

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. Crowley Stated A Substantive Due Process Claim.	3
A. Crowley’s Rights To Participate In The Education Of His Children Were Not Eliminated By Divorce.	3
1. <i>The divorce decree and settlement agreement do not strip Crowley of the rights that Defendants have cut off.</i>	4
2. <i>The rights Crowley asserts are not incompatible with his ex-wife’s exercise of her rights under the decree.</i>	7
B. Defendants’ Conduct Violates Crowley’s Retained Rights.	8
II. Crowley Stated A Procedural Due Process Claim.	11
III. Crowley Stated An Equal Protection Claim.	12
IV. Crowley Alleged That Defendants Retaliated Against Him For Speech On A Matter of Public Concern.	13
V. Crowley Adequately Alleged That McKinney And The District Are Liable Under Section 1983.....	15
A. McKinney Is Not Entitled To Qualified Immunity.....	15
B. Crowley Stated A Claim That The District Is Liable Both For Its Custom And For The Actions Of Its Policymakers.	16
VI. Defendants Are Not Entitled To Judgment On The State Law Claims.	18
CONCLUSION.....	20
CERTIFICATE OF COMPLIANCE	21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

CASES

<i>Augustine v. Doe</i> , 740 F.2d 322 (5th Cir. 1984)	12
<i>Bart v. Telford</i> , 677 F.2d 622 (7th Cir. 1982)	14
<i>Beahringer v. Page</i> , 789 N.E.2d 1216 (Ill. 2003)	19
<i>Bloch v. Ribar</i> , 156 F.3d 673 (6th Cir. 1998)	14
<i>Brokaw v. Mercer County</i> , 235 F.3d 1000 (7th Cir. 2000)	12
<i>Cobb v. Pozzi</i> , 352 F.3d 79 (2d Cir. 2003).....	13
<i>Cushing v. City of Chicago</i> , 3 F.3d 1156 (7th Cir. 1993)	12
<i>Deloughery v. City of Chicago</i> , 2002 WL 31654942 (N.D. Ill. Nov. 25, 2002)	15
<i>Doe v. Anrig</i> , 651 F. Supp. 424 (D. Mass. 1987).....	3, 6
<i>Easter House v. Felder</i> , 910 F.2d 1387 (7th Cir. 1990) (en banc)	12
<i>El Paso Natural Gas Co. v. Neztosie</i> , 526 U.S. 473 (1999).....	18
<i>Fogarty v. City of Chicago</i> , 2002 WL 989452 (N.D. Ill. May 14, 2002).....	17
<i>Franz v. United States</i> , 707 F.2d 582 (D.C. Cir. 1983).....	4
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972).....	4

	Page
<i>Gustafson v. Jones</i> , 117 F.3d 1015 (7th Cir. 1997)	14
<i>Hamlin v. Vaudenberg</i> , 95 F.3d 580 (7th Cir. 1996)	12
<i>Hildebrandt v. Ill. Dep't of Natural Resources</i> , 347 F.3d 1014 (7th Cir. 2003)	15
<i>Indep. Coin Payphone Ass'n, Inc. v. City of Chicago</i> , 863 F. Supp. 744 (N.D. Ill. 1994)	12
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977).....	12
<i>In re J.D.</i> , 510 So. 2d 623 (Fla. Dist. Ct. App. 1987)	4
<i>Jackson v. Marion County</i> , 66 F.3d 151 (7th Cir. 1995)	17
<i>Karim-Panahi v. Los Angeles Police Dep't</i> , 839 F.2d 621 (9th Cir. 1988)	17
<i>Kujawski v. Bd. of Comm'rs</i> , 183 F.3d 734 (7th Cir. 1999)	17
<i>Leatherman v. Tarrant County Narcotics Intel. & Coord. Unit</i> , 507 U.S. 163 (1993).....	17
<i>Lovern v. Edwards</i> , 190 F.3d 648 (4th Cir. 1999)	9, 10, 15
<i>In re Marriage of Davis</i> , 678 N.E.2d 68 (Ill. App. Ct. 1997)	7
<i>In re Marriage of Marquardt</i> , 442 N.E.2d 267 (Ill. App. Ct. 1982)	7
<i>Mass. Mut. Life Ins. Co. v. Ludwig</i> , 426 U.S. 479 (1976) (per curiam).....	18
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	11

