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Who Will Protect Our Students if the Constitution Can't?: An Examination of Due Process Protections for Bullied Students in *Morrow v. Balaski*

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WHO WILL PROTECT OUR STUDENTS IF THE CONSTITUTION CAN'T?: AN EXAMINATION OF DUE PROCESS PROTECTIONS FOR BULLIED STUDENTS IN *MORROW v. BALASKI*

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Abstract: On June 5, 2013, the U.S. Court of Appeals for the Third Circuit, sitting en banc, concluded that the Morrow family failed to state a claim against their school district for failing to protect their daughters from harm sustained by a school bully. By dismissing the Morrows' suit, the Third Circuit failed to hold schools accountable for violence against students under their watch. Worse still, the majority's holding incentivized inaction by school administrators even though they are uniquely positioned to protect bullied students. Judge Julio M. Fuentes, in his dissent, found that Blackhawk High School had coercive control of their students such that a special relationship, and therefore a duty to protect, existed. The failure of the Third Circuit to adopt this reasoning left students vulnerable to school bullying while shielding schools from liability.

INTRODUCTION

In October 2008, Assistant Principal Barry Balaski of Blackhawk High School could no longer ensure the safety of Brittany and Emily Morrow.[1] Throughout the preceding ten months, the Morrow girls suffered verbal and physical assaults at the hands of a school bully, Shaquana Anderson.[2] Neither criminal charges nor stay-away orders stopped the bullying or sparked the school into taking protective action.[3] Instead, Assistant Principal Balaski and the school district recommended to Deirdre and Bradley Morrow, Brittany and Emily's parents, that they enroll their children in a different school.[4] As a result of Assistant Principal Balaski and the Blackhawk School District's failure to protect Brittany and Emily, the Morrows filed suit on behalf of their daughters, alleging that the

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[1] Morrow v. Balaski, (*Morrow I*), No. 10-292, 2011 WL 915863, *1, *2 (W.D. Pa. Mar. 16, 2011) *aff'd en banc*, 719 F.3d 160 (3d Cir. 2013).

[2] *Id.* at *1–2. The bullying included Anderson pushing Brittany Morrow down a flight of stairs, elbowing her in the throat at a school football game, and verbally accosting her with names such as "cracker" and "retarded." *Id.*

[3] *See id.*

[4] *Id.*

school violated the girls' Fourteenth Amendment substantive due process right to liberty.[5] The Morrows included a supplemental suit for negligence and gross and willful misconduct against Balaski.[6] They argued that Pennsylvania had a duty to protect Brittany and Emily under two narrow exceptions to the general rule that states have no affirmative duty to protect citizens from private harm.[7] The State is compelled to protect its citizens when (1) it is in a special relationship with an individual or (2) State actors created the danger that led to harm.[8]

The U.S. District Court for the Western District of Pennsylvania dismissed the Morrows' suit for failing to prove that Pennsylvania owed a duty to protect under the "special relationship" or "state-created danger" exceptions.[9] Sitting en banc, a majority of the U.S. Court of Appeals for the Third Circuit affirmed the lower court's decision despite the judges being divided on the issue of the existence of a special relationship between the school and its students.[10] In affirming the district court's decision, the Third Circuit held that the Morrows failed to establish the existence of either a special relationship or a state-created danger.[11] Although the Morrows had not met their burden, the majority and dissent agreed that if a special relationship had been proven to have existed, then the school district would have been required to protect the students' Fourteenth Amendment rights.[12]

Part I of this Comment summarizes the factual background and circumstances that led to the Morrows' suit. Part II then recounts the history of the Morrows' civil case. Finally, Part III explores the Third Circuit's dissent and argues that courts should find a special relationship between a school district and its students under certain limited circumstances in order to protect students from the violence and harassment of bullying. By failing to hold schools accountable for violence done to students, the Third Circuit created an incentive for school administrators to pursue inaction even though they are uniquely situated to protect their students.

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[5] *See* U.S. CONST. amend. XIV, § 1; Morrow v. Balaski (*Morrow II*), 719 F.3d 160, 165 (3d Cir.), *en banc*, *cert. denied*, 134 S. Ct. 824 (2013).

[6] *Morrow II*, 719 F.3d at 165. The family brought the "negligence and/or gross or willful misconduct" claim as supplemental state law claim. *Id.*

[7] *Morrow I*, 2011 WL 915863, at *5–6. Generally, states have no affirmative duty to protect citizens from private harm. *See* U.S. CONST. amend. XIV, § 1; DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989).

