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WHO'S THE BULLY NOW? THE THIRD CIRCUIT GIVES  
NEGLIGENT SCHOOL DISTRICTS A CONSTITUTIONAL "HALL  
PASS" IN *MORROW v. BALASKI*, LEAVING BULLIED  
STUDENTS OUT IN THE COLD

NICHOLAS A. KARWACKI\*

"No one gains from ignoring school bullying—not even the bullies themselves. The students who are bullied may suffer lasting scars in the form of an inferior education, emotional damage, and decreased self-confidence; the bullies are left to continue on a path that may lead to future violence."<sup>1</sup>

I. BULLYING 101: AN INTRODUCTORY COURSE

For Brittany Morrow, each day at Blackhawk High School was an inescapable nightmare.<sup>2</sup> For over eight months, Brittany was pushed down the stairs, elbowed in the throat, and verbally abused by classmate Shaquana Anderson.<sup>3</sup> There was no reprieve when the school day ended; Anderson followed Brittany home, threatened her over the phone, and threatened her on Myspace.<sup>4</sup> Despite being adjudicated delinquent and subjected to two no-contact orders, Anderson remained in school and continued to bully Brittany.<sup>5</sup> When the Morrow family voiced their concern

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\* J.D. Candidate, 2015, Villanova University School of Law; B.A. 2012, Villanova University. I would like to thank Lauren Purcell, who inspired this Casebrief and provided loving support and encouragement throughout the writing process. I would also like to thank my parents, Tom and Regina Karwacki, who have tirelessly and unconditionally supported me in all of my pursuits. Finally, I would like to recognize two of the finest teachers in the country, Regina Karwacki and Margaret Karwacki, who showed me at a young age that dedicated, hard-working teachers can make an immeasurable impact on their students' lives. Stop bullying, start caring.

1. *T.K. v. New York City Dep't of Educ.*, 779 F. Supp. 2d 289, 293 (E.D.N.Y. 2011).

2. *See Morrow v. Balaski*, 719 F.3d 160, 164–65 (3d Cir. 2013) (en banc) (describing factual background).

3. *See id.* at 164 (chronicling harassment occurring between January and October of 2008).

4. *See id.* (explaining after-school harassment occurring on school bus, internet, and at school football game).

5. *See id.* at 164–65 (discussing court intervention and school response). Anderson was charged with simple assault, making terroristic threats, and harassment for attacking Brittany in the lunchroom on January 7, 2008. *See id.* at 164 (explaining nature of charges). On April 9, 2008, Anderson was given probation and was ordered not to contact Brittany. *See id.* (describing Anderson's initial sentence). In September 2008, Anderson was adjudicated delinquent and another no-contact order was issued. *See id.* (discussing court order). School officials were furnished

to school administrators, the school's response was simple: find a new school for Brittany.<sup>6</sup>

Unfortunately, Brittany Morrow's nightmare is a reality for a startling number of students in the United States.<sup>7</sup> According to the National Center for Education Statistics (NCES), approximately twenty-eight percent of students ages twelve to eighteen reported that they were bullied during the 2009 school year.<sup>8</sup> Bullying peaks during the middle school years, with thirty-nine percent of sixth graders, thirty-three percent of seventh graders, and thirty-two percent of eighth graders reporting that they have been bullied.<sup>9</sup> According to a 2011 study conducted by the National Education Association, sixty-two percent of teachers and educational professionals reported having observed at least two incidents of bullying per month, while forty-one percent reported witnessing bullying on a weekly basis.<sup>10</sup>

The statistics are especially alarming in light of empirical evidence illustrating the long-term physical and emotional harm that bullying in-

with copies of both no-contact orders. *See id.* at 164–65 (discussing efforts of Morrow family to induce school to protect their daughter).

6. *See id.* (noting school's response). In a September meeting, school officials told the Morrrows that they "could not guarantee Brittany and [her sister] Emily's safety." *Id.* at 164. Administrators "advised the Morrrows to consider another school for their children." *Id.* at 165.

7. *See* SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2011, BUREAU OF JUSTICE STATISTICS v (2012), available at <http://www.bjs.gov/content/pub/pdf/iscs11.pdf> (analyzing percentage of students who reported being bullied in 2009). Bullying is defined as a series of "negative acts carried out repeatedly over time" that "involves a real or perceived imbalance of power, with the more powerful child or group attacking those who are less powerful." Nels Ericson, *Addressing the Problem of Juvenile Bullying*, NAT'L CRIMINAL JUSTICE REFERENCE SERV. 1 (June 2001), <https://www.ncjrs.gov/pdffiles1/ojdp/fs200127.pdf>. Bullying can be categorized in "three forms: physical (hitting, kicking, spitting, pushing, taking personal belongings); verbal (taunting, malicious teasing, name calling, making threats); and psychological (spreading rumors, manipulating social relationships, or engaging in social exclusion, extortion, or intimidation)." *Id.*

8. *See* ROBERS ET AL., *supra* note 7, at v (analyzing data collected during 2009 school year). According to the study, nine percent of students reported being pushed, shoved, tripped, or spit on; six percent reported being threatened with harm; and six percent reported having been cyber bullied. *See id.* (listing most commonly reported forms of bullying).

9. *See id.* (providing statistics for bullying in middle school). The NCES further reports that approximately twenty-eight percent of ninth graders, twenty-seven percent of tenth graders, twenty-one percent of eleventh graders, and twenty percent of twelfth graders reported being bullied. *See id.* (providing statistics for bullying in high school).

10. *See* Michaela Gulemetova, Darrel Drury & Catherine P. Bradshaw, *Findings from the National Education Association's Nationwide Study of Bullying: Teachers' and Education Support Professionals' Perspectives*, in WHITE HOUSE CONFERENCE ON BULLYING PREVENTION, STOPBULLYING.GOV 11–12 (Mar. 10, 2011), available at <http://www.stopbullying.gov/resources-files/white-house-conference-2011-materials.pdf> (discussing number of teachers and educational professionals who reported observing bullying in schools).

flicts on its victims.<sup>11</sup> A 2013 study published in the *Journal of the American Medical Association* found that victims of bullying exhibit higher rates of agoraphobia, generalized anxiety, panic disorder, and depression throughout their lives.<sup>12</sup> This evidence is in accord with a notable long-term study that found bullying victims demonstrate higher levels of depression and diminished self-esteem in adulthood.<sup>13</sup>

Despite the prevalence of bullying in schools and studies evidencing its detrimental effects, Pennsylvania law severely limits the tort remedies available to victims.<sup>14</sup> Under the Pennsylvania Political Subdivision Tort Claim Act (PPSTCA), school districts and school officials acting in their

11. See Susan M. Swearer, *Risk Factors for and Outcomes of Bullying and Victimization*, in WHITE HOUSE CONFERENCE ON BULLYING PREVENTION, STOPBULLYING.GOV 3, 7 (Mar. 10, 2011), available at <http://www.stopbullying.gov/resources-files/white-house-conference-2011-materials.pdf> (analyzing psychological, biological, and academic impact bullying has on its victims). Swearer found that bullying imposes serious biological consequences on its victims, saying “[t]he stress of being bullied has been hypothesized to depress immune functioning and research has found that cortisol moderated the link between being bullied and physical health.” *Id.* Further, she explained that bullying has a significant psychological impact on its victims, stating that, “[i]ndividuals involved in bullying and victimization have higher levels of depression, anxiety, and externalizing behavior.” *Id.* (citing Clayton R. Cook et al., *Variability in the Prevalence of Bullying and Victimization*, in HANDBOOK OF BULLYING IN SCHOOLS: AN INTERNATIONAL PERSPECTIVE 347–62 (Shane R. Jimerson, Susan M. Swearer & Dorothy L. Espelage eds., 2009)).

12. See Recent Case, *Fourteenth Amendment—Duty to Protect—Third Circuit Holds That State Has No Duty to Protect Schoolchildren from Bullying Under the Special Relationship or State-Created Danger Exceptions.*—*Morrow v. Balaski*, 719 F.3d 160 (3d Cir. 2013) (*en banc*), 127 HARV. L. REV. 811, 818 n.76 (2013) [hereinafter *Fourteenth Amendment—Duty to Protect*] (citing William E. Copeland et al., *Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence*, 70 J. AM. MED. ASSOC. PSYCHIATRY 419, 422 (2013)) (discussing 2013 study finding that bullying victims exhibit higher rates of several psychological disorders in adulthood); see also Laura M. Bogart et al., *Peer Victimization in Fifth Grade and Health in Tenth Grade*, 133 PEDIATRICS 440, 440–43 (2014), available at <http://pediatrics.aappublications.org/content/early/2014/02/11/peds.2013-3510.full.pdf+html> (finding bullied students exhibit poor physical and mental health in comparison to non-victimized peers).

13. See Dan Olweus, *Bullying or Peer Abuse at School: Facts and Intervention*, 4 CURRENT DIRECTIONS IN PSYCHOL. SCI. 196, 197 (1995) (citing Dan Olweus, *Victimization by Peers: Antecedents and Long-Term Outcomes*, in SOCIAL WITHDRAWAL, INHIBITION, AND SHYNESS IN CHILDHOOD 315–41 (Jens B. Asendorpf & Kenneth H. Rubin eds., 1993)) (“In a follow-up study, I found that the former victims of bullying at school tended to be more depressed and had lower self-esteem at age 23 than their nonvictimized peers.”).

