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Arkansas Civil Rights Act - School Districts' Liability for Peer Abuse: Arkansas Supreme Court Holds School Districts Have No Duty to Protect Students from Each Other. *Rudd v. Pulaski County Special School District*, 341 Ark. 794, 20 S.W.3d 310 (2000).

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ARKANSAS CIVIL RIGHTS ACT—SCHOOL DISTRICTS' LIABILITY FOR PEER ABUSE: ARKANSAS SUPREME COURT HOLDS SCHOOL DISTRICTS HAVE NO DUTY TO PROTECT STUDENTS FROM EACH OTHER. *Rudd v. Pulaski County Special School District*, 341 Ark. 794, 20 S.W.3d 310 (2000).

I. INTRODUCTION

Before the 1980s,¹ parents sent their children off to school bus stops or dropped them off at schoolyard gates with confidence that their children would return home safe and sound.² Over the past twenty years, however, parents have become increasingly uneasy when they surrender their children over to school officials. Despite school districts' attempts to remedy the problem,³ more and more children fill

1. Schoolyard violence began to gain the media's attention in the 1980s, and, by 1989, the nation had begun to realize that such incidents were increasing instead of diminishing. See Gwen Crownover, *School Shootings Prompt Fears of Trend*, ARK. GAZETTE, Mar. 17, 1989, at 1A, available in 1989 WL 6924919. The director of the Center to Prevent Handgun Violence in Washington, D.C., Dennis Smith, who researched the prevalence of weapons in schools, remarked, "I think it's a trend. . . . I see it going across the country. I'm not trying to be an alarmist, but something is going on out there that's driving more kids to carry guns." *Id.*

2. See Felicia R. Lee, *One School Confronts a Killing*, N.Y. TIMES, Nov. 15, 1989, at 3B, available in LEXIS, News Library, US News File. After a fatal shooting in the hallway of a New York high school, a mother expressed her shock: "We send our kids to school in the morning and think nothing of it. . . . For a mother to come home and find her son has been shot inside school is enough to drive you crazy." *Id.*

3. See Crownover, *supra* note 1, at 1A. In an effort to make schools safer, school officials have implemented various policies. See *id.* After a string of shootings in 1989, some schools prohibited students from bringing backpacks to class. See *id.* School superintendents have even forbidden students to wear coats or jackets in class. See *id.* Tampa, Florida schools, hoping to impress upon children the dangerousness of guns, involved children in a gun safety course, where children witnessed the effects guns had on various objects. See Lloyd Chatfield, *Blasted Melons Show Kids Guns' Power*, ST. PETERSBURG TIMES, July 9, 1989, at 1B, available in 1989 WL 6612711. Children reportedly expressed surprise at the effect the guns had on watermelons. See *id.* A thirteen-year-old girl explained, "I think it was a graphic demonstration. . . . My little brother thought the gun would just put a hole in the watermelon." *Id.* More recently, schools have begun passing "zero tolerance" policies. See Shelby Grad, *Irvine: Student Who Fired Gun in Class Expelled*, L.A. TIMES, Nov. 22, 1993, at B2, available in LEXIS, News Library, US News File. Under these policies, school districts may immediately expel a student for possession of a weapon on school premises. See *id.* These policies, however, have led to a barrage of litigation concerning schools' apparent overzealousness in expelling children. See Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 818 (1992). Perhaps the most infamous example of a school's over enthusiasm in enforcing zero tolerance policies occurred in New Jersey. See Jennifer Harper, "Robbers" Suspended from N.J. School: "Cops" Too, WASH. TIMES, Apr. 7, 2000, at 1A, available in LEXIS, News Library, US News File. There, an elementary school principal suspended four kindergarten boys who were "playing cops and robbers" at school, poisoning their hands

their backpacks and lockers with guns and knives instead of schoolbooks.⁴ Sadly, as playground violence has increased and become commonplace, children in the twenty-first century enter kindergarten never having experienced that comfortable confidence in their own safety.⁵ As children more and more frequently release their frustrations by injuring other schoolchildren, parents search frantically for a way to regain the sense of safety that they once took for granted.

The law has not provided much guidance thus far. Because the United States Supreme Court has yet to resolve this issue, decisions across the country are disparate and the law is unsettled.⁶ Most courts, however, have found that school districts do not stand in a special

in the shapes of guns. *See id.* After one of the boys said to another student, "Boom. I have a bazooka, and I'm going to shoot you," the other student reported the incident to a teacher, who solicited the help of the school's superintendent. *Id.* The superintendent explained that his three-day suspension was justified: "Given the climate of our society, we cannot take any of these statements in a light manner." *Id.* But a Virginia mother criticized the superintendent's decision, saying, "He doesn't understand the consequences." *Id.* Her little boy had been permanently expelled for drawing a picture of a gun. *See id.* Schools have also suspended or expelled children for packing toy guns and other objects, such as butter knives and nail clippers, that school districts felt came within the scope of their zero tolerance policies. *See id.*

4. *See* Crownover, *supra* note 1, at 1A. *See also* Deborah Austern Colson, Note, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, HARV. C.R.-C.L.L. REV., Winter, 1995, at 169; John W. Walters, Note, *The Constitutional Duty of Teachers to Protect Students: Employing the "Sufficient Custody" Test*, 83 KY. L.J. 229, 229 (1994). During the first semester of the 1988-1989 school year, Little Rock school officials confiscated 11 guns from students. *See* Crownover, *supra* note 1. Further, a 1989 study revealed that Little Rock schools experienced the third highest number of incidents involving school shootings; Baltimore and New York City were the only cities with more shooting incidents than Little Rock. *See id.* Even Miami's rate of 5.48 guns per 10,000 students was lower than the rate at Little Rock schools; during the 1987-88 school year, Little Rock school officials confiscated an average of 5.7 guns per 10,000 students. *See id.*

5. *See* Eileen Ogintz, *Wounded Childhood: Many Youngsters Don't Need TV to Show Them the Face of War*, CHI. TRIB., May 24, 1989, at 1C, available in LEXIS, News Library, US News File. Teachers in an inner-city Chicago after-school program reported having seen children "playing' funerals: building caskets out of blocks, taking turns being the minister, the crying mourners and the dead person, who inevitably died young and violently." *Id.* The author of a 1989 editorial related a conversation with her seven-year-old daughter, who asked, "Mommy, when they start shooting at me at school, which way should I run?" Carol Dell Young, *Another Lesson for Life in the '80s*, CHI. TRIB., Apr. 4, 1989, at 15C, available in LEXIS, News Library, US News File.

6. *See* William W. Watkinson, Jr., Note, *Shades of DeShaney: Official Liability Under 42 U.S.C. Section 1983 for Sexual Abuse in the Public Schools*, 45 CASE W. RES. L. REV. 1237, 1237 (1995).

custodial relationship with their students such that school districts owe students a constitutional duty of care.⁷

In *Rudd v. Pulaski County Special School District*,⁸ the Arkansas Supreme Court joined the majority of courts, holding that school districts owe no constitutional duty to protect students from peer abuse.⁹ This note recounts the facts that precipitated the *Rudd* decision. It also discusses the history and development of the judicial decisions that led to the Arkansas Supreme Court's holding in *Rudd* and examines the court's reasoning in *Rudd*. Finally, this note explains the implications of the Arkansas Supreme Court's holding in *Rudd*.

II. FACTS

On the morning of October 9, 1996, Willis Ward Johnson ("Willis"),¹⁰ a student at Jacksonville High School ("Jacksonville High"), took a handgun to school and hid the gun in his locker.¹¹ Another student reported to at least one teacher that he had "overheard a conversation concerning [Willis], a gun, and something that was going to happen after school."¹² Despite testimony that school officials performed two searches, no one ever found a gun.¹³ Willis and Earl Jameson Routt

7. See Robert D. Tennyson, *Leffall v. Dallas Independent School District: The Fifth Circuit Finds Few Duties in the Public Schools*, 69 TUL. L. REV. 1061, 1064 (1995). See also *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1373 (3d Cir. 1992) (en banc); *B.M.H. v. School Bd.*, 833 F. Supp. 560, 565 (E.D. Va. 1993); *Hunter v. Carbondale Area Sch. Dist.*, 829 F. Supp. 714, 720 (M.D. Pa. 1993); *Elliott v. New Miami Bd. of Educ.*, 799 F. Supp. 818, 823 (S.D. Ohio 1992); *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576, 1583 (N.D. Ga. 1992); *Arroyo v. Pla.*, 748 F. Supp. 56, 61 (D.P.R. 1990); Adam Michael Greenfield, Note, *Annie Get Your Gun 'Cause Help Ain't Comin': The Need for Constitutional Protection from Peer Abuse in Public Schools*, 43 DUKE L.J. 588, 594-95 (1993); Yama Shansab, Note, *And What of the Meek?: Devising a Constitutionally Recognized Duty to Protect the Disabled at State Residential Schools*, 6 WM. & MARY BILL OF RTS. J. 777, 777 (1998).

8. 341 Ark. 794, 20 S.W.3d 310 (2000).

