New Jersey Special Education Practitioners
60 Park Place, Suite 300
Newark, NJ 07102

April 11, 2013

New Jersey Anti-Bullying Task Force
Public Hearing at Highland Regional High School
450 Erial Road, Blackwood, NJ 08012

Re: NJSEP Comments on Interim Report and ABR Implementation

Dear Ms. Wright, Mr. Meisner, Dr. Ricca, Dr. Lerman, Ms. Pergolin, Ms. de Koninck, and Ms. Peterpaul:

We offer these comments on implementation of the Anti-Bullying Bill of Rights Act (ABR) on behalf of the New Jersey Special Education Practitioners (NJSEP), an association of over 130 attorneys and other advocates who practice in the area of special education in New Jersey. Since students with disabilities are a frequent target of bullying in schools, NJSEP practitioners are developing considerable experience in the area of harassment, intimidation, and bullying (HIB), and have observed firsthand the implementation and non-implementation of the ABR in school districts throughout the state.

As advocates for students with disabilities, we ask that you address our major concerns regarding ABR implementation, set forth below.

We also respectfully request that, as your work moves forward, you expand your focus group list to include NJSEP and other groups, such as the Statewide Parent Advocacy Network, the New Jersey Coalition for Bullying Awareness and Prevention, Disability Rights New Jersey and Education Law Center, who can represent the interests of parents and students. While school personnel are amply represented in your selected focus groups, see Appendix A to Interim Report of New Jersey Anti-Bullying Task Force dated January 26, 2013 ("Report"), your list includes not one parent or student organization, nor one parent or student advocacy organization. This omission should immediately be remedied.

I. THE TASK FORCE'S PROPOSED GRANT OF DISCRETION TO SCHOOL PRINCIPALS IS TOO BROAD

In your Interim Report, this Task Force proposes to grant discretion to school principals to determine upon the receipt of an HIB allegation whether an investigation shall take place. While the intended grant of additional discretion may have merit in some circumstances, the Task Force's rationale for this change demonstrates that the grant -- as presently stated in the proposal -- goes too far. Unless revised, the proposal will have the unintended effect of stopping meritorious HIB investigations before they start.

The rationale provided in the Report cites two problems that the proposal is supposed to address, both having to do with school district complaints that school personnel are spending too much time investigating meritless HIB allegations: First, the Report notes that the actual definition of HIB is unclear to parents and administrators, which leads to non-HIB events being alleged as HIB, and wasting the time of school investigators. Second, the Report says that principals are failing to implement consequences for clear violations of their student conduct codes in areas other than HIB, even where more immediate discipline is needed, because of the ongoing HIB investigation. (Report at 23-24.)

This Task Force proposes to solve these two school district complaints by granting all principals the discretion to simply not conduct any investigation into HIB allegations, whenever they believe that the bare facts presented to them at the onset "do not meet the minimum standard of HIB as set forth in the ABR definition." (Report at 24.) As written, this proposed language would allow each principal to decide in every case and without any investigation of any kind that the HIB definition has not been met.

As to remedying the first problem of erroneous HIB complaints, this language goes too far, and will inevitably curtail investigation of numerous meritorious claims. A limiting revision should be added to the proposed language to rectify this problem, yet still provide an appropriate amount of discretion to deal with the most obvious complaints that do not constitute HIB. As to the second problem of delaying student conduct code enforcement, the proposed provision will have no impact. Instead, a separate directive from this Task Force should be provided to eliminate that problem.

A. This Task Force Should Revise Its Preliminary Recommendation With Regard to Principal Discretion.

As explained in your Report – the *intention* of the proposed solution is that any allegations that even "**appear** to satisfy the definition of HIB" are **"required"** to be referred for investigation. (Report at 26.) This explanation

more appropriately limits the grant of discretion to principals than the actual proposed solution language.

The limitation is critically important. Principals as much as any other administrator are just as likely to have mistaken concepts of the definition, and may have personal bias concerning what does or does not meet the definitions. The statute was enacted precisely because such administrators were in the past dismissing student HIB complaints without sufficient investigation or action. And they often did so based on inaccurate understandings of the law.

For example, because administrators received some minimal training on the federal bullying/harassment standards under the U.S. Supreme Court decision in Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), they sometimes rejected HIB complaints as not being sufficiently "severe" or not being sufficiently "numerous" to satisfy that legal standard. These were judgment calls which often proved inaccurate when cases were taken to court. Had they conducted investigations, these administrators would have uncovered more serious problems that needed to be addressed, and would have avoided judicial intervention. The New Jersey statute was specifically enacted to stop that sort of failure to investigate.