14. See *Morrow v. Balaski*, 719 F.3d 160, 176–77 (3d Cir. 2013) (*en banc*) (discussing ramifications of Political Subdivision Tort Claim Act). The majority notes that Pennsylvania schools are immunized from liability for the negligence of their own officials. See *id.* (“We realize that Pennsylvania’s courts have held that school districts are ‘the beneficiaries of immunity pursuant to the [Political Subdivision Tort Claim] Act’ . . . and are not subject to ‘tort liability . . . when students are injured in the course of the school day, even if, assuming arguendo, there was negligence on the part of the school officials.’” (first and third alterations in original) (citation omitted) (quoting *Auerbach v. Council Rock Sch. Dist.*, 459 A.2d 1376, 1378 (Pa. Commw. Ct. 1983))).

official capacity are immunized from tort liability when an injury occurs in school.<sup>15</sup> Therefore, bullying victims are currently unable to hold school districts and school employees accountable for their negligence in state court.<sup>16</sup>

Accordingly, victims are left with two options: bring a tort action against the bully in state court or bring a constitutional action against the school district in federal court.<sup>17</sup> In order to bring an action against a Pennsylvania school district in federal court, a victim must raise a constitu-

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15. See 42 PA. CONS. STAT. § 8541 (2014) (“Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.”). The Third Circuit has held that school districts are granted “broad immunity” under the Political Subdivision Tort Claim Act. See *Sanford v. Stiles*, 456 F.3d 298, 315 (3d Cir. 2006) (“Under the PPSTCA, local agencies such as school districts are given broad tort immunity.”). Under the Act, a subdivision may be held liable in eight circumstances:

- (1) [T]he operation of a motor vehicle in the possession or control of a local agency;
- (2) the care, custody or control of personal property in the possession or control of a local agency;
- (3) the care, custody or control of real property;
- (4) a dangerous condition created by trees, traffic controls, or street lights;
- (5) a dangerous condition of utility service facilities;
- (6) a dangerous condition of streets;
- (7) a dangerous condition of sidewalks;
- (8) the care, custody or control of animals in the possession or control of a local agency.

*Id.* at 315 n.18 (citing 42 PA. CONS. STAT. § 8542). The court in *Sanford* further held that municipal employees are entitled to the same immunity except when an official acts with “actual malice” or “willful misconduct.” *Id.* at 315. The Third Circuit described willful misconduct as a “demanding standard” that requires “conduct whereby the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desire can be implied.” *Id.* (quoting *Renk v. City of Pittsburgh*, 641 A.2d 289, 293 (Pa. 1994)) (internal quotation marks omitted). In *Sanford*, the court found that a school and its guidance counselor were immune from a state law negligence claim when a student committed suicide after a meeting with the guidance counselor. See *id.* (discussing facts and holding).

16. See *Morrow*, 719 F.3d at 184 (Smith, J., concurring) (“Pennsylvania, like many other states, has deliberately chosen not to make schools and other local government agencies liable for claims like the *Morrows*’.”); see also *Auerbach*, 459 A.2d at 1378 (holding school district not liable for negligent failure to protect student attacked on campus); *Robson v. Penn Hills Sch. Dist.*, 437 A.2d 1273, 1275–76 (Pa. Commw. Ct. 1981) (holding school district is not liable for injury caused by pencil).

17. See *Morrow*, 719 F.3d at 184 (Smith, J., concurring) (“[S]tate law usually provides victims with the ability to sue and recover from bullies who assault, inflict emotional distress on, or commit other torts against fellow students and from the parents whose negligent care allow the bullies to do so.”); see also *id.* at 201–02 (Fuentes, J., dissenting) (“Perhaps students may seek redress under other federal statutes for certain instances of pervasive or race-motivated harassment.”); *Condel v. Savo*, 39 A.2d 51, 53 (Pa. 1944) (holding parents may be held “liable for the torts of [their] child” if they had “knowledge . . . of the child’s mischievous and reckless disposition” and “fail[ed] to exercise the control which they have over their child”). Students may also bring a constitutional claim against the school district under 42 U.S.C. § 1983 for a deprivation of a student’s liberty as the *Morrow* family did in *Morrow*. See *Morrow*, 719 F.3d at 165 (discussing procedural history).

tional claim under 42 U.S.C. § 1983, arguing that the school district deprived the student of due process by restricting the student's liberty.<sup>18</sup>

Although the Due Process Clause of the Fourteenth Amendment does not typically confer upon states an affirmative duty to protect individuals from third-party encroachments, the Supreme Court has carved out a narrow exception for "special relationships."<sup>19</sup> The Court has held that when the State holds a person against their will and subsequently restricts that person's ability to care for himself or herself, the State creates a special relationship. Once a special relationship is formed, the State acquires an affirmative duty to protect the individual from the actions of others.<sup>20</sup>

Additionally, the Third Circuit recognizes an alternative theory of constitutional liability, known as the "state-created danger theory."<sup>21</sup> The Third Circuit reasons that the State similarly deprives an individual of due process when it creates or exacerbates the danger to which the person is exposed.<sup>22</sup>

Recently, in *Morrow v. Balaski*,<sup>23</sup> the Third Circuit considered whether a school district may be held liable under the special relationship and state-created danger theories because it chose to ignore persistent bullying on school grounds.<sup>24</sup> The Third Circuit narrowly construed the aforementioned theories, holding that, generally, a school district is not subject

18. See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) ("In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause . . .").

19. See *id.* at 196–97 (excepting general rule that states do not owe affirmative duty to protect individuals from private actors); see also *Horton v. Flenory*, 889 F.2d 454, 458 (3d Cir. 1989) (recognizing special relationship exception in Third Circuit).

20. See *DeShaney*, 489 U.S. at 199–200 (explaining special relationship exception); see also *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1369 (3d Cir. 1992) (en banc) ("However, when the state enters into a special relationship with a particular citizen, it may be held liable for failing to protect him or her from the private actions of third parties.").

21. See *Kneipp v. Tedder*, 95 F.3d 1199, 1201 (3d Cir. 1996) (affirming viability of state-created danger theory in Third Circuit). Although the state-created danger theory is derived from dictum in *DeShaney*, the Third Circuit recognizes it as a separate and alternative theory. See *id.* at 1205 ("In *DeShaney*, the Supreme Court left open the possibility that a constitutional violation might have occurred despite the absence of a special relationship . . ."); see also *Morrow*, 719 F.3d at 177 (explaining *Kneipp*).

22. See *Kneipp*, 95 F.3d at 1205 (citing *DeShaney*, 489 U.S. at 200) (discussing origins of state-created danger theory); see also *Morrow*, 719 F.3d at 177 (citing *Kneipp*, 95 F.3d at 1205) ("We confirmed that liability may attach where the state acts to create or enhance a danger that deprives the plaintiff of his or her Fourteenth Amendment right to substantive due process.").

23. 719 F.3d 160 (3d Cir. 2013) (en banc).

24. See *id.* at 163–66 (discussing nature of plaintiffs' allegations).

to liability under section 1983 for its passive inaction.<sup>25</sup> Although the Third Circuit indicated its willingness to consider whether certain schools create special relationships under unique circumstances, its narrow interpretation of the two theories leaves most Pennsylvania bullying victims unable to hold negligent school districts accountable, ultimately providing school administrators with little incentive to act.<sup>26</sup>

This Casebrief examines the Third Circuit's evolving interpretation of the special relationship and state-created danger theories through the lens of the court's recent decision in *Morrow*. Part II of this Casebrief discusses the development of the aforementioned theories in the Third Circuit.<sup>27</sup> Part III examines the Third Circuit's decision in *Morrow*, focusing on the court's reasoning.<sup>28</sup> Part IV concludes by assessing the overall impact of *Morrow* on future bullying cases in the Third Circuit, evaluating the narrow circumstances in which the court may recognize a special relationship and advocating for an amendment to the PPSTCA.<sup>29</sup>

## II. A HISTORY LESSON: DUE PROCESS LIABILITY IN THE THIRD CIRCUIT

This section provides an overview illustrating the gradual development of due process liability in the Third Circuit.<sup>30</sup> The first part of this section discusses the special relationship exception, examining its origins as well as the manner in which it has been applied in the Third Circuit.<sup>31</sup> The second part of this section considers the development of the Third

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25. See *id.* at 166–79 (rejecting special relationship and state-created danger theories); *id.* at 196 (Fuentes, J., dissenting) (“[T]he majority narrows the exception to the vanishing point by saying that school officials are free to ignore court orders and their own disciplinary code, enabling a pattern of physical abuse to persist.”).

26. See *id.* at 171 (majority opinion) (“[W]e do not foreclose the possibility of a special relationship arising between a *particular* school and *particular* students under certain unique and narrow circumstances.”); see also *Fourteenth Amendment—Duty to Protect*, *supra* note 12, at 818 (noting that “circuit courts have largely foreclosed constitutional remedies”); John P. Schultz, *MORROW v. BALASKI*, TEMP. L. REV. 3D CIR. BLOG (June 5, 2013), <http://sites.temple.edu/templelawreviewblog/third-circuit-summaries/morrow-v-balaski/> (“[A] victim of bullying in Third Circuit jurisdiction generally may not find recourse against their public school under a special relationship or state created danger theory of constitutional liability.”).

27. For further discussion of the special relationship and state-created danger theories, see *infra* notes 33–57 and accompanying text.

28. For further discussion of *Morrow*, see *infra* notes 58–111 and accompanying text.

29. For further discussion of the impact of the *Morrow* decision, see *infra* notes 112–48 and accompanying text.

30. For a discussion of due process liability in the Third Circuit, see *infra* notes 33–57 and accompanying text.

31. For a discussion of the Third Circuit's approach to the special relationship theory, see *infra* notes 34–48 and accompanying text.

