UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARY ALEXANDER, an Individual, ASHLEY BALL, a minor by and through her Guardian, MARY ALEXANDER; EVERETTE BALL, a minor by and through his guardian, MARY ALEXANDER,

Plaintiffs,

vs.

GARY UNDERHILL, in his official and individual capacity; *et al.*,

Defendants.

_____ /

Case No.: CV-N-05-00178-LRH (RJJ)

NAACP'S NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

To Defendants and their attorneys of record:

Notice is hereby given that pursuant to Local Rule IA 10-2, the National Association for the Advancement of Colored People (NAACP), the Nevada State Conference of NAACP Branches (State Conference) and the Reno NAACP will and hereby do move the Court for Leave to File an *Amicus Curiae* brief in support of Plaintiffs' Motion for Partial Summary Judgment as to liability on their Third Claim for Relief and in Opposition to Defendants' Cross-Motion for Summary Judgment (Third Claim for Relief) on the grounds that Everette and Ashley Ball were denied due process by Defendants Bonine, Cylke and/or the Washoe County School District and that therefore they are entitled to Judgment on liability as a matter of law. This Motion is

based upon this Notice of Motion, the accompanying *Amicus* Brief and pleadings and papers on file in this action.

Dated this 30th day of August, 2007.

/s/

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INTEREST OF *AMICUS CURIAE*

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The Reno/Sparks NAACP is the NAACP affiliate based in Reno, Nevada and charged with implementing the mission of the NAACP in that locality. The principle objectives of the NAACP are to ensure the political, educational, social and economic equality of rights and eliminate race prejudice among citizens of the United States; to remove barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof, and to take other lawful action in furtherance of these objectives. Equal educational opportunity for African Americans has been a fundamental goal of the NAACP since its founding. As epitomized by *Brown v. Board of Education*, 347 U.S. 483 (1954) and, more recently, *NAACP et al. v. David Heineman,* No. 8:06-CV-371 (U.S. District Court Nebraska 2006) (stay pending outcome in related state court action) and *State of Connecticut et al. v. Margeret Spellings, Secretary of the Department of Education*, No. 3:05-cv-01330(MRK) (U.S. District Court Connecticut 2006)(permissive intervention granted to NAACP in NCLB dispute between State and Federal governments), the NAACP has been a leader in litigating and advocating for school desegregation and quality education issues in public education.

[1] The NAACP, consequently, has an interest in student disciplinary policies and/or practices of public school districts that may unconstitutionally contribute to pushing African American and other students of color out of the public school systems, and often into the juvenile justice systems, thereby improperly denying them access to a public school education in which they possess a property interest.[2] The NAACP thus supports the adoption and implementation of school system procedures and programs that can help improve race relations and equal educational opportunities, including the provision of *meaningful* due process and discrimination complaint procedures.

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[1] While first generation desegregation issues dealt with the elimination of segregated, separate and unequal schools, second generation desegregation problems focus on "within school" segregation, discrimination and other forms of abuse. These issues include school policies and practices that lead to isolation or differential treatment based on the racial, sexual or cultural characteristics of the student. Specific areas of concern include (a) **discipline, suspensions or expulsions,** b) tracking and long-term grouping practices that favor one group over another in a discriminatory fashion, c) access to special programs, resources, quality teachers and challenging curricula, d) access to desegregated and diverse cultural groups within classrooms, among students and teachers, and e) grade retention.

[2] Public school students may also possess reputational interests in not being charged with certain disciplinary breaches without appropriate due process protections. *See Paul v. Davis,* 424 U.S. 693, 730 n. 15 (1976), *citing Goss v. Lopez,* 419 U.S. 565, 574-575 (1975). In *Goss* the Court explicitly referred to the liberty interest in reputation implicated in such suspensions. *Id.* at 576. The Court understood that suspensions for certain actions would stigmatize the student. In some school districts around the country, the NAACP is beginning to see the disciplinary history of students being allegedly used as a criteria or basis for the denial of the students' transfer request to another ("better") school system. *See U.S. v. State of Texas, et al.*, Civil Action No. 5281 (E.D. Texas 2006) (Hearne ISD transfer issues). Likewise, some school districts, in addition to Washoe County School District in the case of the Ball siblings (Plaintiffs' Motion for Partial Summary Judgment at 3), are known to unilaterally transfer students to another school within the district as a result of alleged misbehavior on the part of the students being transferred.

