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Deshaney and Its Progeny - The Failure to Mandate That Public School Officials Protect Our Tender - Chalk Talk

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Deshaney and Its Progeny—The Failure to Mandate that Public School Officials Protect Our Tender Youth

I. Introduction

Millions of parents send their children to school each day without thinking of the possible consequences of their actions. Most know where their children are going and generally what time they will return home. Unfortunately, a majority of parents have no idea what occurs within many of the school systems throughout this country. Arguably, the level of danger facing our "tender youth" has risen as society has become more violent. There are a tremendous number of elements which inflict disastrous harm on our children. Teachers try to prevent the possession of weapons and drugs, gang membership and activities, sexual promiscuity, harassment, assault, and other behavior and its consequences. Unfortunately, school personnel can also be the source of mental and physical injuries incurred by various students. Efforts by some schools to install video devices, metal detectors, and security personnel are commendable. For the schools that lack sufficient funds to provide such protection, what is the proper level of supervision under federal law? To resolve this issue, one must first address a question which is the subject of considerable debate among judges, scholars, and parents: who is responsible for ensuring the safety of children within the school setting?

A majority of federal courts have dismissed lawsuits involving children injured at school and have held that the United States Constitution does not mandate that affirmative steps be taken to protect a child. This article will deal with both the legal and practical issues involved with such a decision, and the increased dangers that face our children as a result. Based upon the reasoning of several United States Supreme Court cases and as a matter of sound public policy, public school officials have an affirmative constitutional duty to protect children in certain circumstances.

Discussion

In many states, schools and their officials enjoy immunity from tort liability.[1] Thus, to receive proper compensation, students injured at school must seek alternative methods of recovery outside of their state law remedies. An injured plaintiff without alternatives to state tort law may be unable to receive proper compensation. Furthermore, school officials have no incentive to institute necessary changes when they are granted immunity, because they are not subjected to lawsuits. However, federal law may provide such an alternative by allowing students access to the federal court system to seek compensation for their injuries. This cause of action originates from violations of rights secured by the Constitution or federal laws of the United States, when committed by any person acting under color of state law (hereinafter a "state actor").[2]

However, federal courts have been very hesitant to impose constitutional liability when students are injured in the school setting. School personnel must be the direct cause of the child's harm before courts will impose liability under 42 U.S.C. section 1983 (hereinafter "section 1983"). Mere inaction or nonfeasance by a state actor does not invoke constitutional liability. Thus, if another child or someone other than a school employee injures a student, school officials incur no liability. The policy underlying the courts' refusal to impose liability may be somewhat similar to a state's grant of tort immunity. States have only a limited set of funds for all the necessary municipal functions, and "frivolous suits" will reduce the quality of service and life among their citizens. However, this argument is unpersuasive and should not prevent recovery by injured school children, in light of the proliferation of insurance and a reasonable level of conduct by school officials.

This article will not argue for the emergence of a constitutional negligence standard by which to judge school officials. To some extent, tortious conduct should be governed by state tort law, rather than be subjected to repetitive, constitutional scrutiny. State citizens have the power to effectively change laws deemed inadequate, through lobbying and subsequent legislative actions. However, justifications do exist, under the Fourteenth Amendment and case law interpreting it, to impose a constitutional duty on school officials. The Due Process Clause of the Fourteenth Amendment declares that no State shall

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1. Sovereign Immunity, the origin of most state provided immunities, has its roots in the old English expression, "the King can do no wrong." Tort immunity is still commonly extended to many state employees and entities. Normally, this will include protection for state employees such as teachers, administrators, school board members, and the school districts themselves.

2. 42 U.S.C. 1983 (1988).

deprive a person of life, liberty, or property without due process of law. The United States Supreme Court has stated that this clause does not create positive duties to act, but only proscribes state actions. In *Maher v. Roe*,[3] the Court interpreted due process to mean that states have no duty to provide their citizens with public services or protection, including police, fire and hospital service. Subsequent decisions interpret this case to hold that school personnel need not take action or preventive measures in any given situation on behalf of a child who is faced with potential injury within the school setting.

