

When Child's Play Turns Tragic

A troubling school shooting case raises 'what if ...' questions about the need for adult supervision of young students

A court decision can bring a case to a close, but there's no such thing as "closure" when a child is killed by violence. That's one of the horrible truths I've learned in my career as a defense lawyer, prosecutor, and education law teacher and columnist.

On Feb. 29, 2000, a 6-year-old boy brought a .32-caliber semiautomatic pistol to school and shot and killed classmate Kayla Rolland in their first-grade classroom in Buell Elementary School in Mount Morris Township, Mich. The shooting of little Kayla appalled a nation still shocked by the Columbine High School massacre less than a year earlier.

Kayla's mother sued the Beecher Community Schools, Kayla's teacher, Alicia Judd, and Buell Principal Jimmie Hughes in U.S. District Court, contending that Judd's decision to leave the boy in a classroom with Kayla, without supervision, violated the girl's right to due process under the Due Process Clause of the 14th Amendment.

On April 23, 2004, U.S. District Judge Bernard A. Friedman dismissed the suit, and Kayla's mother appealed to the 6th U.S. Circuit Court of Appeals. On Jan. 5, 2006, the 6th Circuit affirmed Judge Friedman's decision.

A complex tragedy

The full story of the shooting is tragi-

cally complex. According to an article in the *Washington Post*, 93 percent of the students at Buell were eligible for free or reduced-price lunch in the 1999-2000 school year. At the time of the shooting, the boy—called by the pseudonym John Smith in the case because of his age—lived with his mother. His parents had separated, and his father was in jail.

Although John's mother worked 14 hours a day in two jobs, she was evicted from her house because she still did not have enough money to pay the rent. She took her 5-year-old daughter to stay with relatives and left John and his 8-year-old brother in a house with their uncle. The house was a crack house, and one of the residents, Jamelle James, had a stolen .32-caliber semiautomatic handgun. Law enforcement officials had investigated the house for drug and gun trafficking but had not yet shut it down.

According to the *Post*, school officials had identified John as potentially violent, and he was scheduled for an appointment with a psychologist—six days after the shooting. Mount Morris Township Police Chief Eric King told the *Post* that when police officers took John into custody, he said someone else had shot the gun. Then he admitted he had shot Kayla and said he was trying to scare his classmates.

"He thought this was like television, meaning people don't really die," King told the *Post*.

A simple case

The legally relevant facts of this case, however, are tragically simple. According to the 6th Circuit's summary of the facts, John attacked other students several times during the 1999-2000 school year. Sometimes he beat them up, and sometimes he stabbed them with a pencil. School board policy called for expulsion of students for possessing dangerous weapons on school grounds. School officials admitted that a pencil could be a dangerous weapon, though they had not tried to expel John.

On Feb. 29, John brought the pistol to school. That morning, the teacher took her students to a computer class. She left Kayla, John, and four other students behind to punish them for not doing their work. As Judd was leading the rest of the class down the hall, John took the gun out of his desk, inserted a clip with bullets, threatened one student, and fired one shot at Kayla, killing her.

Writing for the 6th Circuit, Judge Karen Nelson Moore observed that Kayla's mother had invoked the constitutional doctrine of "state-created danger" to allege that Judd violated Kayla's due process right to life. Specifically, she contended that when Judd left John in the classroom with other students without supervision, the teacher—an agent of the state—created a risk that John would harm Kayla.

Judge Moore analyzed the claim under a line of cases beginning with the Supreme Court's 1989 decision

in *DeShaney v. Winnebago County Department of Social Services*. In that case, a young boy, Joshua DeShaney, suffered permanent injury from a severe beating by his father after the local department of social services failed to remove him from his father's custody.

The Supreme Court held that a government agency's failure to protect an individual from private violence generally does not violate the victim's due process rights under the 14th Amendment. Of course, the perpetrator might well be criminally or civilly liable under state law, but a government agency is not civilly liable under the Due Process Clause for failing to protect the victim.

However, the Supreme Court also suggested in *DeShaney* that the Due Process Clause might impose a duty to protect a person if the agency either creates or increases the risk that a person will be exposed to private acts of violence.

After *DeShaney*, federal courts around the nation, including the 6th Circuit, ruled that government agencies may be found civilly liable for violating the due process rights of victims of private violence under the doctrine of state-created danger.

Three-part liability

Judge Moore identified the three elements of agency liability under the state-created danger doctrine: "an affirmative act that creates or increases the risk, a special danger to the victim as distinguished from the public at large, and the requisite degree of state culpability."