INTRODUCTION

The Racial Context

Plaintiffs have filed a Motion for Partial Summary Judgment on Plaintiffs' Third Claim for Relief Against Defendants Bonine, Cylke, Kallay and the Washoe County School District (the Procedural Due Process Claim). The legal discussion in this case and, particularly, in Plaintiffs' motion about the failure to provide procedural due process for students accused of disciplinary violations, occurs within the context of a *sub rosa*, and much broader, discussion about race relations in the public school system. Here, Mary Alexander filed discrimination complaints with the District on November 15, 2004, apparently seeking to use the school system's discrimination complaint process as a kind of substitute for the due process the school system failed to provide Everette and Ashley.[3] (Plaintiffs' Notice of Motion and Motion for Partial Summary Judgment, Memorandum of Points and Authorities at 2). This Court has had an opportunity to glean the racialized context in a related case in its recent ruling on whether Title VI of the Civil Rights Act, 42 U.S.C. Section 2000d, subsumes a Section 1983 remedy, and whether Section 1983 remedies are subsumed by Title VI. *See, e.g., Williams v. Underhill*, 2006 WL 383518 at 4 (D.Nev. 2006). Indeed, *Goss v. Lopez*, 419 U.S. 565 (1975), was brought when students were suspended in the wake of racial disturbances in Columbus, Ohio. Dwight

[3] In response to Mary Alexander's Nov. 15, 2004 District Discrimination complaint regarding the October 7, 2004 incidents, the district finally asked to interview the Ball siblings over three months after the incident and the suspension of the students. (Plaintiffs' Motion for Partial Summary Judgment at 5). This arguably slow response, along with another aspect addressed later in Argument III, raises a question about the district's ability to adequately respond to individual claims of difference in treatment by the school system based on race or national origin. How the district has adapted its policies and practices to address more macro-level concerns of discrimination is unclear, as in the current case where the intersection of race and due process appears to be providing a challenge for the school system. Indeed, the case at bar was precipitated by potential student on student racial harassment, a problem exacerbated by the school system's questionable responses. (*See* Plaintiffs' Complaint at 4)("As Ashley was returning from her locker she was attacked, without any provocation, and hit in the face by a female Hispanic student. Ashley fought back in self defense. Several of Ashley's girlfriends, who are black, came to assist Ashley and several other Hispanic female students joined the fight.")

Lopez, the named plaintiff, testified that in late February, 1971, there was tension at Central High School over Black History Week. *Lopez v. Williams*, 372 F.Supp. 1279, 1284 (D.C. Ohio 1973). Mr. Fulton, the principal of Marion-Franklin High School in Columbus, Ohio, testified that on March 23, 1971, during the course of an assembly in the auditorium, Bruce Harris and several other black students stood up, turned their backs to the assembly speaker, and gave the 'black Pledge'. Bruce Harris was suspended for disrupting the assembly program. *Id.* at 1290. [4]

The racialized context of such student-staff disputes provides an important additional judicial policy reason why, at the very minimum, students facing suspension and the consequent interference with a protected property or reputational interest must be given some kind of notice and afforded some kind of hearing. 'Parties whose rights are to be affected are entitled to be heard...' *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531 (1864).

The Historical Context

The Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, ratified in 1868 in the wake of the Civil War, uses the same eleven words, called the Due Process Clause, to describe a legal

[4] As *Lopez* illustrates, issues of race may precipitate a due process case. Likewise, issues of due process may emerge in the course of a school desegregation case. *E.g.,Coalition to Save Our Children v. State Board of Education of State of Delaware,* 90 F.3d 752 (3rd Cir. – Del. 1996). In *Coalition to Save Our Children*, the Court's 1978 order required the implementation of eight specific programs ancillary to the pupil assignment plan. Part of the ancillary relief required the districts to: "6) develop...a code of rights and responsibilities...provid[ing] for racially nondiscriminatory discipline and...*contain[ing] provisions to insure each student in the desegregated area procedural and substantive due process required by existing law*. Such a code will help to provide equal educational opportunity to all students by protecting them from unreasonable, discriminatory and arbitrary rules; and the Board shall not administer the code on a racially selective or otherwise biased basis;" *Id.* at 769 (*emphasis added*).

obligation of all states.[5] These words have as their central promise an assurance that all levels of American government must operate within the law and provide fair procedures.

