

Parent Issues Revisited

In our turbulent society, elementary principals often worry about potential liability in honoring parental rights while focusing on the educational progress of children. As the accompanying case reveals, the law continues to develop rapidly in this broad and murky area. Illustrating the fast-paced changes in the law, the case revisits the one featured in the March/April 2011 “It’s the Law” column. The case appeared to open the door to constitutional liability of school districts and, eventually, their leaders for releasing students to unauthorized adults who subjected them to sexual or other violence.

The Case

In 2007-2008, the parent of Jane Doe, a fourth grader in Covington County, Mississippi, filled out a “Permission to Check-Out Form” on which he listed the individuals who had exclusive consent to retrieve Jane from school during the school day. On six separate occasions between mid-September and early January, each a few weeks apart, school employees released Jane to Tommy Keyes, who was not listed on the check-out form and without verifying his identification. On these occasions, Keyes took Jane from school without the knowledge or consent of her parent, raped and sodomized her, and subsequently returned her to school. In the first five instances, Keyes signed out Jane as her father. On the final occasion, he signed her out as her mother. Under district policy and practice, school officials had the discretion whether to verify the authorization and identification of adults checking students out of school.

Upon learning of the sexual molestation, Jane’s parent filed suit in federal court, claiming that the principal, other administrators, and the school district were liable under various federal and state causes of action, primarily 14th Amendment substantive due process. Upon the defendants’ motion, the federal district court dismissed the parent’s federal civil rights claim and declined supplemental jurisdiction over the state claims. More specifically, the court concluded that Jane had no constitutional right to be protected from harm inflicted by a private third party because her



situation did not fit under either of the two narrow exceptions for such harm under 14th Amendment substantive due process—“special relationship” or “state-created danger.”

On appeal, the three-judge panel of the 5th Circuit voted two-to-one to reverse the lower court decision based on the special relationship exception. However, the majority also concluded that, because the case law had not been clearly settled in this regard, qualified immunity covered the principal and other defendants in their individual capacities. This decision would have resulted in the case against the district proceeding to trial on whether its officials had been deliberately indifferent to known threats to Jane’s safety. However, the district filed a motion for reconsideration “en banc,” that is to say, by all

18 5th Circuit judges. On September 26, 2011, the court agreed to en banc reconsideration, and on March 23, 2012, the full court rendered its full, final opinion.

What do you think was the 5th Circuit’s final decision in this case?

The overwhelming majority—15 of the 18 judges, with an additional judge agreeing with the result via a concurring opinion—affirmed the original dismissal of the parent’s federal civil rights claim. The majority opinion cited the Supreme Court precedent, *DeShaney v. Winnebago County Department of Social Services* (1989), which held that governmental entities are—with narrow exception—not liable under the 14th Amendment due process clause for injuries at the hands of private parties.

The special relationship exception, according to the *DeShaney* court, applies only where the government restrains the liberty of individuals unable to care for themselves and fails to provide for their basic human needs such as food and shelter. The 5th Circuit adhered to its position in previous rulings that public schools, even for students placed in residential special education settings, do not meet the requisite level of custody in comparison to prisoners, involuntarily committed mental health patients, and foster children. The court refused to extend the exception based on the elementary school context, reasoning that parents remain the primary providers of food, shelter, and other basic human needs. Similarly, the 5th Circuit refused to find distinction in the school’s act of releasing Jane due to the lack of knowing conduct.

The other narrow exception, which some lower courts have recognized in interpreting *DeShaney*, is where the government created or knew of and nevertheless placed the victimized individual in a dangerous situation. In this case, the 5th Circuit declined to adopt this theory because school officials lacked knowledge that Keyes posed an immediate danger to Jane.

In the absence of the underlying constitutional violation, in terms of a 14th Amendment duty to protect, the court did not rule on related issues, such as whether the district's action constituted deliberate indifference or was conscience shocking.

Is this decision representative of the prevailing view in other circuits?

Yes. For the first potential exception, as the 5th Circuit observed, "each circuit to have addressed the issue has concluded that public schools do not have a special relationship with their students, as public schools do not place the same restraints on students' liberty as do prisons and state mental health institutions." For the second exception, a few circuits have recognized the state-created danger theory in the public school context, but only in situations of requisite knowledge of an immediate danger.

Would the parent's alternative claim for liability under state law—negligence—likely be successful?

Not necessarily. The first hurdle is governmental immunity for public school defendants, which is written into law in many jurisdictions. In Mississippi, for example, public school employees are generally immune from negligence liability, and school districts are similarly immune if the conduct at issue is ministerial. The scope of the ministerial exception is rather broad but far from unlimited in Mississippi.

The second major hurdle is preponderantly proving the essential elements of negligence—legal duty, breach of that duty, causation, and injury. For example, in *Chalen v. Glen Cove School District* (2006), a New York appellate court ruled that the school district and its administrators were not liable for negligence based on either inadequate supervision or inadequate security in the case of a middle school student who left school without signing out and committed suicide with a man who lived with her and her family. Based on state law,

the New York court concluded that the district's duty generally did not extend beyond its boundaries and that, "It is well settled that a school's provision of security against physical attack by third parties is a governmental function involving policymaking regarding the nature of the risk presented and no liability arises from the performance of such a function absent a special duty of protection."

Principals can and should continue to do the best in setting and administering policies, procedures, and practices regarding safe and sensible access to students by parents and other adults.

If school officials denied access to Jane's noncustodial parent, would they likely be liable if she sued based on 14th Amendment substantive due process?


No, according to a recent 8th Circuit Court of Appeals decision. In *Schmidt v. Des Moines Public Schools* (2011), this federal appellate court concluded that to whatever extent a parent had a 14th Amendment "liberty" to access her children during the school day, the divorce decree substantially reduced it to non-scheduled visitation consented to by her ex-husband, thus leaving her without any "fundamental liberty interest in contacting her children at their schools." Moreover, the court explained, even if the school officials had not correctly interpreted her divorce decree, "substantive due process is reserved

for truly extraordinary and egregious cases."

If the issue were access to records or if the claim was on other grounds, such as state law or local policy, the outcome might have been different. For a 14th Amendment constitutional claim, other courts would likely reach the same result.

Conclusion

Providing for parental involvement and student safety are paramount professional and ethical concerns for elementary school principals as part of their efforts to provide effective education for students in their charge. However, best practice and legal liability should not be confused with each other. Just because schools do not completely do "the right thing" in every case and tragedy unfortunately on occasion is the result does not mean, as a constitutional matter, that the district and its officials will be liable as the result of litigation. Quite the contrary. Fundamental fairness is the core concept of 14th Amendment substantive due process, meaning the courts accord public school officials wide latitude. The 5th Circuit's *en banc* decision seems to have closed the previously reported decision that could have been the beginning of a widening crack.

Plaintiff-parents face a daunting set of high hurdles of proof to make a successful "federal case" of every misstep. Principals can and should continue to do the best in setting and administering policies, procedures, and practices regarding safe and sensible access to students by parents and other adults. The ethical imperative and lesser forms of legal consequences, such as adverse employment actions and state tort law remedies, provide the principal with the constitution to make a commitment to serve and protect each student. 

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