

**CHILDREN ON CAMPUS:
Legal Implications of Children's Presence and Activity on Campus**

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**Sheila Trice Bell¹
Bell & Trice Enterprises, Inc., Washington, DC**

I. Introduction

Children of all ages regularly come to many college and university campuses for a wide range of activities and varied range of circumstances. Minors² may be college students, participants in camps located on campus, campus residents who live with their parents, visitors accompanied by parents, enrollees in campus day care, or campus neighbors cutting across college or university property. Minors may also interact in other ways with higher education institutions. This paper focuses on the duty and potential liability for negligence that colleges and universities have when minors are on campus.

Generally, a successful claim of negligence requires that the claimant prove four elements of negligence: there was a *duty* to the claimant under the circumstances; actions or omission by the person or organization against whom the claim is made constituted a *breach* of that duty; the breach of the duty *caused* the asserted injury; and the claimant was *damaged* by the acts or omissions that are asserted to constitute negligence. *See, e.g., Davidson v. University of North Carolina at Chapel Hill*, 543 S.E.2d 920, 926 (N.C. 2001). Therefore, as one evaluates the potential liability to which a college or university may be exposed as a result of the presence of minors on campus, the first step in the evaluation process is to determine what duty exists to minors. If no duty exists, then the remaining elements of negligence are moot. If the court determines, as a matter of law, that a duty exists, then administrators must remember that liability still may not exist

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² The terms "children," "child," and "minors" are used interchangeably in this paper to refer to individuals who are under the age of majority. The legal age of majority in many states is 18. However, one must check this for each state. At the age of majority, individuals have the legal rights and responsibilities of adults. A legal exception is the legal age for drinking alcoholic beverages which, in many states, is 21 years of age.

under the circumstances in which a specific minor interacted with a college or university. That is, when a court finds there is a duty, the determination of liability must follow a sequential analysis of the three other elements of negligence, namely, breach of duty, causation and damage to the claimant.

II. The Special Relationship between Children and Higher Education Institutions -- Affirmative Duty to Minors

A. The Doctrine of *In Loco Parentis* for Primary and Secondary Schools

The doctrine of *in loco parentis* is applied to primary and secondary schools and one can judiciously analogize the resulting special relationship and affirmative duty schools have for student in K through 12 to various relationships between colleges and universities and children who are not college students and who are on campus for activities that the college or university sponsors or sanctions. In the K through 12 environment, the *in loco parentis* doctrine recognizes the custodial relationship that mandatory schooling creates between schools and the minors who are their students. The custodial relationship imposes an affirmative duty to supervise elementary and secondary school children. See Rupp v. Bryant, 417 So.2d 658 (Fla. 1982). School administrators and teachers are required to supervise students with reasonable care under the circumstances. See, Dailey v. Los Angeles Unified School District, 470 P 2d 360 (Cal. 1970); Eastman v. Williams, 207 A.2d 146 (Vt. 1965).

B. The Abandonment of *In Loco Parentis* for College Students

The doctrine of *in loco parentis* is not applied in the higher education context for college students—irrespective of age. See, Hartman v. Bethany College, 778 F.Supp.286, 293-94 (N.D.W.V. 1991). The erosion of the doctrine as it pertained to colleges and university was clearly evident in the 1961 the decision of the U.S. 5th Circuit Court of Appeals in Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961). The doctrine had been based upon the public policy view of college students as young people who had been placed in the custody of higher education institutions. This custodial relationship created a special duty that higher education institutions owed to students. At the same time higher education institutions had a very high level of control

