

**SUPREME COURT OF MAINE
SITTING AS THE LAW COURT**

**GAYLE A. FITZPATRICK, individually and CHARLES A. RANKOWSKI,
individually, and both as parents of JAN RANKOWSKI, a minor
Plaintiffs / Appellants**

vs.

**TOWN OF FALMOUTH, CAROLYN A. CROWELL, BARBARA POWERS, and
TIMOTHY MCCORMACK all individually and as employees of the Falmouth Public
Schools, and STEVE BRINN, as chairman of the Falmouth School Board Defendants /
Appellees**

Docket No: CUM-04-569

BRIEF OF APPELLANTS

"The highest result of education is tolerance"

Helen Keller

"The secret in education lies in respecting the student"

Ralph Waldo Emerson

"Education is too important to be left solely to the educators"

Francis Keppel

"All animals are created equal, but some animals are more equal than others"

Animal Farm, by George Orwell (1945)

INTRODUCTION

"Education is a very social institution that plays a predominant role in our increasingly urban society... More and more Americans are choosing to provide education to their children themselves. Dissatisfaction with public education is likely to continue and possibly increase given the move toward standardization and accountability such as California's Public School Accountability Act... and the National No Child Left Behind Act. Therefore, home schooling is likely to grow more popular and become more mainstream."[\(footnote 1\)](#) Home schooling is a sociological tidal wave sweeping across America. In 2004, there were 1–2 million home schooled students in our country, and 4,500–5,000 home schooled students in Maine.

In September, 2003, Jan Rankowski was a 9 year old home schooled child residing with his plaintiff parents in Falmouth, Maine. Jan is also disabled and handicapped, diagnosed with Asperger's Autism, a neurological disorder which limits his social skills to that of a 4 year old and his communication skills to a 6 year old. Falmouth need not provide special education to Jan since he is home-schooled. He is not an in-school special education student. This distinction is very important. In September, 2003, knowing of Jan's handicaps as early as June, 2003, a Service Plan was developed by defendants which, in limited part, allowed Jan to use the Falmouth/Plummer School playground (a place of public accommodation) during school hours so Jan could interact and play with his in-school peers. Falmouth does not pay for any of Jan's outside-providers.

Falmouth was also aware of numerous neurological and behavioral assessments conducted on Jan prior to November, 2003. However, due to his disability and home-schooling, Jan was treated "differently" by Falmouth. Due to Jan's "defiance" in the playground, in October and November, 2003, directly related to his autism handicap, Jan was suspended in early November, 2003 from in-school playground use. On November 24, 2003, a PET meeting was held with Falmouth which concluded, by way of a "recommendation", that Jan would continue to remain suspended until the plaintiffs agreed to a new assessment of Jan or, in the alternative, Falmouth would set up a new PET meeting on or before February 12, 2004. (November 24-February 12 is 45 school days; the same "suspension" period which is a normal discipline to a student bringing a weapon to school). Plaintiffs have never set up the new PET date.

Between 2002-2004, Falmouth via defendant Powers utilized certain "Reflection Sheets" to ultimately punish her in-school students for serious physical abuse offenses normally resulting in no more than three day playground suspensions or "time-outs". No Reflection Sheet was ever utilized on Jan for being "defiant" in the playground, but he was suspended from in-school playground use without an end date. Treating someone as "different", and resultant conduct and punishment for being "different", is the core of discrimination. Falmouth's treatment of Jan is discriminatory, and violates his rights as a home schooled, handicapped child. In fact, plaintiffs and young Jan were threatened by Falmouth with criminal sanctions should Jan "trespass" on the playground.

Litigation commenced on February 12, 2004 seeking by way of an injunction, the only basic relief desired, to allow Jan to resume in-school playground use in Falmouth. After deposition discovery of all defendants in July, 2004, the Superior Court conducted three days of trial in August, 2004. The Court below concluded in its August 31, 2004 Order that no injunction would issue, and granted defendants a house-keeping summary judgment on that August, 2004 Order in December, 2004.

Plaintiffs contended that the Superior Court erred in refusing to grant plaintiffs an injunction and granting onto defendants summary judgment, requiring reversal by this instant appeals court.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Trial was held on August 20, 23 and 27, 2004 wherein plaintiffs sought a preliminary and permanent injunction seeking an order to allow plaintiffs' nine year old son Jan to play at the Falmouth Plummer public elementary school ("Falmouth") playground. For clarity, the three hearings are Appendix noted as Hearing 1 (August 20, 2004), Hearing 2 (August 23, 2004) and Hearing 3 (August 27, 2004). A time-line chronology of events best describes the factual background:

Jan is a home-schooled, disabled and handicapped child diagnosed with Asperger's Autism, with an I.Q. of 142 (App 91, Hearing 2, Fitzpatrick, P.23, L. 13-20). In the fall of 2003, Jan was the only home-schooled student allowed to use the Falmouth school playground during school hours. (App 131, Hearing 3, Powers, P. 44, L. 23-25; P. 45, L. 1). In 2004, there were 1-2 million home-schooled students in the United States, and about 4,500 - 5,000 in Maine. (App 67, Hearing 1, Fitzpatrick, P. 89, L. 12-24). As a home-schooled child, there has never been an Independent Education Plan ("IEP") done for Jan (App 64, Hearing 1, Crowell, P. 75, L. 18-20; App 93, Hearing 2, Fitzpatrick, P. 34, L. 16-19). Autism is a brain disorder effecting 1 in 250 people (App 94, Hearing 2, Katz, P. 38, L. 4-9). Of the 2,176 secondary school students in Falmouth, 255 (12%) are labeled as special education in-school students. (App 335, Defendants' Exhibit 4). Asperger's is at the high end of the autism spectrum involving poor social skills and poor communication (App 52, Hearing 1, Crowell, P. 27, L. 21-25; P. 28, L. 1-7). Jan was labeled "different" because he was not an in-school student. (App 47, Hearing 1, Johnson, P. 8, L. 21-25; P. 9, L. 1-5). When Jan was an in-school 2nd grade student (at age 7) at the Lunt public school in Falmouth, Lunt school principal Debbie Johnson knew he was autistic. (App 46, Hearing 1, Johnson, P. 5, L. 10-16). While principal Johnson and defendant McCormack (Superintendent of Falmouth Schools) both agreed that all children were to be treated without discrimination; that disabled students be provided an opportunity to participate in non academic and extra curricular activities to the maximum extent appropriate; that a suspension of a student for more than 10 days required a PET meeting; and that mainstreaming of disabled children is important for their development and that the least restrictive alternative be provided to disabled and handicapped children. (App 67 & 48, Hearing 1, Johnson, P. 10, L. 4-25; P. 11, L. 1-10), none of these rights, ideals, guarantees and goals were implemented whatsoever in regard to Jan.

