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Illinois State School Law Quarterly is published every Fall, Winter, Spring and Summer by the Department of Educational Administration and Foundations and the College of Education, Illinois State University, Campus Box 5900, Normal, IL 61790-5900.

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**Corporal Punishment and Substantive Due Process:
Recent Rarities Signal Favorable Change**

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Revision and expansion of a paper prepared for the 47th Annual Conference of the Educational Law Association, "2001: A Legal Odyssey," Albuquerque, New Mexico, November, 15-17, 2001.

Durante Neal has an artificial left eye as a result of a school incident some five years ago. After that incident during which he was struck by a teacher, Neal sued his school district claiming a violation of his constitutional right to substantive due process. Neal's case follows a long line of cases that relate to *Ingraham v. Wright*,¹ the only Supreme Court full decision to date that has dealt directly with a student's claims of denial of constitutional rights resulting from disciplinary corporal punishment of a student in a public school.² This paper will utilize a recent Eleventh Circuit Court of Appeals decision, *Neal v. Fulton County Bd. of Educ.*,³ as the starting point for illustrating a plaintiff's claims and a defendant's responses in a case centering on substantive due process arising from severe corporal punishment. Then this paper will explore the development of some judicial decisions within the last decade that deal with substantive due process claims arising out of instances of corporal punishment. As such, this paper will constitute an expansion and update of my prior work on corporal punishment.⁴

An introductory few words on substantive due process is appropriate here. Black's Law Dictionary defines substantive due process as focusing on "the constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty, or property; the essence of substantive due process is protection from arbitrary and unreasonable action." Thus, substantive due process is distinguished from procedural due process, the more common and better known type of due process, which focuses on notice and hearing rather than arbitrariness and unreasonable action.

In their treatise dealing with substantive due process, Rotunda and Nowak point out that ever since the beginning of our nation, which developed based on seventeenth and eighteenth century political theory, people espoused a "position that certain natural rights prevailed for all

men and that a governmental body could not limit or impair these rights.... From this seventeenth and eighteenth century political thought grew the concept that a higher or natural law limited the restrictions on liberty that a temporal government could impose on an individual.”⁵ With such a grounding the courts use the concept of substantive due process to review the ability of the government to restrain the fundamental rights of life, liberty, and property of all persons.⁶

Facts of Neal’s Incident and Case ⁷

Durante Neal, age 14, was a freshman and member of the varsity football team of Tri-Cities High School in East Point, Georgia. On May 30, 1996, another member of the football team, Royonte Griffin, slapped Neal in the face during football practice. Neal reported the incident to Tommy Ector, a high school teacher and assistant coach, who told Neal, “You need to learn to handle your own business.” Neal subsequently took a weight lock (a metal object used to secure weights on dumbbell bars) from the coaches’ office and put it in his gym bag. After practice was over, Griffin again approached Neal. Neal then took the weight lock and hit Griffin in the head with it, cutting Griffin’s scalp. Neal put the weight lock back into his bag. The two boys then began to fight.

Ector and Principal Herschel Robinson were in the immediate area. Neither Ector nor Robinson stopped the fight. Ector began dumping out the contents of Neal’s gym bag, shouting repeatedly, “What did you hit him with? If you hit him with it, I am going to hit you with it.” Ector, in the presence of Robinson, took the weight lock and hit Neal with it in the left eye. As a result, Neal’s eye “was knocked completely out of its socket,” destroying and dismembering the eye. The eye was “hanging out of his head” and Neal was in “severe pain.” Nevertheless, neither Ector nor Robinson stopped the fight. Subsequently, the eye “had to be surgically removed.”

On May 22, 1998, Neal and his parents filed suit in the United States District Court, Northern District of Georgia against the defendants (the Fulton County Board of Education; Superintendent Stephen Dolinger, Principal Herschel Robinson, and Coach Tommy Ector, Individually and in their official capacities; and Royonte Griffin) pursuant to 42 U.S.C. 1983. Neal alleged excessive use of force on him and inadequate training of Ector by the school district. In short, Neal claimed that Ector’s “actions were so grossly excessive as to be shocking to the conscience,” thereby implicating Neal’s liberty interest and violating Neal’s Fourteenth Amendment substantive due process rights.⁸

The defendants filed a motion to dismiss the case for lack of federal subject matter jurisdiction and failure to state a claim under Section 1983.⁹ That is, the defendants said that Neal actually asserted not a federal matter but a state torts theory based on the excessive assault on Neal by Ector. Such a claim belongs in a state court, not in a federal court. Furthermore, the defendants stated that binding precedent from the U.S. Supreme Court and the Eleventh

Circuit (which was formed on October 1, 1981 out of the “old” Fifth Circuit where *Ingraham* was originally heard from 1971 to 1976) barred converting a state tort claim into a federal Fourteenth Amendment claim. The defendants contended that the rationale of *Ingraham*¹⁰ was binding in the Eleventh Circuit¹¹ and was as “persuasive” in 1996 when Neal was injured as it was in 1976 when the Fifth Circuit denied *Ingraham*’s claims.

Upon consideration of Neal’s claims and the defendants’ responses, the district court granted the defendants’ motion to dismiss, agreeing completely with its arguments. The district court first held that it did not have “subject matter jurisdiction over plaintiffs’ claim which are based on personal injury tort claims and involve questions of state, not federal, law.” Citing *Ingraham*,¹² the Court then held that Ector’s conduct in striking plaintiff Neal, did not constitute corporal punishment. “Ector’s actions...were not delivered pursuant to Fulton County School District policy and not part of a consciously determined form of discipline.... Ector’s actions were reactive and spontaneous. ...the facts [are] insufficient to show a constitutional violation....”¹³ Three weeks later Neal filed his notice of appeal of the district court’s decision with the Eleventh Circuit Court of Appeals, also sitting in Atlanta.

Appellate Proceedings: The Plaintiff’s Arguments

In his brief to the appellate court, Neal as plaintiff and appellant made essentially one argument, divided into two parts, in his effort to overturn the district court’s decision to dismiss his case. The argument was that the Eleventh Circuit should not be bound by the “old” Fifth Circuit’s decision in *Ingraham* and that the excessive, dismembering corporal punishment of Durante Neal administered by Coach Ector did indeed violate Neal’s Fourteenth Amendment right to substantive due process.

