

TERESA RHOADES and MICHAEL
RHOADES as parents and next friends of
CHELSEA RHOADES, a minor,

Plaintiffs,

v.

PENN-HARRIS-MADISON SCHOOL
CORPORATION, DAVID R. TYDGAT,
DAVID RISNER, STEVEN HOPE, VICKIE
MARSHALL, MARNI CRONK, and
MADISON CENTER, INC.,

Defendants.

Cause No. 3:05-CV-00586

**PLAINTIFFS' BRIEF IN OPPOSITION TO
SCHOOL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants Penn-Harris-Madison School Corporation, David R. Tydgat, David Risner, Steven Hope, Vickie Marshall, and Marni Cronk (hereafter "the School Defendants") have moved for entry of summary judgment under Fed. R. Civ. P. 56 on all the claims set forth in the First Amended Complaint. For the reasons set forth below, the School Defendants are not entitled to summary judgment and the motion must be denied.¹

STATEMENT OF GENUINE ISSUES

In their brief supporting the motion for summary judgment, the School Defendants allege that participation by students in the TeenScreen examination was purely voluntary. But this is disputed by the fact that students were never verbally informed of the purpose of the testing or that they had a choice not to be tested. On the morning of December 7, 2004, Chelsea Rhoades' homeroom teacher announced that all students were to report to Conference Room C to take a

¹ Contemporaneous with this Brief, the Plaintiffs have filed a motion under Fed. R. Civ. P. 56(f) and supporting affidavit requesting that discovery be allowed before deciding the School Defendants' motion.

the test (Chelsea Rhoades Aff. ¶ 3). Indeed, in their instructions to teachers regarding the administration of TeenScreen, Defendants Marshall and Cronk told the teachers “please do not explain what this is to your students.” (Risner Aff. Exhibit M, p. 1). After Chelsea proceeded to the conference room as instructed, an individual read something to the students about the test. Chelsea did not hear what was read because she was distracted while helping a wheelchair-bound friend (Chelsea Rhoades Aff. ¶ 4). Chelsea was then handed a piece of paper and asked to sign it; however, Chelsea was never told that she could choose not to take the test or that it was voluntary. She did not even read the paper she was given and thought it was an acknowledgement that she had taken the test (Chelsea Rhoades Aff. ¶ 4).

Chelsea and the other students were then told to sign into the test on the computer and then complete the test, answering the questions truthfully (Chelsea Rhoades Aff. ¶ 5). After she was finished, Chelsea was told to wait outside in the hallway until another worker called her over. After about 5 minutes, a woman come out the testing room and called Chelsea by name (Chelsea Rhoades Aff. ¶ 6). The woman walked her down several steps away from the other students and told Chelsea, based on her answers, that Chelsea had Obsessive Compulsive Disorder (“OCD”) for cleaning and social anxiety disorder because she doesn’t go out much (Chelsea Rhoades Aff. ¶ 6). When Chelsea went home, she asked her mother, Plaintiff Teresa Rhoades, what social anxiety and OCD were. Teresa explained and asked Chelsea why she was asking. Chelsea then told her mother that a woman at school told her she had those disorders (Chelsea Rhoades Aff. ¶ 8; Teresa Rhoades Aff. ¶¶ 4-7).

Teresa called Assistant Principal David Risner and was told that someone from Defendant Madison Center, Inc. would call her (Teresa Rhoades Aff. ¶ 8). Teresa received a call

TeenScreen, Bright stated that the Defendant School Corporation had assumed responsibility for obtaining consent (Teresa Rhoades Aff. ¶ 14). In response to Teresa's request, Bright sent her by fax the TeenScreen Examination given to Chelsea (Teresa Rhoades Aff. ¶ 16). The examination asked questions such as whether the subject had felt nervous, uncomfortable or afraid recently, whether the subject had persistent thoughts about something, whether the subject had considered suicide, and about drug and alcohol use (Teresa Rhoades Aff., Exhibit A at 5-10). It also asked about the subject's relationship with parents and personal feelings (Teresa Rhoades Aff., Exhibit A at 11-14).

After the woman told Chelsea that she had these two psychological problems, Chelsea felt very upset and confused. She wasn't sure what these conditions were and was afraid they were very serious because she thought these people were like doctors. Chelsea thought about it all day and got more upset as the day went on (Chelsea Rhoades Aff. ¶ 7). When she was revealing what happened to her mother, Chelsea became extremely upset at the fear that she had something seriously wrong with her and began to cry (Teresa Rhoades Aff. ¶ 7). Teresa had to reassure Chelsea that there was nothing wrong with her (Teresa Rhoades Aff. ¶ 7). Chelsea continued to have self-doubt about her mental health (Teresa Rhoades Aff. ¶ 20). The ordeal also caused significant stress for Plaintiffs Teresa and Michael Rhoades in having to see Chelsea so upset over the "diagnosis" she had been given (Teresa Rhoades Aff. ¶ 21).