[8] *Morrow I*, 2011 WL 915863, at *6.

[9] *Id.* at *6–7.

[10] *Morrow II*, 719 F.3d at 164; *id.* at 193 (Fuentes, J., dissenting).

[11] *Id.* at 164.

[12] *Id.* at 167.

I. BULLYING, CRIMINAL PROSECUTION, AND SCHOOL INACTION

Brittany and Emily Morrow were ninth and tenth grade students in good standing in the Blackhawk School District when they were subjected to a string of threats, acts of racial intimidation, physical assaults, and attacks at the hands of their peer, Shaquana Anderson.[13] The harassment, which began on January 4, 2008, included threats made through various modes of communication and social media.[14] On January 5, 2008, Anderson threatened Brittany with bodily harm through a post on Anderson's MySpace blog page.[15] Later that day, Anderson left a voicemail on Brittany's home phone, threatening both Brittany and her sister Emily.[16]

Just two days later, on January 7, 2008, Anderson physically attacked Brittany in the school lunchroom.[17] At the recommendation of Assistant Principal Balaski, Brittany's mother reported the attack to the police.[18] The local Chippewa Township Police Department charged Anderson with simple assault.[19] Due to the school's "No Tolerance" policy, both Anderson and Brittany received a three-day suspension.[20] Anderson served the suspension, but was not expelled.[21]

The attacks continued several weeks later, when on January 29, 2008, Anderson attempted to throw Brittany down a flight of stairs at Blackhawk High School.[22] Anderson verbally accosted Brittany, calling her a "cracker" and "retarded."[23] She told Brittany she "had better learn to fight back" and asked her, "why don't you learn to talk right[?]"[24]

On April 9, 2008, the Court of Common Pleas of Beaver County, Juvenile Division, placed Anderson on probation and ordered her to avoid all contact,

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[13] Morrow v. Balaski, (*Morrow I*), No. 10-292, 2011 WL 915863, *1, *1 (W.D. Pa. Mar. 16, 2011) *aff'd en banc*, 719 F.3d 160 (3d Cir. 2013).

[14] *Id.*

[15] *Id.* MySpace is a website that permits users to create personal profiles and share information, including videos and pictures, with other users in an online community. Morrow v. Balaski (*Morrow II*), 719 F.3d 160, 164 n.4 (3d Cir.) (en banc), *cert. denied*, 134 S. Ct. 824 (2013) (citing Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007)).

[16] *Morrow I*, 2011 WL 915863, at *1. Anderson was later charged by the White Township Police Department with terroristic threats and harassment. *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* The school's "No Tolerance" policy punished both the aggressor and non-aggressor without regard to fault. Petition for a Writ of Certiorari at 3, Morrow v. Balaski, 82 U.S.L.W. 3122 (2013) (No. 13-302), 2013 WL 4822221 [hereinafter Petition for a Writ of Certiorari].

[21] *Morrow I*, 2011 WL 915863, at *1.

[22] *Id.* at *2.

[23] *Id.* The term "cracker" is generally used in a derogatory manner to describe Caucasian people. Traditionally, the term was applied to rural, non-elite white southerners. John A. Burrison, *Crackers*, NEW GA. ENCYCLOPEDIA, (Aug. 6, 2013), http://www.georgiaencyclopedia.org/articles/arts-culture/crackers.

[24] *Morrow I*, 2011 WL 915863, at *2 (internal quotations omitted).

direct and indirect, with Brittany Morrow.[25] Both the school district and Assistant Principal Balaski received copies of the stay-away order.[26] Despite the order, Anderson remained a student at Blackhawk High School and continued to have contact with Brittany Morrow.[27]

On September 9, 2008, the Juvenile Master of the Court of Common Pleas of Beaver County adjudicated Anderson as delinquent based on the simple assault charge filed by the Chippewa Township Police Department in January 2008.[28] Anderson received a second court order directing her not to have any contact, direct or indirect, with Brittany Morrow.[29] Once again, both the school district and Assistant Principal Balaski received copies of the court order.[30] During this time, the school had a disciplinary code in place that required removal of students who engage in certain criminal behavior.[31]

