STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-04-98

GAYLE A. FITZPATRICK and
CHARLES RANKOWSKI, individually and
as parents of JAN RANKOWSKI, a minor

Plaintiffs

v.

ORDER ON
MOTION FOR PRELIMINARY
AND PERMANENT INJUNCTION

TOWN OF FALMOUTH, ET AL

Defendants

This matter is before the court on the motion of the plaintiffs for a preliminary and permanent injunction seeking to enjoin the defendants from prohibiting their minor child, Jan Rankowski, from using the playground facility at the Town's Plummer/Motz and Lunt Elementary Schools ("playground" or "Plummer School playground"), a public school facility.

BACKGROUND

Jan is approximately nine years old and has been diagnosed with Asperger's Disorder Autism, or Asperger's Syndrome, a neurological disability described as being at the high-functioning end of the Autism spectrum.[1] Relevant to this case, the disorder has

[1] According to Maine's Special Education Regulations:

> Autism means a developmental disability significantly affecting verbal and non-verbal communication and social interaction, generally evident before age three that adversely affects educational performance.
>
> Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

Defs'. Exh. 3 at 10, Me. Dep't of Educ., 05-071 CMR 101-3.

affected the development of Jan's social and language skills.[2] In particular, he has difficulty understanding social interactions, such as the facial expressions and verbal cues of others, and this affects his behavior and his ability to communicate.

During the 2003-04 school year, there were approximately 255 special education students in the Falmouth school system. Twelve of those students were within the autism spectrum and six of those autistic children attended either the Plummer/Motz or Lunt Elementary Schools. During that school year, Jan was home-schooled at the 4th grade level by his mother, the plaintiff Gayle Fitzpatrick.[3] He will be home-schooled at the 5th grade level for the 2004-05 school year.

On September 11, 2003 a Pupil Evaluation Team (P.E.T.)[4] meeting was held for Jan. At that meeting, Ms. Fitzpatrick's requests that her son be given access to the Plummer School playground and library were approved. Defs' Exh. 5.[5] Among other things, Ms. Fitzpatrick hoped that the opportunity to use the playground with other

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[2] Jan's mother, Gayle Fitzgerald testified to her understanding that her son has an I.Q. of 142, but the social skills of a 4-year old and the communication skills of a 6-year old. Mora Katz, a special education teacher and Jan's case manager, testified to an understanding that Jan has the adaptive skills of a 6-year old and the communication skills of a 4-year old.

[3] To their great credit, Jan's parents are vigilant advocates for their son and they are very committed to his well-being and successful development. Their commitment includes not only their time and energy, but their resources, as well. With rare exception, they have not asked the Town of Falmouth or its school system to fund any of Jan's special education needs.

[4] Under the special education regulations, a P.E.T. determines a student's eligibility for special education and supportive services, develops an Individualized Education Program appropriate for the student, and determines the least restrictive educational alternative in which the program may be implemented. The P.E.T. also determines the need for evaluations of the student and recommends such evaluations to the parents. Defs'. Exh. 3 at 37, Me. Dep't of Educ., 05-071 CMR 101-8.1. "Supportive services" is defined to include recreation. *Id.* at 05-071 CMR 101-2.28.

[5] The team also approved Ms. Fitzpatrick's request that $1,000 be allocated for Jan's testing needs as determined by the child's WRAP team. Defs' Exh. 5.

students would help in the development of Jan's social and communications skills. Thereafter, Jan began regularly using those facilities.[6]

Separate 20-minute playground recess times were designated for each of the grades 1 through 4 at the Plummer/Motz and Lunt Schools. In addition, there was a 45-minute lunch-recess period during which all four grades used the playground area. Jan variously used the playground during those periods.

On September 22, 2003, Plummer School principal Barbara Powers received complaints from 4th grade students about Jan's behavior on the playground. She was told that Jan had kneed a student in the groin, used offensive or threatening language, and threw rocks. She received additional complaints the next day.

