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# Potentials and Impediments to Universal, School-based Screening for Behavioral and Emotional Risk: A Critical Discourse Analysis of Current Case Law

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ACCEPTANCE

This dissertation, POTENTIALS AND IMPEDIMENTS TO UNIVERSAL, SCHOOL-BASED SCREENING FOR BEHAVIORAL AND EMOTIONAL RISK: A CRITICAL DISCOURSE ANALYSIS OF CURRENT CASE LAW, by NATASHA DEANNE GARDNER, was prepared under the direction of the candidate's Dissertation Advisory Committee. It is accepted by the committee members in partial fulfillment of requirements for the degree Doctor of Philosophy in the College of Education, Georgia State University.

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ABSTRACT

POTENTIALS AND IMPEDIMENTS TO UNIVERSAL, SCHOOL-BASED SCREENING FOR BEHAVIORAL AND EMOTIONAL RISK: A CRITICAL DISCOURSE ANALYSIS OF CURRENT CASE LAW

by

Natasha D. Gardner

Disproportionality, the over- or underrepresentation of a particular group compared to its presence in a population, in special education is a long-standing issue (Dunn, 1968; U.S. Department of Education, 2006; Waitoller, Artiles, & Cheney, 2010). Some scholars have proposed group or universal screening for emotional and behavioral risk in schools as a method of addressing disproportionality (Adelman & Taylor, 1999; Weist, Evans, & Lever, 2003). Notwithstanding the public health implications of disproportionality, considering previous case law, questions exist as to the legality of such screening programs in public schools (*Doe v. Heck*, 2003; *Fields v. Palmdale*, 2005). The purpose of this inquiry was to apply critical discourse analysis (CDA) to the federal case of *Rhoades v. Penn-Harris* (2008) to explore how court discourse reflects issues of social power and multidisciplinarity in the context of a school mental health screening program. CDA has roots in the postmodernist perspective that scholarly discourse is socially influenced and consequential (Weis & Wodak, 2003). CDA is usually interdisciplinary and primarily focused on explaining discourse structures related to social problems and may be applied from various theoretical frameworks and methodologies (Titscher,

Meyer, Wodak, & Vetter, 2000; Weis & Wodak; Wodak, 2001). This study used discourse-historical approach to address the following questions: In *Rhoades* how are persons and entities referred to and what characteristics and qualities are attributed to them? How does this case organize relative power relationships between social actors? What arguments are used to legitimize conclusions about the screening program at issue? From what knowledge bases are these arguments expressed-legal, psychological or both? Case study data were collected from LexisNexus Academic and Public Access to Court Electronic Records (PACER), an online public access service, using criterion sampling and consisted of the two *Rhoades* federal district court opinions and various party pleadings. Interpretations were generated from a three-level data analysis (Titscher, Meyer, Wodak, & Vetter, 2000). Findings indicated that the court's use of various argumentation strategies in its discourse on student mental health screening presented varying potential duties and liabilities for entities and individuals involved in such programs. Additionally, although mental health screening in public schools requires an interdisciplinary approach in development and evaluation, the court's discussion of the program litigated in *Rhoades* used a centrist, law-based perspective, suggesting that attempts to facilitate a pluralist or an integrationist approach to such cases may require efforts particular to legal, as opposed to clinical, practice. Recommendations for developing school mental health screening programs sensitive to issues addressed by *Rhoades* are provided.

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## ABBREVIATIONS

| | |
|---|---|
| CDA | Critical Discourse Analysis |
| CLD | Culturally and Linguistically Different |
| DHA | Discourse Historical Approach |
| EBD | Emotional and Behavioral Disorders |
| LD | Learning Disabilities |
| MR | Mental Retardation or intellectual disability |
| SBHMS | School-based mental health screening |
| SLI | Speech and Language Impairment |

# CHAPTER 1

# SCHOOL-BASED MENTAL HEALTH SCREENING AS A POTENTIAL SOLUTION TO DISPROPORTIONALITY IN SPECIAL EDUCATION

The disproportionate representation of linguistic and cultural minorities in special education, concisely termed disproportionality, is a long-standing national problem in the United States (Westat, 2003). Disproportionality has been defined as the over- or under-representation of culturally or linguistically different students in educational classification, placement, and access to educational programs, resources, and services and as "unequal proportions of culturally diverse students in special education programs" (Artiles & Trent, 2000, p. 514). Oswald, Coutinho, Best, and Singh (1999) defined disproportionate representation as "the extent to which membership in a given ethnic, socioeconomic, linguistic, or gender group affects the probability of being placed in a specific disability category" (p. 198). Skiba et al. (2008) define disproportionality as "the representation of a group in a [special education] category that exceeds our expectations for that group or differs substantially from the representation of others in that category" (p. 266). These varied definitions are based on the assumption that if a sample of children were assigned randomly to various educational categories, the cultural and linguistic demographics of these categories should closely resemble the demographics of the group from which the children were selected; however, in actuality, special education group demographics significantly differ from their populations. Specifically, some groups are consistently over- or underrepresented and certain group memberships, rather than actual need or deficit, may affect one's disability

category placement. Thus, in violation of the randomness and equality assumption, when compared to other groups or their presence in the population, some groups are significantly over- or underrepresented in certain special education categories.

Initially brought to the fore of special education research by Dunn's (1968) seminal work, early studies suggested 60 to 80% of students in classes for intellectually disabled students were from culturally and linguistically different (CLD) groups. In 1979, the National Research Council [NRC; 1980] was commissioned to examine factors related to the over-representation of males and minorities in special education programs and identify criteria and practices that would not disproportionately affect these groups. In the 1980s, the U.S. Department of Education Office of Civil Rights began publishing disproportionality estimates, which have remained relatively consistent (Chinn & Hughes, 1987; Donovan & Cross, 2002; Finn, 1982).

Recent estimates from the U.S. Department of Education (2006) indicate that CLD students remain overrepresented in so-called high-incidence categories of emotional and behavioral disorders (EBD), learning disabilities (LD), mental retardation or intellectual disability (MR), and speech and language impairment (SLI). Continuing disproportionality in special education, especially in the EBD category, is well documented (Guiberson, 2009; Skiba et al., 2008; Waitoller, Artiles, & Cheney, 2010). By comparison, in low-incidence categories (deaf, blind, orthopedic impairment, etc.) where the problem is easily observed outside of school context and typically diagnosed by a medical professional, there is no significant disproportionality.

At the national level, African American students are generally overrepresented in both general special education services and in the specific MR and EBD categories (U.S.

Department of Education, 2006; see Table 1 in Skiba et al., 2008). By some national estimates, African American public school students account for 33% of students identified with MR, a number discrepant from their 17% representation in the school-age population (Donovan & Cross, 2002). In the EBD category, at least one study found African American students were represented at about 160% of the expected rate (National Center for Educational Statistics, 2003); however, disproportionality is not limited to African American students.

State-level data show a correlation between risk of special education identification and different demographic groups (Westat, 2003). Oswald et al. (2001) found that compared to White and African American students, Latinos and Latinas were underrepresented in the MR category. According to the National Center for Educational Statistics (2003), within the EBD category, only American Indian/Alaskan Native students were proportionately represented. African American and White students were disproportionality overrepresented, while Asian or Pacific Islander students and Hispanic students were disproportionality underrepresented. Such high rates of disproportionality have led some scholars to assert that EBD classification is particularly problematic for African American students (Osher, Cartledge, Oswald, Artiles, & Coutinho, 2004). Hosp and Reschly (2003) found that African American and Latino and Latina students were referred more often for special education than their White counterparts. In some states, including California, Latinos and Latinas are overrepresented in the LD and SLI categories (Artiles, Rueda, Salazar, & Higareda, 2005; National Center for Culturally Responsive Education Systems [NCCREDt; 2006]). Thus, disproportionality has implications for all students.

## Contributions to Disproportionality

What causes disproportionality? Admittedly, disproportionality is a very complex issue and likely arises from various factors functioning independently and in concert such that data on its causes are unclear and inconsistent (Abidin & Robinson, 2002; Coutinho & Oswald, 1998; Hosp & Reschley, 2003; Lau et al., 2004; National Research Council, 2002; Osher et al., 2004; Oswald et al.,1998; Yeh, Forness, Ho, McCabe, & Hough, 2004). Heller et al. (1982) categorized potential explanations for disproportionality into six rubrics: legal and administrative policies that fund particular disabilities, students' individual characteristics, quality of student instruction, assessment bias against student language and culture, student contextual factors such as family and community characteristics, and historical processes affecting cultural minorities. Incorporating Heller et al.'s rubrics, Coutinho and Oswald (2000) propose two hypotheses on disproportionality. First, various social and demographic factors, such as poverty, community factors, and availability of appropriate general education options disproportionately affect minority students (Fujiura & Yamaki, 2000, Messick, 1984; U.S. Department of Education, 1998; Utley & Obiakor, 2001). Second, cultural biases within the public education system disproportionately affect minority students during the referral, assessment, and eligibility processes (Harry, Rueda, & Kalyanpur, 1999; Trent & Artiles, 1995; Utley & Obiakor, 2001). Thus, disproportionality is affected by contextual or sociodemographic factors in addition to systemic factors, such as educator or system bias.

Research also indicates that special education referrals may be affected by differences in school structure and resources. Factors such as school funding and teacher quality, as well as school reforms like disciplinary procedures and high-stakes testing, have been linked to

disproportionality (Losen & Orfield, 2002). School culture and attitudes and values held by staff and administration may affect also disproportionality (Osher, Woodruff, & Sims, 2002). Research shows that ELL students in schools offered the least language support services were likely to be referred for special education (Artiles, Rueda, Salazar, & Higareda, 2005). Another study found that if educators viewed special education services as the only resource available for helping struggling students, they were willing to over-refer to increase access to resources (Skiba et al., 2006). Harry and Kligner (2006) suggest that support institutional factors, such as teacher quality, class size, and programming available for minority and special education, significantly influenced special education referrals. Coutinho, Oswald, & Best (2002) conclude that identification processes for identification work differently for different groups, suggesting possible inadvertent or deliberate bias (See also Coutinho, Oswald, Best, & Forness, 2002).

Student functioning, the datum used to determine educational placement, results from interactions between the child, teacher and academic environment, specifically, interactions between student biology, family and community experiences, and instructional environment (National Research Council, 2002). According to the U.S. Department of Education (2007), 83% or more of general educational teachers are White, but current training methods may insufficiently prepare teachers to understand or effectively work with students' cultural and language differences in ways that facilitate academic achievement (Delpit, 2006; Ladson-Billings, 1994, 1997; Meyer & Patton, 2001; Ortiz, Wilkinson Robertson-Courtney, & Kushner, 2006). Some posit that educator bias in special education identification, especially for EBD placement, may result from aversion to or less tolerance for diverse feelings and behaviors exhibited by minority students, over-reporting of the severity of such issues, and

use of behavior rating scales that solicit the rater's perceptions of groups of which they are less tolerant (Elliott & Busse, 2004; Merrell, 2003). Thus, issues with teacher referral for behavioral problems may be influenced by "cultural gaps and misunderstandings" left unfilled by current teacher training (Skiba et al., 2006).

Additionally, evidence suggests that processes used to identify children for special education services may not be equally applied to all racial/ethnic groups (Heller et al., 1982). This misapplication may be attributable to various demographic factors. Shinn, Tindal, and Spira (1987) in their examination of teacher referrals for students in second through fourth grade using curriculum-based measures found teachers were more likely to refer African American students than White students based on those results. Similarly, Gottlieb, Gottlieb, and Trongue (1991) found teachers referred minority children more often than nonminority children and tended to refer minority students for behavioral issues rather than academic problems.

## Why Address Disproportionality?

Disproportionality of concern if the process of special education identification is flawed or results in students' being placed in inappropriate educational settings (Heller et al., 1982). When it results in under-representation, disproportionality means students in need are not identified and consequently do not receive services needed for academic progress (Bollmer, Bethel, Garrison-Mogren & Brauen, 2007; Klingner et al., 2005). In theory, overrepresentation may provide students additional supports but may also carry lowered expectation from teachers, other students, and the identified student, resulting in a trade-off between supports and costs that should be considered in identification and placement decisions (National Research Council, 2002). Compared to students in general education,

children receiving special education services have significantly lower academic achievement; Wagner, Newman, Cameto, Levine, and Garza (2006) found persistent gaps in mathematics, science, social studies, and language arts achievement. Similarly, using data from the National Assessment of Education Programs, Cortiella (2007) found that differences between general and special education achievement ranged from 20 to 61 points and that disabled students performed an average of 32 points lower than general education students. When compounded by cultural differences, such achievement gaps raise questions of the equity of in special education (Artiles, Kozleski, Trent, Osher, & Ortiz, 2010).

Special education identification can involve placing students in restrictive settings. Research suggests that minority students tend to be placed in more restrictive special education environments than their White peers (Fierros & Conroy, 2002; Serwatka, Deering, & Grant, 1995; Skiba et al., 2006; U.S. Department of Education Office of Special Programs, 2002, p. III-45). Compared to White students, African American students are half as likely to be placed in general education settings (National Institute for Urban School Improvement, 2008). This effect holds even when racially different students have the same disability classification (Cartledge, Singh, & Gibson, 2008). Additionally, compared to their White peers in the same disability categories, culturally and linguistically diverse students in special education more often are removed from school, receive fewer vocational and occupational services, and are less likely to enter college (Henderson, 2001; Osher et al., 2002; Parrish, 2002). In contrast, examining placements from the Special Education Elementary Longitudinal Study database of more than 11,000 students, Blackorby et al. (2005) found that special education students who spent more time in general education settings had higher achievement scores, had fewer absences, and performed closer to grade-level than students in

more restrictive settings. These results support Hosp and Reschly's (2003) concern regarding the inequitable labeling effects of restrictive placements for minority students and indicate that inappropriate identification and placement may present particular long-term educational risks for minority students.

