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IN THE
INDIANA SUPREME COURT

CASE NO. _____

D.Z.,	)	
	)	Appeal from the
Appellant (Respondent below),	)	Hendricks Superior Court 3
	)	Cause No. 32D03-1704-JD-00086
	)	The Honorable Karen M. Love, Judge
v.	)	
	)	
STATE OF INDIANA,	)	Indiana Court of Appeals
	)	Case No. 32A05-1708-JV-1907
Appellee (Petitioner below).	)	
	)	

BRIEF OF *AMICUS CURIAE* INDIANA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF APPELLEE'S PETITION TO TRANSFER

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I. INTEREST OF *AMICUS CURIAE*

The Indiana School Boards Association ("ISBA") is a private, nonprofit association whose membership consists of nearly all of Indiana's public school boards. It is governed by a board of directors of local school board members elected from geographical regions of the state. The ISBA has several committees made up of local school board members and school employees. It employs a staff to assist in carrying out its mission and the objectives established by the membership.

The Indiana Council of School Attorneys ("ICOSA") was formed in 2017 as an affiliate of ISBA. ICOSA is a voluntary association of about 75 attorneys who regularly represent Indiana school boards and districts. Its committees are engaged in legislative affairs, collective bargaining, and amicus assistance to members in litigation that presents issues of significance or broad impact. This brief is authored by the current chair of the ICOSA amicus committee.

The ISBA and ICOSA are concerned about the impact of this case on all Indiana public schools. As authorized by statute, IND. CODE §§ 20-26-18.2 *et. seq*, many of them employ school resource officers to assist in carrying out their educational mission. This necessarily includes maintaining order and discipline essential for a safe learning environment. The ISBA strongly believes that the Court of Appeals decision here will impair the fulfillment of that obligation.

II. SUMMARY OF ARGUMENT

A divided[1], published opinion of the Court of Appeals[2] reversed appellant D.Z.'s juvenile delinquency adjudication. The basis for reversal was that his admission to the high school assistant principal that he had engaged in school misconduct was made without receiving a *Miranda*[3] warning. ISBA submits that a warning was not required to be given and the adjudication should be reinstated.

It was undisputed that the assistant principal initiated and controlled an investigation of a serious school discipline matter (*i.e.*, sexually explicit graffiti on bathroom walls targeting identified female students) that occurred entirely during school hours and on school premises. It resulted in an exclusively school-penalty of a five-day suspension. But the majority reversed the adjudication by treating the assistant principal's private conversation with D.Z. as a "custodial interrogation by law enforcement" – thereby requiring the reading of *Miranda* rights – solely because a school resource officer ("SRO") had an incidental role in the school's investigation prior to the assistant principal's conversation with the student.

The State's petition for transfer should be granted for at least three independent reasons.

First, the majority decision is wrong as a matter of law. The undisputed facts confirm there was no custodial interrogation, which is a prerequisite to *Miranda* rights and obligations. The school's investigation and the assistant principal's one-on-one meeting with this seventeen-year-old student were not inherently coercive. The assistant principal and SRO acted consistent with their responsibilities for school safety and

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[1] The ISBA believes that Judge Brown's dissent is a proper application of the law to the undisputed facts in this case.

[2] D.Z. v. State, ___ N.E.3d ___, Cause No. 32A05-1708-JV-1907, slip opinion (Ind. Ct.App. February 22, 2018)

[3] Miranda v. Arizona, 384 U.S. 436 (1966)

security. No independent law enforcement investigation was undertaken. At all times, the assistant principal was gathering facts regarding a serious violation of school policy, determining who was responsible, and imposing appropriate school discipline. Equally misplaced is the suggestion that the assistant principal was acting as the SRO's "agent" for law enforcement purposes and to circumvent *Miranda* rights. The hearing judge did not so find, nor could she on this record.

Second, apart from its legal shortcomings, the decision is a fundamental and unprecedented shift in policy that directly interferes with the school's obligation under IND. CODE § 20-33-8-4(2) "to maintain an orderly and effective educational system." Under the decision, school administrators must now give *Miranda* warnings whenever they talk with students about conduct that violates school rules if that conduct may also constitute a criminal law violation.[4] It requires lay school officials to not only learn the state's criminal code, but to apply it across a broad spectrum of school rules. But more fundamentally, it impairs schools' ability to maintain discipline and foster a safe and orderly learning environment.

Third, as a practical matter, the Court of Appeals' directive is unworkable. It requires school administrators to undergo legal training and then make an on-the-spot,

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[4] The majority adopted an absolute rule, with no qualifiers or exceptions, that the mere daily presence of SROs (or other law enforcement personnel working as school public safety officers) transforms the nature of all school disciplinary investigations or questioning of students by school officials, stating:

> Police officers are not divested of their law enforcement authority when they enter schools; schools employ them precisely because they wield this authority....As such, the presence of law enforcement in schools on a daily basis serves notice that crimes will be charged for conduct the officer believes violates the law....This is not inappropriate, but it does change the nature of the questioning of a child for school discipline purposes to an improper police interrogation absent constitutional safeguards.... Slip op., 11 (citations omitted)

> fact-sensitive analysis of the course of the investigation to date and the roles all staff members may have played in it. It converts all school investigations of matters that potentially implicate the state criminal code into a criminal investigation by law enforcement. Yet it provides no guidance as to what specific actions or involvement by an SRO is needed for that. It also fails to recognize that the *Miranda* warnings themselves are materially different from the rights students actually enjoy in the school discipline setting.