Circuit's state-created danger doctrine, paying particular attention to the elements required to state a claim under the theory.<sup>32</sup>

#### A. *Origins of the Special Relationship Exception*

In the seminal case *DeShaney v. Winnebago County Department of Social Services*,<sup>33</sup> the Supreme Court reiterated that, generally, the Due Process Clause of the Fourteenth Amendment does not require states to protect citizens from private actors.<sup>34</sup> In *DeShaney*, the Court held that the Department of Social Services was not bound by an affirmative duty to protect a boy from his abusive father, despite a clear indication that abuse was ongoing.<sup>35</sup> However, the Court went on to say that the State may acquire an affirmative duty to protect an individual from private actors when it creates a "special relationship" with that individual.<sup>36</sup>

The Court emphasized that a special relationship is not created simply because the State knows of a dangerous situation and fails to act, but because the State restrains the person's freedom to care for himself or herself, depriving the individual of liberty without Due Process.<sup>37</sup> Although the Court did not find a special relationship in this particular case,

32. For a discussion of the state-created danger theory, see *infra* notes 49–57 and accompanying text.

33. 489 U.S. 189 (1989).

34. *See id.* at 196–97 (“[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid . . . . [Therefore] a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”).

35. *See id.* at 201 (“That the State once took temporary custody of Joshua does not alter the analysis, for when it 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 . . . .”). In *DeShaney*, a four-year-old boy was severely and repeatedly beaten by his father. *See id.* at 191–94 (discussing factual background). Eventually, the boy was taken from his father and placed in the custody of the Winnebago County Department of Social Services (DSS). *See id.* at 192 (explaining temporary state custody). The boy was ultimately returned to his father’s custody with periodic supervision by DSS. *See id.* at 192–93 (describing termination of state custody). Several months later, the boy was beaten by his father once again, causing permanent brain damage. *See id.* at 193 (explaining relevant facts).

36. *See id.* at 198 (“It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.”).

37. *See id.* at 200 (“The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.”). The Court further reasoned that:

The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

*Id.* The Court explained that, when the government restrains the individual’s freedom to act “through incarceration, institutionalization, or other similar restraint of



it gave two examples where the State definitively creates a special relationship: when it imprisons someone and when it involuntarily commits someone.<sup>38</sup>

In 1992, the Third Circuit was first asked to apply the special relationship doctrine to the public school context.<sup>39</sup> In *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical School*,<sup>40</sup> the plaintiffs argued that compulsory school attendance laws and school authority to discipline children “*in loco parentis*” combine to create a special relationship with students.<sup>41</sup> However, the Third Circuit held that, because parents remain the primary caretakers of their children, public schools do not acquire an affirmative duty to protect students while school is in session.<sup>42</sup> The Third Circuit

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personal liberty,” it creates the “‘deprivation of liberty’ triggering the protections of the Due Process Clause.” *Id.*

38. *See id.* at 198–99 (fitting preceding cases into special relationship framework). The *DeShaney* Court discussed *Estelle v. Gamble*, where the Court held that the Eighth Amendment, applied to states via the Due Process Clause, requires states to “provide adequate medical care to incarcerated prisoners.” *Id.* at 198 (citing *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976)). The Court reasoned that, “because the prisoner is unable ‘by reason of the deprivation of his liberty [to] care for himself,’ it is only ‘just’ that the State be required to care for him.” *Id.* at 199 (alteration in original) (quoting *Estelle*, 429 U.S. at 103–04). The Court also discussed *Youngberg v. Romeo*, where it held that the Due Process Clause of the Fourteenth Amendment requires states to protect involuntarily committed mental patients from the actions of other private actors. *See id.* (citing *Youngberg v. Romeo*, 457 U.S. 307, 315, 324 (1982)) (discussing special relationship between state and involuntarily committed patients).

39. *See D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1370 (3d Cir. 1992) (en banc) (“Thus, the question presented to us is whether compulsory attendance paired with the *in loco parentis* authority of the school defendants resulted in such an affirmative restraint of D.R.’s liberty by the state that she was left without reasonable means of self-protection . . . .”). The court “consider[ed] this to be an open question” at the time. *Id.* (considering applicability of special relationship doctrine to school context).

40. 972 F.2d 1364 (3d Cir. 1992) (en banc).

41. *See id.* at 1370 (“Plaintiffs assert that Pennsylvania’s scheme of compulsory attendance and the school defendants’ exercise of *in loco parentis* authority over their pupils so restrain school children’s liberty that plaintiffs can be considered to have been in state ‘custody’ during school hours for Fourteenth Amendment purposes.”). Authority granted *in loco parentis* refers to the idea that school administrators act in the place of parents during the school day. *See New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (“Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment.”). In *Middle Bucks*, two female students brought an action against the school district under section 1983, alleging that the school failed to protect them from other male students who sexually abused them in their graphic arts class. *See Middle Bucks*, 972 F.2d at 1366 (discussing facts).

42. *See Middle Bucks*, 972 F.2d at 1372 (“[T]he school defendants did not restrict D.R.’s freedom to the extent that she was prevented from meeting her basic needs.”). The court reasoned, “[e]ven during the school day . . . parents . . . remain a child’s primary caretakers and decisionmakers.” *Id.*

emphasized that parents provide for students' basic needs when they return home each day.<sup>43</sup>

The validity of *Middle Bucks* was later cast into doubt by the Third Circuit's decision in *Nicini v. Morra*.<sup>44</sup> In *Nicini*, the court held that the New Jersey Department of Human Services (DHS) entered into a special relationship with an individual who was sexually molested while under the foster care of a family that he independently chose.<sup>45</sup> There, the plaintiff was in the general, technical custody of the state but was physically residing and being cared for by the abusive foster family.<sup>46</sup> The Third Circuit held that the state owed an affirmative duty to Nicini because he depended on DHS to meet his basic needs.<sup>47</sup> Because the court recognized a special relationship when foster parents, rather than the state, acted as Nicini's primary caregivers, the decision cast doubt upon the underlying reasoning of *Middle Bucks*.<sup>48</sup>

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43. *See id.* ("The state did nothing to restrict her liberty after school hours and thus did not deny her meaningful access to sources of help.").

44. 212 F.3d 798 (3d Cir. 2000) (en banc); *see also* *Morrow v. Balaski*, 719 F.3d 160, 192 (3d Cir. 2013) (en banc) (Fuentes, J., dissenting) ("*Nicini* thus 'discredit[s]' not just the 'underlying reasoning' of *Middle Bucks*, but also its reading of *DeShaney*." (alteration in original) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring))). In *Morrow*, Judge Fuentes argues "*Nicini* makes clear that physical custody cannot be the lynchpin of a *DeShaney* special relationship because the child there was not under the State's control at the time the harm occurred." *Id.* Further, Judge Fuentes argues that, at the time the injury occurred, the state was not the "primary caregiver." *Id.* This contradicts the reasoning underlying *Middle Bucks*, where the court held that schools have no affirmative duty to protect students because parents remain the primary caregiver of students, rather than the state. *See Middle Bucks*, 972 F.2d at 1372 ("Even during the school day . . . parents . . . remain a child's primary caretakers and decisionmakers.").

45. *See Nicini*, 212 F.3d at 808–09 (holding state sufficiently curtailed Nicini's liberty, acquiring affirmative duty to protect him).

46. *See id.* at 801–05 (stating facts of case). In *Nicini*, a troubled teenager was kicked out of his home and was ultimately placed in foster care. *See id.* at 801 (explaining original foster placements). Nicini was unsuccessfully assigned to several different foster families until he ran away and began living with Edward and Dolores Morra. *See id.* at 801–02 (explaining how Nicini came to live with Morra family). Nicini asked the Department of Youth and Family Services (DYFS) to appoint the Morras as his foster parents. *See id.* at 802 (explaining unconventional adoption process). Eventually, DYFS and the applicable Family Court judge allowed Nicini to live with the Morras, while still remaining under the "care and supervision" of DYFS. *See id.* at 804. Nicini would later allege that foster parent Edward Morra, a convicted felon in New York, provided him with drugs and sexually assaulted him while under his para-foster care. *See id.* (describing allegations).

47. *See id.* at 808 ("We now hold that when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties."). The court reasoned that foster children, including Nicini, are "substantially 'dependent upon the state . . . to meet [their] basic needs.'" *Id.* at 808–09 (first alteration in original) (quoting *Middle Bucks*, 972 F.2d at 1372).

48. *See Morrow*, 719 F.3d at 192 (Fuentes, J., dissenting) (arguing that, in *Nicini*, special relationship existed where individual was not in state custody and state was not his primary caregiver). Judge Fuentes argues that "the result and

### B. *Development of the State-Created Danger Theory*

The Third Circuit recognizes an alternative theory of liability under section 1983, known as the state-created danger theory.<sup>49</sup> Like the special relationship theory, the state-created danger theory emanates from language in *DeShaney*.<sup>50</sup> In *Kneipp v. Tedder*,<sup>51</sup> the Third Circuit examined dictum in *DeShaney* and concluded that the Supreme Court intended for an alternative source of liability to exist in the absence of a special relationship.<sup>52</sup>

In order to properly state a claim under the theory, a plaintiff must allege four essential elements.<sup>53</sup> The plaintiff must show: first, that the harm caused by the state was direct and foreseeable; second, that a state official acted in a way that “shocks the conscience;” third, that the state maintained a relationship with the foreseeable victim; and fourth, that the danger was created as a result of the state’s affirmative action.<sup>54</sup>

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reasoning in the foster care cases have thus created ‘tension [with the] public school cases’ because ‘[b]oth involve state constriction of a child’s liberty . . . yet only the former triggers *DeShaney* custody.’” *Id.* (alterations in original) (quoting *Smith v. District of Columbia*, 413 F.3d 86, 96 (D.C. Cir. 2005)).