First, Neal argued that his injury was distinguishable from the one that *Ingraham* suffered on October 6, 1970 in that *Ingraham*’s punishment was excessive conduct but in accord with his school board’s policy. Neal claimed that he, in contrast to *Ingraham*, received punishment that was outside and beyond his school board’s policy. His punishment was not just more “licks” with the paddle as was *Ingraham*’s.¹⁴

Rather, Neal’s punishment was the loss of an irreplaceable eye. Furthermore, Neal argued that the Fifth Circuit cases that interpreted *Ingraham*, by stating that the severity of the injury does not implicate the Due Process clause, were decided after October 1, 1981, which was the starting date for the Eleventh Circuit. Therefore, Neal argued, these cases did not serve as precedent for the Eleventh Circuit.

Second, Neal argued that his punishment was “so brutal, demeaning, and harmful as literally to shock [the] conscience.” As such, he argued that his punishment violated his Fourteenth Amendment right to “personal privacy and bodily

security” so as to constitute a cause of action in federal court that should not have been summarily dismissed.¹⁵

Appellate Proceedings: The Defendants’ Arguments

In their brief to the Eleventh Circuit Court of Appeals the school board defendants, as appellees, argued two major points to support the decision of the district court. In Argument #1 the defendants urged the court not to recognize Neal’s injury as a §1983 claim for excessive corporal punishment for four reasons. First, Coach Ector’s actions were not a “consciously determined form of discipline” within the scope of the discipline policy approved by his board of education. Therefore, his conduct, alleged to be “so excessive, brutal, and inhumane that it was shocking to the conscience,” did not constitute corporal punishment and did not implicate federal substantive due process. Second, Neal’s reliance on decisions from other federal circuits was flawed in that those decisions primarily concerned actions that arose from “school-sanctioned” methods of punishment. Third, the principle that federal courts should not convert what are in actuality state tort claims into federal causes of actions was a “sound one” to guide the *Neal* decision just as it had guided prior cases in the eleventh circuit. Fourth, the defendants had no “special custodial relationship” with Neal. Such a relationship exists for educators in schools where the students are confined in a residential situation. Therefore, there was no liability of the school district for failing to train Coach Ector in ways to protect Neal from harm.

In Argument #2 the defendants said that even if the court decided that Ector’s action constituted corporal punishment, precedent from the Fifth Circuit’s decision in *Ingraham* applied. That precedent foreclosed a substantive due process claim for excessive punishment where “adequate remedies” exist in Georgia’s courts. The defendants argued that the Eleventh Circuit should decline jurisdiction over Neal’s alleged facts. The defendants said, “This is a state-law tort case dressed up to look like a constitutional claim.”¹⁶

Appellate Proceedings: The Eleventh Circuit’s Decision

The appellate court reviewed de novo the district court’s decision to grant the defendants’ motion to dismiss Neal’s claims. In doing so it accepted as true the factual allegations in Neal’s complaint and construed the alleged facts in a light favorable to Neal. The court recognized that a motion to dismiss may be granted only when the defendants demonstrate “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹⁷

The appellate court addressed three questions to arrive at its decision: (1) Did Coach Ector’s conduct constitute corporal punishment? (2) Did the *Ingraham* decision of the former Fifth Circuit “dictate the outcome” of *Neal*?

(3) Did Neal actually state a cause of action under the Fourteenth Amendment's Due Process Clause? The Eleventh Circuit answered those questions in the order asked: Yes; No; and Yes, pursuant to the rationales that follow.

Question #1: Did Ector's conduct constitute corporal punishment?

The court admitted that it did not have a precise definition of corporal punishment but accepted that the touchstone of corporal punishment is the use of some "physical force by a teacher to punish a student for some kind of school-related misconduct."¹⁸ Given that understanding, the court divided corporal punishment in two types. The first type consists of the "traditional" use of paddling, for example, which is meted out according to a school policy governing when, how, how much, by whom, and other relevant factors. The second, "less traditional type" consists of informally administered and more severe punishments that go beyond a school's policy. For example, the court cited the punishment described in another substantive due process case in which a teacher grabbed a student in a chokehold and caused the student to lose consciousness.¹⁹

The court then decided that Ector's conduct did constitute corporal punishment because (1) it occurred on school premises, (2) it was spurred by misconduct related to a school activity, (3) it was severe, unreasonable physical force, and (4) it was Ector's intent to discipline the student, as evidenced by the statement, "If you hit him with it, I'll hit you with it."

Question #2: Does the Fifth Circuit's *Ingraham* decision dictate the outcome of Neal's appeal?

The court distinguished *Ingraham* from *Neal*. In *Ingraham* teachers paddled students who then filed suit for violation of their Fourteenth Amendment substantive due process rights, among other claims. The Fifth Circuit held that corporal punishment was related to the achievement of a legitimate school purpose. That purpose was to create a proper atmosphere for learning, a purpose that is not arbitrary or capricious. Further, the Fifth Circuit decided not to use "judicial power" to examine each instance of punishment to determine whether "five licks" would have been more appropriate than "ten licks."²⁰

In *Neal*, Ector's conduct was not within his school's official policy of corporal punishment. Nor did Ector confer with school administrators about Neal's behavior. Nor did school officials authorize Ector to administer corporal punishment. Rather, Ector "summarily and arbitrarily" hit Neal in his eye with a weight lock. Because of the significant differences in the facts between *Neal* and *Ingraham* and because the Supreme Court decision in *Ingraham* did not rule out all possibilities for a substantive due process claim, the Eleventh Circuit ruled that *Ingraham* did not control the *Neal* decision.

Question 3: Did Neal actually state a cause of action under the Due Process clause?

Citing *Collins v. City of Harker Heights*,²¹ the court recognized that the Supreme Court has been “reluctant” to expand the substance due process rights of plaintiffs.²² The court also recognized that the Supreme Court and the Eleventh Circuit had both said that the Fourteenth Amendment ought not to be “a font of tort law.”²³ Nevertheless, the Eleventh Circuit went on to say that “*in certain circumstances*” (emphasis by the court) a plaintiff may assert a cause of action for violation of substantive due process rights under the Fourteenth Amendment.