Principal Powers telephoned Ms. Fitzpatrick to describe the complaints. Ms. Fitzpatrick replied that she had been with her son on the playground and he did nothing wrong. She also told the principal that other students were teasing and bullying Jan. After further investigation, Ms. Powers concluded that the complaints by Ms. Fitzpatrick and by the other children were all credible.

On September 25, 2003, Ms. Fitzpatrick met with Principal Powers and Mora Katz, a special education teacher and Jan's case manager, to discuss the reports of Jan's misbehavior on the playground, Ms. Fitzpatrick's denial that any inappropriate conduct had occurred, and Ms. Fitzpatrick's concerns that Jan was being bullied by other students. At this meeting, it was agreed that an adult should observe Jan's play area while he was on the playground. Virginia Gilbert, an educational technician, was given the

[6] There is no allegation or evidence that Jan's use of the library was ever inappropriate, and his use of the library has never been suspended or terminated. His use of that particular facility is not part of the subject matter of this action.

assignment. She began on September 29, 2003, and there were no further reports of bullying or teasing by other students.[7]

On September 30, 2003, Lunt School Principal Deborah Johnson received a report from a 1st grade teacher that Jan had been using playground equipment too roughly and, when an adult attempted to intervene, he was non-responsive. Ms. Johnson reported this to Ms. Powers. Teresa ("Tammy") Paul, a special education teacher and an autism specialist for the Plummer/Motz and Lunt Schools, also reported to Ms. Powers that, following an incident at the playground's tire swing, Jan had been disrespectful to her in front of one of Ms. Paul's students.

On October 6, 2003, Principal Powers and Ms. Paul met with Ms. Fitzpatrick on the playground. Ms. Powers said that Jan had to be responsive to adults who were assigned to watch other children on the playground. Ms. Fitzpatrick replied that Jan had been taught not to respond to other adults. The principal said that, if that was the case, then it was incumbent upon Ms. Fitzpatrick to intervene when her son was non-compliant. Ms. Fitzpatrick said she didn't know who those adults were either, became agitated and left. According to Ms. Powers, things went well for a while after that encounter. She did not receive any negative reports about Jan, and one child reported to her that Jan was "playing nice now."

Then, on October 28, 2003, the adult supervisor of a 3rd grade student expressed a concern to Principal Powers that Jan was spending too much time playing with that

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[7] In an October 31, 2003 email to Ms. Powers, Ms. Fitzpatrick wrote that "our goals in having Ms. Gilbert present was accomplished quickly [and] Jan has been accepted by several groups of children." Defs' Exh 2. However, Ms. Fitzpatrick also observed that Ms. Gilbert appeared to be following Jan too closely and "writing on a clipboard very frequently", a practice she objected to because it "makes Jan look significantly different from his peers". *Id.*

student and was rude and swore at other students who wanted to play with the 3rd grader. Ms. Powers went to the playground to speak to Jan and he became very angry. When she directed Jan to leave the playground area with his home-school provider, he yelled at the principal and went into a wooded area near the playground for approximately one-half hour.

Ms. Powers had growing concerns about the reports she had been receiving and her own observations of a continuing pattern of behavior by Jan on the playground that was unsafe to himself and other children, disrespectful to staff and supervising adults and undermined their relationships with other children in their charge, and interfered with the Individual Education Plans (I.E.P.) of special education students. When Ms. Powers requested some guidance on how best to handle Jan in these situations, Ms. Fitzpatrick insisted that her son should not have to respond to adults on the playground unless and until he had been introduced to them and had developed a trust in them. Ms. Powers told Ms. Fitzpatrick of the school's policy that disrespect and defiance to appropriate adult authority by Plummer students resulted in the loss of playground privileges and a requirement that a letter of apology be written. Ms. Fitzpatrick later replied that "the information about the consequences which Plummer Motz students face for non-compliance with staff" was interesting, but "Jan Rankowski is not a student at Plummer Motz School, and I do not have time to peruse interesting data". Defs' Exh. 1.[8]

