

quent accounts. However, the 40% has no relationship to the tax actually collected from the customers and which the Taxpayer is required to pay to the Department. The customers may eventually pay more than the 40%, in which case tax would be paid by the customer but not remitted to the State. In no event should the Department receive less than is paid by the customer.

“ . . . .

“In summary, the general rule is that a retailer remains liable on any transferred accounts and must report and pay tax on any amounts subsequently paid by the customers. The retailer is obligated to keep or provide the Department with reasonable access to records from which the Department can verify the amounts collected on the accounts. If the retailer fails to provide the necessary records, then the retailer must bear the consequences and must pay tax on the full amount due. In no event shall the retailer pay before the tax is collected, *but* the retailer is obligated to keep records showing how much if any has been paid.’”

The judgment of the trial court as it pertains to the taxpayer's sales tax liability on the discounted accounts receivable is affirmed.

[2] The taxpayer also questions the trial court's finding that it owed sales tax on the full amount of the credit card transactions. In its order the trial court found that the taxpayer had conceded the credit card issue. In its post-judgment motion and on this appeal, the taxpayer contends that it made no such concession. In view of the discrepancy of opinions, we will address the issue.

For credit card sales, sales tax is added to the sale price and charged to the credit cards through an electronic terminal. The credit card company charges the taxpayer a previously negotiated fee of between 1½% and 5% and pays the taxpayer the balance either by electronically crediting the taxpayer's bank account or by mailing a check to the taxpayer.

The dispute arises in this case because the taxpayer reported, and paid, sales tax to the department only on the amount received

from the credit card company after subtracting the credit card fee.

As previously discussed, “gross proceeds of sales” is defined as the value proceeding or accruing from the sale of tangible personal property, without deduction for any expenses whatsoever. We find that the credit card fee paid by the taxpayer to a credit card company is a non-deductible expense or cost of doing business. The fact that the credit card company deducts the fee before paying the taxpayer does not change the nature of the fee. The credit card fees paid by the taxpayer in this case must be included in the gross receipts subject to the sales tax.

[3] Furthermore, credit card sales are not credit sales governed by § 40-23-8. Rather, on credit card sales the retailer receives payment immediately and, in return, pays the credit card company a fee for its service.

In view of the foregoing, the judgment of the trial court is affirmed.

The foregoing opinion was prepared by Retired Appellate Judge L. CHARLES WRIGHT while serving on active duty status as a judge of this court under the provisions of § 12-18-10(e), Code 1975.

AFFIRMED.

All the judges concur.



**Jerry BOYETT, a minor child, suing  
by his father and next friend,  
Wayne BOYETT**

v.

**Lalar TOMBERLIN, et al.**

2940975.

Court of Civil Appeals of Alabama.

Dec. 1, 1995.

Rehearing Denied Jan. 12, 1996.

Certiorari Denied May 31, 1996

Alabama Supreme Court 1950668.

Student brought action against teacher, principal, superintendent and county board of

education, asserting state law tort claims and § 1983 claim for violation of his rights under Fourteenth Amendment, in connection with discipline which student received for leaving class, without permission, purportedly to go to restroom. The Crenshaw Circuit Court, H. Edward McFerrin, J., entered summary judgment in favor of all defendants, and student appealed. On transfer by the Alabama Supreme Court, the Court of Civil Appeals, Crawley, J., held that: (1) teacher was exercising her discretionary authority in refusing student's request to leave classroom and, thus, was entitled to immunity from state tort claims; (2) principal was exercising discretionary function when determining what discipline should be imposed on student for leaving classroom without permission, as was superintendent in upholding disciplinary sanction, such that those administrators had immunity from state tort claims; and (3) student failed to show deprivation of constitutional right or establish bad faith or deliberate indifference on part of teacher or administrators.

Affirmed.