Other than Jan, defendants were not aware, or did not know, of any other child suspended from in-school playground use for 6-7 continuous months (App 48, Hearing 1, Johnson, P. 3, L. 2-9; App 53 & 57, Hearing 1, Crowell, P. 34, L. 6-22, P. 48, L. 5-9; App 154, Hearing 3, McCormack, P. 136, L. 2-6). Home-schooled students do not have a right to special education. (App 178, Plaintiff's Exhibit 6, paragraph B) (Emphasis added). Defendant Crowell (Director of Special Education, Falmouth) agrees that autistic children have social problems. (App 57, Hearing 1, Crowell, P. 49, L. 25)

At a Pupil Evaluation Team ("PET") meeting held on June 10, 2003 by Falmouth with plaintiff Fitzpatrick, Falmouth's special education teacher Mora Katz ("Katz") and defendant

Barbara Powers (Principal, Plummer School, Falmouth), Katz had not received prior outside assessments on Jan previously given to defendant Powers ("Powers"). Furthermore, at that PET meeting, Katz understood that it was important for Jan to get out into the community, interact with people, engage in interactive play and decrease his solitary activity (App 182, Plaintiff's Exhibit 8; App 96, Hearing 2, Katz, P. 44, L. 2-21; P. 45, L. 19-23; P. 46, L. 7-11; P. 46, L. 12-18). Jan was not reassessed in June, 2003, because he was home-schooled. (App 97, Hearing 2, Katz; P. 47, L. 11-19). At that PET meeting of June, 2003, defendant Powers and Katz were informed and knew that Jan had the social skills of a 4 year old child and the communication skills of a 6 year old. (App 129, Hearing 3, Powers, P. 37, L. 7-16); App 97, Hearing 2, Katz, P. 50, L. 7-17; App 183, Plaintiffs' Exhibit 9, lower left hand corner). Fitzpatrick gave Falmouth the State of Maine Service Plan ("SP") done on Jan in July, 2002, a year prior (App 286-320, Plaintiffs' Exhibit 22), and the new SP done on July 7, 2003 and again on September 11, 2003 (App 91, Hearing 2, Fitzpatrick, P. 25, L. 12-24).

On September 11, 2003, another PET meeting was held by Falmouth to develop another Service Plan ("SP") for Jan. It was agreed that Jan's behaviors would be managed by his family and outside providers and Jan could use the school library, library books and to use the playground during school hours (App 97, Hearing 2, Katz, P. 47, L. 20-25; P. 48, L. 1-10; App 336-340, Defendants' Exhibit 5). The SP was developed by defendant Crowell. (App 336-340, Hearing 2, Fitzpatrick, P. 9, L. 3-25' P. 10, L. 1-7). Defendant Falmouth does not pay for nor provide any special services to Jan, and all Jan has is a service plan. (App 64, Hearing 1, Crowell, P. 75, L. 8-17; App 67, Hearing 1, Fitzpatrick, P.88, L. 4-6). Jan's outside services are providers who are a neuropsychologist, a speech language therapist, a behavioral therapist, in-home support personnel and private tutors (App 67, Hearing 1, Fitzpatrick, P.87, L. 15-23).

Katz and Powers knew that when Jan was at the Falmouth playground, he was always under an adult's care, such as a plaintiff parent or an in-home support person (App 95, Hearing 2, Katz, P. 39, L. 13-19; App 72, Hearing 1, Fitzpatrick, P. 110, L. 18-22). Defendant Crowell also knew that only in-school students have IEP's (App 59, Hearing 1, Crowell, P. 57, L. 16-25; P. 58, L. 1-11) and that a Functional Behavioral Assessment ("FBA") is only used in an "in-school setting" (App 60, Hearing 1, Crowell, P. 60, L. 6-20), and since Jan was home-schooled, the "process" would be different (App 60, Hearing 1, Crowell, P. 62, L. 15-22). Katz was invited to attend the monthly outside meetings of professional providers regarding Jan, but Katz never attended (App 97, Hearing 2, Katz, P. 49, L. 11-24). Katz would only attend if she were paid \$1,000.00 (App 117, Hearing 2, Katz, P. 130, L. 18-21) Defendants were individually invited to these meetings, but never showed up. (App 64, Hearing 1, Crowell, P. 77, L. 4-8). Falmouth never paid nor is required to pay for Jan's outside providers. (App 67, Hearing 1, Fitzpatrick, P.87, L. 15-25, P.88, L. 1-6)

School started in early September, 2003. On September 25, 2003, plaintiff Fitzpatrick met with defendant Powers and Katz. Katz notes "... 4th grade reports unkindness, sounds like an unpleasant time... swearing, making fun of." (App 185, Plaintiffs' Exhibit 10). Fitzpatrick complained to Powers and Katz of Jan being bullied by the other students in the playground (App 126, Hearing 3, Powers, P.25, L. 20-25; P.26, L. 1-9)

At the September 25, 2003 meeting, Fitzpatrick recalls Powers saying "... that other children had come to the office and said some children were mimicking my son, making fun of him and calling him a weirdo". (App 71, Hearing 1, Fitzpatrick, P. 105, L. 3-5) Katz and Powers both agreed that bullying is a serious problem. (App 112, Hearing 2, Katz, P. 108, L. 15-21; App 125, Hearing 3, Powers, P. 19, L. 20-22). Katz testified that autistic children could be unresponsive to adults (App 101& 102, Hearing 2, Katz, P.66, L. 5; P. 67, L. 1-5), and that it was "within the realm of possibility" that normal (not handicapped) children used curse words on a playground (App 102, Hearing 2, Katz, P.68, L. 22-25, P.69 , L. 1) and that it is also unresponsive child autistic behavior to grumble and walk away (App 102, Hearing 2, Katz, P. 69, L. 18-25, P. 70, L. 1-2) and that all children (handicapped or not) exhibit unsafe behaviors when jumping off the Maze Craze (App 102 & 103, Hearing 2, Katz, P. 70, L. 11-25; P.71, L. 1-5). Katz further testified that plaintiff Fitzpatrick and Jan's outside professionals knew Jan best (App 100, Hearing 2, Katz, P. 60, L. 8-12). Katz also testified that in her 17 years as a special education teacher, she had also seen other children, besides Jan, standing on swings. (App 104, Hearing 2, Katz, P.75, L. 20-25, P.76, L.1). The parties agreed that closer observation would be held when Jan played at the playground.

