

1999.

Lastly, Plaintiffs assert that the purported justification for fast tracking the schools at the Site was pre-textual: they claim that an elementary school could have been expeditiously and efficiently constructed on the Gordon Avenue site in time for a September opening and they point out that the middle schools did not open in September. Accordingly, the Plaintiffs argue that the Municipal Defendants' decisions were motivated by the race and/or color of both the students designated to attend the schools and the opponents of the plan to construct the schools on the former landfill, in violation of § 601 of Title VI of the Civil Rights Act, along with the Fourteenth Amendment to the United States Constitution and Article 1, Section 2 of the Rhode Island State Constitution.<sup>11</sup>

#### **B. DEM's Arguments**

DEM denies that the race of either city officials, community members, or students attending the school, played any roll in DEM's site approval process. DEM's main contention, however, is that Plaintiffs have failed to establish the threshold element for a claim of intentional discrimination pursuant to the Arlington Heights factors: discriminatory impact. DEM contends that the Plaintiffs' have not demonstrated any actual or substantial likelihood of negative environmental harm. DEM cites Lucero v. Detroit Public Schools, 160 F.Supp. 2d 767 (E. D. Mich. 2001), as illustrative of Plaintiffs' failure to establish harm or disparate impact. In Lucero, the court concluded that plaintiffs' constitutional rights had not been violated despite evidence that the Site in

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<sup>11</sup> While the Rhode Island Supreme Court has not enunciated a standard for proving discrimination by the State or its agent pursuant to the Rhode Island Constitution, Plaintiffs assert that proof of a violation of the Equal Protection Clause of the United States Constitution would be satisfactory. Therefore, they argue that the test is the same.

question: (a) had a long history of industrial uses involving volatile and semi-volatile organic compounds, petroleum products, polychlorinated biphenyls (“PCBs”), chlorinated solvents, heavy metals/and radioactive paints, *id.* at 5, (b) exhibited more substantial contamination than was found at the Site,<sup>12</sup> (c) was subjected to a much more limited remedy than was required at the Site,<sup>13</sup> and (d) had a history of unexplained medical problems (severe bloody noses, respiratory difficulties, fatigue, diarrhea, liver pain and rashes) experienced by construction workers who worked on the school. *Id.* at 12. Despite the available evidence, DEM points out that the Lucero court was unable to conclude that the apparent risk of harm associated with the construction of a school on a contaminated site was “*likely to result* in the violation of Plaintiffs’ constitutional right to personal security and bodily integrity.” *Id.* at 22-23 (emphasis in original). Rather, the court found that while the Plaintiffs’ filings were “replete with allegation of speculative dangers . . . [s]uch speculation . . . is not evidence upon which the Court can conclude . . . that Defendants disregarded an obvious risk of harm that is likely to result in the violation of Plaintiffs’ constitutional rights.” *Id.* at 23.

DEM asserts that, despite having had four years to study the Site and the health of the students and staff attending those schools, Plaintiffs have failed to produce even the same quantum of evidence that was produced in the preliminary phases of Lucero. Moreover, DEM argues that Plaintiffs presented no evidence to support their contentions

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<sup>12</sup> DEM points out that, in addition to arsenic and lead (contaminants found in the Site here), the Lucero site investigation also identified other contaminants – carbon tetrachloride, benzopyrene, benzo(a)pyrene, trichlorethene, polynuclear aromatic hydrocarbons (PNAs), and polychlorinated bi-phenyls (PCBs). Lucero, at 5-6. Furthermore, DEM notes that in Lucero, construction workers reported strong petroleum odors during construction, and the contamination was found to have impacted groundwater. *Id.* at 12, 6

<sup>13</sup> The approved remedy in Lucero was limited to the removal of some contaminated soil and the installation of an engineered cap with twelve to eighteen inches of crushed concrete and soil in those areas not covered by foundations or asphalt. *Id.* at 9-11. In Lucero, the remedy did not provide for sub-slab ventilation or for an extended, 20-year post-remedy monitoring regime as was required at this Site.

that the site investigation failed to adequately assess the contaminants at the Site or that the remedy fails to provide adequate protection from exposure to contaminants at the Site. DEM maintains that the mere fact that contaminants may be present at the Site does not mean that the remedy (waste removal, soil cap, sub-slab venting and monitoring program) is not effectively preventing exposure to these contaminants. DEM emphasizes that if exposure to contaminants is being effectively prevented by the remedy then there is no adverse impact.