## Disproportionality and Federal Law

Disproportionality not only affects student outcomes but also has federal implications for schools. Both the 1997 reauthorization of the Individuals with Disabilities Education Act (IDEA, 1997) and its 2004 Improvement Act (IDEA, 2004) emphasized attempts to prevent the worsening of problems associated with mislabeling of minority children with disabilities. Congress designated that disproportionality resulting from inappropriate identification constitutes an important monitoring priority (34 CFR 300.600(d)(3)). The IDEA requires that all states receiving certain federal funds collect and examine student data to determine if significant racial/ethnic disproportionality is occurring in the identification of children with disabilities or impairments at the state and local levels whether in setting placement or disciplinary actions, such as suspension and expulsions (34 CFR 300.646(a)). Qualifying states must provide data disaggregated by race and ethnicity and quantifiable indicators of disproportionality where such representation results from inappropriate identification; they also must have policies and procedures to prevent inappropriate racial/ethnic representation (34 CRF 300.600(d)(3)). Where significant disproportionality is found, states must review and, if appropriate, revise identification and placement policies and procedures, publicly report such changes, and reserve the maximum amount of funds to comprehensive early intervention services targeted toward but not limited to children from disproportionately represented groups (34 CRF 300.646(b); Watioller et al., 2010). At face value, the IDEA's

requirement for tracking disproportionality in special education appears simple; however, neither the IDEA nor its regulations for implementation define significant disproportionality, leaving this to the states' discretion (Skiba et al., 2008). This autonomy means there is no single or uniform method of measuring and addressing disproportionality. Thus, states appear to have broad discretion in addressing disproportionality issues. Such discretion creates an opportunity for school systems to implement a variety of inverventions including school-based mental health screening programs (SBMHS); however, before such programs can be created, it is important to understand the impetus behind such interventions as well as their advantages and disadvantages.

## Methodology

The purpose of this literature review was to explore current research relevant to the potential use of SBMHS to address disproportionality in special education. Specifically, to examine how this intervention may be defined, the arguments for and against SBMHS, the pros and cons of utilizing parents and teachers as informants of student functioning, and the particular challenges such programs may face as a result of their multidisciplinary nature.

The literature reviewed in this study was obtained from various electronic databases as generated by GALILEO, an academic search engine used by various academic institutions. This search engine was used to locate peer-reviewed academic journals published within the past 40 years, specifically addressing disproportionality in special education, mental health screening in public schools, and student behavior ratings. Terms used for the search included "disproportionality and special education;" "student testing, evaluation or screening informants;" and, "mental health testing, assessment, evaluation, or screening." These searches yielded over 100 articles from academic journal, which were reviewed for their

particular relevance to the following research questions: 1) How does SBMHS fit into the various proposed interventions for disproportionality; 2) What does current literature note as potential benefits of and challenges to using SBMHS to address disproportionality; 3) What the advantages and disadvantages of using parents or teachers as informants in SBMHS; 4) What are the primary arguments presented for and against SBMHS; 5) What potential challenges does the multidisciplinary nature of SBMHS present for its implementation? Based on the information obtained from these articles, additional references such as books, newspaper articles, and other materials were obtained, review, and as deemed relevant, applied to the aforementioned research questions.

## Proposed Interventions for Disproportionality

Proposed proactive interventions for disproportionality fall into two main categories: prevention and early detection (Forness, Kavale, MacMillan, Asarnow, & Duncan, 1996). As to prevention, Donovan and Cross (2002) recommended a national approach to offset socioeconomic factors that may cause children to require special education services; however, addressing such factors may be outside the scope of services that schools have traditionally or can reasonably provide. In comparison, early detection and intervention strategies may be more easily implemented.

Serna, Forness, and Nielsen (1998) recommended early detection to identify student problems before they become matters for referral, that is, before these problems become so significant that they require intensive special education supports. Such a prevention and eligibility determination model may be implemented through school-wide screening and multitiered intervention strategies to identify and intervene early with children at risk for academic problems (Lane, 2007; National Research Council, 2002; Osher, Woodruff et al.,

2002; Serna et al., 1998) and to connect underserved and minority children to needed mental health services (Lau et al., 2004).

Mental health screening may be defined as a process used to identify risk factors or early features which increase the likelihood of developing psychological or behavioral problems and subsequently providing interventions to relevant individuals (National Academy of Sciences, 2009). This procedure differs from a full psychological battery or other types psychological evaluation in that the goal is not to obtain a diagnosis but to assess risk or early features of a single or multiple emotional, behavioral, or social problems. Screening may be conducted at the community or universal-level, which focuses on population risks; group-level for specific groups; and an individual-level (National Academy of Sciences). The information provided by such screening may vary from community exposure to risk, such as violence and poverty, to more personal risks, such as problematic behaviors or subdromal symptoms of psychological problems requiring community, group, or individual intervention (National Academy of Sciences). For the purposes of this review, mental health screening conducted in schools to assess student risk at a group or school-wide level is referred to as school-based mental health screening (SBMHS).

## Potential Benefits of and Challenges to Using Screening for Disproportionality

Serna et al. (1998) proposed a primary prevention model, where support, such as screening, is offered to all students who are at risk, to address disproportionality. Universal or school-wide screening may reduce the stigma often affiliated with mental health assessments (National Academy of Sciences, 2009). These benefits may be particularly important for families facing barriers to child-focused mental health services, such as lack of health insurance and lack of available service providers. These challenges are especially

relevant for children who are members of ethnic minorities (U.S. Public Health Service, 2000). Additionally, emotional and behavioral screening as a primary component of a preventative model would not change eligibility established based on students' disability status but provide additional means of matching students' specific needs to interventions without requiring qualification under high-incidence disability labels, such as LD and ED (National Research Council, 2002).

As previously stated, if used to address disproportionality, screening programs should comply with IDEA reporting requirements. Salend, Gartick Duhaney, and Montgomery (2002) recommended that disproportionality interventions include practical ways of collecting, analyzing, and disseminating data. More specifically, Gravois and Rosenfield (2006) proposed that until certain interventions are shown to reduce disproportionality education identification reliably, continued monitoring of disaggregated data should remain in place to ensure these efforts are in fact affecting variables of interest. Information provided by examining local data on racial disparities can result in systems-level changes (Johnson, 2002). Because school districts vary greatly in their student demographics and special education identification rates, data management can be a very cumbersome and complicated process (Bollmer et al., 2007). Adding to these complications Skiba et al. (2008) suggested that efforts to address disproportionality account for different factors that may uniquely contribute to disproportionality in various locales. Consequently, screening programs should provide practical data management and reporting logistics and reflect sensitivity to school and local demographics differences.

## Potential Informants for Risk Screening

In addition to issues of consent, data management, and sensitivity to local differences, student screening program should also consider whom to use as screener informants. Two obvious sources are parents and teachers. Teachers refer most children receiving special education services (National Research Council, 2002). Because of their unique experiences and contexts, teacher ratings are the primary method of assessing school behavior (Frick et al., 2009). Specifically, the particular demands of school and the developmental nature of these tasks allow teachers to detect particular problems and competencies (Frick et al.).

The utility of teacher ratings varies in relation to parent ratings. Generally, teachers are more accurate than parents as reporters of symptoms of Attention Deficit Hyperactivity Disorder (Loeber, Green, & Lahey, 1990; Tripp, Schaughency, & Clark, 2006). In some cases, teachers also are superior to parents in their assessments of ADHD treatment efficacy (Biederman, Gao, Rogers, & Spencer, 2006). However, the accuracy of teacher ratings is not absolute. Teacher ratings are less useful for antisocial behaviors or internalizing problems unlikely to be observed in a classroom setting (Loeber et al., 1990). As the time teachers observe students varies based on their classification (i.e., elementary vs. middle or high school), the usefulness of teacher ratings varies with the student's age; specifically, it may decrease as a child advances in school and as contact with any single teacher decreases (Cullinan, Osborne, & Epstein, 2004; Cullinan & Sabornie, 2004; Edelbrock, Costello, Dulcan, Kalas, & Conover, 1985). Additionally, although the evidence on teacher bias is mixed, if teachers are biased in evaluating student functioning, because of their subjectivity, current referral and placement procedures fail to correct such bias (National Research Council, 2002).

Mixed evidence also exists for parent reporting. Parent reports are vital sources of information for young children who would not be reliable self-reporters; however, their knowledge of adolescent functioning may be more limited (Frick et al.). Some researchers have found parent ratings superior to teacher ratings for certain internalizing problems such as anxiety and depression (Klein, Dougherty, & Olino, 2005; Silverman & Ollendick, 2005).

Comparing referral data from school records, Gottlieb et al. (1991) found that both parents and teachers tended to refer students for academic reasons, and parents and teacher did not differ in their referral rates for behavioral reasons only. Gottlieb et al. (1991) also noted that the consequences of teacher versus parent referral may vary by student race. Specifically, African American students referred by parents had a 6.9% chance of being classified as emotionally disturbed compared to 29.5% referred by teachers, while 9.5% of White students referred by parents and 5.9% referred by teachers were similarly classified. Subsequent research supports the conclusion that teacher-parent discrepancies may be larger for African American students and Latino and Latina students than for White students (Fabrega, Ulrich, & Loeber, 1996; Youngstom, Loeber, & Stouthamer-Loeber, 2000; Zimmerman, Khoury, Vega, Gil, & Warheit, 1995).

Despite these challenges, researchers have identified benefits to using teacher ratings. Daily, teachers observe behaviors relevant to student academic success and, consequently, they are useful measurers of possible student outcomes (Gerber & Semmel, 1984). Also, research suggests that across the variety of methods available for measuring teacher assessment of student performance, teacher ratings tend to be strongly correlated with student academic outcomes and to accurately differentiate students based on academic risk (Hoge & Coladarci, 1989; Gresham, MacMillan, & Bocian, 1997; Shinn et al., 1987). Gottlieb et al.

(1991) suggest that, because most special education referrals had an academic component, intervention should focus on improving student academic skills, as these would affect more children than behavioral interventions alone. Despite bias concerns, teachers provide most special education referrals, the information provided for such referrals is primarily based on students' school-based functioning, and teacher referral tends to be more influential in student placement. Thus, screening for risk via teacher ratings is likely a valid method of accurately identifying early emotional and behavioral problems relevant to student academic outcomes. Considering the federal mandates regarding disproportionality, the diverse and significant student outcomes hinging on identification of mental health risks, and the utility of teacher ratings, the question arises of why SBMHS is not widely used. Potential answers may be found in the screening debate and unanswered questions regarding the courts' potential treatment of such programs.

## The Screening Debate

Supporters of SBMHS posit that multiple research studies conducted over several decades indicate that children's mental health is directly connected to various academic and life outcomes. In the 1980s and 1990s, a plethora of research explored various aspects of children's mental health, including its association with school dropout rates, teen pregnancy, substance abuse, suicide and homicide (Blum, 1987; Lear, Gleicher, St. Germaine, & Porter, 1991; Puskar, Lamb, & Norton, 1990; Rhodes & Jason, 1988). Additionally, unaddressed mental health problems negatively affect the development of emotional and cognitive skills, and the effects can lead to school failure, unemployment, and poverty (Campaign for Mental Health Reform, 2005; Hirshfield-Becker & Biederman, 2002; McGoey, Eckery, & Dupaul, 2002; U.S. Public Health Service, 2000). Research has shown that children's mental and

behavioral health is linked to their physical health, academic achievement, and ability to adapt successfully throughout life (Masten & Coatsworth, 1998). Mental health screenings may aid schools in identifying student psychological needs and connecting students to resources available to prevent and ameliorate the negative impact of unmet needs on their academic and overall functioning. Failure to provide SBMHS, at the least, makes children more vulnerable to these negative outcomes and, consequently, negatively affects the public's welfare.

Proponents assert that schools' dual access to children and mental health professionals create a unique opportunity to provide resources to students. Apart from the family, school is the primary organization to which most children have consistent access over a long period of time (Gottfredson, 1981, 1987). Parents and children often face barriers to obtaining child-focused mental health services such as lack of health insurance, lack of available service providers, and difficulty maneuvering the logistics of health care systems; these challenges are especially relevant for children who are members of ethnic minorities (U.S. Public Health Service, 2001). By some estimates, students can gain access to mental health services more quickly through school-based mental health services than through traditional special education services (Flaherty, Weist & Warner, 1996). Children are more likely to seek mental health treatment when they have access to school-based services, and research indicates that in some elementary schools where students have access to expanded mental health services, special education referrals, disciplinary referrals, grade retentions, and school climate also improved (Bruns, Walrath, Siegel, & Weist, 2004; Slade, 2002; Substance Abuse and Mental Health Administration, 2007). Thus, school-based mental

health services increase access for populations in need and such access positively affects important school outcomes, including special education service processes.

Mental health screenings are logically consistent with other health-related services schools provide. Students commonly receive vision and hearing screenings at school and are screened for the potential presence of learning disabilities and other problems that may influence their learning (Yawn et al., 1999). During the course of providing such services, schools often obtain personal information about students and the courts have upheld schools' rights to do so (*Board of Education v. Earls*, 2002; *Vernonia v. Acton*, 1995). Thus, some argue mental health screening is an appropriate activity in light of past school-based health services and the types of information collected while providing such services.

Opponents of mental health screenings in schools hold that such activities are outside of school's traditional role of educator. They argue that, school's sole purpose is to impart academic knowledge and prepare students for professional and vocational pursuits. Some argue that legislation such as the No Child Left Behind Act of 2001, with its specific emphasis on student performance, creates a mandate for schools to focus on certain aspects of learning, such as reading, writing, and arithmetic (Fleischhacker, 2008). Because of increased pressure to meet federal educational mandates, school resources of time and effort are best spent on academic issues (Fleischhacker). The resultant lesser attention given to other areas, such as the arts or physical education, is seen as a necessary sacrifice for the stated goal of improved student academic standing. Thus, while knowledge of and participation in such activities may supplement student's general development, such endeavors are the responsibility of parents, not schools (Fleischhacker).

Even if screening were within the school's traditional authority, SBMHS creates other concerns. First, some physicians and parents have expressed concern that children are over-diagnosed and receiving inappropriate mental illness diagnoses (Shankar, 2006). This concern is based, in part, on the fact that since the early 1990s, the number of children diagnosed with serious mental illnesses, such as bipolar disorder, has increased to over 6 million (Carey, 2006). Some posit that SBHMS will exacerbate the problem of excessive children's mental illness misdiagnoses (Adelmann, 2006; McElroy, 2004). A companion argument is that definitions of mental health and illness are debatable and thus accurate determinations of psychological functions cannot be had. For example, homosexuality was once considered a mental illness requiring treatment, but both the American Psychiatric Association (2001) and the American Psychological Association (2009) have adopted the position that homosexuality is not an illness or a condition to be repaired. When mental illness diagnoses are made, rightly or wrongly, the accompanying stigma can be detrimental to the one receiving said label (Surgeon General's Report on Culture, Race, and Ethnicity, 1999). Thus SBHMS may result in a series of negative outcomes for students.