9. See *id.* at 799-01, 20 S.W.3d at 312-15.

10. Author's note: Although the court refers to Willis Ward Johnson as "W.J.," see *Rudd*, 341 Ark. at 796, 20 S.W.3d at 311, this note will refer to him as "Willis," as his friends and family referred to him. See Mary Hargrove, *'It Hurts So Very Much': Nine Months After the Murder of Their Son, a Sherwood Family Struggles with the Loss*, ARK. DEMOCRAT GAZETTE, July 13, 1997, at 1A, available in LEXIS, News Library, US News File.

11. See *Rudd*, 341 Ark. at 796, 20 S.W.3d at 312.

12. *Id.*, 20 S.W.3d at 312.

13. See *id.*, 20 S.W.3d at 312. In their answer to the plaintiffs' interrogatories, the defendants denied having conducted any "random metal detection screens" that day. Abstract and Brief of Appellant at 19, *Rudd v. Pulaski County Special Sch. Dist.*, 341

("James"),¹⁴ also a Jacksonville High student, rode to and from school regularly on the same bus.¹⁵ The week before the incident, James and Willis engaged in confrontations and were scolded by the bus driver.¹⁶ On the afternoon of October 9, 1996, as Willis and James rode home on the school bus, Willis took the gun out and shot James several times, killing him.¹⁷

Ark. 794, 20 S.W.3d 310 (2000) (No. 00-128).

14. Author's note: Although the court refers to Earl Jameson Rudd as "Earl," see *Rudd*, 341 Ark. at 796, 20 S.W.3d at 311, his friends and family knew him as "James," see Hargrove, *supra* note 10, at 1A, and this note will refer to him as "James." James, who had a mild learning disability, was supposed to have graduated at the end of the 1995-96 school year, but because he missed too many hours and was unable to graduate, he dropped out of school. See *id.* After moving out of his parents' home and working at various odd jobs, James became homesick and went home, determined to return to high school and finish earning his diploma. See *id.* Had he not been shot, James would have graduated from high school in May 1997. See *id.*

15. See *Rudd*, 341 Ark. at 796, 20 S.W.3d at 311. Although he was 20 years old when he was shot, James rode the bus to and from school because his parents could not afford to put him on their insurance. See Hargrove, *supra* note 10, at 1A.

16. See *Rudd*, 341 Ark. at 796, 20 S.W.3d at 311. Appellee Margie Davis, the bus driver who had admonished the boys for previous misconduct on the bus, frequently drove the school bus on which both boys regularly rode. See *id.*, 20 S.W.3d at 311. "Miss Margie," as the students called her, reported that the discord between James and Willis began the Friday before the shooting, when Willis threw a spitball that almost hit James. See Hargrove, *supra* note 10. See also Linda Satter, 'Started with Spitball,' *It Ends in Murder Plea: Teen Gets 46 Years in School Bus Killing*, ARK. DEMOCRAT GAZETTE, June 25, 1997, at 1A, available in LEXIS, News Library, US News File. James reportedly told Ms. Davis that Willis "want[ed] to fight" but that James wouldn't fight because James was an adult. Hargrove, *supra* note 10, at 1A. But the following Monday, Willis "taunted James," saying, "Come on, bitch. Hit me. I want you to hit me, bitch. Hit me." *Id.* Around the time of this conversation, two of James's friends pulled up alongside the bus in a red sports car. See *id.* Ms. Davis reported that, upon seeing his friends, James "stuck his head out the window and yelled, 'Follow me home. We're going to come back and whip this nigger's ass.'" *Id.* Later, one of the boys in the red sports car told police that he drove to where Willis deboarded the bus and "asked Willis if he would leave James alone because James was just trying to get his diploma." *Id.* After shooting James, Willis, who did not know James's last name, explained to police that he took the gun to school that day because "he was afraid James and his friends would beat him up and kill him in the woods." *Id.* Willis told the officers that he had not intended to shoot James, but meant only to "scar[e] him and mak[e] him get down on his knees and ask for forgiveness." *Id.* Billy Brazle, another student who rode the bus, said Willis had shown him the gun earlier that day and had revealed to Billy his intention of killing James. See *id.* At the time, Billy thought the gun was a toy and that Willis was only kidding. See *id.*

17. See *Rudd*, 341 Ark. at 796-97, 20 S.W.3d at 312. Announcing that he had heard that James had been "talking s[hit] about" him, Willis shot a bullet into the seat next to James and warned James that he was not afraid to use the gun. Hargrove, *supra* note 10, at 1A. Upon James's ducking and throwing his hands up to protect himself, Willis shot James once in the head and then again in the neck. See *id.* Willis put two more bullets in James's back as James slid off his seat to the floor. See *id.* Willis then fired

The year before the shooting, Willis attended Sylvan Hills Junior High School ("Sylvan Hills"), and his records from that period reflected various disciplinary problems.¹⁸ Specifically, the records noted that Willis was a member of a violent gang and that school officials had disciplined Willis for fighting and roughhousing in class.¹⁹ School records also noted Willis's "disorderly conduct" and "persistent disregard for school rules and authority."²⁰ After Willis took a knife to school and assaulted another student with the knife, Sylvan Hills Principal Sue Clark expelled Willis.²¹ Ms. Clark testified that, once a student leaves a school, "the disciplinary records are closed, terminated, resolved."²²

James's stepfather, Joe Rudd, and other members of James's family sued the Pulaski County Special School District ("School District") and several of its employees.²³ Rudd and his family sought compensation under the Arkansas Civil Rights Act²⁴ and under Arkansas negligence

the last of his six shots, barely missing the cheek of a young girl riding the bus. *See id.* Having used up all his bullets, Willis turned around and leveled the gun at Margie Davis, who opened the door to let him off the bus. *See id.* When the prosecution charged Willis, who was 14 years old at the time of the shooting, with capital murder, the prosecutor planned to seek the death penalty. *See* Linda Satter, *Prosecutors Won't Seek Death at Request of Victim's Family*, ARK. DEMOCRAT GAZETTE, Mar. 11, 1997, at 2B, available in LEXIS, News Library, US News File. James's mother and stepfather, Carol and Joe Rudd, however, pled with the prosecutor to seek a lesser punishment. *See* Satter, *supra* note 16, at 1A. The prosecution obeyed the Rudds' request and offered Willis a reduced sentence in return for Willis's pleading guilty to aggravated assault and first-degree murder. *See id.* A few minutes before trial was to begin, Willis accepted this offer, and his sentence was reduced to a 46-year imprisonment, 40 years for the murder and 6 for aggravated assault. *See id.* Willis will be eligible for parole in 32 years from the date of his sentencing, when he will be 47 years old. *See* Hargrove, *supra* note 10, at 1A. After the shooting, Willis's father publicly expressed the Johnson family's sympathy for the Rudd family and explained that, "[o]nce the shock wore off, Willis told [his family that] he was sorry. He asked [his father] if he could take it all back." *Id.*

18. *See* Rudd, 341 Ark. at 796, 20 S.W.3d at 311.

19. *See id.*, 20 S.W.3d at 311.

20. *Id.*, 20 S.W.3d at 311.

21. *See id.*, 20 S.W.3d at 311. In expelling Willis, Ms. Clark referred to him as a "substantial risk." *Id.*, 20 S.W.3d at 311. After he entered prison, Willis continued to engage in disruptive behavior. *See* Hargrove, *supra* note 10, at 1A. Although he had originally resided in the juvenile unit, jail officials moved Willis out of the juvenile unit "because he could not conform to the rules and regulations of the facility." *Id.* Willis destroyed property, fought with other inmates, and used "disrespectful language" to jail officials, who cited him around twelve times for such offenses and eventually placed him in "disciplinary segregation." *See id.*

22. Rudd, 341 Ark. at 796, 20 S.W.3d at 311.

23. *See id.* at 795, 20 S.W.3d at 311.

24. ARK. CODE ANN. § 16-123-105(a) (LEXIS Supp. 1999). The statute provides

law.²⁵ Appellants asserted that the School District knew or should have known that Willis posed a threat because the district knew or should have known that Willis had displayed violent tendencies while he attended Sylvan Hills.²⁶ Rudd argued that a custodial relationship existed between the School District and its students which imposed upon the district a duty to protect students from other students.²⁷ Although the appellants presented no evidence that Willis repeated this pattern of behavior during his attendance at Jacksonville High, the School District was aware of Willis's behavior problems during his enrollment at Sylvan Hills.²⁸

The Pulaski County Circuit Court granted summary judgment in favor of the School District on both the negligence and the civil rights claim.²⁹ The court found that the Arkansas Civil Rights Act did not apply to the facts, and statutory immunity barred Rudd's negligence suit.³⁰ The Supreme Court of Arkansas, finding no special relationship between the School District and either Willis or James, affirmed the grant of summary judgment in favor of the School District and its employees.³¹

III. BACKGROUND

Faced with the epidemic of playground violence, parents latch onto the possibility of holding school districts and their employees legally accountable for student violence. Plaintiffs in these suits seek to establish liability in two ways. First, parents bring negligence claims against school districts under state law tort theories.³² Because most

in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action at law, a suit in equity, or other proper proceeding for redress.

Id.

