendants’ motion.

The claims against the individual School Defendants in their official capacities should be dismissed. Traditionally, the official capacity designation was used as a subterfuge to escape the restrictions the 11th Amendment placed on suits against governmental entities. However, “[t]here is no longer a need to bring official-capacity actions against local government officials, for under Monell[v. New York Department of Social Services, 436 U.S. 658 (1978)], local government units can be sued directly for damages and injunctive relief.” Kentucky v. Graham, 473 U.S. 159, 167 n. 14 (1985). *See also* Smith v. Metropolitan School Dist. of Perry Township, 128 F.3d 1014, 1021 n. 3 (7th Cir. 1997)(Because Smith’s suit is also against the entity, i.e., the School District and School Board, her claims against the principal and assistant principal, in their official capacities, are redundant.)

Because the official capacity claims against the individual School Defendants are “redundant” since the School itself has also been sued, they should be dismissed.

1. The Federal Claims Against the Individual Defendants in their Individual Capacities are Barred by the Qualified Immunity.

In addition to suing the individual School Defendants in their official capacities, the Rhoades also present federal civil rights claims against them in their individual capacities. The 3rd Circuit in the C.N. case discussed such liability: “To impose liability on the individual

defendants, Plaintiffs must show that each one individually participated in the alleged constitutional violation or approved of it.” *Id.*, 430 F.3d at 173. Moreover, “[t]he individual defendants, however, may be entitled to a qualified immunity” *Id.*

In the present case the undisputed facts show, as discussed above, that the individual Defendants did not “individually participate[] in the alleged constitutional violation or approve[] of it” indeed the individuals had nothing to do with the decision to test or the administration of the test. (Tydgat Aff’d., ¶ 17)

Moreover, even if the individual School Defendants had participated in the alleged constitutional violation, they are still entitled to a qualified immunity. The qualified immunity is designed to protect government officials performing discretionary functions so long as their conduct did not violate clearly established rights of which a reasonable official would have known at the time of the conduct. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Qualified immunity is just that, immunity from suit, not just a defense to liability. Mitchell v. Forsyth, 472 U.S. 511(1985). Furthermore, the issue of whether qualified immunity attaches is a question of law for the Court to decide. Hughes v. Meyer, 880 F.2d 967 (7th Cir. 1989) *cert. denied*, 405 U.S. 931 (1990). As the Seventh Circuit noted: “A qualified immunity analysis entails a purely objective inquiry to determine whether, at the time of the alleged illegal act, the right asserted by the plaintiff was clearly established in the particular factual context presented.” Polenz v. Parrott, 883 F.2d 551, 554 (7th Cir. 1989). It is also well settled in this Circuit that the plaintiff bears the burden of proving a clearly established right. Hannon v. Turnage, 892 F.2d 653 (7th Cir. 1990). It is the responsibility of the Court “to determine whether at the time the alleged actions took place there was a substantial consensus of opinion that a course of conduct infringed on a right protected by the Constitution.” Doe v. Bobbit, 881 F.2d 510, 511 (7th Cir. 1989).

In the present case as discussed in detail in the preceding subsections, the School Defendants believe that the law is clear that there was no constitutional violation involved with the TeenScreen survey. However, certainly given the decisions of the 3rd and 9th Circuits, the law was at least unclear regarding the alleged rights of students taking in school surveys like TeenScreen. Under these circumstances the Rhoades cannot meet their burden of demonstrating that there is “clearly established law” in this area. In the absence of clearly established law, the individual School Defendants are entitled to a qualified immunity and should be dismissed from this case irregardless of how the remaining claims fare.

2. The State Claims Against the Individual Defendants are Barred by the Provisions of I.C. § 34-13-3-5(b).

In addition to bringing federal claims against the individual School Defendants, the Rhoades also present state tort claims against them as well. However, in order to bring a claim against a governmental employee personally, a plaintiff must satisfy the requirements of I.C. § 34-13-3-5(b). This statute requires that:

- (b) A lawsuit filed against an employee personally must allege that an act or omission of the employee that causes the loss is:
 - (1) criminal;
 - (2) clearly outside the scope of the employee’s employment;
 - (3) malicious;
 - (4) willful and wanton; or
 - (5) calculated to benefit the employee personally.

The complaint must contain a reasonable factual basis supporting the allegations.

The Rhoades’ Amended Complaint utterly fails to meet these requirements. Indeed the Amended Complaint fails to mention any actions by the individual School Defendants at all. The Amended Complaint simply notes that they are “Parties” in paragraphs 2.4 through 2.7. The only other mention of the individual Defendants in the entire Amended Complaint is in paragraph 3.4 noting that they signed the letter advising of the testing attached as Exhibit “A” to the Amended Complaint. Nowhere in the Amended Complaint do the Rhoades allege, as is

required under I.C. § 34-13-3-5(b), any of the five means by which they could bring claims against the School Defendants personally, and as a consequence, regardless of the resolution of the remainder of this motion, the individual School Defendants are entitled to judgment as a matter of law.

IV. Conclusion.

For the foregoing reasons, School Defendants, the Penn-Harris-Madison School Corporation, David R. Tydgat, Dave Risner, Steven Hope, Vickie Marshall, and Marni Cronk, respectfully request that the Court find that the facts are undisputed and that the School Defendants are entitled to judgment as a matter of law.

Respectfully submitted,

Locke Reynolds LLP

By: /s/Thomas E. Wheeler

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2006, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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