On September 12, 2008, the school allowed Anderson to board Brittany Morrow's bus, even though the bus did not service Anderson's home route.[32] While on board, Anderson threatened to attack Brittany.[33] Later that evening, at a school district football game, Anderson elbowed Brittany in the throat.[34] On September 16, 2008, in another attack ultimately reported to the school district and Assistant Principal Balaski, Anderson's friend Abbey Harris struck Emily Morrow in the throat.[35]

Following that attack, Mr. and Mrs. Morrow met with representatives of the school district and Assistant Principal Balaski.[36] Balaski informed the Morrows that the school district "could not guarantee the safety" of their daughters.[37] He further advised the Morrows to "consider another school."[38] Blackhawk High School refused to protect the Morrows, so in October 2008 Bradley and Deirdre Morrow removed their daughters from the dangerous environment at Blackhawk High School and enrolled them elsewhere.[39] The plight of the Morrows exposed the lack of constitutional protections for the liberty rights of victims of bullying

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* Anderson was initially charged with simple assault for physically attacking Brittany in the school lunchroom on January 7, 2008. *Id.* at *1.

[29] *Id.* at *2.

[30] *Id.*

[31] *Id.* The school's disciplinary code stated that certain criminal behavior, including assault and battery, "always require[s] administrative action resulting in the immediate removal from school." Petition for a Writ of Certiorari, *supra* note 24, at 3.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See Morrow II*, 719 F.3d. at 187 (Fuentes, J., dissenting); *Morrow I*, 2011 WL 915863 at *2.

in the public school system, as well as the absence of accountability for the school districts involved.[40]

II. From the Principal's Office to the Third Circuit: The Morrows Allege that the Blackhawk School District Had a Duty to Protect

Bradley and Deirdre Morrow, individually and on behalf of their daughters, Emily and Brittany, sued the Blackhawk School District and Assistant Principal Balaski in the U.S. District Court for the Western District of Pennsylvania.[41] The Morrows brought a constitutional claim against Blackhawk School District and Assistant Principal Balaski under 42 U.S.C. § 1983.[42]

A. District Court Dismisses the Morrows' Claim for Failing to Prove the State Had an Affirmative Obligation to Protect

The Morrows sued the Blackhawk School District and Assistant Principal Balaski under 42 U.S.C. § 1983, alleging a violation of Brittany and Emily's Fourteenth Amendment substantive due process rights to "life, liberty, or property."[43] Section 1983 provides a claim for private individuals against State actors, for violation of rights created by the Constitution.[44] To state a claim for relief under 42 U.S.C. § 1983, the plaintiff must demonstrate that the oppressive conduct was perpetrated by a person or entity acting under the color of state law.[45] The Morrows needed to prove that the school denied them their substantive due process right to liberty by failing to protect the girls from Anderson.[46]

Generally, the Fourteenth Amendment does not impose an affirmative duty on the State to protect individuals from private harm.[47] There are, however, two exceptions to that general rule.[48] A State's duty to protect its citizens from the acts of other private citizens arises from: a "special relationship" with the State;

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[40] U.S. Const. amend. XIV, § 1; *see Morrow II*, 719 F.3d at 187 (Fuentes, J., dissenting).

[41] *See* Morrow v. Balaski (*Morrow II*), 719 F.3d 160, 165 (3d Cir.) (en banc), *cert. denied*, 134 S. Ct. 824 (2013).

[42] 42 U.S.C. § 1983 (2012); *Morrow II*, 719 F.3d at 165. Section 1983 states, in relevant part, that a person, acting on behalf of the state, who deprives any citizen of their constitutional "rights, privileges, or immunities" shall be held liable to the injured party. 42 U.S.C. § 1983.

[43] *See* U.S. Const. amend. XIV, § 1; 42 U.S.C. § 1983; Morrow v. Balaski, (*Morrow I*), No. 10-292, 2011 WL 915863, *1, *1 (W.D. Pa. Mar. 16, 2011) *aff'd en banc*, 719 F.3d 160 (3d Cir. 2013).

[44] *Morrow I*, 2011 WL 915863, at *4. Section 1983 does not create rights independent of the rights granted by the Constitution. 42 U.S.C. § 1983; *Morrow I*, 2011 WL 915863, at *4.

[45] 42 U.S.C. § 1983; *Morrow I*, 2011 WL 915863, at *4.

[46] *See* 42 U.S.C. § 1983; *Morrow I*, 2011 WL 915863, at *4.

[47] *See* U.S. Const. amend. XIV, § 1; DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989); *Morrow I*, 2011 WL 915863, at *4.