DEM contends that the Plaintiffs' objections and the objections voiced by other community members in the April 26, 1999 public hearing are objections only to the "idea" of building schools on remediated properties like the Springfield Street Schools Site. DEM maintains that neither the Plaintiffs nor the community members who commented at the public hearings were able to support their fears with evidence that the remediated Site presents an unreasonable risk of harm. Rather, DEM contends that these objections to the concept of building schools on remediated sites are policy objections that run to the political question of whether the City should even consider such sites for the construction of schools. DEM argues that its role in this matter involves the limited, technical question of whether a specific site can be safely remediated to support its use for a school, rather than the larger question of whether schools should be sited on properties that require remediation. At this time, DEM maintains there is no technical evidence that the approved remedy is inadequate to protect the students and staff at the Springfield Street Schools.

### **C. Municipal Defendants' Arguments**

Initially, the Municipal Defendants assert that the Superior Court Order denying

Plaintiffs' request for a TRO prior to the opening of the schools, obtained after a five day hearing in which Plaintiffs' expert Dr. Mitchell testified, conclusively established the Constitutional validity of the decision to site the schools on Springfield Street. They further assert that in the four years since the denial of that TRO, Plaintiffs have failed to establish that any person has been harmed by the school. Additionally, the Municipal Defendants point to the evidence in terms of the Arlington Heights factors and conclude that there is no indicia of discriminatory intent.

Aside from the lack of evidence establishing harm to anyone in the school community, the Municipal Defendants also contend that the impact, if there were any, does not bear more heavily on any one race (i.e. Black, Hispanic, Asian). Additionally, since all but one elementary school had a majority of non-white students, any choice of neighborhood in which to build the schools would have affected non-whites more than whites.

The Municipal Defendants rely on the testimony of Dr. DeRobbio (at the time, the Director for school support and business operations within the Providence School Department) to show the non-discriminatory historical background of the decision. Dr. DeRobbio testified that children are assigned to schools based upon their geographical locations and that the School Department did not know what the particular racial breakdown of Springfield Street schools would be. DeRobbio explained that there was a need for an elementary school in the northwest section of the City because of overcrowding in the existing schools and population growth. According to DeRobbio, the Site was chosen because it had enough land for the three schools being proposed, as well as enough acreage for the necessary playground and parking area. The School

Department was providing bus transportation for students living in that neighborhood to several other elementary and middle schools, at an annual cost of approximately \$45,000 per bus. After the schools were opened, only one bus was needed for both the elementary and middle school students. DeRobbio also testified that if the schools were closed, the students would go to “wherever there is a vacant seat” in another elementary or middle school, although “currently, there are no vacant seats available” at the elementary level; and “probably less than 100” for the middle schools. He further explained that the school board was required to maintain a 26 to 1 student/teacher class size ratio, as imposed by a contract with the teachers as well as a Superior Court Order, and that closure of the schools “would place the school department in violation” of the Court Order. DeRobbio did not know where the school department would send the 400 elementary school students if the court ordered the schools closed. The possible options included leasing trailers for temporary classrooms and refurbishing other buildings, each of which involved costs to the School Department.

The Municipal Defendants also cite to the testimony of Sepe and argue that his process of elimination was motivated only by a desire to procure a site that could accommodate the much needed new buildings within the proscribed time constraints. His rejection of the Neutaconkanut site for deed restrictions, the Plainfield Street site at the suggestion of architectural experts, and the Merino Park site for wetland restrictions, were well researched decisions based on practical concerns.

The Municipal Defendants further maintain that there were no substantive or procedural deviations in the site selection process. The school department identified a need and contacted Sepe in the DPP. Sepe contacted the Planning Department and

received a list of available sites from which he chose one to recommend. The school department agreed with his recommendation and a Phase I Environmental Assessment was conducted. Subsequently a Phase II Environmental Assessment was conducted. All this is standard procedure in the site-selection process. The Municipal Defendants also contend that the delay in procuring building permits was acceptable according to Sepe's understanding with the building inspector and a practice of obtaining verbal approvals.