While the text of the due process clause is extremely general, the fact that it appears twice makes clear that it states a central proposition. Historically, the clause reflects the Magna Carta of Great Britain, King John's Thirteenth Century promise to his noblemen that he would act only in accordance with law (legality) and that all would receive the ordinary processes (procedures) of law.[6] It also echoes that country's Seventeenth Century struggles for political and legal regularity, and the American colonies' strong insistence during the pre-Revolutionary period on observance of regular legal order.[7] The requirement that government function in accordance with law is, in itself, ample basis for understanding the stress given these words. A commitment to legality is at the heart of all advanced legal systems, and the Due Process Clause is often thought to embody that commitment.

The clause also promises that before depriving a citizen of life, liberty or property, a government must follow fair procedures. Thus, it is not always enough for

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[5] The Fourteenth Amendment, of course, has an obvious racial context. It was enacted as one federal response to the Civil War (1860-1865), a war between Northern and Southern states over the withdrawal of some Southern states from the Union and disagreements over the abolishment of slavery. The Fourteenth Amendment declares that all persons born in the United States are citizens, guaranteeing them equal protection of the laws, due process and privileges and immunities of citizenship, and giving Congress the authority to enforce the provisions. H. MICHAEL HIGGINBOTHAM, RACE LAW: CASES, COMMENTARIES AND QUESTIONS 704, 705 (2005).

[6] "The rules requiring impartial adjudicators and fair hearings can be traced back to medieval precedents, and, they were not unknown in the ancient world. In their medieval guise they were regarded as part of the immutable order of things, so that in theory even the power of the legislature could not alter them." WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 467 (1994) (Seventh Edition).

[7] During the Seventeenth Century, the English monarch was vested with absolute sovereignty, including the prerogative to disregard laws passed by the House of Commons and ignore rulings made by the House of Lords. In the eighteenth century, absolute sovereignty was transferred from the British monarchy to Parliament, an event that was not lost on the colonists who precipitated the American Revolution and created the U.S. Constitution. *See* Answers.com, http://www.answers.com/topic/rule-of-law at 2.

the government just to act in accordance with whatever law there may happen to be. Citizens may also be entitled to have the government observe or offer fair procedures, whether or not those procedures have been provided for in the law on the basis of which it is acting. Action denying the process that is "due" would be unconstitutional.[8]

SUMMARY OF ARGUMENT

Defendants Bonine, Cylke and the WCSD have failed to provide the process that was due Plaintiffs Ashley and Everette Ball. This failure occurred both with respect to emergency suspensions of 10 days or less, as well as for longer suspensions. In addition, to the extent the substantial prejudice theory even applies, Plaintiffs Ashley and Everette Ball have experienced substantial prejudice. Finally, while school district discrimination complaint procedures are important tools in addressing student complaints of racism in the school systems, such procedures must be timely applied in a meaningful manner. For the discrimination complaint process to also have validity as a due process hearing, the arbiter must have the requisite independence. Defendants' discrimination complaint process, unfortunately, failed to meet the test.

[8] As Kadish observed, correct procedures are required "even in the area of legitimate governmental concern." SANFORD KADISH, METHODOLOGY AND CRITERIA IN DUE PROCESS ADJUDICATIONS—A SURVEY AND CRITICISM, 66 YALE L.J. 319, 340 (1957). The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *Also see Goldberg v. Kelly*, 397 U.S. 254, 267, 268 (1970). In the welfare benefits context, *Goldberg* held that these principles required that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

ARGUMENT

I. DEFENDANTS ERRONEOUSLY ARGUE THAT THERE IS NO EVIDENCE OF SUBSTANTIAL PREJUDICE AND THUS NO PROCEDURAL DUE PROCESS VIOLATIONS.

