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THE DUTY TO PROTECT STUDENTS FROM HARM

Overview

This commentary represents the third in a series devoted to the subject of *school security*. This time, however, the discussion focuses on an important concept in school law--- the *duty to protect* students. The *duty to protect* (defend, guard) students moves far beyond the scope of the traditional *duty of care* (concern) owed students, and marks a major shift both in school law and in local school system policy. When this shift takes place the notion of *safety* changes to one of *security*. While protecting children from pornography is most often associated with the concept, recent closings of entire school systems and cancellations of all after school activities because of the "sniper's" direct threats against children serve as examples of an emerging venue where the *duty to protect* springs into action.

The DeShaney Rule

More than a decade has passed since the United States Supreme Court decided DeShaney v Winnebago Department of Social Services (1989), a non-school case involving a four-year-old male child who had been repeatedly beaten by his divorced father. The child's mother had sued in federal court alleging that the agency had a duty to protect her child and failed to intervene when faced with documented proof of the abuse.

In DeShaney, the Supreme Court had to answer the following question: Does a local social services agency have a duty to protect a child where evidence of physical abuse by his father exists, by removing the child from his father's custody? By a vote of 6 to 3, the high court held that a department of social services is under no legal *duty to protect* a child unless a *special relationship* (e.g., a custodial relationship in an institutional setting) exists between the agency and the child.

For more than a decade, the courts have applied the DeShaney "special relationship test" in school cases. As a general rule, the mere existence of state compulsory attendance and child abuse statutes is not enough to establish the existence of a *special relationship* between school officials and students. Absent direct evidence of an established *special relationship* (e.g., field trips, athletic teams, vocational laboratories, physical education activities, chemistry classes, special classes and schools for students with disabilities, incarcerated kids), most judges agreed that school officials are not duty bound *to protect* students from harm.

Foreseeability plus Deliberate Indifference

The traditional rule holds that school officials owe the following basic duties to students: (1) instruction, (2) supervision, (3) and the proper maintenance of grounds, facilities, and equipment. A common thread running through each of these duties is an implied *duty of care.*

In the past, the typical student injury case finding its way into a court of law took the form of a negligent tort, in which the plaintiff claimed that the breach of one or more of these duties was the proximate cause of the injury suffered. The standard applied in such cases was that of the *reasonable and prudent person* (superintendent, principal, teacher, coach, counselor), and the doctrine of *foreseeability* (i.e., reasonable anticipation that harm or injury are likely) provided the key to establishing and assigning liability. To put it another way, where a reasonable and prudent superintendent, principal, teacher, coach, counselor could have or should have *foreseen* something, and did not take appropriate action to prevent, mitigate, or stop the event, liability likely will attach where the failure to act was the *proximate cause* of injury.

The modern view factors *imminent danger* (certain, immediate, and impending danger) into the duty/risk analysis. In doing so, the traditional *duty of care* transforms into a *duty to protect*. While the reasonable and prudent person standard remains the basic tool of analysis, *deliberate indifference* is added to the equation. Thus, where a reasonable and prudent person could have or should have foreseen something either had or was about to occur, and assumed a *deliberately indifferent attitude* concerning the matter, liability will likely attach. To put it another way, where a reasonable and prudent superintendent, principal, teacher, coach, counselor could have or should have foreseen that something had or was about to occur, and did not take appropriate steps to prevent, mitigate, or stop the event, or tried to "sweep it under the rug," and that *deliberate indifference* was the *proximate cause* of future harm to students, liability likely will attach.

Case Law Examples

The *deliberate indifference standard* has come into clear focus over the past decade. Case law involving student peer sexual harassment is an area of law where judges have consistently applied the concept. What follow are some case law examples.

B.M.H. v School Board of Chesapeake (1993) is a Virginia case where a male student sexually assaulted a female student, on school grounds. She had reported threats made to her by the other student three days before the incident. Subsequently she unsuccessfully sued school officials and certain teachers. In the court's opinion, neither Virginia's compulsory attendance nor child abuse statutes create a special relationship or a special duty to protect students from harm.

In Walton v Alexander (1994), a male student had sexually assaulted another male student. The United States Court of Appeals for the Fifth Circuit saw a difference between student injuries that result from the "mere negligence" or "carelessness" of school officials, and those that are the result of "deliberate indifference." *Deliberate indifference*, said the court, is where a school official: (1) knows about or willfully avoids knowing about, the possibility of serious harm to students, (2) fails to take appropriate action, and (3) a student is harmed because of that failure to act. It is important to note that the Fifth Circuit held in another case involving dangerously aggressive students, Doe v Taylor (1994), that simply because a *special relationship* does not exist school officials are not free from liability when dangerous and disruptive acts are committed on school property.

