



DISCLOSURE STATEMENT

Appellate Court No: 02-3741

Short Caption: Daniel Crowley v. Donald McKinney and Berwyn South School District #100

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Mayer, Brown, Rowe & Maw LLP; Law Office of Bruce E. de'Medici, P.C.

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i) Identify all its parent corporations, if any; and  
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## **STATEMENT OF *AMICUS CURIAE***

*Amicus curiae* is J. Brett Busby, an attorney with Mayer, Brown, Rowe & Maw LLP. This Court appointed *amicus* to represent the interests of Plaintiff-Appellant, Daniel Crowley. This Court's order of August 12, 2003, authorizes the filing of this brief.

*Amicus* believes that oral argument would materially advance the issues presented on appeal, as stated by this Court in its order of June 19, 2003.

## **STATEMENT OF JURISDICTION**

This is an appeal from a final judgment in a civil case. Daniel Crowley filed a complaint that included claims under 42 U.S.C. § 1983 for violations of his constitutional rights to substantive due process, procedural due process, equal protection, and freedom of speech. The district court had federal question jurisdiction over these claims pursuant to 28 U.S.C. § 1331. Crowley's complaint also included pendent state-law claims for violations of the Illinois School Student Records Act and intentional infliction of emotional distress. The district court had supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1367.

The district court signed a final judgment disposing of all claims, which was entered on September 20, 2002. Crowley filed a notice of appeal on October 18, 2002. This Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

## **STATEMENT OF ISSUES PRESENTED**

- 1) Is a parent's fundamental right to participate in the education of his children limited or eliminated by a divorce decree awarding custody to the other parent?
- 2) Can a non-custodial parent state a substantive due process, procedural due process, or equal protection claim against a defendant who deprives him of the right to participate in the education of his children?
- 3) Do statements about a school's poor academic performance, lack of supervision of students, and other safety problems touch on matters of potential public interest?
- 4) Are the right of a non-custodial parent to participate in the education of his children, and the right to be free from retaliation based on constitutionally protected speech, sufficiently well established to overcome a qualified immunity defense on the pleadings?
- 5) Does a plaintiff state a claim against a governmental entity under section 1983 by alleging that the entity knew of a widespread and continuing pattern of conduct that caused his injury, and that the entity authorized and ratified that conduct?
- 6) Should Crowley's state-law claims be reinstated?

## **STATEMENT OF THE CASE**

This is an appeal from a decision granting judgment on the pleadings. It concerns actions by a principal and school district to prevent a non-custodial father's involvement in the education of his children. The father, Daniel Crowley, filed a complaint under 42 U.S.C. § 1983, alleging that these actions violated his fundamental right to participate in the education and upbringing of his children, and that they constituted retaliation for his protected speech on matters of public concern. He also alleged state-law claims for access to school records and intentional infliction of emotional distress.

Defendants filed an answer and then moved for judgment on the pleadings. The district court granted their motion as to Crowley's federal claims, finding that non-custodial parents have no protected rights regarding the upbringing and education of their children, and that Crowley's speech concerned a mere personal quarrel. The court then dismissed Crowley's state law claims for lack of subject-matter jurisdiction.

## STATEMENT OF FACTS

The following facts are based on the complaint filed in this case. Because this appeal concerns a motion for judgment on the pleadings, the facts stated in the complaint must be taken as true and all permissible inferences must be drawn in Crowley's favor. *Delgado v. Jones*, 282 F.3d 511, 515 (7th Cir. 2002).

***The Parties.*** Plaintiff-Appellant Daniel Crowley ("Crowley") married Sandra Crowley ("Sandra") in 1989. Compl., Ex. A. They had two children: Daniel in May 1993, and Kelli in June 1994. *Id.* Crowley is the natural father of these children. Compl. ¶ 20.

Crowley's children are students at Hiawatha Elementary School ("the School"), where defendant Donald McKinney served as principal during the time period covered by the complaint. Compl. ¶¶ 6, 24. The School is part of defendant Berwyn South School District #100 ("the District"), and William Jordan was superintendent of the District during the time period covered by the complaint. Compl. ¶¶ 5, 7. McKinney and the District are referred to collectively as "Defendants."

***Crowley's Rights.*** Crowley lived with his family until he and Sandra separated in February 1997. Compl., Ex. A. The parties were divorced in 1998. *Id.* Sandra was awarded custody of the children, but Crowley was granted visitation rights as a non-custodial parent. Compl. ¶¶ 79, 87. The parties' marital settlement agreement ("Agreement") recognizes that Crowley retains important rights to participate in the children's upbringing, including their education, health care, and religious training. Compl., Ex. A at 14-15. With respect to education, the Agreement states:

2.7 Access to Records. SANDRA and DANIEL shall have joint and equal rights of access to records that are maintained by third parties, including but not limited to education and medical records. Each of them shall direct the school and other relevant authorities

to send them each duplicate notices of all records, events, and issues concerning the children . . . . They shall cooperate to ensure that the children and other authorities do provide the requested notices and information to both parents regarding their progress and activities.

2.8 School Activities. Each party shall direct the children's school authorities to promptly advise each of them of the children's grades and progress in school and of all school meetings, functions, and activities that are open to attendance by parents. . . .

*Id.*

***Defendants Deprive Crowley of his Rights.*** In the years leading up to the acts that are the subject of this suit, Crowley openly criticized the School, the District, and (by implication) the leadership and direction of Jordan and McKinney, at public meetings. Compl. ¶ 25. In addition, he criticized and questioned Jordan and McKinney directly. His criticisms concerned the poor academic performance of the School, the lack of supervision of the students and other general safety concerns, the School's inadequate responses to instances of Crowley's son being bullied, and the School's failure to adequately provide Crowley with notices, records, correspondence, and other documents. *Id.* ¶ 26. McKinney responded to these concerns with hostility, and Jordan ignored them. *Id.* ¶¶ 27-29.

Beginning in the 1999-2000 school year, Defendants comprehensively deprived Crowley of his right to participate in the education of his children. This pattern of deprivation, motivated by Defendants' ill will and a desire to retaliate against Crowley, took several forms. Compl. ¶¶ 14, 17, p. 23. *First*, despite numerous requests, McKinney intentionally and consistently refused to provide Crowley with access to his children's educational records or with correspondence, letters, and notices received by custodial parents of children attending the School. Crowley still does not receive these documents. Compl. ¶¶ 30-31 and p. 17. At the beginning of the 2000-01 school year, and again at the beginning of the 2001-02 school year, Crowley wrote to McKinney

and his children's teachers to discuss the problems of the previous year and express hope for a productive year where he would be adequately included in his children's educational upbringing. *Id.* ¶¶ 32, 36. Although these letters specifically requested all correspondence, documents, and other items received by custodial parents, and Crowley even provided self-addressed envelopes to facilitate his receipt of these items, Crowley's requests have never been granted. *Id.* ¶¶ 33-38.