The proposed language in the Report allows principals to again make those types of early judgment calls without having many, if any, facts, and relies on their ability to accurately apply the proper HIB statutory analysis in all factual circumstances – limited as those facts will be at the initial complaint. (Report at 24-25.) The proposed language should be amended to more accurately reflect the stated intention of the Task Force -- **that any facts that might possibly meet the statutory definition must be investigated.** Therefore, the proposal should be revised as follows:

> " ... the principal or the principal's designee has the discretion to determine, based on the totality of facts available, whether the incident ***appears that it might*** meet the minimum standard of HIB as set forth in the ABR definition. In instances when a principal determines, based on the initial fact finding, that the reported situation does not ***appear that it might*** meet the standards set forth, the HIB investigation will not be required. ***If, however, the facts might satisfy the definition, an investigation is required.*** ...."

(Report at 24-25; suggested revisions in bold, italicized type.)

This revision to the proposed language will ensure that the persons most trained to conduct HIB investigations and to make HIB determinations (the ABR designees) will be making the HIB decision whenever there is an appearance that an HIB incident might have occurred, and that they will be

doing so with the full benefit of at least some investigation into the allegations at issue.

B. The Preliminary Recommendation Does Not Address The Cited Problem Of Delay In Code Of Conduct Implementation.

Even with the above revision to the proposed language, the perceived problem of delayed implementation of other Code of Student Conduct violations is not resolved, nor should it be resolved, by granting principals additional discretion to not investigate HIB complaints.

Instead, the solution is to provide a separate recommendation from the Task Force clarifying that every principal does ***currently*** have the discretion to implement consequences for other Code violations regardless of whether there is a related ongoing HIB investigation.

There is nothing in the statute, for example, suggesting that a principal should delay punishment of a student who has punched another student in violation of a school district's Student Code of Conduct simply because there was also an allegation that the punch was an HIB incident or part of an HIB incident. Principals have no need to curtail an HIB investigation in order to implement code of conduct consequences. If the ongoing investigation later proves HIB occurred, the principal may always then determine that additional or different consequences need to be taken.

On the other hand, the principal currently has discretion to *choose* to delay immediate consequences until the HIB investigation is complete. That choice may be appropriate, for example, in situations where the hypothetical punch above may have been thrown in retaliation to repeated bullying over a long period of time. A principal may in that circumstance want to delay a consequence to the child who threw the punch until the principal understands more of the surrounding facts, which may require that the HIB investigation first be completed.

In short, if principals are improperly delaying consequences during HIB investigations, the solution is not to provide them with additional discretion to curtail the HIB investigations, but instead to specifically clarify that principals already have the discretion under the current HIB statute to enforce (or not to enforce) whatever student conduct code provisions they deem appropriate -- even while an HIB investigation is ongoing.

II. THE SCOPE OF AN HIB INVESTIGATION NEEDS TO BE DEFINED BY THIS TASK FORCE IN PROPOSED REGULATIONS

The ABR provides that each school district shall adopt a policy prohibiting harassment, intimidation or bullying, and allows school districts to have local control over the contents of the policy. N.J. Stat. Ann. § 18A:37-15(a). However, there are some minimum requirements, one of them being that the policy establish a procedure for prompt investigation of reports of violations and complaints. N.J. Stat. Ann. § 18A:37-15(a)(6).

In many instances, parents are encountering situations where the target or perpetrator of bullying, or his or her parents, are not interviewed as a part of the investigation. This is critical as the statute cannot be effective if all parties who have been witness to, or subjected to, the alleged bullying incidents are not interviewed as a part of the investigation. While the ABR requires that the principal or principal's designee conduct the investigation, it is not specific as to the scope of the investigation. N.J. Stat. Ann. § 18A:37-15(a)(6)(a). Defining the scope of the investigation is an area that must be addressed by regulation.

It should go without saying that the target of alleged HIB is included in the investigation, yet even this basic step is too often left out. The inclusion of the target's parents is also critical because it is common for students subjected to HIB behavior to minimize the incidents and to indicate they are "fine" regardless of their level of suffering. This behavior results from the shame students feel when they have been selected out of the school community as a target of abuse. Students, whether targets or perpetrators, may be far more open with their parents than with disciplinary administrators. Parents may also have information unknown to the administration concerning changes in the student's behavior, and how long it has been occurring, which may lead an administrator to uncover an ongoing problem rather than the single incident that may have been reported. These factors are even more important for students who have special needs. Parental interviews of students with disabilities may often provide insights otherwise completely unknown to a principal or investigating administrator. For the same reason, whenever students with IEPs or Section 504 Plans are involved in an alleged HIB incident, the Child Study Team should be contacted at the onset of the investigation and given an opportunity to provide information.