Another argument is that the evidence regarding psychological assessments as a whole is conflicted. For example, although standardized tests are widely used and enjoy some research support, numerous studies indicate that because of the shortcomings in their development, they often provide an inaccurate picture of the factors contributing to student outcomes and are inherently biased against poor and ethnic minority students (Helms, 2002; Hilliard, 2000; Sackett, Schmitt, Ellingson, & Kabin, 2001). Consequently, use of inadequately developed measures in SBHMS may result in inaccurate assessments and have particularly adverse affects for minority populations.

A final argument is that even if such activities are beneficial, they are problematic in that they create additional concerns for schools. Specifically, some posit that by offering students any type of health screenings, schools obligate themselves to provide additional mental health services, such as educational programming and counseling (Allensworth et al., 1997). These interventions add to administrative costs, such as the hiring and training of professionals to maintain the screening program and the costs of purchasing and scoring screening instruments. Currently, very little is known about the actual costs of school-based mental health programs (Chatterji et al., 2004). Thus, school mental health screening requires rigorous economic scrutiny before implementation.

## Screening as a Multidisciplinary Challenge

Regardless of their views on screening, public schools and those providing mental health services within them face the challenge of working within multidisciplinary environments. Specifically, schools face unique demands to collaborate with teachers, administrators, and various student health providers, including mental health professionals, while meeting state and federal service requirements and operating within legal constraints (Pennekamp, 1992). The lack of logistical guidance these provide can increase frustration for schools seeking to meet student mental health needs within these parameters (Allen-Meres, 1996). One reason for this difficulty may be the lack of understanding or inappropriate application of the courts' permissions and limitations regarding SBMHS.

While mental health and school professionals generally receive graduate and continuing education training on issues of law relevant to clinical practice and school administration, they are unlikely to receive or seek legal training of the type needed to understand and predict applications of federal and state law to potential litigation arising

from school programming; this set of competencies is likely reserved for school legal counsel who may not be consulted until after the school and its employees are made party to litigation. Thus, although SBMHS is an interdisciplinary endeavor, the ways schools approach implementing these programs may not appropriately consider the potential for litigation such program create.

## Summary of Literature Review

In summary, disproportionality in special education is a long-standing issue caused by multiple and complicated factors (Dunn, 1968; Westat, 2003). Although special education placement connects students to potentially beneficial services, it also presents various risks for students, including poor academic and life outcomes (National Research Council, 2002). Additionally, federal laws require that schools monitor and address disproportionality as a condition of federal funding (IDEA). Thus, schools have both academic and financial incentives to address this issue. Screening for mental health risk has been proposed as one possible intervention (Serna et al., 1998); however, in addition to the possible risks and benefits posed by such programs, by virtue of the limited legal training and experience school administrators receive, such programming also generates concerns of litigation and liability. Consequently, it is important to examine how courts may address legal issues arising from screening programs in public schools. The purpose of this review was to explore possible legal potentials and impediments to school-based screening as a means of addressing disproportionality.

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# CHAPTER 2

# POTENTIALS AND IMPEDIMENTS TO UNIVERSAL, SCHOOL-BASED SCREENING FOR BEHAVIORAL AND EMOTIONAL RISK: A CRITICAL DISCOURSE ANALYSIS OF CURRENT CASE LAW

Screening students for emotional and behavioral risk has been posited as a way to meet a variety of educational and mental health needs, including disproportional placement in special education (Adelman & Taylor, 1999, Campaign for Mental Health Reform, 2005; Daly et al., 2006; President's New Freedom Commission, 2003; Serna, Forness, & Nelson, 1998; Surgeon General's Report, 1999; U.S. Public Heath Service, 2000; Weist, Evans, & Lever, 2003). Ample psychological research exists regarding certain aspects of screening relevant to disproportionality, including student mental health needs and outcomes and the advantages and disadvantages of different reporters of student risk (Hoge & Coladarci, 1989; U.S. Public Health Service). Additionally, as schools receiving federal funds operate under mandates to monitor and address disproportionality, public schools also have financial motivations to implement programs to address this long-standing issue (Watioller et al. 2010). Despite the potential benefits of such programs, a lack of information regarding the legal requirements for implementing screening programs, including logistical matters such as obtaining informed consent, impedes their wide-scale implementation. This is likely due, in part, to the complex nature of such issues as the product of legal theory, ethical considerations, and practical application (Berg, Appelbaum, Lidz, & Parker, 2001).

## Screening as Multidisciplinary

Multidisciplinary endeavors, meaning those that use knowledge or skill from more than one academic or clinical area of practice, such as school-based mental health screening

(SBMHS) may be conceptualized as using a centrist, pluralistic, or integrationist model. In the centrist model, a discipline places itself in a central role and defines other disciplines in terms of their differences from similarities to this center and ignores issues outside this center of knowledge (van Leeuwen, 2005). This results in structured methods and analysis but increases the risk that potentially important issues will go unaddressed (van Leeuwen). The pluralist model places issues and problems as central and recognizes that various disciplines, which are brought to bear on these issues as unchanged but equal partners, may inform potential solutions from different perspectives (van Leeuwen). In comparison, the integrationist model, which also sees the problem or issue as central and affected by various disciplines, views these disciplines as interdependent and functionally pliable; this approach is more flexible but has also been critiqued as a threat to the status quo (van Leeuwen; Weis & Wodak, 2003).

Personnel providing mental health services in schools must negotiate various challenges presented by the multidisciplinary nature of their clinical work in an educational context. Specifically, licensed mental health professionals use organizationally agreed upon ethical standards and codes to determine practice parameters (Bersoff, 2003). Where there are questions or disputes regarding these boundaries, mental health professionals are to seek consultation or supervision (Bersoff). This process differs from the highly structured, adversarial process used to resolve questions of law and policy. Another point of difference is that unless and until the U.S. Supreme Court presses federal district and state courts to a unitary standard, they may apply their own interpretations of existing statutes and case law. This creates a diverse collection of legal restraints that school officials and mental health professionals are neither trained to seek out nor understand. Lack of familiarity with the legal

boundaries for school-based interventions increases the likelihood of unintentionally trespassing upon legal limits. While public schools generally enjoy sovereign immunity, ignorance of current law is no protection from liability, and an understanding of how courts discuss the provision of mental health services in public schools may help prevent such violations. Such awareness may be particularly beneficial in the area of screening, which is itself a relatively new intervention. For example, from the documents examined in this analysis, there was no indication that either the defendant school or community health center sought legal consultation prior to the implementing the screening program at issue or that the community task force with which the program was developed included persons with legal training. Had legal consultation been obtained prior to the program's implementation, the defendants might have been alerted to and given the opportunity to address potential legal violations well in advance of starting the program and avoided the resultant litigation.

Literature on the possible legal implications of such programs is currently limited to case and statutory law addressing the general parent-child-school relationship. To date, only one federal district court case, *Rhoades v. Penn-Harris,* has directly addressed the issue of universal screening in public schools and no known social science researcher has systematically analyzed this or any other such legal opinion. The purpose of this study was to analyze the *Rhoades* opinions to explore potential challenges to implementing mental health screening programs in public school using a critical discourse methodology, specifically, the discourse-historical approach (DHA). Within the U.S. educational literature, critical discourse analysis (CDA) has successfully been applied to issues of bilingual education (May, 2001; Schmidt, 2000); however, no published studies have used CDA to analyze

SBMHS programs. Thus, my using CDA to analyze SBMHS issues is a novel application of this theory and methodology to an emerging multidisciplinary issue.

The discourse historical approach emphasizes historical context in investigating social issues and encourages the integration of historical sources in both social and political fields of study in which the examined events occurred (Wodak, 2001). This approach also requires that the context of the discourse analyzed be described as holistically and accurately as possible (Titscher et al., 2000). As school and mental health professionals may approach student issues differently but both are affected by laws and their contexts, such knowledge is essential to address legal concerns and misunderstandings about screening and facilitate development of screening programs and policies considerate of legal perspectives. For example, historically, courts have given great deference to parental decisions regarding their children's education and often apply heightened levels of scrutiny to laws and activities which appear to infringe upon this right, but several Supreme Court decisions regarding parental rights leave questions as to these rights may be reviewed based on their legal classification as fundamental, substantial or an alternative type of legal right or protection (Curran, 2008; Custody of a Minor, 1978). This has implications for SBMHS because the types of analysis the court applies to a legal issue are dependent upon the classification of the right allegedly affected and directly relate to the potential treatment courts may apply to screening program challenges. To provide as complete a context for the *Rhoades* discourse, I provide information regarding parental rights; levels of court case analysis; sovereign immunity and school authority; a prior federal court case addressing screening, and perspectives on student assent prior to introducing the case study methodology and results.

## Historical Context of Parental Rights

Providing school-based services to minor students is complicated by federal and state laws and their relationship to the concept of parental rights (Curran, 2008; Fu, 2007). These laws have both legal and cultural foundations. Culturally, Mosiac law as set forth in the Hebrew tradition provides parents specific and, at times, severe authority over their children (Moskowitz, 1975; Witte, 1996). Parental rights were expressly created under English common law, which conceptualized children as property, and parental authority as inviolate as one's authority over any another property (Maltz, 2001; *Poe v. Gerstein*, 1975). As a result of such strong moorings, America courts came to hold parental authority in extremity high regard, even as sacred, such that the Founding Fathers' creation of specific constitutional protections relevant to the parent-child relationship was likely informed by this zeitgeist (Witte, 1996).

Regarding the legal foundation for parental rights, the U.S. Constitution does not create an explicit right for parents to raise their children without governmental influence, but this right is implied via the Fourteenth Amendment, also known as the Due Process clause guarantee, which states "no state shall…deprive any person of life, liberty, or property, without due process of law" (U.S. CONST. amend. XIV, §1). In combination, these cultural and legal factors generated a now largely accepted perspective that parents have a right to the "companionship, care, custody, and management of [their] children" (Gelman, 2005; *Stanley v. Illinois*, 1972). This right includes responsibilities for the child's education, support, and general wellbeing (Custody of a Minor, 1978); however, parents are not expressly provided the right to rear children without governmental interference, and the right to privacy, even as it applied to parents, is not absolute in that it is shared by the State, which is obligated to act in the child's best interest (Custody of a Minor, 1978; Gelman, 2005; *Newmark v. Williams*,

1991). Specifically, in cases involving children's medical care where such action was deemed to be in the children's best interest court have intervened over parental objections (Dickens, 1998; *Newmark v. Williams*, 1991). Thus, when discussing SBMHS program-related questions courts are likely to address and raise questions of parental rights in of these programs. In creating and implementing SBMHS programs, schools should be apprised of this important legal history as it has implications for how courts may balance the school's roles and responsibilities with that of the students, parents, and teachers.

## Potential Court Analysis of SBMHS

Legal analysis involves the application of case facts to federal, state, and local statutes, case law, and regulations. Consequently, the resolution of specific SBMHS issues will be influenced by the facts of the question presented and the rules and regulations of the jurisdiction in which the issues arise. Thus, a review of general legal principles is necessary to understand the foundations and constraints upon which laws relevant to SBMHS and informed consent are built.

Generally, courts give great deference to parental decisions regarding their children's education and often apply heightened levels of scrutiny to activities which appear to infringe upon this right, but several Supreme Court decisions regarding parental rights raise questions as to whether these rights are fundamental, substantial, or merit some other classification (Curran, 2008; Custody of a Minor, 1978).This has implications for SBMHS because the analysis courts apply will depend upon the classification of the allegedly affected right.

Despite their not being expressly delineated, the Constitution deems some rights such as marriage, procreation, and maintaining custody of one's children so important as to be "fundamental" (*Griswold v. Connecticut*, 1964; *Lawrence v. Texas*, 2003; *Santosky v.*

*Kramer*, 1942; *Skinner v. Oklahoma*, 2003). When a state action touches upon rights considered fundamental, such as those of a parent to rear a child, courts apply a level of review known as strict scrutiny (*Washington v. Glucksburg*, 1997; *Zablocki v. Redhail*, 1978). Under this type of review, an action will be held unconstitutional unless the interest it is designed to address is a compelling one and the action is narrowly tailored to further the stated interest (*Lulay v. Lulay*, 2000; *Roe v. Wade*, 1973). This means that if other less restrictive means are available to preserve the interest, those must be implemented.

The question of what constitutes a fundamental right, especially in the context of parental rights in education is an evolving one and varies by jurisdiction (Ross, 2000). Similar uncertainty exists as to what constitutes a compelling interest and whether certain actions are narrow enough to meet the strict scrutiny requirement (Chemerinsky, 2006). Assuming strict scrutiny is applied schools must show a compelling interest for SBMHS. At least one court has found that AIDS prevention constituted such an interest (*Alfonso v. Fernandez*, 1993). Based on research evidencing relationships between disproportionality and various life and academic outcomes, an argument could be made that the consequences of a lack of mental health information and resources in schools present a similarly compelling state interest. Additionally, schools must also prove that their screening programs are narrowly tailored to meet its goals. This requirement may be more challenging in that the school must show that its screening program is a narrowly designed, not overly broad, means of achieving its permissible goal.

In comparison to fundamental rights, substantial rights usually merit a less rigorous analysis known as rational basis review (*Romer v. Evans*, 1996). Under this analysis, a law is constitutional if it is reasonably related to a legitimate state objective (*Adarand Constructors*

*v. Pena*, 1995; *Herndon v. Chapel-Hill-Carrboro City Bd. of Education*, 1996). Should courts determine that SBMHS touches upon substantial but not fundamental rights, a school's argument that the program was rationally related to a permissible state goal, such as providing for the public's health, may be sufficient. This issue has yet to be decided by various state and federal courts, including the Supreme Court.

## Sovereign Immunity and School-Based Mental Health Screening (SBMHS)

As a rule, government actors including public schools are shielded from civil liability when their actions do not "clearly violate established statutory or constitutional rights of which a reasonable person would have known" (*Rhoades v. Penn-Harris*, 2008; *Tamayo v. Blagojevich*, 2008). The U.S. Supreme Court affirmed this principle in its 2009 ruling on school strip searches (*Safford v. Redding*). In *Rhoades*, the case analyzed here, a federal court found that although the school violated the Rhoades' Fourteenth Amendment right to privacy, The School could not reasonably have known that their actions were illegal. Following *Rhoades* and *Safford* although school immunity remains intact informed consent practices may be held to a standard that incorporates the litany of concerns discussed in *Rhoades*. These concerns are subsequently presented in more detail, but it should be noted that failure to address such issues may remove schools from the immunity afforded them when they attempt to comply with established law.