Second, Defendants have consistently failed to respond to Crowley's safety concerns about matters such as bullying and illness of his children. In his letters at the beginning of the 2000-01 school year, Crowley asked McKinney to take some action in response to the bullying of his children. Compl. ¶ 33. McKinney took few, if any, steps to respond. *Id.* ¶ 35. In October 2001, Crowley's son was the victim of a bullying incident on the playground where he was kicked in the groin and dropped on his head. *Id.* ¶ 39. Out of concern for his son's safety and at his son's request, Crowley went to the School the following day to observe his son at recess, but was told that he was not allowed on the playground. *Id.* ¶ 40-42. Crowley then went to the school office, but left after McKinney insulted him. *Id.* ¶ 43-44. McKinney filed a police report on Crowley in connection with this visit to the School. *Id.* ¶ 53.

On February 13, 2002, Crowley learned that his son was ill. The next day, Crowley called the school to determine if his son was in attendance. The acting principal told Crowley that she could not say whether his son was present because Crowley was a non-custodial parent. Compl. ¶¶ 79-81.

Third, Defendants repeatedly rebuffed Crowley's attempts to participate in his children's class and school functions, and barred him from the School's grounds during the school day. For example, when Crowley went to the School office in October 2001 and offered to purchase some items for his children's classes, McKinney responded by insulting him. Compl. ¶ 43-44.

On November 19, 2001, Crowley went to the School to pick up fundraising articles, deliver a letter to his son, and inquire about having his son's school pictures retaken. Crowley was buzzed through the front door of the school and, as he was walking toward the office to sign in, saw his son in the hall. When he arrived at the office, McKinney yelled at Crowley and berated him for failing to sign in immediately. McKinney then called the police, who questioned Crowley about the purpose of his visit and later allowed him to leave. Compl. ¶¶ 45-56.

On December 4, 2001, Crowley went to the School, signed in at the office, and volunteered as a playground monitor. School personnel thanked him and invited him to volunteer again the next day. Compl. ¶ 60-61 and Ex. B. When Crowley returned to the office on December 5, however, McKinney told Crowley that he was not allowed to be a monitor. McKinney refused to provide any written documentation of that decision. Compl. ¶¶ 63-69.

On December 20, 2001, Crowley received a call from his son's teacher inviting him to attend a School Christmas party. On December 21, Crowley called the School to accept the invitation and express his intention to attend and volunteer at the party. McKinney informed Crowley that he was not allowed to volunteer at the School. Compl. ¶¶ 71-73.

Finally, on March 13, 2002, Crowley learned of a book fair at the School that parents were invited to attend. Crowley called the School to determine the time of the fair so that he could attend with his children. McKinney told Crowley that he would not be allowed to attend the fair and that he was not allowed, under any circumstances, to be on the School's grounds during the school day. Compl. ¶¶ 83-86.

***Crowley Files Suit.*** In response to Defendants' comprehensive denial of his rights, which caused him serious physical and emotional problems, *e.g.* Compl. ¶ 19, Crowley filed this suit. He alleged claims under 42 U.S.C. § 1983 for deprivation of his rights to substantive due

process, procedural due process, equal protection, and freedom of speech protected by the First Amendment. Compl. pp. 15-24. He also alleged state-law claims for intentional infliction of emotional distress and violations of the Illinois School Student Records Act. Compl. pp. 24-26. Defendants answered and then filed a motion for judgment on the pleadings under FED. R. CIV. P. 12(c).

***The District Court Finds Facts Against Crowley.*** The district court granted Defendants' motion for judgment on the pleadings as to the § 1983 claims, and dismissed the state-law claims for lack of subject matter jurisdiction. Mem. Op. 1. Although Crowley has not yet had an opportunity for discovery, the district court's comments reveal that its decision rested on factual conclusions:

[F]irst of all, there must be some history here because I will not presume principals act arbitrarily and create prohibitions precluding parental attendance under any and all circumstance[s] unless someone believed – and I would assume reasonably – that there was an occasion for it. I know ***that is prejudging the facts***, but he did not get to be a principal because his head was in the stratosphere. Okay?

Tr. of 5/9/02 Hr'g at 4 (Appendix, Tab A) (emphasis added). Later, the court explained its decision by stating that “. . . this is essentially a private dispute. And it really is not fodder for constitutional consideration. That is the essence of the ruling.” Tr. of 9/19/02 Hr'g at 2 (Appendix, Tab B).

The district court's opinion is replete with factual issues that are resolved against Crowley. In rejecting his substantive due process claim, the court found that “[t]he School's decision to deny a non-custodial father access to his children's educational records is not arbitrary or unreasonable. Such a practice bears a substantial relation to maintaining the safety and welfare of the School's children and preserving a proper educational environment.” Mem. Op. 4. The court discarded Crowley's equal protection claim based on a similar finding. Mem.

Op. 5. In addition, the court rejected Crowley's First Amendment claim by finding that "[h]is alleged criticism and questioning of the School, District #100, Mr. McKinney, and Mr. Jordan involved a personal quarrel regarding his desire to be more involved with his children's education." Mem. Op. 7.

The district court's opinion also announced legal conclusions unsupported by any citation or reasoning. For example, with respect to Crowley's substantive due process claim, the court simply asserted that a non-custodial divorced father has no interest in the upbringing or education of his children. Mem. Op. 3. In addition, it summarily discarded Crowley's marital settlement agreement as "contractual in nature and not necessarily constitutionally protected." Mem. Op. 4. The court then relied on the asserted absence of a protected interest in disposing of Crowley's procedural due process and equal protection claims. Mem. Op. 4-5.

Based on its opinion, the district court entered final judgment against Crowley. This appeal followed.

### **SUMMARY OF THE ARGUMENT**

At this stage of the case, there can be no dispute that McKinney and the District deliberately engaged in a pattern of conduct that cut off Crowley's ability to participate in his children's education. Their response is that a non-custodial parent has no protectable interest in participating in the education or upbringing of his children. But the historically-valued bond between parent and child should not be so cavalierly dismissed, especially when it may be urgently needed to sustain both parties through the difficulties of divorce. Fortunately, Defendants' view of the world is not the one taken by courts and states generally. Several federal cases recognize and support the right of non-custodial parents to participate in their

children's education and upbringing, and Illinois law confirms that Crowley retains those rights here.