Therefore, we propose the following language be issued to ensure that a fair, full investigation takes place:

> The investigation shall include, at a minimum, interviews of people who were involved in the reported incident, including the alleged target, the alleged bully and the parents of both. Whenever

students with IEPs or Section 504 Plans are involved in an alleged HIB incident, the Child Study Team or Section 504 administrator should be contacted at the onset of the investigation and given an opportunity to provide relevant information.

If this language were added it would provide uniformity as to the minimum components of the investigation and provide assurance to school districts that if the anti-bullying specialist interviews these individuals, they are complying with the requirements of the statute.

III. PROPOSED REGULATIONS ARE NEEDED TO ADDRESS DISCLOSURE OF INVESTIGATION RESULTS

The ABR specifically entitles the parents of students who are parties to an HIB investigation to receive information in writing about the investigation. This information must include "the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying." N.J. Stat. Ann. § 18A:37-15(b)(6)(d). This Task Force has not addressed the disclosure of investigation results in its Report, but, as described below, such disclosure constitutes an issue of grave importance to parents and students and an area of significant abuse by school districts.

We encourage you to recommend that the State Department of Education promulgate regulations to implement the statute including that school districts be required to contemporaneously disclose to parents of a child targeted by HIB any and all resulting disciplinary actions against an alleged perpetrator. School districts must also be required to provide parents with a redacted copy of the investigation report prepared for the Board of Education.

In a number of unfortunate cases that we have seen, the HIB has been severe enough that the parent and student have legitimate concerns about the student's safety at school. When a child is too terrified or humiliated to return to school, a parent reasonably wants to know what steps the school district has taken to eliminate the HIB.

Many school districts, however, will disclose only that unspecified remedial action has been taken and unspecified consequences have been imposed. Such a response provides no meaningful information to a family who is trying to determine whether the school district has responded appropriately. The result can often be a stand-off between the school district and the family that has resulted in due process proceedings, truancy proceedings and even involvement of DYFS. All of which could be avoided by simple disclosure of the disciplinary actions.

There is no sound legal basis for denying parents access to, at a minimum, redacted investigation results and specific student discipline and remediation efforts. We believe that school districts are refusing to provide the information out of an overly cautious attempt to avoid potential complaints from parents of students who are found to have committed an act or acts of HIB. The law does not support that approach, and the ABR was not enacted to protect school districts against misplaced legal arguments.

We are aware of no cases under FERPA, the federal Family Educational Rights and Privacy Act, prohibiting the release of redacted student records. To the contrary, the Sixth Circuit Court of Appeals addressed this directly in United States v. Miami University, 294 F.3d 797, 824 (6th Cir. 2002), and specifically held that student disciplinary records from which personally identifiable information has been redacted can be released under FERPA.

Indeed, the reasoning of that court was adopted by the New Jersey appellate court in rejecting a board of education argument that FERPA prohibits the disclosure of redacted disciplinary records. K.L. v. Evesham Township Board of Education, 423 N.J. Super. 337, 363-364 (2011), cert. denied 210 N.J. 108 (2012).[1]

Most on point for the Task Force, the Tenth Circuit in Jensen v. Reeves, 3 Fed. Appx. 905, 2001 WL113829 (10th Cir. 2001) provided strong, direct guidance to school districts precisely in our context – disclosure of disciplinary consequences to the parents of a child who has been victimized by other students at school. In Jensen, the 10th Circuit concluded that "the contemporaneous disclosure to the parents of a victimized child of the results of any investigation and resulting disciplinary actions taken against an alleged child perpetrator does not constitute a release of an 'education record'" within the meaning of FERPA. 3 Fed. Appx. at 910. To rule otherwise, said the court, "would place educators in an untenable position: they could not adequately

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[1] In the Evesham case, since the issue was not directly before it, the court left for decision in an appropriate case whether records created in compliance with the ABR are subject to **full public** disclosure under New Jersey's Open Public Records Act (OPRA). However, the court noted that the ABR "does not expressly modify or repeal any provision of OPRA or other laws regarding access to school records." 423 N.J. Super. at 359. In our view, when the issue does come squarely before a New Jersey court, redacted ABR investigation reports will be required to be disclosed under OPRA. But for Task Force purposes, the issue is only the far more limited disclosure to parents of students who have been targeted by HIB.

convey to the parents of affected students that adequate steps were being undertaken to assure the safety of the student." Id. The court determined that "such a targeted, discrete, contemporaneous disclosure" was not intended to be prohibited by FERPA. Id. (This case is attached hereto for your convenience.)

Even more than putting a school district in an untenable position, failure to disclose disciplinary consequences puts parents of victims in the untenable situation of having no information upon which they can rationally determine if it is safe to send their child back into the school.