On November 7, 2003, there was another series of incidents. As Ms. Katz crossed the playground, she saw Jan and another child on the tire swing. Jan was standing on the swing and it was going too fast. Jan's home-school provider was present, but was not

[8] At the motion hearing, Ms. Fitzpatrick testified to her belief that Jan should have the same discipline as Plummer/Motz and Lunt School students while on the playground.

reacting. When Ms. Katz attempted to intervene, telling Jan to slow the swing down, he called her a "bastard" and told the other child he did not have to listen to her. Jan also said that if his mother was there she would sue Ms. Katz. Because the situation appeared to be escalating out of control, Ms. Katz thought it best to walk away. Ms. Fitzpatrick came upon the scene and asked Jan what had happened. She then told Ms. Katz to leave and the two women had a brief conversation.

At about the same time, Ms. Paul was crossing the playground to go to one of her students, who was also autistic. She saw Ms. Katz and Ms. Fitzpatrick engaged in what appeared from their "body language" to be a "non-friendly" conversation. Ms. Paul went to the school office to alert Principal Powers to the situation. Ms. Powers went to the playground and approached Ms. Katz and Ms. Fitzpatrick. After Ms. Katz described Jan's unsafe conduct on the swing and his disrespectful behavior, Ms. Powers told Ms. Fitzpatrick that she and Jan had to leave the playground immediately.

As this discussion unfolded, Jan ran across the playground in the direction of Ms. Paul's autistic student. Ms. Paul had returned to the playground and was going to her student. Jan approached Ms. Paul and said, "Oh, you, again? Piss off." The teacher told the boy to leave the area. Jan refused and told Ms. Paul's student not to listen to her either. Ms. Paul repeated her instruction two more times, and each time was met with the same response from Jan. As Ms. Fitzpatrick drew near to get Jan, the boy began to cry and told his mother that Ms. Paul said he could never play with that student again. Although Ms. Fitzpatrick repeatedly tried to engage Ms. Paul about Jan's remark, the teacher did not reply because she was concerned about the impact that all of this was having on her student and she focused her attention on that child.

Finally, as Ms. Fitzpatrick and Jan were leaving the playground, the boy called the principal and Ms. Katz "ignorant bastards".

Later that same day, Ms. Powers met with School Superintendent Timothy McCormack and Ms. Crowell. The principal was concerned that her assumptions and Ms. Fitzpatrick's assumptions about Jan's behavior on the playground were radically different. Ms. Powers was also concerned that at times the playground seemed over stimulating and too challenging for Jan. She wanted to develop a plan for him and the school's staff to assure safe and responsible behavior on the playground. To do this, she wanted to identify triggering events that caused Jan to explode, and wanted to obtain "clean data" about the child's behavior so that individual perceptions would not skew the development of a good behavior plan. As a result, Ms. Powers decided to temporarily suspend Jan's playground privileges during school hours until she, Mr. McCormack and Ms. Crowell could meet with the boy's parents and develop a plan for Jan and the school staff regarding his use of the playground with other children.

On November 24, 2003, they met with Ms. Fitzpatrick and her attorney to review Jan's behavior, to consider renewing the child's access to the playground, and to request the parents' permission to obtain a Functional Behavioral Assessment ("FBA") of the child.[9] On December 1, 2003, Principal Powers received a letter from Ms. Fitzpatrick

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[9] Functional Behavior Assessment is defined in the special education regulations as

> a school-based process used by the Pupil Evaluation Team, which includes the parent and, as appropriate, the student, to determine why a student engages in challenging behaviors and how the behavior relates to the student's environment. [It] includes direct assessments, indirect assessments and data analysis designed to assist the P.E.T. to identify and define the problem behavior in concrete terms; identify the contextual factors (including affective and cognitive factors) that contribute to the behavior; and formulate a hypothesis regarding the general conditions under which a behavior usually occurs and the probable consequences that maintain the behavior.

stating that she and her husband would not consent to an FBA. *See* Def. Exh. 9. In that correspondence, Ms. Fitzpatrick said that an FBA by the school would not be in her son's best interests and was "ludicrous" because, statistically, Jan exhibited "an 80% success rate in compliance" on the playground. *Id.* At the motion hearing, Ms. Fitzpatrick also testified to her belief that the FBA was not necessary or appropriate because the parents had already obtained private assessments of their child.