The School Defendants also assert that school officials and employees had no involvement in the administration of the TeenScreen testing other than making conference rooms available for testing, arranging student schedules to allow the test administration, and arranging

officials were deeply involved in the decision to administer TeenScreen and its actual administration. At a school board meeting on February 28, 2005, Dr. Robert Howard, Superintendent of the Schools, stated that “[t]he former superintendent of the Penn-Harris-Madison School Corporation was a member of the task force involved in the development of a screening program for St. Joseph County and committed Penn High School to participate in the screening program. The tenth grade was selected because of alignment with the district’s health education curriculum.” (Exhibit A, p. 4). Risner’s affidavit admits that school personnel were involved in the decision to move from the unsuccessful active consent to a passive consent, and Penn High School personnel agreed to assist Defendant Madison Center, Inc. in using a passive consent system in administering TeenScreen (Risner Aff. ¶¶ 10-11). Defendants Hope, Marshall, and Cronk also prepared and sent out the passive consent forms (Risner Aff. Exhibit K. p. 5), and Defendant Hope specifically asked Penn High School staff to “please help us in administering this important screening by releasing your students as scheduled.” (Risner Aff. Exhibit J, p. 3).

ARGUMENT

I. THE DEFENDANTS’ ACTIONS DEPRIVED THE PLAINTIFFS TERESA AND MICHAEL RHOADES OF THEIR FUNDAMENTAL CONSTITUTIONAL RIGHT TO THE CUSTODY, CARE AND CONTROL OF THEIR CHILD.

The School Defendants do not challenge the principle that Plaintiffs Teresa and Michael Rhoades had a fundamental constitutional right to the care, custody, and control of their daughter, Chelsea. The right of parents to raise their children without undue state interference is

² The School Defendants have mistakenly referred to a “Tydgat Affidavit” throughout their brief in support of their motion. The Plaintiffs did not receive such an affidavit, and based upon a correspondence between brief citations and matters set forth in the Affidavit of David Risner, the Plaintiffs assume that the School Defendants intended to cite to the Risner Affidavit when citing to the Tydgat Affidavit.

The School Defendants assert that they are entitled to summary judgment on this claim because of two recent federal appellate court decisions, *C.N. v. Ridgewood Board of Education*, 430 F.3d 159 (3d Cir. 2005), and *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 1005). In *C.N.*, the Third Circuit held that parents were not deprived of their fundamental right to the control, care, and upbringing of their children when a school district conducted a survey of students. However, *C.N.* involved the mere administration of a survey, the results of which remained wholly anonymous and were not used for the purpose of diagnosing or counseling students. Thus, the interference with parental rights at issue in that case related solely to the administration of the test and the exposure of children to sensitive topics such as sexual activity and drug use. *C.N.*, 430 F.3d at 185. The court there explicitly distinguished the situation where a family’s private information is intruded upon and used for the purpose of counseling and psychotherapy, citing the following passage from another of its decisions:

School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and

It is not educators, but parents who have primary rights in upbringing of children. School officials have only a secondary responsibility and must respect these rights. State deference to parental control over children is underscored by the [Supreme] Court’s admonitions that the child is not the mere creature of the state, and that it is the parents’ responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship.

Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000).

Similarly, *Palmdale* involved claims by parents that their fundamental rights were violated because a survey administered to their children in the school exposed their children to sexual subjects and other sensitive matters. The court stressed that the sole issue in the case “is simply whether the parents have a constitutional right to exclusive control over the introduction and flow of sexual information to their children.” *Palmdale*, 427 F.3d at 1203. In denying the claim, the court was concerned that recognizing a fundamental parental right to prevent schools from exposing children to certain subjects would authorize parents to compel public schools to follow each parent’s idiosyncratic views as to what should be taught in the schools. *Id.* at 1206. *Palmdale*’s decision to deny the parents’ claim was based upon the reluctance of courts to recognize a broad-based right of parents to control what information their children are exposed to while public schools are carrying out their mission of educating students.³

The conduct at issue in *C.N.* and *Palmdale* is a far cry from that involved in the instant case. Here, a student was subjected to a psychological examination without parental consent and then informed that she had psychological problems on the basis of that examination. This is not a situation where the Plaintiff parents are complaining because their daughter was simply

³ *Palmdale*’s holding that the fundamental rights of parents do not extend beyond the threshold of the school door was criticized in *C.N.*, 430 F.3d at 185, n. 26, which pointed out that those rights are not forfeited when parents send their children to public school. *C.N.* recognized that it is still the primary privilege and duty of parents to inculcate moral standards, religious beliefs, and good citizenship, rights which should not be usurped by the public schools.

subjected to a probing psychological evaluation, which was then used as the basis for personal counseling that erroneously told her she suffered from serious psychological disorders. The Defendants arrogated to themselves the authority to counsel and advise Chelsea about deeply personal matters. This authority and privilege lay with Chelsea's parents, and Teresa and Michael Rhoades' fundamental parental rights were usurped by the Defendants without any notice or consent.