over the lives of students. This configuration of the relationship between institutions and college students changed dramatically with the societal changes of the latter 20th century. As older students entered higher education in much larger numbers and as the student population became more diverse in many ways, students demanded more independence. The age of majority was lowered from 21 to 18 or 19 in most states. The increase of civil rights also had an impact on higher education with a rise in judicial scrutiny of university policies and procedures. As *in loco parentis* vanished for college students, colleges and universities used this trend in the context of negligence claims to assert that with diminished control of student behavior and activities, the duty to supervise students should cease in some circumstances. For example, universities argued that universities should not have a duty to supervise students in order to protect them from extra-curricular conduct with peers that causes personal injury. See, e.g., Bradshaw V. Rawlings, 612 F. 2d 135 (3d Cir. 1979), *cert denied* 446 U.S. 909, 100 S. Ct. 1836 (1980); Beach v. University of Utah, 726 P.2d 413 (Utah 1986). In these post-*in loco parentis* days, courts do not expect colleges and universities to supervise students who have reached the age of majority. See Beach. The basis for liability that exists for injury to students who are no longer minors is rooted in a duty to protect students from foreseeable harm. See, Mullins v. Pine Manor College, 449 N.E.2d 331 (Mass. 1983) for the court's discussion of the duty that a college owed for the foreseeable safety and security of a female student who lived on campus, was abducted from her dormitory and assaulted in another campus building by someone who did not live or work on the campus. In the Mullins case, the court held that the college had a duty to maintain a campus free of foreseeable harm. This is quite different from the earlier duty to supervise students.

C. Affirmative Duty to Minors Who are Not College Students

The type of legal duty that a college or university owes to minors depends upon the relationship that the law recognizes as existing between the higher educational institution and minors. Courts view minors, especially young children, as not having the level of experience and judgment to perceive or to avoid circumstances that can lead to their injury. When minors are on campus for reasons that the university can anticipate – particularly when the university benefits from the presence of the child or the child's parent – some courts have held that the minors have a special relationship with the

university. This special relationship creates a legal affirmative duty on the part of the institution to use reasonable care under the circumstances to take actions to prevent injury to minors. However, it is important to remember that the courts have distinguished the duty owed a minor who is a college student from the duty owed a minor who is *not* a college student.

Graham v. Montana State University, 767 P.2d 301 (Mont. 1988) is a case that involves a minor who was not a college student. The university was held to have a special duty of supervision. In Graham a sixteen year old high school student was participating in a summer Minority Appreciation Program (MAP) at Montana State University. She lived on campus and worked as a research assistant on campus. Two weeks into the program, Ms. Graham and several other program participants received permission from the MSU resident advisor and MAP supervisor to visit the off-campus residence of Darryl Tincher. While there, Ms Graham drank some beer. In the afternoon of the same day, Tincher and Graham went for a motorcycle ride and he was driving. He bought beer at a convenience store and then they stopped at a bar and drank mixed drinks. On the return trip on the motorcycle, the vehicle left the road and Graham was seriously injured. Ms. Graham and her mother appealed the summary judgment in favor of MSU. On appeal the Supreme Court of Montana ruled that the University's duty to the minor was in the form of a custodial role "similar to that imposed on a high school because Kimberley (Graham) is a juvenile who lived on campus, was supervised during the MAP program and was a high school student. The form of duty was that of "reasonable care in supervising the MAP participants." Graham, p. 304. Presumably, the duty would have been different if she had been enrolled as a college student at the same age because there would have been no public policy expectation for supervision would have been different – as articulated in Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir.1979), *cert. denied* 446 U.S. 909, 100 S.Ct. 1836 (1980); Beach v. University of Utah, 726 P.2d 413 (Utah 1986).discussed above regarding the abandonment of *in loco parentis* for college students. However, Ms. Graham's status as a high school student distinguished her from college students for the purpose of establishing the duty that the university owed to her. The university prevailed in the case, but for different reasons. The court determined from the facts in the case that the proximate cause for the accident

that caused Ms. Graham's injuries was the intervening behavior of a third part – not the university or its agents. See, Benefield v. Board of Trustees of the Univ. of Alabama at Birmingham, 214 F.Supp.2d 1212, 1220 for *dicta* regarding the inapplicability of the doctrine of *in loco parentis* to a 15 year old college student, despite her status as a minor. For the purpose of determining her relationship with the university, her status as a college student, not her status as a minor, was controlling.