	Page
<i>McCormick v. City of Chicago</i> , 230 F.3d 319 (7th Cir. 2000)	17
<i>McNeal v. Cook County Sheriff's Dep't</i> , 282 F. Supp. 2d 865, 2002 WL 22132717 (N.D. Ill. Sept. 12, 2003).....	17
<i>Mejia v. Holt Pub. Sch.</i> , 2002 WL 1492205 (W.D. Mich. Mar. 12, 2002).....	9, 10, 15
<i>Morfin v. City of East Chicago</i> , 349 F.3d 989 (7th Cir. 2003)	14
<i>Mt. Healthy City Sch. Dist. v. Doyle</i> , 429 U.S. 274 (1977).....	14
<i>Nabozny v. Podlesny</i> , 92 F.3d 446 (7th Cir. 1996)	16
<i>Navin v. Park Ridge Sch. Dist.</i> , 270 F.3d 1147 (7th Cir. 2001) (per curiam).....	3, 4, 6, 7, 8
<i>Newdow v. U.S. Congress</i> , 313 F.3d 500 (9th Cir. 2002), <i>cert. granted in part</i> , 124 S. Ct. 384 (2003).....	3, 4, 6
<i>Olech v. Village of Willowbrook</i> , 160 F.3d 386 (7th Cir. 1998), <i>aff'd per curiam</i> , 528 U.S. 562 (2000).....	13
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981).....	12
<i>Pickering v. Bd. of Educ.</i> , 391 U.S. 563 (1968).....	14
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982).....	4
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972).....	9
<i>Stevenson v. Hawthorne Elementary Sch.</i> , 579 N.E.2d 852 (Ill. 1991).....	4
<i>Swierkiewicz v. Sorema N.A.</i> , 534 U.S. 506 (2002).....	17

	Page
<i>Taylor v. Vt. Dep't of Educ.</i> , 313 F.3d 768 (2d Cir. 2002).....	3, 4, 5, 8, 15
<i>Terry v. Richardson</i> , 346 F.3d 781 (7th Cir. 2003)	11
<i>Van Nortwick v. Van Nortwick</i> , 230 N.E.2d 391 (Ill. App. Ct. 1967)	6
<i>W.T. by Tatum v. Andalusia City Sch.</i> , 977 F. Supp. 1437 (M.D. Ala. 1997)	3, 6
<i>Young Radiator Co. v. Celotex Corp.</i> , 881 F.2d 1408 (7th Cir. 1989)	18
<i>Zinermon v. Burch</i> , 494 U.S. 113 (1990).....	12

STATUTES AND RULES

20 U.S.C. § 1415.....	4
20 U.S.C. § 6318.....	4
42 U.S.C. § 1983.....	15, 16, 17
750 ILL. COMP. STAT. ANN. § 5/602.1	4
750 ILL. COMP. STAT. ANN. § 5/608.....	5
750 ILL. COMP. STAT. ANN. § 5/10-21.8	10
FED. R. APP. P. 32.....	21

SUMMARY OF THE ARGUMENT

In their second brief,¹ Defendants struggle to create the impression that this case is merely about Crowley's access to his children's school and that Crowley seeks a dramatic expansion of parental rights that will guarantee him access at his whim. Yet Defendants have done far more than deny Crowley access. Crowley is suing because Defendants engaged in a pattern of conduct that comprehensively cut off his rights to participate in his children's education. This conduct includes not only barring Crowley from school grounds during the day, but also refusing to provide him with correspondence and access to school records, refusing to respond to his concerns about safety matters such as bullying and illness of his children, and excluding him from class and school functions open to attendance by parents. *Amicus* Br. 5-7. Ignoring these allegations, which must be taken as true at this stage of the case, will not make them go away.

Furthermore, Crowley does not seek an unfettered right of access to school grounds, or unlimited rights of any kind. Instead, he seeks some of the same rights to participate in his children's education that other parents enjoy. But Defendants have cut off those rights where Crowley's divorce decree and marital settlement agreement do not, labeling him as a "non-custodial divorced parent" who has no rights at all. Regardless of whether a denial of school access standing alone would be actionable, this comprehensive deprivation of fundamental parental rights should be, especially given that Defendants acted without any kind of process, with animus, and in retaliation for protected speech on a matter of public concern.

¹ Brief of Defendants-Appellees in Response to Brief of *Amicus Curiae* (filed December 15, 2003) ("Defs.' 2d Br.").

Recognizing that they cannot prevail on the pleadings, Defendants attempt to bolster their arguments with non-record evidence. But even if that evidence is considered, an examination of Crowley's settlement agreement as a whole reveals that divorce did not strip him of the rights that Defendants have cut off. In addition, the non-exclusive rights that Crowley seeks to vindicate are not incompatible with his ex-wife's rights. Because Crowley's complaint adequately alleges that his retained fundamental rights have been infringed by Defendants' cumulative acts, he has stated a substantive due process claim.

The judgment against Crowley on his other claims must be reversed as well. As to procedural due process, Crowley did not receive any process before Defendants deprived him of his rights, and Defendants have not shown that this is an exceptional case where post-deprivation tort remedies can provide adequate process. Regarding equal protection, Defendants do not dispute that reversal is required under a heightened standard of scrutiny, and even under a lower standard Crowley's class-of-one claims cannot be defeated by a hypothetical rational basis. Concerning his retaliation claim, Crowley adequately alleged that his speech addressed a matter of public concern. The balancing test cited by Defendants cannot overcome those allegations at this stage.

Defendants' alternative grounds for affirming the judgment should be rejected. McKinney's qualified immunity defense involves factual issues that cannot be determined on the pleadings. As to the District's liability, Crowley's allegations satisfy the requirements of notice pleading. Finally, Defendants failed to preserve their right to judgment on Crowley's state law claims by filing a cross-appeal. This Court should reverse.