In light of the nature of the intrusion involved, this case is not controlled by *C.N.* or *Palmdale*, but is more like the *Gruenke* case which ruled that parents had stated a claim that a school employee violated the constitutional right of parents. In *Gruenke*, a high school swim coach, suspicious that one of his swimmers was pregnant, intruded into the matter by counseling the student about sex and pregnancy, urging her to obtain a pregnancy test, enlisting the assistance of other team members to get the student to take the test, and then failing to keep the test results confidential. The court held that the case represented another example of the arrogation of the role of parents by school officials and, as noted above, stressed that school-sponsored counseling and psychological testing usurp the role of caregiver and confidante that the Constitution grants to parents alone. *Gruenke*, 225 F.3d at 306-07.

It cannot be doubted that had the examination at issue here been a non-emergency physical examination, the absence of parental consent would be considered a flagrant intrusion upon the rights of Michael and Teresa Rhoades. As one court has written,

It should go without saying that adequate consent is elemental to proper medical treatment. In medical procedures involving children, ensuring the existence of parental consent is critical because children rely on parents or other surrogates to provide informed permission for medical procedures that are essential for their care. American Academy of Pediatrics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, 95 Pediatrics 314-17 (February, 1995).

(2004). “It is not implausible to think that the rights invoked here – the right to refuse a medical exam and the parent’s right to control the upbringing, including the medical care, of a child - fall within this sphere of protected liberty.” *Dubbs*, 336 F.3d at 1203. “The right to family association, embodied in the Fourteenth Amendment, ‘includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state.’” *Parkes v. County of San Diego*, 345 F. Supp. 2d 1071, 1093 (S.D. Cal. 2004) (quoting *Wallis ex rel. Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 1999)). *See also Van Emrik v. Chemung County Dep’t of Social Services*, 911 F.2d 863, 867 (2d Cir. 1990) (the Constitution assures parents that, in the absence of parental consent, x-rays of their child may not be undertaken for investigative purposes at the behest of state officials).

The need for parental consent to psychological testing, analysis, and diagnosis is at least as compelling. A psychological diagnosis can have effects and repercussions for many years, making an impression upon the psyche of minors that can be difficult to dispel. Additionally, involvement of the child’s parent in any psychological analysis is crucial in order to obtain an accurate evaluation of the child. Only parents, who have nurtured and observed their child over the years, can provide the kind of information about the child’s background and makeup that allows for a true evaluation of the emotional and psychological health of the child. And perhaps most crucially, only a parent can provide the kind of understanding, love, and support necessary for a child when receiving information about his or her mental and physical health. “The parental interest [protected by the Due Process Clause] is at its zenith when the issue involves the child’s physical well-being and spiritual, moral, and emotional development.” *Baynard v. Lawson*, 76 F. Supp. 2d 688, 692 (D. Va. 1999) *See also Merriken v. Cressman*, 364 F. Supp.

Teresa and Michael Rhoades had a fundamental, constitutional right to be involved in the decision as to whether Chelsea would be subject to a psychological evaluation and in the decision as to whether and how any results of that evaluation would be communicated to Chelsea. As in *Gruenke*, the Defendants here intruded into the protected parent-child relationship and interfered with the parents' right to manage the care and upbringing of their daughter. The Defendants delved into highly private and personal matters concerning Chelsea and then determined for themselves, without consulting her parents, the conclusions to be drawn from the information extracted and that Chelsea should be given a psychological diagnosis. This deprived Teresa and Michael Rhoades of their right to control the care, nurture, and upbringing of Chelsea that has long been recognized and protected by the Due Process Clause of the Fourteenth Amendment.

II. THE PLAINTIFFS WERE DEPRIVED OF THEIR CONSTITUTIONAL RIGHT TO PRIVACY.

The Plaintiffs' second claim seeks recovery for a deprivation of their right to privacy secured by the Due Process Clause of the Fourteenth Amendment. The School Defendants do not dispute that this right exists. Indeed, both cases relied upon by the School Defendants held that the Supreme Court has recognized two constitutionally protected privacy interests: the right to control disclosure of sensitive information and the right to independence when making certain kinds of important decisions. *Fields*, 427 F.3d at 1207; *C.N.*, 430 F.3d at 178.

Contrary to the School Defendants' assertion, both of these privacy rights are at issue under the Amended Complaint. First, the Defendants used TeenScreen to obtain from Chelsea intimate facts about herself and about her family relationships. Second, the Defendants

The important decisions protected by the constitutional right of privacy include matters relating to marriage, family relationships, child rearing, and education. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Paul v. Davis*, 424 U.S. 693, 713 (1976). The Defendants improperly intruded into the Plaintiffs' family relationship and the parents' right to make decisions regarding Chelsea's rearing by conducting an examination of Chelsea, using the results to make a "diagnosis" of her, and then communicating this diagnosis to her.