Defendants' fall-back position is to trumpet their own interest in maintaining order and efficiency on school grounds, and to suggest that unbearable burdens and untoward consequences would arise if this interest bent even slightly to accommodate others. Crowley agrees that principals have an interest in running orderly and safe schools, and he has no wish to constitutionalize everyday interaction between parents and school personnel. On the other hand, it is not unreasonable or burdensome to ask that school systems in general, and principals in particular, deal professionally with parents who are concerned about their children. Many parents undoubtedly express their concerns in a way some principals would not view as particularly efficient, but that does not give principals license to respond by depriving parents (even non-custodial ones) of their rights altogether.

Under the applicable standard of heightened scrutiny, it is doubtful that Defendants' asserted interest in maintaining orderly school grounds is sufficiently important to justify terminating Crowley's fundamental right to participate in his children's education. Certainly this conclusion cannot be reached on the pleadings. Moreover, many of Defendants' actions – including their refusal to provide correspondence and access to school records, and to respond to safety concerns – have nothing to do with their asserted interest in orderly grounds. Therefore, Defendants are not entitled to judgment on the pleadings regarding Crowley's claim for deprivation of his substantive due process rights. For similar reasons, Crowley has stated procedural due process and equal protection claims.

When the facts found by the district court in Defendants' favor are discarded and the standard of review is faithfully applied, the judgment against Crowley on his other claims must

be reversed as well. As to his First Amendment retaliation claim, Crowley adequately alleged retaliation based on statements that touch on a matter of potential public interest. Regarding Defendants' liability under section 1983, McKinney cannot prevail on his qualified immunity defense (especially on the pleadings) because both federal and state law historically have recognized a non-custodial parent's right to participate in his children's education. Concerning the District's liability, Crowley adequately alleged that the District knew of a widespread and continuing pattern of conduct that infringed his right, and that it authorized and ratified that conduct. For these reasons, this Court should reverse the judgment. Crowley's state-law claims should then be reinstated.

## ARGUMENT

### I. STANDARD OF REVIEW

This Court reviews *de novo* the district court's decision to grant judgment on the pleadings to Defendants. *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802, 804 (7th Cir. 2002). As with a motion to dismiss under FED. R. CIV. P. 12(b)(6), a court should grant a Rule 12(c) motion for judgment on the pleadings only if it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief. *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998); *see also Albiero v. City of Kankakee*, 122 F.3d 417, 419 (7th Cir. 1997) ("A complaint may not be dismissed unless it is impossible to prevail under any set of facts that could be proved consistent with the allegations"). In evaluating the motion, the court accepts the allegations of the complaint as true, views them in the light most favorable to the non-moving party, and draws all permissible inferences in that party's favor. *Delgado v. Jones*, 282 F.3d 511, 515 (7th Cir. 2002).

Although Defendants pay lip service to this standard, their brief seeks to have this Court repeat the district court's errors and find disputed facts against Crowley. When this standard is properly applied, however, Crowley has stated claims under section 1983 for deprivations of his constitutional rights. The judgment on the pleadings should be reversed.

## **II. CROWLEY STATED A SUBSTANTIVE DUE PROCESS CLAIM.**

Crowley's first claim is that by comprehensively severing his right to participate in the upbringing and education of his children, Defendants violated the substantive component of the Due Process Clause. Compl. pp. 15-17. Defendants and the district court contend that non-custodial parents have no right in the upbringing or education of their children. This contention misconceives the nature of the right and how it is affected by divorce.

### **A. Parents Have a Fundamental Right to Participate in the Education of their Children.**

As the Supreme Court recently stated, "it cannot now be doubted 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, 66 (2003) (plurality opinion); *see id.* at 77 (Souter, J., concurring in judgment). This right is "perhaps the oldest of the fundamental liberty interests recognized by th[e] Court." *Id.* at 65. It has been deemed "essential," one of the "basic civil rights of man," and "far more precious than any property right." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982). In sum, the right of a man and woman to raise their children is "the most fundamental of all rights – the foundation of not just this country, but of all civilization." *Brokaw v. Mercer County*, 235 F.3d 1000, 1018 (7th Cir. 2000) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)).

Since *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923), it has been recognized that this fundamental liberty interest includes “the power of parents to control the education of their own.” “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). In recent years, the Supreme Court has confirmed that “the values of parental direction of the . . . education of their children in their early and formative years have a high place in our society.” *Yoder*, 406 U.S. at 213-14. Thus, it is well settled that “the ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one’s children.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

**B. Crowley’s Fundamental Right to Participate in the Education of his Children Was Not Eliminated by the Divorce.**

Without analysis or citation, the district court asserted that “[a]s a [divorced] non-custodian, [Crowley] does not have a fundamental right in the upbringing or education of his children.” Mem. Op. 3. Defendants’ brief on appeal does nothing to bolster this bare statement, citing only a stray reference to “the custodial parent” in dicta from a *dissent* in *Troxel*. Appellees’ Br. 12.

An examination of the authorities, however, reveals an entirely different story. Both federal cases and Illinois law confirm that non-custodial parents can and often do retain the right to participate in the education of their children following a divorce.

*1. Federal Cases:* In *Navin v. Park Ridge School District 64*, 270 F.3d 1147 (7th Cir. 2001), this Court recognized that a non-custodial father retained “important rights, including the opportunity to be informed about and remain involved in the education of his son.” *Id.* at 1149. In that case, the father sought to change the school district’s plan to address his son’s

dyslexia under the Individuals with Disabilities in Education Act (IDEA). The district court ruled that non-custodial parents lack standing under the IDEA. This Court reversed, relying on the parties' divorce decree. "If the divorce decree had given [the child's mother] not only custody but also *every* instrument of influence over [the child's] education, then the district court's decision would be correct. . . . But that is not what the divorce decree does. The district court did not analyze its language . . . ." *Id.* The *Navin* decree contained language similar to Crowley's settlement agreement, recognizing the father's rights to inspect school records and communicate with school authorities to discuss the child's standing and progress in school and to participate in school activities. *Id.* (footnote). The Court held that "[n]othing in the divorce decree strips [the father] of his parental interest in these matters," *id.*, and remanded for a determination whether the father's claims were inconsistent with rights retained by the mother under the decree. *Id.* at 1149-1150.

The Second Circuit reached a similar result in *Taylor v. Vermont Department of Education*, 313 F.3d 768 (2d Cir. 2002), holding that a non-custodial parent stated a claim for denial of her right to reasonable information about her child's health, safety, and progress in school. Unlike in *Navin* and this case, the non-custodial mother in *Taylor* had her rights to participate in her daughter's education revoked by a Vermont family court. *Id.* at 782. Nevertheless, she retained important rights of informational access under the divorce decree that were sufficient to allow her to state a claim for access to school records under the IDEA. *Id.* at 786-88.

