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THE SCHOOL BUS AND STUDENT SAFETY: POLICY IMPLICATIONS

BY: RICHARD VACCA

SENIOR FELLOW, COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

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Overview

In the recent past several disconcerting incidents involving school buses have been reported in the news. While some reports involve highway accidents, others involve situations where automobile drivers have passed school buses stopped with their caution lights flashing. Others involve children disembarking at the bus stop being hit by passing cars and still others involve violent student behavior while the school bus is traveling down the road. While in some jurisdictions such incidents have prompted state legislatures to relook at existing statutes covering traffic laws and school buses, others have caused local school districts to mount surveillance cameras both in and on school buses.

Bus Safety. Student safety is, always has been, and will continue to be a major topic of concern in communities across this nation. Of all the areas of local public school system operation where safety is a constant focus, school system transportation, especially the school bus, is at the top of the list. One only has to envision the millions of children across this country who each day ride thousands of school owned buses in all kinds of weather, over all kinds of terrain, from crowded city streets to winding country roads, and a concern for safety becomes an obvious and clear reality. At the same time parents expect that their children will be kept safe from the time they leave the house, gather at the school bus stop each morning, step onto the bus, and later that day step off the bus at the same bus stop and return home. While year after year the number of harmful situations actually are few in number, every now and then somewhere in our country a tragic story involving a school bus breaks in the news and the cry for school bus safety and tougher penalties for violators heats up once again. Needless to say in many such situations, school bus drivers are a consistent focus of the conversation.

Key Questions to Ask. Is it possible to guarantee the complete safety of students while they are on school property (including school system owned vehicles and designated school bus stops), or in attendance at school sponsored and/or sanctioned activities, or on their way to and from home to school each day? Does a common law duty of care exist or are school officials and personnel (e.g., school bus drivers) expected to exercise only reasonable and prudent care? What about sudden and unforeseen conditions, events, and happenings? Are there situations where a special and/or custodial relationship exists between school systems and their students? What happens in such situations? Does an expectation of reasonable and prudent care grow into a duty of care?

Analysis to Apply in Search of Fault. What constitutes adequate care for students is fact based—that is, it depends on the circumstances in a given situation. To put this another way, what constitutes adequate care in one situation might not be so in another. However, one thing is certain. While student safety cannot be guaranteed, and situations differ in fact, there is no room for *negligence* in any situation involving students and a potential for injury. Thus, negligence becomes the focus of the analysis—*i.e.*, the search for fault.

As a general rule, to establish school district or employee liability where student injury occurred, the facts must show that the school officials, or employees (e.g., administrator, teacher, coach, bus driver) had a duty to keep students from harm, or either created, or had knowledge of, an existing dangerous condition but did not take reasonable steps to remedy the condition. Moreover, the breach of duty owed, or prior knowledge and failure to avoid or correct the existing condition was subsequently the *proximate cause* of student injury. Russo v. Valley Central School District (N.Y.A.D.2 Dept. 2006)

In more recent cases the element of *deliberate indifference* often is applied to the analysis. *Deliberate indifference* has been defined as a situation in which the facts establish that school officials or employees had *direct* (actual, sufficiently specific) knowledge of the potential for serious harm to students, failed to take reasonable steps to remedy the condition, and this deliberate indifference subsequently was the proximate cause of student injury. As one court succinctly phrased it, deliberate indifference exists where school officials knew or were “willfully blind” to what was going on and failed to take reasonable and necessary steps to remedy the situation. Harry A. v. Duncan (D. Mont. 2005)

Another element of analysis to apply in determining whether negligence exists involves *foreseeability*. While it would be unrealistic to believe that school officials and employees can be held responsible for every mishap that occurs on school property during the school day, *foreseeability* dictates that school officials or employees (administrator, teacher, coach, bus driver—working directly with and responsible for students) are expected to take *reasonable care* to avoid acts of commission, or omission, and/or harmful conditions that he or she can *reasonably foresee* would likely cause injury to students. (Vacca and Boshier, 2012)

Recently, while searching for new case law to add to the revised ninth edition of our text, I came across a comprehensive and instructive decision from the New York Court of Appeals—one that reads like a restatement of tort law regarding public school buses.