As to the obtaining and disclosure of information, the School Defendants claim that no constitutional deprivation occurred in this case because the disclosure of information by Chelsea in response to the TeenScreen examination was "voluntary," pointing to the consent form students were required to fill out. But the existence of the form and any execution by Chelsea does not establish that Chelsea's responses were voluntary as a factual matter. As she points out in her affidavit, Chelsea was simply handed the form and told to fill it out and sign it; she was not told the nature or purpose of the form. Chelsea simply filled out and signed the form (Chelsea Rhoades Aff. ¶ 3-4). It is specifically denied that any execution by Chelsea was a knowing, effective, or valid consent to the administration of TeenScreen or to any disclosure or use of the information divulged by Chelsea (Amended Comp. ¶ 3.14). It is significant that in *C.N.*, 430 F.3d at 175-76, the court refused to uphold the district court's conclusion that students voluntarily responded to the survey at issue in that case. It ruled that the question of voluntariness was one of fact that could not be resolved at the summary judgment phase.

More fundamentally, any assent by Chelsea, who was 15 years old at the time, cannot be deemed effective, valid consent under the laws and policies of the State of Indiana. A state has the power to impose requirements of parental notice and consent on a minor's right to make

Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only:

- (1) by counsel retained or appointed to represent the child if the child knowingly and voluntarily joins with the waiver;
- (2) by the child’s custodial parent, guardian, custodian, or guardian ad litem if:
 - (A) that person knowingly and voluntarily waives the right;
 - (B) that person has no interest adverse to the child;
 - (C) meaningful consultation has occurred between that person and the child; and
 - (D) the child knowingly and voluntarily joins with the waiver; or
- (3) by the child, without the presence of a custodial parent, guardian, or guardian ad litem, if:
 - (A) the child knowingly and voluntarily consents to the waiver; and
 - (B) the child has been emancipated under IC 31-34-20-6 or IC 31-37-19-27, by virtue of having married, or in accordance with the laws of another state or jurisdiction.

Ind. Code Ann. § 31-32-5-1. Clearly, none of these circumstances applies to any form executed by Chelsea in connection with the TeenScreen administration

Even more pertinent here are the provisions of Ind. Code Ann. § 20-30-5-17(b),⁴ which restrict the administration by schools of personal analyses and surveys that are not directly related to academic instruction and that reveal or attempt to affect the student’s attitudes, beliefs, or feelings concerning, *inter alia*, mental or psychological conditions that may embarrass the student or the student’s family and sexual behavior or attitudes. The statute forbids

⁴ At the time TeenScreen was administered to Chelsea, these statutory provisions were codified at Ind. Code Ann. § 20-10.1-4-15(b). The current provisions of Ind. Code Ann. § 20-30-5-17 are identical to former at Ind. Code Ann. § 20-10.1-4-15(b)

administration of such tests “without the prior consent of the student if the student is an adult or an emancipated minor or the prior written consent of the student’s parent if the student is an unemancipated minor[.]” Ind. Code Ann. § 20-30-5-17(b). This further establishes a state policy forbidding schools from obtaining personal, intimate information from students without the express, written consent of parents. Under this policy, any purported consent of an unemancipated minor must be considered inoperative; only parents may consent to such surveys.

The School Defendants suggest in their brief supporting summary judgment that this statute was not violated and written parental consent for the administration of TeenScreen was not needed because students were not “required” to submit to TeenScreen and could have refused to submit to the questioning. This contention wholly ignores the plain purpose of the statute, which is to give back to parents control over the decision of whether information may be extracted from students by schools and those who are allowed to use the schools to gather information about children. This legislative intent is demonstrated by the statute’s provision that a survey cannot be administered “without the prior consent of the student,” but then draws a distinction between students who are emancipated or adults, who alone can consent to the administration of a survey or evaluation, and unemancipated minors who can only be mined for information upon the express written consent of the parents. If schools could avoid the strictures of Ind. Code Ann. § 20-30-5-17(b) simply by making the survey nominally nonobligatory, the statute would have little or no effect because the decision as to whether information is collected would rest with immature and easily manipulated children. The statute clearly was meant to require that all evaluations, surveys, and personal analyses of minor students be only with the written consent of parents, and its application and relevance cannot be avoided by the simple expedient of giving minor students the option of whether to participate.

invasion of privacy that is at issue and occurred in this case, any purported consent of Chelsea to the administration of TeenScreen cannot be considered valid or effective. As an unemancipated minor, Chelsea was not capable of waiving her constitutional or statutory right to privacy.

Moreover, an independent violation of privacy occurred when Chelsea's responses to the TeenScreen questions were linked to her and revealed to those administering the evaluation. The School Defendants argue that this is a case where information was disclosed only in the aggregate or anonymously and that no actual disclosure of personal information linked to a particular person was made. But that is clearly refuted by Chelsea's affidavit, which avers that after Chelsea answered the TeenScreen questions, she was approached by someone who told Chelsea that, based upon Chelsea's responses to the TeenScreen questions, she had OCD and social anxiety disorder (Chelsea Rhoades Aff. ¶ 6). The results of the TeenScreen administration were not simply reported in the aggregate or anonymously; the answers to the questions were divulged to a person involved in administration of the test who knew that the answers were given by Chelsea. This is wholly unlike the situation in *C.N.*, 430 F.3d at 177, where the surveys were treated anonymously both during and after administration and results were compiled in the aggregate and not linked to individual students. By contrast, those who administered TeenScreen to Chelsea knew what her responses were and used those responses to form an opinion concerning her psychological health. Chelsea's privacy was not maintained by the Defendants, and they did commit an invasion of her privacy that is actionable here.