Opposing counsel, who were also counsel for the school district in *Navin*, assert that the IDEA does not apply to this case. Appellees' Br. 12. But this Court's analysis of retained rights in *Navin* applies equally in the context of constitutional rights, as the Ninth Circuit has

recognized. In *Newdow v. U.S. Congress*, 313 F.3d 500 (9th Cir. 2002), the court held that the grant of sole legal custody to one parent did not deprive the other parent of standing to object to a school's unconstitutional conduct affecting his child. There, the non-custodial father challenged the recitation of the pledge of allegiance by his daughter in a public elementary school on Establishment Clause grounds. Relying heavily on *Navin*, the court looked to state law and the divorce decree to determine the non-custodial father's retained rights. Because the decree did not strip the father of his parental rights, and California law recognized that he maintained the right to expose and educate his child to his religious views, the court held that he had standing as a parent to maintain the suit. *Id.* at 503-05.

Similarly, the D.C. Circuit holds that a non-custodial parent's fundamental liberty interest in maintaining a relationship with his child and directing the child's education and upbringing survives a divorce decree. *Franz v. United States*, 707 F.2d 582, 594-95 (D.C. Cir. 1983). In *Franz*, a non-custodial father lost contact with his children when they went into the witness protection program with their mother and step-father. In response to the father's claim of a substantive due process right to maintain a relationship with his children, the court observed that while the right is "acknowledged to be potent," it might be argued that it is "less formidable when asserted by a non-custodial parent – one who retains and regularly exercises 'visitation rights' but who participates little in the day-to-day care and nurturing of his children." *Id.* at 595. The court then rejected this argument, concluding that "the bulk of the pertinent precedent seems to suggest that we should not differentiate between custodial and non-custodial contexts when deciding what protections are constitutionally due a parent-child relationship." *Id.* at 595-96 (collecting cases). The court also conducted an extensive analysis focusing on the importance of parent-child relations in our culture, the social functions served by shielding such relations, and

the profound importance of the parent-child bond to the emotional life of both. *Id.* at 597-602. It concluded that the non-custodial father's interests were in critical respects comparable to those of a parent and child in a viable nuclear family, and that the severance of those interests by the government stated a claim for relief. *Id.* at 602.

Supreme Court authority lends additional support to this conclusion. In *Stanley v. Illinois*, 405 U.S. 645, 646 (1972), an unwed father had lived "intermittently" with a woman and their children. When the woman died, the children were declared wards of the State without giving the father a hearing on his fitness as a parent. The Court held that a hearing was required, observing that *Meyer* had declared the right to raise one's children to be "essential." *Id.* at 651. The Court concluded that the "private interest . . . of a man in the children he has sired and raised . . . undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.* at 651. As the Court suggested in *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), the fundamental liberty interest of parents in the care, custody, and management of their child should not evaporate simply because they have lost custody. Crowley's interest merits no less protection here, particularly given that his children were born in wedlock and he has participated in their upbringing.

**2. Illinois Law:** Because these cases support Crowley's right to participate in the education and upbringing of his children, the precise relevance of state law to the matter is unclear. *Navin* certainly focuses on state law, and *Franz* observes that "the manner in which state law defines and limits [the parent's] access to and responsibility for the children" merits careful consideration. 707 F.2d at 600. Yet *Franz* also finds it "well established that the strength and scope of constitutionally protected familial rights are not determined by the contours of state (or federal) law; what is important is the nature of the bond in question . . . ." *Id.* at 599.

Certainly, *Stanley* upheld the importance of the bond between an unwed father and his child in the face of a state statute to the contrary. Thus, it is questionable whether a state law cutting off all rights of a parent to participate in his child’s education would be constitutional, particularly absent a termination of parental rights or other demonstration of harm to the child. This Court does not need to decide that question, however, because Illinois law confirms Crowley’s constitutional right to participate in his children’s education following the divorce.

Illinois’ divorce statutes begin with the proposition that “[t]he dissolution of marriage . . . or the parents living separate and apart shall not diminish parental powers, rights, and responsibilities except as the court for good reason may determine” under the best interest of the child standard. 750 ILL. COMP. STAT. ANN. § 5/602.1(a). In addition, to facilitate an amicable settlement in divorce situations, Illinois allows the parties to enter into an agreement containing provisions for, among other things, custody and visitation of their children. 750 ILL. COMP. STAT. ANN. § 5/502(a). Under Illinois law, this agreement can have an important effect on each parent’s role regarding the children: “*Except as otherwise agreed by the parties in writing at the time of the custody judgment or as otherwise ordered by the court, the custodian may determine the child’s upbringing, including but not limited to, his education, health care and religious training . . . .*” 750 ILL. COMP. STAT. ANN. § 5/608(a) (emphasis added). Thus, the district court’s unsupported statement that Crowley’s settlement agreement is “contractual in nature” and merely defines his rights relative to his ex-wife is erroneous. Mem. Op. 3-4.

As discussed above, Crowley’s settlement agreement recognizes that he retains important rights to participate in his children’s upbringing, including their education, health care, and religious training. See pp. 4-5, *supra*; Compl., Ex. A ¶¶ 2.6-2.8. With respect to education, it provides that Crowley will have joint and equal rights of access to school and medical records,

and that both parents will cooperate to ensure that they receive notices and information regarding the children's progress and activities. Compl, Ex. A ¶ 2.7. Both parents also agree to direct school authorities to advise each of them about the children's grades and progress in school, as well as about all school meetings, functions, and activities open to attendance by parents. *Id.* ¶ 2.8. Illinois courts recognize that the rights retained by Crowley are enforceable.<sup>1</sup> Furthermore, there is no suggestion that the court diminished Crowley's parental rights under section 5/602.1, and no proceedings have been instituted to terminate his parental rights.<sup>2</sup>

Outside the specific context of the divorce statutes, other provisions of Illinois law also uphold Crowley's constitutional right to participate in his children's education. For example, the Illinois School Student Records Act states that natural parents shall have the right to inspect and copy all school records of their children. 105 ILL. COMP. STAT. ANN. §§ 10/2(g), 10/5(a). In addition, school district boards have a duty to require that, upon the request of either parent of a student whose parents are divorced, copies of certain documents furnished by the district to one parent will be furnished by mail to the other parent. 105 ILL. COMP. STAT. ANN. §§ 5/10-21, 5/10-21.8. These documents include reports or records reflecting the student's academic progress, reports of the student's emotional and physical health, notices of parent-teacher conferences, notices of major school-sponsored events involving student-parent interaction, and copies of the school calendar. *Id.* § 5/10-21.8 "[A] school board shall not . . . refuse to mail copies of reports, records, notices or other documents . . . unless the school board first has been

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<sup>1</sup> See, e.g., *Van Nortwick v. Van Nortwick*, 230 N.E.2d 391 (Ill. App. Ct. 1967) (upholding right of non-custodial father to participate in choosing school for child as permitted by agreement); *Mirsky v. Mirsky*, 217 N.E.2d 467 (Ill. App. Ct. 1966) (upholding right of non-custodial father to determine children's education as permitted by agreement); *Taylor v. Taylor*, 176 N.E.2d 640 (Ill. App. Ct. 1961) (same).