***Williams v. Weatherstone* (N.Y. 2014)**

Facts. At the time of her injury (March 13, 2008) the student in this case (hereafter referred to as “A”) was a twelve-year-old sixth grade middle student in a local public school system in New York State. Described by her mother as exhibiting “behavioral issues” while in kindergarten, “A” repeated kindergarten, remained “very behavioral noncompliant,” and she could not identify letters and numbers. Subsequently diagnosed by doctors as ADD/ADHD, with mild mental retardation, at age seven “A” began receiving Supplemental Security Income benefits because of her mental disability.

In March 2005, “A” moved to another school system in the same state. Desiring that her daughter be mainstreamed as much as possible, Mom enrolled “A” in a new middle school where she had an Individual Education Plan (IEP). Subsequently, an IEP for the 2007-2008 school year included, under Special Transportation, that “A” “should be transported to school even when she is within walking distance due to concerns regarding her safety (big bus).” No provision for an escort or monitor to assist her was included in the IEP.

“A” lived on a busy state highway. Her school bus stop was located at the end of her driveway—a twenty-yard driveway connecting her home to the busy highway. A red dumpster was located on the grass on one side of the driveway. Typically “A” played for ten or fifteen minutes while waiting for the bus. “A’s” Mom had a strict rule that “A” was never allowed past the dumpster while playing and waiting for the bus to arrive, never allowed to cross the busy highway without an escort, and that she had to wait at the dumpster until the bus completely stopped at the mailbox. Mom later testified that “A” dependably followed the “instructions and boundaries.”

On March 12, 2008, the bus that “A” had been taking since the beginning of the school year was rerouted to pick up children who had recently moved into the school district. Because that bus did not pass “A’s” house she was assigned to another bus on her route. “A’s” house was the first stop on the route and the pick-up and drop-off times remained the same. Also, a monitor was on that bus for students with IEP’s. The monitor knew “A” and had previously worked with her as a one-on-one teacher’s aide. They became reacquainted on the March 12 bus ride.

On March 13, while her stop was closer than the previous first stop on the route, “A’s” new bus driver forgot to stop and pick up “A” at her house—a ten minute drive from the bus garage. Neither the driver nor the monitor waved or otherwise signaled to “A,” even though the monitor did glimpse “A” standing by the red dumpster as the bus passed. The monitor alerted the driver who then turned off the highway, waited for traffic to clear, and went back east on the busy highway toward “A’s” bus stop. The bus now followed a car driven by defendant Weatherstone. The bus driver intended to go east past “A’s” house and turn around to come back west, stop, and pick up “A” at her designated bus stop. While still traveling east the bus driver and the monitor saw what appeared to be debris being thrown up in front of the Weatherstone car. The Weatherstone car pulled off onto the shoulder and, as the bus driver slowed down, the monitor spotted “A” lying seriously injured in the eastbound lane.

A subsequent state police report attributed the accident to pedestrian error and secondarily an obstructed view—Weatherstone’s failure to clear frost from her windshield. At a municipal law hearing and in a deposition, “A’s” Mom said that “A” told her that the bus missed her, that she saw the bus stop and turn around, and that she “looked both ways” and ran to catch the bus on the other side of the highway.

Trial Court Action (In New York State a Supreme Court).

On October 27, 2008, “A’s” Mom filed a personal injury action against Weatherstone and the school district—*i.e.*, alleging the school bus driver’s negligence in failing to pick up “A” at her bus stop and turning around to go back and pick her up caused her to be hit by the car. On October 21, 2011, the school district moved for summary judgment arguing that it owed no duty to a student not within its physical care or custody and that its purported negligence was not a proximate cause of “A’s” injuries. Experts differed as to the propriety of the actions or inactions of district employees and whether the employees, especially the bus driver, proximately caused the accident.