Defendants erroneously suggest that there is no evidence of "substantial prejudice" and that therefore there can be no procedural due process violation. The principle that substantial prejudice is a prerequisite to a finding of a procedural due violation is a minority rule applied in several circuits (*e.g.,* Tenth, Fifth) and is not currently the law of the Ninth Circuit. One of those "substantial prejudice" decisions, however, states that whether the plaintiff student admitted the charges used to suspend him from school was relevant in establishing substantial prejudice or harm. *S.K. et al. v. Anoka-Hennepin ISD No. 11, et al.,* 399 F.Supp.2d 963, 968, 969 (D. Minn. 2005). Unlike the student plaintiffs in *S.K.*, who admitted to engaging in the misconduct that formed the basis of their expulsions, Ashley and Everette dispute at least some of the charges against them. It is the questioning of such charges that makes the provision of meaningful due process so important to public school students, including black public school students who in many systems across the country disproportionately face the brunt of zero tolerance policies and practices that lead to suspensions, arrests and/or juvenile court entanglement. This intersection of school, police and juvenile bureaucracies that too often unnecessarily pushes black students out of school is often referred to as the "school-to-prison pipeline."[9] Moreover, the fact that the suspensions of Ashley and Everette began a chain

[9] V. Goode & J. Goode, *De Facto Zero Tolerance: An Exploratory Study of Race & Safe School Violations*, *in* TEACHING CITY KIDS: UNDERSTANDING & APPRECIATING THEM 85 (J. Kincheloe & k. hayes eds., Peter Lang 2007); J. Wald & D. Losen, *Defining and Redirecting a School to Prison Pipeline in* NEW DIRECTIONS FOR YOUTH DEVELOPMENT: DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE 9 (J. Wald & D. Losen eds., Jossey-Bass Fall 2003); NAACP, *Arresting Development: Addressing the School Discipline Crisis in Florida*, available at

of transfers is substantially prejudicial. That they kept changing schools three or four times after being kicked out of Hug High indicates fairly significant adjustment difficulties.[10] That they now have another permanent very negative entry on their school discipline records is also substantially prejudicial, a matter that could come back to haunt them in the context of certain future employment, education or occupational licensing opportunities. In addition, Ashley and Everette's grades were not transferred; this resulted in their receiving F's in all their classes for the Fall 2004 semester. (Plaintiffs' Complaint at 7).

Defendants have framed this case as a routine disciplinary matter, while simultaneously presenting an affidavit from Rollins Stallworth that:

> In my 18 years of teaching at Hug High School, I have never witnessed an atmosphere of disrespect, hostility, and aggressive negative behavior towards teachers, administrators, and school police by students and a parent. This incident must be handled in a matter that shows the student body of Hug High School and specific students that this type of behavior will not be tolerated, accepted, and will face dire consequences.

(Defendants' Exhibit 13, Vol. II). Mr. Stallworth thus wanted the school system to use this incident not only to punish the culprits but to also make an example to the entire student body "that this type of behavior will not be tolerated, accepted, and will face dire consequences." (Exhibit 13, Vol. II). Ms. Hess' October 7, 2004 memo states that the incident was "a little out of the ordinary" and she indicates that the gang unit was called to help calm things. (Exhibit 11, Vol. II) With all due respect to the District's perspective, this was no routine disciplinary matter. Probably more accurately, this was

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http://www.advancementproject.org/reports/ArstdDvpmEs.pdf; *also available at*: http://www.naacpldf.org/content/pdf/pipeline/arresting_development_full_report.pdf.

[10] The record, furthermore, does not indicate the quality, absolute or relative, of the "alternative schools" they attended after their suspensions. The challenge of ensuring that "alternative schools" have the resources they need to produce successful learners is a significant issue in many jurisdictions across the country.

the straw that broke the camel's back. And Ashley and Everette paid for it. Given this context, to say blithely that since their grades improved and they graduated they suffered no substantial prejudice from any alleged failure of due process procedures cannot be right. It is also somewhat troubling beyond the understandable wrangling of litigants in the heat of battle. To the extent the Washoe County school system really believes Ashley and Everette suffered no "substantial prejudice," that belief suggests an educational policy view, one perhaps informed by low expectations, that these students' collective post-suspension experience is normative. On the contrary, the process of a student practically simultaneously dealing with challenges to short-term and long-term school suspensions, arrests, juvenile court hearings, transfers to publicly-funded alternative schools that are probably relatively under-resourced, along with transportation issues, new school adjustment difficulties, and the receipt of F's in all their classes because their grades were not transferred for the fall semester, is almost *per se* "substantial prejudice." Defendants should not be permitted to evade the dictates of procedural due process to public school students based on a "no substantial prejudice" theory. If it applies in this Circuit within the context of public school student due process claims—and we suggest that it does not—there is "substantial prejudice" in the post-suspension experience of Ashley and Everette.

