STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	98-CP-10-613
COUNTY OF CHARLESTON	)	
Harold Glover, individually and on behalf of all others similarly situated, Plaintiffs,	)	
vs.	)	
Porter-Gaud School, the Estate of James Bishop Alexander, Edward Fischer, Berkeley Grimball and Gordon Bondurant, Defendants.	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	98-CP-10-707
COUNTY OF CHARLESTON	)	
James Doe and Harold Glover, individually and on behalf of all others similarly situated, Plaintiffs,	)	
vs.	)	
Porter-Gaud School, the Estate of James Bishop Alexander, Edward Fischer, Berkeley Grimball and Gordon Bondurant, Defendants.	)	

IN THE STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	98-CP-10-3956
COUNTY OF CHARLESTON	)	
Jason Doe, Plaintiff,	)	
vs.	)	
Porter-Gaud School, Berkeley Grimball, and Edward Fischer, Defendants.	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	99-CP-10-2372
COUNTY OF CHARLESTON	)	
John Doe Number 12,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Porter-Gaud School,	)	
Defendant.	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	00-CP-10-833
COUNTY OF CHARLESTON	)	
John Doe Number 8, on his own behalf and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Porter-Gaud School, the Estate of James Bishop Alexander, and the Estate of Berkelely Grimball,	)	
Defendants.	)	

MEMORANDUM OF LAW REGARDING DUTIES OF PRIVATE SCHOOLS TO STUDENTS AND PARENTS

The Court has requested the parties to file briefs concerning the duties that may be owed by a private school to its students and their parents. This brief does not consider all such possible duties, but instead focuses on two issues that may be pertinent to the above captioned cases.

1. Did Porter-Gaud have a duty publically to report what it knew about the 1973 allegations about Fischer?

2. Did Porter-Gaud have a duty after 1973 to monitor Fischer's conduct while he was off the school's premises?

I. Overview of Applicable Legal Principles

There are three potential sources from which any legal duty imposed on Porter-Gaud might arise: 1) the state or federal constitutions; 2) common law; and 3) statutes. The brief will also discuss the privilege that attaches to certain personnel information.

1. There is no constitutional duty to protect.

No South Carolina case has recognized a "special relationship" between a private school and its students imposing an affirmative duty to provide for a student's safety and prevent abuse. As the Seventh Circuit has observed in the context of governmental entities, even the due process clause is not "'a guarantee of certain minimal levels of safety and security.'" J.O. and P.O. v. Alton Community Unit School Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990) (quoting DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989)). As the Seventh Circuit explained,

> Both this court and the Supreme Court have repeatedly rejected attempts to read the fourteenth amendment's due process clause as an affirmative charter of governmental duties. Only where the state has exercised its power so as to render an individual unable to care for himself or herself may an affirmative duty to protect that individual arise. But beyond the case of incarcerated prisoners and involuntarily committed mental patients, the Supreme Court has never recognized such a duty.

J.O. and P.O., 909 F.2d at 272 (internal citations omitted). Other circuits agree with the proposition that for due process purposes, a student is not entitled to affirmative protection while at school. See Johnson v. Dallas Indep. School Dist., 38 F.3d 198 (5th Cir. 1994); Maldonado v. Josey, 975 F.2d 727, 730-33 (10th Cir. 1992)(*cert. denied*, 507 U.S. 914 (1993)); Dorothy J. v. Little Rock Sch. Dist.,

Additionally, an employer may have a legal duty arising out of a contract which flows to a plaintiff with whom he is not in privity of contract. Degenhart, 309 S.C. at 117, 420 S.E.2d at 496 (citing Keeton, et al., Prosser and Keeton on The Law of Torts, 667-68 (5th ed. 1984)).

There is no case in South Carolina that holds that the relationship between a school and its students is fiduciary, although Hendricks v. Clemson University, 339 S.C. 552, 529 S.E.2d 293 (Ct.App. 2000) held that plaintiff had pleaded facts sufficient to constitute a claim for breach of fiduciary duty, 529 S.E.2d at 299 and the question was for the jury.

3. There was no statutory duty to report.

As an initial observation, South Carolina now imposes a duty on school teachers, principals, and assistant principals to report suspected activity to law enforcement "when in the person's professional capacity the person has received information which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect." S.C. Code Ann. § 20-7-510 (Supp. 2000). However, this duty was not imposed on school officials until 1996. All of the acts complained of concerning Porter-Gaud occurred between 1973 and 1982. Accordingly, section 20-7-510 is not applicable to this case. No prior statute imposed any similar duty.

4. Personnel matters are privileged.

Even if section 20-7-510 did apply, other courts have acknowledged that under their respective state acts or the common law, information such as Fischer's alleged activities and Porter-Gaud's response to those activities would be privileged and not subject to disclosure to the general public. See e.g., Moore v. St. Joseph Nursing Home, Inc., 459 N.W.2d 100 (Mich. App. 1990) (holding that a former employer has no duty to disclose malefic information about a former

employee to the former employee's prospective employer); Ollie v. Highland School Dist. No. 203, 749 P.2d 757 (Wash. App. 1988) (finding that "not all information contained in personnel evaluations and personnel records of school district is privileged; information about public, on-duty job performances should be disclosed); Cohn v. Wales, 518 N.Y.S.2d 633 (N.Y. App. 1987).