Because we have seen disparity in the manner in which school districts are implementing the ABR mandate to disclose information to parents -- with most school districts taking the "just trust us" approach and declining to release any information other than the mere fact that they have taken some type of action and imposed some type of consequences -- it is critically important that the Task Force recommend that the State Department of Education address this aspect of implementation through regulation. In addition, we note that clarity with regard to the information that must be released by school districts is important not only for students who are the targets of bullying, but also for students who must defend themselves against allegations of HIB.

IV. THE PROTOCOLS FOR INVESTIGATING A COMPLAINT BY OFFICES OF THE COUNTY SUPERINTENDENT SHOULD BE MADE PUBLIC AND A COMPLAINT INVESTIGATION REPORT FORM SHOULD BE DEVELOPED

The ABR requires that the Commissioner of Education establish a formal protocol pursuant to which the office of the executive county superintendent of schools shall investigate a complaint that documents an allegation of a violation of the statute by a school district in the county. N.J. Stat. Ann. § 18A:37-25(a). However, this protocol is not currently available on line to parents, and requests for copies of the protocol have reportedly been denied. Parents often report that they feel that the county superintendent merely "rubber-stamps" whatever action or inaction was taken by the local school district.

Parents should have ready access to this protocol so that they may be aware of what steps the office of the executive county superintendent is required to take if they are alleging that the local school district is not complying with the law. How can a parent be assured that this procedure is being followed if it is not revealed to those parents who have concerns in the first place?

Therefore, the Task Force should strongly recommend the posting of the Commissioner's protocol on the Department of Education's website in the

interest of transparency and to create a level of trust and assurance that offices of the executive county superintendents are in fact complying with this portion of the statute. Moreover, we urge the Task Force to further recommend that the Department develop, and make available on its website, a complaint investigation request form for HIB complaints. Few parents are aware that the ABR mandates that county review be available when HIB is not resolved at the local level, and the Department's failure to post its protocol and to develop a complaint form serves to keep parents in the dark. We note that the Department has developed a complaint investigation request form to implement the complaint procedure required to address violations of special education law. There is no reason that violations of the ABR should not be addressed in a similar manner, making the county review process accessible to parents.

Thank you for consideration of these comments. If you have additional questions or concerns about these comments, please do not hesitate to contact Jerry Tanenbaum, Esq. at 856-482-5733.

Respectfully,

Jerry Tanenbaum, Esq.
Schnader Harrison Segal& Lewis LLP
220 Lake Drive East Suite 200
Cherry Hill 08002
(856) 482-5733

Amelia Carolla, Esq.
Reisman Carolla Gran LLP
19 Chestnut Street
Haddonfield, NJ 08033
(856) 354-0081

Elizabeth Athos, Esq.
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
(973) 624-1815

On behalf of the New Jersey
Special Education Practitioners

The undersigned organizations hereby endorse these comments of the New Jersey Special Education Practitioners:

Education Law Center
60 Park Place Suite 300
Newark, NJ 07102
(973) 624-1815

Statewide Parent Advocacy Network
35 Halsey St. 4th floor
Newark, NJ 07102
(973) 642-8100

The Special Education Leadership Council of NJ
23 Wellington Drive
Annandale, NJ 08801
(908) 730-0080

The Mellburn-Short Hills Special Ed. Committee
mspecmail@gmail.com
www. mspecmillburn.org
(201) 247-3812

EXHIBIT A

CARL JENSEN and JUDY JENSEN, for themselves individually, and on behalf of their children, C.J., AMJ and ABJ, Plaintiffs-Appellants, v. MUFFET REEVES, in her official and individual capacity; ALPINE SCHOOL DISTRICT; TOM RABB, in his official and individual capacity; ROY PEHRSON, in his official and individual capacity; and KENT PIERCE, in his official capacity, Defendants-Appellees.

No. 99-4142

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

3 Fed. Appx. 905*; *2001 U.S. App. LEXIS 1935*; *2001 Colo. J. C.A.R. 794

February 9, 2001, Filed

NOTICE: [**1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *2001 U.S. App. LEXIS 10370.*

PRIOR HISTORY: (District of Utah). (D.C. No. 98-CV-208-B).

DISPOSITION: AFFIRMED.

COUNSEL: For CARL JENSEN, JUDY JENSEN, Plaintiff - Appellant: Matthew F. Hilton, Springville, UT.

For MUFFET REEVES, ALPINE SCHOOL DISTRICT, TOM RABB, ROY PEHRSON, KENT PIERCE, Defendants - Appellees: Brent A. Burnett, Asst. Attorney Gen., Office of the Attorney General Litigation Division, Salt Lake City, UT. Renee Spooner, Utah Attorney General's Office Litigation Unit, Salt Lake City, UT.

JUDGES: Before MURPHY and ANDERSON, Circuit Judges, and KANE, ** District Judge.

** Honorable John L. Kane, Jr., District Judge, United States District Court for the District of Colorado, sitting by designation.