49. *See id.* at 177 (majority opinion) (“We confirmed that liability may attach where the state acts to *create or enhance* a danger that deprives the plaintiff of his or her Fourteenth Amendment right to substantive due process.”); *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996) (“Until now, we have not, however, been presented with the appropriate factual background to support a finding that state actors created a danger which deprived an individual of her Fourteenth Amendment right to substantive due process.”).

50. *See Kneipp*, 95 F.3d at 1205 (“[T]he Supreme Court left open the possibility that a constitutional violation might have occurred despite the absence of a special relationship when it stated: ‘[ ] the State may have been aware of the dangers that Joshua faced in the free world, [but] it played no part in their creation, nor . . . render[ed] him any more vulnerable to them.’” (quoting *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989))).

51. 95 F.3d 1199 (3d Cir. 1996).

52. *See id.* at 1205 (“In *DeShaney*, the Supreme Court left open the possibility that a constitutional violation might have occurred despite the absence of a special relationship . . .”). In *Kneipp*, the Third Circuit held the state liable for a section 1983 violation, even though a special relationship did not exist. *See id.* (“[W]e agree with the district court that the special relationship required by *DeShaney* did not exist between Samantha and the police officers. We disagree, however, with the holding of the district court insofar as it adds a special relationship requirement to the state-created danger theory.”). The court held that police officers created a severely intoxicated woman’s danger through their affirmative action when the officers stopped her at night, told her to walk home, and told her husband to stop looking for her. *See id.* at 1208–09 (explaining holding).

53. *See Morrow*, 719 F.3d at 177 (“To prevail on this theory, the *Morrows* must prove the following four elements . . .”); *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006) (“Our case law establishes the following [four] essential elements of a meritorious ‘state-created danger’ claim . . .”).

54. *See Bright*, 443 F.3d at 281–83 (describing elements of state-created danger claim). The Third Circuit explained that the first element requires proof that “the harm ultimately caused was foreseeable and fairly direct.” *Id.* at 281 (quoting *Kneipp*, 95 F.3d at 1208) (internal quotation marks omitted). The second element requires proof that “a state actor acted with a degree of culpability that shocks the

In *Bright v. Westmoreland County*,<sup>55</sup> the Third Circuit emphasized that a state actor's failure to use its granted authority does not constitute an affirmative act.<sup>56</sup> Further, in *Middle Bucks*, the court held that a school did not act affirmatively when it failed to stop classroom abuse, neglected to inform parents of abuse, and hired an inadequately trained student teacher.<sup>57</sup>

### III. BECOMING THE BULLY: THE THIRD CIRCUIT HOLDS THAT WILLFUL IGNORANCE TO BULLYING DOES NOT GIVE RISE TO CONSTITUTIONAL LIABILITY IN *MORROW V. BALASKI*

In *Morrow*, the Third Circuit was asked to determine whether schools and school administrators may be held liable under the Due Process Clause of the Fourteenth Amendment when they knowingly allow bullying to persist throughout the course of the school day.<sup>58</sup> The court considered the facts set forth below and held that both the special relationship and state-created danger theories did not apply, absolving the Blackhawk School District of liability for its inaction.<sup>59</sup>

#### A. A Brief Narrative: Facts of *Morrow v. Balaski*

In 2008, Brittany Morrow was a student at Blackhawk High School in Beaver County, Pennsylvania.<sup>60</sup> From January 2008 to October 2008, Brit-

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conscience." *Id.*; see also *Sanford v. Stiles*, 456 F.3d 298, 309 (3d Cir. 2006) ("The level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases."). The third element requires proof that the victim was a foreseeable victim, rather than a member of the general public. See *Bright*, 443 F.3d at 281–82 (explaining third element); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 913 (3d Cir. 1997) ("[A]nother view of these cases would allow a plaintiff, in certain situations, to bring a state-created danger claim if the plaintiff was a member of a discrete class of persons subjected to the potential harm brought about by the state's actions."); *Kneipp*, 95 F.3d at 1209 n.22 ("The relationship requirement under the state-created danger theory contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense."). Finally, the fourth element requires proof that "a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all." *Bright*, 443 F.3d at 281.

55. 443 F.3d 276 (3d Cir. 2006).

56. See *id.* at 282 ("It is misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause.").

57. See *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1374 (3d Cir. 1992) (en banc) (conceding it was close call, but holding that school neither increased students' harm nor rendered them more vulnerable to harm).

58. For a discussion of the substantive and procedural facts in *Morrow*, see *infra* notes 60–89 and accompanying text.

59. For a discussion of the Third Circuit's reasoning in *Morrow*, see *infra* notes 90–111 and accompanying text.

60. See *Morrow v. Balaski*, 719 F.3d 160, 164–65 (3d Cir. 2013) (en banc) (discussing factual background and mentioning that Brittany remained student at

tany was incessantly bullied by classmate Shaquana Anderson.<sup>61</sup> The bullying began on the evening of January 5, 2008, when Anderson threatened Brittany over the phone and on MySpace.<sup>62</sup> Anderson's threats materialized two days later when she attacked Brittany in the school lunchroom.<sup>63</sup> Although Brittany was the victim of her bully's attack, both she and Anderson were given three-day suspensions for the lunchroom incident.<sup>64</sup> Brittany's parents reported the attack to the local police, and Anderson was charged with simple assault, among other crimes.<sup>65</sup> Despite police intervention, Anderson continued to bully Brittany.<sup>66</sup>

After her three-day suspension ended, Anderson attacked again.<sup>67</sup> This time, she attempted to throw Brittany down a flight of stairs.<sup>68</sup> Throughout the confrontation, Anderson ridiculed Brittany, calling her a "cracker," labeling her "retarded," and tauntingly asking her "why [she did not] learn to talk right."<sup>69</sup>

Several months later, the court intervened.<sup>70</sup> In April 2008, "Anderson was placed on probation" and "ordered to have no contact with Brittany" Morrow.<sup>71</sup> In September 2008, Anderson was "adjudicated delinquent" on the simple assault charge and was again ordered to have

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Blackhawk High School until October 2008, when her parents enrolled her in another school).

61. *See id.* (noting conflict began on January 5, 2008, and continued until Brittany left Blackhawk High School in October 2008).

62. *See id.* at 164 (describing Anderson's initial threats). The court defined MySpace as "a popular social-networking website that allows its members to create online profiles, which are individual web pages on which members post photographs, videos, and information about their lives and interests." *Id.* at 164 n.4 (quoting *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007)) (internal quotation marks omitted).

63. *See id.* at 164 ("Two days later, Anderson physically attacked Brittany in the school's lunch room.").

64. *See id.* (noting both Shaquana Anderson and Brittany Morrow were issued three-day suspensions under school's "No Tolerance Policy" for lunchroom altercation initiated by Anderson).

65. *See id.* (discussing police involvement). Anderson was charged with "simple assault, terroristic threats, and harassment." *Id.* (listing charges brought against Anderson).

66. *See id.* (describing post-suspension bullying). Dissenting Judge Fuentes noted that "many" of the attacks occurred after Anderson and Morrow were suspended. *See id.* at 187 (Fuentes, J., dissenting) (discussing severity of post-suspension bullying).

67. *See id.* at 164 (majority opinion) ("[S]hortly after she returned to school, Anderson again attacked Brittany . . .").

68. *See id.* (describing second attack).

69. *Id.* The court further noted that, "[d]uring that incident, Anderson allegedly called Brittany a 'cracker,' told her that she was 'retarded' and 'had better learn to fight back,' and asked 'why don't you learn to talk right?'" *Id.*

70. *See id.* ("On April 9, 2008, Anderson was placed on probation by the Court of Common Pleas of Beaver County, Juvenile Division, and ordered to have no contact with Brittany.").

71. *See id.* (describing order of Beaver County Court of Common Pleas).

no contact with Brittany.<sup>72</sup> Although Brittany's parents provided administrators with both no contact orders, Anderson was allowed to return to school.<sup>73</sup>

Three days after being adjudicated delinquent, Shaquana Anderson executed another attack.<sup>74</sup> She began by boarding Brittany's school bus and again threatened her victim.<sup>75</sup> That evening, Anderson "elbowed Brittany in the throat at a school football game."<sup>76</sup> Days later, Anderson's friend Abbey Harris mimicked the act, striking Brittany's sister Emily in the throat.<sup>77</sup>

After the September attacks, Brittany's parents again voiced their concerns to school officials.<sup>78</sup> Despite a school policy requiring expulsion for criminal acts committed in school, the administrators told the Morrows that they would not expel Anderson.<sup>79</sup> School officials said that "they could not guarantee Brittany and Emily's safety" and "advised the Morrows to consider another school for their children."<sup>80</sup>

Accordingly, the Morrows brought an action in federal court against the Blackhawk School District and Assistant Principal Barry Balaski, under

72. *See* *Morrow v. Balaski*, No. 10-292, 2011 WL 915863, at \*2 (W.D. Pa. Mar. 16, 2011) ("On September 9, 2008, Anderson was adjudicated delinquent by a Juvenile Master of the Court of Common Pleas of Beaver County based on the simple assault charge filed by the Chippewa Township Police Department, and was ordered to have no contact, direct or indirect, with Plaintiff Brittany."), *aff'd*, 719 F.3d 160 (3d Cir. 2013) (en banc).

73. *See Morrow*, 719 F.3d at 164 (noting Morrow family provided both no-contact orders to school and Assistant Principal Balaski).

74. *See id.* (describing events of September 12, 2008); *Morrow*, 2011 WL 915863, at \*2 (stating that Anderson was adjudicated delinquent on September 9, 2008). On September 12, Anderson boarded Brittany's bus and threatened her again. *See Morrow*, 719 F.3d at 164 (explaining bus incident).