Additionally, the Municipal Defendants argue that the decision to construct the schools was made in accordance with the normal legislative process. The PSB voted in favor of the City Council issuing bonds, the Mayor issued a request to the City Council, and the City Council approved. The Municipal Defendants point out that the City Council resolution to issue bonds included a number of schools and not just those on the Site. The Municipal Defendants assert that no public hearing was required relative to the issuance of the bonds.

Basically, the Municipal Defendants claim that the only classification used in making the decision was geographic (to the extent students were targeted by the decision they were only targeted based on their residential address), and they argue that such a classification neither burdens a suspect class nor impinges on a fundamental right. Therefore, they assert that the classification will withstand an equal protection challenge if it is rationally related to a legitimate state purpose, Hoffman v. City of Warwick, 909 F. 2d 608, 622 (1st Cir. 1990), and relieving schools of overcrowding, complying with a teacher/student ratio court order, and providing neighborhood schools, are all legitimate state purposes.

#### D. Analysis

Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides as follows:

“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

The Supreme Court has held that this statute “proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment,” Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978); accord Sandoval, 532 U.S. at 279, and that proof that a racially discriminatory purpose has been a motivating factor in the decision is required to show such a violation. Arlington Heights, 429 U.S. at 265-66. “Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” Id. at 267. In Arlington Heights, the Court reviewed a variety of factors that could potentially “shed some light on the decision-maker’s purposes.” Id. at 267. Accordingly, the Arlington Heights factors are relevant to the instant case and this Court reviews those factors in determining whether or not the decision to site the schools on Springfield Street was motivated by an intent to discriminate on the basis of race.

Discriminatory impact is often the starting point of the inquiry when the state action is racially neutral on its face. Id. at 266; Washington v. Davis, 426 U.S. 229, 242 (1976); Yick Wo v. Hopkins, 118 U.S. 356 (1886). In the instant case, the act of siting the schools on Springfield Street has naturally impacted the community served by the

schools, members of which are predominantly non-white.<sup>14</sup> This would be true of a school built on any site in any neighborhood to the extent that a new educational facility impacts its surrounding community. Whether or not this impact can be deemed discriminatory is less clear. Plaintiffs' argument suggests that the remedy implemented is insufficient to protect students and the community from the danger of contaminants present at the Site and therefore they are exposed to great risk of harm. However, since the Solid Waste Regulations were inapplicable, the residential criteria of the Remediation Regulations were adequately met, and there is, as yet, no evidence of actual harm to persons, it is unclear whether there is any actual harm or any real risk of harm. See Lucero, 60 F. Supp. 2d at 795 ("Plaintiffs in the case at bar have been unable to provide this Court with concrete evidence of harm to the students."). To the extent the remedy imposed at the Site is doing its service and will continue to do its service as was supported by the credible evidence in this case, there is no contamination affecting students or the surrounding community, and the impact is not discriminatory: these students are being treated the same as students at any other school who are not exposed to contaminants. Accordingly, without proof of disparate impact, Plaintiffs' equal protection claim stalls at step one. Still, discriminatory impact "is not the sole touchstone of an invidious racial discrimination." Arlington Heights, 429 U.S. at 265. The Arlington Heights Court stated that with these factors it was "identify[y], without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." Id. at 268. Presumably, even if no harm is proved, an intent to cause such

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<sup>14</sup>The parties provided considerable information on the population breakdown between white and non-white students in Providence. For instance, in its first year of operation, the Springfield Street Elementary School was comprised of 16% white and 84% non-white and the middle school was comprised of 30% white and 70% non-white. Also, during that same year only one of twenty-seven elementary schools in Providence had a majority of white students.



harm, might still be apparent and amount to a violation of Plaintiffs' right to equal protection.