ARGUMENT

I. CROWLEY STATED A SUBSTANTIVE DUE PROCESS CLAIM.

A. Crowley's Rights To Participate In The Education Of His Children Were Not Eliminated By Divorce.

Crowley's first claim is that Defendants violated his substantive due process rights by cutting off his participation in the education of his children. Defendants do not question that parents' rights concerning the education of their children are fundamental and, indeed, "undeniable." Defs.' 2d Br. 5; *see Amicus* Br. 12-13. Instead, they argue that "any right [Crowley had] to control or participate in the education of his children" was completely wiped out when the state court awarded custody to his ex-wife. Defs.' 2d Br. 6, 9. This harsh, all-or-nothing view of parental rights following a divorce equates non-custodial status with a termination of all enforceable parental rights. That is not the law.

As this Court and others have recognized, parents may exercise many different kinds of rights concerning their children's education following a divorce. *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 772, 786 (2d Cir. 2002); *Newdow v. U.S. Congress*, 313 F.3d 500, 503-04 (9th Cir. 2002), *cert. granted in part*, 124 S.Ct. 384 (2003); *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147, 1149 (7th Cir. 2001). Courts will not presume that the parent who is awarded custody also holds all of those rights while the non-custodial parent retains none.² Instead, courts hold that a non-custodial parent retains rights to participate in his children's education unless: (1) the divorce decree specifically strips the non-custodial parent of the particular rights he claims are

² *E.g.*, *W.T. by Tatum v. Andalusia City Schs.*, 977 F. Supp. 1437, 1444 (M.D. Ala. 1997); *Doe v. Anrig*, 651 F. Supp. 424, 428-29 (D. Mass.), *vacated pursuant to settlement*, No. 87-1183 (1st Cir. April 3, 1987) (absent restraining order, "a parent's right to be involved in his child's educational planning and progress

(cont'd)

being infringed; or (2) his exercise of those rights would be incompatible with the custodial parent's exercise of her rights under the decree. *Id.* This test properly implements the general rule that waivers of constitutional rights must be clear. *E.g., Fuentes v. Shevin*, 407 U.S. 67, 95 (1972). It also follows the default position under Illinois law that divorce “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 light of this test, Defendants are wrong to contend that Crowley implicitly lost any right to participate in his children's education because that right was not affirmatively set forth in the decree. Defs.' 2d Br. 9.

This unwillingness to strip non-custodial parents of all rights unless the divorce decree so directs is rooted in the fundamental importance that our society places on parental involvement in the education and upbringing of children.³ While awarding custody and final decisionmaking authority to one parent may diminish the non-custodial parent's rights, it does not make his remaining rights to participate in his children's education any less fundamental. In fact, those retained rights are at their most commanding when a state actor seeks to eliminate them altogether, as Defendants have done here. *See Santosky v. Kramer*, 455 U.S. 745, 759 (1982).

1. The divorce decree and settlement agreement do not strip Crowley of the rights that Defendants have cut off.

Applying the first part of the test, the *amicus* brief (at 13-18) explains that Crowley retains enforceable rights to participate in the education of his children. Recognizing that they

(... cont'd)

is basic, even in the event of divorce”); *In re J.D.*, 510 So.2d 623, 629 (Fla. Dist. Ct. App. 1987); *see also Stevenson v. Hawthorne Elementary Sch.*, 579 N.E.2d 852, 855 (Ill. 1991) (right to sue on child's behalf).

³ *Amicus Br.* 12-13; *see also, e.g.,* 20 U.S.C. §§ 1415, 6318; *Franz v. United States*, 707 F.2d 582, 597-99 (D.C. Cir. 1983).

cannot defeat these rights on the district court record, Defendants ask this Court to take judicial notice of additional portions of Crowley's marital settlement agreement. For the reasons discussed in the *amicus*'s motion to strike and reply in support of that motion,⁴ this Court should not take judicial notice of these new portions for the first time on appeal. Yet even if it does, these portions do not strip Crowley of his rights.

Defendants focus on paragraph 2.1 of the Agreement, which provides that Crowley's ex-wife "shall have the sole care, custody, control and education [sic] of the minor children." Defs.' 2d Br., Tab A. But the award of custody alone is not dispositive of Crowley's rights as discussed above. In addition, although it is unclear precisely what an award of "sole education" means, an allocation of ultimate control and decisionmaking authority regarding education to Crowley's ex-wife would not strip Crowley of all rights to participate in his children's educational life. *Taylor*, 313 F.3d at 772, 786.