75. *See Morrow*, 719 F.3d at 164 ("Anderson boarded Brittany's school bus, even though that bus did not service Anderson's home route.").

76. *See id.* ("[S]he elbowed Brittany in the throat at a school football game that evening.").

77. *See id.* ("A few days later, Abbey Harris, Anderson's friend, struck Emily [Morrow] in the throat.").

78. *See id.* (noting Morrow family met with school officials after September attacks).

79. *See id.* at 200 (Fuentes, J., dissenting) (discussing school's response). In his dissent, Judge Fuentes quoted the school disciplinary code which states, in relevant part, that acts deemed "clearly criminal in nature" are classified as Level IV offenses, which require "immediate removal from school." *Id.* (quoting Third Amended Complaint at ¶ 16, *Morrow v. Balaski*, 2011 WL 915863 (W.D. Pa. Mar. 16, 2011) (No. 10-292)) (internal quotation marks omitted). Because Anderson was adjudicated delinquent for simple assault, Judge Fuentes argued that Anderson performed acts that were clearly criminal in nature, requiring, under the school disciplinary code, immediate expulsion. *See id.* (scrutinizing school's response).

80. *Id.* at 164–65 (majority opinion) (describing meeting between school officials and Morrow family).

section 1983.<sup>81</sup> The Morrows asserted that the Blackhawk School District established a special relationship with Brittany.<sup>82</sup> They argued that compulsory school attendance laws and school disciplinary authority created a quasi-custodial relationship with all students.<sup>83</sup> This relationship became fully custodial, they argued, when the school became aware of the bully's violent propensity.<sup>84</sup> Alternatively, the Morrows argued that the defendants should be held liable under the state-created danger theory because school administrators exacerbated Brittany's danger when they disregarded school policy and allowed Anderson to return to school.<sup>85</sup>

However, the United States District Court for the Western District of Pennsylvania dismissed the Morrows' complaint with prejudice.<sup>86</sup> Citing Third Circuit precedent, the district court held that school districts do not engage students in a special relationship.<sup>87</sup> Further, the court dismissed the family's state-created danger argument, holding the plaintiffs failed to

81. *See id.* at 165 (“The Morrows thereafter filed this suit pursuant to 42 U.S.C. § 1983, alleging a violation of their Fourteenth Amendment substantive due process rights.”). The family also brought a state law tort claim against Assistant Principal Barry Balaski, however, the United States District Court for the Western District of Pennsylvania “declined to exercise supplemental jurisdiction over the state law claim.” *Id.*

82. *See id.* (stating arguments raised by Morrow family).

83. *See* Brief and Appendix for Appellants at 14–15, *Morrow v. Balaski*, 719 F.3d 160 (3d Cir. 2013) (en banc) (No. 11-2000), 2011 WL 2687930 (“Students are compelled to attend, and the schools assume the status of parents while the children are in their custody. . . . [This creates a] quasi-custodial relationship that exists in all cases between a public school and its pupils . . .”).

84. *See id.* at 15 (stating knowledge of bullying elevates quasi-custodial relationship to special relationship).

85. *See id.* at 17–19 (arguing school administrators created Brittany Morrow's danger). The Morrows argued in their brief that the school created Brittany and Emily's danger

[B]y choosing to permit Anderson to return to school following her expulsion, choosing to permit her to remain in school following her conviction of a crime, allowing her to remain in school despite two court order[s] mandating that she have no contact with the Morrow children, and deciding to ignore the school's own disciplinary code that defines criminal conduct as an offense always requir[ing] administrative *action* resulting in the immediate removal from school.

*Id.* at 18 (third alteration in original) (internal quotation marks omitted).

86. *See* *Morrow v. Balaski*, No. 10-292, 2011 WL 915863, at \*1 (W.D. Pa. Mar. 16, 2011) (dismissing Third Amended complaint with prejudice), *aff'd*, 719 F.3d 160 (3d Cir. 2013) (en banc).

87. *See id.* at \*6 (citing *Sanford v. Stiles*, 456 F.3d 298, 304 n.4 (3d Cir. 2006)) (“[N]o special relationship exists between school children and the state because parents decide where to send their children to school, children remain residents of their parents' home, and children are not physically restrained from leaving school during the school day.”). The district court further held that the school district's knowledge of the no-contact orders did not elevate the relationship into a special relationship. *See id.* at \*5 (citing *Bennett ex. rel. Irvine v. Philadelphia*, 499 F.3d 281, 288 (3d Cir. 2007)) (“The Defendants' awareness of the state court order directed to Anderson does not create an affirmative duty to protect Minor Plaintiffs.”).

demonstrate that school administrators affirmatively created or exacerbated Brittany's danger.<sup>88</sup> The Morrors subsequently appealed to the Third Circuit.<sup>89</sup>

### B. *Granting a Hall Pass: The Third Circuit Limits School Liability*

Although it expressed sympathy for Brittany Morrow and victims of bullying throughout the United States, the Third Circuit held that the *failure* of a school district to *prevent* further bullying does not give rise to liability under section 1983.<sup>90</sup> The court held that typical school authority, exercised over students during the school day, does not create a special relationship that confers an affirmative duty to protect students from private actors.<sup>91</sup> Further, the Third Circuit held that passively allowing persistent bullying to continue does not constitute an affirmative act giving rise to liability under the state-created danger theory.<sup>92</sup>

#### 1. *Nothing Special: Schools Owe No Affirmative Duty to Students*

The Third Circuit held that traditional school authority, "without more," does not create a special relationship between schools and students.<sup>93</sup> The court reasoned that schools are inherently entitled to re-

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88. *See id.* ("Plaintiffs have identified no action of the Defendants that utilized their authority in a way that rendered Minor Plaintiffs more vulnerable than they would have been otherwise.")

89. *See Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013) (en banc) (noting appeal).

90. *See id.* at 176–77, 179 (expressing sympathy for Brittany Morrow while declining to extend constitutional remedy). Despite its holding, the Third Circuit expressed concern for bullied students and their families. *See id.* at 176 ("Parents . . . should be able to send their children off to school with some level of comfort that those children will be safe from bullies such as Anderson and her confederate."). However, the court held that the special relationship doctrine cannot be contorted to afford a constitutional remedy in the instant case. *See id.* at 177 ("[W]e cannot fashion a constitutional remedy under the special relationship theory based on the facts alleged in this case."). Further, the court held that administrators' abject failure to stop bullying does not give rise to constitutional liability under the state-created danger theory. *See id.* at 179 ("[M]erely restating the Defendants' inaction as an affirmative failure to act does not alter the passive nature of the alleged conduct.")

91. *See id.* at 170 ("[P]ublic schools, as a general matter, do not have a *constitutional* duty to protect students from private actors."). The Third Circuit's holding pertains to the disciplinary authority granted to all public schools. *See id.* at 171 ("[T]hat which is inherent in the discretion afforded school administrators as part of the school's traditional *in loco parentis* authority or compulsory attendance laws.")

92. *See id.* at 179 ("[M]erely restating the Defendants' inaction as an affirmative failure to act does not alter the passive nature of the alleged conduct.")

93. *See id.* at 168–69 ("Although the doctrine of *in loco parentis* certainly cloaks public schools with some authority over school children, that control, without more, is not analogous to the state's authority over an incarcerated prisoner or an individual who has been involuntarily committed to a mental facility." (citation omitted)).



quire uniforms, forbid behavior, monitor student social media activity, and track student movement.<sup>94</sup> Such authority, the court noted, is “commonly accepted” and does not restrict student liberty to such a degree that a special relationship is forged.<sup>95</sup>

In essence, the Third Circuit affirmed the validity of its decision in *Middle Bucks*, reasoning that school children are not held in state custody because parents, rather than the state, remain the primary caretakers of their children during the school day.<sup>96</sup> Recognizing that *Middle Bucks* had been recently cast into doubt, the Third Circuit bolstered its argument by citing to Supreme Court dictum in which the Court declined to suggest that public schools create a custodial relationship with students.<sup>97</sup>

Unlike *Middle Bucks*, the Third Circuit emphasized that its holding in *Morrow* applies only to the general relationship between public schools and students.<sup>98</sup> Therefore, the court did not “foreclose the possibility” that a special relationship may arise in “certain unique and narrow circum-

94. See *id.* at 171 (discussing disciplinary authority granted to public school administrators).

95. See *id.* at 171 (“Rather, such commonly accepted authority over student conduct is inherent in the nature of the relationship of public schools and their pupils.”). Because it is commonly accepted, the court held that this “does not suggest a special relationship at all.” *Id.*

96. See *id.* at 173 (“As we explained in *Middle Bucks*, unlike children in foster care, students in public schools continue to be primarily dependent on their parents for their care and protection, not on their school.”). The Third Circuit narrowly distinguished schools from foster care, reasoning that children in foster care are forced to depend on the state in ways that school children do not. See *id.* (comparing school-student relationship to state-foster child relationship). The court reasoned that, despite compulsory school attendance laws and school authority to act *in loco parentis*, school children may turn to their parents for support at the end of the school day. See *id.* (discussing role of parents).

97. See *id.* at 169–70 (“[W]e 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.” (alteration in original) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)) (internal quotation marks omitted)). The Third Circuit acknowledged that its holding in *Middle Bucks* had been cast into doubt, citing to Judge Sloviter’s dissent in *Middle Bucks* to illustrate the ongoing debate. See *id.* (quoting *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1992) (en banc) (Sloviter, C.J., dissenting) (arguing special relationship exists in schools)). The Third Circuit reasoned that, when it decided *Middle Bucks*, the Supreme Court had yet to consider whether schools forge a special relationship with students. See *id.* at 169 (“[W]hen we decided *Middle Bucks*, the Supreme Court’s jurisprudence allowed room to debate this issue . . .”). Ultimately, the Third Circuit held that “it is difficult to imagine a clearer or more forceful indicator of the Court’s own interpretation of *DeShaney* and the special relationship exception recognized there as applied to public schools.” *Id.* at 170.