In *DeShaney v. Winnebago County Department of Social Services*,[4] the Supreme Court addressed the issue of whether a state has a constitutional duty to protect children of known abuse. The state's social services agency received numerous reports of child abuse inflicted by the father, but refused to remove the child from his custody. The father later beat the child to death. The Court held that nothing in the Due Process Clause required the state to protect the life, liberty, or property of its citizens against invasion by private actors, and that no duty to protect this child existed because the child was not in state custody. Furthermore, the majority opinion cautioned that the Due Process Clause does not transform every tort committed by a state actor into a constitutional violation. Obviously, courts are sensitive to policy considerations and the effects a decision will have. The "slippery slope" doctrine is commonly used to describe this resistance to finding positive state duties. Once courts recognize and impose affirmative duties on the states, such as the responsibility to provide basic safety services, the first step toward a more burdened government occurs.

However, the Supreme Court fashioned an exception to this rule by stating that a duty of protection may arise when the state imposes limitations on an individual's ability to act on his or her behalf. "It is the state's affirmative act . . . through incarceration, institutionalization, or other similar restraint of personal liberty . . . triggering the protections of the Due Process Clause."[5] This wording is strong evidence that other state actions will justify imposing a duty of protection. The relationship between public schools and students is a perfect example of a state's affirmative act and restraint of personal liberty. The Court held that when a state takes and holds a person into its custody, there is a corresponding duty to assume some responsibility for his or her safety

3. 432 U.S. 464 (1977).
4. 489 U.S. 189 (1989).
5. *Id* at 200.

and general well-being.[6] Cited as examples were *Youngberg v. Romeo*,[7] and *Estelle v. Gamble*,[8] which mandate that states protect prisoners and involuntarily committed mental patients by providing for their reasonable care and needs. Additionally, many of the circuit courts of appeal extend this duty of protection to children involuntarily placed in a foster home.[9]

The Supreme Court has never directly addressed the issue of whether public school officials have a constitutional duty to protect students. Without such a duty, school personnel are free to allow a student to suffer any imaginable harm, as long as they are not "active participants" in the harm. It is against sound public policy to hold that school officials have no responsibility to look after their students. Parents expect reasonable levels of responsible conduct from those entrusted to educate and care for their children. Courts have long recognized this important relationship between children and their school, which is often described as *in loco parentis*.[10] As a practical matter, parents are incapable of monitoring their children's educational environment and cannot ensure that they receive adequate care. To insist that a parent should stay at school to maintain his or her child's safety and well-being is preposterous. Regardless of whether we examine the child at school or within the custody of the parent, society should mandate that the child's best interests be protected. After all, a parent who leaves his young child alone in public could be charged with abandonment, neglect, or some other type of crime. Countless laws express this underlying need to promote the health, safety, and welfare of our tender youth. The following doctrines, justifying constitutional liability for school officials, will also further these important interests.

State-Created Danger Analysis

In *DeShaney*, the Court's majority clearly held that the state did not have an affirmative duty to protect a child beaten to death by his father. However, applying constitutional liability to school officials for student injuries may be justified under the Court's analysis. The Court held that "[w]hile the State may

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6. *Id* at 199-200.

7. 457 U.S. 307 (1982).

8. 429 U.S. 97 (1976).

9. *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); *Yvonne v. New Mexico Dept. of Human Services*, 959 F.2d 883, 893 (10th Cir. 1992); *Griffith v Johnson*, 899 F.2d 1427, 1439 (5th Cir. 1990).