Moreover, paragraph 2.1 adds nothing to the Illinois statute already cited in *amicus*'s brief, which provides that "the custodian may determine the child's ... education" "[e]xcept as otherwise agreed by the parties in writing." 750 ILL. COMP. STAT. ANN. § 5/608(a) (emphasis added). Here, the parties have agreed that Crowley retains the following important rights: to inspect the children's educational records; to receive notice from the school of "all records, events, and issues concerning the children" and "their progress and activities;" and specifically to receive prompt notice from school authorities of "the children's grades and progress in school and of all school meetings, functions and activities that are open to attendance by parents." Compl., Ex. A ¶¶2.7-2.8. Crowley's right to receive notice of these meetings and functions also

⁴ See Motion to Strike Brief of Defendants-Appellees in Response to Brief of *Amicus Curiae* (filed Jan. 5, 2004); Reply to Appellees' Response to the *Amicus Curiae*'s Motion to Strike (filed Jan. 26, 2004).

reasonably suggests that his right to attend them has not been eliminated by the decree. Together, these rights to receive information and to participate in meetings show that Crowley's "right to participate in the education of [his] child[ren] ha[s] not been cut off." *W.T. by Tatum v. Andalusia City Schs.*, 977 F. Supp. 1437, 1444 (M.D. Ala. 1997).

In addition, as Defendants point out, Crowley retains the right to cooperate with his ex-wife "in establishing *mutually acceptable* guidelines and standards for the children's ... education." Defs.' 2d Br., Tab B, ¶2.2 (emphasis added). This right to participate in educational decisionmaking is more than a right to consult and is enforceable under Illinois law. *Van Nortwick v. Van Nortwick*, 230 N.E.2d 391 (Ill. App. Ct. 1967). Crowley also bears some financial responsibility for the children's education. Defs.' 2d Br., Tab B, ¶¶2.3, 4.1, 6.1. These rights and obligations further show that Crowley has not waived his rights to be involved in the education of his children. *E.g.*, *Newdow*, 313 F.3d at 504; *Doe v. Anrig*, 651 F. Supp. 424, 429 (D. Mass.), *vacated pursuant to settlement*, No. 87-1183 (1st Cir. April 3, 1987). Moreover, by specifically mentioning the above rights in the Agreement, the parties have confirmed their understanding that Crowley's participation in the education of his children is not inconsistent with his ex-wife's custody and "sole education" rights.

In fact, Crowley's Agreement is virtually identical to the decree this Court interpreted in *Navin*, except that Crowley's Agreement does even more to preserve his rights. In *Navin*, as here, the decree gave custody and the right to make educational decisions to the mother. *Navin*, 270 F.3d at 1148. But this Court rejected Defendants' argument that these provisions deprived the non-custodial father of "every instrument of influence over [his child's] education." *Id.* at 1149. Rather, the Court examined the decree and concluded that the non-custodial father retained "important rights, including the opportunity to be informed about and remain involved

in the education of his son. ... Nothing in the divorce decree strips [the father] of his parental interest in these matters.” *Id.* The Court based this holding on decree language recognizing the father’s rights to inspect educational records, to discuss the children’s standing and progress with school authorities, and to participate in school activities, as well as his obligation to share in educational costs. *Id.* at n.†. As discussed above, Crowley has those same rights and obligations here, as well as the right to set mutually agreeable educational guidelines. Therefore, this Court should follow *Navin* and hold that Crowley’s rights to participate in the education of his children were not eliminated by his divorce.

Amicus believes that the unambiguous language of the Agreement supports this result. If the Court concludes that the Agreement is ambiguous regarding the nature or extent of Crowley’s remaining rights, however, the proper course is to reverse and remand. Illinois courts construe divorce decrees like contracts, and the meaning of an ambiguous decree cannot be decided as a matter of law on the pleadings. *In re Marriage of Davis*, 678 N.E.2d 68, 69-70 (Ill. App. Ct. 1997); *In re Marriage of Marquardt*, 442 N.E.2d 267, 269 (Ill. App. Ct. 1982).

2. *The rights Crowley asserts are not incompatible with his ex-wife’s exercise of her rights under the decree.*

Given that the Agreement does not strip (and in fact confirms) Crowley’s retained rights to participate in the education of his children, his assertion of those rights must be upheld unless it would be incompatible with his ex-wife’s exercise of her rights under the Agreement. Defendants do not even attempt to argue that Crowley’s rights are inconsistent with any decisions actually made by his ex-wife on matters over which she has final authority. Crowley’s suit does not seek to wrest control of such decisions from his ex-wife, but merely to defend his retained rights to participate in the education of his children against elimination by Defendants. The record does not show that any of these rights are incompatible with the guidelines and

standards for education mutually set by the parties under the Agreement or with any final decisions of Crowley's ex-wife. Moreover, many of the rights that Crowley is suing to vindicate, including access to records and participation in school functions, are non-exclusive of his ex-wife and are within the scope of his retained rights under the Agreement regardless of the choices she makes. *Navin*, 270 F.3d at 1150.

It is also significant that the injury Crowley is suing to redress is the elimination of his rights by Defendants, not any impairment of those rights as a result of final decisions made by his ex-wife. Because neither the Agreement nor his ex-wife has limited Crowley's rights to participate in the education of his children, Defendants do not have a free pass to violate those rights here.