Yet, "[w]here the decision maker is motivated by a factor other than the party's race, there can be no intentional discrimination." Buchanan v. City of Bolivar, 99 F. 3d 1352, 1356 (6<sup>th</sup> Cir. 1996). While Plaintiffs' evidence proves that the process was rushed and even sloppily executed, there is insufficient evidence to support a finding that intent to discriminate was the driving force behind Defendants' actions. To the contrary, credible evidence was presented to show that the Defendants' motivation to build the schools on the Site was clearly based upon factors other than race. The Municipal Defendants' were focused on alleviating overcrowded classes, saving money on student transportation costs, and complying with a court order. Providing students with one neighborhood school was a step toward resolving each of these issues. The decision to locate the buildings within the neighborhood being served was also motivated by a cost analysis. The Site was the best choice among those available at the time the need for new schools became unavoidable. Even if the Plaintiffs could prove that the opportunity for community involvement in the decision making process was purposefully limited so as to expedite construction, there would not be a showing of discriminatory intent because the City Defendants were motivated by clearly legitimate purposes. Additionally, DEM, who had no hand in choosing the Site, provided that level of oversight necessary to assure that the proper remedy was put in place in accordance with legally established criteria. Even if there had been more opportunity for community involvement, unless evidence, which has not yet been produced, showed that the remedy was inadequate to the task, DEM would have been compelled to approve the RAWP. Thus, the Plaintiffs claims under

Counts Three and Five must fail.

#### COUNT FOUR: DUE PROCESS

Plaintiffs claim that they were deprived of both “property” and “liberty” interests that are protected by the Due Process Clauses of the United States and the Rhode Island Constitutions. Specifically, they assert that they have a fundamental liberty right to control the formal education of their children and that their children have a fundamental right to bodily security, both of which are protected by the substantive component of the Due Process Clause. Additionally, they claim that they were deprived of a property right, created by the IPRARA, to community involvement and adequate notice, which is protected by the procedural component of the Due Process Clause. Plaintiffs allege that the IPRARA and the Remediation Regulations established the procedural process that was due and that Defendants’ failure to adhere to the statute and the attendant regulations resulted in a clear denial of that process. Additionally, Plaintiffs claim that Defendants’ decision to site the school on a former dump, accompanied by the failure to adhere to the legally established procedural process and the adoption of a remedy that Plaintiffs believe to be inadequate to the task,<sup>15</sup> exhibited a deliberate indifference to the Plaintiffs’ rights which also transgressed their right to substantive due process.

Defendants counter that the IPRARA created no constitutionally protected property right and that Plaintiffs’ were not deprived of either their right to control their children’s education nor their children’s right to bodily integrity. Additionally, Defendants assert that the notifications that were given were adequate to afford Plaintiffs’

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<sup>15</sup> Plaintiffs continue to insist that the remedy should have been based on application of the Solid Waste Regulations, which this Court has held inapplicable.

procedural due process if any property or liberty right had been at risk. Defendants further assert that there was no substantive due process violation because the siting of the schools on Springfield Street was the result of a well reasoned selection process and that the remedy implemented was protective of the students and the community.

The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property without due process of law.” The United States Supreme Court has found that the Due Process Clause affords individuals “three different kinds of constitutional protection.” Daniels v. Williams, 474 U.S.327, 337, (1986) (Blackmun, J., concurring). “First, it incorporates specific protections defined by the Bill of Rights.” Id. “Second, it contains a substantive component, sometimes referred to as ‘substantive due process,’ which bars certain arbitrary government actions ‘regardless of the fairness of the procedures used to implement them.’ Id. Finally, “it is a guarantee of fair procedure, sometimes referred to as ‘procedural due process.’ Id. Plaintiffs assert claims alleging violations of both substantive and procedural due process.

#### **Substantive Due Process.**

“Substantive due process serves ‘as a check on official misconduct which infringes on a ‘fundamental right’ or as a limitation on official misconduct, which although not infringing on a fundamental right is so literally ‘conscience shocking,’ hence oppressive, as to rise to the level of a substantive due process violation.” Lucero, 160 F.Supp. at 799. Fundamental rights worthy of substantive due process protection are those “rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’” Washington v. Glucksberg, 521 U. S. 702, 721 (1997) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)), “and ‘implicit in the concept of ordered

liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Id. (quoting Palko v. Connecticut, 302 U.S. 319, 325,326 (1937). Substantive due process "protects certain 'fundamental liberty interests' from deprivation by the government, regardless of the procedures provided, unless the infringement is narrowly tailored to serve a compelling state interest." Chavez v. Martinez, 538 U.S. 760, 775 (2003) (quoting Glucksberg, 521 U.S. at 721). In instances where a fundamental right is not at stake, a substantive due process violation may be established by showing that legislation was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" Kaveny v. Town of Cumberland Zoning Bd. Of Review, 875 A.2d 1, 10 (R.I. 2005) (R.I. 2005) (quoting Brunelle v. Town of Kingstown, 700 A.2d 1075, 1084 (R.I. 1997)). The United States Supreme Court has also held that non-legislative government conduct that results from "deliberate indifference" and is so egregious that it "shock[s] the conscience" may also give rise to a substantive due process violation. Chavez, 538 U.S. at 774.