II. THE "EMERGENCY SUSPENSION" PROCEDURE IS INADEQUATE.

The District's "emergency suspension" procedure is inadequate. Due process requires adequate notice of the charges and the opportunity to be heard. For an academic suspension of ten days or less, due process requires that the "student be given oral or written notice of the charges against him and, if he denies them, an explanation of the

evidence the authorities have and an opportunity to present his side of the story." *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

The Ball siblings seem to contend that their actions on October 7, 2004 should not be deemed to be a violation of the student code of conduct (or the law) and/or that they should not have been punished in the manner in which they were punished. "As Ashley was returning from her locker, she was attacked, without any provocation, and hit in the face by a female Hispanic student. Ashley fought back in self-defense. Several of Ashley's girlfriends, who are black, came to assist Ashley and several other Hispanic female students joined the fight. Ashley was eventually able to escape her assailants and return to her mother at the curb." (Plaintiffs' Complaint at 4) "...No one was fighting when school police arrived. The school police started arresting all the black students in the vicinity even though they did not know who participated in the affray and who did not. A student witness told Defendant Underhill that Everette Ball and Chanae Smith (a black female student) had nothing to do with the fight." (Plaintiffs' Complaint at 4) Nevertheless, after arresting Ashley, Defendant Underhill "then told Officer Lorentzen and Doe I to arrest Plaintiff Everette Ball for fighting...Everette was leaning into the back of his mother's car through the rear window with his feet off the ground when he was on the cell phone. Defendant Lorentzen then place a handcuff on one of Everette Ball's arm then twisted it behind him and forcibly dragged him out of the window. Everette asked what they were doing but no one answered. Plaintiff Everette Ball was squirming and proclaiming his innocence as he was thrown on the ground by two officers and dragged towards the gym on his stomach." (Plaintiffs' Complaint at 5) These actions by Ashley and Everette, in addition to Plaintiffs' subsequent meetings with Defendants Bonine and

Cylke, strongly suggest that they deny the charges. To put it differently, the students do not admit all of the facts which it is the purpose of the due process hearing to establish.

The Defendants failed to provide adequate written notice to the students and may have failed to provide adequate oral notice as well. School officials must provide the student with notice both of the specific charge, that is, the specific rule allegedly violated, and of the specific alleged conduct that is said to violate the rule. *Butler v. Oak Creek-Franklin School District et al.,* 172 F.Supp.2d 1102, 1112, 1113 (E.D. Wisconsin 2001); *Riggan v. Midland ISD*, 86 F.Supp.2d 647, 658 (W.D. Tex. 2000). Thus, the notice "need only be sufficiently specific to advise the student and his counsel of the activities or incidents which have given rise to the proceeding and which will form the basis for the hearing." *Bd. of Educ. of Monticello Cent. Sch. Dist. V. Comm'r of Educ.,* 91 N.Y.2d 133, 139, 667 N.Y.S.2d 671, 690 N.E.2d 480, 483 (N.Y. 1997)(internal quotation marks and citation omitted):

> What constitutes "reasonable notice" obviously varies with the circumstances of each case...While school officials need not particularize every single charge against a student, notice that merely repeats the relevant language of [N.Y.] Education Law Section 3214(3)(a)[authorizing suspension of a "pupil who is insubordinate or disorderly or violent or disruptive, or whose conduct otherwise endangers the safety, morals, health or welfare of others"], or sets forth conclusory assertions that a student violated school rules or disrupted school activities, is not "reasonable" because it fails to provide the student with enough information to prepare an effective defense.

Id.

In the present case, Hug High School provided the following written notice on October 7, 2004 regarding Everette's emergency suspension. It reads, in relevant part, "The reason for this suspension is: 15/Emergency NRS 392.915 Threatening to cause bodily harm or death to a school employee NRS 200.485 Battery to a School Police Officer NRS 392.910 Disturbance of School." (*See* Defendants' Opposition to Plaintiffs'

Motion for Partial Summary Judgment at 14, citing Plaintiffs' Exhibit 2). The October 7, 2004 written emergency suspension notice to Ashley was similar. It stated, in part, "[t]he reason for this suspension is: 15/Emergency/NRS 392.910 Disturbance of School"). (Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment at 14, citing Plaintiffs' Exhibit 1).