B. Defendants' Conduct Violates Crowley's Retained Rights.

Yet Defendants have violated Crowley's rights by acting on their erroneous view (shared by the district court) that non-custodial parents have no rights of educational participation. As discussed in the *amicus* brief, Defendants comprehensively prevented Crowley from participating in his children's education by barring him from school grounds during the day, refusing to provide him with correspondence and access to school records, refusing to respond to his concerns about safety matters such as bullying and illness of his children, and excluding him from class and school functions open to attendance by parents. *Amicus* Br. 5-7; Compl. p.16. These allegations show much more than a mere possibility that Crowley's rights have been infringed by Defendants' cumulative acts, which is all that is required to state a claim. *Taylor*, 313 F.3d at 787. The brief acknowledges that these rights are not boundless or unchecked, but explains that Defendants' asserted interest in maintaining order on school grounds does not

justify cutting off all of Crowley's rights, and that it is impossible to determine on the pleadings whether Defendants' actions would pass heightened constitutional scrutiny. *Amicus* Br. 20-23.

Tellingly, Defendants ignore these arguments, hoping instead to persuade the Court to turn a blind eye to their actions and treat this case as nothing more than a demand for unlimited access to school grounds. Defs.' 2d Br. 11, 13-15, 18. But Crowley's allegations that Defendants took many different steps to cut off his rights of educational participation cannot be ignored. Defendants' asserted interest in orderly school grounds cannot justify cutting off Crowley's rights altogether, and that interest has nothing to do with many of the steps Defendants took – including their refusals to provide Crowley with correspondence and records⁵ and to respond to his safety concerns. *Amicus* Br. 22.

Because they view Crowley as a “non-custodial divorced father” who presumptively has no rights, Defendants have felt free to prohibit and frustrate all manner of attempts by Crowley to be informed about or participate in his children's education. In so doing, however, Defendants have completely cut off rights that Crowley in fact retains under his marital settlement agreement. As the Supreme Court recognized in a similar case, eliminating a fundamental right by presuming that it does not exist is unconstitutional. *Stanley v. Illinois*, 405 U.S. 645, 653-58 (1972).

Defendants cite no case for the proposition that they are entitled to eliminate parental rights when a divorce decree does not. They rely heavily on two cases, *Lovern* and *Mejia*, but both are inapposite. First, in both cases only the parent's right to enter school property was limited, and in *Lovern* the parent was still allowed to attend public events at school. *Lovern v.*

Edwards, 190 F.3d 648, 651, 656 (4th Cir. 1999); *Mejia v. Holt Pub. Schs.*, 2002 WL 1492205, at *1, 6 (W.D. Mich. March 12, 2002). Both courts expressly noted that the parents remained free to participate in their children's education in other ways, such as by obtaining information and communicating with school authorities about issues regarding the children. *Id.* In this case, however, Defendants have denied Crowley those rights as well.

Second, in both *Lovern* and *Mejia*, the courts only evaluated the strength of the asserted interest in school order after an evidentiary hearing or on summary judgment, and they upheld that interest based on circumstances not present here. *Lovern*, 190 F.3d at 650, 655 (continued pattern of verbal abuse and threatening behavior toward school officials); *Mejia*, *supra*, at *1 (indecent exposure on school premises). In this case, however, the pleadings do not give the Court enough information to determine whether Defendants' asserted interest justifies cutting off Crowley's fundamental rights. *Amicus* Br. 23.

Defendants' final objection to Crowley's substantive due process claim is that he has not alleged arbitrary action that shocks the conscience. Because a heightened standard of scrutiny applies to violations of parents' fundamental rights regarding the education of their children, however, Crowley does not also need to prove that Defendants' conduct shocked the conscience in order to state a claim. Defs.' 2d Br. 15; *Amicus* Br. 19 n.3, 22-23. For these reasons, Defendants are not entitled to judgment on the pleadings regarding Crowley's substantive due process claim. This Court should reverse.

(... cont'd)

⁵ Any attempt to justify Defendants' refusal to provide records based on a need for school order would be negated by the statutory requirement that schools furnish records to both divorced parents absent a court order prohibiting their release. 750 ILL. COMP. STAT. ANN. § 5/10-21.8.

II. CROWLEY STATED A PROCEDURAL DUE PROCESS CLAIM.

Crowley's second claim is that Defendants deprived him of his right to participate in the education of his children without any procedural due process at all. Defendants have abandoned their argument that Crowley received adequate pre-deprivation process. *Cf. Amicus* Br. 24. Instead, they contend that if this Court holds Crowley's rights of educational participation are not fundamental, no process is due. Not so. The strength of the private interest affected is only one of three factors that courts balance to determine the amount of process due. *Amicus* Br. 25 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Defendants do not dispute that another factor – the risk of an erroneous deprivation – weighs heavily in favor of providing Crowley with at least some process before cutting off his rights. *Id.* In addition, balancing these factors to determine if pre-deprivation process is required involves factual inquiries that cannot be resolved on the pleadings. *Id.* Thus, even if this Court holds that Crowley's rights are not fundamental, the judgment regarding Crowley's procedural due process claim should still be reversed.