III. THE DEFENDANTS VIOLATED INDIANA STATE LAW REQUIRING WRITTEN PARENTAL CONSENT TO THE PARTICIPATION OF MINOR STUDENTS IN SURVEYS OR TESTS SEEKING PERSONAL INFORMATION.

under Ind. Code Ann. § 20-10.1-4-15(b) (repealed) or Ind. Code Ann. § 20-30-5-17⁵, the School Defendants note the repeal of § 20-10.1-4-15 in July 2005 and suggest that this affects the Plaintiffs' right to recover for the Defendants' violation of that section. However, the substantive protections afforded by § 20-10.1-4-15 never lapsed notwithstanding its repeal because the identical provisions were reenacted and codified at Ind. Code Ann. § 20-30-5-17 as part of the same repealing legislation. Thus, the legislature has made plain its intent that the protection granted to parents and students under § 20-10.1-4-15 was to continue in force.

In any event, a repeal of § 20-10.1-4-15 would not affect any claim that accrued under it before July 2005 under Indiana's general savings statute. "[T]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing statute shall so expressly provide; and such statute shall be treated as still remaining in force for the purposes of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." Ind. Code Ann. § 1-1-5-1. Moreover, where a statute is repealed by subsequent statute which substantially reenacted the former statute, it does not require an express saving clause to prevent destruction of rights existing under the former statute, for if the intention to preserve and continue such right is clearly apparent, it will be carried into effect without the aid of the general savings statute. *State ex rel. Milligan v. Ritter's Estate*, 221 Ind. 456, 471-72, 48 N.E.2d 993, 999 (1943). Thus, the remedies allowed by § 20-10.1-4-15 were preserved either under the savings statute or under canons of statutory construction.

⁵ The successor statute enacted after the repeal of Ind. Code Ann. § 20-10.1-4-15 is mistakenly cited as Ind. Code Ann. "§ 20-3-5-17" in the First Amended Complaint instead of "§ 20-30-5-17".

was not "required" to participate in TeenScreen. As discussed, *supra*, the fact that the statute draws a distinction between emancipated students and unemancipated students demonstrates that the requirement of parental notification and written consent cannot be avoided by the mere expedient of giving the unemancipated children themselves the theoretical choice of whether to participate in the survey or not. Under the School Defendants' reading of the statute, a school would be allowed to conduct mental or psychological evaluations and examinations of elementary school children without parental consent so long as the children were provided with a consent form giving them the option of whether to participate. This result clearly was not intended by the legislature when it adopted § 20-10.1-4-15(b) and its successor statute, the purpose of which are to assure that personal information is extracted from unemancipated students only when parents know of and affirmatively consent. Significantly, the School Defendants do not argue that the passive consent form used here, which was adopted only after the Defendants could not obtain a significant number of parents to give their actual consent, complies with the requirements of the §§ 20-10.1-4-15(b) or 20-30-5-17(b).

The School Defendants have shown no basis in law or fact for dismissing the Third Claim set forth in the First Amended Complaint⁶ so this aspect of their motion for summary judgment also must be denied.

IV. THE SCHOOL DEFENDANTS OWED THE PLAINTIFFS A DUTY OF CARE, WHICH THEY BREACHED.

⁶ In passing, the School Defendants also argue that there is no private cause of action under §§ 20-10.1-4-15(b) or 20-30-5-17(b). But under Indiana law, a private cause of action will be inferred where a statute imposes a duty for a particular individual's benefit. *Blanck v. Indiana Dep't of Corrections*, 829 N.E.2d 505, 509 (Ind. 2005). Only where it can be said that the statute was meant to provide protection exclusively to the general public will a private cause of action not be inferred; "it makes little sense to preclude recovery for violations of specific rights merely because the public receives an ancillary benefit from the statute conferring rights." *Whinery v. Roberson*, 819 N.E.2d 465, 475 (Ind. App. 5th Dist. 2004). Sections 20-10.1-4-15(b) and § 20-30-5-17(b) clearly grant specific rights to parents and children not to be subjected to surveys, examinations, and tests seeking personal information without the knowing consent of parents.

assert that they owed the Plaintiffs no duty with respect to conducting mental health evaluations and tests or with respect to communicating a diagnosis as a result of the tests. The controlling law, however, is clearly to the contrary. In *Mangold v. Ind. Dep't of Natural Resources*, 756 N.E.2d 970 (Ind. 2001), the court held that the lower courts erred in holding that a school corporation and the Department of Natural Resources did not owe a student a duty of care. The student had attended a firearm safety class conducted by the Department at the school as a part of the school's science curriculum. During that class, Department personnel had demonstrated the parts of a shotgun shell and what happens when the shell is fired. Later that day while at home, the student disassembled a shotgun shell and struck the firing pin with a hammer, which resulted in an explosion that injured the student's eye. The lower courts held that the school did not owe students a duty off school property and granted summary judgment.

