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Preschooler II v. Clark County School Board of Trustees: A Closer Look at Application of Qualified Immunity in Public School Districts

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CASE SUMMARY

PRESCHOOLER II V. CLARK COUNTY SCHOOL BOARD OF TRUSTEES:

A CLOSER LOOK AT APPLICATION OF QUALIFIED IMMUNITY IN PUBLIC SCHOOL DISTRICTS

INTRODUCTION

During the 2002-2003 school year, the mother of a pre-school aged, non-verbal, autistic child became concerned when her child came home with unexplained bruises and began exhibiting violent behavior.[1] The mother brought an action on behalf of herself and her child seeking relief under the Individuals with Disabilities Act ("IDEA"), Americans with Disabilities Act, and claimed constitutional violations under Section 1983.[2] In *Preschooler II v. Clark County School Board of Trustees*,[3] the United States Court of Appeals for the Ninth Circuit held: 1) teacher's alleged conduct in beating, slapping, and head-slamming child violated Fourth Amendment rights for purposes of a section 1983 claim;[4] 2) teacher allegedly making child walk from school bus without shoes did not involve excessive force or other abuse that was violative of the

[1] Preschooler II v. Clark County School Board of Trustees, 479 F.3d 1175, 1177 (9th Cir. 2007).

[2] *Id.*

[3] Preschooler II v. Clark County School Board of Trustees, 479 F.3d 1175 (9th Cir. 2007).

[4] *Id.* at 1181; *see also* 42 U.S.C. § 1983 (Westlaw 2008).

Fourth Amendment;[5] 3) teacher was not entitled to qualified immunity with respect to hitting and head-slapping claims;[6] 4) supervisory liability claims were stated against school officials;[7] and 5) school officials were not entitled to qualified immunity.[8]

I. FACTS AND PROCEDURAL HISTORY

This case arose from alleged physical abuse of a preschooler ("Preschooler II") at the Betsy Rhodes School in Clark County, Nevada.[9] Preschooler II was four years old when he was allegedly abused.[10] Preschooler II has tuberous sclerosis, which causes tumors to form in various organs in his body as well as symptoms including seizures, rashes and skin lesions.[11] In conjunction with his tublerous sclerosis, Preschooler II also suffers from non-verbal autism.[12] Due to his disabilities, Preschooler II is eligible for special education services under the Individuals with Disabilities Education Act ("IDEA").[13]

In compliance with IDEA's requirements, Preschooler II began a two-part educational program, which included a special education program known as Kids Intensive Delivery of Services ("KIDS"), and twenty hours per week of one-on-one in-home instruction.[14] One teacher, Kathleen LiSanti, and multiple teaching assistants staffed the KIDS program at the Betsy Rhodes School.[15]

LiSanti allegedly began abusing Preschooler II in September 2002.[16] The abuse continued until April 2003 when Preschooler II transferred to another school.[17] LiSanti allegedly physically assaulted Preschooler II

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[5] *Id.*

[6] *Id.* at 1182.

[7] *Id.* at 1183.

[8] *Preschooler II*, 479 F.3d at 1183.

[9] *Id.* at 1177.

[10] *Id.* at 1178. The alleged abuse occurred during the 2002-2003 school year. *Id.*

[11] *Id.* at 1178.

[12] *Id.*

[13] *Preschooler II*, 479 F.3d at 1178; *See generally*, 20 U.S.C.A. § 1400 (Westlaw 2008).

[14] *Id.* at 1178; *See also*, Roe v. Nevada, No. 2:04-cv-00348-RLH-PAL, 2007 WL 4380138, at *2 (D. Nev. Dec. 10, 2007). "KIDS" is the name given to the special education pre-school program at the Betsy Rhodes School. The home instruction was to be carried out by representatives from the Lovaas Institute for Early Intervention, which is a special education home service provider approved by the Betsy Rhodes School. When Preschooler II's mother asked for the at-home instruction hours to be increased she was denied. *Id.*

[15] *Preschooler II*, 479 F.3d at 1178.

[16] *Id.*

[17] *Id.*

by slapping and beating him repeatedly in his face and head.[18] On one occasion, a detective witnessed LiSanti maliciously body slam Preschooler II into a chair.[19] Additionally, LiSanti allegedly forced Preschooler II to walk from the school bus to his classroom barefoot on four separate occasions.[20] Preschooler II also sustained unspecified bruising and scratches.[21]

Preschooler II's mother became suspicious of problems at school when Preschooler II began to exhibit violent behavior at home.[22] This behavior was not present prior to the abuse.[23] Although the alleged abuse began in September 2002, it was not until April 2003 that the principal notified Preschooler II's mother of the allegations against LiSanti.[24] The principal told Preschooler II's mother that LiSanti was disciplining Preschooler II to teach him not to "swat" himself.[25] Several months after the first reported incident of abuse, LiSanti was placed on administrative leave.[26] Dissatisfied with this consequence, Preschooler II's mother filed suit in federal court.[27]