[48] *Morrow I*, 2011 WL 915863, at *6.

or as a result of a "state-created danger."[49] The Morrows pursued both exceptions.[50] First, the Morrows argued that a special relationship arose out of the school district's coercive power over its students.[51] Additionally, the Morrows contended that under the state-created danger theory a duty to protect their daughters existed because the school district ignored their own school code and allowed Anderson to return to school after her suspension.[52]

The district court dismissed the Morrows' complaint with prejudice for their failure to prove that a special relationship existed or that the State had created the danger present.[53] First, the district court did not recognize the custodial relationship that was needed to find a special relationship and resulting duty to protect.[54] The district court noted that schools have limited control over students.[55] The court reasoned that public schools are open institutions, and at the end of the day, students return home to the care of their parents or guardians.[56] The court found that a special relationship arises only from situations of incarceration or institutionalization.[57] Second, according to the district court, the Morrows did not show sufficient facts to meet the state-created danger exception.[58] In order to meet this exception, the Morrows needed to prove that the State, acting through school administrators, created or exacerbated the harm faced by Emily and Brittany.[59] The court found that the Morrows were unable to demonstrate that a State actor affirmatively used his or her authority in a manner that made Emily and Brittany more susceptible to harm.[60] Rather, the Morrows simp-

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[49] *Id.*

[50] *Id.* at *4, *6.

[51] *Morrow II*, 719 F.3d at 165; *see DeShaney*, 489 U.S. at 199–200. The *DeShaney* court held that:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being . . . . 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.

489 U.S. at 199–200 (citations omitted).

[52] *Morrow II*, 719 F.3d at 165; *id.* at 196 (Fuentes, J., dissenting); Petition for a Writ of Certiorari, *supra* note 24, at 3.

[53] *Morrow I*, 2011 WL 915863, at *6, *7.

[54] *Id.* at *6.

[55] *See id.* at *6.

[56] *Id.* The court reasoned that since children remain residents of their parents' homes and are not physically restrained from leaving school during the day, schools are "open institutions." *Id.*

[57] *See* Torisky v. Schweiker, 446 F.3d 438, 444–45 (3d Cir. 2006); *Morrow I*, 2011 WL 915863, at *6.

[58] *Morrow I*, 2011 WL 915863, at *6.

[59] *Id.* at *5.

[60] *Id.*

ly showed that the Blackhawk School District had taken no action at all.[61] The district court found that omissions, or lack of action, are insufficient for culpability under the state-created danger theory.[62]

B. The Third Circuit's Examination of Whether a Special Relationship Exists Between Schools and Their Students

The Morrows appealed the district court's decision to the Third Circuit, which, sitting en banc, affirmed the lower court's decision.[63] The Third Circuit majority and dissent were divided primarily with respect to the existence of a special relationship between the school and its students.[64] Five judges, in a dissenting opinion authored by Judge Julio M. Fuentes, argued that the district court should have found that a special relationship existed under the unique circumstances of the Morrows' case.[65] The *Morrow* majority, however, held that the plaintiffs had not proven the existence of either the special relationship or state-created danger exceptions.[66] In reaching this conclusion, the Third Circuit relied heavily on the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services* and a prior Third Circuit case, *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*.[67]

In *DeShaney*, a mother filed suit against the State of Wisconsin for not protecting her child when the State returned the child to his abusive father.[68] The Supreme Court dismissed the complaint, but it carved out a "special relationship" exception that provided circumstances in which a State could be responsible for affirmatively caring for and protecting individuals from harm caused by private citizens.[69] The narrow exception was limited to circumstances in which the State maintained physical custody of a person against his or her will, specifically in scenarios of incarceration and institutionalization.[70] Brittany and Emily

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[61] *Id.*

[62] *See id.*; *see also* Bright v. Westmoreland Cnty., 443 F.3d 276, 281–82 (3d Cir. 2006) (holding that it is misuse of state's authority rather than failure to use it that may violate due process).

[63] *Morrow II*, 719 F.3d at 164, 165. A Third Circuit panel heard oral argument on January 9, 2012, before granting en banc review. Petition for a Writ of Certiorari, *supra* note 24, at 5.

[64] *See Morrow II*, 719 F.3d at 164; *id.* at 193 (Fuentes, J., dissenting).

[65] *Morrow II*, 719 F.3d at 193 (Fuentes, J., dissenting).

[66] *Id.* at 177, 179 (majority opinion).