#### 1. Schools ⇨147

Teacher was engaged in discretionary function at time she denied student's request to leave classroom in order to use restroom and, thus, teacher was entitled to immunity as to student's state law tort claims; teacher's resolution of issue of whether student genuinely needed to use restroom or was seeking to get out of class for another reason necessarily involved exercise in judgment and choice.

#### 2. Schools ⇨63(3), 147

When principal determined what discipline should be imposed on student for leaving classroom without permission, and superintendent upheld that disciplinary sanction, they were exercising discretionary functions, for which they had immunity as to student's state law tort claims.

#### 3. Civil Rights ⇨234

To state claim under § 1983, plaintiff must allege facts constituting deprivation of

constitutional right, under color of state law. 42 U.S.C.A. § 1983.

#### 4. Civil Rights ⇨127.1

In order to recover against teacher or school administrator under § 1983, student must establish not only that he or she was deprived of constitutional right, but also that person who deprived him or her of that right did so in bad faith or with deliberate indifference to his or her rights. 42 U.S.C.A. § 1983.

#### 5. Civil Rights ⇨127.1

Student failed to show, in support of § 1983 claim, deprivation of constitutional right or bad faith or deliberate indifference on part of teacher who refused to excuse student from classroom, purportedly to use restroom, and administrators who imposed discipline on student for subsequently leaving classroom without permission, despite student's claims that he was denied "liberty interest in his bodily integrity," as well as constitutional right to "privacy and freedom from humiliation and embarrassment." U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Charles J. Kettler, Jr., Luverne, for Appellant.

Mark S. Boardman and J. Wesley Hughes of Boardman & Tyra, P.C., Birmingham, for Appellees.

CRAWLEY, Judge.

Jerry Boyett (the student), a senior at Luverne High School, sued Lalar Tomberlin (the teacher), Jim Head (the principal), Sammy Carr (the superintendent), and the county board of education (the board), after he was disciplined for leaving class, without permission, to go to the restroom.

The student sought compensatory and punitive damages for state law tort claims involving "pain and suffering, embarrassment, humiliation, and invasion of privacy," as well as injunctive relief, or, in the alternative, a writ of mandamus to set aside the disciplinary action and to expunge any record of it from his permanent school record. He also alleged a violation of his rights under the

Fourteenth Amendment to the United States Constitution and requested relief pursuant to 42 U.S.C. § 1983. The trial court entered summary judgments in favor of all defendants, and the student appealed. The Alabama Supreme Court transferred the cause to this court pursuant to Ala.Code 1975, § 12-2-7(6).

The student alleged that on September 13, 1993, while he was enrolled in the teacher's class at Luverne High School, he was suffering from diarrhea; that at the beginning of class, he asked the teacher for permission to go to the restroom; that the teacher refused to give him permission; that five minutes later he renewed his request; and that upon receiving a second denial of his request, he left the classroom, without permission, and went to the restroom. The principal imposed a disciplinary sanction of 10 days' detention, which meant that the student was required to read or study each day for 10 days while other students had a 15-minute recess.

The teacher filed the following affidavit:

"On September 13, 1993, in my 7th period class [the student] stood up and announced in a loud voice, almost immediately after the bell rang to begin class, that (quoting to the best of my recollection): 'I have got to go to the bathroom and this tea has got to come out.' He said nothing about diarrhea. The first time I heard anything about diarrhea was when I read the complaint against me, which was filed on November 16, 1993.

"When [the student] did this, the facts I had before me were as follows:

"1. [The student] had been in my 6th period class immediately prior to this, where he exhibited no signs of discomfort.

"2. During my 6th period class, [the student] . . . did not request to go to the bathroom. He could have gone to the bathroom without any affect on his grades, because he was not getting a grade for this 6th period class. Instead of acting sick, he acted, in my opinion, in a disruptive manner and in an attempt to get attention. Towards the end of class, he popped a rubberband on some kind of notebook, making a sound . . . like a firecracker. All

of the students stopped and looked at him. He said 'Why are y'all looking at me?'