She agreed with Kayla's mother that when Judd left John unsupervised with other students in a classroom, the boy posed a special danger to those students, including Kayla. As Moore observed, even though John could have left the classroom and shot anyone, he "was much more likely to shoot the students in his immediate physical presence than a member of the general public."

The issue is whether the presence of an adult would have reduced the risk of danger—not whether it would have guaranteed prevention.

The judge agreed with the school district, though, that the other two elements of the state-created doctrine were not satisfied.

First, she concluded that Judd's act of leaving the students unsupervised in the classroom "was not an affirmative act that created or increased the risk." It was John's possession of the gun and Kayla's presence in the classroom with him that created the risk to Kayla, Moore wrote. Even if Judd had been in the room, "there is no guarantee that, upon seeing the gun, she would have gotten to John in time to prevent the shooting; indeed, in a busy classroom, she may not have even noticed [John's] actions until the fatal moment."

She added that "there is no reason to believe that Judd's presence in the room would have discouraged [John] from drawing the weapon, as [John's] behavioral issues indicate that he did not shy away from misbehaving directly in Judd's view."

Second, Moore agreed with the school district that Judd's conduct was not sufficiently wrongful to establish liability under the state-created-danger principle. The burden of proof was on Kayla's mother to show that Judd had acted with deliberate indifference—that the risk that John might hurt one of the other students was so obvious that Judd had to have known about it.

Moore rejected the contention that in light of John's "history of behavior problems, Judd knew that [John] might

violently assault another student and acted recklessly in conscious disregard of that risk by leaving [John] and several other children unsupervised in the classroom." In rejecting this argument, Moore quoted the decision of District Judge Friedman:

[A]lthough Judd was aware of [John's] disruptive and sometimes violent behavior, no reasonable fact finder could conclude that she knew [John] would use a gun to kill another student if left unsupervised for a few minutes. Plaintiff does not claim that [John] ever specifically threatened to kill or seriously injure [Kayla] or any other student. Nor does plaintiff claim that prior to February 29, 2000, [John] had ever brought a gun or other dangerous weapon to school. Absent such evidence, it is impossible to conclude that [Judd] was on notice of a substantial risk to the students left alone in the classroom.

In addition, Moore, noted, there was no evidence that Judd knew or suspected that John possessed a gun, knife, or other dangerous weapon in school that day or that John's history of violence "would escalate from hitting with fists, feet, and pencils to such weapons."

Without such evidence, Moore concluded, the risk of such a violent attack by John was not so obvious that Judd should have known about it.

Moore also rejected the mother's claims that the school district and Principal Jimmie Hughes were liable for their failure to expel John, to train teachers to deal with violent students, to establish policies to protect students from violence, and to prohibit teachers from leaving children in classrooms without supervision. As Moore explained, Hughes and the district could be liable only if Judd were liable.

A misguided ruling?

I disagree with the 6th Circuit's decision. Of course, Judd did not create the danger that John would shoot a student. John created that danger, and John fired the shot. And I have enor-

mous compassion for Judd, who certainly did not imagine that leaving John and the other students alone for a few moments would end in such tragedy, and who, the *Washington Post* reported, watched Kayla die while desperately feeling her for a pulse and frantically calling 911.

But I do think Judd increased the danger that John would at least hurt a student by leaving him and the other students in the classroom without adult supervision. Of course, there's no guarantee that the presence of an adult would have discouraged John from shooting or that an adult in the classroom could have acted in time to prevent John from firing.

But the issue is whether the presence of an adult would have reduced the risk of danger—not whether it would have guaranteed prevention. I believe the evidence suggests that leaving John in a room with four other students, but without an adult, at least increased the risk that John would fire the gun. And while it's true Judd had no reason to fear that John would use a gun to kill a student, she did have reason to believe he might assault a classmate.

In my view, Judd failed to realize the risk of violent injury by leaving John in a room with other students without supervision. John killed Kayla. But it was adults (John's parents and uncle and Jamelle James) who created the risk and—I believe—adults (Judd and school officials) who increased the risk that John would hurt or kill another student.

As I said, the full story of this case is tragically complex, and it defies closure. According to a Michigan newspaper, the *Morning Sun*, Jamelle James later pled no contest to involuntary manslaughter, and John's mother lost parental rights to John and his brother. Because he is a juvenile, John's current status is not a matter of public record.

He's now just 13 years old.

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