On September 29, 2004, Katz instructed special education assistant Virginia Gilbert, in regard to following Jan in the playground, to: "Document each day. Don't be lulled into couple of weeks of calm. Don't talk to Mom. Just watch kids and journal. Note who he plays with/what they do." (App 186, Plaintiffs' Exhibit 11). The next day, September 30, 2003, Johnson sent an e-mail to all of her teachers which, in part, instructed that "...we need to document ANY inappropriate interaction between this boy and "our" kids or staff. (App 173, Plaintiffs' Exhibit 2) (App 47, Hearing 1, Johnson, P.7, L. 14-20) (Emphasis in original exhibit). It was clear that "our" kids were non-handicapped in-school students as contrasted to Jan, a home-schooled disabled child. Jan was then closely followed for 5 weeks, with Gilbert keeping clipboard notes as instructed. Katz further testified that she did not inform plaintiffs that notes would be taken as Jan was being followed around. (App 103, Hearing 2, Katz, P.74, L. 14-18). Katz also testified she kept no notes of other children when Jan was being "defiant" (App 105, Hearing 2, Katz, p.81, L. 18-22)

Crowell testified she saw the 18 pages of "snooping notes" (also known as "observation notes") kept on Jan in the playground for the period September 30, 2003 to November 7, 2003 (App 64, Hearing 1, Crowell, P.78, App 65, L. 3-8, P.79, L. 10-19)

On November 7, 2003, Jan was indefinitely suspended from in-school playground use by letter of defendant Crowell, anticipating another PET meeting to address "a variety of issues." (App 174, Plaintiffs' Exhibit 3). This suspension did not have a termination date. Crowell testified that Jan was suspended "because... .and... until we could get together and decide what to do next." (App 61, Hearing 1, Crowell, P. 6, L. 11-21). The November 7, 2003 suspension did not a request further assessment of Jan. (App 50, Hearing 1, Crowell, P.21, L. 3-6). In fact, prior to November 7, 2003, per testimony of Crowell, Jan had been assessed many times prior. (App 50, Hearing 1, Crowell, P.21, L. 13-16). Crowell further testified that there were no written incident reports on Jan during the fall of 2003 (App 56,

Hearing 1, Crowell, P.46, L. 1–10). Katz also testified that she observed Jan put his fingers in his ears, an indication that he be left alone, which is autistic behavior and that of a 4–5 year old child (App 116, Hearing 2, Katz, P.124, L. 4–14, P.124, L. 22–25, P. 125, L. 1–16). Katz further testified that not getting off a swing was possibly both autistic and non handicap behavior (App 111, Hearing 2, Katz, P.105, L. 6–9).

In anticipation of another PET meeting scheduled for November 24, 2003, Katz prepared a "Draft of Script", wherein Katz typed, in part:

"As I have reflected on Jan's non-compliant behavior on the playground I see that it falls into 3 areas:

- unacceptable language
- unresponsiveness to adults
- undermining adult supervision of others

These behaviors are not totally unheard of in children with autism or Asperger's."

(App 177, Plaintiffs' Exhibit 15) (Emphasis added)

Prior to November 7, 2003, Jan's prior assessments which comprised three, three inch ring binders for years 2001 to 2003, were given to defendants. (App 66, Hearing 1, Fitzpatrick, P.85, L. 13–25, P.86, L. 1–9; App 279–283, Plaintiffs' Exhibit 19) (Yahr report only).

On November 24, 2003, the last PET meeting was held at Falmouth, with 8 persons attending (App 175 & 176, Plaintiffs' Exhibit 4). The purpose of the meeting, per this Exhibit, was to "review behavior connected with Jan's use of the Lunt/Plummer playground and to determine how to better manage Jan's behavior in order for him to resume access to the playground during school hours". This exhibit is very important. The only issue as to "safety" was "emotional safety" to students, a clear subjective analysis, and not further explained. Crowell "recommended" (but did not require) that a new FBA be completed on Jan, and that "the FBA would not begin until Ms. Fitzpatrick authorized the same, by executing an IDP." An IDP is an Independent Developmental Plan. Crowell, who dated and signed this two page document determined in part, on page two:

"3. Reconvene a PET on or before February 12, 2004, or within 45 school days of receipt of permission to conduct FBA". (Emphasis added)

Crowell testified that she gave plaintiffs an alternative (the word "or") to having the FBA done or not. (App 63, Hearing 1, Crowell, P.73, L. 4–7). The word "or" is most significant.

Powers acknowledged, in testimony, that no other child had ever had, nor was ever requested to have an FBA who Powers had censured or who had misbehaved in the playground. (App 152, Hearing 3, Powers, P.128, L. 12–15). Crowell testified that the plaintiffs did not sign a permission to have the FBA conducted (App 53, Hearing 1, Crowell, P.32, L. 3–6), and that Falmouth did not set up another PET meeting prior to and after

February 12, 2004 (App 53, Hearing 1, Crowell, P.33, L. 11–14). Powers testified that she "recalled" that plaintiffs had the alternative of either agreeing to a new FBA or that Falmouth would set up the new PET meeting. (App 130, Hearing 3, Powers, P.39, L. 13–21).

At the November 24, 2003 PET meeting, defendants wanted plaintiffs to sign the IDP consent form (App 322–325, Plaintiffs' Exhibit 28) with the notation "Jan has had some significant difficulty using the school playground safely and age appropriately." No mention was made that Jan presented a "direct threat" to anyone, because, in fact, he had not. Plaintiffs never signed this consent form. Ironically, defendants had known for many months prior that Jan had the social skills of a 4 year old, and the communication skills of a 6 year old. Powers further testified she knew, by December 1, 2003, that plaintiffs did not agree to the FBA on Jan. (App 129, Hearing 3, Powers, P.37, L. 18–25). In fact, Powers knew, as informed by plaintiffs, that no new FBA would be agreed upon since there were numerous previous assessments. (App 129, Hearing 3, Powers, P.36, L. 18–25, P.37, L. 1–10). By plaintiffs' letter of November 24, 2003 to Powers, plaintiffs were clear in rejecting a new FBA (App 344, Defendants' Exhibit 9). In spite of the many prior detailed assessments, Powers wanted a further assessment (App 132, Hearing 3, Powers, P.47, L. 13–16). Powers also knew that prior to November 24, 2003, Jan was an Asperger's Autistic child who had minimal social and communication skills (App 151, Hearing 3, Powers, P.125, L. 19–25). Powers further agreed with Katz that "unacceptable language, unresponsiveness to adults and undermining adult supervision of others" was not totally unheard of in Asperger's Autistic children (App 148, Hearing 3, Powers, P.113, L. 8–12), and there were no Reflection Sheets on Jan's fall 2003 playground behavior (App 148, Hearing 3, Powers, P.113, L. 13–18). In fact, Powers testified that those areas of conduct did "not matter" to her. (App 149, Hearing 3, Powers, P.117, L. 4–21)

Powers, as the principal of the Plummer school is also the chief disciplinarian of the 8, 9, and 10 year old children at her school (App 121 & 122, Hearing 3, Powers, P.4, L. 4–12; P.7, L. 17–19) and knew that Jan was allowed to use the school library, library books and school playground, and was "no problem" in the library (App 121, Hearing 3, Powers, P.4, L. 14–21). Powers has no special training in Autism and describes herself as just in charge of the playground (App 127, Hearing 3, Powers, P.30, L. 21–25). During academic years 2002–2003 and 2003–2004, Powers utilized certain Reflection Sheets to regulate student conduct (App 194–278, Plaintiffs' Exhibit 17). Combined with the school's Level II Behaviors (App 193, Plaintiffs' Exhibit 16), the Reflection Sheets identified in-school children who had hit, punched, pushed, threw or otherwise abused other children, and Power's punishment for those offenses. Powers further testified she set up behavioral plans so that a child could make "reflective choices" (App 134 & 135, Hearing 3, Powers, P.58, L. 10–25; P.59, L. 1–7). Of the 17 Reflection Sheets testified to by Powers at trial, no student was given more than a 3 day suspension or "time-out" (App 123–126, Hearing 3, Powers, P.11, L. 5 to P.23, L. 8). Of those 17 "punishments", none were home-schooled students (App 126, Hearing 3, Powers, P.25, L. 7–10). In fact, Powers testified that she knew of no in-school student who had been suspended for 7 continuous months (App 123, Hearing 3, Powers, P. 13, L. 16–20). No Reflection Sheets were ever done on Jan in the Fall of 2003 (App 122, Hearing 3, Powers, P. 7, L. 23–25), nor were there any written reports of Jan throwing rocks or hitting

children (App 122, Hearing 3, Powers, P. 8, L. 9–25; P. 9, L. 1–4). In the 5 weeks Katz and Virginia Gilbert followed Jan around, neither observed Jan throwing rocks or hitting a child (App 109, Hearing 2, Katz, P. 95, L. 7–21).