## Schools' Authority to Implement SBMHS

*Rhoades* in its discussion of parental authority cites the U.S. Supreme Court cases of *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Wisconsin v. Yoder*. These cases were

instrumental in framing the discourse of parental rights in public schools. Their use in *Rhoades* indicates their potential for use in other cases relevant to SBMHS; thus, they are briefly explained to inform the context of the Rhoades analysis.

Adjudicated in 1923, the first Supreme Court case to test parental rights in the context of public education, *Meyer v. Nebraska*, involved a state law that prohibited public and private schools from teaching a foreign language to any child who had not passed the eighth grade. The Supreme Court held that the statute was an unconstitutional limitation on parental rights in part because the Fourteenth Amendment provided the freedom to "establish and home and bring up children" without state interference (*Meyer v. Nebraska*, 1923). Although the Court noted a state interest in encouraging cultural assimilation and patriotism, it emphasized that this end could not "be promoted by prohibited means" (*Meyer v. Nebraska*, 1923). Two years later in *Pierce v. Society of Sisters*, the Supreme Court addressed an Oregon law requiring compulsory enrollment in public schools (1925). The Court held that although the State had the authority to regulate schools, including to "inspect, supervise and examine them, their teachers and pupils," the Oregon law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control" (*Pierce v. Society of Sisters*, 1925).

In tandem, *Meyer* and *Pierce* clearly articulated the tensions between parents and schools and established the first limits on the influence schools could exert over children's education. In *Pierce*, the Supreme Court also clearly established a school's right to test its students; however, the question of whether this authority includes psychological testing was well as academic evaluations remains to be seen (*Id.*). Thus, parental rights were effectively established as a limit on the state's educative goals and while states could grant public

schools the ability to manage their operations, including the examination of students, the school's authority did not eliminate parents' right to make decisions about their children's education or upbringing.

In *Wisconsin v. Yoder* (1972), an Amish couple sought exemption from the State's compulsory education law, arguing that this infringed upon their First Amendment right to freedom of religion. The Supreme Court held that "a state's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children" (*Wisconsin v. Yoder*, 1972). The Court acknowledged that education was primarily a State function but held that this interest was outweighed by the parents' religious liberty and parental authority. Thus, where a school requirement infringes upon parents' fundamental rights, such as the free exercise of religion, it will likely be deemed unconstitutional. As applied to SBMHS, this means that if such a program conflicts with a family's religious beliefs and requires student participation in additional activities without sufficient alternatives or options for non-participation, it may be unconstitutional.

Reaching ahead to cases more immediately relevant to SMBHS, in *Brown v. Hot, Sexy and Safer Products* (1995) a federal court upheld the schools' authority to control its curriculum despite parental objection. The court ruled that while parents may have had valid objections to the school's sex education presentation, they could not "restrict the flow of information to the public schools" (*Id.*). The same year in *Immediato v. Rye Neck School District* (1995), non-curricular requirements were addressed. Parents argued that the high

school's community service requirement infringed upon their rights to exclude their child from undesirable activities and, as the requirement was not related to the school's curriculum, was unconstitutional (*Id.*). The court held that the service requirement's goal was to impart a sense of civic duty and was thus sufficiently related to the school's curriculum as to be within the school's authority (*Id.*). In light of these cases, it seems schools possess wide latitude in the activities they may provide and require. Some legal scholars posit that the *Brown* and *Immediato* rulings make it impossible for parents to challenge school requirements that are even remotely related to academic goals (Gelman, 2005). Because of this perceived authority, it may be argued that if screening, particularly school or class-wide screening, is related to some academic purpose and does not infringe upon parents' constitutional rights, it is permissible; however, several factors complicate this analysis.

First, the relatively recent Supreme Court case of *Troxel v. Granville* (2000) may provide some insight into how the Court may address these issues. At issue in *Troxel* was a state statute permitting any person at any time to petition the court for child visitation when it was in the child's best interest (2000). The Supreme Court applied strict scrutiny and held that the law was unconstitutional, in part, because it failed to consider the parent's perception of the child's best interest and was "breathtakingly broad" (*Id.*). Some have interpreted the court's application of strict scrutiny and the language of the majority decision in *Troxel* to suggest that parental authority may be strengthened in the context of public education, but others see *Troxel* an indication that the Supreme Court may clearly delineate parental authority as a fundamental right or limit school's authority over its students (Bloom, 2003; Curran, 2008; Fu, 2007; Gelman, 2005); however, several post-*Troxel* school-related cases have applied rational basis review to parents' attempts to exempt their students from school

requirements such as school uniform policy and sex education class (*Leebaert v. Harrington*, 2003; *Vines v. Board of Education*, 2002). Also of interest to SBMHS, in the post-*Troxel* case of *Doe v. Heck* (2003) after county social service workers interviewed students about corporal punishment without prior parental consent, parents claimed that this violated their right to "familial relations." The court did not expressly rule on the parental rights issue but acknowledged that in light of *Troxel* the appropriate level of scrutiny was unclear (*Doe v. Heck*, 2003). Thus, the question of the level of scrutiny courts will consistently apply to any level of screening remains unanswered.

In addition to case law, informed consent for SBMHS is also subject to legislation. In 2003, the Illinois state legislature enacted the Children's Mental Health Act (CMHA), which requires, *inter alia*, psychological health assessments for children in Illinois public schools (Children's Mental Health Act, 2003). In comparison, several states have introduced or passed laws limiting individual-level screening. For example, in 2006 and 2007, respectively, Alaska and Utah enacted bills prohibiting schools and teachers from recommending psychological assessment or intervention for students (S.B. 48, 25th Leg., Reg. Sess. (Ak. 2005); H.B. 202, 2007 Leg., Reg. Sess. (Ut. 2007). Taking the middle road, a 2004 Indiana statute provides that "a student shall not be required to participate in a personal analysis, an evaluation, or a survey that is not directly related to academic instruction and that reveals or attempts to affect the student's attitudes, habits, traits, opinions, beliefs, or feelings" (§ 20-10.1-4-15(b)). Thus, states differ in whether and how they will allow individual- or group-level screenings.

## *Merriken* and School-Based Mental Health Screening

*Merriken v. Cressman* is a 1973 federal district court case cited in *Rhoades* discussion of school counseling and testing and parental rights. *Merriken* directly addresses issues of psychological testing in schools but *Rhoades* does not provide contextual information about the case. As such information may facilitate an understanding of *Rhoades'* use of *Merriken* and inform recommendations for screening program development, it is provided here.

In the early 1970s, a Pennsylvania high school implemented a drug prevention program called Critical Period of Intervention (*Merriken v. Cressman*, 1973). The program required students and teachers to complete questionnaires soliciting information regarding student demographics, individual behavior, and home life (*Id.*). Initially, the school attempted to secure student participation by using a passive consent procedure in which "silence would be construed as acquiescence," but after the suit was filed, the school changed the procedure to "affirmative written parental consent" (*Id.*). Student *Merriken's* parents argued that because the instrument the school selected sought highly sensitive information about the student's family and relationships, they should have been explicitly informed of the school's intent to administer the test (*Id.*). The court agreed and held that although there was scientific evidence that depression and suicide were significant health problems, because of the highly sensitive nature of the information sought and the constitutionally protected rights of parents to control the rearing of their children and ergo the information obtained from them, the school's implied consent procedure was insufficient to protect parents' rights (*Id.*).

*Merriken* raised several additional issues relevant to potential legal analyses of SBMHS. First, while the *Merriken* court acknowledged the need to understand and prevent drug abuse and the potential benefits of such a program, they stated that, as designed, the CPI program created "too much of a chance that the wrong people for the wrong reasons will be

singled out and counseled in the wrong manner" (1973). The court also opined that "the actual testing of the students and the results gained are suspect" and that the research used by the defendants did not define the term potential drug user or clearly state a connection between its analysis and the intended results of the program (*Id.*). Additionally, the court expressed discomfort with the lack of information provided regarding how many children could be falsely identified (*Id.*).

The *Merriken* court also took issue with "the qualifications for the personnel who [would] administer the so-called interventions" (1973). The court relied upon the testimony of psychiatrists that psychological instruments were "quite sophisticated and require the skills of trained psychotherapists, psychiatrists, psychologists, etc. who have undergone many years of training" (*Id.*). Supporting this point the court referenced a 1971 article, "Some Legal and Psychological Concerns about Personality Testing in the Public Schools:" which stated:

> …in all probability, [parents are] not clear regarding the qualifications of the school 'psychologist' who is likely to hold a master's degree in school psychology, not from the psychology department of a college or university, but from an education school or department. Chances are great that he has not had significant supervision in a hospital, or outpatient clinic, or from a clinical psychologist or psychiatrist. He is likely to be considered 'untrained' by the persons the parents have in mind when they 'picture' a psychologist (pp. 114-115).

Generally speaking, the court was concerned that the personnel responsible for carrying out the clinical aspects of the program were not qualified to do so.

Lastly, the *Merriken* court noted that student confidentiality throughout the program was of major concern. Specifically, the court was concerned that students' information would

not remain confidential during the administration of the test, that confidentiality may be violated by reporting results to various individuals and entities including law enforcement (1973). Because of these issues were not addressed in the school's informed consent agreement, the court held that the school's consent procedure was inadequate and, consequently, invalid (*Id*.).

## Student Assent

Currently, children are generally believed to lack the psychological ability to engage in the decision-making processes required to meet the Nuremburg Code's standard of voluntary participation (The Code). It is unclear when minors obtain the capacity to assent to participation in various activities including psychological evaluation or research. In *Cardwell v. Bechtol* (1973), a medical treatment case, the Tennessee Supreme Court generated the Rule of Sevens, which stated that there exists a rebuttable presumption that children between the ages of seven and fourteen lack the mental capacity to consent to medical treatment. Conversely, for children age 14 and older, the rebuttable presumption is that they have the capacity to consent (*Cardwell v. Bechtol*, 1973). A child's assent to participation is required for research purposes (Berg et al., 2001); however, unless they have been granted legal emancipation, children lack the legal capacity to consent to participate in such activities (Thiel, 2002). Thus, obtaining minor students' assent for participation in SBMHS has a basis in previous and current legal and ethical standards.

## *Rhoades* Case History

The discourse-historical approach also requires that case setting be described as accurately as possible (Titscher et al., 2000). The PACER documentation states that the Complaint was filed in the U.S. District Court for the Northern District of Indiana on September 16, 2005. Two opinions, both written by Judge J. T. Moody (hereinafter, The Court), were entered in the case. The 2006 opinion was entered, that is filed with the clerk of the court, on September 26, 2006. The 2008 opinion was entered on August 5, 2008. The undisputed facts (those presented in the plaintiffs' and defendants' pleadings and the court's opinions) are as follows: In October 2004, several Penn High School administrators prepared and signed correspondence which was disseminated to high school student parents. This correspondence stated that students would participate in an administration of TeenScreen, termed a mental health evaluation, unless parents "opted out" by returning an attached form indicating they did not want their children to participate. In December 2004, Chelsea Rhoades, a 15-year-old tenth grader, participated in a school-wide screening program that used the TeenScreen suicide risk assessment. After completing the evaluation, Chelsea was told by an individual affiliated with the screening program that based on her responses she had obsessive compulsive disorder and a social anxiety disorder. Chelsea informed her mother of these events, and her parents brought suit against Penn-Harris-Madison School Corporation, an legal organization including the student's high school (hereinafter, "The School") as an organization, school employees as individuals and in their official capacity with the School, and Madison Center, Inc. (hereinafter, "The Center"), a "community mental health center" that administered the TeenScreen to the Penn High School students.

The 2006 opinion arose from the Center's motion to dismiss the plaintiffs' amended complaint, the complaint filed after the original complaint, for lack of subject matter

jurisdiction. In this instance, such lack of jurisdiction would mean that the plaintiffs' claims were administrative, not federal, and consequently, federal court was not the proper arena to resolve the claims. The Court dismissed two counts of the complaint as to the Center only, meaning all counts pertaining to the School were unaffected.

The 2008 opinion arose from The School's motion for summary judgment. If granted, this motion would mean The Court concluded that, for certain counts, no legal issue existed for adjudication. This conclusion would prevent those counts from progressing to trial.

In the 2006 opinion, the legal question presented in the motion to dismiss required The Court to review the plaintiffs' claims and determine which, if any, were appropriate for federal adjudication. This type of legal conclusion answers the question, "Is this court the proper place to answer these legal questions?" As such, a detailed examination of the facts may be less relevant, and, as was the factual discussion in the 2006 opinion, the resulting opinion may be relatively brief. As the Court states in the 2008 court opinion, as established by the federal rules of civil procedure and federal case law, the legal standard for granting a motion for summary judgment is that the evidence shows there is no genuine issue as to any material fact (*Rhoades,* 2008, p. 890). A motion for summary judgment requires resolution of factual issues. Consequently, these opinions can be relatively lengthy and detailed because The Court must support its conclusions on all of the legal issues pertaining to the motion by applying the facts deemed relevant to those issues. Thus, that the 2008 opinion contains more facts than the 2006 opinion is not unusual considering the different legal questions presented and the standards required for their resolution. Despite this difference in context, because the opinions arose from the same discourse, I examined the texts' linguistic implementations with the expectation that they would provide similar data for analysis.

## Research Questions

The purpose of this study was to analyze the case of *Rhoades v. Penn-Harris* using the discourse-historical approach to explore how a court has discussed and decided issues arising out of a school-based mental health screening (SBMHS) program. Through this study, I sought to answer the following research questions:

1. How are entities involved in the program referenced?
2. How are relative power relationships organized?
3. What argumentation strategies are used in the screening program discourse?
4. Which knowledge bases are used within the *Rhoades* opinions?