25. See Appellant's Brief at 2, *Rudd* (No. 00-128).

26. See *id.* at 4. See also *Rudd*, 341 Ark. at 801, 20 S.W.3d at 314-15.

27. See *id.* at 797, 20 S.W.3d at 312.

28. See *id.* at 801, 20 S.W.3d at 315.

29. See *id.* at 795-96, 20 S.W.3d at 311.

30. See Appellant's Brief at 2, *Rudd* (No. 00-128).

31. See *Rudd*, 341 Ark. at 795-96, 20 S.W.3d at 313-15.

32. See Benjamin Lange Meeker, Note, *Is B Less than PL? Economic Tort Law Analysis and our Public Schools: An Opportunity Forgone in Beshears v. Unified School District No. 305*, 31 CREIGHTON L. REV. 1413, 1420 (1998). See also *Anderson v.*

courts apply state sovereign immunity to bar such claims,³³ parents have pursued their claims under federal and state civil rights acts.³⁴ This section will discuss the history and development of judicial responses to those claims.

A. Negligence Claims: Sovereign Immunity and State Level Duty Analysis

The success or failure of negligence claims depends largely upon the State's statutory immunity as it applies to school districts and the state's judicial interpretation of that immunity. When immunity does not bar negligence claims, the determination whether liability exists begins with duty analysis.³⁵ Where courts have held that immunity did not bar the claim, plaintiffs have occasionally succeeded in establishing that a school district owed its students a duty of protection.³⁶

1. *State Sovereign Immunity from Negligence Claims*

Because many states grant school districts immunity from most negligence claims, courts usually hold that state sovereign immunity bars negligence claims against school districts.³⁷ Immunity statutes, however, vary widely from state to state. Some states immunize school

Shaughnessy, 519 N.W.2d 229, 232 (Minn. Ct. App. 1994), *rev'd in part*, 526 N.W.2d 625 (Minn. 1995); *McLeod v. Grant County Sch. Dist. No. 128*, 255 P.2d 360, 362 (Wash. 1953).

33. See *Mickelsen v. Sch. Dist. No. 25*, 901 P.2d 508, 510 (Idaho 1995) (barring suit where statute immunized schools from suits involving injury to persons in school's custody). See also *Soper v. Hoben*, 195 F.3d 845, 851 (6th Cir. 1999) (dismissing claim because statute barred all claims for ordinary negligence and plaintiffs failed to prove gross negligence). *But see Anderson*, 519 N.W.2d at 232 (reversing summary judgment in favor of school district because school district owed a duty to prevent students from carrying guns onto buses); *McLeod*, 255 P.2d at 362 (remanding case to trial court to determine whether rape of student on school premises was foreseeable).

34. See *Arroyo v. Pla*, 748 F. Supp. 56, 57 (D.P.R. 1990). See also *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1256 (10th Cir. 1998); *Nabozny v. Podlesny*, 92 F.3d 446, 449 (7th Cir. 1996); *Seamons v. Snow*, 84 F.3d 1226, 1229 (10th Cir. 1996), *rev'd in part*, 206 F.3d 1021 (10th Cir. 2000); *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576, 1577 (N.D. Ga. 1992), *affirmed*, 981 F.2d 1263 (11th Cir. 1992).

35. See *Mickelsen*, 901 P.2d at 510. See also *Soper*, 195 F.3d at 851; *Armijo*, 159 F.3d at 1260; *B.M.H. v. School Bd.*, 833 F. Supp. 560, 563-64 (M.D. Pa. 1993); *Morris v. Ortiz*, 437 P.2d 652, 654 (Ariz. 1968); *McLeod*, 255 P.2d at 362.

36. See *McLeod*, 255 P.2d at 363-65.

37. See *Soper*, 195 F.3d at 851.

districts from negligence claims that arise from custodial relationships,³⁸ while other states immunize schools from “ordinary negligence” claims.³⁹ And in states where immunity statutes protect school districts from suit for exercising some ministerial, as opposed to discretionary, duty, courts have ascribed a motley of definitions to “ministerial” and “discretionary” duties.⁴⁰ Yet other states, such as Arkansas, provide school districts with absolute immunity from tort claims.⁴¹ Because immunity statutes differ from state to state, the cases interpreting sovereign immunity are highly disparate in reasoning and outcome.⁴²

For example, the United States Court of Appeals for the Sixth Circuit applied immunity to bar a negligence suit in *Soper v. Hoben*.⁴³ In that case, students sexually assaulted and raped Renee Soper, a developmentally disabled student who attended Huron Valley Public School.⁴⁴ She and her parents sued the school district and several of its employees, claiming negligence in the school district’s failure to protect Renee from the assaults.⁴⁵ Statutory law provided the school district and its employees immunity from “ordinary negligence” claims.⁴⁶ Renee’s parents argued that the following conduct amounted to gross negligence: the school district had implemented no policy regarding the protection of students like Renee; its agents had allowed Renee to walk from the classroom to the cafeteria unaccompanied by a school official; and its agents left Renee and her classmates unsupervised in their classroom.⁴⁷ The court concluded that the plaintiffs had failed to show gross negligence, and the statute therefore barred the claim.⁴⁸

38. See *Mickelsen*, 901 P.2d at 510.

39. See *Soper*, 195 F.3d at 851.

40. See *Armijo*, 159 F.3d at 1260. See also *B.M.H.*, 833 F. Supp. at 563-64.

41. See ARK. CODE ANN. § 21-9-301 (LEXIS Supp. 1999). The statute immunizes school districts against “[tort] liability and from suit for damages except to the extent that they may be covered by liability insurance.” *Id.* The statute further provides that “[n]o tort action shall lie against any such political subdivision because of the acts of its agents and employees.” *Id.*

42. See *Armijo*, 159 F.3d at 1260. See also *B.M.H.*, 833 F. Supp. at 563-64.

43. 195 F.3d 845, 851 (6th Cir. 1999).

44. See *id.* at 848-49.

45. See *id.* at 847-48. Renee, who had Down’s Syndrome, frequently expressed her affection for her fellow classmates and teachers by hugging them. See *id.* at 848. Renee’s parents consulted with the school district on numerous occasions regarding Renee’s particular vulnerability to sexual assault, requesting that the school district take special care to supervise Renee. See *id.* at 848-49. School officials allegedly met the Sopers’ concerns with reassurance, advising them that officials would “keep an eye on” Renee. *Id.*

46. See *id.* at 851.

47. See *id.*

48. See *id.* In a strong dissent, Judge Moore argued that reasonable minds could

Similarly, in *Mickelsen v. School District No. 25*,⁴⁹ Andrea Mickelsen and her parents sued the school district after other students fighting in the hallway of the school inflicted severe head injuries on Andrea.⁵⁰ Again, statutory immunity provided the school district and its employees immunity from the claim.⁵¹ Idaho's immunity statute immunized school districts when the negligence claim arose from custodial relationships.⁵² Because the plaintiffs' claim rested on the school district's alleged failure properly to supervise students in its custody, the statute barred this claim.⁵³

Applying governmental immunity to negligence claims against school districts, then, the courts have usually summarily disposed of such cases. Some courts, however, have allowed plaintiffs to proceed on negligence claims against school districts under a failure to protect theory.⁵⁴ These courts have held that liability could attach to a school district for failure to protect students from foreseeable harm.⁵⁵

2. *Duty to Protect at State Level*

In states that allow plaintiffs to bring tort suits against school districts, a plaintiff must encounter the difficult question of whether a school district owes its students an affirmative duty of protection. In answering this question, courts employ a sort of *Palsgraf*⁵⁶ analysis.⁵⁷

differ as to whether the school district's conduct qualified as grossly negligent. *See id.* at 855 (Moore, J., dissenting).

49. 901 P.2d 508 (Idaho 1995).

50. *See id.* at 509.

51. *See id.* at 510.

52. *See id.* at 509. The statute provides:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without reckless, willful and wanton conduct . . . shall not be liable for any claim which . . . [a]rises out of injury to a person or property by a person under supervision, custody or care of a governmental entity . . .

IDAHO CODE § 6-904A(2) (1990).

53. *See Mickelsen*, 901 P.2d at 509-10.

54. *See Anderson v. Shaughnessy*, 519 N.W.2d 229, 232 (Minn. Ct. App. 1994). *See also McLeod v. Grant County Sch. Dist. No. 128*, 255 P.2d 360, 365 (Wash. 1953).

55. *See Anderson*, 519 N.W.2d at 232. *See also McLeod*, 255 P.2d at 362-63.

56. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

57. *See Alhambra Sch. Dist. v. Superior Court*, 796 P.2d 470, 473 (Ariz. 1990).

In *Alhambra*, the Supreme Court of Arizona decided that the school district owed a duty of protection to Brenda Nichols, a student injured while crossing at a dangerous crosswalk that the school district had created and maintained: "[I]n creating the marked crosswalk where none previously existed, the District created a relationship with those who would use the crosswalk and thereby assumed a duty of reasonable care

Under *Palsgraf*, no duty can exist unless the defendant could have reasonably foreseen that the defendant's negligent act might injure the particular plaintiff.⁵⁸ In other words, the plaintiff must have been in the foreseeable zone of risk for the defendant to have owed the plaintiff a duty.⁵⁹

The Supreme Court of Washington, in *McLeod v. Grant County School District*,⁶⁰ held that a school district could owe a duty of protection against reasonably foreseeable harm.⁶¹ There, two male students raped Lorraine McLeod, a twelve-year-old girl, in an unlocked room inside the school gymnasium.⁶² The court remanded the case, directing the trial court to determine whether the school district could have reasonably foreseen the rape.⁶³ In doing so, the court discussed extensively the foreseeability of the particular harm Lorraine suffered.⁶⁴ The court held that a reasonable jury could find that the school district could have anticipated that students might use the room to engage in sexual misconduct.⁶⁵ Further, the court explained, the school district would have owed Lorraine a duty to protect her from a reasonably foreseeable rape.⁶⁶

Other courts have used the same analysis to reach the opposite result. In *Morris v. Ortiz*,⁶⁷ James Morris was injured in a mechanics class when another student jumped on a car top that James was holding.⁶⁸ The Arizona Supreme Court analyzed the existence of a duty by examining the foreseeability of the harm.⁶⁹ The court held that Ortiz,

with respect to its operation . . . [T]he District owed Brenda a common law duty of care." *Alhambra*, 796 P.2d at 474.

