The Legal Intelligencer

Litigating Bullying Cases Post- *Morrow*

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Case Digest Summary

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It began in third grade. “Dante” was called “dumbass,” “retard,” and “b_ _ _ _ ,” according to *N.T. v. School District of Philadelphia*. On a good day, classmates would take Dante’s things and taunt him. On bad days, which were frequent, Dante was attacked by groups of students in the hallways and restrooms. In fourth grade, Dante’s sister found him attempting to hang himself with an extension cord in their home. Dante survived, but bullies continued to harass him until he left his school district.

Dante’s story is far from unique. According to the U.S. Department of Justice, one in seven students in K-12 is either a bully or a victim of bullying. Ninety percent of fourth through eighth graders report being victims of bullying. Each day, 160,000 students miss school due to a fear of being bullied. Most dramatically, school-shooting incidents, such as Sandy Hook and Columbine, have been linked to bullying.

As an education lawyer, this past summer, the U.S. Court of Appeals for the Third Circuit made my job much harder. In *Morrow v. Blackhawk School District*, 719 F.3d 160 (3d Cir. 2013), the Third Circuit limited a school district’s duty under the 14th Amendment to protect its students from bullying to the point where it is hard to imagine any bullying lawsuit, based upon substantive due process, surviving constitutional muster. The Third Circuit’s en banc decision is disappointing on a number of levels and holds vast implications for how parents and children can and cannot use the legal system to address the malady of bullying. This article critiques not only the court’s explicit analysis, but also what appears to be a motivating force below the surface. While the court dresses its opinion in legal formalism by professing to apply a set of pre-existing legal rules to reach a conclusion, it appears that policy preferences are, at least, partly driving its analysis.

In *Morrow*, two sisters, Brittany and Emily, were the victims of bullying at their school in the Blackhawk School District. After a physical altercation, the bully and Brittany were suspended. The school suggested that the Morrows report the bully to the local police. They did, and the bully was arrested. After the bully returned from the

school suspension, the harassment continued. When the school told the Morrows that it could not guarantee their children's safety, the Morrows enrolled them in a different school. Ultimately, the Morrows sued the Blackhawk School District and its assistant principal, alleging that defendants denied them substantive due process by not protecting Brittany and Emily from the bullying.

The starting point for any analysis of such a claim is *DeShaney v. Winnebago County*, 489 U.S. 189, 198-201 (1989).

In *DeShaney*, the Winnebago County Department of Social Services received ongoing reports that a father was physically abusing his 4-year-old son. The state failed to effectively intervene and the boy ultimately suffered brain damage. The *DeShaney* court ruled that a state actor generally has no constitutional duty to intervene to protect an individual from private violence unless: (1) a "special relationship" exists between the parties or (2) the state actor creates or exacerbates the danger that harmed the plaintiff.

Typically, "special relationships" exist where the state has restrained a person's ability to protect himself or herself, i.e., with prisoners, involuntarily committed individuals, and foster care children. The Morrows believed that a "special relationship" existed in their case because, like other students, their children were subject to compulsory attendance laws, schools serve in loco parentis, and Brittany and Emily were subject to the disciplinary authority of the school. The Morrows also contended that the defendants had worsened the danger that their children faced, and therefore, were liable under the state-created danger theory as well.

Third Circuit Rejects 'Special Relationship' Exception

After finding that state actors must have near complete authority over an individual's basic life decisions for a "special relationship" to exist, the court held that public schools do not possess such control.

In reaching this conclusion, the court relied on dicta from *Vernonia School District v. Acton*, 515 U.S. 646 (1995), a case where the Supreme Court analyzed whether drug testing student athletes violates the Fourth Amendment. After deciding this issue, the *Vernonia* court stated, "We do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect.'" Even though the *Vernonia* case had no bearing on the 14th Amendment and the language was mere dicta, the *Morrow* court held the contrapositive—that schools have no constitutional duty to protect our children from bullies.

In addition to its reliance on dicta that appears inapposite, the dissent points out that the majority also relied on questionable Third Circuit precedent. The court's reliance on these legal sources suggests that something other than traditional legal formalism may have been driving some of its analysis. Statements by the majority regarding state liability and the reach of federal courts illustrate that normative concerns about opening up a floodgate of litigation, at least, in part, motivated the decision. In fact, the *Morrow* court concluded its discussion of the special relationship exception stating: "The due process clause is not a surrogate for local tort law or state statutory and administrative remedies. Nor is substantive due process … a license for judges to supersede the decisions of local officials and elected legislators on such matters."

The court's analysis of the state-created danger exception further illustrates the court's normative concerns.

Court Limits Reach Of State-Created Danger Theory

In a state-created danger case, among other elements, a plaintiff must show that a state actor has used her authority to affirmatively create or render a citizen more vulnerable to danger, as in *Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir. 2006).

The dissent in *Morrow* argued that the school district took affirmative action by permitting the bully to return to school after suspension, allowing the bully to board Brittany's school bus, and suspending Brittany when she defended herself against the bully. The court held that permitting conduct is not the same as creating a danger, otherwise "every decision by school officials to use or decline to use their authority … would constitute affirmative conduct that may trigger a duty to protect." In other words, "schools would always be liable."

The court's analysis of the state-created danger exception also proves troubling. The action/inaction construct that the court embraces has the potential to lead to absurd outcomes. If a school knowingly places a bully in the same classroom as the victim, then presumably, the "affirmative act" requirement is satisfied. But, if bullying arises after the two students are placed in a classroom together and the school refuses to intervene, then the plaintiff's claim will likely fail. In both situations, the school is aware that a student is being bullied, but the court's analysis only appears to compel liability in the former case. One can easily imagine a number of other situations where the action/inaction divide leads to absurd results.

But even if an affirmative act is a prerequisite, it would appear that the plaintiffs satisfied it. As the dissent indicates, in suspending Brittany when she defended herself against the bully, the school district increased the danger Brittany faced by circumscribing her ability to defend herself.

A Limiting Principle

Like its analysis of the "special relationship," the court's stated concerns about restricting what can constitute an affirmative act appears to be motivated, in part, by a desire to limit the scope of school liability. In a concurrence/dissent, Judge Thomas Ambro crystallized the court's concerns, stating, "Federal courts cannot be the forum for every complaint that a government actor could have taken an alternate course that would have avoided harm to one of our citizens."

But, such concerns are overblown as limits to liability are already embedded in the legal framework for 14th Amendment claims.

For example, in any constitutional claim, a plaintiff needs to prove that the state acted with deliberate indifference that shocks the conscience—no easy standard to satisfy. (See, e.g., *County of Sacramento v. Lewis*, 523 US 833, 849-50 (1998).) In school harassment claims, plaintiffs must also establish actual notice on the part of a school principal, causation, and injury.

Courts have long held a storied place as a forum for addressing these types of social ailments. Unfortunately, *Morrow* creates an uphill battle for any parent who seeks to use the courts to remediate the harm that school bullying can cause.

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