Compare, Hartman v. Bethany College, 778 F.Supp.286, 293-94 (N.D.W.V. 1991), in which the court held that a university had *no* duty of a special relationship with a 17 year old college freshman who had been sexually assaulted after having gone off campus to a local bar, unlawfully engaged in under-age drinking with two men who were not connected with the college, and gone to the home of one of the men, where she was assaulted. She had not been involved in a college activity during her time at the bar or at the home of one of the men. The student and her mother asserted that the college had been negligent because it breached its duty arising from a special relationship because of her status as a minor. She and her mother also asserted that due to her daughter's status as a minor the college stood *in loco parentis* and was obliged to supervise her daughter. The court stated that the standard of care that the university owed to the student was based upon her status as a student. The duty owed her by the university was not based upon her age. Indeed, the court was quite direct in its discussion that it was not appropriate to hold colleges and universities to a higher standard of care for enrolled students who were minors than for student who had reached the age of majority. The court found, as a matter of law, that the doctrine of *in loco parentis* did not apply to the relationship between a college and a seventeen year old freshman.

The plaintiff in Davidson v. University of North Carolina at Chapel Hill, 543 S.E. 2d 920; (N.C. 2001) was not a minor. However the case was one of first impression in North Carolina on the issue of special relationship and affirmative duty that a university owed to a student. The reasoning of the court is very helpful as one considers the liability that may arise from special relationships with minors. In Davidson, a college student who was not a minor was injured as a junior varsity cheerleader when she fell from the top of a three-person high cheerleading pyramid. The court held that the student's

relationship with the university as a member of the school sponsored intercollegiate cheerleader team was the basis for a special relationship that created an affirmative duty to exercise a degree of care which a reasonable and prudent person would exercise under the same or similar circumstances.” Davidson, 928. The court held that on remand the Commission that acted as a trial court for the tort claims against public institutions must reconsider liability in light of the finding of duty arising from a special relationship. On remand, the commission would be required to look at all facts pertinent to the issue of this duty and determine whether the university, through its agents, breached the duty it owed the injured student. The court clearly considered the interdependency that the injured student and other cheerleaders had with the university in reaching its decision that a special relationship existed. The court also considered evidence submitted that administrators were concerned about the dangerous nature of the type of pyramid that precipitated the injury. Furthermore, there was evidence that administrators had not informed the junior varsity – which consisted of the least experienced cheerleaders, of their concerns about the risk. This combination of facts in the case presented the trial court with several questions related to whether the duty owed to the injured student had been breached. The Davidson case is also a good illustration that the determination of liability is fact-driven. Indeed, the determination of the applicable legal standard for duty is very much dependent upon the underlying facts of a case which define the parameters of the relationship between the parties for the purpose of determining whether negligence occurred.

III. Vicarious Liability

Dismukes v. Quaynor, 637 So.2d 555 (La.App.1994), *rev denied*, 639 So.2d 1164 (La.1994) also involved a minor who enrolled in a summer program at a university. Ms. Dismukes was a 15 year old summer day camp participant in a program on the Grambling University campus. A Grambling student who was hired as a camp counselor to supervise male camp participants raped Ms. Dismukes in a room of the student union following her early dismissal from a camp session. The university was found liable for the tortious act committed by the student employed as a camp counselor because the

court determined that the counselor had been acting within the course and scope of his employment at the time of the assault of Ms. Dismukes.

This case raises important issues about the reasonable hiring, training and supervision of university employees who interact with minors. Younger children are likely to be especially vulnerable because of their youth and lack of experience to perceive certain dangerous situations. Indeed, state law may require background checks of employee who interact with minors – especially those who interact with children in day care centers that are on campus or other programs designed for very young children. See the companion paper written by Angela Alkire and Ann Franke regarding risk management issues and resources for taking prudent steps to minimize risk in running programs on campus in which minors are participants.

IV. Premises Liability

Another theory for liability for negligence is based upon the classification of a minor, for legal purposes, as a business invitee. In Stanton v. University of Maine System, 773 A.2d 1045 (Me. 2001) the Supreme Judicial Court of Maine ruled that the public Maine system of higher education had a duty to reasonably warn and advise a seventeen year old special student (she took classes at the university, but did not have a high school diploma) and other students of steps they could take to improve their personal safety. Ms. Stanton had been sexually assaulted when she let someone she had met at a fraternity party come into her dormitory with her because he had said that he knew someone in the dormitory. She got off the elevator in her dormitory and he stayed on the elevator. She went to her room and propped the door open while she walked to the other part of the room. When she turned around, he had entered her room and sexually assaulted her. The court reasoned that the duty to warn was not based upon Ms. Stanton's status as a minor. Rather, the duty was based upon her status as a student.