Falmouth's "Student Handbook" (App 340–343, Defendants' Exhibit 8) never discusses any of the reasons why Jan was suspended from playground use.

For 8 weeks, plaintiffs repeatedly requested defendants to send them copies of the snooping/observation notes conducted on Jan from September 30, 2003 to November 7, 2003. Powers responded by saying no "assessments" were being made, a clear evasion. (App 128 & 129, Hearing 3, Powers, P.33, L. 11 to P. 36, L. 1). Finally, on December 23, 2003, Crowell forwarded to plaintiffs the notes when requested by the Maine Disability Rights Center (App 345 & 346, Defendants' Exhibit 11). In spite of the fact that plaintiffs would not agree to a new FBA, defendants failed to set up a new PET date as defendants themselves had detailed in Plaintiffs Exhibit 4 (App 175 & 176, Plaintiffs' Exhibit 4).

By letter to plaintiffs dated December 1, 2003 from defendant McCormack, plaintiffs were threatened with criminal sanctions since plaintiffs had rejected the new FBA (App 177, Plaintiffs' Exhibit 5), suggesting Jan's "short term removal" be reviewed at a new PET meeting. To date, as of the writing of this instant Appellate Brief, defendants have never set up a new PET meeting to address Jan's playground suspension of November 7, 2003. The same day, December 1, 2003, McCormack telephoned Falmouth Police Officer Robert Succi ("Succi"), concerning Jan and his mother (App 284 & 285, Plaintiffs' Exhibit 20). Plaintiffs' Exhibit 20 is Succi's concurrent written police report. Officer Succi testified he telephoned plaintiff Charles Rankowski that he would make an arrest and put "someone in a cruiser" if Jan trespassed, and "take them to the Cumberland County Jail" (App 81, Hearing 1, Succi, P.143, L. 10–25; P.144, L. 1–24). Similar testimony was offered by plaintiff Charles Rankowski (App 82, Hearing 1, Rankowski, P.148, L. 14–25; P.149, L. 1–16).

Defendant McCormack testified that he had no recollection of telephoning Officer Succi on December 1, 2003 nor receiving a call from Powers on that date (App 153, Hearing 3, McCormack, P.131, L. 3–24; P.139, L. 23–25; P.140, L. 1–24). Defendant McCormack grudgingly admitted that at his prior sworn deposition he had acknowledged that he had no conversations with his staff, personnel or teachers regarding bullying (App 153, Hearing 3, McCormack, P.134, L. 4–23), and that he had previously testified that the school board policies on ethical and responsible behavior was not distributed to the teachers (App 154, Hearing 3, McCormack, P.135, L. 8–25; P.136, L. 1).

Admitted at trial, but not for the truth as an exception to hearsay, Powers testified that 3 in-school students had reported an incident involving them and Jan on September 22, 2003, and that she had concluded "wrong doing on both sides" (App 139, Hearing 3, Powers, P. 78, L. 20–22) but had not required the 3 in-school students to do a Reflection Sheet (App 148, Hearing 3, Powers, P.114, L. 4–7). Powers testified that it was her feeling that "some children were being emotionally distraught by Jan's behavior" which she felt was

an "emotional risk". (App 148, Hearing 3, Powers, P.110, L. 15–21). It is important to note that no child or parent testified that Jan's playground behavior was an "emotional risk", or a risk of any kind.

The only expert testimony at trial was from Gregory Yahr, Phd., a member of Jan's outside professional team, who had read the 18 pages of observation notes made on Jan's playground conduct previously mentioned (App 79, Hearing 1, Yahr, P.136, L. 1–25; P.137, L. 1–25; P.138, L. 1–3). Dr. Yahr testified that Jan's playground behavior is typical non-handicapped and Asperger's behavior, and that handicapped children are often harassed, bullied and teased in a playground (App 79, Hearing 1, Yahr, P.138, L. 14–19). Dr. Yahr was not cross examined.

Katz made a summary of Jan's observations at the playground from September 29, 2003 to November 14, 2003, with notations on the left border, based upon her unauthorized conversations with the school's outside psychologist in early December, 2003, a month after Jan was suspended from the playground (App 101, Plaintiffs Exhibit 12; App , Hearing 2, Katz, P.65, L. 7–15). Defendants were only authorized to share copies of Jan's prior reports and assessments with staff, not outside people (App 326, Plaintiffs' Exhibit 29)

The last action taken by Falmouth was from defendant Brinn (Chairman–Falmouth School Board) by letter to plaintiffs informing plaintiffs to file a civil discrimination action (App 69, Hearing 1, Fitzpatrick, P.95, L. 9–23).

Having rejected the new FBA as the alternative (see App 175 & 176, Plaintiffs' Exhibit 4), plaintiffs awaited from defendants the PET meeting to occur "on or before February 12, 2004". Defendants have never set up, to date, this new PET meeting. Suit commenced on or about February 12, 2004.

II. PROCEDURAL BACKGROUND

Suit commenced on February 12, 2004 by Complaint and a Motion for a Preliminary and Permanent Injunction. On March 25, 2004, defendants removed to the U.S. District Court, and on May 12, 2004 (after filing two significant Orders), the U.S. District Court remanded back to the Superior Court. On May 13, 2004, an Amended Complaint was served and filed. On May 28, 2004, plaintiffs withdrew their Appeal to the First Circuit and were allowed to serve and file an Amended Third Complaint. In June and July, 2004, discovery occurred with depositions taken of all defendants. Plaintiffs were never deposed. On July 20, 2004, defendants served a Motion for Summary Judgment, and on or about August 5, 2004, defendants served an Amended Statement of Material Facts (App 377–389). On August 9, 2004, by Order dated August 3, 2004, the Superior Court extended plaintiffs time to respond to defendants' Motion for Summary Judgment to September 20, 2004. However, a full evidentiary trial was held on Plaintiffs' Motion for an Injunction on August 20, 23 and 27, 2004. (App 44–172).

By Order of the Superior Court entered on August 31, 2004, and docketed on September

31, 2004, the Court below denied Plaintiffs' Motion seeking an Injunction (App 11–30). This August 31, 2004 Order and the house–keeping Order of December 20, 2004 are the basis for this instant Appeal. On September 15, 2004, plaintiffs served and mailed their Notice of Appeal to the Law Court with supporting papers, appealing the August 31, 2004 Order. However, and never explained and very odd, the Superior Court Clerk's Office did not docket this Notice of Appeal until September 30, 2004 (after again docketing the Order dated August 31, 2004 on September 27, 2004). See, also, Affidavit of Gayle Fitzpatrick dated November 5, 2004.