The court, citing the Supreme Court in *County of Sacramento*, recognized that a violation of substantive due process rights occurs when the government’s action is arbitrary or shocking to the conscience.²⁴ Furthermore, the “concept of conscience shocking” does not duplicate state tort law.²⁵ On the other hand, the court also recognized that when school officials use reasonable force within the limits of the common law privilege of corporal punishment, there is no violation of the Fourteenth Amendment.

With the above two different conditions in mind, the court noted that “almost all” of the other Courts of Appeals have ruled that a student suffering excessive disciplinary corporal punishment may indeed state a claim of substantive due process rights. The Eleventh Circuit relied on and agreed with the Fourth Circuit in particular when that court famously established its standard for determining when a violation of substantive due process occurs in school corporal punishment cases:

“As in the cognate police brutality cases, the substantive due process inquiry in school corporal cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.”²⁶

At that point of its considerations in *Neal* the Eleventh Circuit accepted the rationale of these other Courts of Appeals rather than the rationale of its parent Fifth Circuit.²⁷ Following the lead of the other courts of appeals, the Eleventh Circuit established its own two-part test, one that is similar to the other courts’ tests in regard to severe, excessive corporal punishment. The Eleventh Circuit stated that

“at a minimum, the plaintiff must allege facts demonstrating (1) a school official intentionally used an amount of force that was obviously excessive under the circumstances, and (2) the force used presented a reasonably foreseeable risk of bodily injury....In determining whether the amount of force used is obviously excessive, we consider the totality of the circumstances. In particular, we examine: (1) the need for the application of corporal punishment, (2) the relation-

ship between the need and amount of punishment administered, and (3) the extent of the injury inflicted.”²⁸

By examining the “totality of the circumstances,” the Eleventh Circuit Court of Appeals then ruled that Neal did state a cause of action under Section 1983. The Eleventh Circuit, therefore, vacated the district court’s decision to dismiss Neal’s complaint and remanded the case for further proceedings consistent with its decision. Judge Edmondson dissented from the majority opinion but did not write a dissenting opinion.

Commentary

Three significant effects of the *Neal* appellate decision to reverse the district court’s dismissal of Neal’s complaints against the Fulton County Board of Education are significant and now evident. Two of these effects became apparent immediately and one became apparent slightly less than two months after the decision was rendered. First, Neal’s case returned to the district court level where, as I write, the parties are now engaged in discovery so as to present their positions for adjudication.

The questions to be decided at trial are: Did the Fulton Board of Education, Ector, Robinson, and Dolinger violate Neal’s Fourteenth Amendment right by the use of corporal punishment that was so excessive that it presented a reasonably foreseeable risk of bodily injury? Are the defendants liable for not properly training, instructing, and supervising Ector, thereby establishing a wrongful school disciplinary policy which violated Neal’s Fourteenth Amendment due process rights? Understandably, at the same time that discovery is proceeding, the parties are also considering negotiations for a settlement on Neal’s claims. Whether the parties settle or whatever the outcome of the trial is, the fact remains that the Eleventh Circuit now permits a claim for denial of substantive due process arising from disciplinary corporal punishment in a public school even if a constituent state provides a remedy based on tort law.

Second, the appellate decision separated the Eleventh Circuit from its roots in the Fifth Circuit, thereby bringing the Eleventh Circuit in line with the other circuits of the country. *Neal* has indicated to everyone that the Eleventh Circuit has left its past stance on corporal punishment, a stance which was based on the *Ingraham* approach to dealing with students who suffer from excessive corporal punishment at the hands of public school educators. *Neal* has rejected what one critic of the Fifth Circuit has called the “irrationality” of *Ingraham* and its progeny.²⁹

Third, most significantly and most unexpectedly the appellate decision in *Neal* has had a quick and direct effect on the new Fifth Circuit itself. In *Moore v. Willis Independent School District*,³⁰ a case dealing with the corporal punishment³¹ of 14-year old Aaron Moore, the Fifth Circuit affirmed the district court’s decision in favor of the school district. The district court had granted summary

judgment in favor of the defendant, stating that Moore failed to allege a due process violation. On appeal the Fifth Circuit, with Judge Weiner writing the court's opinion, reviewed the lower court's record de novo.

The appellate court's three-judge panel ruled unanimously that Moore did not meet the initial requirements for a suit alleging a violation of substantive due process as provided in the Fifth and Fourteenth Amendments. The court came to that conclusion because it has "held consistently that as long as the state provides an adequate remedy, a public school student cannot state a claim for denial of substantive due process through excessive corporal punishment, whether it be against the school system, administrators, or the employee who is alleged to have inflicted the damage."³² That is to say, under the precedent of the Fifth Circuit, which dates back to the Fifth Circuit's final 1976 decision in *Ingraham v. Wright*,³³ corporal punishment of a public school student, even "severe" corporal punishment, cannot become a constitutional substantive due process violation.

The unanimous decision written by Judge Weiner, which includes the supporting rationale quoted in the paragraph above, was not a surprise inside or outside the Fifth Circuit. After all, it was the Fifth Circuit's decision in *Ingraham* that led to the Supreme Court's affirming and seminal decision in 1977 that corporal punishment of students in public schools does not violate rights provided by our constitution.³⁴

However, what was significant and unexpected in *Moore* was Judge Weiner's accompanying opinion, a "specially concurring" opinion to go along with his opinion written for the court. That move by Weiner was a rarity. The term "specially concur" does not even appear in Black's Law Dictionary, Fifth Edition.

(This is the first time I have heard of such an action in an education law case.³⁵) It is to Weiner's specially concurring opinion in *Moore* that we now must turn because it is what was triggered in time and content by the Eleventh Circuit's decision in *Neal*, as Weiner himself indicated.