Liability arising from invitee status applies to minors who are not students, as well. For example, minors who come to campus either with or without parents to use food facilities on campus that are open to visitors as well as to students are invitees to

whom there is a duty of reasonable care. *See, McMahan v. Crutchfield*, 1997 Wash.App. LEXIS 66 (1997), *rev.denied*, 937 P.2d 1102 (Wash.,1997) where a five year old child was held to be an invitee, not only because she accompanied her mother to a community college cafeteria, but also because she was an invitee in her own right. Her independent invitee status arose from the fact that she was visiting a cafeteria that was open to the public and she was an anticipated customer of the refreshments in the cafeteria. Pursuant, in part, to the provisions of Restatement (Second) of Torts, §344, the university as property owner or occupier was liable for physical harm proximately caused to the child, as a business or public invitee by the accidental, negligent or intentionally harmful acts of third persons where the university fails to exercise reasonable care to: a) discover that such harmful acts are likely to occur; b) give a warning adequate to enable visitors to avoid harm; or c) protect invitees against the danger. The alternative duties to exercise reasonable care to discover or to give adequate warning against harm or to protect are clearly applicable to other situations and circumstances involving minors. The standard is one of reasonableness. Therefore, the college or university need not take unreasonable steps to protect a minor who is a business invitee. However, implicit in taking reasonable action to protect is the duty to reasonably foresee likely dangers to minors who are expected on campus.

The duty to a minor who is considered a trespasser may well be greater than the duty to an adult trespasser. American negligence law has long recognized that because of children's lack of maturity and possible inability to perceive or avoid dangerous circumstances, a landowner may owe them the duty of reasonable care to eliminate the danger or otherwise protect children even when the children trespass onto the landowner's property. *See, Edward v. Consolidated Rail Corporation*, 567 F.Supp.1087 (D.D.C. 1983), *aff'd*, 733 F.2d 966, (D.C.Cir., 1984), *cert. denied*, 469 U.S. 883 (1984) where the court rejected a claim for liability because the danger to which the child was exposed was rare.

Generally, colleges and universities are held to the same standard for duty as a landlord as a private landlord regarding the safety of the commercially operated premises. Dormitories housing minors for college or university sanctioned programs must be run

and maintained in a way that contemplates the presence of minors. The same is true for married student housing. In Bolkhin v. North Carolina State University, 365 S.E. 2d 898 (N.C. 1988), the Supreme Court of North Carolina held that the university had a duty to exercise due care in making repairs to a door to the leased premises. The university landlord also “in the exercise of reasonable care had a duty to recognize that children have less discretion than adults and may be unmindful of dangers that adults would recognize.” p. 901.

It is important to note that some courts have eliminated distinctions between the duties owed to invitees and licensees and have used, instead, a duty of care for invitees and licensees of reasonable care under the circumstances. It is essential to consult with counsel to learn the standard for duty on a state-by-state basis. *See*, Rowland v. Christian, 443 P.2d 561 (Cal. 1968); Jones v. Hanson, 638 P.2d 914(Kan.1994)

V. Immunity from Liability

A three-year-old visiting the University of Texas at San Antonio with her parents fell through the railings on the side of bleachers on campus and died from her injuries. Her parents sued the university alleging claims based on negligence and premises liability. The public university asserted that the court did not have jurisdiction over the university because of sovereign immunity from suit. University of Texas at San Antonio v. Trevino, 2002 Tex. App. LEXIS 8395 (Texas Ct. of App. 2002). The university claimed the basis for immunity was that the injury was the result of a design decision. Design decisions have been interpreted as discretionary in nature under Texas law and discretionary decisions are immune from liability. The court held that the parents sufficiently alleged maintenance activities undertaken at the operational level were not discretionary functions. Therefore, the trial court could consider the merits of the parents’ allegation that the University of Texas San Antonio (UTSA) had breached its duty to their daughter by the manner in which the bleachers were maintained. The Court of Appeals of Texas decided the UTSA case on November 27, 2002. It will be interesting to see whether the case goes to trial and, if so, the effect the decision may have on case law that may affect other colleges and universities.