On October 13, 2004 (after previously filing with the Law Court on October 12, 2004), plaintiffs' served and filed a Motion to Extend time for Appeal, which was granted. By Order of the Superior Court dated and docketed on December 20, 2004 (App 31 & 32), the Court below granted Summary Judgment to defendants on Counts I, II, and III of the Amended Complaint, and stated, in part:

The parties agree that the underlying facts, issues and arguments raised by the defendants' Motion for Summary Judgment are the same as those generated by the plaintiffs' prior claims for Preliminary and Permanent Injunctive relief. See Order on Motion for Preliminary and Permanent Injunction (August 31, 2004).

In essence, plaintiffs now Appeal, and seek a reversal of the October 31, 2004 Order below on Counts I, II and III of the Complaint alleging discrimination towards Jan based on 5 MRSA § 4601 (freedom from discrimination in education), 5 MRSA § 4592 (freedom from discrimination in denial of public accommodation) and Art. 1, § 6–A Maine Constitution (freedom from discrimination in violation of due process, and equal protection). Counts IV and V of the Amended Complaint seeking money damages alleging emotional distress have been withdrawn by plaintiffs.

Defendants' three affirmative defenses contained within their Answer (App 42 & 43) alleging failure to exhaust administrative remedies, a bar pursuant to the Maine Tort Claims Act and immunity were not argued nor briefed below and are deemed abandoned. Maine's Special Education Regulations (App 330–334, Defendants' Exhibit 3) were held to be inapplicable by the Court below, and ruled that the Regulations only applied to in–school students "getting a free education" (App 162, Hearing 3, P. 197, L. 18–25; P. 198, L. 1–22) and agreed as not applicable by defendants' attorney. (App 168, Hearing 3, P.221, L. 18–22).

III. STANDARD OF REVIEW

The Superior Court's house–keeping Order dated December 20, 2004 granting defendants Summary Judgment on Counts I, II, and III of the Complaint, and specifically incorporating that Court's Order dated August 31, 2004 is most revealing. While plaintiffs' original Notice of Appeal was mailed on September 15, 2004, and again re–served thereafter, the Superior Court pursuant to Rule 62 (h), M.R.Civ. P., made the Order of December 20, 2004 to

preserve the status quo of the parties, to wit: the Order of August 31, 2004.

By granting "Summary" Judgment to defendants on December 20, 2004, rather than merely stating "judgment", the plaintiffs conclude that the Court below wanted this instant Law Court to review de novo the proceedings below. The proceedings below are the trial transcripts and exhibits, all of which were subject to direct and cross examination. Defendants' Amended Statement of Material facts (App 377–389) are irrelevant, as superceded and nullified by the full trial of this action.

It is iron clad law that a grant of summary judgment is reviewed de novo. Bay View Bank, N.H. v. The Highland Mortgages Realty Trust, 2002 ME § 9, 814A. 2d 449. Also, an entry of summary judgment is reviewed "for errors of law, viewing the evidence in the light most favorable to the party against whom judgment was entered". Peterson v. State Tax Assessor, 1999 ME 23 § 6, 724 A. 2d 610, 612, cited in Bennet v. Tracy, 1999 ME 165 § 7, 740 A. 2d 571, 573.

Plaintiffs, as more fully explained below, seek a reversal of the Superior Court Orders, granting onto plaintiffs a permanent injunction allowing Jan to play at the Falmouth playground during school hours.

ISSUES PRESENTED FOR REVIEW

- 1. DID THE SUPERIOR COURT ERR IN FAILING TO ADDRESS "DIRECT THREAT" AND FAILED TO APPLY THE ENTIRE MAINE PUBLIC ACCOMMODATION STATUTE TO THE FACTS?**
- 2. DID THE SUPERIOR COURT MISAPPLY AND INCORRECTLY ANALYZE MAINE'S HOME SCHOOLING LAW AND MAINE'S POLICY ON PUBLIC EDUCATION?**
- 3. DID THE SUPERIOR COURT GROSSLY ERR WHEN IT RULED THAT NO INJUNCTION WOULD ISSUE BASED UPON THE PLAINTIFFS' FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES?**
- 4. DID FALMOUTH'S CONTACT WITH AN OUTSIDE PSYCHOLOGIST WITHOUT PRIOR PARENTAL CONSENT VIOLATE FEDERAL LAW?**

ARGUMENT

DID THE SUPERIOR COURT ERR IN FAILING TO ADDRESS "DIRECT THREAT" AND FAILED TO APPLY THE ENTIRE MAINE PUBLIC ACCOMMODATION STATUTE TO THE FACTS?

- 1. THE SUPERIOR COURT ERRED IN FAILING TO ADDRESS "DIRECT THREAT" AND FAILED TO APPLY THE ENTIRE MAINE PUBLIC ACCOMMODATIONS STATUTE TO THE FACTS.**

The court below was initially correct in briefly mentioning the definition of "direct threat" as defined in the first paragraph of the Maine Public Accommodation Statute, 5 MRSA § 4592, (footnote 2) but erroneously concluded that Jan's "defiance-to-adults" behavior posed a "significant risk" to the health and safety of others in the playground. However, in concluding that Jan's defiance was a "direct threat", the Superior Court totally ignored the remaining body of this statute under subsection 1 (A, B, C, and E) 4, 5, 6, and 7 which explain what specifics constitute a denial of public accommodation. Significantly ignored portions of the law are:

For purposes of this subsection, unlawful discrimination also includes, but is not limited to:

A. The imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages or accommodations, unless the criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages or accommodations being offered;

B. A failure to make reasonable modifications in policies, practices or procedures, when modifications are necessary to afford the goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities, unless, in the case of a private entity, the private entity can demonstrate that making modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations;

>C. A failure to take steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless, in the case of a private entity, the private entity can demonstrate that taking those steps would fundamentally alter the nature of the good, service, facility, privilege, advantage or accommodation being offered or would result in an undue burden;

* * *

4. Participation. For a covered entity:

A. To subject an individual or a class of individuals, on the basis of a disability or disabilities of the individual or class, directly through contractual, licensing or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations of that entity;

B. To afford an individual or a class of individuals, on the basis of a disability or disabilities of the individual or class, directly through contractual, licensing or other arrangements, with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage or accommodation in a manner that is not equal to that afforded to other individuals; and

C. To provide an individual or a class of individuals, on the basis of a disability or disabilities of the individual or class, directly through contractual, licensing or other arrangements, with a good, service, facility, privilege, advantage or accommodation that is different or separate from that provided to other individuals, unless this action is necessary to provide the individual or class of

individuals with a good, service, facility, privilege, advantage or accommodation or other opportunity that is as effective as that provided to others.