Judge Weiner recognized and admitted upon reading *Neal* that the Fifth Circuit is now totally "isolated" in its position regarding claims for denial of substantive due process in corporal punishment cases.³⁶ Weiner noted that the isolation occurs in that other federal circuits have rejected the Fifth Circuit's fundamental position, as it established in *Ingraham*.

In *Ingraham* the Fifth Circuit held that (1) *Ingraham*'s corporal punishment did not violate Fourteenth Amendment procedural due process, (2) that the Eighth Amendment's proscription of cruel and unusual punishment did not apply to school discipline cases, and (3) that the infliction of corporal punishment (even severe punishment) did not deprive *Ingraham* of Fourteenth Amendment substantive due process rights because cases such as his do not give rise to a substantive due process claim.

The Supreme Court's subsequent affirmance of *Ingraham*, however, dealt

only with the issues of procedural due process and the application of the Eighth Amendment to school discipline cases. It did not deal with the issue of substantive due process even though the Fifth Circuit did deal with it. As Justice Powell explicitly noted before writing the rationale for his *Ingraham* decision, “We granted *certiorari* limited to the questions of cruel and unusual punishment and procedural due process.”³⁷

Thus, the Supreme Court did not deal directly with the question: Can excessive corporal punishment constitute a violation of substantive due process? Nevertheless, the Court did state in *Ingraham* that when school officials “deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated.”³⁸ Based on that statement circuits other than the Fifth Circuit have felt free to deal with the substantive due process issue in their own ways.

The Fifth Circuit has continued since 1976 to strengthen its *Ingraham* decision in two ways regarding substantive due process. First, the Fifth Circuit has continued to view corporal punishment not as “arbitrary, capricious, or wholly unrelated to the legitimate state purpose of determining its educational policy.”³⁹

The Fifth Circuit, through *Ingraham* and its progeny, has held that

[w]ithout the existence of disciplinary sanction for misbehavior, students who desire to learn would be deprived of their right to an education by the more disruptive members of their class. We are unwilling to hold that corporal punishment, as one of the means used to achieve an atmosphere which facilitates the effective transmittal of knowledge, has no real and substantial relation to the object sought to be attained.⁴⁰

With this holding on corporal punishment the Fifth Circuit has upheld a state’s right to legalize even severe discipline measures for misbehaving students.

The second approach used by the Fifth Circuit to strengthen its denial of claims of substantive due process related to corporal punishment is the acceptance of and reliance on the provision stated by Justice Powell in his *Ingraham* decision for the Supreme Court. Powell stated that the “concept of reasonable corporal punishment...represents the balance struck by this country between the child’s interests in personal security and the traditional view that some limited corporal punishment may be necessary in the course of a child’s education. Under that longstanding accommodation of interests, there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege.”⁴¹ That is to say, there is no substantive due process claim when there is an adequate state tort remedy available.

It is this second approach, as stated by Justice Powell, that Judge Weiner utilized to critique the Fifth Circuit’s stand on the unavailability of substantive due

process.⁴² Weiner pointed out that the Supreme Court did not rule that the availability of a state remedy precluded the availability of a substantive due process claim. “It [the Supreme Court] did *not* proclaim that an adequate remedy provided by state law or procedure constitutes a per se bar to a student’s ability to state a substantive due process claim.”⁴³ (emphasis in original). Weiner’s point is significant because in a 1990 Supreme Court case dealing with the claims of a mental patient against the State of Florida the Supreme Court held that the “Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the ‘fairness of the procedures used to implement them.’ *Daniels v. Williams*, 474 U.S., at 331. A plaintiff...may invoke a §1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.”⁴⁴

Weiner went on to recognize that, even given the 1990 position of the Supreme Court, the Fifth Circuit has “never closely examined the adequacy of those state remedies, instead simply dismissing §1983 claims against school districts and individual defendants alike, regardless of whether they might be immune from suit.”⁴⁵ Weiner admitted that in general school districts are immune from tort claims. Then he admitted that there is doubt “whether the state provides a remedy to injured students at all, much less an adequate one.”⁴⁶

After recognizing that the Fifth Circuit is isolated from the views of at least seven other circuits that have developed a constitutional concept of substantive due process rights for corporal punishment⁴⁷ or have provided students other constitutional protection from excessive corporal punishment,⁴⁸ Weiner “suggested” that the time has arrived for his circuit to sit “en banc to re-examine its position.”⁴⁹ Weiner’s suggestion thus creates a crack in the formerly solid, strong, and secure Fifth Circuit wall. This crack, I believe, is a critical one because it was evoked by the courageous position of the Fifth Circuit’s offspring, the Eleventh Circuit.

Judge Weiner arguably has decided on a discreet approach for leading his colleagues to join today’s mainstream of American jurisprudence regarding corporal punishment in public schools. In a reflective tone Weiner wrote, “Can we be the only circuit that is ‘in step’ and all the rest out of step? We should not demur in our own housekeeping...”⁵⁰ Without attacking any specific judge or any specific case decision, Weiner has suggested a step in which his colleagues have the most and the direct power. That is to say, the appellate judges cannot directly control the use of corporal punishment in the public schools of Louisiana, Mississippi, and Texas. Such control is the responsibility of the legislatures of those three states. However, the judges do control the decision to re-examine their own position on substantive due process within the context of the changed societal conditions and judicial positions in the country at large. It is surely possible that a changed Fifth Circuit position regarding the availability of claims of substantive due process may subsequently directly affect educators and members of boards of education. Public exposure of incidents of excessive corporal

punishments through court documents, especially those incidents accompanied by substantial monetary damages, might well lead to a further reduction of student abuse by educators.

A recent case, *Hinson v. Holt*,⁵¹ illustrates how even a state-based claim can bring a positive result. (*Hinson* was decided in November 1998 but published in April 2001.) The father of middle school student Dustin Holt sued his school district, the superintendent of schools, and teacher Jacqueline Hinson, claiming assault and battery, intentional infliction of emotional distress, and negligence arising from an incident of corporal punishment (paddling). He sued in Alabama state court. Holt won against the teacher because she violated her school's policy on corporal punishment. Both the trial court and the Alabama Court of Civil Appeals held that teacher Hinson willfully and with malice punished the student, thereby meeting the standard for liability set by the Alabama state supreme court in *Suits v. Glover*, 71 So.2d 49 (1954). In its decision the state appellate court acknowledged that "the power of an educator to discipline an errant student must, at some point, yield to the liberty interest of that student."⁵² The court referred to the U.S. Supreme Court's *Ingraham* decision.