[67] *DeShaney*, 489 U.S. at 197; *Morrow II*, 719 F.3d at 166, 168; D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1366 (3d Cir. 1992).

[68] *DeShaney*, 489 U.S. at 192–93; *Morrow II*, 719 F.3d at 166–67.

[69] *DeShaney*, 489 U.S. at 198; *Morrow II*, 719 F.3d at 167.

[70] *DeShaney*, 489 U.S. at 200 (concluding that the protections of the Due Process Clause are only triggered by the State's affirmative act of restraint on an individual's freedom in one of three situations: (1) incarceration; (2) institutionalization; or (3) similar restraint of personal liberty); *Morrow II*, 719 F.3d at 167.

were neither incarcerated nor institutionalized, so the *Morrow* majority held that they could not claim relief under these *DeShaney* categories.[71]

The *DeShaney* court also identified a third category of control that gave rise to a special relationship.[72] The Court held that if, through an examination of the totality of the circumstances, the physical control exerted by the State was of a similar degree to the control exerted in situations of incarceration or institutionalization, a special relationship may be found to exist.[73] In *Morrow*, the Third Circuit therefore focused on whether the Morrows were under a degree of control similar to incarceration or institutionalization, but ultimately concluded that they were not.[74] To examine the degree of control exerted by the State in a public school context, the Third Circuit turned to its own precedent in *Middle Bucks*, which transformed *DeShaney*'s totality of the circumstances analysis into an "all-or-nothing" approach.[75] *Middle Bucks* held that, generally the type of physical custody necessary to create a special relationship did not exist in public schools despite compulsory school attendance laws and the exercise of *in loco parentis* authority because parents remain the students' primary caretakers.[76] While the *Morrow* majority conceded that a special relationship between "a *particular* school and *particular* students under certain unique and narrow circumstances" could give rise to a special relationship, the majority held that such circumstances were not present in the Morrows' case and failed to provide further guidance on what exactly would constitute such "unique and narrow circumstances" that could create a special relationship.[77]

The five dissenting justices argued that there was a special relationship and therefore that the school had a duty to protect Brittany and Emily.[78] The dissent attacked the legal foundation of the majority opinion as well as its application of

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[71] *See DeShaney*, 489 U.S. at 200; *see Morrow II*, 719 F.3d at 168, 170.

[72] *DeShaney*, 489 U.S. at 200; *see Morrow II*, 719 F.3d at 168.

[73] *See DeShaney*, 489 U.S. at 200; *Morrow II*, 719 F.3d at 168.

[74] *DeShaney*, 489 U.S. at 200; *see Morrow II*, 719 F.3d at 177.

[75] *Morrow II*, 719 F.3d at 188–89 (Fuentes, J., dissenting); *see DeShaney*, 489 U.S. at 200; *Middle Bucks*, 972 F.2d at 1370. To bridge the gap between the totality of the circumstances approach of *DeShaney* and the "all-or-nothing approach" adopted by *Middle Bucks*, the *Middle Bucks* court relied on *Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. Philadelphia*, which failed to find a special relationship with an individual who was under some supervision by the state but lived at his own home. *Morrow II*, 719 F.3d at 189 (Fuentes, J., dissenting); *see* Phila. Police & Fire Ass'n for Handicapped Children, Inc. v. Philadelphia, 874 F.2d 156, 168 (3d Cir. 1989).

[76] *See Morrow II*, 719 F.3d at 169; *Middle Bucks*, 972 F.2d at 1377 (Sloviter, C.J., dissenting) (arguing that a functional custody should create a special relationship that imposes a constitutional duty). Pennsylvania law declares that *in loco parentis* provides school officials with the same authority as the students' parents in regards to conduct and behavior. 24 PA. CONS. STAT. ANN. § 13-1317 (West 2014).

[77] *See Morrow II*, 719 F.3d at 171; *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (stating that, as a general matter, public schools do not "have such a degree of control over children as to give rise to a constitutional 'duty to protect'").