Rejecting the reasoning of the lower courts, the Indiana Supreme Court emphasized that a school's duty of care to its students is not so limited:

“Duty is not sa[]crosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.” *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 53 (5th ed. 1984)). By declaring that a school may be held liable for the injuries suffered by its students, we essentially have made a policy decision that a school's relationship to its students, the foreseeability of harm, and public policy concerns entitle students to protection. We articulate this expression of liability as a school's duty to exercise “reasonable care and supervision” for its students. *Miller*, 308 N.E.2d at 706. An approach that focuses on rearticulating that duty based upon a given set of facts is misplaced in our view because to do so presupposes that an issue which is thought to be settled must be revisited each time a party frames the duty issue a little differently. Rather, because a school's duty to its students already has been established, the focus shifts to whether a given set of facts represents a breach of that duty.

The School Defendants plainly had a common law duty to provide reasonable care and supervision of Chelsea. Therefore, their claim that no duty existed in this case is without merit. As in *Mangold*, the question of whether that duty was breached in this case is a fact question. Significantly, the allegations in this case are similar to those in *Mangold*, in that it also is alleged that the Defendants provided false and inaccurate information that caused harm to the Plaintiffs. The Plaintiffs contend, and the Defendants offer nothing to dispute this, that Chelsea was falsely told that she suffered from OCD and social anxiety disorder. As the Plaintiffs have pointed out, this has caused them significant mental distress.

The School Defendants go on to assert that the School Corporation and its employees had no involvement in the administration of TeenScreen to Chelsea and, thus, the School Defendants cannot be held responsible for any violations of law or duty resulting from its administration. This attempt to distance the School Corporation and its employees from TeenScreen and the other Defendants is remarkable in light of the admission elsewhere that “[t]he TeenScreen program was one component of a comprehensive health education curriculum for 10th graders[.]” (School Defendants’ Brief in Support of Their Motion for Summary Judgment at 15). On the one hand, the School Defendants attempt to justify the administration of the test as a necessary

responsible for its administration because this aspect of the curriculum was not conducted by any Penn High School employee. Clearly, the School Defendants cannot have it both ways.

Additionally, the record does not support the School Defendants' claim that employees and agents of the School Corporation were wholly passive bystanders in the decision to have the TeenScreen program implemented at Penn High School or its actual administration. The topic of TeenScreen and its use at Penn High were addressed at the February 28, 2005, School Board meeting. The minutes of that meeting reflect that Dr. Robert Howard, Superintendent of the Schools, stated that "[t]he former superintendent of the Penn-Harris-Madison School Corporation was a member of the task force involved in the development of a screening program for St. Joseph County and committed Penn High School to participate in the screening program. The tenth grade was selected because of alignment with the district's health education curriculum." (Exhibit A, p. 4). Thus, there is evidence here showing that the school's chief administrative officer, the School Superintendent, was actively involved in the decision to use the TeenScreen program and went so far as to commit the School Corporation to making Penn High School and its students available for testing by Madison Center.

Given this evidence, the School Defendants cannot claim that they had no responsibility for the administration of the TeenScreen examination and the harm caused to the Plaintiffs. The School Defendants acted jointly and in concert with the other Defendants in allowing the TeenScreen examination to be administered to Chelsea Rhoades and other students at Penn High School. Persons are responsible for tortious or wrongful conduct if they cooperate or act in concert with others in inflicting harm on the plaintiffs or there is an agency relationship between them. *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 835 (Ind. App. 2d Dist. 2005).

but they have admitted that the other Defendants were assisting in the implementation of the school's curriculum. In that case, there was an agency relationship between the parties, which allows the conduct of the other Defendants to be attributed to the School Defendants. This case is no different from *Mangold*, where a school was held responsible for the conduct of agents of the state Department of Natural Resources who were invited into the school to conduct a class on firearm safety.

More to the point, the School Defendants cannot actively invite others to come into the school to conduct psychological testing and analysis, grant these third parties space and time during the school day to conduct the testing, assist these third parties by issuing notices and other materials promoting the testing and providing access to students, and then disclaim any responsibility for the consequences of that testing. The duty of care and supervision imposed upon schools certainly extends to requiring that the school understand what other persons who are invited on school property for the purpose of having access to students intend to do while at the school and take reasonable precautions to assure that the activities involving the students will not pose a risk of harm. The School Defendants' contention that they had no duty to the Plaintiffs and are not responsible for what other Defendants did while at Penn High School demonstrates a callous disregard for the well-being and safety of students. The duties imposed by law demand more of school officials and prevent the entry of summary judgment in favor of the School Defendants.