OPINION BY: Michael R. Murphy

OPINION

[*906] **ORDER AND JUDGMENT ***

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of *10th Cir. R. 36.3.*

[**2] After C.J. was suspended from Sharon Elementary School for engaging in several alleged incidents of misconduct, his parents, Carl and Judy Jensen, filed this civil rights action on their own behalf and on behalf of C.J. (collectively the "Plaintiffs") against the following entity and four individuals: Alpine School District; Tom Rabb, Roy Pehrson, and Kent Pierce, employees of Alpine School District; and Muffet Reeves, the principal of Sharon Elementary School (collectively the "Defendants"). The Plaintiffs' civil rights complaint alleged the following seven general causes of action: (1) they were denied procedural due process in violation of the United States and Utah Constitutions when C.J. was suspended from school; (2) the Defendants failed to comply with § 504 of the Rehabilitation Act in dealing with C.J.'s behavioral problems; (3) the Defendants' actions relating to the suspension of C.J. denied them equal protection under both the United States and Utah Constitutions; (4) the Jensens were denied their right as parents "to direct the care and upbringing of their children in fulfillment of their moral, God-given duty to do so" in violation of both

the United States and Utah [**3] Constitutions; (5) the Defendants infringed C.J.'s interest in his reputation; (6) the Defendants violated their privacy rights under the United States Constitution, the Family Educational Rights and Privacy Act ("FERPA"), and the Utah Constitution; and (7) the Defendants violated their *First Amendment* right to petition the government for redress of grievances.

[*907] In response to the Defendants' *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, the district court dismissed the Plaintiffs' complaint in its entirety, resolving both the federal and state claims on the merits. On appeal, the Plaintiffs contend as follows: (1) the district court erred as a matter of law in ruling that their civil rights complaint failed to state a claim under the United States Constitution, Rehabilitation Act, and FERPA; (2) the district court abused its discretion in refusing to dismiss their state-law claims without prejudice after concluding the complaint failed to state a valid federal claim; and (3) even assuming the district court acted within its discretion in reaching the merits of their state-law claims, it erred in dismissing those claims on the ground that the Plaintiffs had not filed a timely notice [**4] of claim pursuant to Utah Code Ann. §§ 63-30-11 and 63-30-13. This court exercises jurisdiction pursuant to *28 U.S.C. § 1291* and **affirms** the district court's order of dismissal.

The district court began its analysis of the Defendants' motion to dismiss by correctly noting that it must assume the truth of all well-pleaded facts alleged in the Plaintiffs' complaint, viewing those facts and all reasonable inferences in the light most favorable to the Plaintiffs. *See* Dist. Ct. Memorandum Opinion & Order at 6; *see also Roman v. Cessna Aircraft Co., 55 F.3d 542, 543 (10th Cir. 1995)*. Applying that standard, the district court set forth a thorough recital of the relevant facts, drawing those essential facts from the well-pleaded allegations in the Plaintiffs' original and first amended complaints. *See* Dist. Ct. Memorandum Opinion & Order at 2-6. Because this court's *de novo* review of the Plaintiffs' amended complaint reveals that the district court's rendition of the facts is both thorough and accurate, and because neither party on appeal objects to the district court's statement of the facts, this court need not restate the relevant [**5] facts.

The district court began by addressing each of the Plaintiffs' numerous federal claims. As noted by the district court, the Plaintiffs' federal due process claims arise out of the events surroundings C.J.'s ten-day suspension. In particular, the Plaintiffs argue that they were denied due process with regard to the manner in which Reeves investigated and handled the suspension. They further argue that the post-suspension hearing was not in conformity with Alpine School District policy. As to Plaintiffs' claims regarding the processes utilized by Reeves in investigating and handling C.J.'s suspension, the district court concluded those processes afforded C.J. the rudimentary precautions against unfair or mistaken findings of misconduct as required by *Goss v. Lopez, 419 U.S. 565, 581, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975)*. With regard to the post-suspension hearing, the district court noted that the Jensens were given notice of the hearing and an opportunity to attend. When the Jensens were unable to attend the hearing, the administrative panel sent them a tape of the hearing and informed the Jensens that they could respond in writing or set another time to reconvene [**6] the panel. These procedures complied with Alpine School District policy. Finally, the district court concluded that to the extent Carl and Judy Jensen were claiming a violation to their due process rights arising out of the suspension of C.J., those claims failed because procedural due process is due to the student facing suspension, not that student's parents.