[78] *Morrow II*, 719 F.3d at 193 (Fuentes, J., dissenting).

the law to the facts.[79] Each dissenter, including Judge Thomas L. Ambro who concurred in part, argued that there was a special relationship under the specific circumstances of the case.[80] Judge Fuentes's dissent highlighted the importance of protecting vulnerable students from harms that are out of their control due to the coercive power of public schools.[81]

III. Schools' Coercive Power over Students Should Create a Special Relationship Between State and Student

A constitutional duty to protect should be imposed on schools in limited circumstances where the coercive control exerted by the school obliterates students' ability to protect themselves.[82] The *Morrow* majority was misguided on two fronts.[83] First, the legal standard adopted by the majority was based on unfounded inferential leaps, and second, their analysis demonstrated a misapplication of the law to the facts of the case.[84] The Morrow girls had a special relationship with their school because of compulsory attendance laws, the existence of restraining orders issued by the courts, the lack of school supervision over the students while under the school's custody and control, and the school's enforcement of a "No Tolerance" Policy.[85] The Third Circuit majority opinion failed to protect the Morrows who, under the circumstances, were not permitted to protect themselves.[86]

Ostensibly, the *Morrow* majority left the door open for a future court to find a special relationship in a public school context.[87] The reality, however, is that the majority's narrow reading left little room in an already narrow exception to find such a relationship in a public school context.[88] The *Morrow* holding significantly strips away accountability for school administrators who are uniquely situated to protect students.[89]

Judge Fuentes argued in his dissent that the majority should have found a special relationship, and that it failed to do so because it relied too heavily on *Middle Bucks*, a case that demonstrated a clear misunderstanding of *DeShaney*.[90]

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[79] *Id.* at 187.
[80] *Id.* at 186, 193.
[81] *See id.* at 190, 191.
[82] *See* Morrow v. Balaski (*Morrow II*), 719 F.3d 160, 188, 193 (3d Cir.) (en banc) (Fuentes, J., dissenting), *cert. denied*, 134 S. Ct. 824 (2013).
[83] *See id.* at 187.
[84] *See id.* at 187, 189.
[85] *Id.* at 193.
[86] *See id.* at 187.
[87] *Id.* at 171 (majority opinion).
[88] *See id.*
[89] *See id.* at 187 (Fuentes, J., dissenting).
[90] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989); *Morrow II*, 719 F.3d at 188 (Fuentes, J., dissenting); D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1379 (3d Cir. 1992) (Sloviter, C.J., dissenting).

The central premise of *Middle Bucks* is that a student, unlike a prisoner, is not under severe and continuous restraint.[91] As Judge Fuentes pointed out, *DeShaney* never advocated for an "all-or-nothing" approach.[92] The focus of *DeShaney* was instead on the ability of the victimized individual to care for him- or herself.[93] The majority's leap to an all-or- nothing approach is dangerous because it is unlikely that any student can ever meet a standard of absolute physical custody in a public school context.[94] A student's complaint will fall short of the severe and absolute control that is found when citizens are held in a prison or similar institution.[95] A student is therefore without a remedy if they have the misfortune of being functionally under the State's control rather than fully institutionalized.[96] The majority's application of the *DeShaney* test effectively renders the third category meaningless.[97]

The facts of this particular case should have given rise to a special relationship.[98] As Fuentes's dissent pointed out, Blackhawk High School compelled attendance, exercised extensive control over the victims, and enforced school policies that prevented Brittany and Emily from being able to take reasonable steps to protect themselves.[99] The State has near absolute and coercive power over students and parents alike in the public school setting.[100] In Pennsylvania, children between the ages of eight and seventeen are legally required to attend school.[101] The State enforces the mandatory attendance law by threatening parents whose children do not comply with punishment, including imprisonment.[102] The State's act of compelling attendance creates power and control over students such that students are unable to protect themselves by avoiding the place where they face harm.[103] If students stay home to protect themselves from a bully at their school, they or their parents are subject to penalty.[104]

The State has extensive and coercive power to punish students.[105] The Pennsylvania statute that establishes *in loco parentis* gives school officials, "the

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[91] *Morrow II*, 719 F.3d at 188 (Fuentes, J., dissenting); *Middle Bucks*, 972 F.2d at 1371 (Sloviter, C.J., dissenting).

[92] *Morrow II*, 719 F.3d at 188–89 (Fuentes, J., dissenting); *see DeShaney*, 489 U.S. at 200.

[93] *Morrow II*, 719 F.3d at 189 (Fuentes, J., dissenting); *see DeShaney*, 489 U.S. at 200.

[94] *See Morrow II*, 719 F.3d at 168, 171; *id.* at 189 (Fuentes, J., dissenting).

[95] *See Morrow II*, 719 F.3d at 168, 171; *id.* at 189 (Fuentes, J., dissenting).