To date, the parties have been unable to reach an acceptable compromise and the suspension of Jan's playground privileges remains in effect. The plaintiffs claim that the school's decision constitutes disability-based discrimination. Contrarily, the defendants assert that their decision was based on Jan's behavior and playground safety issues, not on his diagnosis.

DISCUSSION

The plaintiffs' claims for injunctive relief are based upon the assertions in their amended complaint that the defendants have violated the Maine Human Rights Act ("MHRA") by engaging in education discrimination in violation of 5 M.R.S.A. § 4601 of (Count I) and public accommodations discrimination in violation of 5 M.R.S.A. § 4592 (Count II), and have deprived them of the rights of due process and equal protection guaranteed under Article I, § 6-A, of the Constitution of the State of Maine.

A. MOOTNESS

Because of the playground's popularity in the community, it is the school's policy to restrict its use during school hours to students at the Plummer/Motz and Lunt Elementary Schools, unless special arrangements are made with the principal to use it

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Defs'. Exh. 5 at 10, Me. Dep't of Educ., 05-071 CMR 101-2.10.

during non-recess periods. The exclusion of non-elementary school students during school hours also applies to Falmouth middle and high school students. For the 2004-05 year, 5th graders will attend the Falmouth Middle School, which does not have a playground. On these facts, the defendants argue that, since Jan is no longer at the elementary grade level, the plaintiffs' request for injunctive relief is now moot.

Under Maine law, "[a] student receiving home-school instruction may use public school facilities and equipment on the same basis as regularly enrolled students" if certain conditions are met.[10] 20-A M.R.S.A. § 5021(6) (Supp. 2003). The court interprets this provision to mean that Jan may use the Plummer School playground during the ensuing academic year on the same basis as "regularly enrolled" middle school students. And, based upon school policy, this means he may not use the playground during the school day unless special arrangements are made with the Plummer School principal to use it during non-recess periods.

The defendants' mootness argument would be compelling if the issue was narrowly limited to whether Jan could use the playground during the elementary school recess or lunch periods. However, it has been cast more broadly by the plaintiffs as whether Jan can use the facility during the school day. Thus, absent the temporary

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[10] Those conditions are that the

> A. Use does not disrupt regular school activities;
> B. Use is approved by the school principal in accordance with established school policy;
> C. Use does not create additional expense to the school unit;
> D. Use is directly related to the student's academic program; and
> E. Use of potentially hazardous areas, such as shops, laboratories and the gymnasium, is supervised by a qualified employee of the school administrative unit.

20-A M.R.S.A. § 5021(6)(A)-(E).

suspension now in effect, Jan might still seek to use the playground during non-recess periods during the school day. While the time frame for such use may be inconsistent with the plaintiffs' desire to have their son interact with other students on the playground, his future use of the facility is a sufficient possibility to avoid a determination that their claim for injunctive relief is moot.[11] *See Nugent v. Town of Camden*, 1998 ME 92, ¶ 6, 710 A.2d 245, 247 (explaining that "[the] test for mootness is whether there remain sufficient practical effects flowing from the resolution of the litigation to justify the application of limited judicial resources"). *See also Int'l Paper Co. v. United Paper Workers Int'l Union*, 551 A.2d 1356, 1360-61 (Me. 1988).