Preschooler II's complaint alleged eight causes of action against the Defendants ("School Officials"): 1) petition for judicial relief, declaratory and equitable relief, and claim for attorney's fees and costs; 2) violation of the Americans with Disabilities Act; 3) violation of the Rehabilitation Act; 4) violation of 42 U.S.C. § 1983 based on the Fourth and Fourteenth Amendments; 5) *Monnel/Canton* claims; 6) assault, battery and use of aversive interventions; 7) negligence claims; and 8) negligent failure to report.[28] The School Officials moved to dismiss several of Preschooler II's claims under 12(b)(6), and asserted qualified immunity with respect to the fourth claim.[29]

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[18] *Preschooler II*, 479 F.3d at 1178. "This event was especially traumatic for Preschooler II because of his tuberous sclerosis diagnosis, which causes tumors in the eyes and brain."

[19] *Id.* at 1178.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 1179.

[23] *Id.*

[24] *Preschooler II*, 479 F.3d at 1179.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* 1179; *See also*, Roe v. Nevada, No. 2:04-cv-00348-RLH-PAL, 2007 WL 4380138, at *2 (D. Nev. Dec. 10, 2007).

[29] *Preschooler II*, 479 F.3d at 1179. The School Officials moved to dismiss the second, third, fourth, fifth and eighth causes of action under 12(b)(6). They also requested a declaratory judgment that the enforcement provisions of the Nevada Reporting Statute are not "state educational requirements" under the IDEA. *Id.*

The district court denied both the School Officials' motion to dismiss and assertion of qualified immunity.[30] The court held that because Preschooler II had alleged conduct sufficient to support a claim for constitutional deprivation under the Fourth and Fourteenth Amendments and violations of clearly established law, the School Officials were unable to assert qualified immunity.[31] The School Officials appealed the District Court's ruling on qualified immunity.[32]

II. ANALYSIS

The Ninth Circuit applied the rule from *Harlow v. Fitzgerald*, which states that "government officials do not enjoy qualified immunity from civil damages if their conduct violates 'clearly established constitutional or statutory rights of which a reasonable person would have known.'"[33] To determine whether the School Officials were entitled to qualified immunity, the court asked two questions.[34] The court inquired into whether, viewed in the light most favorable to the injured party, that party has established a violation of a federal right.[35] If this threshold requirement is met, the court would then consider whether the School Officials' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[36] This second test is satisfied if "in light of preexisting law the unlawfulness [is] apparent."[37]

The court began with the general proposition "that excess force by a [school official] against a student violate[s] the student's constitutional rights."[38] The court mentioned that even though courts have historically applied the substantive due process "shocks the conscience" test,[39] the consequences of a teacher's force against a student at school is generally analyzed under the "reasonableness" rubric of the Fourth Amendment.[40] When applying the Fourth Amendment in the school context, the court considered the student's age and sex as well as the nature of the

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[30] *Id.*

[31] *Id* at 1179.

[32] *Id.*

[33] *Id.* at 1179 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[34] *Preschooler II*, 479 F.3d at 1179.

[35] *Id.* at 1180 (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)).

[36] *Preschooler II*, 479 F.3d at 1180 (citing Hope v. Pelzer, 536 U.S. 730, 739 (2002)).

[37] *Preschooler II*, 479 F.3d at 1180.

[38] *Id.* at 1180.

[39] *Id.* at 1180 (citing Doe v. State of Hawaii Dep't of Educ., 334 F.3d 906, 908-09 (9th Cir. 2003) (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

[40] *Preschooler II*, 479 F.3d at 1180.

infraction.[41] The court found that LiSanti's alleged slapping, forced participation in self-beating and slamming were unreasonable under this test.[42] The court noted that Preschooler II's serious disabilities made him more vulnerable than the average child, and his actions were not endangering anyone.[43] The opinion rejected the School Officials' argument that LiSanti's actions were at worst a "failure to conform to best practices."[44] Moreover, the court found that LiSanti's conduct allegedly occurred over a period of months and the full extent of the abuse is unknown due to Preschooler II's young age and the lack of verbalization due to his autism.[45] The court reasoned that precedent requires analysis of the school and child's specific circumstances.[46]

The Ninth Circuit did not find, however, that all of the alleged abusive incidents violated constitutional rights.[47] The court held that Preschooler II's unexplained bruises and scratches did not amount to a constitutional violation, and that making him walk from the school bus to the classroom without his shoes was not "unreasonable" either as excessive force or abuse.[48]

Relying on *Ingraham v. Wright*,[49] the Ninth Circuit stated that excessive force allegations in section 1983 actions should be analyzed under a more specific constitutional provision, rather than through generalized notions of substantive due process.[50] The Ninth Circuit found that no reasonable special education teacher would believe it was lawful to force a seriously disabled child to beat himself or to violently throw or slam him.[51] Therefore, the Ninth Circuit held that LiSanti was not entitled to qualified immunity for the alleged head beating and slamming assaults on Preschooler II.[52]

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[41] *Id.*

[42] *Id.*

[43] *Id.* at 1180

[44] *Id.*

[45] *Id.* at 1180-81.