For purposes of this subsection, the term "individual" or "class of individuals" refers to the clients or customers of the covered public accommodation that enters into a contractual, licensing or other arrangement;

5. Integrated setting; programs or activities not separate or different. For a covered entity to not afford goods, services, facilities, privileges, advantages and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability may not be denied the opportunity to participate in programs or activities that are not separate or different;

6. Association. For a covered entity to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations or other opportunities to an individual or entity because of the known disability of an individual with whom the individual entity is known to have a relationship or association; and

7. Administrative methods. For an individual or an entity, directly or through contractual or other arrangements, to utilize standards or criteria or methods of administration:

A. That have the effect of discrimination on the basis of disability; or

B. That perpetuate the discrimination of others who are subject to common administrative control.

It is an absurd weighing of the facts of Jan's conduct, per the words of Mora Katz, that "unacceptable language, unresponsiveness to adults and undermining adult supervision of others" which Ms. Katz concluded were "... behaviors... not totally unheard of in children with autism or Asperger's" be construed as a "direct threat" to others. Even Plummer School principal Powers explanation that Jan's conduct possibly posed a subjective, anti-social and hypothetical "emotional risk" to others, does not come any closer to any rational definition of "direct threat".

Abbott v. Bragdon 107 F.3d 934 (1st Cir. 1997) vacated and remanded 524 U.S. 624 (1998), an Americans With Disabilities ("ADA") case, dealt in detail with the issue of direct threat, as "fact sensitive", requiring a case-by-case inquiry. In balancing the rights of an individual to be free of discrimination by providers of public accommodations, the court concluded that "fundamental fairness insists that providers in any such circumstances ought not to be entitled to rely on subsequent understandings to shield them from the

condign consequences of discriminatory conduct.: Id., at P. 944. (footnote 3)

Here, with defendants' detailed knowledge of Jan's limited social and communication abilities and assessments prior to Jan's suspension from playground use, defendants recommended either a new FBA within 45 days of November 24, 2004 or the setting up of a new PET meeting on or before February 12, 2004. In rejecting the first alternative of a new (and concededly unnecessary) FBA, the plaintiff parents awaited the PET meeting, which, through defendants' design, never occurred. The defendants cannot, per Abbott, rely on any "subsequent understandings" that might have been concluded by the new FBA. The Superior Court also ignored 20 U.S.C. § 7886 entitled Private, Religious and Home Schools, which states "Nothing in this chapter [70] shall be construed to affect a home school... nor shall any student schooled at home be required to participate in any assessment references in this chapter. (Emphasis added).

While the U.S Supreme Court, in School Board of Nassau County v. Arline, 480 U.S. 273, 288 (1987) suggested that "courts normally should defer to the reasonable medical judgments of officials", the Abbott court rejected the concept of conclusive presumption by administrative officials, Abbott, at P. 944–945 and said "rather, to frame a genuine issue, an opposing view must be documented by competent countervailing evidence that is directly relevant. Speculative inferences, glancing statistics, unsupported conclusions, and ruminative surmise will not serve". Abbott, at P. 945. The Superior court below, in the present instance, appears to have totally deferred to the actions of the defendants and never looked at Jan's disability, a position rejected by the Abbott court.

All the evidence below concluded that defendants, not knowing what to do with a "defiant" child, chose to throw this home schooled, handicapped child off the playground which is discriminatory conduct. No paper trail or testimony exists that Jan was a "direct threat to others". "Get rid of the child, and he's no longer a problem to us" is clear exclusion and discrimination.

In Rideout v. Riendeau, 200 ME 198 §§, 15–18, 761 A2d 291, this court examined the relationship between a fundamental liberty interest and a state's actions to justify a compelling (and competing) interest. The defendants' compelling interest in protecting the welfare of its in-school students vs. the rights of home-schooled Jan to play in the playground must also be examined in light of the federal No Child Left Behind Act of 2001 ("NCLB"), PL–107–110, which fundamentally changed the relationship between schools and parents, requiring accountability of educators. Title 20–Education, U.S. Code. 20 U.S.C. 1232 h, under the heading of Protection of Public Rights, states, in part:

(a) ... No student shall be required, as part of any applicable program, to submit to a survey, analysis or evaluation that reveals information concerning –

(4) illegal, anti-social, self-incriminative, or demeaning behavior; ... without the prior written consent of the parent. (Emphasis added).

Contrary to black-letter federal law, the defendants here demanded a new FBA (requiring parental consent), and when not granted by the parents, refused to set up a new PET meeting to address Jan's playground conduct.

Defendants further ignored, and the Superior Court failed to address, the federal education mandate of 20 U.S.C. 1471, entitled Findings of Purpose, which states:

(A) Findings

The Congress finds the following:

(1) The federal Government has an ongoing obligation to support programs, projects, and activities that contribute to positive results for children with disabilities, enabling them to meet their early intervention, educational, and transitional goals and,

(A) to the maximum extent possible, educational standards that have been established for all children; and

(B) to acquire the skills that will empower them to lead productive and independent adult lives.

(1)(A) As a result of more than 20 years of Federal support for research, demonstration projects, and for personal preparation, there is an important knowledge base for improving results for children with disabilities.

(B) Such knowledge should be used by States and local educational agencies to design and implement state-of-the-art educational systems that consider the needs of, and include, children with disabilities, especially in environments in which they can learn along with their peers and achieve results measured by the same standards as the results of their peers. (Emphasis added)

Instinctively to the plights of disabled children, labeling disabled children as "different" especially when they are home-schooled, is intolerance which leads to discrimination.

"The natural right of a parent to the care and control of a child should be limited only for the most urgent reasons". Merchants v. Bussell, 139 Me. 118, 27 A.2d 816, 818 (1942) (as emphasized by the Abbott court, supra).

The court below further ignored 20 U.S.C. § 7801 (32) which defined parental involvement with public education. That law states:

The term "parental involvement" means the participation of parents in regular, two-way, and meaningful communication involving student academic learning and other school activities, including ensuring –

(A) that parents play an integral role in assisting their child's learning;

(B) that parents are encouraged to be actively involved in their child's education at school;

(C) that parents are full partners in their child's education and are included, as

appropriate, in decision making and on advisory committees to assist in the education of their child;
(D) the carrying out of other activities, such as those described in section 6318 of this title. (footnote 4)

Defendants have, and continue to also ignore the federal mandate of parental involvement specified in 20 U.S.C. § 6318(a) (c) which requires all local educational agencies to conduct an annual evaluation to involve parents in the school's activities to evaluate academic quality and to identify barriers to greater parent participation. Defendants have done nothing since November–December, 2003 in regard to Jan, except to continue his playground suspension, demand an illegal FBA, threaten criminal prosecution and suggest the filing of a discrimination action. "Get rid of the child, and he's no longer a problem to us".

The most compelling reason to reverse the lower court in the present case are discussed in the case of Burriola v. Greater Toledo YMCA, 133 F. Supp. 3d 1034 (DCND Ohio, 2001). In Burriola, plaintiffs' 8 year old autistic child was terminated from defendants' day care program because the child exhibited violent and destructive behavior. In rejecting the "direct threat" argument of defendant, and directing that a preliminary injunction be issued and concluding that irreparable harm existed to the child, the court concluded that "Because [the child's] injuries would be the result of discrimination based on disability, they are the very type of injuries Congress sought to avoid in enacting the ADA." *Id.*, at P. 1040. The entire Burriola case is drawn to this court's attention and reading. In the present instance, Jan was merely "defiant" and anti-social, and exhibited no violent or destructive behavior.