Apparently Holt did not seek a federal substantive due process claim in the eleventh circuit in 1998 because he saw no way then to state a federal claim. Perhaps he thought it would be futile to allege a Fourteenth Amendment claim in light of *Gaither v. Barron*.⁵³ In *Gaither*, a then-recent eleventh circuit case, the district court explicitly stated, "Because of the availability in Alabama of state criminal and civil actions against a teacher who excessively punishes a child, it would be a misuse of this court's judicial power to consider whether this particular instance of corporal punishment was arbitrary or excessive."⁵⁴ Holt simply used the state remedy route as outlined by Justice Powell in *Ingraham*.

Despite Judge Weiner's efforts in his concurring opinion, temptation exists to criticize Judge Weiner for not taking a stand against corporal punishment itself. After all, the data on corporal punishment have changed significantly in the last quarter-century. In his majority opinion for the Supreme Court's decision in *Ingraham* in 1977, Justice Powell noted, "Only two states, Massachusetts and New Jersey, have prohibited corporal punishment in their public schools."⁵⁵ According to current data, 27 states, several large cities, and Washington, D.C. now ban corporal punishment. Moreover, the number of reported paddlings of students has decreased from 1.4 million in the 1979-80 school year to 470,000 in 1993-94 to 365,000 in 1997-98.⁵⁶ (It is fair to point out that in the 1997-98 school year ten states, including the three that comprise the fifth circuit [Louisiana, Mississippi, and Texas], accounted for 90% of the incidents nationwide.⁵⁷)

In addition, it is possible to criticize Judge Weiner for not citing or otherwise utilizing Rosenberg's excellent and detailed 1990 article, positing the "irrationality" of the decisions of the Fifth Circuit regarding substantive due process.⁵⁸ In her 1990 article specifically devoted to the Fifth Circuit, Professor Rosenberg noted that state laws authorize only the use of reasonable force on students. She

argued correctly, I believe, that fifth-circuit states should not then “insulate its overzealous agents from suit in the federal courts by creating state remedies” for dealing with corporal punishment.⁵⁹ She incisively pointed out that “the Fifth Circuit, *without analysis*, has steadfastly adhered to the view that state remedies in some way preclude a Section 1983 claim....”⁶⁰ (emphasis added).

Furthermore, Weiner is subject to criticism because it is apparent that he was not able to convince even one colleague to join him in his specially concurring opinion. Nor was Weiner willing to insist that one of his colleagues write the opinion for the court so he could dissent, thereby forthrightly supporting Moore’s claim regarding the denial of substantive due process. It is not clear why Weiner shifted the burden of responsibility for examining the availability of state remedies from individual judges or panels of judges to the full, en banc Fifth Circuit.

In the end, Weiner has left us two opinions that conflict, one that supports his circuit’s precedent and one that questions it. Which reflects the real Weiner is also not clear. Weiner was not clear about what is his jurisprudential stance on corporal punishment. His opinion for the unanimous panel is a strong defense of precedent. However, precedent, as the Supreme Court understood in *Brown v. Topeka*, must yield when people and their ideas about society change. “Any language in *Plessy v. Ferguson* contrary to this finding [i.e., segregation is detrimental] is rejected.”⁶¹ Indeed, if precedent is dispositive, then change is virtually impossible. Furthermore, change for sake of being in step with others, as implied in the foregoing quotation from Weiner, is not as influential as change grounded in principled jurisprudence. Change guided by vogue rather than by an understanding of education and the legal necessity for supporting substantive due process as a legitimate claim against corporal punishment in our public schools does not provide firm direction to anyone.

In addition, I simply cannot reconcile Weiner’s statements in his opinion for the court with those in his specially concurring opinion in regard to the adequacy of state remedies. In his court opinion Weiner justified the denial of substantive due process by stating, “We have held consistently that, as long as the state provides an adequate remedy, a public school student cannot state a claim for denial of denial of substantive due process....”⁶² He then proceeded to cite Texas law and a prior Fifth Circuit case, *Cunningham v. Beavers*,⁶³ to show that there exists an adequate state remedy for Texas students. On the other hand, in his concurrence Weiner admitted that the Texas remedy is inadequate. He said, “As a matter of fact, Texas school districts generally do have state-law governmental immunity from tort claims brought by injured students.”⁶⁴ In short, Weiner appears to be talking out of both sides of his mouth.

In spite of my overall criticism of Weiner, I am grateful for the crack in the Fifth Circuit’s wall that was created by him. A change in the Fifth Circuit will be desirable and acceptable even if it is based on weak grounds. Better a change for weak reasons than no positive change at all. If the Fifth Circuit’s wall subsequently falls due to Weiner’s Joshua-like trumpet call,⁶⁵ other benefits may oc-

cur. For example, the Fifth Circuit might serve as a model for other circuits to follow; the States of Louisiana, Mississippi, and Texas might modify their state laws by banning corporal punishment completely or by setting narrow restrictions on the use of corporal punishment in discipline situations; and the Supreme Court might some day decide to grant *certiorari* based on a claim of denial of substantive due process, something it did not do when reviewing *Ingraham* in 1977.

We need not fear nor expect an overnight revolution in the law on corporal punishment. The 23 states that now permit corporal punishment do so because their legislatures reflect the cultural approach of their constituents to the rearing and educating of their children. A change in culture is a slow process. It has taken tremendous pressure from the nation as a whole, “withering criticism,” according to the New York Times, to bring change in Texas’s criminal law regarding the death penalty. “While most of the changes cover a broad range of criminal defendants and not solely those charged with capital crimes, many lawmakers were motivated largely by the *intense negative attention* focused on the state’s death penalty...” (emphasis added).⁶⁶ Such criticism and attention will not likely arise regarding corporal punishment because all of the states contiguous with Texas now permit corporal punishment in their public schools.