10. *In loco parentis*, a Latin phrase meaning "in the place of the parent", describes the authority vested in school personnel to assume the role of parent with respect to students who are attending school. *Black's Law Dictionary*, 787 (6th ed. 1990). In the eyes of a court, teachers literally stand in the place of the parents in order to maintain a proper educational environment and administer discipline.

have been aware of the dangers that Joshua faced in the real world, it played no part in their creation, nor did it do anything to render him more vulnerable to them."[11] Many post-*Deshaney* courts have interpreted this statement as creating a duty of protection when a state actor has created or increased a person's vulnerability to a given danger.

Two cases exemplify the state-created danger analysis and its proposed applicability to school children. In *Wood v. Ostrander*,[12] a state-created danger was found when a police officer arrested a drunk driver and left the female passenger of the vehicle alone in a dangerous area of town. She was later raped by a stranger who had offered her a ride home. Another case held that a state could be liable for injuries to a plaintiff who was abducted and held hostage by a prisoner.[13] The prisoner, who was known to have a violent history, participated in a work release program supervised by an untrained city employee. These state actions, which ultimately played an important role in the plaintiff's harm, justified imposing a duty of protection, under federal law, on the respective state actors.

The underlying policy behind the state-created danger theory is evident. When a state actor has taken some affirmative action to increase a person's risk of harm, there are compelling reasons for the imposition of liability. When a child enters a school's premises without a parental figure, school personnel have the sole responsibility, and are in the better position, to ensure the child's safety. If school officials create, or have knowledge of, a dangerous environment, constitutional liability is justified when no attempt is made to rectify the situation. Therefore, section 1983 liability is justified when this type of "state action" occurs.

One could argue that the failure to act on behalf of a child, even with knowledge of a dangerous situation, is mere nonfeasance and not state action. Throughout common law, a person had no duty to render aid to another unless the former had created the harm or had been instrumental in increasing the likelihood of the latter's incurring some injury. For example, if a teacher saw a student drowning in the school's swimming pool but did not encourage or require the act of swimming, the teacher's failure to act on behalf of the endangered child would merely be nonfeasance. However, school officials cannot tolerate such inaction in light of their relationship to public school

11. 489 U.S. at 201.

12. 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990).

13. Cornelius v. Town of Highland Lake, 880 F.2d 3488 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990).

children. The difference between malfeasance (a wrongful act) and nonfeasance (a failure to act) can be a very difficult distinction to make. The Seventh Circuit clearly articulated the difficulty in making such distinctions: "We do not pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm is clearer than it is. If the state puts a person in a position of danger from a private person and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much of an active tortfeasor as if it had thrown him into the snakepit." [14]

The most comprehensive analysis of the state-created danger theory is found in *Doe v. Taylor Independent School District*, [15] in which a complete panel of the Fifth Circuit Court of Appeals analyzed this issue. The facts clearly indicated that a sexual relationship between a high school teacher and a freshman student endured for over a year. Many people, including the parents and friends of the molested child, made repeated efforts to inform school officials of possible wrongdoing by the teacher. The student eventually admitted having a sexual relationship with the teacher, after her mother found several love notes from the teacher to the student.

Subsequently, a section 1983 lawsuit was filed on the student's behalf claiming that school officials had deprived her of a constitutional right. The court held that sexual abuse deprived the student of a liberty interest recognized under the Due Process Clause of the Fourteenth Amendment and allowed the suit against the teacher. Furthermore, because the school supervisors of this teacher failed to take steps to remedy or prevent further abuse, they could be sued under section 1983 for failing to act on behalf of the injured child. The teacher's act of sexual abuse and the school officials' failure to prevent the wrongdoing were equally blameworthy, and thus each should incur potential section 1983 liability.