98. Compare *id.* at 171 (“In holding that public schools do not generally have a constitutional duty to protect students from private actors . . . we do not foreclose the possibility of a special relationship arising between a particular school and particular students . . .”), with *Middle Bucks*, 972 F.2d at 1371–73 (holding compulsory school attendance laws and disciplinary authority do not create special relationship between students and schools without discussing potential exceptions).

stances.”<sup>99</sup> For a special relationship to exist, a school must implement additional restrictive measures that exceed the scope of traditional school disciplinary authority.<sup>100</sup>

In the present case, the Third Circuit held that the relationship between Brittany Morrow and the Blackhawk School District was not unique.<sup>101</sup> The court reasoned that the school’s knowledge of the no-contact orders did not alter the relationship between Brittany and the school.<sup>102</sup> Therefore, Brittany was merely subjected to traditional school authority, which does not confer an affirmative duty to protect students.<sup>103</sup>

## 2. *No Action Is Inaction: The State Did Not Create Brittany Morrow’s Danger*

The Third Circuit further held that school districts will not be exposed to liability under the state-created danger theory for passively allowing bullying to persist.<sup>104</sup> The court emphasized that a plaintiff may not redefine “clearly passive inaction as affirmative acts.”<sup>105</sup> Although the court conceded that it is difficult, at times, to differentiate between action

99. *Morrow*, 719 F.3d at 171.

100. *See id.* (“[A]ny such circumstances must be so significant as to forge a different kind of relationship between a student and a school than that which is inherent in the discretion afforded school administrators as part of the school’s traditional *in loco parentis* authority or compulsory attendance laws.”).

101. *See id.* (applying facts). The Third Circuit held that Blackhawk High School did not restrict Brittany Morrow’s freedom any more than it is entitled to under traditional school authority. *See id.* (“[T]hose factors do not distinguish the circumstances here from those that arise in the general relationship between public schools and their students.”). Here, the conditions were “not ‘certain narrow’ circumstances at all,” rather “they [were] endemic in the relationship between public schools and their students.” *Id.*

102. *See id.* at 173 (“[T]he Defendants’ knowledge—of both the no-contact orders and Anderson’s threats and conduct—may be relevant to determining whether the Defendants’ conduct was sufficiently egregious to violate a previously existing duty to protect the Morrow children, but that knowledge cannot create a duty that did not otherwise exist.”).

103. *See id.* at 171 (“[T]hose factors do not distinguish the circumstances here from those that arise in the general relationship between public schools and their students.”).

104. *See id.* at 178–79 (holding decision not to intervene is “passive inaction” rather than affirmative act). The Third Circuit rejected the plaintiffs’ argument that the school acted affirmatively by allowing Anderson to board Brittany Morrow’s bus. *See id.* at 178 (“[T]he only reasonable interpretation of that allegation is that the Defendants *failed* to take any affirmative steps to ensure that Anderson did not board the Morrow children’s bus.”). Further, the court rejected the plaintiffs’ argument that deviating from the school disciplinary code constituted an affirmative act. *See id.* (“[W]e decline to hold that a school’s alleged failure to enforce a disciplinary policy is equivalent to an affirmative act under the circumstances here.”).

105. *Id.* Here, the court found that “the Morrrows’ Complaint simply attempts to redefine clearly passive inaction as affirmative acts.” *Id.*; *see also* *Sanford v. Stiles*, 456 F.3d 298, 312 (3d Cir. 2006) (holding counselor’s failure to prevent student’s suicide did not constitute affirmative act).

and inaction, the Third Circuit ultimately held that a school district's decision not to intervene constitutes mere inaction.<sup>106</sup>

Considering this distinction, the Third Circuit held that a school's decision not to fully enforce its disciplinary code is, at its essence, a failure to act rather than an affirmative act.<sup>107</sup> The court expressed grave concern that schools would be exposed to liability for virtually all administrative decisions if it held school officials liable for their decision *not* to enforce a policy.<sup>108</sup>

Accordingly, the Third Circuit held that the Blackhawk School District did not expose Brittany and Emily Morrow to more danger by suspending Anderson and allowing her to return.<sup>109</sup> Further, the court held that the defendants' failure to prevent Anderson from boarding Brittany's bus merely constituted "passive inaction."<sup>110</sup> In sum, the Third Circuit affirmed the district court's ruling and left the Morrows without a viable remedy against the Blackhawk School District.<sup>111</sup>

#### IV. STUDYING THE CURRENT GEOGRAPHY: CRITICAL ANALYSIS—ASSESSING THE IMPACT OF *MORROW V. BALASKI* ON PRACTITIONERS, SCHOOLS, AND BULLYING VICTIMS

By holding that, generally, schools do not forge a special relationship with students, the Third Circuit left the majority of Pennsylvania bullying victims unable to hold school districts and school administrators accountable for their neglect.<sup>112</sup> However, the prognosis is not entirely grim, as the

106. See *Morrow*, 719 F.3d at 177–78 (quoting D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1374 (3d Cir. 1992) (en banc)) (explaining difference between action and inaction).

107. See *id.* at 178 (“[W]e decline to hold that a school’s alleged failure to enforce a disciplinary policy is equivalent to an affirmative act under the circumstances here.”).

108. See *id.* (considering practical effects of plaintiffs’ arguments). The Third Circuit reasoned that, if a school district’s decision to deviate from disciplinary policy constituted an affirmative act, “every decision by school officials . . . may trigger a duty to protect.” *Id.* The majority further reasoned that such a holding would create a predicament in which “[a]ny and all failures to act would be transformed into an affirmative exercise of authority.” *Id.*

109. See *id.* (“Although the suspension was an affirmative act by school officials, we fail to see how the suspension created a new danger for the Morrow children or ‘rendered [them] more vulnerable to danger than had the state not acted at all.’” (alteration in original) (quoting *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006))).

110. See *id.* at 178–79. The court explained that “the only reasonable interpretation of that allegation is that the Defendants *failed* to take any affirmative steps to ensure that Anderson did not board the Morrow children’s bus.” *Id.* at 178. The court concluded that “the Complaint attempts to morph passive inaction into affirmative acts.” *Id.* at 178–79.

111. See *id.* at 176 (holding no constitutional remedy exists under facts, as presented).

112. For a discussion of how *Morrow* will impact future cases, see *infra* notes 115–22 and accompanying text.

Third Circuit indicated that it may recognize a special relationship in two particular circumstances, set forth below.<sup>113</sup> Although the Third Circuit may recognize a special relationship in a future case, the Pennsylvania legislature should not wait for the court to take action and should consider amending the PPSTCA in order to provide a remedy to all victims.<sup>114</sup>

A. *Taking More than Just Their Lunch Money: Most Pennsylvania Victims Will Be Left Without a Remedy*

In *Morrow v. Balaski*, the Third Circuit effectively absolved Pennsylvania school districts of liability in the majority of bullying cases.<sup>115</sup> By holding that a school's failure to intervene constitutes "passive inaction," the court seemingly eliminated the possibility that school districts may be held liable for their negligence under the state-created danger theory.<sup>116</sup>

Additionally, the Third Circuit drastically limited the number of actions that may be brought under the special relationship theory, asserting that public schools do not typically engage students in a special relationship.<sup>117</sup> Although the Third Circuit would "not foreclose" the possibility

113. For a discussion of possible exceptions, see *infra* notes 123–40 and accompanying text.

114. For a discussion of recommended future legislative action, see *infra* notes 141–48 and accompanying text.

115. See *Morrow*, 719 F.3d at 171 ("[P]ublic schools do not generally have a constitutional duty to protect students from private actors and . . . the allegations here are not sufficient . . . . Instead, they are endemic in the relationship between public schools and their students."). The court held that it will only recognize a special relationship between a school and its students when school administrators implement measures that are "so significant" that they exceed the "discretion afforded school administrators as part of the school's traditional *in loco parentis* authority . . ." *Id.* Further, because of the PPSTCA, Pennsylvania public schools are immunized from liability for their negligence under state tort law. See *id.* at 176–77 (acknowledging immunity granted to Pennsylvania school districts). See generally *Fourteenth Amendment—Duty to Protect*, *supra* note 12, at 816 (stating Third Circuit largely foreclosed remedies to bullying victims).

116. See *Morrow*, 719 F.3d at 178 (holding Blackhawk School District's failure to act was passive inaction rather than affirmative action required to state a state-created danger claim). The Third Circuit rejected the appellant's argument that a school district's decision not to act constituted an affirmative choice. See *id.* ("[W]e decline to hold that a school's alleged failure to enforce a disciplinary policy is equivalent to an affirmative act under the circumstances here."). In his dissent, Judge Fuentes argues that the majority improperly limited the scope of the state-created danger theory by narrowly construing the affirmative act requirement. See *id.* at 196 (Fuentes, J., dissenting) ("[T]he majority narrows the exception to the vanishing point by saying that school officials are free to ignore court orders and their own disciplinary code, enabling a pattern of physical abuse to persist.").