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The defendants also assert that the plaintiffs' education discrimination claim (Count I) must fail because the plaintiffs have failed to exhaust their administrative remedies. The court is mindful that, in *dicta*, United States District Judge Hornby earlier wrote that, "[u]nlike the federal claims, the [plaintiffs'] state claims are not subject to an exhaustion requirement."[12] *Fitzpatrick v. Town of Falmouth*, 321 F. Supp. 2d 119, 130 (D. Me. 2004).[13]

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[11] Since the non-recess periods might also be available to other home-schooled students or to students enrolled in the 5th grade, there is the further possibility, however remote, that Jan could have an opportunity to interact with other students on the playground.

[12] Those state claims now appear as Counts I and II of the Amended Complaint in this action.

[13] In a subsequent analysis, Judge Hornby concluded that the plaintiff's federal claims were grounded upon the federal Individuals with Disabilities Education Act ("IDEA") under which claimants are required to exhaust their administrative remedies before bringing a court action. *Fitzpatrick v. Town of Falmouth*, 324 F. Supp. 2d 95, 2004 U.S. Dist. LEXIS 8189 (D. Me. 2004). *See also* 20 U.S.C. §§ 1400, *et seq.*; *and Frazier v. Fairhaven Sch. Comm.*, 276 F.3rd 52, 60-61 (1st Cir. 2002).

This court is not persuaded by the plaintiffs' argument that the earlier federal court decision is the law of this state case. *See Blance v. Alley*, 404 A.2d 587, 589 (Me. 1979) (stating that "[the law of the case] doctrine is an articulation of the wise policy that a judge should not in the same case overrule or reconsider the decision of another judge of coordinate jurisdiction"). *Id.* Judge Hornby's analysis was directed primarily to the plaintiffs' federal claims and his conclusion that they had failed to exhaust their administrative remedies under the federal IDEA, 20 U.S.C. § 1400, *et seq.* The exhaustion requirement of IDEA does not apply to the state claims of education and public accommodations discrimination. In fact, when discussing the plaintiffs' state education discrimination claim and expressing doubt as to whether it was viable, he concluded that "[t]his is a state law claim, however; the issues have not been well briefed; and I do not want to interpret the state statute without better argument".[14] *Fitzpatrick*, 321 F. Supp. 2d at 129. It is also significant that Judge Hornby's remark about the lack of a state exhaustion requirement appears to have been made as part of his discussion about the plaintiffs' public accommodations discrimination claim. This court agrees that there is no exhaustion requirement under Maine law regarding such a claim.

In the context of the plaintiffs' education discrimination claim, Maine's special education laws set out an administrative procedure for addressing complaints that a school is failing to provide services to an "exceptional student". *See* 20-A M.R.S.A. §§ 7001, *et seq.* (Supp. 2003); Defs'. Exh. 5, Me. Dep't of Educ., 05-071 CMR 101-4.7;

[14] Because he did not have the benefit of an analysis of Maine law from the parties, Judge Hornby only expressed "serious doubt that this home-schooled child qualifies as an 'individual at an educational institution' within the meaning of [Maine law] or that the defendants' actions can be characterized as denying him the opportunity 'to participate in ... programs' at the school." *Fitzpatrick*, 321 F. Supp. 2d at 129. This court has had the benefit of such an analysis and concludes that under certain circumstances a home-school student can qualify as an "individual at an educational institution". *See ante.*

13.5. Jan is an exceptional student within the meaning of the law. *See* 20-A M.R.S.A. § 7001(2)(C)(8). He had been using the playground pursuant to a service plan developed by the school and permitted under 20-A M.R.S.A § 5021(6). Although the event that triggered this dispute was the decision to temporarily suspend Jan's playground privileges, at its heart was the plaintiffs' objection to the decision of the school's service plan team to require an FBA and a behavior management plan before letting the child resume his use of the playground.