The application of constitutional liability under the state-created danger theory is also applicable when a third party, other than a school official, causes injury to a student. A typical example includes injuries which occur within the school setting and are inflicted by other students or complete strangers. The theory of nonfeasance would mandate that school officials not incur section 1983 liability because no specific "state action" exists, such as when one student is shot by another or is abducted by a stranger. In the case of the shooting, if the teacher knew that a child currently possessed a gun, had threatened his intended victim, would not common notions of decency mandate that the teacher take

14. Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982).
15. 15 F.3d 443 (5th Cir.), *cert. denied*, 115 S.Ct. 70 (1994).

affirmative steps to prevent the crime? Because children often act irresponsibly, a supervisory school official must report a potentially dangerous situation to the principal or the police, who can take necessary action to prevent injury to the child. Even if the teacher ultimately fails to stop the assault or prevent harm to the student, a proper level of supervision would prevent the imposition of liability.

Many situations, too varied to detail in this analysis, should impose section 1983 liability on school officials when there has been a failure to protect a student. A court should balance the following factors in determining whether a duty of protection is appropriately applied to a school official:

(1) Has the school employee created or caused the plaintiff's peril?
(2) Has the school employee increase the child's risk of harm or acted to render her more vulnerable to such harm?
(3) Did the school personnel place the student in the dangerous environment?
(4) Is a dangerous environment or situation allowed to continue without any attempted correction by school personnel?
(5) Was the conduct a random act of criminality, or was it so foreseeable that a response was justified?
(6) Did school officials create an opportunity for harm, which would not have otherwise existed absent their conduct?

These questions allow a court to analyze the types of behavior by school personnel which breach the level of protection or supervision owed to students, as required by federal law.

Unfortunately, courts are still hesitant to impose constitutional liability on a school official when student injuries are inflicted by a third party. Consider *Johnson v. Dallas Independent School District,*[16] which involved a suit by a student who had been shot by a nonstudent during a dance after normal school hours. The Dallas police department warned school officials not to have the dance, since there had been numerous shootings at these events. However, school officials failed to check mandatory identification badges which students were required to carry and did not require those present to pass through the school's metal detector. In the resulting lawsuit, the court refused to apply the state-created danger analysis because the officials lacked actual knowledge that the plaintiff was in danger.

16. 38 F.3d 198 (5th Cir. 1994), *cert. denied,* 115 S.Ct. 1361 (1995).

Another case exemplifying the frequent opposition to holding school personnel liable under federal law can be found in *Graham v. Independent School District No. I-89.* [17] While seeming to recognize the state-created danger theory, this court rejected the allegation that school personnel created or increased the level of danger for the plaintiff. The student-victim in this case was shot to death by another student, during an on-campus, after-school dance. The plaintiff alleged that school employees received numerous warnings that the student-perpetrator, who had threatened violence against the victim, was on school grounds with a gun. Even though school personnel failed to react to these warnings, the court refused to mandate an affirmative, constitutional duty to take action. The court reasoned that school officials did not create the hazardous situation by placing these students in the same location. Knowledge by any of the school officials of any potential danger was too remote a consequence in which to hold the school officials liable. [18] Such a decision ultimately fails to require an appropriate level of protection by school officials when student safety and well-being are in jeopardy.

Special Relationship Doctrine

Another compelling argument arising out of *DeShaney* relies on the existence of custody, or a "special relationship," between school officials and pupils. Many cases filed in federal court on behalf of injured school children allege that the children are in the custody and control of the school's personnel during normal school hours. These cases argue that the special relationship between children and school personnel imposes on the schools a corresponding duty to protect students from known or reasonably foreseeable dangers which occur within the school setting. The Supreme Court has never expressly stated the relevant factors to determine whether this custodial relationship exists between a state and its citizens. However, mandatory attendance laws are a persuasive justification for acknowledging that a special relationship exists between students and their schools, justifying a corresponding duty of protection. These laws, although taking many different descriptions and forms, are enacted to some degree in most states. Generally speaking, mandatory attendance laws require the child's presence in a public school, unless the child is enrolled in a private school, until the age of about sixteen. Many states grant the authority to impose criminal sanctions, fines, penalties, or other corrective remedies

17. 22 F.3d 991 (10th Cir. 1994).
18. *Id.* at 995.

when the parents or child fail to comply with minimum attendance requirements. The vast majority of parents do not send their children to private school, and therefore, must comply with these laws.