<sup>2</sup> Cf. 750 ILL. COMP. STAT. ANN. §§ 50/6, 50/13, 50/17, 405/2-29 (discussing procedural safeguards applicable in proceedings to terminate parental rights).

furnished with a certified copy of the court order prohibiting the release of such [items] to that parent.” *Id.*

Thus, Illinois law confirms that Crowley’s divorce and his status as a non-custodial parent do not eliminate his fundamental right under the Due Process Clause of the U.S. Constitution to participate in the education of his children.

**C. Defendants Interfered With Crowley’s Right, and Their Asserted Interests Do Not Entitle Them to Judgment on the Pleadings.**

Crowley’s complaint alleges that Defendants comprehensively deprived him of this right by refusing to provide him with correspondence and access to school records, refusing to respond to his safety concerns about matters such as bullying and illness of his children, rebuffing his attempts to participate in his children’s class and school functions, and barring him from the School’s grounds during the school day. *See* pp. 5-7, *supra*. Defendants do not dispute these actions, nor could they at this stage. Instead, they argue that their actions did not “significantly interfere” with Crowley’s rights.<sup>3</sup> Appellees’ Br. 14. But they do not reveal the source of this supposed prerequisite to stating a claim, which does not appear in the cases they cite.

Moreover, it is absurd to argue that the alleged comprehensive deprivation of rights, which covers wide-ranging aspects of Crowley’s participation in his children’s education, is not significant. Even if “significant interference” were required, these allegations amply meet that threshold. As the district court put the matter, “the notion of absolute prohibition [of parental

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<sup>3</sup> Defendants also assert as a defense that their actions were not “arbitrary.” Appellees’ Br. 14-15. But Crowley has alleged that they were arbitrary, and those allegations must be accepted as true. *E.g.*, Compl. ¶ 17 and pp. 16-19, 21. Even if arbitrariness were lacking, however, it is not required in order to state a claim for violation of substantive due process rights. *See Dunn v. Fairfield Community High School Dist.*

(cont’d)

attendance], without some consideration of possible circumstances . . . , does not make a whole lot of sense.” Tr. of 5/9/02 Hr’g at 4-5 (Tab A). “[I]t is draconian to say, ‘Under any and all circumstances, you are not welcome here.’ . . . [A]s Judge Frankfurter once said, ‘That is the tyranny of absolutes,’ and it cannot work in a reasonable society.” *Id.* at 6-7. A parent’s fundamental right is most commanding when a state actor seeks to eliminate it. *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). Thus, Crowley’s allegations are more than sufficient to state a claim. Any further inquiry into whether the alleged deprivation is sufficiently “significant,” if such is required, should await discovery. *Cf. United States v. Thompson*, 130 F.3d 676, 686-87 (5th Cir. 1997) (substantial interference is a fact question).

Defendants also attempt to justify their deprivation of Crowley’s rights by asserting an interest in maintaining orderly conduct on school grounds. Appellees’ Br. 14; *see also* Mem. Op. 4 (interest in “maintaining the safety and welfare of the School’s children and preserving a proper educational environment”). Yet Defendants’ actions did not serve this interest, and their argument is in any event improper in the context of a motion for judgment on the pleadings.

Courts have acknowledged that the fundamental right of parents to make decisions concerning the care, custody, and control of their children, including the right to participate in their education and upbringing, is not absolute. *Brokaw v. Mercer County*, 235 F.3d 1000, 1019 (7th Cir. 2000). “[W]hen incompatible with sufficiently potent public interests, [it] must give way. But such situations arise infrequently.” *Franz v. United States*, 707 F.2d 582, 602 (D.C. Cir. 1983). The parent’s right “undeniably warrants deference and, absent a powerful countervailing interest, protection.” *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

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*No.* 225, 158 F.3d 962, 965-66 (7th Cir. 1998) (discussing various methods of stating substantive due

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The countervailing public interests that courts traditionally use in this balancing test are not implicated here. For example, a threat to the welfare of Crowley’s children cannot be said to motivate Defendants’ actions,<sup>4</sup> especially given the presumption that a parent acts in the best interests of his children. *Troxel v. Granville*, 530 U.S. 57, 69-70 (2000) (plurality opinion); *Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003). Nor is the power of the state to compel school attendance or prescribe a curriculum implicated. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).<sup>5</sup>

Instead, Defendants assert an interest based on the procedural due process case of *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975), which allowed a student posing a danger or threat of disruption to be removed from school immediately if a hearing followed soon thereafter. They also rely on the equal protection and First Amendment picketing case of *Carey v. Brown*, 447 U.S. 455, 470-71 (1980), which recognized in dicta the power of governmental units to pass laws protecting the public from boisterous and threatening conduct in places that require peace and quiet to function, such as schools. Crowley agrees with these principles. More generally, Crowley acknowledges that school officials have an interest in maintaining a safe and orderly educational environment on school grounds. These are worthwhile objectives, and acknowledging their legitimacy will help to avoid turning everyday interactions between parents and school officials into constitutional cases.

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process claim).

<sup>4</sup> *Cf. Prince v. Massachusetts*, 321 U.S. 158 (1944) (state interest in limiting crippling effects of child employment); *Doe v. Heck*, 327 F.3d 492, 520 (7th Cir. 2003) (acknowledging “the compelling governmental interest in the protection of children particularly where the children need to be protected from their own parents”).

<sup>5</sup> Many of the cases that Defendants cite on page 13 of their brief concern these subjects. In addition, several of those cases are distinguishable (including *Fleischfresser*, *Gernetzke*, and *Swanson*) because they turn on Free Exercise or Establishment Clause challenges that are not made in this case. Finally, *Bystrom* does not concern parental rights, but rather addresses a prior restraint on student speech.