Essentially, Plaintiffs advance three substantive due process arguments, none of which is availing under the facts of this case. First, they cite to Lucero, and allege that their children's fundamental right to bodily security has been put at risk by the potential exposure to contaminants at the Site. The Lucero facts are strikingly similar to the facts of this case: Lucero involved the construction of a school on a former industrial site in Detroit. Lucero, 160 F. Supp. at 771. In contrast, however, the Lucero building site had a documented history of heavy industrial use and was located in an industrially zoned section of the city, plus the evidence showed that construction workers became physically ill while working on the site. Id. at 772, 776. Still, while the Lucero court did find that

students had a fundamental right to personal security and bodily integrity, there was no substantive due process violation where the alleged harm to that bodily security was merely speculative. *Id.* at 799 (“While a student has a Fourteenth Amendment right to personal security and bodily integrity, there must be a showing that the ‘force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than merely careless or unwise zeal that it amounted to a brutal and inhuman abuse of power literally shocking to the conscience.’”) (quoting Lillard v. Shelby Cty Bd. of Education, 76 F.3d 716, 725 (6th Cir. 1996)). In the instant case Plaintiffs have produced no evidence that any student at the school has been harmed by any contaminants existing at the Site. Additionally, this Court has held, *supra*, that the remedy applied to the Site satisfied the requirements of the Remediation Regulations and is therefore presumptively protective of human health and the environment; there was also credible expert testimony to the effect that the contaminants present at the Site would not threaten students or the surrounding community. In other words, the students’ bodily security has in no way been infringed and no fundamental right has been compromised.

Second, Plaintiffs claim that Defendants violated their fundamental liberty interest to control the formal education of their children. While this liberty has clearly been recognized by the United States Supreme Court as among those rights deemed fundamental, see Glucksberg, 521 U.S. at 720 (citing Meyers v. State of Nebraska, 262 U.S. 390, 399 (1923)(holding that Due Process protected parents right to engage foreign language teacher to educate their children)), it is not absolute. Indeed, “[t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools, . . . is not questioned,” Meyers, 262 U.S. at 402, neither is the power to “to

prescribe a curriculum for institutions which it supports.” Id. These state powers, clearly curtail a parent’s ability to control their child’s education to some extent – a parent may not choose to forgo educating their child completely nor may they disregard school rules – but they do not violate the fundamental right to “direct the education and upbringing of one’s children,” Glucksberg, 521 U.S at 720 –a parent may choose home-schooling or between public and private schools. Likewise, siting the schools on Springfield Street did not infringe upon this liberty. Unlike the situation in Lucero, the City did not force students to attend the Springfield Street schools. For example, Deborah Martin received notice during the 1998-99 school year that her son was being assigned to a Springfield Street school but, upon her request, the school department allowed him to stay in the school he was already attending. Additionally, since the remedy implemented is presumptively protecting human health and the environment from any contaminants, and the choice of siting the schools on Springfield Street was reasonably related to the legitimate state purpose of providing adequate public school space for a growing population, the fact that the parents may have limited their own choice based on fear of the Site cannot be attributed to the Defendants.

Additionally, Plaintiffs claim that Defendants’ actions with respect to siting and approving the schools constituted an abuse of power and an exhibition of deliberate indifference to the rights of the children. Yet, even aside from the fact that the remedy approved has satisfied the Remediation Regulations and is protecting students and others from any potential contamination, the decision to site the school, and the attendant process, although truncated and in violation of certain statutory provisions, does not “shock the conscience.” The city was in dire need of a new school in the Springfield

Street neighborhood in order to avoid overcrowding; Sepe reviewed at least four potential sites before making a recommendation;<sup>16</sup> and while the community involvement process may have been flawed, the remedy applied to the Site was the strictest required under the existing regulations. Indeed, even in light of Plaintiffs' evidence produced at trial showing the sensitivity of inner city children to contaminants and the threat posed by the contaminants present, but contained, at the Site, the remedy chosen would still have been the strictest required by law. Therefore, Defendants' actions in siting the schools do not manifest a deliberate indifference to the Plaintiffs' rights, nor do they shock the conscience so as to give rise to a substantive due process violation.