As to Plaintiffs' claims arising under the Rehabilitation Act, the district court noted that although the Jensens were provided with all the documents necessary for C.J. to be considered for a special education placement, including permission slips, the [*908] Jensens never consented to the placement of C.J. in such a program. Absent such consent, the Defendants were without authority to place C.J. in a program providing special education and related services. Furthermore, the district rejected as inconsistent with controlling regulations the Plaintiffs' assertion that their private evaluation of C.J., which was communicated to C.J.'s classroom teacher and other school officials in the process of dealing with and trying to control C.J.'s behavioral outbursts, constituted consent to special placement. *See 34 C.F.R. §§ 300.500,* [**7] *300.504.*

The Plaintiffs' amended complaint also alleged that the Defendants denied C.J. equal protection under the United States Constitution when they treated him differently than other similarly situated students. In finding that this allegation failed to state a claim, the district court first noted that neither the Plaintiffs' original nor amended complaints alleged any facts to support their conclusory allegation that C.J. was treated differently from similarly situated students. Furthermore, the Plaintiffs' equal protection claim is premised on the assumption that C.J. qualified as disabled under the Rehabilitation Act. The district court concluded that because the Plaintiffs' Rehabilitation Act claim failed as set forth above, their equal protection claim failed on the same grounds.

The district court concluded the Jensens' claim that the Defendants had interfered with their right to direct the care and upbringing of C.J. failed because the well-pleaded facts in the amended complaint demon-

strated the Defendants' actions were rationally related to the legitimate state purpose of disciplining students who violate school rules. *See generally San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973)*; [**8] *New Jersey v. T.L.O., 469 U.S. 325, 334, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985)*. The district court recognized, however, that the "rational relationship" test did not apply to the extent the Jensens had coupled their parental-right claim with a free-exercise-of-religion claim. Nevertheless, other than broadly stating that the actions of the Defendants "interfered with their ability to live what they believe is the best way to fulfill their moral duty to God regarding C.J. by providing for his social and moral development" the Plaintiffs' amended complaint failed to identify any specific religious belief that was infringed by the Defendants during the events surrounding the suspension of C.J. Even assuming, however, that the Jensens had successfully added a religious component to their parental-rights claim, the district court concluded the amended complaint still failed to state a claim. There was nothing in the complaint to indicate the actions of the Defendants were based on anything other than purely secular considerations that were content neutral and implemented in a reasonable manner. *See Dep't of Human Res. v. Smith, 494 U.S. 872, 882, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)* [**9] ("Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.").

As to C.J.'s claim regarding injury to his reputational interests, the district court simply noted that something more than mere defamation must be involved in order to state a federal claim under *42 U.S.C. § 1983. See Paul v. Davis, 424 U.S. 693, 712, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)*. Because the Defendants provided C.J. all of the process due during the suspension-decision proceedings, the fact that other students were aware of the suspension [*909] could not, standing alone as it did, form the basis of an action for injury to reputation.

In their first amended complaint, the Plaintiffs asserted that Reeves violated their right to privacy, which right arose under the *Fourth Amendment*, the *Fourteenth Amendment*, and FERPA. The district court concluded that the Plaintiffs' privacy claims based on the *Fourth* and *Fourteenth Amendments* failed to state a claim because Reeves' investigation [**10] of the complaints against C.J. was reasonable and Reeves' suspension decision was made in conformity with *Lopez*. The district court concluded that the Plaintiffs' privacy claims based on FERPA failed to state a claim because: (1) Reeves' alleged disclosure to the parents of children involved as victims or witnesses did not constitute a prohibited disclosure of an educational record under *20 U.S.C. § 1232g*; (2) FERPA only regulates the release of records pursuant to a policy or practice and there was nothing in the complaint to indicate Reeves' disclosures were pursuant to such a policy or practice; and (3) FERPA does not create a private cause of action enforceable under *§ 1983*.

The district court dismissed the Plaintiffs' claims relating to their right to petition the government for redress of grievances, noting that the chain-of-command comments attributable to the Defendants, even if they could be construed as critical of the Jensens' actions in contacting the Alpine School District Superintendent rather than Reeves, fell far short of an infringement of the Jensens' right to petition for redress of grievances.

This court reviews the sufficiency of [**11] a complaint *de novo* and will affirm a 12(b)(6) dismissal only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999)* (quotations omitted). All well-pleaded allegations in the complaint are accepted as true and viewed in the light most favorable to the Plaintiffs. *See id.* Nevertheless, while this court must accept reasonable inferences derived from well-pleaded facts, we need not accept mere conclusions characterizing pleaded facts or "unwarranted inferences drawn from the facts or footless conclusions of law predicated upon them." *Bryson v. City of Edmond, 905 F.2d 1386, 1390 (10th Cir. 1990)* (quotations omitted).