[46] *Preschooler II*, 479 F.3d at 1181.

[47] *Id.*

[48] *Id.*

[49] Ingraham v. Wright, 430 U.S. 651, (1977) (finding that the Supreme Court described *Ingraham* as standing for the proposition that while children sent to public school are lawfully confined to the classroom, arbitrary corporal punishment represents an invasion of personal security to which their parents do not consent when entrusting the educational mission to the state.) (Sandin v. Connor, 515 U.S. 472, 485 (1995)).

[50] *Preschooler II*, 479 F.3d at 1182 (citing Graham v. Connor, 490 U.S. 386, 394 (1989)).

[51] *Preschooler II*, 479 F.3d at 1182.

[52] *Id.*

Preschooler II alleged that School Officials faced individual liability under section 1983 for their inaction in the training, supervision and control of LiSanti.[53] Preschooler II bases liability on the School Officials' reckless indifference to the children's rights when they permitted LiSanti to work with Preschooler II knowing that she posed a risk to the children, and their failure to immediately report and remedy the alleged abuse.[54] Although there is no pure respondeat superior liability under section 1983, a supervisor is liable for his subordinate's acts "if the supervisor participated in or directed the violations, or knew of the violations [of subordinates] and failed to act to prevent them."[55] The Ninth Circuit found that to survive a 12(b)(6) motion, Preschooler II was only required to state the allegations generally to provide notice to the defendant and alert the court to the violative conduct.[56] The court held that Preschooler II's allegations were not only sufficiently specific to meet the pleading requirement, but also that they constitute a constitutional violation sufficient to satisfy step one of the *Saucier* analysis.[57]

The Ninth Circuit finds that it has been clearly established that "supervisory liability is imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional deprivations of which the complaint is made, or for conduct that showed a reckless or callous indifference to the rights of others."[58] The court also held that a person deprives another of a constitutional right, within section 1983, "if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation."[59]

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[53] *Id.* (Preschooler II specifically alleges that the following individuals are liable: administrative personnel Green, Davis and Harley, and Principal Wyatt).

[54] *Id.* (The School Officials were allegedly on notice that LiSanti posed a risk when the abuse was reported and they failed to notify Preschooler II's parents for several months).

[55] *Id.* (citing Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)).

[56] *Preschooler II,* 479 F.3d at 1182.

[57] *Id.* at 1182-1183. The amended complaint details the allegations of abuse, the role of the School Officials, the knowledge and reporting duty of the officials, and their failure to report or take corrective action. Preschooler II further alleges that the School Officials ratified a custom that subjected Preschooler II to an educational environment in which he was physically and emotionally abused, in part by failing to train special education teachers, or to hire qualified individuals to work in special education classrooms. He also alleges that the officials abdicated their duty to report and discipline LiSanti when they first became aware of the alleged abuses.

[58] *Id.* (citing Menotti v. City of Seattle, 409 F.3d 1113, 1149 (9th Cir. 2005) (quoting Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991)).

[59] *Id.* (citing Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (citing Sims v. Adams, 537 F.2d 829 (5th Cir. 1976)).

The Ninth Circuit concludes that the School Officials' alleged acts and omissions, if proven true, establish liability to Preschooler II for a constitutional violation.[60] The court reasons that the School Officials disregarded their responsibilities in hiring, training, supervising, disciplining and reporting abuses committed by LiSanti.[61] A reasonable special education school official would know that LiSanti's alleged conduct, and the failure to report that conduct are grounds for liability.[62] Therefore, the district court properly denied qualified immunity protection to the School Officials.[63]

III. IMPLICATIONS OF THE DECISION

Preschooler II reaffirms the principle found in *Hunter v. Bryant*,[64] that "[q]ualified immunity will not protect the 'plainly incompetent' or those 'who knowingly violate the law.'"[65] Declining to accept the School Officials "candy-coat[ed]" version of the allegations, the Ninth Circuit found that neither LiSanti nor the School Officials could hide behind qualified immunity's protection.[66] Although it remains to be seen whether Preschooler II will ultimately be successful in his claims against LiSanti and the School Officials, by declining to protect the defendants with qualified immunity, the Ninth Circuit allowed the case to continue. The court noted that the allegations were not based on some "obscure and abstract legal requirement;" but rather those any reasonable school official would know would be grounds for liability.[67]

While school districts in California will continue to enjoy immunity under the U.S. Constitution's Eleventh Amendment, *Preschooler II* makes clear that school teachers and administrators who knew or should have known that their actions would violate federal rights will not enjoy the same immunity from damage awards in federal court.

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[60] *Preschooler II*, 479 F.3d at 1183.

[61] *Id.* at 1183.

[62] *Id.*

[63] *Id.*

[64] Hunter v. Bryant, 502 U.S. 224 (1991).

[65] *Preschooler II*, 479 F.3d at 1180 (citing Hunter v. Bryant, 502 U.S. 224 (1991)).

[66] *Id.* at 1180-1183.

[67] *Id.* at 1183.

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