117. See *id.* at 171 (majority opinion) ("[P]ublic schools do not generally have a constitutional duty to protect students from private actors . . . ."). The Third Circuit emphasized that traditional school authority to compel students to attend school and to monitor their behavior during the school day does not restrict liberty so substantially that it creates a special relationship. See *id.* ("[W]e cannot hold that a special relationship arose from compulsory school attendance laws and

that a special relationship may arise under unique circumstances, it emphasized that this will be a rare occurrence.<sup>118</sup> The court explained that it would only recognize a special relationship in “certain narrow circumstances,” where a school takes restrictive measures that are “so significant” that they forge a unique relationship, exceeding the “commonly accepted authority” that schools exercise over students.<sup>119</sup>

The Third Circuit appears willing to include a number of restrictive measures under the guise of “commonly accepted authority.”<sup>120</sup> Specifically, the court reasoned that a school may, in the exercise of its inherent authority, require students to wear uniforms, discipline students for behaving inappropriately, and utilize technology tracking student activity in school and on social media.<sup>121</sup> Therefore, the Third Circuit emphasized that it is unlikely to find a special relationship unless a school employs exceptionally restrictive measures.<sup>122</sup>

### B. *A Glimmer of Hope: Recognizing Special Relationships on a Case-by-Case Basis*

Although the Third Circuit absolved numerous school districts of liability, it suggested that it may recognize a special relationship between a school and its students under unique circumstances.<sup>123</sup> The court highlighted two instances where it may recognize a special relationship in future cases, including: when a school adopts a locked-door policy and when

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the concomitant *in loco parentis* authority and discretion that schools necessarily exercise over students . . .”).

118. *See id.* (“[W]e do not foreclose the possibility of a special relationship arising between a *particular* school and *particular* students under certain unique and narrow circumstances.”).

119. *Id.* (“[A]ny such circumstances must be so significant as to forge a different kind of relationship between a student and a school than that which is inherent in the discretion afforded school administrators as part of the school’s traditional *in loco parentis* authority or compulsory attendance laws.”).

120. *See id.* at 170–71 (describing authority to supervise students during school day).

121. *See id.* at 171 (listing restrictive measures permitted as means of exercising “commonly accepted” authority). The Third Circuit noted that “a school can require uniforms or prescribe certain behavior while students are in school . . .” *Id.* (citation omitted); *see also id.* (stating some authority to restrict student liberty is “inherent” in relationship between schools and students). Further, the court noted that “technology tracking student movement to ensure they are in class” and technology “monitoring . . . social media activity” are “new precautionary measures some schools have undertaken” that are not “so severely restrictive” that they change the relationship between students and schools. *Id.* at 170.

122. *See id.* at 171 (“[A]ny such circumstances must be *so significant* as to forge a different kind of relationship between a student and a school than that which is inherent in the discretion afforded school administrators . . .”) (emphasis added).

123. *See id.* (“In holding that public schools do not generally have a constitutional duty to protect students from private actors . . . we do not foreclose the possibility of a special relationship arising between a *particular* school and *particular* students under certain unique and narrow circumstances.”).

a school houses its students as part of a court-ordered residential program.<sup>124</sup>

### 1. *Recognizing a Special Relationship in Schools with Locked-Door Policies*

The Third Circuit indicated its willingness to consider whether schools with locked-door policies forge a special relationship with students.<sup>125</sup> The court noted that “a school’s exercise of authority to lock classrooms in the wake of tragedies such as those that have occurred in Newtown, Connecticut and Columbine [sic], Colorado” could “be a relevant factor in determining whether a special relationship or state-created danger exists in those specific cases.”<sup>126</sup> In making this observation, the court suggested that locking classroom doors *may* change the nature of the relationship between schools and students.<sup>127</sup>

The *Morrow* majority cites dissenting Judge Fuentes’s discussion of locked-door policies.<sup>128</sup> Judge Fuentes notes that, in response to recent tragedies, public schools across the country lock classroom doors during the school day, as a matter of policy.<sup>129</sup> The Pennsylvania House Select

124. *See id.* at 171, 174 (discussing two instances where special relationship may exist). For a further discussion of locked-door policies, see *infra* notes 125–33 and accompanying text. For a further discussion of court-ordered residential programs, see *infra* notes 134–40 and accompanying text.

125. *See id.* at 170–71 (indicating schools locking doors as a matter of policy may create special relationship). Locked-door policies vary but generally require both classroom doors and school entrances to automatically lock when closed. *See* Michael Aubry, *Province Beefs up Elementary School Security with New Locked-Door Policy*, OTTAWA SUN (Sept. 7, 2013, 5:43 PM), <http://www.ottawasun.com/2013/09/07/province-beefs-up-elementary-school-security-with-new-locked-door-policy> (explaining locked-door policies in Ottawa schools); Louise Brown, *Newtown Aftermath: Of Ontario Elementary Schools, 80% Will Lock Front Doors This Fall*, TORONTO STAR (June 18, 2013), [http://www.thestar.com/yourtoronto/education/2013/06/18/newtown\\_aftermath\\_of\\_ontario\\_elementary\\_schools\\_80\\_will\\_lock\\_front\\_doors\\_this\\_fall.html](http://www.thestar.com/yourtoronto/education/2013/06/18/newtown_aftermath_of_ontario_elementary_schools_80_will_lock_front_doors_this_fall.html) (discussing locked-door policies implemented in most Ontario schools); Donna St. George, *Washington Region Schools Tighten Security in Wake of Conn. Massacre*, WASH. POST (Jan. 27, 2013), [http://www.washingtonpost.com/local/education/washington-region-schools-tighten-security-in-wake-of-conn-massacre/2013/01/27/c8c5fd96-60b6-11e2-b05a-605528f6b712\\_story.html](http://www.washingtonpost.com/local/education/washington-region-schools-tighten-security-in-wake-of-conn-massacre/2013/01/27/c8c5fd96-60b6-11e2-b05a-605528f6b712_story.html) (discussing locked-door policies in D.C.-area schools); *see also Door Locking Options in Schools*, NAT’L CLEARINGHOUSE FOR EDUC. FACILITIES, [http://www.ncef.org/pubs/door\\_locks.pdf](http://www.ncef.org/pubs/door_locks.pdf) (last visited Aug. 27, 2014) (explaining various options for schools considering locked-door policies).

126. *Morrow*, 719 F.3d at 170–71 (suggesting locked-door policies may change relationship between schools and students).

127. *See id.* (“[A] school’s exercise of authority to lock classrooms in the wake of tragedies such as those that have occurred in Newtown, Connecticut and Columbine [sic], Colorado . . . may be a relevant factor in determining whether a special relationship or a state-created danger exists in those specific cases.” (citation omitted)).

128. *See id.* at 170 (citing *id.* at 195–96 (Fuentes, J., dissenting)) (discussing locked-door policies).

129. *See id.* at 196 (Fuentes, J., dissenting) (examining prevalence of locked-door policies in public schools).

Committee on School Safety has gone so far as to recommend that all Pennsylvania schools should adopt a locked-door policy.<sup>130</sup> Judge Fuentes argues that these policies impose a significant “restriction [on] student movement” that drastically changes the relationship between schools and students.<sup>131</sup>

If the Third Circuit considers such a case, the plaintiff may rely on Judge Fuentes’s dissent in *Morrow*, arguing that locked-door policies impose an additional restriction on student liberty that exceeds the scope of traditional school authority.<sup>132</sup> The plaintiff must demonstrate that locking classroom doors, as a matter of policy, is a restriction that is “so significant as to forge a different kind of relationship between a student and a school . . . .”<sup>133</sup>

## 2. *Recognizing a Special Relationship Between Boarding Schools and Court-Adjudicated Youths*

The Third Circuit also indicated that a special relationship may exist between boarding schools and children compelled to attend those schools by court order.<sup>134</sup> The court distinguished Brittany Morrow’s case from that of the plaintiff in *Smith v. District of Columbia*,<sup>135</sup> where the United States Court of Appeals for the D.C. Circuit held that a special relationship existed between a boarding school and a student compelled to attend that school.<sup>136</sup> The Third Circuit noted that a special relationship existed in *Smith* because the state “removed the juvenile from the care and custody of his parents” by court order and “required him to live under the care and

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130. See H.R. 197, 2013 Regular Sess., at 51 (Pa. 2013), available at [https://www.psha.org/downloads/house\\_select-school\\_safety\\_report.pdf](https://www.psha.org/downloads/house_select-school_safety_report.pdf) (recommending locked-door policies to all Pennsylvania schools).

131. See *Morrow*, 719 F.3d at 195–96 (Fuentes, J., dissenting) (“There are now abundant examples of schools exercising greater control over students . . . [including locking classrooms] . . . in the wake of recent tragic school shootings . . .”). Despite good intentions, locked-door policies also prevent school administrators from regularly observing classroom behavior. See, e.g., Stephen Ceasar & Howard Blume, *To Lock Classroom Doors or Not?*, L.A. TIMES (Jan. 13, 2013), <http://articles.latimes.com/2013/jan/13/local/la-me-school-security-20130114> (discussing Los Angeles elementary school teacher who performed lewd acts on children in his locked classroom).

132. See *Morrow*, 719 F.3d at 195–96 (Fuentes, J., dissenting) (arguing schools exercise greater authority over children today than they did when court considered traditional school authority in *Middle Bucks*).

133. *Id.* at 171 (majority opinion). The court set a difficult standard to meet, stating, “any such circumstances must be so significant as to forge a different kind of relationship between a student and a school than that which is inherent in the discretion afforded school administrators as part of the school’s traditional *in loco parentis* authority or compulsory attendance laws.” *Id.*

134. See *id.* at 174 (comparing typical school setting in *Morrow* to independent living program in *Smith*).

135. 413 F.3d 86 (D.C. Cir. 2005).