The administrative procedures under the special education laws allow education experts to decide such disputes in the first instance. 20-A M.R.S.A. § 7206. The rationale for this process is not unlike that described by Judge Hornby for the federal IDEA under which claimants are required to exhaust their administrative remedies before bringing a court action. *See* Fitzpatrick, 324 F. Supp. 2d at __, 2004 U.S. Dist. LEXIS 8189 * 13-14; ;*(quoting Frazier v. Fairhaven Sch. Comm.*, 276 F.3rd 52, 60-61 (1st Cir. 2002) ("The IDEA's administrative machinery places those with specialized knowledge – education professionals – at the center of the decisionmaking process, entrusting to them the initial evaluation of whether a disabled student is receiving a free, appropriate public education.")).

The plaintiffs did not employ the administrative process before bringing their education discrimination claim. Because none of the exceptions to the exhaustion requirement apply in this case, the court concludes that the plaintiffs' education discrimination claim is barred by their failure to meet this exhaustion requirement and they are not entitled to injunctive relief as to it. *See Ciresoli v. M.S.A.D. No. 22*, 901 F. Supp. 378, 385 (D. Me. 1995) (explaining that "exhaustion may not be required where

the pursuit of administrative remedies would be futile or inadequate; waste resources, and work severe or irreparable harm on the litigant; or when the issues involve purely legal issues.") *Id. See also Northeast Occupational Exch. v. Bur. of Rehab.*, 473 A.2d 406, 410-11 (Me. 1984).

Even if the exhaustion requirement does not apply to the plaintiffs' education discrimination claim, injunctive relief is still unavailable.

C. INJUNCTIVE RELIEF

In order to obtain a preliminary and permanent injunction in this case, the plaintiff must establish:

> (1) that plaintiff will suffer irreparable injury if the injunction is not granted, (2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant, (3) that plaintiff has exhibited a likelihood of success on the merits (at most, a probability; at least, a substantial possibility), and (4) that the public interest will not be adversely affected by granting the injunction.

Ingraham v. University of Maine at Orono, 441 A.2d 691, 693 (Me. 1982). Because the court concludes that the plaintiffs have not demonstrated a likelihood of success on the merits of their discrimination and constitutional claims, their motion for a preliminary and permanent injunction must be denied.

1. Education Discrimination – Count I

The Maine Human Rights Act ("MHRA") declares that it is a civil right for "an individual at an educational institution" to have the opportunity to participate in educational programs free of discrimination based on physical or mental disability. 5 M.R.S.A. § 4601 (Supp. 2003). Enforcement of that right and the prohibition against education discrimination are provided by 5 M.R.S.A. § 4602.

The threshold question is whether Jan is an "an individual at an educational institution" within the meaning of section 4601. The court concludes that he is and does not agree with the defendants' argument that the MHRA's definition excludes Jan.[15] It is more reasonable to construe both that definition and section 4601 to include not only an enrolled student, but also a home-schooled exceptional student, such as Jan, who is using the facilities and equipment of the educational institution pursuant to a special education plan for supportive services developed for him by the school.

The next question is whether the prohibitions of section 4602 apply to this case. The court concludes that they do not. Section 4602(2) declares that it is unlawful education discrimination to "[e]xclude from participation in, deny the benefits of or subject to discrimination under any educational program or activity any otherwise qualified individual with physical or mental disability" solely on the basis of that disability. *Id.* However, those prohibitions do not apply to "the rights of exceptional students to special education programs under state or federal law." *Id.* This court has already concluded that Jan's use of the Plummer playground was part of a special education program and that the pursuit of a remedy on his behalf should have been by way of the administrative procedures of Maine's special education laws.

Finally, even if section 4602 does apply here, there is no evidence that the school's decision was at all discriminatory. It was not based solely on Jan's disability and it was not motivated by a discriminatory animus.

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[15] In relevant part, the MHRA defines "educational institution" as "any public school or educational program ... and the governing body of each such school or program." 5 M.R.S.A. § 4553(2-A).