ARGUMENT

Based upon these authorities and the facts involving Fischer's tenure at Porter-Gaud, it is clear there the school did not have a duty to publish information concerning the 1973 allegations to the student body, and further, did not have a duty to supervise Fischer's off premises conduct.

In 1973, the parents of a Porter-Gaud student told Berkeley Grimball that Fischer had invited their son to meet him at a drugstore to help him with his homework. Deposition of Berkeley Grimball at p. 26, ll.1-13, excerpts attached hereto as Exhibit A. That student has subsequently testified that Fischer told him not to masturbate beforehand, and that the student would "go in a boy and come out a man." Deposition of Henry Orvin at p. 17, ll.12-13, excerpts attached hereto as Exhibit B. There is no evidence that this statement by Fischer was repeated to Berkeley Grimball.

It is also undisputed that no contact, sexual or otherwise, occurred as a result of the conversations between Henry Orvin and Fischer. When confronted by Berkeley Grimball, Fischer denied that he had said or done anything inappropriate. Deposition of Berkeley Grimball at p.26, ll. 14-18, Ex. A. Interestingly, Fischer continues to deny to this day that the episode ever took place. Deposition of Edward Fischer at p. 231, l. 19-p.236, l. 16, excerpts attached hereto as Exhibit C. That denial has some measure of credibility in light of all the other things that Fischer admitted in his deposition. Not even a fiduciary relationship would require disputed facts to be reported.

Thus, in 1973, Porter-Gaud was on notice only of an at worst ambiguous invitation by Fischer to a student, which was denied by the student and denied by Fischer. Porter-Gaud had also been requested to keep the incident confidential. There is no evidence that Porter-Gaud received any additional complaints about Fischer until the 1982 episode that resulted in his resignation.[1] The testimony that the court heard from Guerry Glover in the Shaw Simpson case related to events that took place after Fischer had left Porter-Gaud.

To evaluate whether the notice received by Porter-Gaud created any duties, it is useful to consider Moore v. Berkeley County School District, 326 S.C. 584, 486 S.E.2d 9 (Ct. App. 1997). One of the principle claims in Moore was that the school district negligently supervised a teacher who had sex with a student off the school grounds. 486 S.E.2d at 11. The recited facts that were argued to have created such a duty were as follows:

> Moore did not know Steward before attending summer school. However, after entering her class, he observed Steward was not "an average teacher." The students did not do any work in her class. They were rowdy and sat around talking. The radio was often playing. Steward permitted the students to smoke cigarettes in class and on one occasion Moore observed her smoking marijuana with other students during a break. Notably, Moore testified Hilson came through the classroom many times while these activities were going on, but did nothing about it. Sanders stated he personally visited Steward's classroom and did not observe anything unusual or inappropriate.
>
> Other summer school teachers described activities they observed in Steward's classroom including a male student massaging Steward's shoulders, students sitting around chatting, students walking around, a male student answering the locked door to Steward's classroom when the lights were off, and Steward holding

[1]Plaintiffs have indicated in an interrogatory answer that another complaint was made in the 1970s, but at present there is no evidence to that effect.

> hands with a male student. While these persons considered some of the observed behavior inappropriate and discussed it among themselves, they did not report it to the administration. Steward admitted in her deposition that male students sometimes massaged her shoulders.

The court easily concluded that:

> [T]here is no evidence in this case that the District had notice of improper sexual contact between Steward and any other students prior to the incident involving Moore. There is no evidence Steward made inappropriate advances toward Moore whether in or out of the classroom prior to this incident. Also, there is no evidence Moore or anyone else ever complained to the District either about Steward's conduct during summer school or her tutoring in her home. At best, there is evidence aplenty that Steward's summer school classroom was conducted in a lax manner, and while some of the summer school teachers observed what they considered "inappropriate" behavior in the classroom, they did not report it to the administration and did not consider the behavior to be of such a character that it might harm the students. Whether or not Hilson adequately monitored Steward's classroom is of no significance, inasmuch as none of the alleged classroom incidents were of such a character that the administration would have, if aware of them, reasonably anticipated that Steward would engage in sexual intercourse with a student in her own home after school hours.

Doe v. Greenville Hospital System is distinguishable both from this case and from Moore. In the hospital case, the hospital was on notice of a prior sexual assault involving the same victim. Nothing like that was true in Moore, and nothing like that was true at Porter-Gaud. There is no evidence in the present case sufficient to have created a duty requiring Porter-Gaud to supervise Fischer's off premises activities.

CONCLUSION

Thus, the two issues should be resolved as follows:

1. Porter-Gaud did not have a duty publically to report what it knew about the 1973 allegations about Fischer.

2. Porter-Gaud did not have a duty after 1973 to monitor Fischer's conduct while he was off the schools premises.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: _____

Robert E. Stepp
Laura W. Robinson
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Defendants Porter-Gaud School, the Estate of James Bishop Alexander and the Estate of Berkeley Grimball

Columbia, South Carolina

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