In other cases, courts have held the following notices adequate: "on or around January 13th, appellant had 'participate[d] in the preparation and/or distribution and/or dissemination of a newspaper type publication calling for destruction of property and insubordination,'" *Monticello Cent. Sch. Dist.,* 91 N.Y.2d at 139, 667 N.Y.S.2d 671, 690 N.E.2d at 483; "The allegation and basis for the expulsion hearing is your part in the conspiracy to shoot and injure students and staff on November 16, 1998," *Remer v. Burlington Area Sch.Dist.,* 149 F.Supp.2d 665, 667 (E.D. Wis. 2001)(Stadtmueller, C.J.), appeal filed, No. 01-2654 (7th Cir. June 28, 2001); "I officer B. Fields observed offenders McPherson, Monte D.O.C. # 943559 and offender Steele, Tommy D.O.C. # 93304 kissing and rubbing on each others [buttocks] and hold each others [genitals] while the running of chow," *McPherson v. McBride*, 188 F.3d 784, 784-85 (7th Cir. 1999)(alterations in original)(prison discipline case charging inmate with engaging in sexual acts with another). By contrast, the lines in the emergency suspension notices give no information about what specifically Everette and Ashley were supposed to have done wrong. That is, the notices failed to provide factual context to the alleged violations.[11]

[11] To the extent that this is the school district's approach to written suspension notices generally, this becomes a systemic issue and school officials should reconsider how they might also provide the requisite factual context to such notices.

With respect to oral notice, Defendants assert that "the necessary notice of the charges was given orally to Plaintiffs that same day, October 7, 2004, and then in writing." (Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment at 14). Defendants also state that additional notice was supplied when Mrs. Alexander spoke to administrator Sharon Lieberstein about the suspensions. (Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment at 14). Ms. Lieberstein testified that she did not talk to Everett or Ashley before she sent out the suspension notices, probably on October 8, 2004, the day after they were suspended. (Deposition of Sharon Lieberstein, 12-8-06 at 25-26, Ex. 9, Vol. II). Everette was asked when was the first time he was told that he was suspended for ten days (after the October 7, 2004 incident). He responded: "I wasn't told. I think my mom was and then something was sent in the mail." (Deposition of Everette Ball, III, 8-17-06 at 195, Ex. 5, Vol. I). Ashley testified that when she returned home from the juvenile detention facility on October 7, 2004 that there was a message on her voice mail from school staff (Mr. Sheppard, she thought) that she and her brother were suspended for ten days. When asked if it was because of what happened that day, she said yes. (Deposition of Ashley Loren Ball, 9-21-06 at 123-124, Ex. 3, Vol. I). The Court should review the voice mail itself to determine whether the message provides the requisite contextual specificity as to each charge. Further, while we are unable to find a reference in Ms. Lieberstein's testimony to her talk with Ms. Alexander, the Court should similarly determine whether her talk with Ms. Alexander provided the requisite contextual specificity as to each charge.

Beyond the issue of notice, there is also the issue of the provision of a meaningful opportunity to be heard. As for the issue of a pre-suspension hearing, a key question is

whether Plaintiff Mary Alexander's conversation with Ms. Lieberstein constituted such hearing. As we construe Defendants' response to the hearing issue, Defendants are not alleging that such communication amounted to a pre-suspension hearing. And for good reason. A school administrator's speaking with a student's parent will not in every case create a meaningful opportunity for the student's side of the story to be told, as required by due process prior to a suspension of students. *Mayer et al. v. Austin Independent School District*, 167 F.3d 887, 888 (5th Cir. 1999). In *Mayer* plaintiffs contended that various administrators merely informed the parents of what had happened and the discipline *already* imposed. In the case at bar, the October 7, 2004 emergency suspension notice went out before Ms. Lieberstein had completed her investigation. The Alexander-Lieberstein talk also did not provide a meaningful opportunity to present the students' response to the charges since their mother was not there, at least during the beginning of the fight, and because the students did not participate in the conversation to have an opportunity to explain for themselves why they thought the charges and/or punishment were unfair. The conversation, consequently, suffered from a defect similar to that found in *Mayer*.