For public schools and their administrators, the implications are ominous. The majority's holding is an unprecedented change in the law. It may subject schools and their officials to civil liability for missteps, even unintentional ones. And it is a step backward in the effort to provide a safer environment in our nation's schools.

III. ARGUMENT

The material facts are not in dispute and the relevant case law is set forth in the parties' appellate briefs. Those cases won't be rehashed here. As pointed out by the State, absent the active and meaningful involvement of law enforcement in the student's questioning or a surrogacy situation (which is not present here), school officials have not been required in Indiana or elsewhere to provide *Miranda* warnings in investigating student misconduct that occurs in the schoolhouse.

Simply stated, the majority erred in concluding the assistant principal's interview was a "custodial interrogation by law enforcement." D.Z. himself acknowledges that *Miranda* warnings and the juvenile waiver statute [IND. CODE § 31-32-5-1] "apply only when the juvenile is in custody and subject to interrogation." Appellant's Brief, p. 13. As Indiana and other courts

have interpreted that term, when D.Z. met with the assistant principal to discuss the bathroom graffiti he was not in custody and was not being interrogated by a law enforcement officer.

Here, the assistant principal's interview of D.Z. was part of a school disciplinary investigation conducted without the SRO's presence, participation, direction or authority.[5] And the sanction imposed was decidedly school discipline – a five-day suspension. Only after the principal's interview did the SRO independently question the student, which led to further admissions and eventually the initiation of juvenile charges by the local prosecuting attorney.

The trier of fact accepted as truthful the assistant principal's testimony that he met with the student alone because he had a good relationship with him. Under the applicable standard of review, the appellate courts should do so as well. *B.K.C. v. State*, 781 N.E.2d 1157, 1163 (Ind. Ct.App. 2003), *trans. denied* (in reviewing a delinquency adjudication, "we consider only the evidence most favorable to the judgment and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment.") The dissent correctly points out that no basis exists in the record for the majority's suggestion that the principal was acting as the agent of law enforcement or that his meeting with the student was part of a purposeful plan or scheme to circumvent D.Z.'s civil rights. Slip Op., p. 14-15.

As authorized by statute, IND. CODE §§ 20-26-18.2-1 *et seq.*, and demanded by the public, many Indiana school districts now employ SROs. They do so in order to better provide a more safe and orderly environment. But according to the majority, the mere "presence of law enforcement in schools on a daily basis . . . does change the nature of questioning a child for

[5] It is undisputed that the SRO's role was simply to review video recordings to help narrow those to be scrutinized to identify the graffiti's author.

school disciplinary purposes to an improper police interrogation absent constitutional safeguards." Slip Op., p. 11. As a result, the assistant principal's *mere request* of the SRO to assist in investigating the vandalism rendered the school and law enforcement "inextricably intertwined." Slip Op., p. 14. These pronouncements by the majority are remarkable. Under this decision, just an SRO's presence in the building and being asked to assist in investigating possible misconduct makes it a criminal matter *per se* with all the attendant rights and procedural requirements. ISBA has found no other court that has gone that far, and the facts do not justify it here.

Admittedly, times are changing and school safety is frequent headline news. *See, e.g.,* INDIANA LAWYER, "*School threats pose new risk: overreactions*", p. 1, March 21-April 3, 2018. But will this overhaul of the traditional rules of custodial interrogation by law enforcement make our schools safer? In ISBA's view, the answer is No. It will further complicate the job of school administrators and will needlessly hamstring them in meeting the already difficult task of maintaining order and discipline.

School officials are expected to anticipate violent behavior and cooperate with law enforcement, mental health professionals and others to identify and thwart those who threaten school safety. When a tragedy occurs, their decisions are second-guessed, and they are often sued for not having done enough. *D.Z.* presents a new risk of liability – violating a student's civil rights in the administration of school discipline for misconduct that could also lead to criminal charges. *Monell v. Dep't. of Social Services*, 436 U.S. 658, 690 (1978)(declaring local school officials to be "persons" for purposes of § 1983 liability for violations of another's civil rights). A school official's violation of a juvenile's Fifth Amendment rights is surely actionable, and that will undoubtedly affect the official's behavior. That coupled with uncertain standards

and cumbersome roadblocks to investigations will only make it more difficult to administer school discipline.

It is clear that school officials' personal immunity from tort liability under Indiana's governmental tort claims act, IND. CODE §§ 34-13-3-5, does not apply to civil rights claims. While some school districts may purchase insurance coverage for this potential liability, many do not. Coverage for these claims is typically excluded under the school's comprehensive general liability policy. While special coverage is available in the market, it is expensive and usually comes with a high deductible or self-insured retention. Further, aside from the cost of insurance, the administrative burden of dealing with these claims is real.