58. See *Palsgraf*, 162 N.E. at 100. The *Alhambra* court specifically referred to Chief Judge Cardozo's opinion in *Palsgraf*: "The risk reasonably to be perceived defines the duty to be obeyed." *Alhambra*, 796 P.2d at 473 (quoting *Palsgraf*, 162 N.E. at 100). In *Palsgraf*, Cardozo further explained that the risk that gives rise to a duty is "risk to another or to others within the range of apprehension." *Palsgraf*, 162 N.E. at 100.

59. See *Palsgraf*, 162 N.E. at 100.

60. 255 P.2d 360 (Wash. 1953).

61. See *id.* at 363-65.

62. See *id.* at 361.

63. See *id.* at 363-65.

64. See *id.*

65. See *id.* If the harm was reasonably foreseeable, then the school district had a duty either to supervise students in the gymnasium or to lock the door to the room where the boys raped Lorraine. See *id.* Accordingly, the school district could be liable for Lorraine's injuries because it failed to take either precaution. See *id.*

66. See *McLeod*, 255 P.2d at 363-65.

67. 437 P.2d 652 (Ariz. 1968).

68. See *id.* at 653.

69. See *id.* at 654. The court explained:

[T]o constitute actionable negligence the defendant must owe a duty to the

the defendant teacher, could not have anticipated the danger that another student would jump on a car top while James held the car top.⁷⁰ Because the court determined that Ortiz could not have reasonably foreseen the danger, the supreme court vacated the trial court's judgment in favor of James.⁷¹

Although courts usually apply statutory immunity to bar negligence suits, a few courts have allowed plaintiffs to proceed with negligence claims against school districts in these circumstances.⁷² In those states where immunity does not bar all negligence suits, a plaintiff has a chance at recovery.⁷³ Once a plaintiff survives the statutory immunity step, she can establish liability if she can persuade the court that the particular harm her child suffered was a reasonably foreseeable consequence of the defendant school district's failure to act.⁷⁴ But in states such as Arkansas, which absolutely immunize school districts from negligence claims, parents of injured schoolchildren must resort to seeking a constitutional remedy.⁷⁵

B. Judicial Treatment of Federal and State Civil Rights Claims: Absence of Duty

Like negligence claims, federal and state civil rights actions against school districts for student-inflicted injuries usually fail.⁷⁶ Because civil

plaintiff, the breach of which results proximately in plaintiff's injury. So, the question which must be answered is, "What duty did Ortiz owe as the supervising instructor, the breach of which resulted in Morris' injury?" To hold that Ortiz had to anticipate Gillmor's act and somehow circumvent it is to say that it is the responsibility of a school teacher to anticipate the myriad of unexpected acts which occur daily in and about schools and school premises, the penalty for failure of which would be financial responsibility in negligence. We do not think that either the teacher or the district should be subject to such harassment nor is there an invocable legal doctrine or principle which can lead to such an absurd result.

Id. (internal citations omitted).

70. *See id.* James argued that Ortiz might have prevented the injury by assigning someone to supervise the students while they participated in the project. *See id.* The court referred to the argument as "but the sheerest speculation" and remarked that "[s]uch gossamer speculation is the stuff from which dreams are made and not the foundation stone for an action in negligence." *Id.*

71. *See id.* at 654, 656.

72. *See McLeod*, 255 P.2d at 363-65.

73. *See Morris*, 437 P.2d at 654.

74. *See id.*

75. *See* ARK. CODE. ANN. § 21-9-301 (LEXIS Supp. 1999).

76. *See Tennyson*, *supra* note 7, at 1064. *See also* Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993); D.R. v. Middle Bucks Area Vocational

rights acts protect citizens from *governmental* deprivation of their liberties, not *private* deprivation, a plaintiff who alleges that her injury resulted from a state entity's failure to act must prove that the state entity owed her a duty to act.⁷⁷ The United States Supreme Court has found such a duty to exist between prison officials and their prisoners⁷⁸ and between mental health professionals and involuntarily-committed patients.⁷⁹ The Court has left open the possibility that a foster care agency might owe foster children such a duty.⁸⁰ Although the United States Supreme Court has not addressed the existence of such a duty in the context of school districts, lower courts have repeatedly found that school officials owed students no constitutional duty to protect them from other students.⁸¹

The United States Supreme Court first recognized a state entity's duty of care for an individual in *Estelle v. Gamble*.⁸² There, the Supreme Court held that prison officials have a duty to provide prisoners with

Technical Sch., 972 F.2d 1364, 1373 (3d Cir. 1992); *B.M.H. v. School Bd.*, 833 F. Supp. 560, 565 (E.D. Va. 1993); *Hunter v. Carbondale Area Sch. Dist.*, 829 F. Supp. 714, 720 (M.D. Pa. 1993); *Elliott v. New Miami Bd. of Educ.*, 799 F. Supp. 818, 823 (S.D. Ohio 1992); *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576, 1583 (N.D. Ga. 1992); *Arroyo v. Pla*, 748 F. Supp. 56, 61 (D.P.R. 1990); *Greenfield*, *supra* note 7, at 594-95; *Shansab*, *supra* note 7, at 777.

77. See Matthew J. Conigliaro, Recent Development, *Walton v. Alexander: The Fifth Circuit Limits a State's Fourteenth Amendment Duty to Protect to Instances of Involuntary Restraint*, 70 TUL. L. REV. 393, 394 (1995). See also *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989); *Russell*, 784 F. Supp. at 1580-81; Robert L. Phillips, Comment, *Peer Abuse in Public Schools: Should Schools Be Liable for Student to Student Injuries Under Section 1983?*, 1995 BYU L. REV. 237, 242.

78. See *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976).

79. See *Youngberg v. Romeo*, 457 U.S. 307, 318-19 (1982).

80. See *Watkinson*, *supra* note 6, at 1264-65.

81. See *D.R.*, 972 F.2d at 1373. See also *Dorothy J.*, 7 F.3d at 732; *B.M.H.*, 833 F. Supp. at 565; *Hunter*, 829 F. Supp. at 720; *Elliott*, 799 F. Supp. at 823; *Russell*, 784 F. Supp. at 1583; *Arroyo*, 748 F. Supp. at 61.

82. 429 U.S. 97, 103-04 (1976). In *Estelle*, a bale of cotton fell on W.J. Gamble, an inmate in the Texas Department of Corrections. See 429 U.S. at 98-99. Over the next three months, his pain worsened and he complained of high blood pressure. See *id.* at 99-101. Prison officials allowed Gamble to see a doctor, who gave him medicine for the pain and high blood pressure and also granted him "cell-pass, cell-feed," so that Gamble would be allowed to abstain from working. See *id.* In response to Gamble's refusal to work, however, prison officials punished him, twice bringing him before the disciplinary committee and also placing him in solitary confinement. See *id.* at 100-01. During his last period of confinement, Gamble apparently suffered a heart attack, but prison officials repeatedly denied his requests for medical attention. See *id.* at 101. He sued the prison, claiming that prison authorities' failure to provide him adequate medical care amounted to a constitutional deprivation of his right to be free from cruel and unusual punishment. See *id.*

medical care.⁸³ The Court based its decision on the prisoner's inability to provide his own medical care.⁸⁴ The Supreme Court extended the *Estelle* exception to a substantive due process claim in *Youngberg v. Romeo*.⁸⁵ The Court in *Youngberg* held that mental health professionals owe involuntarily committed patients a duty to protect these patients from themselves and from other patients.⁸⁶ Although the Supreme Court found no duty in *DeShaney v. Winnebago County Department of Social Services*,⁸⁷ the Court did not foreclose the possibility that a duty of care might arise in the context of foster care agencies.⁸⁸ There, the Court held that the state agency owed no duty to protect a child from his father's abuse because the agency had not taken the child into its custody and had neither created nor increased the child's danger of suffering abuse at his father's hands.⁸⁹

Applying *Estelle*, *Youngberg*, and *DeShaney*, lower courts have reasoned that a state entity's duty to protect a private citizen may arise in one of two ways. First, a state entity may create a special relationship with an individual by asserting involuntary custody over the victim.⁹⁰

83. See *id.* at 103-04.

84. See *id.* The Court explained its reasoning:

An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose "[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."

Id. (internal citations omitted).

85. 457 U.S. 307, 318-19 (1982). In *Youngberg*, Nicholas Romeo's mother sought compensation for injuries her son sustained while a patient at Pennhurst State School and Hospital. See *id.* at 310. Ms. Romeo had petitioned to have Nicholas committed after her husband died, because she could not care for Nicholas, who had the cognitive ability of an 18-month-old child, without her husband's help. See *id.* at 309-10. In her complaint, Ms. Romeo alleged that the hospital owed Nicholas a duty to treat and care for him. See *id.* at 310.