III. THE POST-SUSPENSION PROCESS IS DEFICIENT.

The Defendants' post-suspension process is deficient, a problem that impacts both the "emergency suspensions" and long-term suspensions. Defendants state:

> Plaintiffs' ongoing and unacceptable behaviors were the impetus for any disciplinary actions taken against Ashley and Everette. CMSJ SUMF 20, 24-27. These behaviors include Ashley's and Everette's voluntary participation in numerous confrontations and encounters with faculty and staff at HHS,CMSJ SUMF 20 (includes reference to numerous disciplinary infractions); their participation with other in beating up and battering "Shanelle," another HHS student, at the Boys' & Girls' Club simply because the girl had "disrespected" Everette, CMSJ SUMF 21; their wearing "hit list" T-shirts at school and

> threatening the girl once again to the extent that she felt unsafe and had to transfer to another school, CMSJ SUMF 22, 23; another girl who was listed on the "hit list" T-shirts was threatened, but since she would not fill out a formal complaint, there was nothing concrete Officer Price could do, CMSJ Exhibit "20" Price Affidavit at paragraphs 5-6.

(Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgement at 11). This sounds like Ashley and Everette were punished for more than the offenses stated in the October 7, 2004 emergency suspension notices. The notices would thus appear to be defective. Moreover, to the extent Defendants Bonine and Cylke based their decisions regarding the propriety of the October 7 suspensions on these additional allegations, such "hearings," which should be based on the conduct articulated in the notices, would appear to be unfair.

Defendants also argue that Plaintiffs squandered "another opportunity to be heard" through their failure to respond to Defendants' requests to interview them, requests made in response to Plaintiffs' discrimination complaint. (Defendants' Response to Plaintiffs Motion for Partial Summary Judgment at 15) School system discrimination complaint procedures are a potentially important tool to help resolve disputes between students and school officials about claims of racism in the school system. Such discrimination complaint processes, however, should, at a minimum, be transparent, structured to also address the issues underlying the symptoms that triggered the complaint and administered in a timely manner. Here, there was apparently a problem with the Defendants' timeliness in responding to the complaint. Defendants' discrimination complaint process also had a legitimacy or credibility problem because the school administration apparently failed to communicate to Plaintiffs how a suspension decision already affirmed and even broadened into a long-term suspension might be

overturned via the discrimination complaint process. That the requests for interviews came from none other than Defendants' counsel, who would (or did) presumably have some responsibility for advising and/or defending Defendants with respect to the arrests, the emergency suspensions, the long-term suspensions, the effectively involuntary transfers, the procedures employed by Defendants to provide notice and hearing and, last but not least, any racial discrimination claims, could not have engendered great faith in the legitimacy of the discrimination complaint procedure.

A discrimination complaint procedure such as this fails to satisfy due process. Defendants' counsel appears to have had an actual and/or potential conflict of interest between its ethical duty to its clients and its duty to serve as a fair and impartial arbiter. The dual role of Defendants' counsel created an unacceptable risk of bias. *Gonzales, et al., v. McEuen, et al.*, 435 F.Supp. 460, 464, 465 (D.C. Cal. 1977)(multiple roles of counsel created unacceptable risk of bias in context of due process proceedings). In short, not only was it not a good discrimination complaint procedure. It was not a good due process procedure either.

There is another aspect of Defendants' post-suspension process that is troubling. The ten (10) day "emergency suspensions" morphed into long-term suspensions.[12] Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. *Goss* at 565, 581, 584; *also see Montoya et al. v. Sanger Unified School District, In the County of Fresno, State of California*, 502 F. Supp.

[12] By letter dated October 20, 2004, Defendant Bonine suspended Everette Ball for 152 days and removed him from Hug High School. He was allowed to attend Opportunity School. He was not given any alternative but to accept the suspension or face a suspension for 90 days without any educational alternatives. (Plaintiffs Motion for Partial Summary Judgment at 3) By letter dated October 20, 2004, Defendant Bonine suspended Ashley Ball for 12 days and removed her from Hug High School and transferred her to Sparks High School. Ashley also had no alternative other than to accept the suspension or face a 90 day suspension without educational options. (Plaintiffs' Motion for Partial Summary Judgment at 3, 4)

209, 212, 213 (D.C. Cal. 1980)(an extension of the students' suspensions until the school governing board had determined whether to expel the students had to be treated as separate suspensions and *Goss* due process requirements had to be complied with). Plaintiffs met with Defendant Bonine to address the 10-day "emergency suspensions." Instead, after the meeting, they received letters imposing even longer term suspensions and transfers.[13] (Plaintiffs' Motion for Partial Summary Judgment at 3, 4).