2. Public Accommodations Discrimination – Count II

The plaintiffs next assert that the Plummer School playground is a place of public accommodations and that the suspension of Jan's privilege to use it is discriminatory and a violation of 5 M.R.S.A. § 4592. There is no dispute that the Plummer School playground is a place of public accommodation and, under Maine law, it is unlawful for a public accommodation to

> directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of ... physical or mental disability ... any of the ... facilities, ... services or privileges of public accommodation, or in any manner discriminate against any person in the ... terms or conditions upon which access ... may depend.

5 M.R.S.A. § 4592(1). The law prohibiting public accommodations discrimination

> does not require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that entity when the individual poses a direct threat to the health or safety of others. For the purposes of this section, the term "direct threat" means a significant risk to the health or safety of others that can not be eliminated by a modification of policies, practices or procedures or by the provision of auxiliary aids or services.

5 M.R.S.A. § 4592. Viewing the evidence in light of this standard, the court finds and concludes that Jan's behavior did pose a significant risk to the health and safety of others on the playground, including students, some of whom were disabled with special education needs, and the adults supervising them.

It is also significant that the public's right of access to the playground is not unlimited, particularly during the school day, but is subject to the to the control and management of the school and its policies. 20-A M.R.S.A. § 2(2). The reasons are obvious and need no discussion here.

As a home-schooled student, Jan's right to access the playground during the school day is governed by 20-A M.R.S.A. § 5021(6). He can use it "on the same basis as regularly enrolled students" if his

A. Use does not disrupt regular school activities;

B. Use is approved by the school principal in accordance with established school policy;

C. Use does not create additional expense to the school unit;

D. Use is directly related to the student's academic program; and

E. Use of potentially hazardous areas, such as shops, laboratories and the gymnasium, is supervised by a qualified employee of the school administrative unit.

20-A M.R.S.A. § 5021(6)(A)-(E). However, not all of those conditions were met in this case. Jan's behavior was disruptive to regular school activities and, in particular, to other students and their adult supervisors. In addition, because his parents would not consent to an FBA and the development of an appropriate behavioral management plan for him and for the school's staff, Jan could not be "supervised by a qualified employee of the school administrative unit".

The evidence is clear that the defendants were prepared to make reasonable modifications based on such a plan to allow Jan to resume his use of the playground, but the plaintiffs were not willing to give the consent necessary to ascertain and implement such changes.[16] 5 M.R.S.A. § 4592(1)(B). While there

[16] Plaintiffs' counsel repeatedly asserted that, as of the hearing date in this case, Jan had been "banned" from the playground for seven months. The court disagrees with that characterization. Jan's use of the playground was temporarily suspended only until a safe and effective behavioral plan could be developed for the boy and the school's personnel. The request for an FBA and a behavioral plan was reasonable and well-suited to the timely and effective return of Jan to the playground. Ironically, the FBA itself would have required Jan's almost immediate return to the playground so that he could be observed in that environment.

was testimony that Jan's behavior was both consistent with his disability and consistent with that of a non-disabled child his age, the school's decision to temporarily suspend his access to the playground was not based on his disability, but on the school's legitimate need to obtain an assessment of the child and develop a plan for his safe and beneficial use of the facility.

The testimony of Ms. Fitzpatrick and Mora Katz was very telling on this point. Ms. Fitzpatrick said that in order to assist her son, school personnel needed to understand Jan's disability and needed to know how to prompt him verbally. And, in a statement apropos to all of the school's staff, Ms. Katz testified that, as of September 2003, Jan had been out of the school system for about one year, that she did not have a lot of experience with him at that point, and that she needed the guidance of a behavior plan in order to know how to effectively deal with him. Each of their points is accurate and well taken and, together, make the case for the reasonableness of the service team's request for an FBA and a behavioral management plan – a plan intended to assist both the child and the adults he would encounter on the playground.

(c) Constitutional Guarantees of Due Process and Equal Protection – Count III

The plaintiffs also claim that the suspension of their son's playground privileges violates their fundamental interests as parents in Jan's education and deprives them of due process and equal protection of the laws in violation of Article I, § 6-A, of the Constitution of the State of Maine. The court concludes that this claim is without merit.

