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December 31, 2013

Molly C. Dwyer, Clerk of the Court
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Payne v. Peninsula School District*, Case No. 13-35921
Letter of *Amicus Curiae* American Civil Liberties Union of Washington Supporting Plaintiff-Appellee Payne

Dear Honorable Judges:

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In accordance with Rule 29 of the Federal Rules of Appellate Procedure and the Circuit Advisory Committee Note to Rule 29-1, *amicus curiae* American Civil Liberties Union of Washington (ACLU-WA) respectfully submits this letter supporting the arguments and position of Plaintiff/Appellee Windy Payne. On December 30, 2013, ACLU-WA sought the parties' consent to this filing. Plaintiff/Appellee gave consent, but no response was received from Defendants/Appellants.

I. Identity of *Amicus Curiae*

The ACLU-WA is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including the right to be free of excessive force inflicted by the government. The ACLU-WA has participated in numerous excessive force cases, as *amicus curiae* and as counsel to parties. *See, e.g.*, *Brooks v. Seattle*, Ninth Circuit Case No. 08-35526.

II. Relevant Facts

ACLU-WA joins in the factual statement of Plaintiff/Appellee Payne.

III. Arguments Supporting Plaintiff/Appellee Payne

The issue before the Court is the district court's rejection of defendant's qualified immunity defense, thereby allowing the case to proceed to trial. Plaintiff/Appellee's brief correctly points out that the standard of review is *de novo*. Br. of Appellee, p. 17. Given the procedural posture of the case, all disputed facts and reasonable inferences therefrom must be viewed in the light most favorable to Plaintiff/Appellee, as the non-moving party. Br. of Appellee, p. 17; *Hope v. Pelzer*, 536 U.S. 730, 736 (2002). To the extent that Defendant/Appellants' arguments rest on their alleged version of disputed facts instead of assuming the truth of Plaintiff's allegations, Defendant Coy's arguments should be rejected.

The first step of qualified immunity analysis addresses whether a specific constitutional right has been violated. Plaintiff/Appellee properly identifies the specific right violated here, by describing defendant Coy's conduct as: "punishing a 7-year-old child … by forcibly locking him or her in a poorly ventilated and dark isolation room, without a direct line of sight, and for indeterminate periods of time;" or "locking a disabled child in an isolation room for punishment and without proper supervision." Br. of Appellee, p. 19-37. Plaintiff/Appellee explains how this conduct, in the school discipline context, violated the Fourth Amendment (excessive force) and the Fourteenth Amendment (substantive due process). *Id*. Supporting the egregiousness of the defendant's constitutional violation are the additional facts that the disabled child urinated or defecated in the isolation room out of fear, the defendant forced him to clean it up as further punishment, and that the defendant used the isolation room in an effort to "break" disabled students of their disability. Br. of Appellee, p. 4-12.

A recent Tenth Circuit ruling also involving treatment of a young child illustrates why the district court's rejection of qualified immunity was correct here. In *Blackmon v. Sutton*, 734 F.3d 1237 (10th Cir. 2013), the plaintiff alleged that the defendants' repeated use of a restraint chair in the juvenile detention center violated the Fourteenth Amendment. 734 F.3d at 1242. The conduct in issue occurred in 1997, when the then-11-year-old plaintiff was awaiting trial on a rape charge. 734 F.3d at 1239, 1242. The Court agreed the use of the chair may have been valid some of the time, for safety and maintenance of order in response to plaintiff's serious attempts at self-harm, but nevertheless found qualified immunity had to be rejected due to the evidence the chair was also used for invalid punitive reasons and beyond the scope of what was necessary for legitimate reasons. The Court had no trouble concluding that a Fourteenth Amendment violation had been sufficiently proven to justify denial of summary judgment, and it discussed Fourth and Eighth Amendment case law in reaching this conclusion. 734 F.3d 1240-42.

It is not necessary to address the Eighth Amendment here, since violation of the Fourth and Fourteenth Amendment is established and criminal punishment is not involved. However, even if the more difficult requirements of the Eighth Amendment were considered, it would still be clear that a constitutional violation occurred here. In *Hope v. Pelzer*, *supra*, the Supreme Court found a prison's use of a hitching post to discipline an inmate violated the Eighth Amendment, in part because any safety concerns had abated when the particular method of discipline was used. The Court agreed with a 1958 case that methods of discipline which, considering all the circumstances, violate the "dignity of man," also "obviously" violate the Constitution. The same principles which led to a finding of constitutional violation involving a convicted adult criminal support a finding of constitutional violation as applied to the 7-year-old disabled child's treatment in this case.

The remaining step in qualified immunity analysis is whether the constitutional right violation was "clearly established" at the time of the defendant's conduct. The

"salient question" is whether the state of the law at the time gave the defendant "fair warning" that his or her conduct was unconstitutional. *Hope v. Pelzer*, *supra*, 536 U.S. at 741. "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Id.; accord, Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011). To be clearly established, "there is no need that the 'very action in question have previously been held unlawful.'" *Safford Unified School District et al. v. Redding*, 557 U.S. 364, 377 (2009) (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)).

If there are not cases exactly on point, this "may be due more to the obviousness of the illegality than the novelty of the legal issue." *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir. 2002); *Giebel v. Sylvester*, 244 F.3d 1182, 1189 (9th Cir. 2001) ("[E]ven if there is no closely analogous case law, a right can be clearly established on the basis of common sense.") (internal citations omitted)). "The easiest cases don't even arise. There has never been … a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose the official would be immune from damages liability." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (quotations and citations omitted).

A 1996 federal district court case explained how qualified immunity should be dealt with even when there was no case directly on point "dealing with the punitive isolation of public school students." *Orange v. County of Grundy*, 950 F.Supp. 1365, 1373 (E.D. Tenn. 1996). As in the *Blackmon* case, *supra*, the *Orange* Court found Eighth Amendment jurisprudence enlightening in evaluating a school's use of an isolation room for punitive purposes. 950 F.Supp. at 1373:

> [I]solation as a form of punishment has been used in this country's prisons for centuries and the potential for serious harm to inmates confined in isolation has long been realized. … *In re Medley*, 134 U.S. 160, 168, 10 S.Ct. 384, 386, 33 L.Ed. 835 (1890).
> … In the few cases where isolation of school children has been utilized either as a form of punishment or a form of "teaching", the courts have found the practice to be unconstitutional. See *Jefferson v. Ysleta Independent School District*, 817 F.2d 303 (5th Cir.1987). The court is of the opinion that a reasonable teacher in the individual defendants' position would have known that the day-long isolation of students without access to lunch or toilet facilities was unconstitutional.

While the isolation room in the case at bar was not used for as long a period of time as in *Orange*, just as in *Hope*, *Blackmon* and *Orange*, the Court does not need a prior case with identical facts to reject qualified immunity here. There is ample authority supporting the conclusion that the defendant had fair warning that locking a disabled elementary school-aged child in a closet, unsupervised and for indeterminate time periods, causing him to defecate and urinate out of fear, violated clearly established constitutional rights.

IV. Conclusion

ACLU-WA respectfully requests that the Court rule in favor of the Plaintiff/Appellee.

Respectfully yours,
/s/ Nancy L. Talner
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