**Procedural Due Process.**

“The most familiar office of [the Due Process Clause] is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty or property by a State.” Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). Before determining whether the procedure was fair, a plaintiff must first establish that he has a constitutionally protected private interest; and that there was a deprivation of that interest caused by government action. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Plaintiffs ground their procedural due process claim on alleged property interests in the community involvement procedures mandated by the IPRARA and the Remediation Regulations. These interests were taken, as a matter of law, since this Court has held, supra, that the statute was violated. Therefore, the threshold issue is whether or not the statute granted Plaintiffs any constitutionally protected property rights in these procedures.

Property interests are “created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” Bd. of

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<sup>16</sup> Cf. Lucero, 160 F. Supp. at 772 (“Defendants did not seriously consider an alternative site”).

Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). “To have a property interest in a benefit, a person must have . . . a legitimate claim of entitlement to it.” Id. A claim of entitlement based on a procedural statutory or regulatory scheme may be found where there was a “repeated use of explicitly mandatory language in connection with requiring specific substantive predicates.” Hewitt v. Helms, 459 U.S. 460, 473 (1983)(concluding that State had created a protected liberty interest in prison administration rule); see also Davila-Lopes v. Zapata, 111 F.3d 192, 196 (1st Cir. 1997)(holding that no property interest was created by hospital rule which didn’t sufficiently circumscribe hospital administrators’ discretion). However, “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.” Town of Castle Rock, Colorado v. Gonzales, 125 S. Ct 2796, 2803 (2005) (holding that despite the mandatory language in a restraining order and an enforcing statute, the State had not conferred a benefit on the plaintiff because “a well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.” (at 2805-06)).

Plaintiffs claim that the IPRARA as well as the Remediation Regulations are independent state law sources conferring a property right on “abutters” and “interested parties” such that they have a legitimate claim of entitlement to partake in the process.<sup>17</sup>

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<sup>17</sup>Plaintiffs derive their claim of entitlement from the following: “The department of environmental management will develop and implement a process to ensure community involvement . . . . That process shall include . . . (1) Notification to abutting residents when a work plan for a site investigation is proposed; (2) Adequate availability of all public records concerning the investigation and clean up of the site, including, where necessary, the establishment of informal repositories in the impacted community; and (3) Notification to abutting residents, and other interested parties, when the investigation is deemed complete by the department of environmental management.” §23-19.14-5; “Public Notice is required at two (2) points during the Site Investigation. (A.) Prior to the implementation of the Site Investigation field activities, the performing party must notify all abutting property owners and tenants that an investigation is about to occur; and (B.) When the Site Investigation is deemed complete, the Department will issue a program letter confirming that the performing party has adequately assessed the nature and extent of contamination at the contaminated-site. Prior to the formal Department approval of the Site Investigation Report (in the form of a Remedial Decision Letter), the performing party must notify all abutting property owners, tenants and community well suppliers associated with any well head protection areas which



Both the statute and the regulations use “language of an unmistakably mandatory character.” Hewitt, 459 U.S. at 471; see supra, note 19. Additionally, both mandate certain action upon occurrence of specific substantive predicates; for example notification is required prior to implementation of Site Investigation activities, and again when the investigation is deemed complete. Hewitt, 459 U.S. at 472; cf. Olim v. Wakinekona, 461 U.S. 238, 249 (1983). The controlling question is whether or not DEM’s or the City’s discretion to abide by the laws was curtailed. This determination depends on whether or not the provisions were truly mandatory. City of Castle Rock, 125 S.Ct. at 2805.