Even at first glance, however, it is apparent that the goals of protecting students from disruptive and threatening conduct, and of maintaining a safe and orderly educational environment, are not served by comprehensively cutting off the fundamental rights of non-custodial parents to participate in the education of their children. *Stanley*, 405 U.S. at 652 (considering whether means used actually promote declared goals). As *Franz* recognizes, the relationship between non-custodial parents and their children actually serves important social functions and promotes the emotional life of the children, while cutting off that relationship can cause emotional damage and disruption. 707 F.2d at 601-02. Moreover, there are aspects of parents' involvement in their children's education that have nothing to do with order on school grounds. For example, refusing to provide a parent with correspondence and access to school records, and refusing to respond to his safety concerns about matters such as bullying and illness of his children, cannot possibly be said to promote order on school grounds. Because Defendants' actions do not serve the interest they say justifies their infringement of Crowley's rights, they are not entitled to judgment on the pleadings regarding Crowley's substantive due process claim.

Furthermore, even if Defendants' actions and interests were more closely aligned, it cannot be said on the pleadings that they would survive the applicable standard of heightened constitutional scrutiny. Although there is some disagreement whether strict or intermediate scrutiny should apply to violations of parents' fundamental rights regarding their children,<sup>6</sup> courts agree that some heightened standard of scrutiny should apply. Under either standard,

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<sup>6</sup> Cases applying the strict scrutiny standard include *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment), *Franz v. United States*, 707 F.2d 582, 602 (D.C. Cir. 1983), and *Lulay v. Lulay*, 739 N.E.2d 521, 531-32 (Ill. 2000). Cases applying some form of intermediate scrutiny standard

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hypothesizing rational bases for a challenged action is not enough to justify it. *Cf.* Mem. Op. 5-6. Rather, to obtain judgment in their favor, Defendants would at least have to show (under intermediate scrutiny) that their interest in preserving order was important and immediate enough to warrant the elimination of Crowley's fundamental right to participate in his children's education, and that their actions against Crowley were substantially related to that interest. *E.g.*, *Doe*, 327 F.3d at 520; *Hodgkins v. Peterson*, 175 F. Supp. 2d 1132, 1164 (S.D. Ind. 2001). Their ability to make this showing seems doubtful at best. In addition, at this stage of the case, the Court lacks factual details about the interactions of the parties and the knowledge and purpose of Defendants that are necessary to determine whether their infringement of Crowley's right was justified under this standard.<sup>7</sup> *Brokaw*, 235 F.3d at 1019. Therefore, Defendants are not entitled to judgment on the pleadings. *Id.* The judgment for Defendants on Crowley's substantive due process claim should be reversed.

### **III. CROWLEY STATED PROCEDURAL DUE PROCESS AND EQUAL PROTECTION CLAIMS.**

Based on its conclusion that Crowley had not established a protected interest in his children's education, the district court granted judgment for Defendants on Crowley's procedural due process and equal protection claims as well. Mem. Op. 45. As demonstrated above, however, Crowley does have a fundamental right to participate in the education of his children. Therefore, the district court's judgment should also be reversed as to these claims. Defendants

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include *Doe v. Heck*, 327 F.3d 492, 519-20 (7th Cir. 2003), and *Hodgkins v. Peterson*, 175 F. Supp. 2d 1132, 1164 (S.D. Ind. 2001).

<sup>7</sup> Defendants rely on *Lovern v. Edwards*, 190 F.3d 648 (4th Cir. 1999), to argue that they were justified in banning Crowley from the School grounds. But that case was decided after an evidentiary hearing, which has not yet occurred here. *Id.* at 650.

offer few alternative arguments to support their judgment on these claims, and none are persuasive.

#### **A. Procedural Due Process**

Whether or not Defendants acted to further a sufficiently important interest that could overcome Crowley's fundamental right, the manner in which they deprived Crowley of that right violated procedural due process. *Franz*, 707 F.2d at 602 (deprivation of fundamental right must comport with procedural due process); *see also Brokaw*, 235 F.3d at 1020 n.16 (possible to state both substantive and procedural due process claims). A procedural due process claim has two elements: (1) the defendant deprived the plaintiff of a constitutionally protected liberty or property interest; and (2) the deprivation occurred without due process of law. *Doe*, 327 F.3d at 526. Crowley satisfied the first step by adequately alleging a claim for deprivation of his substantive due process right to participate in his children's education. *Id.*

As to the second step, Crowley pled that the deprivation of this right occurred "without notice, hearing, or other process." Compl. p. 17. Defendants attempt to contradict this allegation by arguing that Crowley received adequate due process through "discussions" and "exchange[s] of] correspondence" with McKinney and Jordan. Appellees' Br. 16. But the complaint reveals that Crowley's requests for correspondence and access to school records, and his safety concerns about matters such as bullying and illness of his children, never received a response. *See* pp. 5-6, *supra*. In addition, Crowley's so-called "discussions" with McKinney regarding participation in his children's class and school functions merely consisted of McKinney announcing his decision. *See* pp. 6-7, *supra*. Requests for information and contact that have been refused or ignored do not constitute notice and an opportunity to be heard. *Franz*, 707 F.2d at 589-90, 607-08.

The amount of process due is determined by balancing the following factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). This test is similar to the balancing-of-interests test in the substantive due process context. *Doe*, 327 F.3d at 527. As discussed in Part II above, Crowley's interest in participating in his children's education is fundamental. In addition, the risk of an erroneous deprivation is very high given that Crowley received no process whatsoever. *See Goss v. Lopez*, 419 U.S. 565, 580 (1975). It is probable that this risk would be ameliorated by at least informal notice-and-hearing safeguards that would not be prohibitively burdensome for the District. *Id.* at 581-83. Of course, presuming that non-custodial parents should not participate in their children's education is cheaper and easier than an individualized determination, but that presumption needlessly risks running roughshod over the important interests of both parent and child. *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).

Nevertheless, Defendants assert that providing any safeguards would be too burdensome. Appellees' Br. 16. As with substantive due process, this factual dispute cannot be resolved in the context of a motion for judgment on the pleadings. *Brokaw*, 235 F.3d at 1021. Therefore, the judgment for Defendants on Crowley's procedural due process claim should be reversed.

## **B. Equal Protection**

Crowley also alleged claims under both traditional equal protection and class-of-one theories. As to traditional equal protection, Crowley alleged that he was a member of a class of non-custodial divorced fathers, and that his membership in that class was a motivating factor of

Defendants' actions to prevent him from participating in the education of his children. Compl. p. 19. Defendants and the district court take the position that these actions had a rational basis, and that no higher level of scrutiny is required because non-custodial fathers are not a suspect class and have no fundamental right to participate in the education of their children. Appellees' Br. 16-17; Mem. Op. 5-6. As discussed above, however, non-custodial fathers do have such a right. Therefore, a higher level of scrutiny is required, and judgment for Defendants is improper. *See* Part II.C., *supra*.