This court has conducted a *de novo* review of the Plaintiffs' original and amended complaints, the district court's order of dismissal, and the parties' briefs and contentions on appeal. That review demonstrates that the district court's order of dismissal is comprehensive, thorough, and substantially correct. Accordingly, with the exception of the brief comments set [**12] out below with regard to the Plaintiffs' FERPA claims, this court affirms the district court's 12(b)(6) dismissal of the Plaintiffs' federal claims for substantially those reasons set forth in the district court's order of dismissal filed March 29, 1999.

We recognize that after the district court entered its order of dismissal this court issued its opinion in *Falvo v. Owasso Independent School District No. 1-001, 233 F.3d 1201 (10th Cir. 2000)*. In *Falvo*, this court held that the provisions of FERPA can be privately enforced through an action brought pursuant to *§ 1983. See id. at 1211-13*. Based on *Falvo*, this court specifically disavows any contrary conclusion expressed by the district court in dismissing the Plaintiffs' amended complaint. Neverthe-

less, this court concludes that the district court correctly dismissed the Plaintiffs' FERPA claims.

[*910] The Plaintiffs' complaint identifies two disclosures that purportedly implicate FERPA's privacy provisions. The first disclosure occurred on October 31, 1997, in a memorandum sent by Reeves to the parents of a female student named L.P. According to the amended complaint, "the memorandum outlined [**13] what had been done in response to a harassment complaint that had been filed against C.J. The memorandum indicated that matters had been investigated in accordance with district policy and C.J. would lose his lunch privileges during the first week of November and be required to stay in the principal's office." Like the district court, we conclude that the contemporaneous disclosure to the parents of a victimized child of the results of any investigation and resulting disciplinary actions taken against an alleged child perpetrator does not constitute a release of an "education record" within the meaning of *20 U.S.C. § 1232g(a)(4)(A)*. Reading such disclosures to fall within the ambit of *§ 1232g* would place educators in an untenable position: they could not adequately convey to the parents of affected students that adequate steps were being undertaken to assure the safety of the student. Nor do we think that such a targeted, discrete, contemporaneous disclosure fits within the bounds of the plain language of *§ 1232g(a)(4)(A)*. Finally, we note that this particular disclosure is completely unlike the broad, routinized disclosures of student grades at issue in [**14] *Falvo. See 233 F.3d at 1203.*

The second disclosure set out in the Plaintiffs' amended complaint related to a separate playground incident that allegedly occurred on March 2, 1999. The amended complaint alleges that on March 4th, Reeves sent a series of memoranda to "the parents of students who had claimed they had been hit or touched by C.J. as well as other students who had reported were [sic] witnesses to the conduct of C.J." In both their appellate brief and at oral argument, the Plaintiffs emphasized that this second disclosure went not only to the parents of the children allegedly assaulted by C.J., but also to the parents of children who simply witnessed the incident. This court need not decide how a broader, yet still contemporaneous, disclosure to the parents of children witnesses, in addition to the parents of alleged victims, would affect the calculus set out above because the memoranda identified in the amended complaint simply do not disclose anything that could qualify as an education record under *§ 1232g(a)(4)(A)*. Instead, the memoranda all reflect the following information: (1) an incident allegedly occurred on the playground involving C.J. and a [**15] number of other children; (2) C.J. was allegedly verbally and/or physically abusive to several children during the incident; (3) each addressee's child had been questioned about the incident and each reported C.J. had been abusive in some manner; (4) C.J. was informed that *if he had been* abusive, he must stop such behavior immediately; and (5) C.J. was warned that there were consequences for abusive behavior. As should be apparent, the memoranda identified in the complaint disclosed no more than the fact that the addressee's child had been involved in an alleged incident involving C.J., either as a victim or witness, and that the addressee's child had been questioned about the incident. The memoranda do not disclose whether C.J. was ultimately found to be at fault, whether he was punished, or, if so, what that punishment was. The Plaintiffs have not identified, and this court has not found, a single case holding that the extremely limited type of information conveyed here constitutes an education record under *§ 1232g*. Accordingly, this court concludes that the district court did not [*911] err in dismissing the Plaintiffs' FERPA claim pursuant to *Fed. R. Civ. P. 12(b)(6)*.

Having concluded [**16] that the district court properly dismissed the Plaintiffs' federal claims, we must move on to address the propriety of the district court's decision to address the Plaintiffs' state claims on the merits. On appeal, the Plaintiffs raise the following three primary contentions: (1) the district court abused its discretion in reaching the merits of their state claims after having dismissed all federal claims; (2) the district court erred in concluding that the state claims were barred because of the Plaintiffs' failure to comply with the notice-of-claim provisions of the Governmental Immunity Act (the "Act"), Utah Code Ann. §§ 63-30-11, 63-30-13; and (3) even assuming their failure to file a notice of claim barred their action for money damages, their claims for declaratory and equitable relief were unaffected by the Act's notice-of-claim provisions.