Defendants also contend that no pre-deprivation process was required because Crowley's loss was "minor" and adequate post-deprivation remedies for that loss were available in state court. This argument is difficult to accept given Defendants' own contentions later in their brief that Crowley's state law claims must be dismissed. *Cf. Defs.' 2d Br.* 27-30. In addition, it is ridiculous to argue that Defendants' comprehensive denial of Crowley's rights to participate in the education of his children stretching back to 1999 should be considered "minor" as a matter of law. *Compare Amicus Br. 5-7 with Terry v. Richardson*, 346 F.3d 781, 786 (7th Cir. 2003) (losing single day of visitation).

More importantly, Defendants are wrong that post-deprivation remedies can provide adequate process in this case. In general, "the Constitution requires some kind of a hearing

before the State deprives a person of liberty or property.” *Zinerman v. Burch*, 494 U.S. 113, 127 (1990). None of the recognized exceptions to this principle apply here. *See generally Easter House v. Felder*, 910 F.2d 1387, 1396-97 (7th Cir. 1990) (en banc); *Augustine v. Doe*, 740 F.2d 322, 327-28 (5th Cir. 1984). For example, no common-law privilege allows Defendants to deprive Crowley of his rights without advance process. *Cf. Ingraham v. Wright*, 430 U.S. 651, 674 & n.44 (1977). In addition, Defendants have not argued that emergency action was required, and they could not sustain that point on the pleadings in any event. *Brokaw v. Mercer County*, 235 F.3d 1000, 1021 (7th Cir. 2000).

Nor have Defendants argued that it was impossible to provide pre-deprivation process because their acts were “random and unauthorized.” *Parratt v. Taylor*, 451 U.S. 527, 541 (1981). To the contrary, they contend that McKinney’s actions were well within his authority and discretion. Defs.’ 2d Br. 18, 30. Therefore, this exception does not apply. *See, e.g., Hamlin v. Vaudenberg*, 95 F.3d 580, 584 (7th Cir. 1996); *Cushing v. City of Chicago*, 3 F.3d 1156, 1165 (7th Cir. 1993); *Indep. Coin Payphone Ass’n, Inc. v. City of Chicago*, 863 F. Supp. 744, 752-53 (N.D. Ill. 1994). As a result, pre-deprivation process was required. The judgment for Defendants on Crowley’s procedural due process claim should be reversed.

III. CROWLEY STATED AN EQUAL PROTECTION CLAIM.

Regarding Crowley’s traditional and class-of-one equal protection claims, the district court entered judgment for Defendants after applying the rational basis test. As the *amicus* brief explains, however, a higher standard of scrutiny applies to deprivations of a parent’s fundamental rights to participate in the education of his children. *Amicus* Br. 26. Defendants do not dispute that the judgment must be reversed under this standard.

Even if no heightened standard applies, however, judgment for Defendants is improper on Crowley's class-of-one claims. Defendants assert that the district court correctly rejected these claims by finding that Defendants' conduct had a hypothetical rational basis. But Crowley's complaint affirmatively negates that hypothesis by alleging that Defendants' conduct "was wholly arbitrary and vindictive, [and] solely or substantially motivated by [their] spite and ill will toward [Crowley]." Compl. p.21. These allegations must be taken as true at this stage of the case. Thus, even if there is also a hypothetical reasonable explanation for Defendants' conduct, the choice between these two explanations must await discovery; it cannot be made as a matter of law. *See Cobb v. Pozzi*, 352 F.3d 79, 99-100 (2d Cir. 2003).

In fact, if Defendants were correct that any rational relationship to a legitimate state objective could defeat a class-of-one claim on the pleadings, the result would have been different in *Olech v. Village of Willowbrook*, 160 F.3d 386 (7th Cir. 1998), *aff'd per curiam*, 528 U.S. 562 (2000). There, although the Village usually demanded an 18-foot easement as a condition of hooking up residents to the water supply, it demanded a 33-foot easement from the Olechs because it also wanted to widen their road. 160 F.3d at 387. Yet despite this potential rational basis for the Village's demand, both this Court and the Supreme Court held that the Olechs had stated a claim by alleging that the demand was irrational, arbitrary, and motivated by ill will. *Id.* at 388; 528 U.S. at 564. Likewise, the Defendants' proposed rational basis for their actions cannot defeat Crowley's class-of-one claim. The district court's judgment dismissing that claim should be reversed.