Regarding the class-of-one theory, this Court has recognized two methods of stating a claim: (1) by alleging that the plaintiff has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment; or (2) by alleging that the defendant is treating unequally those individuals who are *prima facie* identical in all relevant respects, and that the cause of the differential treatment is a totally illegitimate animus toward the plaintiff. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001). Crowley's complaint can be read to state a claim under either method. He pled:

The conduct of Defendants in preventing Plaintiff from participating in the education of his children, where Defendants do not do the same to persons in a situation similar to that of Plaintiff, was wholly arbitrary and vindictive, was solely or substantially motivated by Defendants' spite and ill will toward Plaintiff, and deprived Plaintiff of his clearly established right to Equal Protection of the law . . . .

Compl. p. 21. He also pled that McKinney's acts were performed "intentionally." Compl. p. 22.

The Supreme Court held that an allegation of intentional conduct that was "wholly arbitrary," such as Crowley made here, states a claim under the first theory. *Village of Willowbrook*, 528 U.S. at 565. In addition, Crowley's allegations that Defendants treated him unequally compared to similarly situated persons, and that their conduct was wholly vindictive

and solely or substantially motivated by spite and ill will, are sufficient to state a claim under the second theory. *Albiero*, 246 F.3d at 932. The district court concluded that Crowley had nevertheless pled himself out of court on the second theory by stating, under the separate count regarding his traditional equal protection theory, that his membership in the class of non-custodial divorced fathers was a factor motivating Defendants' actions. Mem. Op. 6-7. This conclusion is erroneous. There is nothing wrong with pleading inconsistent theories in the alternative, which is all Crowley has done. FED. R. CIV. P. 8(e)(2); *Mizuho Corp. Bank (USA) v. Cory & Assocs.*, 341 F.3d 644, 651 (7th Cir. 2003); *Alper v. Alzheimer & Gray*, 257 F.3d 680, 687 (7th Cir. 2001). The judgment for Defendants on Crowley's equal protection claim should be reversed.

#### **IV. CROWLEY STATED A FIRST AMENDMENT RETALIATION CLAIM.**

Crowley's next claim is a First Amendment retaliation claim. For such a claim to survive a motion for judgment on the pleadings, a plaintiff must allege that (1) he engaged in speech that was constitutionally protected under the circumstances; and (2) the defendant retaliated against him because of it. *Delgado v. Jones*, 282 F.3d 511, 516 (7th Cir. 2002). Crowley met both requirements by alleging that Defendants' conduct was substantially motivated by their desire to retaliate against him for constitutionally protected statements he made that were critical of Defendants. Compl. p. 23. Defendants dispute, however, whether his statements were in fact constitutionally protected.<sup>8</sup> The district court concluded they were not, finding instead that they involved a mere personal quarrel. Mem. Op. 7.

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<sup>8</sup> Defendants also contend that their actions in response to Crowley's statements were not "so severe or adverse" as to rise to the level of a First Amendment violation, though they cite no authority for that standard. Appellees' Br. 19-20. This argument is answered by the discussion in Part II.C., *supra*.

For purposes of a retaliation claim, speech warrants First Amendment protection if it addresses a matter of public concern, which should be determined based on the content, form, and context of a particular statement in light of the record as a whole. *Connick v. Myers*, 461 U.S. 138, 147-48 (1982). But where the defendant brings a motion to dispose of a retaliation claim on the pleadings, “the speech may be presumed to involve a matter of public concern if it touches upon any matter for which there is potentially a public interest.” *Trejo v. Shoben*, 319 F.3d 878, 885 (7th Cir. 2003) (internal quotation marks omitted). Thus, “it would be a rare case indeed where the pleadings as a whole would permit judgment as a matter of law in favor of the [defendant].” *Id.*; *see also Deloughery v. City of Chicago*, 2002 WL 31654942, at \*3 (N.D. Ill. Nov. 25, 2002) (examination of plaintiff’s motivation for alleged speech under *Connick* cannot properly be undertaken on the pleadings).

Crowley’s allegations regarding the statements he made more than meet this standard. Crowley openly criticized the School, the District, and (by implication) the leadership and direction of Jordan and McKinney, at public meetings. Compl. ¶ 25. His criticisms concerned not only personal issues such as failure to receive correspondence and bullying of his son, but also the poor academic performance of the School, the lack of supervision of the students, and other general safety concerns. *Id.* ¶ 26. As this Court has observed, “it cannot be gainsaid that educational policies in a public school are matters of public concern.” *Hesse v. Board of Educ.*, 848 F.2d 748, 751 (7th Cir. 1988). At a minimum, general safety and academic concerns regarding a school touch on a matter for which there is potentially a public interest. Therefore, Crowley has stated a First Amendment retaliation claim. The judgment for Defendants on this claim should be reversed.

**V. CROWLEY ADEQUATELY ALLEGED THAT MCKINNEY AND THE DISTRICT ARE LIABLE UNDER SECTION 1983.**

Crowley brought each of the claims discussed above against McKinney and the District under 42 U.S.C. § 1983. Both McKinney and the District argue they are not liable under section 1983, but the district court did not reach the issue. Defendants' arguments do not provide alternative grounds to affirm the judgment.

**A. McKinney Is Not Entitled to Qualified Immunity.**

McKinney argues that he is entitled to qualified immunity because his conduct did not violate clearly established rights. This argument does not withstand scrutiny. Courts conduct a two-step inquiry to determine whether the defense of qualified immunity is available: (1) whether the facts, taken in the light most favorable to the plaintiff, show that the official's conduct violated a statutory or constitutional right; and (2) if so, whether that right was clearly established at the time of the alleged violation. *E.g., Knox v. Smith*, 342 F.3d 651, 657 (7th Cir. 2003). The discussion in Parts II through IV above shows that the facts alleged state a claim that McKinney violated Crowley's rights.

As to whether those rights were clearly established, the fundamental right of a parent to direct and participate in the upbringing and education of his children is the foundation of Crowley's claims regarding substantive due process, procedural due process, and equal protection. This right has a long pedigree, dating back at least to *Meyer v. Nebraska*, 262 U.S. 390 (1923). The D.C. Circuit confirmed that this right extended to non-custodial parents in *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983). In addition, Illinois law made it apparent long ago that non-custodial parents continue to enjoy such rights. *See Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 793 (2d Cir. 2002) (relying on similar state law to inform whether federal law was clearly established). The default rule in Illinois preserves the rights of a

divorcing parent, and the Illinois statutes look to the parents' agreement to determine their respective rights regarding the upbringing and education of their child. Illinois courts have enforced these agreements at least since the 1960s. *See* Part II.B.2., *supra*.