86. See *id.* at 318-19, 322.

87. 489 U.S. 189 (1989). In *DeShaney*, Joshua DeShaney's father beat Joshua so brutally that Joshua suffered permanent brain damage. See *id.* at 193. Randy DeShaney's prolonged abuse of his child eventually caused Joshua to fall into a coma. See *id.* Joshua suffered multiple brain hemorrhages and will be profoundly retarded for the remainder of his life. See *id.* Joshua's mother sued the child protection agency because the agency knew that Joshua's father abused him, and it did not remove Joshua from his father's custody. See *id.*

88. See *id.* at 201.

89. See *id.* at 198-203.

90. See Karen M. Blum, *DeShaney: Custody, Creation of Danger, and Culpability*, 27 LOY. L.A. L. REV. 435, 436-37 (1994). See also *Angela R. v. Clinton*, 999 F.2d 320,

Second, a duty may arise if the state entity's agents create or increase an individual's risk for harm.⁹¹

1. *Involuntary Custody*

Plaintiffs, attempting to establish liability against state entities under the holdings in *Estelle*, *Youngberg*, and *DeShaney*, have succeeded where the state agency was a prison, a mental healthcare facility, or a foster home.⁹² In school district cases, plaintiffs have argued that state compulsory attendance laws create a special custodial relationship between school districts and students.⁹³ Because such laws require that children submit to the school district's custody, these plaintiffs argue,

323-24 (8th Cir. 1993); *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992); *K.H. v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990); *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990); *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459, 465 (3d Cir. 1990); *Baby Neal v. Casey*, 821 F. Supp. 320, 334-35 (E.D. Pa. 1993) (reversed in part on other grounds); *Jordan v. Tennessee*, 738 F. Supp. 258, 259-60 (M.D. Tenn. 1990).

91. See *Blum*, *supra* note 90, at 436-37. See also *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1262 (10th Cir. 1998); *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir. 1996); *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995); *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1373-74 (3d Cir. 1992); *Losinski v. County of Trempealeau*, 946 F.2d 544, 550-51 (7th Cir. 1991); *Bryson v. City of Edmond*, 905 F.2d 1386, 1392 (10th Cir. 1990); *K.H.*, 914 F.2d at 859 (Coffey, J., concurring and dissenting); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990); *Gibson v. City of Chicago*, 910 F.2d 1510, 1521-22 n.19 (7th Cir. 1990); *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 359 (11th Cir. 1989); *Hunter v. Carbondale Area Sch. Dist.*, 829 F. Supp. 714, 720-21 (M.D. Pa. 1993); *Was v. Young*, 796 F. Supp. 1041, 1048 (E.D. Mich. 1992); *Sinthusomphone v. City of Milwaukee*, 785 F. Supp. 1343, 1348-49 (E.D. Wis. 1992); *G-69 v. Degnan*, 745 F. Supp. 254, 265 (D.N.J. 1990); *Swader v. Virginia*, 743 F. Supp. 434, 439-40 (E.D. Va. 1990).

92. See *Blum*, *supra* note 90, at 439. See also *Ashley Smith*, Comment, *Students Hurting Students: Who Will Pay?*, 34 HOUS. L. REV. 579, 607 n.24 (1997); *Watkinson*, *supra* note 6, at 1237.

93. See *D.R.*, 972 F.2d at 1371. By 1918, every state had enacted compulsory school attendance laws. See *Greenfield*, *supra* note 7, at 588 n.1. After the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954), some states repealed those laws in an attempt to avoid racial integration. See *Greenfield*, *supra* note 7, at 588 n.1. Every state has since re-enacted its compulsory attendance laws. See *id.* In Arkansas, compulsory attendance law is codified in Arkansas Code Annotated § 6-18-222 (LEXIS Supp. 1999). That statute authorizes Arkansas courts to fine parents up to \$500 for their children's repeated absences. See ARK. CODE ANN. § 6-18-222(a)(5)(A) (LEXIS Supp. 1999).

the state asserts involuntary custody over school children.⁹⁴ Courts have rejected this argument, distinguishing school district cases on the ground that a school district does not assert total, involuntary custody over school children.⁹⁵ These courts explain that the custody is not total because school children are in the school district's custody only part of the day.⁹⁶ According to these courts, the custody is not involuntary because school children may either transfer to private schools or receive home schooling from their parents or guardians.⁹⁷

School children are different from prisoners, mental patients, and foster children, courts explain, because children's parents retain primary responsibility for students' care.⁹⁸ Prison officials, mental health care

94. See *D.R.*, 972 F.2d at 1371.

95. See *id.*

96. See *id.* See also *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272-73 (7th Cir. 1990). In *J.O.*, the United States Court of Appeals for the Seventh Circuit explained that its refusal to apply the doctrine to school districts derived from the disparity in the degree of freedom allowed mental patients and prisoners as opposed to that allowed students. See *id.* The court pointed out that students retain a much greater degree of freedom than do mental patients and prisoners:

The state's custody over [a student's] person is the most distinguishing characteristic in the cases of the mental patient and the prisoner; these people are unable to provide for basic human needs like food, clothing, shelter, medical care, and reasonable safety. At most, the state might require a child to attend school, but it cannot be suggested that compulsory school attendance makes a child unable to care for basic human needs. The parents still retain primary responsibility for feeding, clothing, sheltering, and caring for the child. By mandating school attendance for children under the age of sixteen, the state . . . has not assumed responsibility for their entire personal lives; these children and their parents retain a substantial freedom to act.

Id. at 272 (internal citations omitted). The court added that, although the "analogy of a school yard to a prison may be a popular one for school-age children, . . . we cannot recognize constitutional duties on a child's lament." *Id.*

97. See *D.R.*, 972 F.2d at 1371. The court explained why custody was not involuntary:

[I]t is the parents who decide whether that education will take place in the home, in public or private schools . . . For some, the options may be limited for financial reasons. However, even when enrolled in public school parents retain the discretion to remove the child from classes as they see fit, . . . subject only to truancy penalties for continued periods of unexcused absence. In the case of special education students, the parents have even greater involvement since they must approve the precise educational program developed for their child. Moreover, as the Pennsylvania Supreme Court has recognized, even without reference to the Pennsylvania School Code or related statutes, "it [cannot] be denied that a parent is justified in withdrawing his child from a school where the health and welfare of the child is threatened."

Id. (citations omitted.)

98. See *J.O.*, 909 F.2d at 272-73.

professionals, and foster care authorities, on the other hand, take complete responsibility for providing the "basic needs" of the individuals in their custody.⁹⁹

In *Dorothy J. v. Little Rock School District*,¹⁰⁰ the court found that students do not fit within the special relationship exception because students are not sufficiently analogous to prisoners or involuntarily committed mental patients.¹⁰¹ In that case, Louis C., a ward of the State of Arkansas, raped Brian, a mentally retarded child.¹⁰² Despite the fact that the state agency that placed Louis C. in the program with Brian knew of Louis C.'s propensity toward violence, the court declined to find a special relationship entitling Brian to the State's protection.¹⁰³

In *D.R. v. Middle Bucks Area Vocational Technical School*,¹⁰⁴ seven male students¹⁰⁵ allegedly subjected the plaintiffs to sexual assaults at least twice a week over a five-month period.¹⁰⁶ Plaintiffs D.R. and L.H., both public high school students,¹⁰⁷ argued that they stood in a special relationship with the school district.¹⁰⁸ The district court found that the school district owed its students a constitutional duty of protection, and that the duty arose from compulsory attendance and truancy laws.¹⁰⁹ That court nevertheless dismissed the case because the plaintiffs had

99. *See id.*

100. 794 F. Supp. 1405 (E.D. Ark. 1992).

101. *See id.* at 1411-14. Explaining its reasoning, the court quoted *Harpole v. Arkansas Department of Human Services*, 820 F.2d 923, 927 (8th Cir. 1987):

The facts in the present case do not support the finding of a special relationship because the massive state control found in the prison environment is absent here. Without that control there is no constitutionally mandated duty to protect one private citizen from another. We do not believe that the concept of special relationships was intended to extend beyond prison or prison-like environments.

Dorothy J., 794 F. Supp. at 1416.

102. *See Dorothy J.*, 794 F. Supp. at 1407.

103. *See id.* at 1411-14.

104. 972 F.2d 1364 (3d Cir. 1992).

105. *See id.* at 1366. Although the plaintiffs named all seven students as defendants in this action, only two of the boys appeared in court. *See id.*

106. *See id.* The plaintiffs alleged that the boys repeatedly forced the girls into either a darkroom or a bathroom. *See id.* Once there, the boys sodomized the girls, offensively touched their breasts and genitals, forced the girls to perform fellatio on them, verbally abused the girls, and forced the girls to watch them force other students to engage in similar conduct. *See id.*

107. *See id.* at 1365. D.R. was hearing impaired and suffered resultant communication problems. *See id.* at 1366 n.5. She attended the graphics art class at Middle Bucks because, under Pennsylvania law, she qualified as an "exceptional" student. *See id.*

108. *See id.* at 1368.