The most detailed examination of Maine's Public Accommodation laws was examined in Maine Human Rights Commission v. City of South Portland, 508A.2d 948 (Me. 1986) wherein this court held that inaccessibility of fixed route bus service to certain handicapped persons was a violation of civil rights. Pertinent language of this important decision follows: "The rights of handicapped persons are given meaning and form in absolute terms under 5 MRSA §§ 4591 and 4592. Equal access is declared to be a civil right and discrimination is prohibited with respect to public accommodations". *Id.*, at P. 954; "The requirement of reasonable accommodation is both rational and meaningful". *Id.*, at P. 955; "The law, however, protects the rights of the individual. The plaintiffs in this case have demonstrated a violation of their civil rights". *Id.*, at P. 956. "In considering factual findings on appeal, we employ a rigorous standard of review". *Id.*, at P. 956. The entire case is also drawn to the court's attention and reading.

See, also, Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F3d 725 (9th Cir. 1999) [a "direct threat" case under the ADA wherein the court reversed a denial of a preliminary injunction and concluded that a "direct threat" included serious "severe and likely harms to the community" excluding any hypothetical or presumed risks] In Rizzo v. Children's World Learning Center, 54 F.3d 758 (5th Cir. 1996), a Title I case, the court reversed summary judgment for the employer, and held that when "safety" concerns tend

to screen out the disabled, the burden of proof shifts to the employer to prove a "direct threat".

Under defendants' contention, and that of the Superior Court that an anti-social, hypothetical "emotional threat" to others constitutes an immediate and serious "direct threat",^(footnote 5) what is to prevent a restaurant owner from denying entrance to a cerebral palsy child in a wheel chair where the child's spastic behavior presents, in the eyes of the owner, a "direct threat" to other patrons; what is to prevent a librarian at a public library from denying access to a homeless person because that person is dressed poorly and carries paper bags of possessions; what is to prevent a bus driver from denying access to public transportation to a war-wounded veteran with one artificial leg and crutches; the list is endless. Insensitivity breeds hostility. Hostility breeds contempt. Contempt breeds intolerance. Intolerance leads to discrimination. Discrimination does not require deliberate intent by the discriminator, but rather is end-driven result determined.^(footnote 6) See, D. Don Welsh, Removing Discriminatory Barriers: Basing Desperate Treatment Analysis on Motive Rather Than Intent, 60 S. Cal. L. Rev. 733, 759-63 (1987) (concluding that discriminatory purpose is not a prerequisite to liability under Title VII).

2. DID THE SUPERIOR COURT MISAPPLY AND INCORRECTLY ANALYZE MAINE'S HOME SCHOOLING LAW AND MAINE'S POLICY ON PUBLIC EDUCATION?

THE SUPERIOR COURT ERRED IN MISAPPLYING AND INCORRECTLY ANALYZED MAINE'S HOME SCHOOLING LAW, 20-A MRSA § 5021 (6), AND MAINE'S POLICY ON PUBLIC EDUCATION, 20-A MRSA § 2(2).

Local control of Public Education, 20-A MRSA § 2(2) is vested in the local school districts, and the schools must comply with State Law. The only case cited under this statute is Logiodice v. Trustees of Maine Cent. Institute, 135 F. Supp. 2d 199 (DC. Me 2001) which denied dismissal of a § 1983 action based upon the school's suspension of a student for 17 days without holding a hearing.

Maine's Home Schooling law, 20-A MRSA § 5021 (6) prescribes, in part, that:

Use of School Facilities and Equipment: A student receiving home-school instruction may use public school facilities and equipment on the same basis as regularly enrolled students if the following conditions are met:

- A. Use does not disrupt regular school activities;
- B. Use is approved by the school principal in accordance with school policy;
- C. Use does not create additional expense to the school unit;
- D. Use is directly related to the student's academic program; and
- E. Use of potentially hazardous areas, such as shops, laboratories and the gymnasium, is supervised by a qualified employee of the school administrative unit.

Subpart A above is clearly vague. What does "disrupt" mean? Clearly, a "disruption" is

something considerably less than "direct threat" as detailed in Part 1 of this Brief, and is therefore in direct conflict with Maine's Public Accommodation Law, 5 MRSA § 4592. Part B is appropriate since Falmouth agreed on September 11, 2003 to Jan's use of the playground and library. However, no "school policy" existed, either in written form or ad-hoc. Part C is inapplicable in the present case, since no testimony exists as to any additional expenses required of Falmouth for Jan to use the playground. Since Jan is always under the direct supervision of a non-school employee adult, this subsection is clearly further inapplicable. Part D is obvious. Jan's play during in-school hours was directly related to his interaction with his peers, and as Mora Katz explained, "to decrease his solitary activities". Part E is also inapplicable since the Plummer School does not have shops, laboratories or a gymnasium. Totally absent in testimony was the notion that a playground is a potentially hazardous area requiring an additional qualified supervising employee of the school to monitor Jan. Since Jan was always under the direct care of an outside non-school adult while at the playground, there was no need whatsoever to include additional school personnel to monitor his play.

Maine's legislative history of 20-A MRSA § 5021 regarding home-schooling, submitted to the court below in "Plaintiffs' Submission as to Relevant Statute, Laws and Regulations, Exhibit B" dated August 10, 2004 was also ignored by the court below.[\(footnote 7\)](#) Plaintiffs / Appellants incorporate this entire legislative history in this Brief by reference, but wish to point out to the Law Court most pertinent portions detailed to the court below:

"Final Report of the Home School Study Committee, submitted to the Committee on Education and Cultural Affairs – January 19, 1996"

Specific references:

Page 2, third paragraph:

"When Superintendents and principals were access advocates, it seemed that there was little opposition within districts to accessibility. If the leadership was less clear or opposed to accessibility, divisions were more openly fueled".

Page 2, last sentence:

"Access seemed to work best when both parents and school personnel made efforts to communicate".

Page 3, First and Second paragraph:

Key Issues and their Resolution:

"The fundamental issue facing the Committee weighed absolute accessibility for home-schooled students to public programs and activities. Woven throughout the Committee's review process and subsequent proposed legislative response is a philosophy of equity. The Committee's unstated principal is one which recognized the educational welfare of the student rather

than any philosophy of other persons or institutions. When possible, the Committee recommends accessibility for the home-schooled student on the same precise basis as applicable to the enrolled students"

Page 7, middle full paragraph

"While repetitious, it is essential that the reader recognize that the committee looked at all issues associated with accessibility from the perspective of what is best for Maine's young people. Further it is the Committee's hope that the proposed legislation will help insure policy consistency across the state in a heretofore divisive issue. The home schooling population continues to demonstrate steady growth (see Appendices F and G) and the public school systems in Maine need to discover models of collaboration which enable home schooled students to participate in public school programs".