In addition, both state and federal statutes uphold a non-custodial parent's right to specific educational records and information. Illinois law imposes a duty to provide both parents in a divorce situation with reports on their children's academics and health as well as notices of school events. Furthermore, the Illinois School Student Records Act and the federal Family Educational Rights and Privacy Act of 1974 guarantee a right of access to school records for both parents. *Id.*; *see also* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.4. Under these circumstances, it cannot reasonably be argued that McKinney was ignorant of the right to participate in the education of his children that Crowley asserts in this case. *Cf.* Compl. ¶ 16 (Defendants' acts "were performed with the knowledge that said acts were in violation of clearly established rights").

Crowley also asserts a right to be free from retaliation based on constitutionally protected speech. This right has been established in the school context since at least 1968. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). In addition, this Court observed in 1988 that "it cannot be gainsaid that educational policies in a public school are matters of public concern" such that speech about them warrants constitutional protection. *Hesse v. Board of Educ.*, 848 F.2d 748, 751 (7th Cir. 1988). A reasonable public official in 1999-2002 would have known that retaliating against such speech was unlawful.

Therefore, this Court should reject McKinney's qualified immunity defense. Alternatively, at a minimum, the Court should hold that a ruling on that defense would be premature on the pleadings. As many courts have recognized, qualified immunity is "almost

always a bad ground of dismissal” on the pleadings. *Jacobs v. City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring); *see also Franz*, 707 F.2d at 610. In particular, in cases concerning a record access claim by a non-custodial parent, the qualified immunity issue may turn on factual questions such as the information Defendants had at the time they acted. *Taylor*, 313 F.3d at 793-94. Thus, at a minimum, the issue of qualified immunity should not be decided until the parties have had a suitable opportunity for discovery. *Id.*

**B. The District is Liable for its Policy or Custom.**

The District argues that no policy or custom was alleged on which its liability under section 1983 could be based. This argument turns a blind eye to Crowley’s complaint. A governmental unit is liable under § 1983 if the deprivation of rights is caused by a policy or custom of that unit. *Kujawski v. Board of Comm’rs*, 183 F.3d 734, 737 (7th Cir. 1999). To state a claim, the plaintiff must allege that (1) the unit had an express policy that, when enforced, caused the constitutional deprivation; (2) the unit had a widespread practice constituting custom or usage that caused the deprivation; or (3) the plaintiff’s constitutional injury was caused by a person with final policymaking authority. *McCormick v. City of Chicago*, 230 F.3d 319, 324 (7th Cir. 2000). Final policymaking authority may be delegated or ratified by an official having policymaking authority, either expressly or as a matter of custom. *Kujawski*, 183 F.3d at 737, 739.

Crowley has stated a claim under each of the latter two prongs of this test. As to custom or usage, Crowley pled that:

[t]he acts and conduct of McKinney complained of herein were not isolated incidents but, rather, are part of a longstanding, widespread and continuing pattern of harassment and animosity against the Plaintiff, of which Jordan and District #100 had actual or constructive knowledge, such that the acts complained of can be said to represent the official policy of District #100 . . . .

Compl. ¶ 14. Defendants' brief ignores this allegation, but the complaint buttresses it with a lengthy recitation of operative facts that form the basis of Crowley's claims. *See pp. 5-7, supra.* Thus, the complaint is sufficient to put the District on notice of Crowley's claim against it. *McCormick*, 230 F.3d at 325. The District is not entitled to judgment on the pleadings.

Crowley also stated a claim under the final policymaking authority prong of the test. He not only alleged that McKinney and Jordan are "official policymaker[s]" with regard to the operations of Hiawatha School and the decisions at issue here, but also that the acts complained of "were done . . . with either the explicit or implicit authorization of . . . District #100." Compl. ¶¶ 10-13. In addition he pled that "[t]he actions and, more importantly, inaction of Jordan, District #100 and any other policymaking officials in addressing the continuing [violations of Plaintiff's rights], despite their knowledge thereof, demonstrates District #100's authorization and ratification of the conduct complained of herein." These allegations are likewise sufficient to state a claim and make judgment on the pleadings improper. *E.g., Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 470 (7th Cir. 2001) (deliberate inaction can be convincing evidence of delegation of final decisionmaking authority, or of ratification).

## **VI. THE STATE LAW CLAIMS SHOULD BE REINSTATED.**

After granting judgment for Defendants on all of Crowley's federal claims, the district announced that it was dismissing Crowley's state-law claims for lack of subject matter jurisdiction. Mem. Op. 8. Presumably, what the court meant is that it was declining to exercise supplemental jurisdiction over Crowley's state-law claims because it had disposed of his federal claims. *See* 28 U.S.C. § 1367(c). For the reasons discussed above, however, the judgment disposing of those federal claims should be reversed. Therefore, the judgment dismissing the pendent state-law claims should be reversed as well.

Defendants make a few half-hearted attempts to persuade this Court to grant them judgment on the pleadings regarding the state-law claims, even though the district court only dismissed those claims for lack of jurisdiction. But Defendants have filed no cross-appeal seeking that relief. Moreover, their arguments do not support that result.

As to Crowley's claim for intentional infliction of emotional distress (IIED), Defendants argue it must fail because Crowley failed to plead that any of their actions were extreme and outrageous. Not so. In paragraph 87 of the complaint, Crowley pled that Defendants' "abusive, vindictive, unlawful and unconstitutional conduct in denying Plaintiff the ability to participate in the educational lives of his children constitutes extreme or outrageous conduct." *See also* Compl. ¶ 88 (referring to their "extreme and outrageous conduct").

In addition, Defendants argue that McKinney is immune from liability for IIED<sup>9</sup> because his conduct was discretionary and related to the determination of policy. 745 ILL. COMP. STAT. ANN. § 10/2-201. This argument contradicts Defendants' position that McKinney was not a policymaker for purposes of the District liability analysis under section 1983. In addition, whether McKinney's conduct was discretionary and related to the determination of policy are questions of fact that should not be resolved on the pleadings. Yet even on the pleadings, McKinney would not be entitled to judgment given the immunity exception for willful and wanton conduct, which Crowley has pled. *See* 745 ILL. COMP. STAT. ANN. § 10/2-202; Compl. pp. 17, 25. Therefore, the judgment dismissing the pendent state-law claims should be reversed.

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<sup>9</sup> This tort immunity does not apply to Crowley's claim under the statutory cause of action created by the Illinois School Student Records Act, 105 ILL. COMP. STAT. ANN. § 10/9(b).

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment and remand this case to the district court for further proceedings.

Dated: October 14, 2003

Respectfully submitted,

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Dated: October 15, 2003

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of the foregoing Brief and Supplemental Appendix of *Amicus Curiae* in Support of Appellant to be served upon the following counsel of record via overnight mail on October 15, 2003:

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