109. *See id.* at 1367.

failed to establish that school officials were sufficiently aware of the misconduct to constitute reckless indifference.¹¹⁰ On appeal, the United States Court of Appeals for the Third Circuit held that custody during part of the day did not give rise to a duty of protection.¹¹¹ The court therefore affirmed the dismissal.¹¹²

Some courts have accepted the argument that state compulsory attendance laws create a special custodial relationship between school districts and students.¹¹³ For example, in *Carabba v. Anacortes School District #103*,¹¹⁴ the Supreme Court of Washington posited the view that the state assumes a duty of protection under the *in loco parentis* doctrine.¹¹⁵ Because state law requires students to submit to the mandates of the school rules, the court explained, teachers supplant parents.¹¹⁶ Teachers, therefore, must bear a responsibility to protect students in their custody.¹¹⁷ In *McLeod v. Grant County School District No. 128*,¹¹⁸ the Supreme Court of Washington again emphasized the correlation between the parent-child relationship and the teacher-student relationship.¹¹⁹ The court pointed out that the child must obey his teachers at school just as he must obey his parents at home.¹²⁰ According to the court, teachers owe the child a reciprocal duty to protect him from harm, as would his parents if he were at home.¹²¹

Custodial relationship analysis is difficult to overcome. A plaintiff must establish total control and a high degree of helplessness.¹²² A

110. See *D.R.*, 972 F.2d at 1367. The plaintiffs alleged that, in the classroom, the students exhibited violent, non-sexual misconduct toward other students as well as toward the student teacher, Defendant Susan Peters. See *id.* at 1366. Although D.R. and L.H. did not allege having told Ms. Peters of the incidents, they argued that she knew or should have known of the sexually assaultive behavior and that she was or should have been present in the classroom when the conduct took place. See *id.* L.H. testified that she had informed Defendant James C. Bazzel, the school's Assistant Director, of one boy's conduct, and Bazzel failed to try to stop the sexual assaults. See *id.*

111. See *id.* at 1371-73.

112. See *id.* at 1377.

113. See, e.g., *Carabba v. Anacortes Sch. Dist. No. 103*, 435 P.2d 936, 947-48 (Wash. 1967). See also *McLeod v. Grant County Sch. Dist.*, 255 P.2d, 360, 362-63 (Wash. 1953).

114. 435 P.2d 936 (Wash. 1967).

115. See *Carabba*, 435 P.2d at 947-48. See also *McLeod*, 255 P.2d at 362-63.

116. See *Carabba*, 435 P.2d at 947-48.

117. See *id.*

118. 255 P.2d 360 (Wash. 1953).

119. See *id.* at 362-63.

120. See *id.*

121. See *id.*

122. See Thomas A. Eaton & Michael Wells, *Governmental Inaction as a*

plaintiff may, however, establish constitutional liability if she can prove that the state created or increased the danger that led to her child's injuries.¹²³

2. *State Creation or Exacerbation of Danger*

In *DeShaney*, the United States Supreme Court concluded that no special relationship entitled Joshua DeShaney to state protection from his father.¹²⁴ In reaching its conclusion, the Court pointed out that the agency had neither created nor increased Joshua's danger of suffering harm at his father's hands.¹²⁵ Thus, lower courts have interpreted the Court's opinion in *DeShaney* to provide another avenue for the establishment of civil rights liability.¹²⁶ According to those courts, if a state official creates a dangerous situation or increases an individual's vulnerability to risk, then the State might be constitutionally liable for the ensuing harm.¹²⁷ Courts that have employed this analysis in school

Constitutional Tort: DeShaney and its Aftermath, 66 WASH. L. REV. 107, 124-25 (1991).

123. *See id.* at 126.

124. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197-98 (1989).

125. *See id.* at 201. Joshua's mother argued that the state agency knew or should have known of the abuse that Joshua suffered at his father's hands. *See id.* at 193. Therefore, she asserted, the agency stood in a special relationship with Joshua and owed him a duty of protection. *See id.* After deciding that Joshua did not fall within the *Estelle-Youngberg* special relationship exception, the Court explained:

While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them [W]hen [the agency] returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all"

Id. at 201.

126. *See Blum, supra* note 90, at 436-37. *See also Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1262-63 (10th Cir. 1998); *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir. 1996); *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995); *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1372-74 (3d Cir. 1992); *Losinski v. County of Trempealeau*, 946 F.2d 544, 551 (7th Cir. 1991); *K.H. v. Morgan*, 914 F.2d 846, 859 (7th Cir. 1990); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990); *Gibson v. City of Chicago*, 910 F.2d 1510, 1521 n.19 (7th Cir. 1990); *Bryson v. City of Edmond*, 905 F.2d 1386, 1392 (10th Cir. 1990); *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 359 (11th Cir. 1989); *Hunter v. Carbondale Area Sch. Dist.*, 829 F. Supp. 714, 720-21 (M.D. Pa. 1993); *Was v. Young*, 796 F. Supp. 1041, 1048 (E.D. Mich. 1992); *G-69 v. Degnan*, 745 F. Supp. 254, 265 (D.N.J. 1990); *Swader v. Virginia*, 743 F. Supp. 434, 439-41 (E.D. Va. 1990).

127. *See supra* note 125 and accompanying text.

district cases, however, have invariably concluded that no state action created or increased the risk.¹²⁸

In *D.R.*, the plaintiffs' custodial relationship argument failed.¹²⁹ The court next addressed the plaintiffs' argument that the school district created or exacerbated the dangerous situation that led to the abuse.¹³⁰ According to the plaintiffs, the school district created or increased the plaintiffs' peril when the school district placed an inexperienced teacher in charge of the class; failed to notify parents of students' in-class misconduct; failed to discipline students for in-class misconduct; failed to investigate and stop the students' out-of-class violence; and designed the classroom in such a way as to render students more vulnerable to abuse.¹³¹ The court first explained that a plaintiff could establish liability under this theory only by showing that the state had affirmatively acted to increase or create the danger.¹³² The plaintiffs, therefore, could not base their argument on the school's failure to notify parents of students' misconduct or to discipline students, because such conduct was not affirmative action.¹³³ The court concluded that the design of the classroom befit the purpose of the art class and the layout was not inherently dangerous.¹³⁴ Therefore, the court held that the school officials' conduct did not create or exacerbate plaintiffs' vulnerability to the sexual assaults.¹³⁵

*Armijo v. Wagon Mound*¹³⁶ and *Hunter v. Carbondale Area School District*¹³⁷ both addressed injuries that students sustained while not physically in the custody of the school.¹³⁸ In *Armijo*, sixteen-year-old Philadelfio Armijo committed suicide in his home after school officials

128. See *Armijo*, 159 F.3d at 1262. See also *Seamons*, 84 F.3d at 1236; *D.R.*, 972 F.2d at 1372-74; *Hunter*, 829 F.Supp. at 720-21.

129. See *D.R.*, 972 F.2d at 1373.

130. See *id.*

131. See *id.* at 1373, 1375. The plaintiffs suffered most of their abuse in the darkroom and the unisex bathroom, both of which rooms annexed the main classroom. See *id.* at 1366.

132. See *id.* at 1374.

133. See *id.*

134. See *id.* at 1375.

135. See *D.R.*, 972 F.2d at 1375-76. In holding that the defendants' conduct did not entitle the plaintiffs to redress under the Constitution, the court noted the "apparent indefensible passivity of at least some school defendants under the circumstances." *Id.* at 1376. The court also took care to point out that the Constitution did not necessarily "embrace such conduct." *Id.*

136. 159 F.3d 1253 (10th Cir. 1998).

137. 829 F. Supp. 714 (M.D. Pa. 1993).

138. See *Armijo*, 159 F.3d at 1257; *Hunter*, 829 F. Supp. at 716-17.

suspended him and drove him home.¹³⁹ Philadelfio's parents sued the school, seeking compensation for deprivation of their son's civil rights.¹⁴⁰ The court first concluded that no custodial relationship imposed a duty on the school district.¹⁴¹ The court next addressed the plaintiffs' argument that liability attached because the officials created or worsened Philadelfio's peril.¹⁴² Philadelfio's parents argued that the school officials affirmatively placed their son in danger when they suspended him and drove him home without notifying the plaintiffs.¹⁴³ The plaintiffs alleged that the defendants knew that Philadelfio was particularly vulnerable to committing suicide; he had expressed suicidal tendencies, he was frequently depressed, and school officials knew that he had access to firearms.¹⁴⁴

The United States Court of Appeals for the Tenth Circuit affirmed the lower court's finding that the plaintiffs had alleged facts sufficient to state a cause of action.¹⁴⁵ In reaching that conclusion, the court carefully analyzed the plaintiffs' allegations under a five-part test which the court then modified pursuant to the United States Supreme Court's holding in *DeShaney*.¹⁴⁶ In essence, the test requires that the plaintiff prove that (1) she belonged to "a limited and specifically definable group"; (2) the alleged misconduct placed her "at substantial risk of serious, immediate and proximate harm"; (3) the defendants knew of the risk or the risk was obvious; (4) the defendants "acted recklessly in conscious disregard of that risk"; and (5) as a whole, the defendants' conduct shocks the conscience.¹⁴⁷ The court then added that, under *DeShaney*, a plaintiff must also prove that the state entity created or worsened the dangerous condition that led to the plaintiff's injury.¹⁴⁸ The court concluded that Philadelfio's parents had alleged facts sufficient to prove each element, including the *DeShaney* requirement.¹⁴⁹

139. See *Armijo*, 159 F.3d at 1256-57.

140. See *id.* at 1257.

141. See *id.* at 1261-62.

142. See *id.* at 1262.

143. See *id.* at 1258.

144. See *id.* at 1256-57.

145. See *Armijo*, 159 F.3d at 1264.

146. See *id.* at 1262-64.

147. *Id.* at 1262-63.