Judging from prior court decisions concerned with holding a school district liable in matters related to student behaviors, the standard to be applied in any future reform will be a high one to meet. The two-part standard of the Eleventh Circuit quoted earlier constitutes a deliberately high bar that will defeat many student plaintiffs. Perhaps unnecessarily, the Eleventh Circuit immediately went on to indicate explicitly that it did not expect a great response to the change it had made in the law. In reflecting on the “test” it had established, the court said:

The test we adopt today will, we think, properly ensure that students will be able to state a claim *only* where the alleged corporal punishment truly reflects the kind of egregious official abuse of force that would violate substantive due process protection in other, non-school contexts. We do not open the door to a flood of complaints by students objecting to traditional and reasonable corporal punishment. [emphasis in the original].⁶⁷

The approach of the Eleventh Circuit is reminiscent in language and content of the opinions issued by the other circuit courts, as indicated earlier. It is also reminiscent of the approach taken by the Supreme Court just two years ago in *Davis v. Monroe County Bd. of Education*,⁶⁸ a case dealing with a school district’s liability under Title IX for failure to remedy a classmate’s sexual harassment of a student. The Court established the following high standard for holding a school district liable: “We thus conclude that funding recipients are properly held liable in damage only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and

objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”⁶⁹

We must accept the fact that most federal courts have finally recognized the need to protect students via constitutional provision rather than via tort law in severe instances of corporal punishment. We must also accept the fact the standards established for such protection may be too high for many student plaintiffs to meet. A case decided last November illustrates just this point. In *Brown v. Ramsey* a federal district court within the fourth circuit stated that “the standards for establishing a constitutional injury are far higher, and Plaintiffs have failed to meet the exacting standards as stated by the Fourth Circuit in *Hall*. Again, evidence that may give rise to a tort claim will not necessarily establish a substantive due process violation under §1983; the mere fact that a state official may have committed a tort will not suffice to support a cause of action for constitutional harm.”⁷⁰

Additionally, we must admit that it is not clear, nor can it ever be clear, to what extent the availability of constitutional protection has lowered the number of student victims over the past two decades. Even if there is no causal relationship between court decisions and the reduction of corporal punishment, it is true that the number of students struck (paddled) has decreased during the two decades from 1980 to 1998, the same time period during which most jurisdictions decided that constitutional protection was appropriate. (Note the dates in the decisions cited in endnotes 47 and 48.) Of course, the decrease in corporal punishment may not be attributable to the court decisions but to the rise of public concern,⁷¹ which is the cause for the court decisions in the first place. After all, it is roughly in this same time period from 1980 to today that the number of states banning corporal punishment in public schools has risen from 2 to 27. It is also the period during which world-wide support appeared for the United Nations Convention on the Rights of the Child, a document with provisions for prohibiting the corporal punishment of children. As of the year 2000, 191 nations have ratified that Convention. (The United States has not done so at this time.⁷²)

In any case, it is apparent that there is an interdependent relation between the official banning of corporal punishment, the reduction of students paddled for disciplinary reasons, and court decisions giving constitutional protection to students. Court decisions do strengthen and support any popular movement against corporal punishment, whether that punishment is severe or not severe. One author has pointed out correctly that the banning of corporal punishment in our public schools by over half the states is a “sign of an evolving society.” She then went on to assert, “The federal courts should not turn a blind eye to the evolving standards of decency that mark the progress of our maturing society. They should be encouraged and required to supplement that progress with judicial actions that conforms both to the Constitution and reflects the positive developments within society.”⁷³ I agree completely.

In conclusion, I am optimistic that with the combined appearance of *Neal*, *Moore*, and *Hinson* the courts will move forward in protecting students, leading at times and following at times the state legislators, local board of education members, and educators who recognize the continuing need to value the constitutional and humane rights of students. Some change has already occurred in the law and in the use of corporal punishment in schools. It is a significant change, albeit a slow and tardy one, and it will and should continue.

ENDNOTES

¹ 430 U.S. 651, 97 S. Ct. 1401, 51 L.Ed. 2d 711 (1977).

² The only other Supreme Court decision on corporal punishment is *Baker v. Owen*, 435 U.S. 907 (1975). In *Baker* the Court just summarily affirmed a district court opinion that held that a parent's approval was not necessary before a school could administer reasonable corporal punishment pursuant to its regular school policy. Thus, no violation of the Fourteenth Amendment occurred. See the district court's opinion at 395 F. Supp. 294 (M.D.N.C.).

³ 229 F.3d 1069 [148 Ed.Law Rep.[86]] (11th Cir. 2000).

⁴ R.T. Hyman and C.H. Rathbone, *Corporal Punishment in Schools: Reading the Law* (1993).

⁵ Ronald D. Rotunda and John E. Nowak, *2 Treatise on Constitutional Law: Substance and Procedure* 374 (1992).

⁶ *Id.* at 400.

⁷ These facts stated here derive from official court documents, including court decisions and the briefs filed by the two sides. Even with extensive research I was not able to uncover any contemporary newspaper articles on *Neal*. I have spoken with the attorneys on both sides.

⁸ Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion To Stay Discovery and To Dismiss for Lack of Subject Matter Jurisdiction, *Neal v. Fulton County Board of Education*, No.1-98-CV-1474, U.S. Dist. Ct. (N.D.Ga. Sept.3, 1998) at 2, citing the Plaintiffs' Complaint 13-33. This language as to the impact of Defendant Ector's actions is summarized and quoted by the Eleventh Circuit in *Neal*, 229 F.3d at 1071. Note that this language derives from a prior school corporal punishment decision subsequently relied upon by the Eleventh Circuit in reaching its own decision in *Neal*. See Endnotes 26 and 27 and the text material accompanying them, *infra.*, for the context of this language.

⁹ Defendants' Motion To Stay Discovery and To Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim, *Neal v. Fulton County Board of Education*, No.1-98-CV-1474, U.S. Dist. Ct. (N.D.Ga. Aug. 14, 1998).

¹⁰ *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (en banc). *aff'd on other grounds*, 430 U.S. 651 (1977).