Rhode Island “recognize[s] the general distinction between statutes aimed at public officers and those aimed at individuals,” Town of Tiverton v. Fraternal Order of Police, 118 R.I. 160, 164 (1977); which allows for substantial compliance by the former but strict compliance by the latter. Washington Highway Dev. v. Bendick, 576 A.2d 115, 116 (R.I. 1990); Gryguc v. Bendick, 510 A.2d 937, 941 (R.I. 1986). In Washington Highway Development, 510 A.2d at 117, the Court held that where the notice provision was directed at public officers and not followed by a sanction for non-compliance, the provision was directory rather than mandatory. Conversely, in Town of Tiverton, 118 R.I. at 165, where the notice provision was directed at private persons and conditioned rights on compliance thereto, the Court held that the provision was mandatory.

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encircle the contaminated site that the investigation is complete and provide them with findings of the investigation and any proposed remedial alternative which includes on-site treatment and/or containment of hazardous materials as part of the final remedy.” CRIR 12-180-001 § 7.07; “Remedy Selection: Upon completion of the Site Investigation Report the Director shall issue a Remedial Decision Letter, identifying the preferred remedial alternative. All preferred remedial alternatives which included on-site treatment and/or containment of hazardous materials as part of the final contaminated-site remedy shall be subject to public notice as specified in rule 7.07 (Public Notice), and shall be subject to public review and comment regarding the technical feasibility of such preferred remedial alternative prior to issuance of the Remedial Decision Letter. If none of the proposed remedial alternatives are acceptable, the Director shall require the performing party to consider other remedial alternatives.” Id. § 7.09.

The overall statutory scheme of the IPRARA is to foster redevelopment and reuse of contaminated properties in order to protect “human health and the environment based on current and reasonably foreseeable future use.” Section 23-19.4-4. Environmental equity is a concept that acknowledges the disadvantaged status of many of the communities in which contaminated sites are located. The Environmental Equity and public participation provision promotes the involvement of the low income and minority populations likely to be surrounding each site in the remediation process. Section 23-19.4-5. The provision seeks to advance the power of such individuals to participate in a process that affects their daily lives. See Tanner v. Town Council of the Town of East Greenwich, 2005 R.I. LEXIS 154 (July 18, 2005)(explaining that knowledge is power in the democratic process). However, the provision is directed at DEM and the General Assembly did not include any sanctions for non-compliance. Therefore, the environmental equity provision is not truly mandatory such that it gives rise to a property right upon which Plaintiffs may rely. On the other hand, the Remediation Regulations are largely directed at private actors – performing and responsible parties. The stated purpose of the Remediation Regulations is “to create an integrated program requiring reporting, investigation and remediation of contaminated sites” Section 1.02. Integrated within that program are the notice provisions requiring performing parties to act and conditioning rights upon those required actions: “prior to the formal department approval . . . , the performing party must” and “prior to implementation . . . , the performing party must.” Therefore the requirements of the Remediation Regulations were mandatory as far as they imposed obligations on the City, as a performing party, to act, and Plaintiffs’ claim of a property right based thereon may be protected by the Due Process Clause.

Once a constitutionally protected right has been established, the next question must be whether the process provided prior to the deprivation was adequate. Zinermon v. Burch, 494 U.S. 113, 126 (1990) (“[I]t is necessary to ask what process the State provided and whether it was constitutionally adequate). “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” Mathews v. Eldridge, 424 U.S. 319, 333 (1976). In the instant case, no process was provided prior to depriving the Plaintiffs of their right to notice. The deprivation was final at the time it occurred. Clearly, no process cannot equal due process. Therefore, it is not necessary to determine what process would be required prior to a deprivation of the right to proper notice in order to determine that the City violated Plaintiffs’ due process right.

The final question remaining under § 1983, is whether or not Plaintiffs were damaged. The denial of due process is actionable only for nominal damages without proof of actual injury, and substantial damages should be awarded only for actual injury. Carey v. Piphus, 435 U.S. 247, 266 (1978). In the instant case, Plaintiffs have not proved damages. Plaintiffs allege that had their right to proper notice and community involvement not been deprived, the schools would not have been built on Springfield Street and they would not be threatened by the potential escape of contaminants. However, given the evidence before this Court, particularly the lack of evidence as to injury and the ample evidence as to the adequacy of the remedy according to the applicable laws, it is unlikely that DEM would not have given its approval to the City in any event. Accordingly, the failure of the city to provide proper notice did not harm the Plaintiffs and is only subject to nominal damages.