136. See *Morrow*, 719 F.3d at 174 (citing *Smith*, 413 F.3d at 94) (discussing facts of *Smith*).

custody of the independent living program . . . .”<sup>137</sup> The Third Circuit did not disclaim the reasoning of the D.C. Circuit, describing its holding in *Smith* in a manner consistent with its own reasoning in *Nicini*.<sup>138</sup>

In the state of Pennsylvania, several schools operate under a model very similar to the independent living program at issue in *Smith*.<sup>139</sup> Accordingly, if presented with such a case, the Third Circuit may follow its sister circuit and hold that these boarding schools create a special relationship with juveniles compelled to attend the school by court order.<sup>140</sup>

C. *Addition by Subtraction: Amend the PPSTCA to Eliminate Tort Immunity Granted to Schools and School Officials*

In *Morrow*, the Third Circuit acknowledged the dire consequences of pervasive bullying but declined to fashion a constitutional remedy to solve the problem.<sup>141</sup> As the court acknowledged, its decision, combined with the broad tort immunity granted by the PPSTCA, ultimately leaves many bullying victims in Pennsylvania unable to hold culpable schools and administrators accountable.<sup>142</sup> Considering the long-term psychological, bi-

137. *See id.* (“The state’s liability arose from the fact that the state, through court order, had removed the juvenile from the care and custody of his parents and required him to live under the care and custody of the independent living program, which was acting as the state’s agent under a very detailed contract between the program and the state.”).

138. *Compare Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (“A relationship between the state and foster children arises out of the state’s affirmative act in finding the children and placing them with state-approved families.” (quoting *D.R. ex. rel. L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1370 (3d Cir. 1992) (en banc)) (internal quotation marks omitted)), *with Morrow*, 719 F.3d at 174 (“[T]he state, through court order, had removed the juvenile from the care and custody of his parents and required him to live under the care and custody of the independent living program . . . .”). The Third Circuit also recognized that the *Smith* court relied on the same paragraph in *DeShaney* that the Third Circuit relied on in *Nicini*. *See id.* at 174 (comparing Third Circuit’s reasoning in *Nicini* to D.C. Circuit’s reasoning in *Smith*); *see also Smith*, 413 F.3d at 93 (quoting language from *DeShaney*); *Nicini*, 212 F.3d at 807 (quoting same language from *DeShaney*).

139. *See, e.g., THE ACADEMY SCHS.*, <http://www.theacademyschools.com/> (last visited Aug. 27, 2014) (explaining The Academy Schools network comprises several schools in Western Pennsylvania providing residential academic programs to court-referred youths); *THE GLEN MILLS SCHS.*, <http://www.glenmillsschool.org/> (last visited Aug. 27, 2014) (describing The Glen Mills Schools as “oldest existing residential school for court referred young men in the country”); *ST. GABRIEL’S HALL*, <http://www.st-gabes.org/residential/saint-gabriels-hall> (last visited Aug. 27, 2014) (describing St. Gabriel’s Hall as residential program for court-referred students, providing year-long academic program and ongoing treatment).

140. *See Smith*, 413 F.3d at 96–97 (holding independent living program forged special relationship with juvenile compelled to attend school by court order).

141. *See Morrow*, 719 F.3d at 176–77 (expressing sympathy for Morrow family but holding Constitution does not provide remedy under facts of case).

142. *See id.* (“[N]either our holding here nor the Supreme Court’s jurisprudence forecloses states from providing public school students and their parents with personally enforceable remedies under state law. [But] [w]e realize that



ological, and educational impact of bullying, the Pennsylvania legislature should amend the PPSTCA to provide victims with an appropriate tort remedy.<sup>143</sup>

Although victims may still bring an action against the bully, it is essential to hold school districts liable for their inaction in order to effectively change the school environment.<sup>144</sup> As Judge Ambro noted in his partial dissent, immunizing schools from liability creates a perverse incentive for administrators to turn a blind eye to persistent bullying.<sup>145</sup> Further, Judge Fuentes argued that the court's decision, coupled with the current statutory scheme, allows administrators to "take shelter under the label 'inaction'" and "[d]ereliction of duty becomes a school's best defense."<sup>146</sup> Judge Fuentes also expressed concern that parents and students may even resort to vigilantism if they conclude that school administrators are not actively intervening.<sup>147</sup> Therefore, with no constitutional remedy availa-

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Pennsylvania's courts have held that school districts . . . are not subject to 'tort liability . . . when students are injured in the course of the school day . . . .'" (fifth alteration in original) (quoting *Auerbach v. Council Rock Sch. Dist.*, 459 A.2d 1376, 1378 (Pa. Commw. Ct. 1983))).

143. *See id.* at 177 ("[S]tate legislatures retain the authority to reconsider and change such restrictions in order to better respond to the kind of bullying that happened here and that appears to be all too pervasive in far too many of today's schools."). Similarly, Judge Smith suggests in his concurring opinion that Pennsylvania residents may pursue legislative action if they would like to "expose" school districts to liability for their failure to stop bullying. *See id.* at 183–84 (Smith, J., concurring) ("If the people of Pennsylvania . . . want to expose their schools to greater liability for inaction, or if they desire different solutions to the problem that all on this en banc court agree bullying to be, it is their prerogative to do so."). For further discussion of the psychological, biological, and educational impact bullying has on its victims, see *supra* notes 11–13 and accompanying text.

144. *See Morrow*, 719 F.3d at 185 (Ambro, J., concurring in part, dissenting in part) (theorizing majority may be implicitly encouraging administrative inaction); *see also id.* at 184 (Smith, J., concurring) ("[S]tate law usually provides victims with the ability to sue and recover from bullies who assault, inflict emotional distress on, or commit other torts against fellow students and from the parents whose negligent care allow the bullies to do so.").

145. *See id.* at 185 (Ambro, J., concurring in part, dissenting in part) ("[F]ailing to hold a school accountable for violence done to students creates an incentive for school administrators to pursue inaction when they are uniquely situated to prevent harm to their students."); *see also* James Esposito, Recent Case, *Morrow v. Balaski: Third Circuit Affirms High Bar for Establishing a "Special Relationship" Between School and Student*, RUTGERS J.L. & PUB. POL'Y REGION IN REV. BLOG (Jan. 13, 2014), <http://www.rutgerspolicyjournal.org/morrow-v-balaski-third-circuit-affirms-high-bar-establishing-special-relationship-between-school-and> ("These cases give school officials legal authority to turn a blind eye to a child being bullied.").

146. *Morrow*, 719 F.3d at 196 (Fuentes, J., dissenting).

147. *See id.* at 202 ("To the detriment of schools' ability to manage their own affairs, concerned parents could seek greater control and awareness over the moment-to-moment safety of their children . . . . Some parents may even take unilateral acts to protect their children."); *see, e.g.*, Candice Nguyen, Gene Cubbison & R. Stickney, *Cops Stop Armed Teen Heading to Confront School Bully*, NBC 7 SAN DIEGO (Feb. 4, 2014, 12:54 PM), <http://www.nbcsandiego.com/news/local/Student-Po>

ble to most bullied students, the next best option is to heed the majority's suggestion and amend the PPSTCA.<sup>148</sup>

#### V. CONCLUSION: WHAT IS THE SUM OF IT ALL?

As Judge Weinstein of the Eastern District of New York stated, “[n]o one gains from ignoring school bullying . . . . Bullying and inappropriate peer harassment in its many forms provides an unacceptable toxic learning environment.”<sup>149</sup> In *Morrow*, the Third Circuit held that, in most instances, public schools will not be held liable under section 1983 when they choose to ignore persistent bullying.<sup>150</sup> Although the court indicated its willingness to consider liability in unique and narrow circumstances, the Third Circuit rendered most Pennsylvania victims unable to hold schools responsible.<sup>151</sup> Therefore, in order to induce schools to stop bullying and to engender a healthy learning environment for all, it is incumbent upon the Pennsylvania legislature to amend the PPSTCA and expose Pennsylvania schools to liability for their passive inaction and willful neglect.<sup>152</sup>

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lice-Gun-Armed-San-Diego-School-Violence—243392331.html (reporting fifteen-year-old student brought handgun to school after bully threatened him); Ryan Raiche, *Parents of Boy Who Brought Butcher Knife to School Says It Was to Defend Himself from Bullies*, ABC ACTION NEWS WFTS-TV TAMPA BAY (Jan. 15, 2013, 8:59 AM), [http://www.abcactionnews.com/dpp/news/region\\_polk/wintwi\\_haven/parents-of-boy-who-brought-butcher-knife-to-school-says-it-was-to-defend-himself-from-bullies](http://www.abcactionnews.com/dpp/news/region_polk/wintwi_haven/parents-of-boy-who-brought-butcher-knife-to-school-says-it-was-to-defend-himself-from-bullies) (reporting parents armed eleven-year-old boy with an eight inch butcher's knife to protect him from bullies after the school failed to take action); Fred Shropshire, *Woman Arrested for Gun on School Campus Says Daughter Was Bullied*, ABC 11 EYEWITNESS NEWS RALEIGH DURHAM (Nov. 14, 2013, 4:24 AM), <http://abclocal.go.com/wtvd/story?section=news/local&id=9324358> (reporting mother brought gun to school after daughter was attacked by bullies earlier that day).

148. See *Morrow*, 719 F.3d at 177 (encouraging Pennsylvania legislature to “reconsider and change” PPSTCA immunity).

149. *T.K. v. New York City Dep’t of Educ.*, 779 F. Supp. 2d 289, 293 (E.D.N.Y. 2011).

150. See *Morrow*, 719 F.3d at 171, 178–79 (holding typical school relationship is non-custodial and passive inaction does not equate to affirmative act).

151. See *id.* at 171 (suggesting court may find a special relationship in unique situation where state restricts student liberty in excess of traditional school authority).

152. See *id.* at 176–77 (encouraging Pennsylvania legislature to amend PPSTCA).