148. See *id.* at 1263.

149. See *id.* at 1264. The court held that the plaintiffs could proceed against everyone but Defendant Pam Clouthier, a school aide, because the court found no facts that indicated that Clouthier had added to or created Philadelfio's peril. See *id.* Clouthier apparently took no part in the decision that led to Armijo's suspension. See *id.*

The Eastern District of Pennsylvania reached the opposite result in *Hunter*.¹⁵⁰ There, school officials ordered twelve-year-old David Hadden, a seventh-grade special education student,¹⁵¹ to report to detention hall after David became involved in a confrontation with other students.¹⁵² When David appeared for detention, he and the other students engaged in another altercation.¹⁵³ After officials released the students from detention, the other boys chased David down the hall and through the doors of the school.¹⁵⁴ The chase continued off school premises and ended when David fell into a stream, where he was found dead four months later.¹⁵⁵ The court narrowed the dangerous situation to the possibility that students would chase and attack David after detention.¹⁵⁶ The court then found that the school officials took no affirmative action to create or increase that risk.¹⁵⁷

Plaintiffs seeking to recover for their children's student-inflicted injuries and deaths usually fail under a constitutional tort theory.¹⁵⁸ Neither the special relationship doctrine nor the state creation of danger theory affords plaintiffs much hope of success.¹⁵⁹ A duty under custodial relationship analysis is also difficult to establish.¹⁶⁰ To prove that a state entity owed a duty of protection by virtue of a special relationship, a plaintiff must prove total, involuntary custody.¹⁶¹ Thus,

150. See *Hunter*, 829 F. Supp. at 721.

151. See *id.* at 716.

152. See *id.*

153. See *id.*

154. See *id.*

155. See *id.* at 716-17.

156. See *Hunter*, 829 F. Supp. at 721.

157. See *id.* The court explained:

[T]here is nothing in the record . . . that suggests that either Defendant encouraged, facilitated or authorized the students to engage in the conduct which took place. There is no evidence at all that the Decedent would be attacked and pursued after the detention period ended by the other juveniles. The only notice that the school had of any danger to the Decedent was the incident which occurred the day before which led to the Decedent being detained after school

Id. at 721.

158. See *Tennyson*, *supra* note 7, at 1064. See also *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1373 (3d Cir. 1992); *B.M.H. v. School Bd.*, 833 F. Supp. 560, 565 (E.D. Va. 1993); *Hunter*, 829 F. Supp. at 720; *Elliott v. New Miami Bd. of Educ.*, 799 F. Supp. 818, 823 (S.D. Ohio 1992); *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576, 1583 (N.D. Ga. 1992); *Arroyo v. Pla*, 748 F. Supp. 56, 61 (D.P.R. 1990); *Greenfield*, *supra* note 7, at 594-95; *Shansab*, *supra* note 7, at 777.

159. See *supra* note 156 and accompanying text.

160. See *Blum*, *supra* note 90, at 436-37.

161. See *supra* notes 95-97 and accompanying text.

when the Arkansas Supreme Court held that the Rudds could not hold the Pulaski County Special School District liable for James Routt's death, Arkansas joined the majority of courts, who have found no constitutional liability for student-inflicted injuries.¹⁶²

IV. REASONING

In *Rudd v. Pulaski County Special School District*,¹⁶³ the Arkansas Supreme Court held that a school district owes no duty to protect students from harm by other students.¹⁶⁴ Parents, therefore, cannot hold school districts liable for student aggression under the Arkansas Civil Rights Act.¹⁶⁵ The court examined both the School District's relationship with the aggressor child, Willis, and the School District's relationship with the harmed student, James, and the court found that no special relationship existed between the School District and either James or Willis.¹⁶⁶ According to the court, no state action caused the incident; therefore, the school could not be held liable for James's death.¹⁶⁷

A. State Actor Analysis: No Right to Restrain Aggressor

Finding no custodial relationship between the School District and Willis, the court held that Willis was not a state actor within the meaning of the Arkansas Civil Rights Act.¹⁶⁸ The court posed the issue concerning Willis's status as a twofold inquiry. First, the court had to determine whether a custodial relationship between the School District and Willis imposed upon the School District a duty to restrain Willis from harming another student.¹⁶⁹ Second, provided that the court were to find such a duty, the court had to decide whether the School District's

162. See Tennyson, *supra* note 7, at 1064. See also *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1373 (3d Cir. 1992); *B.M.H. v. School Bd.*, 833 F. Supp. 560, 565 (E.D. Va. 1993); *Hunter*, 829 F. Supp. at 720; *Elliott v. New Miami Bd. of Educ.*, 799 F. Supp. 818, 823 (S.D. Ohio 1992); *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576, 1583 (N.D. Ga. 1992); *Arroyo v. Pla*, 748 F. Supp. 56, 61 (D.P.R. 1990); *Greenfield*, *supra* note 7, at 594-95; *Shansab*, *supra* note 7, at 777.

163. 341 Ark. 794, 20 S.W.3d 310 (2000).

164. See *id.* at 801, 20 S.W.3d at 314.

165. See *id.* at 801, 20 S.W.3d at 315.

166. See *id.* at 798-801, 20 S.W.3d at 312-16.

167. See *id.* at 799-800, 20 S.W.3d at 313-14.

168. See *id.*, 20 S.W.3d at 313-14.

169. See *Rudd*, 341 Ark. at 798, 20 S.W.3d at 312.

nonfeasance “transform[ed] [Willis] into a state actor.”¹⁷⁰ In other words, if a custodial relationship exists between the state entity and the aggressor, the court explained, then the state entity thereby owes a duty to restrain the aggressor child from acting out violently toward other students.¹⁷¹

Although ultimately distinguishing these cases, the court first looked to case law involving custodial relationships between persons and state entities other than school districts.¹⁷² While acknowledging that several courts, including the Arkansas Supreme Court,¹⁷³ have found a custodial relationship to exist between prisons and their prisoners,¹⁷⁴ the court declined to extend the holdings in those cases to school districts and their students.¹⁷⁵ The court explained that prison liability derives from prison officials’ right to restrain prisoners’ actions, and, unlike prisons, school districts and their employees have no right to restrain students’ actions.¹⁷⁶ Also, the court advised, imposing upon school district employees a duty to restrain violent children would interfere with employees’ “primary purpose of teaching and carrying out administrative duties.”¹⁷⁷

The court, then, found no custodial relationship between the School District and Willis. Willis, therefore, was not a state actor for purposes of civil rights liability.¹⁷⁸ Accordingly, the School District could owe no duty unless its relationship with James imposed on it an affirmative duty of protection.¹⁷⁹

B. Custodial Relationship Analysis: No Duty to Protect Victim

After finding no special relationship between the School District and Willis, the court turned to the question of whether a special custodial relationship existed between the School District and James.¹⁸⁰

170. *Id.*, 20 S.W.3d at 312.

171. *See id.* at 799-800, 20 S.W.3d at 313-14.

172. *See id.* at 798-800, 20 S.W.3d at 312-13.

173. *See Shepherd v. Washington County*, 331 Ark. 480, 962 S.W.2d 779 (1998).

174. *See Rudd*, 341 Ark. at 799, 20 S.W.3d at 313.

175. *See id.* at 799, 20 S.W.3d at 313.

176. *See id.*, 20 S.W.3d at 313. The court presumably means that school officials cannot restrain students in the same way that prison officials and mental health care professionals may restrain individuals in their custody. For further discussion, see *infra* note 202.

177. *Rudd*, 341 Ark. at 799, 20 S.W.3d at 313.

178. *See id.* at 799-800, 20 S.W.3d at 313-14.

179. *See id.*, 20 S.W.3d at 313-14.

180. *See Rudd*, 341 Ark. at 800, 20 S.W.3d at 314.

The existence of such a relationship would impose upon the district a duty to protect James and could thus render the School District liable for Willis's violence.¹⁸¹ The court, relying solely on *Dorothy J. v. Little Rock School District*,¹⁸² found no special custodial relationship between the School District and James.¹⁸³

The Arkansas Supreme Court espoused the *Dorothy J.* court's rejection of the argument that compulsory school attendance laws placed the school district-student relationship in the category of special custodial relationships.¹⁸⁴ The court further adopted the district court's finding that school district liability for student-inflicted harm would force teachers to take on the roles of prison guards or police officers.¹⁸⁵

Another important factor in the *Dorothy J.* decision involved the remoteness of the violence from the state action; the violence in *Dorothy J.* took place at least two years after the state action.¹⁸⁶ The court in *Rudd* did not expressly address the remoteness of Willis's action from the State's alleged misfeasance.¹⁸⁷ The *Rudd* court did, however, note that, during his attendance at Jacksonville High, Willis had apparently not repeated the misbehavior which had characterized his attendance at Sylvan Hills.¹⁸⁸

In sum, the Arkansas Supreme Court held that no custodial relationship existed between the School District and Willis that would impose upon the School District a duty to restrain Willis.¹⁸⁹ Likewise, no special custodial relationship existed between the School District and James that would impose upon the School District a duty to protect James.¹⁹⁰ Therefore, in the court's view, no state action led to James's murder.¹⁹¹ Thus the appellants could not hold the School District liable for Willis's actions because the appellants failed to prove state action as the cause of James's death.¹⁹²

181. *See id.*, 20 S.W.3d at 314.