Given the presence of SROs in the school arena, how are lay school administrators to walk this tightrope and apply the expanded meaning of "custodial interrogation by law enforcement"? Must all meetings with a student suspected of misconduct now be treated as a custodial interrogation? Which type – civil or criminal? If the matter concerns missing money, cell phone or clothing, should it be treated as merely misplaced or a possible theft, thereby triggering *Miranda* warnings? If the matter concerns student insults or bullying, should it be treated as garden-variety student immaturity or as a true criminal threat? (See further discussion hereafter at pp. 12-13)

In the context of immediate threats, it may have to be done on-the-spot in real time. Since this topic is not covered in education schools or standard in-service programs, special training will be required of administrators and SROs. The cost in direct expense and staff time will detract from other educational needs.

Giving *Miranda* warnings to every student questioned cannot be the answer; contacting parents prior to all juvenile conversations is unworkable. Aside from the inherent inefficiency, it also engenders an adversarial relationship between students, families and administrators which itself is inconsistent with the historical mission of the schools. By statute in Indiana, "in all matters relating to discipline and conduct of students, school corporation personnel stand in the relation of parents to students." IND. CODE § 20-33-8-8; *Penn-Harris-Madison Sch. Corp. v. Joy*, 768 N.E.2d 940, 947 (Ind. Ct.App. 2002) In *Linke v. Northwestern Sch. Corp.*, 763 N.E.2d 972, 977 (Ind. 2002), this Court favorably restated the Supreme Court of the United States own description of the school relationship as follows:

> Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their students.

763 N.E.2d at 978, citing *New Jersey v. T.L.O.*, 469 U.S. 325, 349-50 (1985).

Making no inquiries in response to a school threat is not reasonable. Leaving to law enforcement all interviews and disciplinary interactions with students is not feasible. With time often of the essence, how do school officials even determine what role its SROs may have played in the matter? Some larger districts have multiple SROs with overlapping territories and responsibilities. How is the information that each SRO may possess to be tracked by the administrator?

This Court has noted that *Miranda* warnings are "required in order to overcome the inherently coercive and police-dominated atmosphere inherent to a custodial interrogation" . . . but "the essential ingredients of a 'police-dominated atmosphere' are not present when an

incarcerated person speaks freely to someone he believes is not an officer." *Richie v. State*, 875 N.E.2d 706, 717 (Ind. 2007). Hence, statements made to lay persons, the media or others not acting as agents of law enforcement are not subject to *Miranda* principles. *Id.* And if the juvenile is not in custody, the procedural safeguards and warnings do not typically attach to conversations with law enforcement. *S.A. v. State*, 654 N.E.2d 791, 797 (Ind. Ct.App. 1995), *trans. denied.* These principles have historically been applied in the schoolhouse setting, and that should continue.

A further indication of the unworkability of the majority's directive is that three experienced appellate judges with the benefit of law clerks, written briefs and time for thoughtful deliberation could not agree whether D.Z's rights were violated. Even with extensive training, lay school officials cannot reasonably be expected to do so either.

The majority decision also takes the schools into unchartered territory by failing to recognize that *Miranda* warnings in criminal interrogations (*i.e.*, the right to remain silent, the right to counsel during questioning, etc.) are themselves inconsistent with the rights of students in the school setting. In the context of school misconduct and discipline, students do not have a right to the presence of counsel during a disciplinary meeting. IND. CODE § 20-33-8-19; *Lake Central Sch. Corp., v. Scartozzi*, 759 N.E.2d 1185 (Ind. Ct.App. 2001). And outside the criminal arena, one's silence in the face of questions or accusations may normally be taken into consideration by a supervisor or superior in determining misconduct or imposing discipline. *See, e.g., Baxter v. Palmiganio*, 425 U.S. 308, 318 (1976) (prison discipline); *LaSalle Bank Lake View v. Seguban,* 54 F.3d 387, 389-90 (7th Cir. 1995)("The rule that adverse inferences may be drawn from *Fifth Amendment* silence in civil proceedings has been widely recognized by the circuit courts of appeal, including our own.") A student who owns up to wrongdoing and

expresses remorse may appropriately receive a lesser punishment than one who refuses to acknowledge wrongdoing or even talk with school officials.

Because standard *Miranda* warnings do not accurately reflect a student's rights in all school discipline circumstances, a second or modified set of warnings would need to be available. The resulting confusion over which warnings should be given would unduly impair the efficient administration of discipline.

IV. CONCLUSION

The State's transfer petition should be granted, thereby vacating the Opinion of the Court of Appeals, and the juvenile court's delinquency adjudication affirmed.

Respectfully submitted,

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V. WORD COUNT CERTIFICATE

As required by IND. APP. RULE 44(F), the undersigned certifies that this brief does not contain more than 4,200 words.

/s/ Kent M. Frandsen
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VI. CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Brief of *Amicus Curiae* Indiana School Boards Association in Support of Appellee's Petition to Transfer has been served on the following via the Court's eFiling system and deposit in U.S. Mail, postage prepaid, this 26th day of March, 2018:

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