## Methods

The purpose of this qualitative case study was to use contemporary case law to explore how one court addressed legal issues generated by screening programs in public schools. Qualitative research allows context-specific, in-depth, detailed exploration of phenomena; thus, it is often used to investigate novel or not yet well-defined phenomena (Creswell, 2007). Because of its emphasis on in-depth analysis as opposed to generalizability of results, qualitative research can be appropriately applied to small data sets, including single case studies, and historical and contemporary documents obtained from various sources (Merriam, 2009). Also, in qualitative research, the categories, that is, the patterns or findings used to answer research questions may be determined from previous research (Merriam). For this study, the research questions and consequently the data categories were taken from the listing of structuring questions and concepts used in Wodak's (2001) previous applications of the discourse-historical approach (DHA) to legal and political discourse.

Power relationships are central to any critical discourse-related analysis (Wodak & Meyer, 2009). For the purpose of this study, positions of relative power are also important as they may indicate how the court arrived at its conclusions of entity and individual liability for those involved in the screening program at issue. Power is relative in that it requires at least two unequal positions of authority or action (Wodak & Meyer). One way of noting existence of this relativity is through reference or nomination. In this linguistic strategy, in- and out-groups are constructed by the creation of membership categories (Wodak, 2001). Reference/nomination can also indicate bias held for or against particular groups (Wodak). Thus, in this investigation, in addition to suggesting power relationships, reference/nomination may also reflect bias the court possessed regarding particular entities or individuals involved in or affected by the screening program. Based on her previous legal and policy research, Wodak developed a list of 15 topoi, or argumentation strategies, frequently used in such discourse to support arguments for or against particular conclusions to proposed social problems. This set of topoi was considered appropriate because I sought to obtain information to address a social issue, screening as a potential intervention for disproportionality. Lastly, as DHA is designed to be an interdisciplinary research method, it aims to developing relations between disciplines that enhance their capacities, individually and collectively, to address the dialectical nature of the relations between various areas and aspects of social life (Fairclough, 2005). As SBMHS has health and legal implications that are and will continue to affect the implementation of such programs, an understanding of how a court may view such interdisciplinarity may provide a starting point for future collaboration between the fields. Based on these parameters and goals, a qualitative case

study using a discourse-historical approach was the most appropriate methodology for this exploratory investigation.

The discourse-historical approach is a multitheoretical, multimethodological approach that emphasizes historical context in investigating social issues and encourages the integration of historical sources in both social and political fields of study (Wodak, 2001). As DHA incorporates historical and other contextual information in its data analysis, it allows for a comprehensive presentation that facilitates an understanding of current perspectives (Reisigl & Wodak, 2001; Wodak, 2001, 2006). Thus, this approach is appropriate for the analysis of legal texts, which often use historical and context-specific information to assist the reader in understanding the court's logic and conclusions.

DHA is a form of critical discourse analysis, which has its foundations in critical-dialectical and phenomenological-hermeneutic approaches to theory. From the critical-dialectical approach, CDA obtains its focus on the criticism of discourses, particularly examining them for contradictions and considering them in social and historical contexts (Weis & Wodak, 2003). Because particular ways discourse uses language and presents power relationships are often unclear to the readers of the discourse, a goal of CDA is to make these opaque discourse aspects more transparent (Fairclough & Wodak, 1997). From the phenomenological-hermeneutic approach, CDA assumes that all scientific theory, including social science theory, originates in a social matrix that is vital for understanding how knowledge works in everyday life (Schutz, 1962; Weis & Wodak). Specifically, in this social matrix, discourse creates the social identities of and relationships between people and entities and delineates the knowledge available and applied to individual and groups; discourse also facilitates existence of the social status quo by contributing to its maintenance or

modification (Fairclough & Wodak, 1997). Case law exemplifies this connection of discourse to social life in that it delineates the permissions and limitations of power and relationship among persons and groups in statutes and case opinions. These boundaries are continually referenced, clarified, maintained, or modified by subsequent case law. This view of scientific inquiry not readily transparent but social in origin and effect is foundational not only to CDA but to various qualitative methods including grounded theory (Weis & Wodak, 2003). These commonalities provide additional support for the combination of DHA with established qualitative methods in a case study of legal opinion.

*Role of the researcher*

Researcher interest, motivation, and worldviews can influence how data are collected and interpreted (Creswell, 2007). Perhaps particularly in policy-related texts, readers do not approach the text passively but with values, purposes, experiences, and histories that influence the meaning derived from the text (Creswell). Critical discourse analysis assumes that the analyst's personal history and social experience are not left behind when reading texts; rather, they should be clearly presented for the reading audience (Meyer, 2001). Thus, as the researcher I inform the reader that I have worked in educational, legal, and psychological settings in the roles of public school substitute teacher, licensed attorney, screening research team member, and psychology intern in a state hospital-affiliated program. These experiences facilitated an understanding of legal, psychological, and less so educational issues investigated in this study. Additionally, I am interested in the empirical study and clinical application of issues relevant to children's mental health needs and health disparities. Specifically, based on my interactions with historically advantaged groups in clinical and forensic settings, I believe lack of access to mental health treatment, including

preventative interventions, significantly contributes to a variety of negative life outcomes and that student screening for mental health prevention and intervention should be considered as one method of addressing mental health resources disparities. I am also of the belief that healthcare and psychological practice operate within a legal system whose goals and limitations differ significantly from those of others fields. As a result, litigation outcomes may be more likely to reflect legal as opposed to health or psychological considerations. In combination, these experiences and beliefs resulted in my interpretations being somewhat legally conservative; specifically, I highlighted the cautions involved in developing SBMHS programs with the intention of providing guidance in creating legally permissible forms of such programs. Also, my legal training and experience resulted in explanations written in language that is more legal, as compared to psychological or educational in terminology and tone. This reflected my challenges in writing critically about a system in which I have been educated and practiced.

*Data collection*

In documentary research, the documents to be analyzed may be appraised in terms of authenticity, reliability, meaning, and theory (McCulloch, 2004). Authenticity requires a determination of the genuineness and origin of the document, which can be obtained from the document's place and date of creation (Merriam, 2009; Scott, 1990). Document reliability may refer to whether the documents provide an accurate account of the events presented therein (Tosh, 2002). The court opinions analyzed in this study were obtained from LexisNexus Academic, an online database of various legal documents, including federal district court opinions. Other case-related documents were obtained from the Public Access to Court Electronic Records (PACER), an online public access service provided by the

federal judiciary that archives and provides electronic user access to case and docket information, including pleadings and documentary evidence, from federal appellate, district and bankruptcy courts. As the documents provided in these databases must accurately reflect their authorship, origin, dates of publication, and contents as provided by their authors and those submitting documents to the database, I deemed them to meet the requirements for authenticity and reliability.

Case studies require use of a criterion data sample procedure, meaning documents should be selected only if they meet particular and predetermined qualifications (Creswell, 2007; Merriam, 2009). For this case study, the qualifications for inclusion were state and federal civil court opinions, published within the past 20 years, specifically addressing universal mental health screening in public schools. From prior work, I was aware of one such case, *Rhoades v. Penn-Harris*, a federal district court case. Copies of the two *Rhoades v. Penn-Harris* court opinions were obtained from the LexisNexus Academic database. Using the LexisNexus Academic database, I conducted a search for state and federal cases citing *Rhoades* where universal mental health screening in public schools was the issue presented for discussion. Terms used for the search included student and/or child, public school or schools, psychological testing, assessment, evaluation or screening, mental health testing, assessment, evaluation, or screening. These words and terms were also used to search LexisNexus Academic for state and federal case law involving universal mental health screening not citing *Rhoades*. Neither of these searches yielded any additional school screening case opinions. To obtain additional information regarding the context of the *Rhoades* case, the following case documents and their attached documentary evidence were obtained from PACER: Complaint, Answer, Defendants' Brief in Support of Its Motion for

Summary Judgment, and the Plaintiff's Brief in Response to Defendants' Motion for Summary Judgment.

Regarding the meaning of documents, data obtained from documents should be clear and comprehensible; this may require explaining technical phrases, institution- or individual-specific allusions or references, and an awareness of changes in the uses of terms and words (McCulloch, 2004). As I, the researcher, have didactic and experiential training in both law and psychology, I was aware of particular practice-area-specific jargon and how use of terminology in one area may differ in definition and/or application in another areas. In critical discourse analysis, the goal is not to determine the conclusive or correct meaning of a text but to consider various meanings as indicative of examined texts' ambiguities, contradictions, distortions, and absences (Codd, 1998; McCulloch). In this study, the goal of explaining legal and psychological terminology was not to obtain a single, all-inclusive meaning of the examined discourse but to provide possible meanings and additional context for the data analysis and interpretation. Thus, in qualitative research, theorizing allows for the explanation of an area of practice and the prediction of future activity (Merriam, 2009). This is consistent with the study's exploratory purpose and use of Wodak's (2001) data categories. In this study, CDA as applied through DHA provided the theoretical basis for analysis and interpretation.

*Data Analysis*

The discourse-historical approach has been used with a three-dimensional analysis, specifically, forms of linguistic implementation, contents, and argumentation strategies (Matouschek et al., 1995). Forms of linguistic implementation include texts, sentences, and words. Argumentation strategies are unconscious or conscious processes, or plans of action,

operating at varying levels of communication. While linguistic implementation and argumentation strategies may be generally found in and transferable to other texts, because of the uniqueness of their linguistic presentations, the content of a text is viewed as specific and nontransferable; this is consistent with the limitations of transferability in qualitative research (Merriam, 2009).

Methods used to apply DHA may be modified to accommodate brief discourse investigations (Wodak & Meyer, 2009). Case law options often contain information on diverse, as opposed to single, legal issues; for example, multiple topics and their legal analyses may be presented and opinion may contain statements on particular legal procedures. For this reason, the three-dimensional analysis requirement that text be described as accurately as possible at all linguistic levels was modified such that linguistic implementation was applied only to portions of the opinion discourse related to the *Rhoades* screening program. The researcher retained Titscher et al.'s (2000) requirement that case setting and context be described as accurately as possible. Additionally, as CDA should account for what is present as well as absent in discourse, such differences were noted in my analysis (Kress & van Leewen, 2001). For example, in the psychological literature, individual and public health implications of student mental health issues are often cited as support for SBMHS. Thus, analysis of the data also consisted of reviewing the presence or absence of similar health-related implications.

The *Rhoades* 2006 and 2008 federal district court opinions written by Judge J. T. Moody were used for data analysis. I analyzed each opinion at three levels: as a whole or complete document, as individual but connected paragraphs, and as individual but connected sentences. Specifically, these whole, paragraph, and sentence units were analyzed for

statements regarding the defendant school's screening program and, as the program was developed in response to student suicide, student mental health issues generally. The research questions were addressed by analyzing relevant texts for the following categories of interests: (a) use of referential or nomination strategies using titles/names, characteristics, qualities, or other descriptions attributed to entities involved in SBHMS; (b) relative power relationships; (c) use of argumentation strategies with an emphasis on the topoi, that is, explicit or inferable premises that connect an argument to, or justify an argument's transition to, its conclusion or claim, as developed by Wodak (2001) in her prior analysis of social issues addressed in public policy; and, d) the interdisciplinary perspective (e.g., centrist, pluralist, or integrationist) used.

*Trustworthiness*

In qualitative research, trustworthiness refers to the accuracy of the interpretations made from the data (Lincoln & Guba, 1985). For qualitative data to be trustworthy, that is plausible enough to persuade the reading audience that the data are worthy of one's attention and that the results are worthy of confidence, it must be obtained through efforts that are credible and dependable (Lincoln & Guba). Credibility means that the study's findings and any interpretations based on those findings are derived using an appropriate research design and data analysis methods (Lincoln & Guba). Data triangulation for data analysis is one method that may be used to meet the credibility threshold (Denzin & Lincoln, 2005; Lincoln & Guba). Dependability requires that the research findings be determined by the data such that interpretations are independent of the researchers' perspectives, motives, or interests (Lincoln & Guba). Creswell (2007) suggests researchers may limit the effect of these personal factors on data interpretation by "bracketing" such bias during the analysis. In

comparison, CDA assumes strict objectivity cannot be achieved; the risk of biased interpretation may be reduced by making research choices transparent and using theory to justify why some interpretations seem more valid than others (Meyer, 2001; Wodak, 2001). In this study triangulation of data perspectives (Creswell, 2007; Scollon, 2003) and peer review (Merriam, 2009) were used to reduce bias in data interpretation and increase trustworthiness. Specifically, drafts of completed analyses were submitted to a committee member with qualitative research expertise and experience in several such studies.

In this study, I used Wodak's (2001) triangulatory approach, which is based on the concept of context and takes into account four levels of comparison and contrast related to the research questions. First, the internal language of the 2006 and 2008 texts was analyzed for the presence, absence, and interpretation of concepts established by the research questions. Next an intertextual analysis was used to compare statements relevant to the research questions between the 2006 and 2008 opinions. For triangulation of *Rhoades* case context, the presentation of facts in the aforementioned PACER-obtained case documents were compared to each other and to the facts presented in the 2006 and 2008 opinions. Data were also triangulated to the case's sociopolitical and historical contexts. Specifically, because the *Rhoades* opinions were preceded by and cited the federal school-related cases of *Fields v. Palmdale* (2005) and *C.N. v. Ridgewood* (2005), these cases were also reviewed for research question delineated concepts. The Supreme Court cases of *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Wisconsin v. Yoder* were also reviewed and their discourse relevant to the research questions compared to that in the *Rhoades* case.

## Results

*Reference/Nomination of Screening Program Actors*

In the linguistic strategy of reference/nomination, in- and out-groups are constructed by the creation of membership categories (Wodak, 2001). Such groups may be directly created through the application of covert labels or more subtly as through analogy or metaphor. In legal opinions, labels such as "plaintiff" and "defendant" are customary; however, even such familiar labels assist in framing the discourse. Specifically, discussing those involved in litigation in terms of their respective roles or titles instead of as individuals may work to depersonalize the events underlying the litigation and the potential consequences of the legal decision. As the purpose of this study was to explore court discourse relevant to the broad issue of student mental health screening program implementation, this analysis did not focus on the use of these specific customary terms but on other ways distinct groupings of and separations between entities and concepts were created within the *Rhoades* decision; however, in keeping with the reflexive nature of critical discourse analysis, I acknowledge that using similar labels in this analysis may have certain discursive effects. For example, I chose to identify the judge writing the opinions as "The Court," not by name or some other label. Discussing those involved in litigation in terms of their respective roles or titles instead of as individuals may work to depersonalize the events underlying the litigation and the potential consequences of the legal decision. Such terms may also reinforce or suggest approval of these roles, limit perceptions and discussion of the entities involved. Here the use of these terms is to maintain continuity with terms used in the case opinions to facilitate comprehension of the concepts explored in this study

An example of reference/nomination is provided by the identical headings of the *Rhoades* opinions:

> TERESA RHOADES and MICHAEL ALLEN RHOADES, individually and as parents and next friends of CHELSEA RHOADES, a minor, Plaintiffs, v. PENN-HARRIS-MADISON SCHOOL CORPORATION, an Indiana Political Subdivision, et al., Defendants.