"3. [The student] walked right by the bathroom when changing from my 6th period class to my 7th period class.

"4. [The student] arrived in my 7th period class with approximately 3 minutes to spare. He spent this time chatting with another student, whom I understand to be his girlfriend.

"5. [The student] was disruptive and disrespectful at the time he asked to leave the classroom. He was a disruptive student in my classroom at Luverne High School during his senior year.

"6. [The student] was interrupting my classroom when he stood up in class and made his announcement. Students in my classroom know that they can quietly approach me with a request to go to the bathroom and then leave the classroom. [The student's] loud interruption was not in keeping with this policy.

"I made a decision based on the above facts not to honor [the student's] request to go to the bathroom. Given the theatrical nature of his request, I felt that allowing such request would affect my ability to educate my students and control my classroom."

In *Byrd v. Sullivan*, 657 So.2d 830 (Ala. 1995), a recent case involving a student's claims against a school principal and a county board of education alleging negligence and invasion of privacy, our Supreme Court reiterated the following long-standing principles:

"Article I, § 14, Ala. Const. (1901), provides that the State of Alabama shall not be made a defendant 'in any court of law or equity'; this is the constitutional basis for the doctrine of sovereign immunity. County boards of education, as local agencies of the State, partake of this immunity. *Hutt v. Etowah County Bd. of Educ.*, 454 So.2d 973, 974 (Ala.1984). An individual who, while acting as a State agent, engages in the exercise of a discretionary function may also be entitled to qualified immunity. *Nance v. Matthews*, 622 So.2d 297 (Ala. 1993); see also *Faulkner v. Patterson*, 650 So.2d 873 (Ala.1994). 'Discretionary acts' have been defined as

'[t]hose acts [as to which] there is no hard and fast rule as to course of conduct that one must or must not take . . . [;] [those requiring] exercise in judgment and choice and [involving] what is just and proper under the circumstances.'

*Black's Law Dictionary* 467 (6th ed. 1990); see also *Smith v. Arnold*, 564 So.2d 873, 876 (Ala.1990); *Nance v. Matthews*, supra."

*Byrd v. Sullivan*, 657 So.2d at 832-33 (brackets added by the court in *Byrd*). See also *Bonwell v. Bobo*, 659 So.2d 98, 101 (Ala.1995).

[1] The student argues that the teacher was not engaged in the exercise of a discretionary function because, he claims, a teacher has no discretion to refuse a student's request to go to the restroom. He maintains that "[w]hen the child needs to use the bathroom, there is no conceivable justification in denying him that need."

[2] Of course, that argument begs the question, which, for the classroom teacher, is: does the student genuinely need to use the restroom, or is he seeking to get out of class for another reason? A teacher's resolution of that question necessarily involves an exercise in judgment and choice. It is the epitome of a discretionary function. The student's medical expert recognized as much on cross-examination:

"Q. My question is: A teacher has to make a discretionary call in a situation like what happened at Luverne High School on September 13, 1993, that is, to decide whether to interrupt the class, allow a student to leave or not allow a student to leave. Is that a fair statement?

"A. That's a fair statement."

In *Byrd v. Sullivan*, our Supreme Court observed:

"[T]hese are the types of decisions made by teachers, principals, and other school personnel every day, using their best judgment and evaluation of the circumstances." 657 So.2d at 833. The teacher was entitled to immunity when she exercised her discretionary authority to refuse the student's request to leave the classroom. Likewise,

when the principal determined what discipline should be imposed on the student for leaving the classroom without permission, and the superintendent upheld that disciplinary sanction, those administrators were also exercising discretionary functions, for which they have immunity. As to the state law claims, the summary judgments were proper under the doctrine of discretionary immunity.