[96] *See Morrow II*, 719 F.3d at 168, 171; *id.* at 189 (Fuentes, J., dissenting).

[97] *See Morrow II*, 719 F.3d at 168, 171; *id.* at 189 (Fuentes, J., dissenting).

[98] *Id.* at 188 (Fuentes, J., dissenting).

[99] *See id.*

[100] *Id.* at 189–90.

[101] 24 PA. CONS. STAT. ANN. §§ 13-1326, 1327(a) (West 2014); *Morrow II*, 719 F.3d at 190 (Fuentes, J., dissenting).

[102] 24 PA. CONS. STAT. ANN. § 13-1333(a)(1); *Morrow II*, 719 F.3d at 190 (Fuentes, J., dissenting).

[103] *See Morrow II*, 719 F.3d at 190 (Fuentes, J., dissenting).

[104] *See id.*

[105] *Id.* at 187.

same authority as to conduct and behavior over the pupils attending . . . school . . . as the[ir] parents . . . ."[106] The authority of school administrators arises from an *in loco parentis* relationship that is the same as the relationship between a parent and child.[107] In fact, while a parent can only punish a child, the State can bring juvenile detention charges.[108] The power of the State to punish a child through juvenile detention charges undermines the *Morrow* majority's assertion that a school has limited power over students.[109] The State's power is extensive and coercive.[110]

In addition, the Blackhawk School District enforced a "No Tolerance" policy that swept up and punished both bully and victim.[111] In Brittany Morrow's case, she was punished for standing up to her bully.[112] Through the enforcement of a "No Tolerance" policy that punishes both aggressor and victim alike, the school forced Brittany and Emily to decide between protecting themselves and succumbing to the bullying.[113] The school district essentially eliminated Brittany and Emily's ability to protect themselves.[114]

The failure of the Third Circuit to hold school administrators accountable for harm done to students creates an incentive for administrators to ignore violence and bullying rather than stop it.[115] Administrators, not parents, are uniquely situated to protect students from the harms of bullying inflicted by their peers.[116] It is therefore clear that the Third Circuit should have adopted a functional approach and, in failing to do so, amplified the harm done to vulnerable students.[117]

CONCLUSION

In failing to find a special relationship between Brittany and Emily Morrow and their school, the Third Circuit failed to protect the girls' Fourteenth Amendment due process rights. More importantly, the court all but eliminated any recourse for other students who find themselves similarly situated to the Morrows. Obligatory attendance laws, *in loco parentis*, and the threat of punishment to both parents and children for truancy should create a special relationship be-

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[106] 24 PA. CONS. STAT. ANN. § 13-1317 (West 2014); *Morrow II*, 719 F.3d at 190 (Fuentes, J., dissenting).
[107] *Morrow II*, 719 F.3d at 190 (Fuentes, J., dissenting).
[108] 24 PA. CONS. STAT. ANN. § 13-1338; *Morrow II*, 719 F.3d at 190 (Fuentes, J., dissenting).
[109] *See* 24 PA. CONS. STAT. ANN. § 13-1338; *Morrow II*, 719 F.3d at 168.
[110] *Morrow II*, 719 F.3d at 193 (Fuentes, J., dissenting).
[111] *Morrow I*, 2011 WL 915863, at *1.
[112] *See id.*
[113] *See Morrow II*, 719 F.3d at 193 (Fuentes, J., dissenting).
[114] *See id.* at 193, 202.
[115] *See id.* at 185 (Ambro, J., concurring in part and dissenting in part).
[116] *See id.*
[117] *Id.* at 202 (Fuentes, J., dissenting).

tween the State and students in limited circumstances. In the Morrows' case, there were specific circumstances that should have created a special relationship. First, the bullying and abuse were reported to school officials on numerous occasions. In addition, the school received copies of both stay-away orders issued by the municipal court. Finally, the school punished Brittany for standing up for herself under the "No Tolerance" policy. The State had clear coercive control to such an extent that the Morrows could no longer protect themselves for fear of reprisal.

The Third Circuit had an opportunity to take a stand against bullying. Like administrators at the Blackhawk High School, however, the court chose to "pursue inaction."[118] Should other circuits follow this example, bullied students in public schools across the United States will suffer the consequences.

[118] *See* Morrow v. Balaski (*Morrow II*), 719 F.3d 160, 185 (3d Cir.) (en banc) (Ambro, J., concurring in part and dissenting in part), *cert. denied*, 134 S. Ct. 824 (2013).