In addition to informing the reader of the members included in the categories of plaintiff and defendant, the use of "et al.," indicates that the defendant category includes yet unidentified members. The following defendants are omitted from the header but introduced in the text:

> Penn-Harris-Madison School Corporation, an Indiana political subdivision, David R Tydgat, individually and in his official capacity as Principal of Penn High School, a division of Penn-Harris-Madison School Corporation, Dave Risner, individually and in his official capacity as Associate Principal of Penn High School, Steven Hope, individually and in his official capacity as Assistant Principal of Penn High School, Vickie Marshall, individually and in her official capacity as Guidance Counselor at Penn High School, Marni Cronk, individually and in her official capacity as Guidance Counselor of Penn High [and] Madison Center Inc, an Indiana non profit corporation…(*Rhoades*, 2006, 2008).

This suggests that the Court will discuss the School as an entity and its various employees, and the Center only as an organization. Although not noted in the header or the introductory text, the Court also discusses the involvement of two individuals for whom their organizational affiliation is unclear. In both opinions, reference/nomination creates groups from the persons and entities referenced in and omitted from the opinion headers.

In each opinion the child/student and her parents are consistently grouped as a category separate from other entities. The descriptions used for this categorization include those traditionally used in cases involving minors and parents. For example, the 2006 and 2008 opinion headers and introductions, respectively, label the parents as the "next best friends of their daughter" and as "Chelsea's parents and next friends" (*Rhoades*, 2006, p. 3; 2008, pp. 890, 896).

Statements regarding the parents' interest in their child's upbringing and describing the parental relationship as private emphasize the closed nature of the parent-child group (*Rhoades*, 2006, pp. 17-18; 2008, p. 889). The Court notes that this private interest in rearing children is consistent with the historical and legal perspective of parent-child relationships (*Rhoades*, 2008, p. 894). Thus, The Court maintains a long-standing legal conceptualization of parents and children as a unit and creates a presumption that The Court will treat other entities as distinctly separate from this group.

Regarding The School, The Court's discussion grouped it with The Center and a community task force by noting the (in)actions engaged in regarding the screening program. The task force was described as consisting of "leaders in the community in the business, education and health fields," which presents the task force lacking input from parents, the group alleging a violation of rights (*Rhoades*, 2008, p. 891). Within the School-task force discourse, The Court noted that the community task force asked The School to implement a suicide prevention program, to allow the Center to conduct the screening program, and to use a passive parental consent form for the program (*Rhoades*, 2008, p. 891); however, the task force is not listed in the suit, nor does the opinion suggest that it should be. This results in The School being grouped with the task force in terms of screening program activity but not legal liability.

Regarding The School's affiliation with The Center, although the 2006 opinion stated that The Center "accepted a lead role in the development of" the screening program, prior to the 2008 opinion The School attempted to separate itself from The Center by describing it as an "entity which is unconnected to PHMSC" (*Rhoades*, 2008, pp. 905-906). Specifically, The School argued that there was "no evidence that [it] had any control (or knowledge)" of

certain of The Center's activities, specifically, how assent was obtained from some students, The Center's representative's discussion with Chelsea, or the results of Chelsea's TeenScreen, and should not be held liable for these actions (Rhoades, 2008, p. 907); however, The Court's discourse consistently groups the two organizations. For example, the screening program is described as being "conducted by defendant Madison Center…acting as the agent of defendant Penn-Harris-Madison School Corporation" (*Rhoades*, 2006, p. 3). The School is also noted as inviting The Center to The School to conduct the screening, seeking assistance from The Center in administering the screening program generally and in specific program logistics such as the selection of a passive parental consent procedure after an active consent procedure yielded a low response rate, providing school space and other resources to conduct the screening, and using Center Employees to supervise and administer the TeenScreen to students (*Rhoades*, 2008, pp. 890-891, 906-907). The Court maintained and expanded its 2006 holding, stating that even if the School-Center relationship was not one of agency, such that The Center was an independent contractor with The School, The School may still be liable for damages (*Rhoades*, 2008, p. 909). Thus, because of the screening program activities shared by The School and The Center, uncertainly about the legal nature of the School-Center affiliation was insufficient to remove The School from potential liability arising from The Center's (in)actions.

As with The School and Center, the opinions discussed individual school employees in terms of their activities related to the screening program. For example, the opinions noted teachers as being informed of the program and its schedule and releasing students to participate, but they were not named in the complaint nor did the opinions discuss their omission as an oversight (*Rhoades*, 2008, p. 892). In comparison, the associate principal and

guidance counselors, who were named as parties to the action, were noted as preparing the test schedule, preparing correspondence for teachers about the screening program, and requiring that students sign an assent form prior to participating in the program (*Rhoades*, 2008, pp. 891-892). The Court determined that, as required for summary judgment, the facts viewed most favorably for the plaintiffs indicated that the screening program violated the Rhoadeses' federal right to privacy but, as questions existed as to whether the individual employees knew their actions were wrong, the individual employees retained their qualified immunity and were granted a summary judgment on the federal claims (*Rhoades*, 2008, pp. 899, 911). Consequently, because they could not reasonably have known their actions violated federal rights, the individual school employee defendants were not held liable. This raises questions of what facts may indicate that The School employees knew or should have known that their actions violated parental rights and, as a result, generate a different conclusion regarding The School's qualified immunity and liability.

The Court discussed two other individuals' involvement in the screening program but did not clearly group them with either The School or The Center. According to Chelsea, the first individual participated in obtaining student assent by reading something about the TeenScreen prior to its administration, telling her that she needed to sign the assent form, and telling students to proceed quickly because others needed to complete the screening (*Rhoades*, 2008, p. 892). This individual is also noted by her inaction, particularly, not telling Chelsea the screening was voluntary and that she could refuse to participate (*Rhoades*, 2008, p. 892). The Court also discussed an individual identified as "a representative of Madison Center [who] informed Chelsea that she suffered from two mental health problems: obsessive-compulsive disorder and social anxiety disorder" (*Rhoades*, 2006, p. 3). In the

2008 opinion, The Center representative is identified as a woman who told Chelsea that she had the two mental health problems and she could talk to a counselor or have her mother call The Center for treatment (*Rhoades*, 2008, p. 892). Although it is unclear with which entity these persons were affiliated, considering The Court's determinations regarding The Center's and The School's liability, employees of either organization could have been held liable for their participation in the screening program.

In addition to The Center and the task force, The School and its actions were also grouped by analogy to an entity not a party to the action. In the 2008 opinion, The Court compared The School's argument that it was not responsible for The Center's communication of psychological information to Chelsea to The School's having invited the North American Man/Boy Love Association (NAMBLA) for an information session, a student's being molested, then The School's arguing it was not responsible for the student's damages because The School itself did not inflict the injury (*Rhoades*, 2008, p. 906). The Court stated that this comparison is not intended to be facetious as an analogy. The School's disclaimer to the NAMBLA example groups The School's actions with an act resulting in physical and emotional harm to a child and groups The School as an organization with another entity whose actions are harmful to children.

In the 2008 opinion, groups are also created using abstract concepts, such as the law; specifically, the entities and issues in *Rhoades* are compared to prior case law addressing similar questions arising from school activities. In discussing the cases of *C.N. v. Ridgewood Board of Education* (2005) and *Fields v. Palmdale School District* (2005), each cases in which the court found in favor of the school on the grounds that the survey activities at issue fell within the schools' authority, The Court stated that its case should not be grouped with

*C.N.* or *Fields*, in part because the survey administered in *Rhoades* was not anonymous as in these cases (*Rhoades*, 2008, p. 898). Additionally, the surveys in *C.N.* and *Fields* were designed to collect aggregate data while TeenScreen was to determine if an individual student "was a suicide risk or had other significant psychological problems" (*Rhoades*, pp. 898-899). Thus, The Court viewed The School's screening program as belonging to a category separate from the programs at issue in *C.N.* and *Fields* because the screening program differed in purpose, type of risk identified (i.e., individual or community), and the type of information collected from students (i.e., identifiable individual or aggregate anonymous).

The Court's discourse also grouped the legal issues presented into potential state and federal liabilities. Specifically, The Court used *C.N.* and *Fields* to support its conclusion that the federal issues raised by the plaintiffs of the "liberty interest in upbringing of children" and their "privacy interest in non-disclosure of personal information" contained sufficient questions of facts to deny The School's motion for summary judgment on those issues (*Rhoades*, 2008, p. 899, 904). Regarding state law issues, the plaintiffs alleged the screening program violated a statute preventing mandatory student participation in "a survey revealing personal beliefs and opinions" (*Rhoades*, 2008, p. 904). The Court granted The School summary judgment on this issue because it was unclear whether the state law provided the type of remedy the plaintiffs sought; however, The Court expressed concern that student participation in the screening program may not have been voluntary (*Rhoades*, 2008, p. 904, 905). Specifically, The Court questioned whether the conditions under which the students, particularly Chelsea, signed the assent form rendered the process involuntary (*Rhoades*, 2008, pp. 891-892).

*Power*

The *Rhoades* case header suggests relative power relationships even prior to the main discourse. As explained in the reference/nomination section, parental rights include the legal authority to bring suit on the parents' as well as on their children's behalf (*Rhoades*, 2006, p. 3). Such rights also include the ability to subject children to medical examination and decide whether or not the child will attend a public school (*Rhoades*, 2008, p. 895, 896). In its discussion of these rights, The Court cites multiple Supreme Court cases to support its arguments regarding the "liberty interest in the rearing and education of one's children" that the U.S. Constitution and other courts have repeatedly recognized within the parent-child relationship (*Rhoades*, 2008, p. 894. It also cites a 2000 U.S. Supreme Court case affirming "the fundamental right of parents to make decisions regarding the care, custody, control and upbringing of their children" (*Rhoades*, 2008, p. 911). In this, the Court confirms that parental authority is not just a contemporary federal right but a long-standing one based in the U.S. Constitution. Thus, parental power concerning students is established as primary compared to other persons or entities, including schools, which may affect students' education or upbringing.

In the discourse of parental authority relative to that of others interacting with students, the *Rhoades* opinions recounted the plaintiffs' claims that the defendants' actions constituted a "breach of parental interest" and noted that such allegations rest on "the breach of a duty not to interfere in the privacy of the familial relationship between Chelsea and her parents" (*Rhoades*, 2006, pp. 17-18). This statement further supports the idea that protection of parental authority is the primary power issue to be addressed. This statement also implies that the parent-child relationship is vulnerable to interference or disruption. The Court cites

previous cases to state that schools may interfere with parental authority by introducing certain topics to children before parents chose to do so (*Rhoades*, 2008, p. 898). As it relates to screening, The Court explicitly states its concern about testing in its selection of the following quotation from *Merriken v. Cressman* (364 F. Supp. 913, 922 (E.D. Pa. 1973), a case holding a school-administered survey unconstitutional: “School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution” (*Rhoades*, 2008, p. 889). Also from *Merriken*, The Court states that, “public schools must not forget that *"in loco parentis"* does not mean "displace parents" (*Rhoades*, 2008, p. 889). Thus, not only are schools as an entity a potential interference with parental authority, but their various activities, including counseling and testing, may also be seen in encroaching upon parents’ authority over children.

Not only is parental authority set out as a well-established right but also as a fundamental one, meaning it is afforded special protection in federal law. This special status creates a higher standard for protection. Without providing instruction on how The School may have protected this right within the context of screening program, The Court noted where The School’s actions fell short. Specifically, in discussing The School’s passive informed consent procedure, The Court posited that, although nine parents opted out of the program, the opt-out procedure as presented in the school newsletter “would be treated as ‘junk mail’ in many households and quickly thrown out” (*Rhoades*, 2006, p. 4; 2008, p. 891, 907). Additionally, as the Rhoades denied ever receiving such notice, their consent was not obtained (*Rhoades*, 2006, p. 4). This suggests that the screening program should have used

other informed consent methods, specifically ones that would insure receipt of the information and cause parents to attend to the communication and in the information provided therein.

Regarding student power, as previously stated, in both opinions, Chelsea's legal status is established via her relationship to her parents. In addressing the use of Chelsea's name in the opinion, The Court stated that it is doing so because her parents have done so in their pleadings, suggesting that parents must waive her anonymity by using her name in public legal documents before others, including the student herself, may do so (*Rhoades*, 2008, p. 890). Consequently, as an unemancipated minor, the student is subject upon her parents even in regards to the use of her own name. This indicates The Court intends to maintain a traditional view of children as completely under parental authority.

The Court is consistent in its discourse of relative student power in its subsequent statements regarding parental consent (e.g., such consent's being required before a minor can participate in evaluations requesting personal, private, or familial information), which also suggests that the student is unable to do so of own her accord (*Rhoades*, 2006, p. 12; 2008, p. 890). The Court restates and does not rebut, thus implying at least some measure of agreement with, the plaintiffs' statement that the application of this authority would remain unchanged "even if the TeenScreen had identified Chelsea as an imminent suicide risk and saved her life," suggesting that an actual or potential benefit to the student, even of a serious magnitude such as preventing death, may be insufficient to overcome parental authority and the student's inability to act independent of such authority (*Rhoades*, 2006, p. 12).

In addition to students' general inability to consent, The Court also discusses other aspects of student involvement in the program, particularly through participation in and

requesting information regarding the screening. The Court also questions, considering the circumstances under which Chelsea signed the assent, "whether she understood what she was signing" (*Rhoades*, 2008, p. 892). Specifically, The Court stated that although the form may have been read during the TeenScreen administration, she was not attending to the information, did not read the form, was not told the test was voluntary, was unclear about the purpose of the form, and her impression was that she was required to take the test (*Rhoades*, 2008, p. 892). Thus, although Chelsea was a high school student with no known cognitive or learning deficits that would prevent her from reading or comprehending the information in the form, The Court discusses her as unwilling or unable to attend to or understand the information given her, which suggests that the students may be unwilling or unable to attend to instruction or to read and comprehend assent-related information. Additionally, in recounting the student's perspective of the assent procedure, The Court shows that in reviewing questions of the validity of student assent the students' experience of the process may be considered in determining legal violations. Regardless of the student's degree of agency in such situations, The Court maintained that the School bore the responsibility of ensuring each student's legally appropriate, individual comprehension of the assent process, which includes the student's right to decline to participate in the activity.