182. 794 F. Supp. 1405 (E.D. Ark. 1992), *aff'd*, 7 F.3d 729 (8th Cir. 1993).

183. *See Rudd*, 341 Ark. at 800-01, 20 S.W.3d at 314.

184. *See id.* at 801, 20 S.W.3d at 314 (citing *Dorothy J.*, 794 F. Supp. at 1414).

185. *See id.*, 20 S.W.3d at 314 (citing *Dorothy J.*, 794 F. Supp. at 1414). The district court in *Dorothy J.* also remarked that liability would result "anytime a child skinned his knee on the playground or was beat-up by the school bully." *Dorothy J.*, 794 F. Supp. at 1414.

186. *See Dorothy J.*, 794 F. Supp. at 1421, 1424.

187. *See Rudd*, 341 Ark. at 801, 20 S.W.3d at 315.

188. *See id.*, 20 S.W.3d at 315.

189. *See id.* at 799-800, 20 S.W.3d at 313-14.

190. *See id.* at 801, 20 S.W.3d at 315.

191. *See id.* at 799-800, 20 S.W.3d at 313-14.

192. *See id.*

V. SIGNIFICANCE

In holding that school districts owe children no duty of protection from peer abuse, the Arkansas Supreme Court, in *Rudd v. Pulaski County Special School District*,¹⁹³ joined the majority of jurisdictions. The majority of courts, however, have based their conclusions on faulty logic. The analysis that underlies the majority trend is flawed because the holdings in those cases do not logically follow from the Supreme Court's holdings in *Estelle*, *Youngberg*, and *DeShaney*. And although the Arkansas Supreme Court reached the correct result in this case, the court's ruling in *Rudd* unnecessarily sounds the death knell for every parent in Arkansas whose child suffers injury or death at the hands of fellow classmates.

In every decision where a court has found no constitutional duty to protect school children, courts have attempted to apply and interpret the United States Supreme Court's opinions in *Estelle*, *Youngberg*, and *DeShaney*.¹⁹⁴ In attempting to apply those holdings to school district cases, courts have interpreted the dependency requirement too narrowly. Courts have declined to include school children within the special relationship doctrine on the basis that school districts' custody of children is not absolutely involuntary.¹⁹⁵ The problem with this reasoning is that the Supreme Court's establishment of the special relationship doctrine is not based on absolute involuntariness.¹⁹⁶

In *Estelle*, where the Supreme Court first recognized a duty arising from a custodial relationship, the Court focused on the State's impairment of an individual's ability to care for himself and the individual's resultant dependency on the State.¹⁹⁷ Unlike an incarcerated adult, who would supply his own basic needs *but for* the State's deprivation of his liberty, children always depend on adults for their care. Without state compulsory attendance laws, children would not be any more capable of feeding, clothing, and sheltering themselves than they are when laws

193. 341 Ark. 794, 20 S.W.3d 310 (2000).

194. Author's note: Although the *Rudd* court did not mention *DeShaney* in its opinion, the court's reference to cases applying special relationship analysis and the state creation of danger doctrine reflects that it considered *DeShaney* and its progeny. See *Rudd*, 341 Ark. at 798-801, 20 S.W.3d at 312-15.

195. See *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1371 (3d Cir. 1992). See also *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272-73 (7th Cir. 1990).

196. See *Estelle*, 429 U.S. at 103-04; *Youngberg*, 457 U.S. at 309; *DeShaney*, 489 U.S. at 198-203.

197. See *Estelle*, 429 U.S. at 103-04.

force them to attend school. Hence, because children are always at the mercy of the adults whom they accompany, the analysis of whether a duty of care exists should not turn on the involuntariness of the child's presence in the company of those adults.

In *Youngberg*, Nicholas Romeo's mother petitioned the court to commit Nicholas to a mental care institution.¹⁹⁸ Because every state mandates that parents send their children to school, parents have less freedom in "choosing" to send their children to public schools than Ms. Romeo had in petitioning the court to commit her son to a mental health care hospital.¹⁹⁹ Yet the Supreme Court in *Youngberg* found that Pennhurst State Hospital owed Nicholas a duty, not only to provide him with the "basic needs" of food and shelter, but also to provide him with "habilitation," or "minimally adequate training."²⁰⁰ Moreover, the plight of school children is similar to Nicholas Romeo's situation in that children have no choice whatsoever in which schools they attend. Parents choose where their children attend school, as Ms. Romeo chose where her son would receive treatment for his disability.

Finally, the lower courts' blanket refusal to find a duty of protection in school district cases does not rationally follow from the Supreme Court's decision in *DeShaney*. In *DeShaney*, Joshua had been in the state agency's custody only once.²⁰¹ But a state agency's removal of a child from his home on one occasion is not analogous to a state's compulsion of its children's attendance at the same place every day from early childhood into near adulthood.

Therefore, the majority's reliance on the principle of absolutely involuntary custody is flawed because that analysis does not logically follow from the Supreme Court's development of the special relationship analysis.

The main problem with the *Rudd* decision is that it foreclosed any possibility that any school district or school official could ever be liable for failing to protect students from other students.²⁰² The court's holding means that no matter how egregious a school official's decision not to

198. See *Youngberg*, 457 U.S. at 309.

199. See *Greenfield*, *supra* note 7, at 588 n.1, 624.

200. See *Youngberg*, 457 U.S. at 318-19, 322.

201. See *DeShaney*, 489 U.S. at 192.

202. Author's note: Another problem with the *Rudd* decision is that the court bases its holding in part on the inaccurate premise that school districts possess no right to restrain students. See *Rudd*, 20 S.W.3d at 313. Students are subject to various types of restraint by school officials: they may be suspended, expelled, and detained. In some districts, school officials may even administer corporal punishment to students who misbehave. See ARK. CODE ANN. § 6-18-501 (LEXIS Repl. 1999).

act, no child in Arkansas can ever recover for harm he suffers at the hands of fellow students. Such an absolute denial neither serves the policy reasons underlying the decision nor follows logically from the Supreme Court's interpretations of custodial relationship analysis. After this decision, if a child were to approach a teacher, show the teacher a gun and announce his intention of killing a classmate, the teacher could not be liable for doing absolutely nothing. The teacher is under no legal obligation to notify a principal, a superintendent, a police officer, the children's parents, or even the possible victim.

Although absolute foreclosure was unnecessary, the court's decision in James Routt's case was justified. From a legal standpoint, even if compulsory attendance laws place children in a special relationship with school districts, James was twenty years old when Willis shot him.²⁰³ State law no longer required that James attend school.²⁰⁴ Further, if the analysis turns on the degree of the victim's dependency, and children are always dependent, James's case still fails because he was not a child.

Policy reasons also support the court's decision in *Rudd*. During his attendance at Jacksonville High, Willis had not repeated the behavior that characterized his attendance at Sylvan Hills.²⁰⁵ In *Rudd*, the possibility that Willis might act out violently probably seemed at the time only slightly greater than any other child's tendency toward violence. School officials who attempt to prevent violence in situations like that which precipitated *Rudd* subject themselves to liability from the targeted child's parents. Parents of injured children and parents of children that the school district deems violent will both sue school districts. Whether school officials act or not, they will be subject to liability.

Moreover, the school district had taken every possible precaution with the possible exception of informing Ms. Davis of Willis's violent history. Sylvan Hills authorities had expelled Willis when he demonstrated violent tendencies the year before and had recorded each incident in their records.²⁰⁶ It would be neither practical nor fair to expect a school to track each student's history from the beginning of the child's attendance and to report that history to every school official who might come into contact with that child and to further require that officials prevent children from misbehaving when those children demonstrate no

203. See Crownover, *supra* note 1, at 1A.

204. See ARK. CODE ANN. § 6-18-201 (LEXIS Repl. 1999).

205. See *Rudd*, 341 Ark. at 801, 20 S.W.3d at 314-15.

206. See *id.* at 796, 20 S.W.3d at 311.

intention of doing so. As the Court in *Estelle* explained, state entities should not be liable for failing to protect against an “unforeseeable accident.”²⁰⁷

On the other hand, not every fact situation should lead to this result. Where children make known their violent tendencies or where teachers actually know of specific misconduct, courts should allow liability to attach to school districts who fail to act. Rather than summarily disposing of school district cases, courts should carefully consider the specific facts of each case before declaring that school districts owe no duty of protection.

In conclusion, the majority trend away from finding a duty to protect in public schools derives from a questionable analysis. Further, after *Rudd*, Arkansas plaintiffs have no chance of recovering against a school district for an official’s failure to act, regardless of the circumstances in which a student’s violence arises. Despite the court’s unnecessary foreclosure of school district liability in every situation, however, both policy and law justified the Arkansas Supreme Court’s decision to follow the majority trend in *Rudd*.

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207. See *Estelle*, 429 U.S. at 105 (citing *Louisiana v. Resweber*, 329 U.S. 459 (1947)).

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