¹¹ *Bonner v. City of Pritchard*, 611 F.2d 1206, 1209 (11th Cir. 1981).

¹² *Ingraham*, 525 F.2d at 917.

¹³ *Neal v. Fulton County Bd. of Educ.*, No. 1:98-CV-1474 GET, slip op. 4-5 (N.D.Ga. Nov. 23, 1998).

¹⁴ The plaintiffs in *Ingraham*, of which 14-year old James Ingraham was the named plaintiff among ten plaintiffs, actually suffered much more than would be expected from regular multiple "licks" with a paddle in Charles R. Drew Junior High School in Dade County, Florida. The principal, Willie J. Wright, paddled Ingraham 20 times while two male assistants held him by the arms and legs face down across a table. A hospital doctor described Ingraham's injury as including "a hematoma approximately six inches in diameter which was swollen, tender, and purplish in color. Additionally, there was seriousness or fluid oozing from the hematoma." *Ingraham*, 498 F.2d at 255-259.

¹⁵ Appellants'/Plaintiffs' Brief, *Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000).

¹⁶ Appellees'/Defendants' Brief, *Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000).

¹⁷ *Neal*, 229 F.3d at 1072.

¹⁸ *Id.*

¹⁹ *Id.*, citing *Metzger v. Osbeck*, 841 F.2d 518 [45 Ed.Law Rep. [530]] (3rd Cir. 1988).

²⁰ *Neal*, 229 F.3d at 1073, quoting *Ingraham*, 525 F.2d at 917.

²¹ 503, U.S. 115 (1992).

²² *Neal*, 229 F.3d at 1074. In *Collins* Justice Stevens, writing for a unanimous Supreme Court in a case dealing with the death of a sanitation worker by

asphyxia in a sewer, said, “As a general matter, the Court has always been reluctant to expand the concept of substantive due process, because guideposts for responsible decision making in this unchartered area are scarce and open-ended.” *Collins*, 503 U.S.at 125. For a case three years prior to *Collins* that gives a guideline for analyzing excessive force, see *Graham v. Connor*,490 U.S. 386,394 (1989). “In most instances, that will be either the Fourth Amendment’s prohibition against unreasonable seizures of the person, or the Eighth Amendment’s ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against abusive governmental conduct. The validity of the claim must then be judged by reference to the to the specific constitutional standard which governs that right rather than to some generalized ‘excessive force’ standard.” See also the cases that a few years ago dealt with mandatory community service in high school. In those cases the courts also denied the expansion of student Fourteenth Amendment liberty rights. *Immediato v. Rye Neck School District*, 73 F.3d 454 [106 Ed.Law Rep. [85]] (2nd Cir. (1996) and *Herndon v. Chapel Hill-Carrboro City Board of Education*, 89 F.3d 174 [110 Ed.Law Rep. [1037]] (4th Cir. 1996). For more on these cases see my book *Mandatory Community Service in High School: The Legal Dimension* (1999).

²³ *Id.*, citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) and *McKinney v. Pate*, 20 F.3d. 1550 (11th Cir. 1994).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Hall v. Tawney*,621 F.2d 607, 613 (2nd Cir. 1980). *Hall*’s standard of “shocking to the conscience” is based on *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), which in turn is based on *Rochin v. California*, 342 U.S. 165 (1952). In *Rochin* the Supreme Court ruled on a case involving police brutality. Three deputy sheriffs of the County of Los Angeles unlawfully broke into and entered Rochin’s room in his house. When Rochin seized two capsules from his night stand and put them in his mouth, the officer jumped upon him and attempted to extract the capsules to no avail. They handcuffed Rochin and took him to a hospital. There, at the direction of the officers, a doctor forced an emetic solution through a tube into Rochin’s stomach. The stomach pumping produced vomiting, and the officers found two capsules of morphine. In its decision the Court held that “the proceedings by which [Rochin’s] conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.” *Id.* at 172.

²⁷ For a 1994 review of the cases dealing with corporal punishment, see the article by Jerry R. Parkinson, *Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence That Is Literally Shocking to the Conscience*, 39 S. Dakota L.R. 276 (1994). (Note the title's reference to the Fourth Circuit's 1980 standard for determining substantive due process.) See also the discussion of *Moore* in the Commentary section, *infra*.

²⁸ *Id.*, at 1075.

²⁹ I. M. Rosenberg, *A Study in Irrationality: Refusal to Grant Substantive Due Process Protection against Excessive Corporal Punishment in the Public Schools*, 27 Houston L. Rev. 399 (1990).

³⁰ 223 F.3d 871 [149 Ed.Law Rep. [337]] (5th Cir. 2000).

³¹ As punishment for talking during roll call in his gym class, Aaron Moore performed "100 'ups and downs,' also known as squat thrusts." Then he did 25 minutes of weight lifting required of the gym students that day. Subsequently, in the following days he developed rhabdomyolysis and renal failure. ("Rhabdomyolysis is a degenerative disease of the skeletal muscle that involves destruction of the muscle tissue, evidenced by the presence of myoglobin in the urine.") He also developed esophagitis/gastritis. He entered the hospital and missed three weeks of school. He continued to experience fatigue and was unable to participate in school sports and gym class. *Id.* at 873.

³² *d.* at 874.

³³ *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976).

³⁴ *Ingraham, op. cit.*, 430 U.S. 651.

³⁵ I know of only one other such special concurrence. Justice O'Connor in *Bush v. Vera*, 517 U.S. 952 (1996), a voting rights case, wrote the court's opinion and also a separate concurring opinion.

³⁶ *Moore*, 223 F.3d at 876 and 877.

³⁷ *Ingraham*, 430 U.S. at 659.

³⁸ *Id.* at 674.

³⁹ *Ingraham*, 525 F.2d at 916.

⁴⁰ *Id.* at 916-917.

⁴¹ *Ingraham*, 430 U.S. at 676 (citation omitted).