Further diminishing student power is the description of Chelsea after being told she had two mental disorders and could speak to a counselor or have her mother seek treatment for her as "very 'upset and confused' by this information and dwelled on it all day, becoming more upset the more the thought about it" (*Rhoades*, 2008, p. 892). This presents the student as emotionally unable to manage receipt of mental health information even for a brief time

without parental assistance. This also reinforces the presentation of students as needing parental protection from outside entities.

*Rhoades* does not deem students completely powerless; however, The Court notes that students may refuse to participate in a screening program, but this right must be clearly communicated and understood by the student (*Rhoades*, 2008, pp. 902, 903). This suggests students may not be required to participate in screening programs, meaning such programs cannot be made mandatory. Additionally, applying state contract law, The Court likens the screening program to a contract that the student can void at any time, even after fulfilling the terms of the agreement, here, after completing the TeenScreen (*Rhoades*, 2008, p. 901). It is unclear what actions the student must take to void an agreement or how their terminating the agreement affects the management of the information they provided prior to termination; thus, the allowance for the student to end participation at any time further indicates The Court's protection of the students option not to participate in screening.

In contrast to the parents, who are presented as being uninvolved with the screening program, the Court's discussion of The School's power is focused on in its actions in creating and implementing the screening program. As previously explained, The Court in citing *Merriken* posits that school counseling and testing activities have the potential to interfere with parental authority. In comparison to this general reference, The Court notes particular activities over which The School exercised power. Specifically, The School was noted as collaborating with and accepting recommendations from community entities, incorporating screening into the curriculum, selecting the measure used in the screening program, preparing protocols for screening program, and arranging student scheduling for screening (*Rhoades*, 2008, pp. 891-892). The School also selected and changed the processes for obtaining

informed consent for parents and developed the student assent procedure (*Rhoades* 2008, p. 891). The School asserts that, as in *C.N.* and *Fields*, their actions were undertaken under its authority to direct its curriculum (*Rhoades*, 2008, p. 891). The Court notes that in those cases, the schools based the legality of their surveys, on their authority to manage their curricula, but this authority is limited and does not operate in isolation. First, as a governmental actor, the schools' interest in obtaining "valuable health information" is balanced against disclosing private information (*Rhoades*, 2008, p. 899). This balance may tip in the government's favor when, as in *C.N.* and *Fields*, such information is collected in the aggregate and personal information is highly protected (*Rhoades*, 2008, pp. 894, 899). Also, this authority may be abused where, as in *C.N.*, the facts suggest student participation was coerced by threatening a cut in grades, requiring absent students to make up the survey, not allowing students to leave until they completing the survey, and parental rights are potentially violated by not seeking parental consent (*Rhoades*, 2008, p. 894). This statement indicates that although The Court acknowledged The School's power to control its curriculum, such authority is relative to other rights, such as those related to private information, parental authority or voluntary student participation. Based on The Court's analysis in *Rhoades*, it is possible that where these other rights are involved, particular facts regarding program development and logistics may be used to determine whether screening programming has overstepped a school's limited authority by violating some other right.

The School was also described in terms of its communicative power. Specifically, The Court noted The School's ability to provide information about school-related activities, to solicit consent for student participation from parents and to use multiple attempts and various methods of communication such as newsletters or other correspondence and

(*Rhoades*, 2008, p. 891). The Court also noted the use of school personnel to prepare and disseminate parent correspondence and to inform and instruct teachers regarding the screening program (*Rhoades*, 2006, p. 4; 2008, p. 892). Additionally, in its discussion of *C.N.* and *Fields*, The Court noted that although such action would likely violate parental rights, a school may, by withholding information, misrepresent programming to parents (*Rhoades*, 2008, p. 896). Thus, The School was considered the primary source of information about the screening program not only regarding to communication with parents but also in sharing information with and directing communications from teachers. This discourse on school communication indicates that The Court considered how The School used or refrained from using its ability to provide screening program information to parents and personnel.

The Court's discussion of the screening program prior to student participation focused on the lack of information given to students about the program. The Court noted that teachers were instructed not to tell their students about the TeenScreen (*Rhoades,* 2008, p. 892). Also, the woman participating in the TeenScreen administration which Chelsea attended was described as instructing students to sign the form while withholding information that their participation was voluntary and of their right not to participate (*Rhoades*, 2008, p. 892). The woman was also reported as telling students "to be as quick as possible," which may be interpreted as removing the opportunity for students to review, question, and understand the meaning of their assent (*Rhoades*, 2008, pp. 892, 903). The Court also noted that the student assent form contained a typographical error in that the contact information for the project coordinator, who was to be contacted with questions or concerns about the TeenScreen, was omitted (*Rhoades*, 2008, p. 903). This suggests The School should have taken additional care in providing information to students involved in the

screening, particularly as it relates to ensuring student understanding of assent, providing sufficient time for students to ask questions about their participation, and providing accurate contact information in documentation provided to students about screening.

*Argumentation (topoi)*

As part of her historical discourse approach, Wodak (2001) developed a list of 15 topoi, or argumentation strategies, frequently used in discourse to support arguments for or against particular conclusions to proposed social problems. Of these 15 strategies, my analysis of the *Rhoades* discourse found The Court made use of the following topoi: law/right, history, numbers, responsibility, definition or name-interpretation, usefulness or advantage, and danger or threat.

The topos of law or right is the argument that an action should be permitted or omitted if a law or codified norm prescribes or forbids the action (Wodak, 2001). The topoi of history is that because history shows that actions have specific consequences, an action should be performed or omitted if it is comparable to the historical example referenced (Wodak). In its discussion of how the screening program violated the Rhoades' parental rights, The Court uses a combined law/right and history argument by stating that "The Supreme Court has recognized for almost 100 years that the due process clause of the Fourteenth Amendment encompasses a liberty interest in the rearing and education of one's children" and immediately thereafter citing the 2000 case of *Troxel v. Granville*, in conjunction with the older Supreme Court cases of *Carey v. Population Services, Intern* (1977), *Pierce v. Society of Sisters* (1925) and *Meyer v. Nebraska*, (1923) (*Rhoades*, 2008, pp. 894, 897). The Court acknowledges The School's legal obligation to educate its students and that this duty was asserted by defendants and affirmed by the courts in *C.N.* and *Fields*;

however, The Court cites *Merriken* (1973), *Pierce* (1925), and *Yoder* (1923) to support its argument that The School's duty to educate is limited by the parents' privacy interest in and authority over the student (*Rhoades*, 2008, pp. 894-896).

The Court does not use history independently, but law/right is used to support its analysis and conclusions regarding each issue presented for resolution. In the 2006 opinion, these topoi are used to analyze the question of whether The School's screening program should be defined as medical malpractice or whether the plaintiffs should be awarded emotional distress damages, and the judge concluded that this is unclear (*Rhoades*, 2006, pp. 12-13, 15). In addition to the abovementioned discussion of parental rights, the 2008 opinion also applies law to discussions of (a) the conditions under which The School as a governmental entity may access private information; (b) whether The School's program was voluntary and confidential; (c) screening participation as a contract, which the minor may void at any time; and (d) The School's inability to require student participation in "a personal analysis, evaluation, or survey not directly related to academic instruction" (*Rhoades*, 2008, pp. 889-902).

In addressing the complexity of these issues, The Court uses a variation of the potentially fallacious numbers argument that an action should be performed or omitted if the numbers prove a specific topos; this argument can be flawed when drawn from presumed but not empirically verified, majorities (Wodak, 2001). Specifically, The Court uses this argument in discussing The School's active consent procedure noting, "only nine parents returned the forms consenting to having their children take the TeenScreen" and its discussion of the subsequent passive consent procedure noting that although 23 opt-out forms were returned, most parents would respond to passive consent in newsletter as junk mail

(*Rhoades*, 2008, p. 891). The Court also notes a lack of numerical information provided by the School regarding 94 students who did not participate in the screening, particularly the reasons for their non-participation (*Rhoades*, pp. 902-903, 909). In its discourse on the individual liability of school employees The Court states, “It took this court nearly twenty pages to analyze and determine whether the facts of this case . . . establish the violation of a Constitutional right” *Rhoades*, p. 911). Thus, The Court consistently used numbers, or the lack thereof, to support its concerns regarding the use of passive informed consent and the voluntariness of student participation in the screening program.

The topos of responsibility is that if an entity is responsible for a specific problem, it should act to find solutions to that problem (Wodak, 2001). In *Rhoades*, the problems as presented by plaintiffs are that The School’s screening program impinged upon the parents’ interest in the child’s interest and upbringing by not obtaining the parents’ written consent (*Rhoades*, 2006, p. 17; 2008, p. 890). The defendants asserted consent was obtained using the passive consent procedure and that Chelsea’s participation was voluntary (*Rhoades*, 2006, p. 17; 2008, p. 890). Ultimately, The Court held that the overall program violated the Rhoades’ parental rights and did so by recounting the actions making The School responsible, such as inviting and collaborating with the Center and its personnel, selecting the informed consent procedure, and using insufficient methods to inform parents of the screening program (*Rhoades*, 2008, pp. 891-892). Regarding individual school employee responsibility arising from their various program-related activities, The Court also details their various activities, but in its final conclusion holds that it is unclear “whether a reasonable state actor would have understood that his or her actions were unlawful" (*Rhoades*, pp. 891-892, 911). Thus,

school employee actions were used for their contribution to The School's responsibility for the program, but not to generate individual employee liability.

The Center's responsibility for the problem is presented via its relationship with the school (*Rhoades*, 2006, p. 3). Specifically, The Court discusses The Center's contribution to the problem as including its representative failing to ensure voluntary and knowing student assent and failing to maintain student confidentiality in the screening program adequately (*Rhoades*, 2006, p. 2; 2008, p. 892); however, these actions were discussed as problematic not because of the entity performing them but because of how the facts surrounding then resulted in a violation of parental rights. Thus, regardless of whether The School or its agent performed the actions contributing to a breach of confidentiality, in combination, the actions resulted in a breach of the Rhoades' federal privacy rights.

In neither opinion is the student discussed as having any responsibility or contributing in any way to the problem of a violation of rights. For example, in its presentation of Chelsea's recollection of her (in)actions during the administration (i.e., her not attending to the information, signing the form without reading it, and not asking any questions of the person administering the TeenScreen), The Court is silent as to whether any of these facts would mitigate The School or Center's responsibility to ensure voluntary and knowing participation (*Rhoades*, 2008, p. 892). That the balance of responsibility lies outside of the student likely stems from her status an "unemancipated minor," which implies that some other person or entity is responsible for her (*Rhoades*, 2006, p. 3). In this instance, The Court concludes such responsibility rests with The School and/or The Center as collaborators in the screening program.

The topos of definition or name-interpretation is also used in *Rhoades*. Under this argument, if an action, a thing, or a person is named/designated as X, then it carries or should carry the qualities, traits, or attributes contained in the meaning of X (Wodak, 2001). In its discussion of Chelsea's participation in the screening program, The Court consistently applies a presumption of a lack of responsibility because of her designation as a minor (*Rhoades*, 2008, p. 892). This unchanging definition helps simplify the discourse by removing one party from potential liability. It also works to assign responsibility to an entity other than the student.

Use of the topos definition creates challenges for The Court's analysis. For example, the plaintiffs allege medical malpractice, but The Court says it has an "initial reluctance to conclude that every claim in the complaint is a claim for medical malpractice, simply because the TeenScreen program is involved" (*Rhoades*, 2006, pp. 12-13). This suggests The Court may consider TeenScreen a medical process or procedure but is unsure if this is an accurate designation. Also, in discussing the TeenScreen instrument The Court is clear that it differs from those used in *C.N.* and *Fields* because it was used to screen "for emotional health concerns" and to collect individual as opposed to aggregate data, but it does not proceed to clarify whether the TeenScreen is the type of analysis, evaluation, or survey that state law prohibits from mandatory participation; instead it addresses whether the facts indicate its administration was voluntary (*Rhoades*, 2008, pp. 892, 898-899).

The topos of usefulness or advantage is that if an action will be useful then one should perform it (Wodak, 2001). The Court states that the screening program was developed in response to student suicide as part of a larger suicide prevention program and that The School's administration was a pilot of the program, implying that the program was created to

benefit the Penn-Harris students and possibly other students throughout the state (*Rhoades*, 2008, p. 891, 899). The Court does not discuss this goal as problematic; however, its statements regarding parental rights and its discussion of those rights to the child's benefit/advantage of having parents making important decisions indicates that benefits to student health are outweighed by the benefit/advantage of maintaining parental rights (*Rhoades*, 2006, pp. 17-18).

The topos of danger or threat is that if an action has specific dangerous or threatening consequences, one should not perform it or should do something against such consequences (Wodak, 2001). In the 2006 opinion's discussion of parental rights, The Court notes that "as a hypothetical, even if the TeenScreen had identified Chelsea as an imminent suicide risk and saved her life, plaintiffs' claim would be the same;" thus the potentially averted danger or threat of teen suicide is presented as insufficient to overcome the protection or value imbued to parental authority (*Rhoades*, 2006, p. 12).

The Court also accesses this topos in reference to The School's argument that liability should be shared with The Center. Specifically, in its NAMBLA example, The Court states that if a student is emotionally or physically harmed The School may bear responsibility for the actor causing the harm (*Rhoades*, 2008, p. 906). Thus, the Court simultaneously connects the harm a student may suffer from a screening program to that of a child being sexually molested and maintains that it is The School's responsibility to protect students from such potential harm.