## CONCLUSIONS OF LAW

1. The Municipal Defendants violated the notice provisions of the Remediation Regulations, §7.07, by failing to notify landowners and tenants abutting the Site, prior to the commencement of investigatory activities that they were about to commence such investigatory activities.
2. DEM violated the public participation requirements of the IPRARA and §7.07 of the Remediation Regulations by failing to notify landowners and tenants abutting the Site, and/or by failing to assure that the municipal defendants notified landowners and tenants abutting the Site, prior to the commencement of investigatory activities on the Site, that the Municipal Defendants were about to commence such investigatory activities.
3. The Municipal Defendants violated the notice provisions of the Remediation Regulations, §7.07, by failing to notify landowners and tenants abutting the Site, prior to the submission of the SIR to DEM, that the SIR was complete, and failing to provide such abutters with the findings of the investigation and any proposed remedial alternative which included on site treatment and/or containment of hazardous materials as part of the final remedy.
4. DEM violated the public participation requirements of the IPRARA and §7.07 of the Remediation Regulations by failing to notify landowners and tenants abutting the Site, and/or by failing to assure that the Municipal Defendants notified landowners and tenants abutting the Site, prior to the Municipal Defendants' submission of the SIR to DEM, that the SIR was complete, and failing to provide said abutters with the

findings of the investigation and any proposed remedial alternative which included on site treatment and/or containment of hazardous materials as part of the final remedy.

5. The Municipal Defendants violated §10.01 of the Remediation Regulations by conducting excavation, soil sifting, bulldozing, and construction activities on the Site prior to submitting, and receiving DEM approval of, a RAWP.
6. DEM violated §7.09 of the Remediation Regulations by issuing a Remedial Decision Letter that determined the Municipal Defendants' SIR was complete, prior to making the SIR available to the public for public review and comment regarding the technical feasibility of the preferred remedial alternative proposed therein involving on-site treatment and/or containment of hazardous materials.
7. DEM violated the IPRARA, § 23-19.14-5, by failing to take a "hard look" at issues involving the environmental equity of constructing the schools on the Site, and failing to consider environmental equity as a factor in making its ultimate determinations to approve the SIR and RAWP, and issue its Order of Approval.
8. DEM violated the IPRARA, §23-19.14-5, by failing to develop and implementing a process that ensured community involvement throughout the investigation and remediation of the contaminated sites where the schools were built.
9. Defendant Sepe's determinations to site the schools, and to commence construction activities in the absence of City ownership of the Site, and in the absence of necessary DEM and City Building Department approvals, were policy determinations of the City within the meaning of 42 U.S.C. §1983.
10. DEM, acting under color of state law, did not intentionally discriminate against the Plaintiffs on the basis of race and/or color and/or national origin.

11. The Municipal Defendants, acting under color of state law, did not intentionally discriminate against the Plaintiffs on the basis of race and/or color and/or national origin.
12. The Municipal Defendants, acting under color of state law, deprived the Plaintiffs of property in the absence of procedural due process of law, in violation of the 14th Amendment to the U.S. Constitution, and Article I, Section 2 of the R.I. Constitution by failing to provide the proper notice and community involvement procedures mandated by the Remediation Regulations.
13. DEM did not deprive the Plaintiffs of property in the absence of procedural due process of law, in violation of Article I, Section 2 of the R.I. Constitution by failing to provide the proper notice and community involvement procedures mandated by the IPRARA.
14. The Municipal Defendants, acting under color of state law, did not deprive the Plaintiffs of liberty or property in the absence of substantive due process of law, in violation of the 14th Amendment to the U.S. Constitution, and Article I, Section 2 of the R.I. Constitution.
15. DEM did not deprive the Plaintiffs of liberty and property in the absence of substantive due process of law, in violation of Article I, Section 2 of the R.I. Constitution.

### **REMEDY**

Given the specific claims brought by Plaintiffs against Defendants, the findings of fact and the conclusions of law *infra*, this Court will not impose a remedy until a further hearing is held. The parties are directed, within thirty days of the filing of this decision,

to confer with each other to either (1) submit a proposed remedy, or (2) submit suggested dates for hearing on a remedy.