Doe v Oyster River Coop. School District (1997), also established that public school officials could be held liable for student peer sexual harassment if they knew or should have known of the matter, but failed to correct the problem. However, in Doe, a federal district court added that the following conditions must be present: (1) a special relationship or *duty* must exist to *protect students*, and (2) the harassment must be severe and pervasive.

Three years ago, the United States Supreme Court decided Davis v Monroe County Board of Education (1999). In Davis, a male student in a public school classroom sexually assaulted a female fifth-grade student. By a vote of 5 to 4 the Court crafted the following comprehensive standard: school officials may be held liable where (1) the harassment is so severe and pervasive that it limits the student victim's ability to learn, (2) school officials knew of the harassment, (3) school officials demonstrated deliberate indifference to the matter, and (4) reasonable steps were not taken to remedy the situation.

A post-Davis decision from Louisiana illustrates the importance of the "knew or should have known" (i.e., prior knowledge) factor. In Lee v B&B Ventures (2001), a student was shot in the parking lot of a disco club following a fund raising event sponsored by a public middle school. A trial court held that the school district was liable. On appeal the lower court's judgement against the school district was reversed. In the appellate court's opinion, unless the *foreseeability* of harm was high, the school district had no required duty to the student. Since no prior criminal activity was reported at the disco, no required duty existed to make available additional security.

Policy Implications

The case law reported in this commentary validates the recent efforts of school officials to protect students from the potential harm. The threatened harm was clearly articulated in communications between the sniper and the police. The situation contained all the criteria set out in the case law. Briefly summarized these criteria are:

- a student had been shot and wounded in front of a public middle school,
- an actual written threat to the safety of children had been communicated to the police,
- the random and serial nature of the sniper's acts, in more than one jurisdiction, made the incidents both severe and pervasive in nature,
- students' opportunities to learn were interrupted,
- a special relationship existed in all schools (especially those placed in a lock-down mode), and
- an immediate and proactive plan had to be put into effect.

The events of the past two weeks demonstrate a shift from a *duty of care* to a *duty to protect*, coupled with a responsibility to provide needed *security*. Thus, in (a) placing all schools in a high security mode, (b) canceling all outside school activities, (c) locking- down all buildings, and (d) some communities closing the entire school system, officials took reasonable, prudent, and necessary steps to carry out their *duty to protect* students. In other words, school superintendents "did the right thing."

Now that the police have sniper suspects in custody, and schools once again are in full operation, it is appropriate to take time and reflect on the effectiveness of school system policies implemented during this horrific crisis. What follow are some suggested questions to ask as a part of the debriefing activity:

- Were our policies clearly stated? If not, how can the wording be improved?

- Were our policies conducive to immediate and effective cooperation between school administration and police agencies? If not, how can improvements be made?
- Were our policies on school safety and security appropriate and responsive to meet the high stress of such a terrifying set of events as the sniper shootings? If not, what needs too be done to make them more appropriate and responsive?
- Did our policies assist building level administrators, teachers, counselors and other key staff in carrying out their roles and responsibilities? What can be done to improve?
- Did our policies encourage and promote the continuous and sustained involvement of parents? If not, what needs to be done?
- Did our policies in any way prevent open lines of communication at all levels? What did we learn about the appropriateness of our information flow, both within and outside our school system? How can we improve?
- Did our policies help us in our relationships with the media? How can we better work with the media during such high stress situations?
- Were our policies appropriate and responsive to the special needs of our students, from pre-school children to the high school seniors? What do we need to do to improve our information flow and crisis management efforts for students of all maturity levels in every school?

Finally, it behooves school officials to research their state's statutes to see if the law has changed regarding critical events and emergencies. In Virginia, for example, the Code of Virginia, *Section 22.1-279.8*, was amended to add acts of terrorism to those crises and emergency events that must be addressed in school crisis and emergency plans. The Code also requires the inclusion of procedures and means by which parents can contact the school system regarding the location and safety of their children during crises and emergency events.

Resources Cited

B.M.H. v School Board of Chesapeake, 833 F.Supp. 560 (E.D.Va. 1993)

Davis v Monroe County Board of Education, 119 S.Ct. 1661 (1999)

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Doe v Oyster River Coop. School District, 992 F.Supp. 2d 467 (D.N.H. 1997)

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Lee v B&B Ventures, 793 So.2d 215 (La.Ct.App. 2001)

Walton v Alexander, 20 F.3d 1350 (5th Cir. 1994)

Code of Virginia 22.1-279.8 (2002)

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Note: The views expressed in this commentary are those of the author.