Citing to this court's opinion in *Bauchman ex rel. Bauchman v. West High School, 132 F.3d 542, 549-50 (10th Cir. 1997)*, the Plaintiffs assert that the district court erred in reaching the merits of their state law claims after dismissing their federal claims on the pleadings. Although *Bauchman* noted a general preference [**17] in favor of dismissing state claims without prejudice when federal claims are dismissed on the pleadings, it noted that district courts retain discretion to reach the merits of pendent state claims. *See id. at 549.* On appeal, this court analyzes only whether the district court abused that discretion. *See id. at 550.* In this circuit, abuse of discretion is defined as "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Coletti v. Cudd Pressure Control, 165 F.3d 767, 777 (10th Cir. 1999)*. Upon review of the record, keeping in mind those factors identified by the court in *Bauchman*, we conclude that the district court did not abuse its discretion in reaching the merits of the state claims. *See 132*

F.3d at 549 ("Pendent jurisdiction is exercised on a discretionary basis, keeping in mind considerations of judicial economy, convenience and fairness to the litigants."). In particular, as briefly set forth below, this court agrees with the district court's resolution of the Plaintiffs' state claims and with the district court's observation that the Plaintiffs' state claims are not as novel as Plaintiffs [**18] would paint them.

Under the provisions of the Act, all claims against a political subdivision and its employees are barred unless a notice of claim is filed with the appropriate entity within one year after the claim against that entity or its employees arises. *See* Utah Code Ann. § 63-30-13. It is uncontested that the Plaintiffs never filed a notice of claim. Citing the Utah Supreme Court's decision in *Bott v. DeLand, 922 P.2d 732 (Utah 1996)*, the Plaintiffs argued before the district court that because their claims arose under the Utah Constitution, the Act and its notice-of-claim provisions did not apply. In rejecting this argument, the district court first recognized that *Bott* did stand for the proposition that governmental entities cannot use governmental immunity to shield themselves from liability for violations of the Utah Constitution. *See id. at 736*. Nevertheless, the district court concluded that *Bott* could not be reasonably read for the proposition that none of the provisions of the Act, including its purely procedural requirements, apply to claims arising under the Utah Constitution. Instead, relying on the plain language [**19] of the Act, the district court concluded that the Act's notice-of-claim provisions applied to all claims against a governmental entity and its employees. *See* Utah Code Ann. §§ 63-30-2(1), -11.

On appeal, the Plaintiffs reassert the same arguments raised before the district [*912] court. Like the district court, this court does not read *Bott* as standing for the broad proposition advanced by the Plaintiffs. In fact, the court in *Bott* specifically recognized that the legislature could impose rules and regulations regarding remedies for constitutional violations, as long as those rules do not unreasonably impair the constitutional right at issue. *See 922 P.2d at 736*. Plaintiffs never asserted before the district court that the Act's notice-of-claim provisions constitute an unreasonable impairment. Furthermore, it is worth noting that the Act specifically provides that constitutional claims involving the taking of private property without just compensation are governed by the Act. *See* Utah Code Ann. § 63-30-10.5. This belies the Plaintiffs' assertion that the Utah legislature never intended that claims based on the Utah Constitution be governed by the provisions [**20] of the Act.

Finally, Plaintiffs contend that even assuming their claims for money damages are barred by their failure to file a notice of claim, the district court erred in dismissing with prejudice their state claims for declaratory and equitable relief. *See id.* § 63-30-2(1) (defining claim for purposes of the Act as "any claim or cause of action for money or damages"); *id.* § 63-30-13 ("A *claim* against a political subdivision, or against its employees for an act or omission occurring during the performance of the employee's duties . . . is barred unless notice of claim is filed with the governing body of the political subdivision . . . within one year after the claim arises." (emphasis added)). This court has scoured the appellate record and concludes that this argument was never advanced before the district court. The Plaintiffs' filings before the district court only vaguely reference the fact that their state claims contained equitable and declaratory elements. Those filings, however, never indicated any specific legal basis for treating the equitable claims differently from the damages claims. Because the Plaintiffs failed to adequately raise this argument before [**21] the district court, we will not consider the question for the first time on appeal. *See Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992).* [1]

1 We reach the same resolution as to the Plaintiffs' claims that (1) C.J.'s time for filing a notice of appeal has not expired because of his minority and (2) the district court should have liberally read their complaint as stating a claim that the individual employees acted in a fraudulent or malicious fashion thereby obviating the need to file a notice of claim. Because these arguments were not raised before the district court, this court will not consider them on appeal.

The judgment of the United States District Court for the District of Utah dismissing the Plaintiffs' claims pursuant to *Fed. R. Civ. P. 12(b)(6)* is hereby **AFFIRMED.**

ENTERED FOR THE COURT:

Michael R. Murphy

Circuit Judge