V. THE COMPLAINT STATES A CLAIM FOR INVASION OF PRIVACY ON THE BASIS OF THE EXTRACTION OF PERSONAL INFORMATION CONCERNING THE PLAINTIFFS.

invasion of privacy, the School Defendants unduly restrict the scope of the tort of invasion of privacy. In *Van Jelgerhuis v. Mercury Fin. Co.*, 940 F. Supp. 1344, 1368 (S.D. Ind. 1996), the court held as follows:

Although the scope of the tort remains somewhat uncertain, there are two cases applying Indiana law that shed light on its range sufficient to find that plaintiffs' contentions, if true, could make Johnson liable on this claim. In *Garus v. Rose Acre Farms, Inc.*, the court, discussing the tort's "undefined parameters", noted that in their treatise, Prosser and Keeton maintain that "highly personal questions or demands by a person in authority may be regarded as an intrusion on psychological solitude or integrity and hence an invasion of privacy." 839 F. Supp. 563, 570 (N.D. Ind. 1993) (quoting *W. Prosser & J. Keeton, Prosser and Keeton on Torts* § 117 (Supp. 1988)). The court also noted that the Indiana Supreme Court, in *Cullison*[*v. Medley*, 570 N.E.2d 27, 30 (Ind. 1991)], relied upon Prosser and Keeton in defining the invasion of privacy tort. *Garus*, 839 F. Supp. at 570. In *Moffett v. Gene B. Glick Co., Inc.*, the court held that the tort "consists 'solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.'" 604 F. Supp. 229, 236 (N.D. Ind. 1984) (quoting *Restatement (Second) of Torts* § 652B cmt. a).

The instant case falls squarely within the scope of the intrusion recognized by the federal court.

Chelsea was subjected to highly personal questions and demands by persons in authority; her responses were not kept private, but were disclosed and used to make an erroneous psychological diagnosis. Contrary to the School Defendants' argument, the Fifth Claim is not insufficient as a matter of law.

VI. THE DEFENDANTS' CONDUCT IN THIS CASE WAS SUFFICIENTLY EGREGIOUS TO SUPPORT A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The School Defendants' primary objection to the Sixth Claim of the First Amended Complaint for intentional infliction of emotional distress is that the conduct at issue here was not "extreme and outrageous." But they also concede that whether conduct can be deemed insufficient as a matter of law depends upon prevailing cultural norms and values. *Creel v.*

include the established public policy of the State of Indiana and the federal government, which forbids subjecting unemancipated minor students to psychological tests and assessments without obtaining the affirmative written consent of the students' parents. Ind. Code Ann. § 20-30-5-17(b); 20 U.S.C. § 1232h(b). Any civilized person would be shocked at the idea of informing a minor that she has significant psychological problems without first consulting the child's parents and allowing the parents to be included in any disclosure in order to provide emotional support. The egregiousness of this conduct is exacerbated by the fact that the "diagnosis" was based upon an impersonal, computer-based survey and without having made any personal contact with the minor. In *Bradley v. Hall*, 720 N.E.2d 727, 753 (Ind. App. 1st Dist. 1999), the court refused to rule as a matter of law that a workplace supervisor's discussion of highly personal matters with the plaintiff, such as her medical condition and sexual status, and his misleading the plaintiff about her workplace security was not sufficiently extreme and outrageous to support a claim for infliction of emotional distress.

The conduct at issue here is at least as egregious as in *Bradley*, especially when it is considered that it was directed at a minor in a school setting where parents believe their children will be safe and protected. Therefore, summary judgment also should be denied as to the Plaintiffs' Sixth Claim.

VII. THE PLAINTIFFS' RIGHT TO PRIVACY UNDER IND. CONST. ART. I, § 1 WAS VIOLATED BY THE CONDUCT OF THE SCHOOL DEFENDANTS.

In *Clinic for Women, Inc. v. Brizzi*, 814 N.E.2d 1042, 1048-1049 (Ind. Ct. App. 2004), *superseded on other grounds*, 837 N.E.2d 973 (Ind. 2005), the court recognized a right of privacy under the Indiana Constitution, writing as follows:

Therefore, we make explicit what heretofore has been implicit: The citizens of Indiana have a fundamental right of privacy inherent and protected by our state constitution. While we need not decide today precisely what the right to privacy--or the substantive content of article I, § 1, animated by the core value of privacy--encompasses, we have no doubt that it extends to the right to make decisions about our health and the integrity of our minds and bodies.

The School Defendants do not dispute the existence of this right of privacy under the state constitution and concede that there was some intrusion into privacy when Chelsea was subjected to the TeenScreen examination.

However, the School Defendants erroneously evaluate this invasion of privacy under a “material burden” test used for testing the constitutionality of legislation. In *Brizzi*, the issue was whether a statute requiring pre-abortion counseling materially burdened a woman’s right to seek an abortion. In *Price v. State*, 622 N.E.2d 954 (Ind. 1993), the court examined whether a disorderly conduct statute was applied in such a manner as to excessively restrict a person’s right to free expression. In both cases, the state action at issue was under the police power, the state was acting as a regulator of conduct, and the question was whether the regulation materially burdened the exercise of a right such that the regulation should not be applied. That is not the situation in the instant case. The Defendants in administering the TeenScreen program were not acting as regulators of conduct, but as investigative agents for the state. The enforceability of some regulation is not at issue; what is at issue is whether past conduct of the Defendants invaded the privacy of the Plaintiffs.