In Patena v. The University of Akron, 2002 Ohio 1917 (Ohio 2002), the university sought to have its university swimming and diving coach determined to have been acting outside the scope of his employment, ineligible for personal immunity, thus taking the university out of the case. The case involved injury to a 15 year old minor who was being observed by the coach as a possible recruit for the university's diving team. She was injured while using the coach's trampoline at a natatorium during an opportunity for the coach to observe her diving skills. The Ohio Court of Appeals ruled that there were sufficient factual contacts between the coach and the public university for him to have been deemed working within the scope of his employment with the university when he was at the natatorium to observe the plaintiff. The implications of the decision relate more to the issue of scope of employment than to the standard of liability for the university's relationship with a minor.

Colleges and universities need to consider, with the advice of counsel, whether some form of immunity is available as a mean of being dismissed from various forms of litigation including claims brought by minors.

IV. Various Other Issues Involving Minors

As stated at the beginning of this paper, there are a wide variety of events and circumstances that bring minors from infants to teenagers on the threshold of adulthood to campus. This paper highlights some of the types of relationships between minors and colleges and universities that can result in liability for higher education institutions. Several other relationships need to be considered from the perspective of local law for your institution:

A. Professional performers who are minors scheduled to appear on campus. State law may require that the college or university secure the necessary licenses or certificates that authorize the minor to perform on your campus. Your state Department of Labor can probably either answer your question or point you in the right direction. Of course it would be prudent to consult with you legal counsel.

B. Does your institution hire minors in capacities other than student workers or as performers? If so, review local child labor laws regarding age, hours of work, prohibited types of work and review institutional policies and procedures—especially for individuals outside of human resources who may not know about the legal requirements for hiring minors.

C. College and university computer labs and computer facilities in institutional may be congregating places for minors who are either enrolled in classes, participants in programs for minors or foreseeable visitors to the libraries. Institutional policies should be in place and visible regarding whether there is and what constitutes appropriate access by minors to computer systems at the institution.

D. Consider the institution general policy regarding the presence of minors on campus and specific policies regarding specific programs for minors. If no policy exists, have strategic discussions with those on campus that interact most often with minors and determine what the college or university's position is regarding appropriate interaction with minors on campus, e.g. may adult students bring children to classes; are there any dangerous areas that are easily accessible to the public and are off limits to minors? In the case of areas that present a danger to minors, it is important to take reasonable action under the circumstances to protect them from the danger.

E. Review and update policies and procedures for all child care facilities on campus. Train staff and update staff training so that staff in child care facilities are current on legal requirements—including background checks that should be a prerequisite to working in with young children, familiarity with child abuse reporting statutes, and familiarity with requirements for obtaining appropriate health care for children in child care, camps or other programs.

V. Concluding Comments

Children and older minors are positive additions to the campus as long as their presence on campus fits within the college's or university's mission, vision and plans. It

is important to evaluate the institution's planned and unplanned forms of interaction with minors and to develop policies and procedures that are designed to reasonably fulfill the institution's duty to minors as well as minimize risk to the institution.

The companion to this paper discusses risk management and recommends policies and procedures to minimize potential liability arising from the many events and programs that bring children to campus. By referring to both papers we hope that you will be better able to assess your institution's approach to interaction with minors.

Resources

"Kids' on Campus: A Review of Selected Tort-Accident Cases Defining the Duty of a College or University to Children Visiting Its Premises," NACUA Conference, June 18-21, 1997, by Robert D. Bickel, Stetson University College of Law, St. Petersburg, FL

"Hosting Campus Minors and Avoiding Major Headaches, NACUA Conference," June 28, 2000, Annette R. Wilson, St. Cloud State University, St. Cloud, Minnesota

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