⁴² Judge Weiner is not the first Fifth-Circuit judge to critique the Fifth Circuit's 10-5 majority opinion in its 1976 *Ingraham* decision (525 F.2d 900). In that very case two separate dissenting opinions by Judge Godbold (joined by Chief Judge Brown) and Judge Rives (joined by Judges Goldberg and Ainsworth) stated the belief that arbitrary and excessive corporal punishment is a denial of substantive due process. *Id.* at 920 and 921, respectively. Judge Logan in an opinion for a unanimous three-member panel in *Garcia v. Miera*, 817 F.2d 650, 655 n.8 [39 Ed.Law Rep [33]] (10th Cir. 1987) quoted from and agreed with Judge Godbold's dissent in *Ingraham*. These three opinions, (there may well be others, as well) all pre-date Weiner's opinion in *Moore*.

⁴³ *Moore*, 233 F.3d at 877.

⁴⁴ *Zinerman v. Burch*, 494 U.S. 113, 125 (1990).

⁴⁵ *Moore*, 233 F.3d at 878.

⁴⁶ *Id.*

⁴⁷ The circuits are the Third, Fourth, Sixth, Eighth, Tenth, and Eleventh. See the following cases' key statements on this matter, as follows: *Metzger v. Osbeck*, 841 F.2d 518, 520 [45 Ed.Law Rep. [530]] (3d Cir. 1988); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980); *Saylor v. Bd. of Edu. of Harlan County, Ky.*, 118 F.3d 507, 514 [119 Ed.Law Rep. [834]] (6th Cir. 1997); *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560, 564 [48 Ed.Law Rep. [1098]] (8th Cir. 1988) and *London v. Directors of DeWitt Pub. Sch.*, 194 F.3d 873, 876-77 [139 Ed.Law Rep. [145]] (8th Cir. 1999; *Milonas v. Williams*, 691 F.2d 931, 940-942 [7 Ed.Law Rep.[247]] (10th Cir. 1982) and *Garcia v. Miera*, 817 F.2d 650, 654 [39 Ed.Law Rep. [33]] (10th Cir. 1987); and *Neal*, 229 F.3d at 1074 and 1076 (see *supra* text for Endnote 27).

⁴⁸ These circuits are the Seventh and Ninth. See the following cases' key statements on this matter, as follows: *Wallace v. Batavia Sch. Dist.* 101, 68 F.3d 1010, 1014-16 [104 Ed.Law Rep. [1010]] (7th Cir. 1995); and *P. B. v Koch*, 96 F.3d 1298, 1303 n.4 and 1304 [112 Ed.Law Rep.[687]] (9th Cir. 1996). The Seventh Circuit in *Wallace* established its "test" for public schools, which provided that the Fourth Amendment is violated in a matter of corporal punishment "only when the restriction of liberty is unreasonable under the circumstances then existing and apparent." *Wallace* at 1014. The Ninth Circuit in *P.B.*

said that for its purpose in that case, to resolve an appeal concerning qualified immunity, “we need not and do not resolve the question of whether the Fourth Amendment, rather than the Due Process Clause, protects a student from the use of excessive force by a school official.” *P.B.* at 1303. Therefore, a substantive due process claim might well be permitted in that circuit for disciplinary corporal punishment in a public school.

⁴⁹ *Moore*, 233 F.3d at 880.

⁵⁰ *Moore*, 233 F.3d at 880.

⁵¹ 776 So.2d 804 [151 Ed.Law Rep. [343]] (Ala.Civ.App. 1998).

⁵² *Id.* at 813.

⁵³ 924 F.Supp. 134 [109 Ed.Law Rep. [754]] (M.D. Ala. 1996).

⁵⁴ *Id.* at 136. See also a later district court decision in the eleventh circuit, *Carestio v. School BD. of Broward County*, 79 F. Supp.2d 1347 [141 Ed.Law Rep. [629]] (S.D.Fla. 1999) in which the court said the same thing as the *Gaither* court.

⁵⁵ *Ingraham*, 430 U.S. at 663.

⁵⁶ Jodi Wigoren, *Lawsuits Touch Off Debate Over Paddling in the Schools*, N.Y. Times, May 3, 2001, at A1 and A22, citing a report from the U.S. Department of Education.

⁵⁷ *Id.*

⁵⁸ The case that triggered Rosenberg’s article, *supra*, is *Cunningham v. Beavers*, 858 F.2d 269 [49 Ed.Law Rep [490]] (5th Cir. 1988). See also the subsequent decision in *Fee v. Herndon*, 900 F.2d 804 [59 Ed.Law Rep. 1003]] (5th Cir. 1990); and *Doe v. Taylor Independent School Dist.*, 15 F.3d 443 [77 Ed.Law Rep. 652]] (5th Cir. 1994).

⁵⁹ Rosenberg, at 445.

⁶⁰ *Id.*

⁶¹ 347 U.S. 483, 494-495 (1954).

⁶² *Moore*, 233 F.3d at 874.

⁶³ 858 F.2d 269 [49 Ed.Law Rep. [490]] (5th Cir. 1988).

⁶⁴ *Moore*, 223 F.3d at 878.

⁶⁵ See *Joshua* 6:1-20.

⁶⁶ Jim Yardley, *Texas Set To Shift in Wake of Furor on Death Penalty*, N.Y. Times, June 1, 2001 at A1; Raymond Bonner, *Ban on Execution of the Retarded Is Vetoed in Texas*, N.Y. Times, June 18, 2001 at A1.

⁶⁷ *Id.* at 1076.

⁶⁸ 119 S. Ct. 1661 [134 Ed.Law Rep. [477]] (1999).

⁶⁹ *Id.* at 1675.

⁷⁰ 121 F.Supp.2d 911 [149 Ed.Law Rep. [392]] (E.D. Va. 2000).

⁷¹ According to the National Coalition to Abolish Corporal Punishment headquartered in Columbus, Ohio, over 40 organizations favor the abolition of corporal punishment. See the Coalition's Web cite at <www.stophitting.com>

⁷² Andre R. Imbrogno, *Corporal Punishment in America's Public Schools and the U.N. Convention on the Rights of the Child: A Case for Nonratification*, 29 J.L. & Educ. 125, 126 (2000).

⁷³ L. Roy, *Corporal Punishment in American Public Schools and the Rights of the Child*, 30 J. of Law and Educ. 554, 563 (2001).