What is clearly evident is Falmouth's overt division and hostility to home-schooled students, especially if they are disabled and "defiant". Falmouth's attempts to force discipline, with an emphasis on compliance, obedience and conformity, coupled with threats of criminal sanctions shows Falmouth's complete lack of cooperation with Jan's parents and a disregard of Jan's rights, as previously discussed in this Brief as to Falmouth's violations of federal law.(footnote 8)

3. DID THE SUPERIOR COURT GROSSLY ERR WHEN IT RULED THAT NO INJUNCTION WOULD ISSUE BASED UPON THE PLAINTIFFS' FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES?

THE SUPERIOR COURT GROSSLY ERRED WHEN IT RULED THAT NO INJUNCTION WOULD ISSUE BASED UPON PLAINTIFFS' FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

Relying on Maine's Special Education Law, 20-A MRSA § 7206 which requires administrative appeals, the court below ignored its own trial ruling that only in-school special education students were entitled to the protection of Maine's Special Education Regulations , and were not applicable to Jan as a home-schooled student.(footnote 9) If Laws are applicable, but Regulations thereunder are not, anarchy reigns. State v. Hopkins, 526 A2d 945, 950 (Me. 1987) (The Law Court has the power to and duty to interpret statutes so as to avoid absurd results); See, generally, Gordon v. Maine Central R.R., 657 A.2d 785 (Me. 1995), Peggy S.M. v. State, 397 A.2d 980 (Me. 1979), State v. Prescott, 151 A. 426, 129 Me. 239 (Me. 1930) (Statutes and regulations thereunder are to be read, relate and examined together).

Furthermore, the court below also ignored testimony and exhibits of Falmouth's own school regulations. These school regulations are clear and direct that home-schooled students do not have a right to a special education. If Jan and his parents were not subject to Falmouth's own special education regulations, and not subject to the Special Education Regulations of the Maine Department of Education, they obviously did not come within Maine's Special Education statute and therefore the exhaustion requirements in 20-A MRSA § 7206 do not apply.

Furthermore, the Superior Court grossly erred when it concluded that Jan's use of the playground "was part of a special education program". Contrary wise, Jan's playground use was solely based upon the September 11, 2003 SP and Maine's Home Schooling law, previously discussed, and not part of any special education program.

This is not a federal IDEA case, and the Superior Court's reliance upon the prior rulings in the U.S. District Court discussing IDEA have no bearing whatsoever.

Finally, the Superior Court erred when it ruled that Jan's suspension "was not solely on Jan's disability and it was not motivated by a discriminatory animus". The court below ignores the conduct of adult education personnel, and appears to predicate its analysis of facts solely on the conduct of the child and his parents. Under black-letter guidelines of NCLB to hold educators accountable, it is an entirely incorrect analysis. Parents direct the education of their children, and educators are hired to teach. The court below totally ignored the testimony and e-mail of Johnson (this child is different from "our" kids); totally ignored the testimony of Katz (Jan's "defiant" behavior is typical of autistic and Asperger's children); ignored the deliberate discriminatory conduct of Powers in regard to her "Reflection Sheets" and her discipline of playground students; ignored the criminal threats of Falmouth's police officer directed to plaintiffs as instructed by defendant McCormack; and totally ignored the testimony of Dr. Yahr, the only outside professional who knew Jan best, who described Jan's playground behavior as age typical, and typical of an Asperger's child.

4. DID FALMOUTH'S CONTACT WITH AN OUTSIDE PSYCHOLOGIST WITHOUT PRIOR PARENTAL CONSENT VIOLATE FEDERAL LAW?

FALMOUTH'S CONTACT WITH AN OUTSIDE PSYCHOLOGIST WITHOUT PARENTAL CONSENT VIOLATED FEDERAL LAW.

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C § 1232 h (FERPA) is designed to protect the privacy of student education records; It is applicable to all schools (such as Falmouth) that receive federal funding. Generally, a school must have written permission from a parent (or a student over age 18) to release any student information, but allows release to certain specific parties, none of which are applicable to the facts of Jan's case.

Falmouth, via Mora Katz, knowing after November 24, 2003 that plaintiffs would not agree to a new FBA, contacted the schools' outside psychologist to discuss Jan's behavior, without prior written permission of the plaintiffs. That contact was not only prohibited by FERPA, but a violation of Falmouth's duty to cooperate with Jan's parents.

CONCLUSION

This court should reverse the court below, and grant plaintiffs a permanent injunction allowing their son to play in the playground during in-school hours, with costs and attorneys fees of this appeal.

Date: March 2, 2005

Respectfully submitted,

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1: See, "The 'Ins' and 'Outs' of Home Schooling: The Determination of Parent Motivations and Student Achievement", P.30, 2004, to be published in Education and Urban Society, by Ed Collom, Prof. of Sociology, U of S. Maine; found at www.usm.maine.edu/soc/collom/research under "Home Schooling", page 2.

2: "Direct threat" is also defined in 5 MRSA § 4553 (1-C) as "a significant risk to the health or safety of others that can not be eliminated by reasonable accommodation". See, also, EEOC v. Amego, Inc., 110 F3d 135 (1st Cir. 1997) which requires a defense of "direct threat" that must be raised as an affirmative defense, never affirmatively raised by defendants herein.

3: Entitled Bragdon v. Abbott, 524 U.S. 624 (1998) in the Supreme Court stage, that court acknowledged that the ADA's language on disability discrimination and the "direct threat to others" exception was controlling.

4: See, e.g. Taylor v. Phoenixville School District, 184 F3d 296 (3rd Cir. 1999) which required an interactive process of cooperation between an employer and employee to find a reasonable accommodation regarding a disability; Beck v. University of Wisconsin Bd. Of Regents, 75 F3d 1130, 1135 (7th Cir. 1996) ("A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith"). Other than punishing Jan, defendants appeared to have done nothing to cooperate with plaintiffs. Failing to meet with plaintiffs "on or before February 12, 2004" was only designed by defendants to continue Jan's isolation.

5: See, Glanz v. Vernick, 756 F. Supp. 632, 638 (D. Mass. 1991) ("a strict rule of defense would enable doctors to offer merely pretextual medical opinions to cover up discriminatory decisions"); cf. Cook v. Rhode Island, 10 F.3d 26-27 (1st Cir. 1993) (employer's subjective judgment that disabled plaintiff was not qualified for job insufficient to thwart liability).

6: During Jim Crow Days of racial discrimination, separate water fountains and bathrooms were not examined as to the discriminatory reasons for their existence, but rather as an end result of practices designed to discriminate. Whoever installed "negro only" signs above water fountains and bathrooms may not have been a bigot, but the users of those facilities were denied equal access.

7: See, "The Law Court's Philosophy of Statutory Interpretation" by James McKenna, Maine Bar Journal, Summer 2004, P. 164.

8: See, The Least Restrictive Environment - Its Origins and Interpretations in Special Education, Crocket and Kauffman, Lawrence Erlbraum, Publishers, 1999, at P.198. "Education remains an enabling good, but in order to be morally defensible as well as effective, it must afford recognition of the diversity of the back ground and life circumstances of the children it seeks to educate".

9: And conceded and agreed by defense counsel to be correct.

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