This extension of the "emergency suspensions" should have triggered some additional due process protections for the students, *e.g.,* a separate notice and hearing, preferably before the implementation of the new punishment, providing them with the written evidence against them, the right to cross-examine Defendants' witnesses. *See Montoya* at 213; *Goss* at 565, 581, 584. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1975) articulates the interests to be considered in determining what additional process was due given the long-term suspensions. Those factors are: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1975).

Applying the principles of *Mathews* to the present case, the Ball siblings' interest is weighty on the scales of *Mathews.* The deprivations at issue here are significant, *e.g.*, long-term suspensions, effectively involuntary transfers, tarnished educational records,

[13] The euphemism "opportunity class" or "opportunity school" was also used in the California student suspension law dispute challenged in *Montoya v. Sanger Unified School District, in Fresno County, State of California*, 502 F. Supp. 209, 212 (D.C. California 1980).

both students' grades were not transferred resulting in their receiving F's in all their classes for the fall semester. (Plaintiffs' Complaint at 7; Plaintiffs' Motion for Partial Summary Judgment at 4).

The procedures employed by Defendants create an unreasonable risk of deprivation. Even considering our concerns with the process Defendants provided for the "emergency suspension," that was a short-term suspension. Once the Defendants extended this punishment into a long-term suspension for each sibling, some additional protection was required because the stakes were now considerably higher. While Defendants contend that they provided Ashley and Everette with another "opportunity to be heard" when they met with Defendant Cylke, they do not contend that at that meeting (or before) they provided Ashley and Everette with the written evidence against them (*e.g.*, police reports, witness statements) or with the opportunity to cross-examine the witnesses against the students. Plaintiffs, on the other hand, have argued that they were not given access to the evidence or allowed to present their side, an implication of which is that they were not allowed to cross-examine witnesses even in the "hearing" with Defendant Cylke. The "opportunity to be heard" is diminished, almost to a slogan, when a public school student subject to a long-term suspension is unable to see the written evidence and to test the witnesses. The "opportunity to be heard" must also be timely in order to be meaningful. Providing, or offering to provide, the evidence and opportunity to examine the witnesses at some point *after* the meeting with Defendant Cylke, that is, at some point after the Level II "hearing," fails the test of timeliness.[14]

The school system could easily and efficiently provide the necessary transparency and compliance with procedural due process by providing students punished via long-

[14] Of course, in this case the parties never got to a Level III hearing.

term suspensions with a timely and meaningful post-suspension hearing. Turning over copies of written evidence that the district already has in its possession is not a lot to ask.[15] Providing students with the opportunity to question school district witnesses is only fair. In some cases the district has already relied on some of those witnesses to rationalize its "emergency suspension." The provision of such additional protections to students facing such long-term suspensions would occur within a context whereby school systems generally have been allowed to provide notice and hearing for short-term suspensions that does not include such protections. But higher stakes for students justify some reasonable adjustments to what are, for the most part, largely informal, albeit routinized, systems of student discipline.

CONCLUSION

For much of human history, rulers and law were synonymous. Law was simply the will of the ruler. While modern democracies have in some important ways moved beyond such tyranny, these Defendants' conduct in this case flouts the Rule of Law. Defendants failed to provide Plaintiffs Ashley and Everette Ball with adequate process with respect to their "emergency suspensions" and with respect to their subsequent long-term suspensions. Not only was Defendants' "pre-deprivation" process flawed. Their post-deprivation process was also flawed. Defendants, consequently, employed arbitrary procedures. In the process, they injured the constitutionally protected property and reputational interests of Everette and Ashley. *Amicus curiae* respectfully requests that the Court grant Plaintiffs' Motion for Partial Summary Judgment, deny Defendants'

[15] This evidence should be provided to the students early enough so that they can review the material and prepare for the hearing.

Cross-Motion for Summary Judgment (Third Claim for Relief) and, in the Court's discretion, order that Defendants make an appropriate assessment of and such changes in their handling of student suspensions as may be necessary to ensure full compliance with the letter and spirit of *Goss* and *Mathews*.

Respectfully submitted,

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