*Multidisciplinarity*

The Court's approach to multidisciplinarity is presented both in its general presentation of the case and its discussion of parental involvement in the screening program's

design and implementation. As to the case presentation, the 2008 *Rhoades* opinion describes the formation and composition of the task force and its collaboration with The School (pp. 890-891); however, its discussion does not include the various documents submitted by The School with its Brief in Support of its motion for summary judgment to evidence the scientific and state data used to support the task force and School's program development including a statewide study of student suicide, academic articles on school-community screening collaboration, and suicide prevention program guidelines and references (*Defendants Brief in Support of Motion for Summary Judgment*). That neither these, nor any other documents from any other disciplines outside of legal texts, were included in The Court's discourse suggests that only, or primarily, legal concepts were used to guide the discussion and reach conclusions regarding the screening program. This reflects a centrist, as opposed to pluralist or integrationist, perspective to the issues presented (van Leeuwen, 2005).

According to the defendants' pleadings, the parents of the Penn-Harris student who committed suicide were involved in the task force, which collaborated with the School in creating the screening program (*Defendants Brief in Support of Motion for Summary Judgment*). This indicates that parents and their authority were used in collaboration with other entities; however, this involvement was omitted from the case opinions. Specifically, The Court's discourse limits parental involvement to the passive receipt of information from the School, parental opting out of the program, and the Rhoades' objections to the program (*Rhoades*, 2006, p. 3; 2008, p. 890). This suggests that The Court views parental authority as only independent from, or incapable of collaborating with other entities affecting student health.

In sum, in the two *Rhoades* opinions, The Court's use of reference/nomination, organization of relative power relationships, and selection of topoi are each consistent with the legal system's long-standing perspective of parental rights in the context of public education. Specifically, The Court groups the various entities at issue in *Rhoades* in a way that sets the students and her parents as a unit whose rights are irreversibly connected to each other; the alleged violation of the parents' rights arise from the facts related to the child, and the child's rights must be asserted by the parents. In comparison, although The Center is discussed as an agent of The School, The School is referenced as an independent entity, by its affiliation The Center administering the screening, and, grouped by analogy with an organization advocating pedophilia. Thus, The Court's discusses The School's potential legal liability for the screening program as based on its own and it's agents (in)action and as a potential source of harm to students if its activities and personnel are not carefully selected and monitored. Additionally, The Court uses reference/nomination to categorize the present case relative to legal concepts from previous and current case law and statutory law. Specifically, The Court maintains the existing legal perspective that schools may manage their curricula but also discusses its concerns, regarding whether The School's efforts at confidentiality adequately protected the parents' and students' rights to privacy and whether student participation was truly voluntary.

The Court's discussion of power relationships also reflects a divide between the parent-student unit and The School. The Court discusses parental authority over children in terms of the parents' as protectors of students' rights and well-being and specifically singles out counseling and testing as potentially interfering with this relationship and interest. Because of their status, parents are presented as the recipients of school screening program

information with The School having the obligation to communicate student-related information and obtain parental consent for screening in ways that ensure receipt and comprehension. Similarly, because the student has no independent power but derives it from the parental relationship, student assent for screening is also discussed as requiring care in communication and procurement, particularly ensuring student participation follows clear information about and purely voluntary engagement.

In support of its various arguments, The Court's uses the following of Wodak's (2001) topoi: history, particularly, the legal system's historical perspective on parental rights; law/right, specifically, recent cases addressing parental rights in the context of public school activities; numbers in support of questions regarding The School's passive consent procedure; responsibility of the entities to each other in conducting the screening program; definition or name-interpretation as related to limited student power and The Court's challenges in classifying screening relative to other testing; and the general usefulness/advantage of screening relative to the danger/threat of such programs to parental rights. Each of these topoi are presented in either the plaintiffs' or the defendants' documents submitted to The Court; however, the defendants' efforts to broaden the screening discourse by using a more specific topos of benefit by explaining and submitting documentation regarding teen suicide as a local and national mental health concern are not incorporated into either of the *Rhoades* decisions.

By not addressing the information provided by the defendants' regarding student mental health challenges and interventions The Court applies a centrist approach to the multidisciplinary issue of screening. Specifically, its discussion of the case facts includes a statement that the impetus for the screening program was a student suicide, which The Court

describes as a tragedy, but there is no discussion of suicide as a mental health problem nor is screening discussed as a means of addressing this or any other student mental health concern. Specifically, student well-being is discussed as an interest contained solely contained within and to be adjudicating using the legal concept of parental authority; there is no discussion of screening as a collaboration between schools and parents, an intervention sharing the goal of student well-being with parents, or as a matter related to areas outside of law such as public health or psychology.

## Discussion

The U.S. legal system places a high value on parental rights (Gelman, 2005; *Stanley v. Illinois*, 1972). Although the strategies and concepts *Rhoades* used for grouping varied, the goal of the discourse was to address the issues related to the legality of the defendants' actions, specifically whether The School's screening program violated the Rhoades' parental rights. Throughout the *Rhoades* opinions, discussions of informed consent, student assent, and confidentiality were framed by their actual or perceived effects on these rights. Thus, The Court maintained the value of parental rights as paramount in keeping with multiple prior decisions including the aforementioned Supreme Court parental rights cases and *Merriken*. This hierarchy of rights is based on the assumption that parental rights consider, or are at least aware of, students' best interests; it does not consider the possibility that this may not be so. It is unknown how many parents are aware of or consider how unmet educational and mental health needs affect various student life outcomes. Such awareness requires information regarding educational and psychological functioning that many parents, due to their lack of access to such information, do not have. Assuming parents have this awareness, should they decide not to act to meet these needs, students or other concerned adults with

access to students are limited in their ability to connect students to needed resources. In many areas of the county, there are insufficient community or public resources to meet student educational and mental health needs, and many families in underserved populations are unable to access local resources due to lack of financial or healthcare resources. Thus, students, particularly those with the most need, and others who may be aware of and able to assist them in meeting their educational and mental health needs, are severely constrained by current legal perspectives viewing parents rights as more worthy of protection than student health needs.

*Rhoades'* discussion of parental authority was consistently connected to concerns about how The School communicated information about the screening program to parents and students. Thus, schools may be expected to communicate with parents in ways reflective of their authority. While The Court did not expressly require the use of an active consent procedure and did not impose liability upon the school because it could not have known its actions were illegal, it found that the administration of the TeenScreen test violated the Rhoades' right to privacy. Post-*Rhoades,* it is unlikely that some courts will hold schools blameless for utilizing implied consent procedures in mental health screening in which familial and relational information is sought. This also limits students' opportunities to seek and obtain educational and mental health services to those parents deem worthy of attention. Even if schools used active consent procedures, this may not increase parents' knowledge, understanding, or appreciation of student mental health needs. Where parents opt not to read or consider SBMHS information provided, students would be constrained from participating in school-interventions that may alert school personnel or parents to student educational and mental health needs. This would result in a default to the current processes of service

provision that require students' needs be so severe as to merit teacher referral for special education services, which may or may not be the most efficient or appropriate means of addressing student needs. In keeping with parental authority, screening need not be automatically linked to the provision of services; post-screening, parents could be notified of screening results and recommended interventions requiring parental consent. This would allow parents to make decisions about student services with knowledge of their students' particular needs. In contrast, The Court's preservation of parental control by requiring active consent for screening participation prevents parents from obtaining the information needed to make decisions about student services and, consequently, prevents children from obtaining services.

In the variety of argumentation strategies used, at no point was the student discussed as responsible for any actions contributing to the issues presented for resolution. She was, however, discussed as unable to voluntarily participate without parental consent and without appropriate provision of information by screening personnel. Thus, adequate parental consent and students assent procedures are necessary to facilitate student voluntariness. This limitation on student autonomy results in limited access to resources, prevents students from alerting potentially helpful others of their needs, and continues student vulnerability to various negative life outcomes that may have been averted with appropriate intervention.

The Court also devoted discussion to the individuals involved in the TeenScreen administration and in the handling and conveying of the screener's results, particularly their contributions to breaching the student's confidentiality and the parents' privacy rights. Merriment raised similar concerns about the competence of persons involved in its program. The mental health field has changed since 1971; school and other types of psychologists, and

master's-level counselors attending accredited programs receive extensive didactic and clinical training in psychological issues relevant to school-aged children (American Psychological Association, 1987). Additionally, many psychiatrists now limit their work to the medication management aspects of mental health and rarely engage in therapy, or as termed in *Merriken*, psychotherapy (Olfson, Marcus, & Pincus, 1999); however, the discourse in *Rhoades* suggests that courts will use mistakes or errors in judgments made by personnel involved in screening programs as factors in determining liability.

In *Rhoades*, The Court expressed concern about the program's relationship to medical malpractice. It also used various terms in describing the TeenScreen. *Merriken* presented a similar issue in its court's discussion about that test's psychometric properties and the soundness of the empirical or theoretical basis upon which conclusions were made about the test results, and the lack of relationship between the test and general program goals. This suggests a lack of familiarity with concepts or terms outside of legal practice consistent with a centrist perspective. In combination, The Court's lack of information or understanding of the personnel and assessment logistics of screening supports its maintenance of parental rights as the ultimate protector of student wellbeing. To entrust student educational or mental health needs to poorly trained individuals or poorly designed instrumental would not serve students' best interest; however, The Court's discussion of this issues suggests that legal systems lack sufficient knowledge or understanding of these processes, which occur outside of the legal system. Were The Court more accurately apprised of the personnel and measurement logistics of the screening program at issue, it may have arrived at a different conclusion; perhaps one more amenable to meeting student needs. In this case, a lack of clarifying information may have contributed to the creation of legal precedent, which limits

schools ability to, or serves to make schools less likely to, implement screening programs that could work to meet well-established student educational and mental health needs. Thus, in communicating programming information related to other student health needs, such as vision screening and weight management, schools considering SBMHS should take particular care to regularly keep parents, students, school personnel, and perhaps even the public at large informed of these needs, of the perils of not addressing such needs, and of the interventions available to facilitate student wellbeing. Such information campaigns may increase parental support for such programs and facilitate schools' ability to better address student needs.

## Implications

In implementing screening programs, schools should understand how courts may review the facts arising from their program in light of prior cases and how various program participants may be categorized to determine liability. In addition to federal law, familiarity with relevant state law on consent, assent, and psychological evaluations, or procedures categorized as evaluations is essential to understanding potential screening program liability. As discussed in *Rhoades*, how student capacity to consent and mental health information are described within relevant statutes may determine whether the solicitation of such information requires active parental consent. Considering the emphasis *Rhoades* placed on communication with parents, schools should take special care to communicate clearly information about screening programs and their privacy protections to parents.

Also, considering *Rhoades* discussion of *C.N.* and *Ridgewood*, the legal requirements for obtaining informed consent in SBMHS programs may vary based on, not only the jurisdiction in which research is conducted, but also how data are used. When student data

obtained from SBMHS are used anonymously in the aggregate, courts may be more likely to approve of an implied consent procedure; however, when such factors are absent, passive consent may be viewed skeptically. Where schools seek to implement community or group-level screening to assess and intervene at these levels, passive informed consent procedures with an opt-out provision may be permissible. In cases where schools face particularly problematic issues related to school climate and academic outcomes, this may bolster arguments that screening meets a compelling state interest. In contrast, for individual-level screening, active consent is likely more appropriate. In either scenario, parents should receive adequate information regarding the process, goals, risks and benefits of such programs, and the use of screening data in clear terms and in advance of program implementation (National Academy of Sciences, 2009).

*Rhoades* discussion of *C.N.* and *Ridgewood* should also alert schools to the possibility that simply incorporating screening program in the curriculum may provide insufficient protection from liability. Schools should provide a clear link between their screening program and some academic purpose. Where this connection is not clearly established or communicated to parents or students, courts may be less likely to defer to the school's, as opposed to parental, authority.

Additionally, it must be emphasized that some states and federal laws specifically require written consent for the release of private information, denote the form that such releases must take, and specify the procedures deemed appropriate for the release of such information (Sales, Miller & Hall, 2005). Written consent usually creates a presumption that the consent is legally valid (Jones, 1990). However, despite the presumption of the validity of written consent, because of the sensitive nature of the information sought and the power

imbalance between students and schools, as in *Rhoades*, courts may not view a minor's written consent as sufficient (Redding, 1993).

Lastly, although The School attempted to broaden the discourse on screening by providing various sources of information, including academic texts, the *Rhoades* discussion reflected a centrist perspective on this admittedly complex multidisciplinary issue. While attempts to convey psychological or other knowledge relevant to screening in legal setting may meet with similar results, schools and mental health professionals working in school should take care to explain and communicate concepts that, if not understood, may lead to misunderstanding about the process and purpose of screening program and information.

These findings are affected by several limitations. First, compared to other qualitative methodologies, the discourse historical approach derives from critical discourse analysis, a relatively modern evolving multitheoretical, multimethod approach to qualitative research (Fairclough & Wodak, 1997). While this allows for flexibility in its application, it also makes it difficult to clearly delineate and communicate the research method to readers in a way that may be more easily understood because of its similarity to more established or well-known research methodologies. A similar challenge exists regarding DHA's use of context in explaining study results. Although the reasoning for providing as complete a context for the social problem explored as possible is that such background is essential to understanding the development and maintenance of the problem examined, such in-depth descriptions can provide a copious amounts of information for the reader to comprehend in addition to that presented in the study itself (Fairclough & Wodak, 1997). Where, as in this analysis, such context requires explanation of multiple contexts, which have little terminology or methods of analysis in common, both the researcher and the reader must commit to investing the

additional time and effort needed to comprehend and adequately address each area presented. Such additional investment of resources makes DHA a particularly challenging approach to clearly implement and communicate as compared to more unitary or homogenous research methods that do not require explanation or use of multiple perspectives. This case study focused on a single case arising from one student's experiences in one jurisdiction. As there are no other cases addressing this issue, it is unclear how multiple students being affected would change a court's analysis, if another jurisdiction would arrive at different conclusions. Lastly, as this is the first study to explore a legal analysis of screening using a discourse historical analysis, additional studies are needed to explore this methodology's applicability to school-related discourse.

## Conclusion

The potential benefits of school based mental health programs and the links between children's mental health and various outcomes are well-documented (Masten & Coatsworth, 1998; New Freedom Commission on Mental Health, 2003). However, the implementation of school-based mental health screening programs is complicated by the debate over the utility and consequences of such programs and their relationships to parental rights in the context of education. Schools must determine whether the benefits of screening compared to the risks of not screening at least equal the resources needed for informed consent planning. These decisions should be made in collaboration between school officials, legal counsel, and mental health professionals. Complying with the legal requirements for informed consent will require significant and continuous effort.

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