The issue here is simply whether the Defendants in fact intruded upon the Plaintiffs’ right to maintain their privacy respecting decisions about their mental health and the integrity of their minds, bodies, and other personal matters. Thus, in *C.N.*, 430 F.3d at 179-80, the court analyzed whether there had been an extraction and disclosure of personal information in determining

information about an identified person concerning sexual activity and drug use was clearly an intrusion into intimate and private matters. *Id.* at 180. The School Defendants' attempt to minimize the intrusion by relying upon the supposed consent of Chelsea is, for the reasons set forth *supra*, unavailing; Chelsea could not consent to this intrusion because of her minority. Administration of the TeenScreen examination to extract private information about Chelsea and her family relationships was an intrusion into private and intimate matters by persons acting under the authority of the state and violated the Plaintiffs' fundamental right of privacy under Ind. Const. art. I, § 1.

VIII. THE INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Preliminary to their qualified immunity argument, the School Defendants again assert that they individually did not participate in the constitutional deprivations set forth in the First Amended Complaint. Again, this contention is refuted by the materials of record, which at the very least indicate their complicity in organizing and administering the TeenScreen examination at Penn High School. Defendants Hope, Marshall, and Cronk each were involved in sending out the "opt-out" letter to parents dated October 1, 2004. Hope, Marshall, and Cronk were clearly involved in arranging for the testing places and times and making students available for testing. Individuals are liable under 42 U.S.C. § 1983 for constitutional deprivations if they caused or participated in the deprivation. *Castellano v. Chicago Police Department*, 129 F. Supp. 2d 1184, 1189 (N.D. Ill. 2001) (citing *Vance v. Peters*, 97 F.3d 987, 991 (7th Cir. 1996)). At the very least, the individual Defendants participated in the deprivation by making Penn High School and its students available for the TeenScreen examination.

(citing *Saucier v. Katz*, 533 U.S. 194 (2001)):

First, a court must decide whether the facts, when viewed in the light most favorable to the plaintiff, indicate that the officer's conduct violated some constitutional right of the plaintiff. 533 U.S. at 201. Second, if the answer to the first question is "yes," then the court must determine whether the constitutional right violated was "clearly established" at the time of the alleged violation. *Id.* The officer will enjoy qualified immunity unless the court affirmatively answers both questions. *Id.*

As discussed *supra*, the Plaintiffs were deprived of their federal constitutional rights by the Defendants, and neither *C.N.* nor *Fields* establishes that no rights were invaded.

The federal constitutional rights of Plaintiffs to familial integrity and privacy that were infringed by the Defendants were clearly established in November 2004 when TeenScreen was administered to Chelsea. "[T]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Jones*, 425 F.3d at 461 (quoting *Saucier*, 533 U.S. at 202). The right of parents to make decisions respecting the care, control, custody, and upbringing of their children has long been recognized and deemed fundamental. *Troxé v. Granville*, 530 U.S. 57 66 (2000). Furthermore, well before the incidents at issue here occurred, courts had specifically held that "[s]chool-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution." *Gruenke*, 225 F.3d at 307.

In order to defeat a claim of qualified immunity, it is not necessary for "a plaintiff to produce a case that is 'directly on point' in order to show that a right is clearly established.

state actor would have known that his actions, viewed in the light of the law at the time, were unlawful.’” *Kiddy-Brown v. Blagojevich*, 408 F.3d 346, 356 (7th Cir. 2005). Given the fundamental and long-standing recognition of the right of parents to the control and care of their children, a reasonable person would have known that the acts that occurred in this case violated the rights of the Rhoades family.

CONCLUSION

For the reasons set forth above, the Plaintiffs respectfully request that the School Defendants’ Motion for Summary Judgment be denied.

DATED this 22nd day of March, 2006.

Respectfully submitted,

JOHN R. PRICE & ASSOCIATES

s/John R. Price

John R. Price,
Counsel for Plaintiffs

PARTICIPATING ATTORNEY FOR
THE RUTHERFORD INSTITUTE

John R. Price
Attorney No. 5828-49
JOHN R. PRICE & ASSOCIATES
9000 Keystone Crossing, Suite 150
Indianapolis, Indiana 46240
Telephone: (317) 844-8822
Facsimile: (317) 844-7766
E-mail: john@johnpricelaw.com

PARTICIPATING ATTORNEY FOR
THE RUTHERFORD INSTITUTE

I hereby certify that on March 22, 2006, a copy of the foregoing Plaintiff's *Brief in Opposition to School Defendants' Motion for Summary Judgment* 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.

Thomas E. Wheeler, II
Anthony W. Overholt
LOCKE REYNOLDS LLP
Twheeler@locke.com
aoverholt@locke.com

Attorneys for Defendants PHD, Tydgate, Risner, Hope, Marshall and Cronk

D. Andrew Spalding
MAY OBERFELL LORBER
dspalding@maylorber.com

Attorney for Defendant Madison Center, Inc.

s/John R. Price
John R. Price, Counsel for Plaintiffs

Rhoades/Response to MSJ