To the extent that the plaintiffs assert that the defendants have denied their son the "right to receive the benefits of a free public education", including "the use of public

school facilities and equipment", without due process of law, their claim in without merit. In the first instance, it is not clear that the plaintiffs have a "fundamental" constitutional right to education. *School Administrative Dist. No. 1 v. Comm'r, Dept. of Educ.*, 659 A.2d 854, 857 (Me. 1995). However, if they do, the use of a playground facility is not an integral part of that right. *Id.* While it is within the discretion of the school to conclude that a home-schooled student should be permitted to use the school's facilities and equipment, there is no fundamental right that would compel the school to make such a decision. Absent a showing of a fundamental right, the plaintiffs' substantive due process claim cannot survive.

Similarly, the claim that the temporary suspension of access to the playground violates the plaintiffs' right to equal protection of the law is without merit. The equal protection provision of our State's constitution is co-extensive with the guarantees provided by the United States Constitution. *Peters v. Saft*, 597 A.2d 50, 52 n. 1 (Me. 1991). Where the challenged action infringes upon a fundamental right or involves a suspect class such as race or religion, it is subject to a strict scrutiny analysis. *School Administrative Dist. No. 1*, 659 A.2d at 857. *Id.* As previously noted, the action challenged in this case does not involve a fundamental right and Jan's disability does not place him in an inherently suspect class requiring analysis under the strict scrutiny standard. *Id.* (citing *Butler v. Supreme Judicial Court*, 611 A.2d 987, 992 (Me. 1992)) ("That standard requires that the challenged action be narrowly tailored to achieve a compelling governmental interest").

Because we are not dealing with a suspect class, the plaintiffs must show by clear and irrefutable evidence that the school created a classification that was arbitrary and

irrationally discriminatory such that no conceivable set of facts could reasonably support their action. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313-14, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993); *Aseptic Packaging Council v. State*, 637 A.2d 457, 459 (Me. 1994) (*citing State v. Eaton*, 577 A.2d 1162, 1166 (Me. 1990)). First, it not clear whether the plaintiffs claim that the defendants created such a classification and, if so, what it might be. They do not charge that the defendants' decision regarding Jan applies generally to autistic children in the Falmouth school system, nor could they on the facts of this case.[17] And they do not charge that it applies generally to home-schooled students.

Even if an arbitrary and irrationally discriminatory classification could be discerned from the evidence, the school's decision to temporarily suspend Jan's use of the playground until an FBA and a behavioral plan could be developed meets the strict scrutiny analysis. It is temporal and narrowly tailored to achieve the school's compelling interest in addressing Jan's particular needs without jeopardizing those of its students and staff.

Where, as here, challenged action does not involve a fundamental right or a suspect class, allegedly different treatment accorded to similarly situated persons need only be rationally related to a legitimate governmental interest. *Aseptic Packaging Council v. State*, 637 A.2d 457, 459 (Me. 1994). Under the circumstances of this case, the school's decision was "rationally related to a legitimate governmental interest" – assuring that Jan's use of the playground is beneficial to him and that it does not abridge

[17] To the contrary, Falmouth appears to be effectively and successfully meeting the needs of its autistic students. The court heard from parents of autistic children with behavioral issues who are enrolled in the 3rd grade. Each praised the treatment of her child by Falmouth school personnel, and the effectiveness of behavior plans developed after an FBA of their child was performed.

his safety and welfare and that of others who are there with him. *School Administrative Dist. No. 1 v. Comm'r, Dept. of Educ.*, 639 A.2d 854, 857 (Me. 1995).

DECISION

Based upon the foregoing, the plaintiffs have not demonstrated a likelihood of success on the merits of their discrimination and constitutional claims and their motion for a preliminary and permanent injunction must be denied.

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference and the entry is

Plaintiffs' Motion for Preliminary and Permanent Injunction is DENIED.

Dated: August 31, 2004

Justice, Superior Court