IV. CROWLEY ALLEGED THAT DEFENDANTS RETALIATED AGAINST HIM FOR SPEECH ON A MATTER OF PUBLIC CONCERN.

The parties' only dispute regarding Crowley's First Amendment retaliation claim is whether his speech addressed a matter of public concern. The *amicus* brief cites cases holding

that this requirement is easy to meet at the pleading stage and that it is satisfied by statements about educational policy matters like those made by Crowley. *Amicus* Br. 28. Defendants have absolutely no response to these cases except the irrelevant observation that they arose in the employment context. But the elements of a First Amendment retaliation claim are exactly the same in non-employment contexts, as the case cited by Defendants confirms. *Compare Morfin v. City of East Chicago*, 349 F.3d 989, 1005 (7th Cir. 2003), with *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977).⁶

Defendants' only other argument is that even if Crowley's speech is protected, they are entitled to judgment under the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968). But Defendants have not pled this affirmative defense or carried their burden to prove it as a matter of law. *See Gustafson v. Jones*, 117 F.3d 1015, 1019 (7th Cir. 1997). As this Court has observed:

it would be a rare case indeed where the pleadings as a whole would permit judgment as a matter of law on this point, unless the plaintiff was relying on speech that is wholly unprotected by the First Amendment or the defendant's justifications were frivolous. Normally, application of the *Pickering* balancing test will be possible only after the parties have had an opportunity to conduct some discovery.

Id. Because Crowley pled facts that could support a finding that his speech is about a matter of public concern, *see Amicus* Br. 5, 28, Defendants are not entitled to judgment on the pleadings regarding his First Amendment retaliation claim. *Gustafson*, 117 F.3d at 1018-19. Any further

⁶ Defendants observe that some courts consider whether the complained-of conduct "likely would chill a person of ordinary firmness from continuing to engage in that activity." Defs.' 2d Br. 22. This language also appears in both employment and non-employment cases. *See Bloch v. Ribar*, 156 F.3d 673, 678-79 (6th Cir. 1998); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). Defendants do not argue that this is a separate element of a First Amendment retaliation claim, nor could they reasonably argue that Crowley fails to meet it. In any event, the chilling potential of particular conduct is a question of fact that courts do not decide on the pleadings. *Bart*, 677 F.2d at 625.

inquiry into the factual circumstances of Crowley's speech – including his motivation – must await discovery. *Deloughery v. City of Chicago*, 2002 WL 31654942, at *3 (N.D. Ill. Nov. 25, 2002); *cf.* Defs.' 2d Br. 22.

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

Crowley brought the above claims against Defendants under 42 U.S.C. § 1983. Defendants' arguments that they are not liable under Section 1983 do not provide alternative grounds to affirm the judgment.

A. McKinney Is Not Entitled To Qualified Immunity.

Regarding McKinney's claim of qualified immunity, Defendants ignore the principle that qualified immunity is almost always a bad ground of dismissal on the pleadings. *Amicus* Br. 30-31. One reason is that factual matters, such as the information McKinney had at the time he acted, are part of the inquiry into whether a right is clearly established for qualified immunity purposes. Thus, in a similar case involving a non-custodial parent's claims to her child's educational records, the Second Circuit held that ruling on the availability of a qualified immunity defense would be premature on the pleadings. *Taylor*, 313 F.3d at 793-94; *see also Hildebrandt v. Ill. Dep't of Natural Resources*, 347 F.3d 1014, 1038 n.22 (7th Cir. 2003) (issues of fact regarding whether constitutional right was violated preclude resolution of qualified immunity issue). Given the presence of these factual issues, as well as Crowley's allegation that Defendants acted with knowledge that they were violating clearly established rights, Compl. ¶16, qualified immunity cannot support a judgment for McKinney on the pleadings.

Defendants nevertheless argue that the only cases on point are *Lovern* and *Mejia*, which supposedly show that Crowley's rights were not clearly established. But those cases are not relevant for the reasons explained in Part I.B. above, and in any event *Mejia* was not decided

until 2002. Moreover, a case directly on point is not required. If general principles of law in existence at the time would put a reasonable person on notice that his actions were unlawful, that is enough to defeat a claim of qualified immunity. *E.g., Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir. 1996).

Defendants conspicuously fail to respond to *amicus*'s explanation that liability for retaliating against protected speech about educational policies has been established since 1968. *Amicus* Br. 30. Thus, at a minimum, Crowley's First Amendment retaliation claim cannot be disposed of on qualified immunity grounds. In addition, with respect to Crowley's other claims, the cases and statutes cited show that a reasonable person in 1999-2002 would have known it was unlawful to cut off a parent's rights regarding the education of his children altogether, and that particular actions such as denying Crowley access to educational records were unlawful. *Amicus* Br. 29-30. For these reasons, the Court should reject McKinney's qualified immunity defense.

B. Crowley Stated A Claim That The District Is Liable Both For Its Custom And For The Actions Of Its Policymakers.

As to the District's liability, Crowley alleged that: (1) he was injured by a widespread pattern of harassment that represents the District's policy or custom; and (2) both McKinney and Jordan were official policymakers and their acts against him were authorized and ratified by the District. *See Amicus* Br. 31-32 (detailing allegations). Defendants do not dispute that either theory, if the allegations are true, would be sufficient to make the District liable. Instead, they argue that Crowley had to plead facts showing the District's authorization and the duration and scope of the practice. *Defs.' 2d Br.* 26 n.6, 27. Not so. All that the federal rules require is a short and plain statement of the claim that gives a defendant fair notice of the grounds on which it rests; a plaintiff can meet this requirement and avoid dismissal in Section 1983 cases by

pleading conclusions.⁷ Crowley's allegations are more than sufficient under this standard, and Defendants do not contend that they lacked notice of the grounds of his claims.