On March 1, 2012, the trial court denied the school district’s motion in its entirety. Citing a prior New York State Court of Appeals decision, Pratt v Robinson (N.Y. (1976), where the court held that a school district owes its students a duty to exercise the same degree of care as would a reasonably prudent parent under similar conditions, and that this duty exists only so long as a student is in the school district’s care and custody, the trial court held that in this case “A’s” status as a special needs child justified an “expansion” of the school district’s duty. The court denied that part of the school district’s motion seeking dismissal of the complaint for lack of proximate cause and the school district appealed.

Intermediate Appellate Division Decision.

On March 22, 2013, a majority (two Justices dissenting) of the Appellate Court Division (4th Dept.) disagreed with plaintiff's claim that the district owed a duty because the child was a special education student. The IEP required only that transportation be provided. However, said the Court, under the facts of this case, "A" was within the orbit of the school district's authority. What is more, the injury occurred during the act of busing itself, broadly construed. And, it was reasonably foreseeable (the bus arrived at the bus stop, passed it, and turned around) that the child would be placed into a foreseeably hazardous setting the school district had a hand in creating. As such, in this case the district owed a duty to the child. The dissenters rejected plaintiff's contention endorsed by the majority, would have reversed the lower court order, and would have granted the school district's motion in its entirety.

The intermediate appellate court majority agreed with the trial court that an issue of fact existed as to whether the school district's alleged negligence was the proximate cause of "A's" injuries. On June 7, 2013, the Appellate Division granted the school district leave to appeal to the New York State Court of Appeals where the following question was certified: Was the order of the Appellate Division entered on March 22, 2013, properly made? At 961 N.E.2d 673 (N.Y. App. Div. 4th Dept., 2013)

New York State Court of Appeals Rational and Decision.

The New York State Court of Appeals began its analysis of the issues presented in Weatherstone by discussing in detail and comparing both Pratt v. Robinson (N.Y. 1976), which the court acknowledges is the seminal case on duty owed by a school district to students it transports, and Ernest v. Red Cr. Central School Dist. (N.Y. 1991). Pratt involved a seven-year-old child who, having disembarked at the regular bus stop nearest to her family residence, was severely injured while crossing a heavy traffic street three blocks away from the stop while walking home. Ernest involved a second grade student who was hit by a truck and severely injured while crossing the road on which the school was situated. There were no sidewalks on the road and no traffic signals or crosswalks to assist students in crossing the road.

Mainly relying on and quoting from Pratt, but citing case law both from New York and other states, the Court of Appeals stressed that "negligence of the sort alleged can only be found if there exists a duty on the part of the school district to transport [the child] to a location from which she could walk home without crossing any dangerous street on the way." The court also points out that in Pratt it opined that the state legislature has not imposed such a duty, and that the "common law custodial duty of a school toward its pupils" did not "supply any basis for liability." Such a duty stems from the school's "physical custody of and control over the child." And, when custody ceases, the custody the child passes "out of the orbit of the school's authority" and "the parent is free to reassume control over the child's protection..."

Continuing to discuss and quote from Pratt the appellate court reiterated that when a school district has undertaken to transport students it has a duty to perform this task "in a careful and prudent manner." In its analysis the court emphasizes the importance of a school district's obligation to place the school bus stop in a safe location, and for bus drivers to stop, remain stopped with lights flashing, and to properly instruct the children on crossing the street. Students transition from the school district's transportation to an area "outside its scope." In Pratt, said the court, we concluded that the school district

fulfilled its duty to provide busing with due care, and it did not provide transportation from the bus stop to the home, thus the district could not be held liable for hazards that might beset children on their way home from the bus stop.