[3-5] "To state a claim under § 1983, the plaintiff must allege facts constituting a deprivation of a constitutional right, under color of state law." *Bonwell v. Bobo*, 659 So.2d at 102. Furthermore, in order to recover against a teacher or a school administrator under § 1983, a student must establish not only that he or she was deprived of a constitutional right, but also that the person who deprived him or her of that right did so in bad faith or with deliberate indifference to his or her rights. *Id.* Relying on *Bonwell*, the student claims that he was denied "a liberty interest in his bodily integrity," as well as a constitutional right to "privacy and freedom from humiliation and embarrassment."

In *Bonwell*, the Alabama Supreme Court held that students who had been sexually molested by a teacher had a § 1983 claim for violation of their substantive due process rights to bodily integrity. The facts of this case are a far cry from those in *Bonwell*. The Due Process Clause of the Fourteenth Amendment simply does not guarantee a student the right to be excused from a classroom upon demand, even if the asserted reason is to use the toilet. In this case, the student neither showed the deprivation of a constitutional right nor established bad faith or deliberate indifference on the part of the teacher and the administrators. The trial court properly entered the summary judgment as to the student's § 1983 claim.

The student's claim for injunctive relief or for a writ of mandamus to expunge any record of this disciplinary proceeding from school records was also correctly denied. The principal's affidavit states that the disciplinary action against the student is not now and never was mentioned in the student's permanent record. The evidence in this case

indicates that the disciplinary form was destroyed at the end of the student's senior year. The student does not dispute that evidence. Accordingly, there was no basis for injunctive relief.

The judgment of the trial court is affirmed.

**AFFIRMED.**

ROBERTSON, P.J., and THIGPEN,  
YATES, and MONROE, JJ., concur.



T.L.W.

v.

**STATE DEPARTMENT OF  
HUMAN RESOURCES.**

(In the Matter of R.S. and F.W.).

2940815.

Court of Civil Appeals of Alabama.

Dec. 1, 1995.

Rehearing Denied Jan. 12, 1996.

Certiorari Denied May 24, 1996  
Alabama Supreme Court 1950665.

Following ore tenus proceeding, the Morgan Juvenile Court, David H. Bibb, J., terminated parental rights of children's mother and their putative fathers. Mother appealed. The Court of Civil Appeals, Crawley, J., held that record supported decision to terminate mother's parental rights.

Affirmed.

**1. Infants ⇌178**

Natural parents have prima facie right to custody of their children, and that right can be overcome only by clear and convincing evidence that children's best interests will be served by permanently removing them from their parents' custody.

**2. Infants ⇌155, 178**

When state is petitioner, trial court must apply two-pronged test in determining whether to terminate parental rights; court must first find from clear and convincing evidence that child is dependent, and court must then determine that there are no viable alternatives to termination of parental rights.

**3. Infants ⇌250, 252**

Trial court's decision in proceedings to terminate parental rights is presumed correct when it is based on ore tenus evidence, and its decision will be set aside only if record reveals decision to be plainly and palpably wrong.

**4. Infants ⇌178**

Record supported trial court's finding, in support of termination of mother's parental rights, that mother had not made sufficient efforts to adjust her circumstances to meet needs of children, in accordance with agreements reached with Department of Human Resources; although mother had embarked on several programs of self-improvement, she had not successfully completed them, and while mother may have made some improvement, her condition had been of such duration and nature as to render her unable or unwilling to care for minimal needs of her children. Code 1975, § 26-18-7.

**5. Infants ⇌178**

Trial court's findings, in support of termination of mother's parental rights, that mother was unable or unwilling to discharge her responsibilities to her children, that mother's conduct or condition rendered her unable to properly care for children, and that such conduct or condition was unlikely to change in foreseeable future, were supported by record; psychiatric social worker testified that mother suffered from major depression, addictive disease problems, and personality disorder that made it unlikely that she would ever be able to care adequately for her children. Code 1975, § 26-18-7(a)(2).

**6. Infants ⇌158**

Evidence of mental deficiency is significant factor for trial court to consider in proceedings to terminate parental rights. Code 1975, § 26-18-7(a)(2).