Defendants raise three other objections to the District's liability, but none supports a judgment in their favor as a matter of law. First, they contend that Illinois statutes assign policymaking authority to school boards and that courts have found some principals not to be final policymakers. Yet whether statutes make all principals final policymakers is not dispositive of whether, in this case, the District delegated policymaking authority to McKinney or ratified his exercise of that authority. *Kujawski v. Bd. of Comm'rs*, 183 F.3d 734, 737 (7th Cir. 1999). In fact, Defendants' admissions that McKinney had the "unique prerogative to control access to the school," and that he "was not required to follow any particular course of conduct," strongly suggest that McKinney has policymaking authority. Defs.' 2d Br. 30. Defendants do nothing to blunt the force of these admissions by asserting, without explanation, that they are not relevant in the Section 1983 context. Whether McKinney's prerogatives amount to policymaking authority should be decided on the facts, not on the pleadings.

Second, Defendants assert that the District's subsequent ratification of acts by McKinney cannot support liability. But Crowley pled that the District knew about and ratified a "continuing" pattern of violations, not that the ratification occurred subsequent to the violations.

⁷ E.g., *Leatherman v. Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 168 (1993); *id.* at 165 ("[A] claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice." (quoting *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988)); *McCormick v. City of Chicago*, 230 F.3d 319, 324-25 (7th Cir. 2000); *Jackson v. Marion County*, 66 F.3d 151, 153-54 (7th Cir. 1995); *McNeal v. Cook County Sheriff's Dep't*, 202 F. Supp. 2d 865, 2003 WL 22132717, at *2-3 (N.D. Ill. Sept. 12, 2003); *Fogarty v. City of Chicago*, 2002 WL 989452, at *5-8 (N.D. Ill. May 14, 2002); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (complaint may be dismissed only if it is clear that no relief could be granted under any facts that could be proved consistent with allegations, and defendant can move for more definite statement if allegations fail to provide sufficient notice).

Compl. ¶15. Again, the precise nature and timing of the ratification should be decided on the facts, not the pleadings.

Third, Defendants argue that Crowley failed to allege facts showing that the District's custom was of sufficient duration and scope to support liability. As explained above, however, fact pleading is not required in order to state a claim. In addition, Crowley not only alleged a widespread pattern of harassment against him personally, but also that Defendants harassed him because of his membership in the broader class of non-custodial divorced parents. Compl. p.19. Nothing more is required to give Defendants fair notice of Crowley's theory that they are liable based on custom. Therefore, judgment on the pleadings is improper.

VI. DEFENDANTS ARE NOT ENTITLED TO JUDGMENT ON THE STATE LAW CLAIMS.

Defendants' final argument is that although the district court dismissed Crowley's state law claims after declining to exercise supplemental jurisdiction, this Court should "dismiss[s]" them "on substantive grounds." Defs.' 2d Br. 27. Because Defendants did not file a cross-appeal, however, they failed to preserve their right to that relief. Unless an appellee files a cross-appeal, he may not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *Mass. Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480 (1976). Here, Defendants-Appellees are asking this Court to convert the district court's jurisdictional dismissal of Crowley's state law claims without prejudice (*see Amicus Br.*, Tab B at 2) into a "substantive" dismissal – that is, into a judgment for Defendants on those claims with prejudice. This relief obviously would enlarge their rights under the judgment and diminish Crowley's rights. Thus, Defendants cannot pursue that relief on appeal. *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 479-80 (1999); *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1416 (7th Cir. 1989).

Even if Defendants had cross-appealed, however, they would not be entitled to a judgment on Crowley's state law claims. Defendants offer no explanation at all of why they are entitled to judgment on Crowley's statutory claim under the Illinois School Student Records Act. As to his tort claim for intentional infliction of emotional distress, Defendants cite an Illinois case for the proposition that a plaintiff must allege facts showing that the conduct was extreme and outrageous. But Illinois is a fact pleading jurisdiction. *Beahringer v. Page*, 789 N.E.2d 1216, 1221 (Ill. 2003). Under the notice pleading approach of the Federal Rules, Crowley's allegations of extreme and outrageous conduct are sufficient to state a claim. *Amicus* Br. 33.

Finally, Defendants argue that they are entitled to state statutory immunity regarding the intentional infliction claim. But Defendants ignore that Crowley has pled the exception to immunity for willful and wanton conduct, as well as *amicus's* argument that the immunity determination involves questions of fact that should not be decided on the pleadings. *Id.* Therefore, Defendants are not entitled to judgment in their favor on Crowley's state law claims. The district court's judgment dismissing those claims should be reversed.

CONCLUSION

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

Respectfully submitted,

Amicus curiae

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Amicus curiae representing the interests of Plaintiff-Appellant Daniel Crowley

Dated: February 6, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of the foregoing Reply Brief of *Amicus Curiae* in Support of Appellant to be served upon the following counsel of record via certified mail on February 6, 2004:

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