By contrast, said the court, in Ernest, the injured child “was not released in a safe spot but to a foreseeably hazardous setting partly of the School District’s making. Thus, while a school has no duty to prevent injury to schoolchildren released in a safe and anticipated manner, the school breaches a duty when it releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating.” The Ernest decision held that where a student is placed in foreseeable harm a school district’s duty of care requires “continued exercise and control of the child.” Here the Court quoted McDonald v. Central School Dist. No. 3 (N.Y. 1942)

Relying on Pratt and Ernest and other case law on point, the Court of Appeals then focused on each of plaintiff’s theories in Weatherstone and reached the following conclusions:

- Because “A” walked onto the highway and was injured while the school bus was still moving in traffic, she was never within the district’s physical custody or at any time in a space of implied custody and control, “A’s” injuries did not occur “during the act of busing itself, broadly construed.”
- “A” was never in the school district’s physical custody so the school district did not release her into a “hazardous setting.” She was in plaintiff’s custody while waiting at the dumpster—where plaintiff set boundaries and rules to keep “A” safe and away from the highway, and plaintiff acknowledged her responsibility for her daughter’s safety during those times.
- Neither the bus driver nor the monitor waved at or signaled “A” or summoned her to cross the highway, and nothing in the record shows that the bus driver intended by driving east to signal “A” to leave the safety of her designated bus stop and cross the busy highway.
- Regarding plaintiff’s claim that a special duty is imposed by the fact that “A” is a special needs child requiring special care and additional transportation-related needs, this argument is “belied by the IEP itself.” The IEP did not specify any “special busing services.” It only required “regular bus transportation.” The school district in the IEP undertook only to provide the same transportation required for all students

Emphasizing the concept of *in loco parentis* as “the fountainhead of the duty of care owed by a school to its students,” and because the facts in this case show that “A” never left plaintiff’s custody and control and that plaintiff entrusted “A” to wait at her designated bus stop independently, the Court held that the accident did not happen while “A” was within the school district’s custody and control. Refusing to limit or modify either Pratt or Ernest, and expand the duty of care, the Court concluded that the school district did not owe any common law duty to the child under the circumstances and facts presented.

Decision (one Justice dissenting). The appealed order should be reversed, with costs; defendant school district’s motion for summary judgment dismissing the complaint and cross claims against it granted; and the certified question is answered in the negative. The dissenter opined that since a duty of

reasonable care was owed, a triable issue existed as to whether “A’s” injury was proximately caused by a breach of that duty.

Policy Implications

While the applicability of the New York Court of Appeals decision is limited to New York State, and emphasizing that incidents involving public school system buses are fact based and for analysis must be placed within the context of state law (both traffic law and public school law), the Court’s rationale is nonetheless instructive. Williams v. Weatherstone (2014) reads like a restatement of the law on tort liability as applied to public school busing. What follows are generalized suggestions for local school board policy gleaned from that decision:

School board policies must make it clear that:

- The school system, with cooperation and involvement of appropriate local municipal governmental agencies, plans for and locates school bus stops in safe locations nearest to the homes where students reside; and, regularly monitors the conditions of designated school bus stops in an effort to maintain student safety.
- Where unsafe and or dangerous conditions might develop at school bus stops the Board seeks the cooperation and involvement of parents and appropriate local governmental agencies to remedy the existing conditions.
- The Board requires that school bus drivers follow all traffic laws and implement all school board policies and procedures applicable to school bus operation and student safety; that drivers take steps to maintain student safety while the bus is in transit; and that drivers properly instruct students on safety precautions to take while boarding and disembarking from the school bus.
- The school system seeks the cooperation and involvement of parents in maintaining student safety: (1) at school bus stops; (2) while children are boarding and disembarking at school bus stops; and (3) as children transition from the school bus stop to home.

Final Comment

The reader is reminded that state governmental immunity statutes applicable to local public school boards and school officials must be factored into the analysis where they exist.

Richard S. Vacca
Senior Fellow and Editor
CEPI

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

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