It should be apparent that such an exercise of control over schoolchildren and their families constitutes a "custodial relationship" between the state and its students. Courts often define legal custody as the confinement of an individual under legal authority. When the state mandates that children attend public schools or face legal repercussions, it is clear that the state has exercised its authority over these people's lives. Furthermore, when a state requires attendance at school and then either increases a child's dependence on state actors or subjects the child to additional risks, courts should mandate a certain duty of protection. It is important to consider the level of control, dependency, and vulnerability that exists with most students. Many children are unable to provide for all their needs, particularly when decisionmaking is involved. School personnel are in a better position to filter a child's important choices, which could lead to dangerous or injurious consequences. As a practical matter, many school rules are enacted to protect children. For example, children can be picked up after school only by their parents, children who ride the bus must be dropped off close to their homes, and students are not allowed to wander beyond school property during lunch or recess periods. An authoritative figure, whether a school official or a parent, must provide for a child's basic needs and safety. During school hours, school personnel are the appropriate source of such protection.

Several of the circuits make the counter-argument that a state does not assume responsibility for a child's entire personal life by mandating school attendance. Attendance is only mandatory during a fraction of the child's day, which indicates that the child's parents have the ultimate duty to provide the necessary food, clothing, and shelter. The school/student relationship lacks the continuous or physical restrictiveness evident in the settings of prisons and mental institutions as described in the *Estelle/Youngberg* analysis. Children are free to leave the school setting every day and return home. Since children reside in their parents' homes, parents have the duty to provide for their primary care. A few opinions reason that children simply do not look to the state to provide for their needs. Thus, courts often draw the conclusion that mandated public school attendance does not place the school child in the custody of the state.[19]

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19. D.R. by L.R. v. Middle Bucks Area Voc. Tech. Sch., 972 F.2d 1364 (3rd Cir. 1992) (en banc), *cert. denied*, 113 S.Ct. 1045 (1993).

This argument fails to consider that custodial relationships co-exist between the state and a child's parents in certain circumstances. A school cannot diminish its role in a child's life because the child returns home to a primary caretaker at the end of a school day. Schools invoke a separate and distinct relationship with students because of these mandatory attendance laws. When the state removes a child from the home, even when the child's best interests lie in the action, the child is still undeniably separated from her primary caretaker. Common sense dictates that only school personnel can ensure the reasonable safety and needs of a child while the child is at school. Children depend on these educated and trained people when they are at their most vulnerable—at school. It is illogical for school personnel to deny that some duty of supervision and protection is necessary for children's safety. Regardless of whether these dangers arise from school personnel or third parties, compulsory attendance laws do establish state custody, and any failure to provide the necessary level of supervision or protection amounts to a constitutional violation of section 1983. Thus, the alliance between schoolchildren and public school personnel, in states which have compulsory attendance laws, establishes a special relationship. Unfortunately, many circuit courts of appeal refuse to find these arguments persuasive.[20]

Conclusion

States have a special relationship with public school students because compulsory attendance laws create a form of state custody. Furthermore, when school officials promote a state-created danger or fail to protect students from reasonably preventable harms, a violation of the Fourteenth Amendment occurs. Students have a right to be free from avoidable injuries while attending school. This is unequivocally a protection which can be traced to a student's right of due process to life and their liberty interest in bodily integrity. Public policy and rational thought demand that state school employees adhere to this constitutional duty of protection, which includes protection from actions by state actors, as well as third parties. These doctrines must be adopted because schools are no longer the safe havens they once were. The health, safety, and welfare of our children is at stake.

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20. J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir. 1990); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993); Graham v. Independent School District No. I-89, 22 F.3d. 991 (10th Cir. 1994).